

NEW YORK COUNTY LAWYERS' ASSOCIATION

14 Vesey Street
New York, NY 10007
(212) 267-6646 ▪ www.nycla.org

**SURVEY OF ATTORNEY DISCIPLINARY RULES IN
THE STATE AND FEDERAL COURTS OF NEW YORK
WITH COMMENTS**

by the

The Committee on Professional Discipline

November 12, 2005

SURVEY OF ATTORNEY DISCIPLINARY RULES IN THE STATE AND FEDERAL COURTS OF NEW YORK WITH COMMENTS

**by the
The Committee on Professional Discipline***

Introduction

This report surveys the attorney disciplinary rules applicable to lawyers admitted to practice in the state and federal courts of New York who are charged with misconduct. The report summarizes and compares the disciplinary rules of the four New York State Supreme Court Appellate Departments, the federal District Courts in New York and the United States Court of Appeals for the Second Circuit. Comprised of four principal sections, the report outlines the statutory and case law origins of the rules and presents in some detail the rules' components: the behavior that constitutes attorney misconduct, the sanctions imposed for misconduct and the procedures for determining whether it has occurred. Intended to help the Association's membership, the bar and the public to better understand the disciplinary process, the survey points out major procedural differences and, according to some commentators, legally significant variations in substantive rights the rules. Earlier this year, the Committee sponsored a Symposium on the question of whether the differences should be resolved through unified statewide attorney disciplinary rules. The Symposium was attended representatives of each of the four Appellate Department Presiding Justices, grievance committee prosecuting counsel, respondents' defense counsel, academics specializing in legal ethics and New York State and NYCLA bar association ethics committee representatives. The Committee's report on the Symposium and its comments on and recommendations regarding the rules and the question of unification will be issued in the future.

Background

Although The New York Law Journal regularly reports the outcomes of proceedings disciplining attorneys, many practitioners are not familiar with the rules governing the disciplinary processes involved. Yet some attorneys must counsel or represent colleagues in disciplinary matters, and other attorneys find themselves personally facing such proceedings. Even those attorneys not directly involved in the process should be familiar with the rules concerning attorney misconduct, if only to have an informed framework for guiding their own behavior. This report seeks to provide some basic information regarding the salient features of state and federal disciplinary processes. The rules examined include those of the New York State Supreme Court Appellate Division's four Departments, the four federal

District Courts in New

*This report is solely that of the Committee on Professional Responsibility, has not been approved by the Board of Directors of the New York County Lawyers' Association and does not necessarily represent the views of the Board.

York State, and the United States Court of Appeals for the Second Circuit, which has appellate jurisdiction of New York cases. The report also offers some recommendations concerning issues of procedure and substance to which the rules give rise.

1. The Scope of the Report

a. Survey of State and Federal Court Local Rules for Disciplining Attorneys for Violations of Ethical Standards

The focus of this survey is on court disciplinary rules imposed on attorneys for ethical violations. These rules have been promulgated pursuant to what has been identified as 1) a state's natural authority to control who will be admitted to practice law in that state and 2) the federal government's constitutional authority to determine who will practice in its courts.

b. Ethical Conduct Rules Distinguished from Statutes and Rules Sanctioning Attorney Litigation Misconduct

These rules are different from the rules, statutes, and common law obligations directly imposed by the courts that control acts committed during litigation. Although violation of such rules or obligations may form the substantive basis for misconduct charges and can result in referrals to state or federal disciplinary bodies, consideration of them is beyond the scope of this report. Not addressed here, for example, are provisions under Rule 11 of the Federal Rules of Civil Procedure (sanctions available against attorney for factual or legal misrepresentations to the court) or Rule 37 thereof (sanctions for failure to make disclosure or cooperate in discovery), or 28 U.S.C. § 1927 (2004) (counsel liability for multiplying legal proceedings in a case due to unreasonable, vexatious conduct); or under Federal Rule of Appellate Procedure 38 (sanctions for filing a frivolous appeal); or under 22 NYCRR § 130-1 (awards of costs and imposition of financial sanctions for frivolous conduct in civil litigation), New York Civil Practice Law and Rules § 8110 (fiduciary to pay costs personally for mismanagement or bad faith in the prosecution or defense of an action), or various other contempt or legal malpractice proceedings under state or federal law.

2. What conduct is subject to discipline?

a. Division of the Report into Three Parts: Types of Sanctionable Conduct, Range of Sanctions, and Procedures to Determine Sanctionability and Relief from Sanctions

This examination of attorney disciplinary processes is, for greater ease of comprehension, divided into three parts. The first part reviews the types of conduct that are sanctionable. The second covers the range of sanctions available, and the third covers the procedures used to determine whether specific conduct was sanctionable. Before proceeding, however, the basis of the courts' authority to make disciplinary rules ought to be considered.

b. Background Sources of the Courts' Misconduct Rule Making Authority

(1). "Inherent, [Self]-contained" Authority to Protect the Public from Attorneys Who No Longer "[A]dvance the Ends of [J]ustice"

The United States Supreme Court has given both state and federal courts the power to determine who may practice before them and has permitted them to promulgate rules controlling practitioner conduct inside and outside the courthouse. Such power is said to arise from an "inherent, self contained" authority a court has to protect the public by removing an attorney who no longer fulfills the duty imposed on an attorney as an officer of the court – the duty to serve as an agent advancing the ends of justice. Theard v. United States, 354 U.S. 278, 281 (1957) (Frankfurter, J.), citing People ex rel. Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, C.J.) ("Membership in the bar is a privilege burdened with conditions ... The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.").

A disciplinary proceeding does not function as a civil action. A private person or attorney has no right to bring or participate in one. Its purpose is not to litigate a civil cause of action seeking damages or other relief against an attorney.¹ Nor is it a criminal prosecution, since its goal is not to "punish" the attorney but to prevent harm to the legal system by

¹ Cf. infra note 7. However, the Lawyers' Fund for Client Protection, pursuant to Judiciary Law § 468-b, provides reimbursement of losses caused by the dishonest conduct of attorneys admitted to practice in New York. The Fund, represented by the New York State Attorney General's Office in collaboration with its own legal staff, seeks to collect restitution from offending lawyers.

determining whether the attorney (who as an officer of the court bears responsibility for upholding and protecting the system) should be sanctioned for conduct that breaches the rules. Jawa v. Rome Developmental Disability Services, 1999 WL 288661, at *4 (N.D.N.Y.). Accord In re Singer, 290 A.D.2d 197, 738 N.Y.S.2d 38, 40 (1st Dep't 2002)(In determining appropriate sanction for attorney, court must bear in mind purpose of disciplinary procedure is not to punish but to determine fitness of an officer of the court to serve protect the courts and the public from unfit attorneys.).

(2). General Rules Applicable to Both State and Federal Courts and Variations Among Them

The general terms and conditions pursuant to which attorneys may be sanctioned have been stated in the decisions of the United States Supreme Court and those of other courts.² In New York, the rules that state and federal courts have adopted to govern the conduct of attorneys vary from one another sufficiently to benefit from an explanation of their differences.

The rules differ in several respects both between the state and federal courts and among the four state court appellate division departments authorized to discipline attorneys³ as well as among the four federal district courts in the state⁴ and the Court of Appeals for the Second Circuit. These variations will be explored in this report.

c. Misconduct Under State Law And Rules

(1). The Primary Rules

² In re Ruffalo, 390 U.S. 544, 551 (1968) (attorney in disciplinary proceeding entitled to procedural due process including fair notice of charges and an opportunity for a hearing of the attorney's explanation and defense); Theard v. United States, 354 U.S. 278, 282(1957) (same); Bradley v. Fisher, 80 U.S. 335, 354-55 (1872) (attorney faced with disbarment entitled as a rule of "natural justice" to notice of the grounds for complaint and ample opportunity to explain and defend), cited in Committee on the Federal Courts, Procedural Rights of Attorneys Facing Sanctions, 40 The Record of the Association of the Bar of the City of New York 313, 316-17 (1985); In re Gouiran, 58 F.3d 54, 57(2d Cir. 1995) (the state and federal judiciary have autonomous control over the conduct of their officers); In re Wong, 275 A.D. 1, 710 N.Y.S.2d 57, 60 (1st Dep't 2000) (the Appellate Division, as a separate branch of government, retains inherent authority to discipline attorneys practicing before it for misconduct independent of any authority granted by statute).

³ New York, atypically among the states, places authority to discipline attorneys in its intermediate appellate courts, rather than its highest court. Gary L. Casella, The Esoteric World of Attorney Discipline, 16 Westchester B.J. 177, Summer 1989, cited in David M. Appell, Note, Attorney Disbarment Proceedings and the Standard of Proof, 24 Hofstra L. Rev. 275, 279 n. 36 (1995) .

⁴ The District Courts for the Southern and Eastern Districts of New York, however, have promulgated joint substantive and procedural disciplinary rules, which have eliminated such differences. Differences have been partially eliminated among the appellate division departments by statute and the joint Disciplinary Code of Professional Responsibility. See discussion in Section 1(c)(1) below.

In addition to the New York State courts' inherent authority to control attorney conduct, see footnote 2, the authority is set out in statute. Jud. L. § 90 (granting the Supreme Court the power to discipline attorneys); see also Jud. L. § 487 (Misconduct by attorneys). New York Judicial Law Section 90 grants the State Supreme Court the power to discipline attorneys, authorizing whichever of the Appellate Division's four departments admitted the attorney to sanction him or her for misconduct.⁵ The Appellate Departments have promulgated joint Disciplinary Rules of the Code of Professional Responsibility, effective September 1, 1990, codified at 22 NYCRR Part 1200.⁶ In 1996, the departments approved amendments to the joint rules to permit the disciplining of law firms for misconduct;⁷ New York was the first state to allow disciplining of firms.⁸ There is no agreement among the departments, however, regarding the manner in which firms should be sanctioned for violations.⁹ Additional revisions to Part 1200 were promulgated in 1999 and 2001.

(2). Misconduct Sanctions for Culpable Acts Committed

⁵ Jud. L. § 90 provides in relevant part that an appellate division department is "authorized to censure, suspend from practice or remove from office any attorney [admitted to practice in the department] guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice." Id. § 90(2); see In re Race, 296 A.D.2d 162, 169, 744 N.Y.S.2d 29, 31(1st Dep't 2002) (mere utterance by attorney of fabricated story to police twenty-four years ago was conduct prejudicial to the administration of justice, even if it did not hinder the police investigation). An attorney may also be sanctioned for failure to participate in paternity or child support proceedings or failure to meet child support obligations. Id. § 90(2-a). Under § 487, an attorney who 1) commits deceit or collusion, or consents to the same, with intent to deceive the court or a party, or 2) willfully delays her client's suit for personal gain or willfully receives any money or other payment for or on account of any funds he or she has not laid out, commits a misdemeanor. In addition to punishment for the misdemeanor, the attorney is subject to forfeiture of treble damages to the injured party in a civil suit. New York City Transit Authority v. Morris J. Eisen, P.C., 276 A.D.2d 78, 715 N.Y.S.2d 232, 237-38 (1st Dep't 2000) (attorneys in state civil action for treble damages collaterally stopped from relitigating federal jury findings in a racketeering suit against them that they committed deceit and collusion when they presented false evidence in personal injury suits).

⁶ "The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id., Preliminary Statement.

⁷ 22 NYCRR §§ 1200.3(a) [DR 1-102] and 1200.5 [DR 1-105]. The amended 22 NYCRR § 1200.3(a) provides that a lawyer or law firm shall not 1) violate a disciplinary rule, 2) circumvent a disciplinary rule through actions of another, 3) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness to practice, 4) engage in conduct involving dishonesty, fraud or misrepresentation, 5) engage in conduct that is prejudicial to the administration of justice, 6) unlawfully discriminate in one's practice of law, 7) engage in any other conduct that adversely reflects on the fitness as a lawyer. Section 1200.5 requires a law firm and its attorneys with management and supervisory authority to make reasonable efforts to ensure that all attorneys in the firm conform to the disciplinary rules; the firm must adequately supervise the work of partners, associates and non-lawyers who work at the firm, taking into account such factors as the level of experience and the extent to which ethical problems are likely to arise in a matter. In addition, under § 1200.5, a lawyer is responsible for a rule violation by another lawyer whom she retained or employed. The lawyer is also responsible for the conduct of retained or employed non-lawyers that would be a violation if committed by a lawyer. A lawyer must comply with the disciplinary rules notwithstanding that she acted at the direction of another person. A subordinate lawyer does not violate the rules if she acts in accordance with a supervisory attorney's reasonable resolution of an arguable question of professional duty. Id.

⁸ Connors, Professional Responsibility, 47 Syracuse L. Rev. 655, 676-78 (1997).

⁹ See Connors, *supra* note 7, at 676-77, citing Edward A. Adams, New Rule Authorizes Discipline of Firms, N.Y.L.J., June 4, 1996, at 1, speculating that, among the issues that prevented promulgation of rules for misconduct sanctions against firms, the departments were unable to resolve disagreements over whether they had authority to impose monetary penalties.

Outside the Practice of Law

Misconduct may be found even if the culpable acts occurred outside the practice of law, e.g., in In re Race, 296 A.D.2d at 169, 744 N.Y.S.2d at 31 (fabricated story told to police); Matter of Burns, 242 A.D.2d 49, 672 N.Y.S. 2d 321 (1st Dep't 1998) (failure to file income tax returns); Matter of Wong, 241 A.D.2d 297, 672 N.Y.S.2d 323 (1st Dep't 1998) (filing false insurance claims); Matter of Whelan, 169 A.D.2d 71, 571 N.Y.S.2d 774 (2d Dep't 1991) (drunk driving), all cited in Patrick M. Connors, Practice Commentaries, McKinney's Judiciary Law § 90 (2003).

(3). Rules in the First Department of the Supreme Court, Appellate Division

In the First Department, New York Supreme Court, Appellate Division, the disciplinary rules apply to attorneys who are admitted to, practice in, reside in, commit acts in or who have offices in the department, whether the attorney practices as an individual, with a firm, with the government, or as in-house counsel to a corporation or other entity. 1st Dep't R. § 603.1(a).

The Department's detailed rules provide that misconduct subject to disciplinary action occurs when there is a violation of any of the following: 1) Judiciary Law §90(2); 2) the Department's own rules governing the conduct of attorneys; 3) the requirement that one conduct oneself, both professionally and personally, in conformity with the standards of conduct imposed upon members of the bar; 4) any Disciplinary Rule of the Code of Professional Responsibility as adopted by the New York State Bar Association, effective January 1, 1970, as amended; 5) with respect to conduct occurring on or before December 31, 1969, any Canon of the Canons of Professional Ethics as adopted by the New York State Bar Association; 6) with respect to conduct occurring on or after September 1, 1990, any of the disciplinary rules adopted by the Appellate Divisions, effective September 1, 1990; 7) decisional law; or 8) special rules regarding decorum. 1st Dep't R. §§ 603.2, 605.2(10), 605.4.

Section 1200.3(a) [DR 1-102] of the Disciplinary Rules applies to firms, including but not limited to professional legal corporations, limited liability companies, law partnerships and qualified legal assistance corporations. 22 NYCRR §§ 1200.1(b), 1200.3(a). However, in the First Department, the term "firm" more specifically applies to any law firm "that has a member, employs, or otherwise retains a lawyer or legal consultant[.]" where the "firm is the object of an investigation or prosecution of alleged violation of the Code of Professional

Responsibility.” 1st Dep’t R. §§ 603.1(b), 605.1(c).

(4). Rules in the Second Department

The Second Department’s misconduct rules apply to “all” attorneys who are admitted to practice in, reside in, commit acts in, or who have offices in the Second Department, or who are admitted by another court and regularly practice in the Department or who have been admitted by another court and participate in Second Department court proceedings whether admitted pro hac vice or not. 2d Dep’t R. § 691.1(a). Unlike the First Department, there is no reference to or special definition of firms.

The Second Department’s definition of misconduct is more general than the First Department’s. An attorney is deemed guilty of professional misconduct in the department, within the meaning of Jud. L. § 90(2), for failure to conduct him or her self “either professionally or personally, in conformity with the standards of conduct imposed on members of the bar as conditions for the privilege to practice law.” Attorneys may also be disciplined for violation of 1) any disciplinary rule of the Code of Professional Responsibility adopted by the Appellate Divisions, effective September 1, 1990, 2) any canon of the Canons of Professional Ethics adopted by the New York State Bar Association, and 3) any other standard of attorney conduct announced by the Second Department. 2d Dep’t R. § 691.2. Unlike the First Department, the Ethical Canon’s applicability is not restricted to the period before January 1, 1970.

(5). Rules in the Third Department

The Third Department’s more general grounds for discipline, contained in its “Professional Misconduct Defined” section, 3d Dep’t R. § 806.2, apply to attorneys who are admitted to practice by the department, reside in, or have an office in, are employed in, or transact business in the Third Department. Like the Second Department, the rules contain no provisions expressly applicable to firms. Id. § 806.1. An attorney is deemed to commit professional misconduct in violation of Jud. L. § 90(2) by 1) failing to conduct him or herself according to “the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law,” 2) violating the 1990 joint Appellate Division disciplinary rules, or 3) violating “any other rule or announced standard of the court.” 3d Dep’t R. § 806.2. The department rules do not expressly make violation of a provision of the Canon of Professional Ethics a misconduct predicate.

(6). Rules in the Fourth Department

The Fourth Department's rules of professional misconduct apply to all attorneys who are admitted to practice in, have offices in, or practice in the department. 4th Dep't R. § 1022.1. The Department's misconduct rules are the most general of all. Under them, a violation of any disciplinary rule of 22 NYCRR Part 1200 or any other rule or announced standard of the Appellate Division constitutes professional misconduct within the meaning of Judiciary Law § 90(2). 4th Dep't R. § 1022.17. The rules make no reference to firms, or to the State Bar Association's Canon of Professional Ethics.

(7). Appellate Department Misconduct Definition Differences Discussed

Compared to the First Department's detailed provisions requiring the application of the version of the rules in effect at the time the conduct in question occurred, the Second, Third, and Fourth Departments grounds for discipline are largely chronologically un-nuanced. This lack of chronological specificity suggests that extra care is needed in notices of charges from these departments to avoid due process problems.

It is noteworthy that unlike the other departments', the Second Department's grounds for discipline can be based on the New York State Bar's Canon of Professional Ethics for periods on or after September 1, 1990, the date the Appellate Division adopted the joint Disciplinary Rule. The rules do not include the Canon. Authoritative commentators have described the Canon as "aspirational" and "not mandatory."¹⁰

(8). Applying Misconduct Rules in a Complex Case

A review of the case of In re Wong, 275 A.D.2d 1, 710 N.Y.S.2d 57(1st Dep't 2000) is useful in seeing how the range of rules may be applied in a difficult case. Wong involved an attorney whom the First Department disciplined for conduct that occurred in New Jersey in 1986 (sexually touching a 10 year old girl) prior to his New York admission in 1988 (and prior to his New Jersey admission in 1989). The attorney pleaded guilty in New Jersey to a

¹⁰ Roy D. Simon, The 1999 Amendments to the Ethical Considerations in New York's Code of Professional Responsibility, 29 Hofstra L. Rev. 265, 266 (2000); Stephen Krane, Regulating Attorney Conduct, Past, Present and Future, 29 Hofstra L. Rev. 247, 248 (2000). Mr. Krane, a former President of the New York State Bar Association, has remarked that the American Bar Association's ("ABA's") Model Canon, its Model Code, and subsequent Model Rules show a movement from a mere "aspirational guide" in the 1908 Canon, to a combination of aspiration and discipline in the 1969 Code (adopted with amendments by the New York State Bar Association) and finally to a more rigid ethical framework in the 1983 ABA Rules (some of which was incorporated into the New York State Code of Professional Responsibility that was eventually adopted by the Appellate Departments in 1990 and codified at 22 NYCRR Part 1200). In Krane's view, the Canons are so vague that their use as a basis for imposing discipline would violate due process and they may be safely ignored. Id. at 252-53. Professor Simon argues that nonetheless the courts look to the Canons to help them interpret the Disciplinary Rules.

felony in 1994. The misconduct only came to the attention of New York disciplinary authorities in 1999 after the attorney was disciplined by New Jersey. Although the court noted that the behavior took place before the attorney's admission in New York, it held that it was not barred from applying its rule permitting discipline of an attorney for misconduct in a foreign jurisdiction whenever it occurred. This was so, the court held, because it retained inherent authority pursuant to 1) its rule allowing it to impose any other sanction authorized by law, including the power to discipline for misconduct independent of violations of New York's Code of Professional Responsibility, and 2) the court's inherent duty to protect the public and maintain its own integrity by insuring that an attorney is fit to practice in its jurisdiction. Id. at 4-7, 710 N.Y.S.2d at 60-61.

d. Misconduct Under Federal Law And Rules

(1). Sources of Authority

The federal trial and appellate courts have, as do the state courts, an "inherent, self contained power" to sanction attorneys, a power derived from "the attorney's role as an officer of the court which granted admission." In re Snyder, 472 U.S. 634, 643 (1985). Based on this inherent power and powers granted by statute pursuant to 28 U.S.C. § 2071 and the Federal Rules of Civil and Appellate Procedure (that provide the courts with authority to make local rules for the control of their business), the federal district courts and circuit courts of appeal have promulgated disciplinary rules controlling the conduct of attorneys practicing in them. Id. § 2071(a); Fed. R. Civ. P. 83; Fed. R. App. P. 47 (Authorizing each Circuit Court of Appeals to make and amended local rules governing its practice).

(2). Federal Appellate Disciplinary Rules

Pursuant to Fed. R. App. P. 46(b), a member of a circuit court's bar may be suspended or disbarred if 1) the member has been suspended or disbarred from practice by another federal or state court or 2) the member is "guilty of conduct unbecoming a member of the court's bar." Id. 46(b)(1). In addition, an attorney who is not a member of the court's bar but practices in the court may be disciplined for conduct unbecoming a member of the bar or for failure to comply with a court rule. Id. 46(c); Snyder, 472 U.S. at 644. The phrase "conduct unbecoming a member of the bar" is interpreted in the light the "complex code of behavior" to which attorneys are subject, i.e., "conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct." 472

U.S. at 644-45 (citations omitted).

(3). Court of Appeals for the Second Circuit Rules

Under 2d Cir. R. 46, promulgated pursuant to Fed. R. App. P. 46 and 47, an attorney suspended or disbarred from practice by any other federal or state court of record will be automatically suspended or disbarred on comparable terms by the circuit court, unless the sanction is modified or reversed by the court. 2d Cir. R. 46(f). An attorney may also be suspended if convicted of a serious crime, regardless of the pendency of an appeal. A serious crime is defined as any federal or state felony and any lesser crime an element of which constitutes a) interference with the administration of justice, b) false swearing, c) misrepresentation, d) fraud, e) willful failure to file income tax returns, f) deceit, g) bribery, h) extortion, i) misappropriation, j) theft, or k) an attempt to, conspiracy to, or solicitation of another to commit a serious crime. Id. 46(g)(2). Pursuant to 2d Cir. R. 46(h)(2), the court may refer to the court-appointed Committee on Admissions and Grievances¹¹ accusations and evidence of conduct that violates professional disciplinary rules of the State or jurisdiction where the attorney has his or her principal office. The committee may investigate, hear, and report on the charges as directed by the court. Id.

(4). Local Rules in New York's Federal District Courts

The federal district courts in New York have promulgated local rules pursuant to Fed. R. Civ. P. 83(a)(1).

(5). Joint Local Rules of the Southern and Eastern Districts of New York

The district courts for the Southern and Eastern Districts of New York, which divide jurisdiction of New York City and the New York counties north and east of the city within commuting distance,¹² have found that joint court rules best serve the interests of counsel, many of whom practice in both districts.¹³ Over the years these courts have successfully coordinated rule making, rule revisions and amendments, while taking into account any of the courts' differing needs and perspectives on particular issues. An extensive recasting of the

¹¹ The committee is composed of seven members of the bar and a non-voting bar member who is the committee's Secretary, all of whom are appointed by the court. 2d Cir. R. 46(h)(1).

¹² The Southern District comprises the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester and concurrently with the Eastern District, the waters within the Eastern District. The Eastern District comprises the counties of Kings, Nassau, Queens, Richmond, and Suffolk and concurrently with the Southern District, the waters within the counties of Bronx and New York.

¹³ See *infra* note 4 for a discussion of the joint Southern/Eastern District of New York rules.

joint rules took place in April 1997. L. Civ. R. 1.5 provides for attorney discipline.¹⁴ Id.

Pursuant to L. Civ. R. 1.5, each district has a Committee on Grievance, composed of judges from the district, that determines by clear and convincing evidence whether an attorney has violated the rule. Grounds for discipline or other relief occur when the attorney 1) has been convicted of a felony or misdemeanor by any federal, state, or territorial court, 2) has been disciplined by any federal, state, or territorial court, 3) has resigned from any federal, state, or territorial court while under investigation into allegations of misconduct, 4) is under an infirmity which prevents the practice of law, 5) in connection with activities in district court, has violated the New York State Lawyer's Code of Professional Responsibility as adopted by the New York Appellate Divisions, as interpreted by the United States Supreme Court, the United States Court of Appeals for the Second Circuit and the district court,¹⁵ or 6) has appeared in district court without permission when not a member of the court's bar. Id.

(6). Northern District of New York Rules

Under the Northern District of New York's L. P. R. 83.4, Discipline of Attorneys, the Chief Judge is in charge of disciplining members of the bar of the court. Id. 83.4(a). A member convicted of a felony in any state, territorial, or district court must be suspended from practice in the district court, and she is disbarred when the conviction becomes final.¹⁶ Id. 83.4(b). A member who resigns from the bar of the court while an investigation into allegations of misconduct is pending in any state, territorial, or district court is barred from practicing in the court. Id. 83.4(c). A member of the Northern District bar disciplined by any state, territory, or district court will be disciplined by the district court to the same extent, except if a) the record shows that the other proceeding so lacked notice or opportunity to be heard as to violate due process, b) there was a clear lack of proof establishing misconduct, c) imposition of the same discipline would result in a grave injustice, or d) the misconduct has been held by the Northern District to warrant substantially different discipline. Id. 83.4(d).

A member of the Northern District bar convicted of a misdemeanor by any state,

¹⁴ NYCLA Professional Responsibility Committee member Igou M. Allbray, as a member of the Joint Southern District Eastern District Rules Committee, participated in that committee's drafting of the revised joint local rules adopted by those courts.

¹⁵ The adoption by the two district courts of the Appellate Division's New York State Lawyer's Code of Professional Responsibility has tended to regularize and minimize the number of rules to which attorneys practicing in these courts are expected to conform their conduct. The rule makes clear that federal law as applied by the two courts, the Second Circuit and the Supreme Court control the interpretation of the New York code. Conflicts between the state rules and the federal rules are resolved pursuant to the U.S. Constitution's Supremacy Clause, art. VI, cl. 2.

¹⁶ The term "final" typically means that either the time to appeal has lapsed or that the conviction has been affirmed on appeal. See, e.g., W.D.N.Y. Local Rule of Civil Procedure 83.3(b)(2), discussed below.

territory, or district court may be disbarred, suspended, or censured. Id. 83.4(e). An attorney disbarred or suspended for a period by the state that admitted him or her will be similarly disbarred or suspended from practice in the Northern District. Id. 83.4(f). An attorney admitted to the court's bar may also be disciplined "for cause" after a hearing. Id. 83.4(g). A visiting attorney permitted to practice in a particular case found guilty of misconduct shall be barred from appearing again, and the court clerk will notify the court to which the attorney was admitted. Id. 83.4(h). In a recent amendment, the court has replaced its L. P. R. 83.4 (j) (which called for enforcement of the ABA Code of Professional Responsibility) with a version similar to Southern/Eastern District L. Civ. R. 1.5(b). Pursuant to the revision, the court enforces the New York Code of Professional Responsibilities as adopted from time to time by the Appellate Division as interpreted by the Second Circuit.¹⁷

(7). Western District of New York Rules

Under the Western District of New York's Discipline of Attorneys local rule, L. R. Civ. P. 83.3, an attorney admitted to practice in the district may be disbarred or otherwise disciplined "for cause" after a hearing. Id. 83.3(a). An attorney convicted of a felony will be suspended from practice.¹⁸ When the felony conviction becomes final, the attorney will be disbarred. Id. 83.3(b). An attorney admitted to practice in the district that has been suspended, disbarred or disciplined in any district, state or territory, or who has resigned from the bar of any such court while an investigation into misconduct allegations is pending, shall be similarly disciplined in the Western District. Id. 83.3(c). The court has eliminated the former L. R. Civ. P. 83.3(c) (2002), which provided for the enforcement of the American Bar Association's Code of Professional Responsibility as adopted by the New York Bar Association. No other disciplinary code or provision replaced this one.

(8). New York Federal District Courts' Cross-Adoption of Their Local Disciplinary Rules Considered

The Joint Southern and Eastern Joint Rules are the result of longstanding coordination between the benches and bars of both courts. Reported district and circuit court cases arising under the local joint disciplinary rules show no divergences of results or differences in interpretation or application of the joint rules. Elements of the joint rules have been adopted

¹⁷ The Southern/Eastern District rule is broader. It provides for the interpretation of the Appellate Division's disciplinary rules under federal law as pronounced by the Supreme Court, the Second Circuit Court of Appeals and the district court itself.

¹⁸ A felony is defined as any criminal offense classified as a felony under federal or New York law, or a criminal offense committed in any other state, commonwealth or territory classified as a felony there, which if committed in New York would constitute a felony in New York. L. R. Civ. P. 83.3(b)(3).

by the two other New York district courts. Compare N.D.N.Y. District L. P. R. 83.4(j) (2002) and L. P. R. 83.4(j) (2003) with S.D.N.Y./E.D.N.Y. L. Civ. R. 1.5(b)(5), and W.D.N.Y. L. Civ. P. R. 83.3(b) (2002). Compare also W.D.N.Y. L. Civ. P. R. 83.3(b)-(c) with S.D.N.Y./E.D.N.Y. L. Civ. R.1.5(d)(1). However, the Western District has dropped its former adoption of the New York State Bar Association Code, L. Civ. P. R. 83.3(c) (2002), without any replacement.

(9). New York Federal District Courts' Adoption of State Court Disciplinary Rules Considered

The practice of “wholesale” adoption of state bar rules of conduct by the federal courts has been severely criticized on grounds that the bar rules are often “extremely imprecise,” vague, and ambiguous and simply defer rulemaking to the court on a case-by-case basis. According to this view, because disciplinary cases arise only sporadically, such rules, derived from specific cases, are not likely to gain the respect of attorneys. Further, according to this view, systematic authoritative standards of conduct may never be developed based on them.¹⁹ However, provisions like those of New York’s Judiciary Law §§ 90 and 487 and the Appellate Division disciplinary rules (adopted by three of the New York federal district courts) appear to meet much of this criticism in that they more precisely describe and provide clearer notice of prohibited conduct.²⁰

3. Kinds of Penalties Imposed For Misconduct

a. Variations in the Range of Penalties Among the State and Federal Courts

The different Appellate Division departments show some variation in the range of punishments meted out for misconduct, although all start necessarily (although sometimes not expressly) from the three basic types provided by § 90 of the Judiciary Act – censure, suspension, and disbarment. The First, Second, and Third Departments’ rules also provide a range of lesser penalties. In the federal system, the Southern/Eastern District Courts’ local

¹⁹ Green, Whose Rules Of Professional Conduct Should Govern Attorneys And How Should They Be Created, 64 Geo. Wash. L. Rev. 460, 467-68 (1996). Professor Green attacks adoption in the federal courts of the ABA’s most recent version of the rules, the Rules of Professional Conduct, or adoption of the disciplinary rules of the state in which a federal district court is located on vagueness grounds. He proposes a single set of detailed national rules.

²⁰ The Northern District L. P. R. 83.4(g) and the Western District L. R. Civ. P. 83.3(a) define much misconduct broadly through “for cause” provisions. See discussion of the United States Supreme Court’s effort to give content to like provisions at section 2(c) above.

rules provide a wider range of sanctions than do those of the Northern and Western District Courts or the Court of Appeals for the Second Circuit (which has the fewest).

b. State Court Penalties For Misconduct: Generally

(1). Authority Accorded Each Appellate Division Department
to Censure, Suspend, or Disbar An Attorney Admitted
to Practice in New

Jud. L. § 90 grants each Appellate Division Department the authority to censure, suspend from practice for a period of time, or remove from office any attorney admitted to practice in New York who is guilty of “professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . .” Id. § 90(2).²¹ Suspension or disbarment by the Appellate Division operates as a suspension or removal from practice from every court of the state. Id. § 90(3). Violation of a sanctions order is punishable as contempt of court. An admitted attorney will be disbarred on presentation of a certified copy of the record of conviction for a felony by a New York court or if convicted of a felony by a federal court or any state court where the crime would constitute a felony in New York. Id. §§ 90(4)-(b), (e). The burden is on the convicted attorney to file the certificate. Failure of the attorney to do so is deemed a separate act of misconduct by the attorney. Id.

An attorney convicted in another jurisdiction of a “serious crime,”²² not a felony under New York law, will be suspended from practice until the conviction becomes final. On notice that the conviction by the other court has become final, the Appellate Division will order the attorney to show cause why an order of suspension, censure, or removal from office should not be made. Id. §§ 90(4)(f)-(g). The attorney may request a hearing pursuant to the show cause order, which, if granted, will be conducted by a justice, judge, or referee who will issue a report and recommendation. For good cause shown on the attorney’s or on the Appellate Division’s own motion, the court may set aside a suspension if it appears consistent with maintenance the “integrity and honor of the profession, the protection of the public and the interest of justice.” Id. After the § 90(4) hearing, the Appellate Division may impose such discipline it deems warranted by the facts and circumstances of the case. Id. § 90(4)(h).

²¹ See footnote 5 for a summary of the contents of Jud. L. § 90(2).

²² A serious crime is defined as any criminal offense denominated a felony under the laws of any state or federal jurisdiction which does not constitute a felony under New York law, and any other crime a necessary element of which includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime. Jud. L. § 90(4)(d).

If the conviction upon which the § 90(4) removal or disbarment was based is reversed or pardoned by the President of the United States or any state governor, the Appellate Division Department has the power to modify or vacate its sanction, subject to certain conditions. Id. § 90(5)(a). Pursuant to an application for reinstatement and a hearing, the § 90(4) removal or disbarment may also be vacated or modified after seven years have elapsed if the person sanctioned has not been convicted of a crime during that period. Id. § 90(5)(b). Where an attorney has been found by a preponderance of the evidence to have misappropriated funds, the Appellate Division sanction order may require monetary restitution, as well as reimbursement of any sum paid by the Lawyers' Fund For Client Protection to the person whose funds were misappropriated. Id. §§ 90(6-a)(a)-(b). A restitution or reimbursement order is enforceable as a civil money judgment. Id. § 90(6-a)(d). Where an attorney is permitted to resign from the bar, the court may order restitution. Id. § 90(6-a)(e). Pursuant to § 90(7), when directed by the justices of a department or a majority of them, court designated attorneys from the counties within a department or appointed counsel investigate and prosecute proceedings for suspension or removal.

(2). Judiciary Law § 487: Misconduct by Attorneys

Under Jud. L. § 487, an attorney is guilty a misdemeanor if he 1) acts deceitfully or collusively, or consents to deceit or collusion, with intent to deceive the court or any party, or 2) willfully delays his client's suit with a view to his gain, or 3) receives money for or on account of any money he or she has not laid out. In addition to punishment under the penal law, the attorney forfeits treble damages to the injured party, recoverable in a civil action.

(3). First Department Rule § 605.5 Types of Discipline: Disbarment, Suspension, Censure, Reprimand, Admonition

The types of discipline specified in the First Department Rules are: 1) disbarment, 2) suspension, and 3) censure, all to be levied by the court; as well as 4) reprimand, levied by the Departmental Disciplinary Committee,²³ with or without referral to the court for further action and 5) admonition, levied by the committee without hearing. In re Harley, 298 A.D.2d 49, 744 N.Y.S.2d 171 (1st Dep't 2002) (disbarment appropriate where attorney made false and misleading statements to clients and the trial court to induce signing of back-dated retainer agreement allowing attorney's law firm to receive \$382,000 in unearned fees). Previous discipline may be considered when determining whether to impose discipline and

²³ See footnote 34 for a description of the composition the committee.

the extent of any discipline to be imposed when an attorney is subject to new misconduct charges. 1st Dept R. § 605.5. Department Disciplinary Committee staff counsel may refer minor complaints involving attorneys with no significant disciplinary history to court-appointed volunteer mediators, who attempt to mediate and resolve matters raised in complaints. Unsuccessful mediations that need further consideration are referred back to staff counsel. Id. § 605.20(d)(2).

- (4). Second Department Rule § 691.6(a): Reprimand, Admonition, Letter of Caution, Confidentiality; See 2d Dep't R. § 691.10 Conduct of Disbarred, Suspended or Resigned Attorney; Abandonment of Practice by Attorney

In the Second Department, besides suspension and disbarment pursuant to Jud. L. § 90(2), see 2d Dep't R. § 691.10, in cases of professional misconduct not warranting proceedings in court, a Grievance Committee,²⁴ after an investigation and by majority vote, may issue a reprimand, an admonition, or a letter of caution. The reprimand can issue after a hearing before the committee. An admonition may be imposed without a hearing. A letter of caution may issue when the committee believes that the attorney acted in a manner, which, while not constituting clear misconduct, involved behavior that requires comment. Id. § 691.6(a).

- (5). Third Department Rule § 806.5: As Directed By Court - Suspension, Disbarment; 3d Dep't R. § 806.4(c): Determined By Professional Standards Committee – Admonition, Letter of Caution, Letter of Education

In the Third Department, suspensions and disbarments are determined in disciplinary proceedings as directed by the court. Factual issues are referred to a judge or referee who conducts a hearing and makes a report. The court may issue the final determination or direct the judge or referee to make the decision. 3d Dep't R. § 806.5; Matter of Wheatley, 297A.D.2d 872, 873, 747 N.Y.S.2d 853, 854 (3d Dep't 2002) (attorney disbarred for dishonesty, fraud, deceit and misrepresentation), modified by 304 A.D.2d ____, ____, 758 N.Y.S.2d ____, ____(2003)(sanction reduced to two year suspension based on mitigating evidence). Other penalties for misconduct include: 1) admonishment by the Professional Standards Committee,²⁵ where acts of misconduct have been established by clear and

²⁴ See discussion of the Second Department Grievance Committee structure in Section 4 of this report.

²⁵ See discussion of the composition and scope of authority of the Third Department's Committee on

convincing evidence but the misconduct is not serious enough to warrant prosecution in a disciplinary proceeding; 2) letter of caution issued by the committee, where misconduct has been established by clear and convincing evidence but is not serious enough to warrant either prosecution in a disciplinary proceeding or a imposition of an admonishment; and 3) letter of education issued by the committee, in cases where the attorney's conduct warrants comment. 3d Dep't R. § 806.4(c). A county bar association may mediate complaints not constituting misconduct it receives or that are referred to it by the Committee on Professional Standards or the committee's professional staff. Id. § 806.6.

- (6). Fourth Department Rule §§ 1022.19 - 1022.22 and 1022.27: Referral to a Mediation or Monitoring Program, Letter of Caution, Letter of Admonition, Reciprocal Discipline, Suspension and Disbarment

In the Fourth Department, responsibilities for determining whether attorney misconduct has occurred are handled by the Attorney Grievance Committee, the committee's legal staff, and the County and Local Bar Associations in a complex arrangement, discussed infra at Section 4 (Procedure). Under this arrangement, a misconduct complaint may be 1) dismissed as unfounded; 2) referred to the attorney-client dispute mediation program pursuant to 22 NYCRR § 1220.2; 3) result in a Letter of Caution, where the attorney appears to have engaged in inappropriate behavior that does not constitute professional misconduct; or 4) result in a Letter of Admonition, where the conduct is found to be inappropriate. 4th Dep't R. § 1022.19. Formal misconduct charges filed in the Appellate Division can lead to suspension or disbarment. See id. §§ 1022.20 and 1022.27.

c. Federal Court Penalties For Misconduct

- (1). Federal Rules of Appellate Procedure §§ 46(b)-(c):
Suspension, Disbarment, "Discipline" for "conduct unbecoming" a Bar Member or for "failure to comply with any court rule"

The kinds of sanctions for disciplinary breaches authorized by the Federal Rules of Appellate Procedure are, except for suspensions and disbarments by other courts, stated in general terms. Fed. R. App. P. 46(b) provides for suspension or disbarment of a member of the court's bar, if the attorney has been suspended or disbarred from practice by any other

court, or is guilty of “conduct unbecoming a member of the court’s bar.” The rule does not define “conduct unbecoming.” It does not expressly provide for lesser sanctions. Under Fed. R. App. P. 46(c), any attorney who practices in the appeals court may be “disciplined” for conduct unbecoming a member of the bar or for failure to comply with any court rule. The kinds of discipline that may be levied are not stated.

(2). Local Rule of the Court of Appeals for the Second Circuit
46(f): Suspension, Disbarment

Pursuant to the 2d Cir. R. 46(f), attorneys are subject to reciprocal suspension or disbarment as a result of being suspended or disbarred by another court. These sanctions apply as well to attorneys who resign from the bars of other courts while under investigation into allegations of misconduct. Id. 46(f)(5). Under 2d Cir. R. 46(g)(1) an attorney convicted of a “serious” crime²⁶ will be immediately suspended from practice in the Second Circuit, regardless of the pendency of an appeal. The suspension remains in effect pending the disposition of a disciplinary proceeding authorized to be commenced on the filing of the certificate of conviction, unless the court orders otherwise. Id.²⁷ Convictions for crimes not constituting serious crimes are referred to the court’s Committee of Admissions and Grievances, which is composed of attorneys, for whatever action the committee deems warranted.²⁸

(3). Joint Southern and Eastern District of New York Local
Civil Rule 1.5(c): Letter of Reprimand, Letter of
Admonition, Censure, Suspension, Disbarment from the
District Court

Although the Federal Rules of Civil Procedure do not provide specific authorization for the promulgation of disciplinary rules, Fed. R. Civ. P. 83(a)(1) permits the district courts to make and amend rules governing practice before them.²⁹ There is a wider range of stated

²⁶ See Section 1(d)(2) for the definition of a serious crime under 2d Cir. R. 46(g)(2).

²⁷ In addition to suspension of an attorney for conviction of a serious crime, the court may direct commencement of a disciplinary proceeding against the attorney to determine what discipline will finally be imposed. A hearing to determine the final sanction is not commenced until all appeals of the conviction have been concluded. The proceeding will be terminated if a suspension or disbarment order is entered under 2d Cir. R. 46(f). Id. 46(g)(4). An attorney suspended by the Second Circuit because of a conviction for a serious crime (but who has not been suspended or disbarred by another court under 2d Cir. R. 46(f)) will be reinstated if the conviction is reversed, although the reinstatement will not terminate a disciplinary proceeding against the attorney pending in the circuit, which will proceed to disposition on the basis of available evidence. Id. 46(g)(6).

²⁸ See discussion of the composition of the committee infra in Section 4.c. and note 34.

²⁹ Fed. R. Civ. P. 83(a)(1) permits a district court, acting through a majority of its judges, to make and amend rules governing its practice consistent with federal law and the practices and procedures of the United States Supreme Court promulgated pursuant to 28 U.S.C. § 2072.

misconduct sanctions available in most of the New York federal district courts than there is in the circuit court.

In the Eastern and Southern District Courts, the sanctions include a letter of reprimand or admonition, censure, suspension, and disbarment from practice. L. Civ. R. 1.5(c)(1). They may arise from the following: felony or misdemeanor conviction (id. 1.5(b)(1)); discipline by another court (id. 1.5 (b)(2)); resignation from the bar of any court while a misconduct investigation is pending there (id. 1.5(b)(3)); and in connection with activities in the Southern or Eastern District Courts, violation of the New York Lawyer’s Code of Professional Conduct as adopted by the Appellate Division (id. 1.5(b)(5)).

An attorney who has not been admitted to one of these courts who violates the Code of Professional Responsibility in court-connected activities or who appears in court without permission may be sanctioned with a letter of reprimand or admonition, censure, or an order precluding the attorney from appearing again in the court which issued the order. Id. 1.5(c)(2). In addition, an attorney under an infirmity that prevents the practice of law will be suspended. Id. 1.5(c)(3).

(4). Northern District of New York Local Practice Rule 83.4:
Disbarment, Suspension, Censure, Preclusion, or
“Otherwise Disciplined”

In the Northern District of New York, the local rules structure provides for a specific penalty for each ground for discipline. L. P. R. 83.4. Thus, a member of the Northern District bar convicted of a felony will be suspended from practice in the district. When the conviction becomes final, the attorney is barred from practice in the district. Id. 83.4(b). A Northern District bar member who resigns from another court while a misconduct investigation is pending there against him or her will be disbarred in the district. Id. 83.4(c). A district bar member disciplined by another court will be disciplined to the same extent by the district court, unless the original disciplinary record shows that there was a due process deficiency in the notice or the attorney’s opportunity to be heard; that there was such an infirmity of proof that the district court had a “clear conviction” that it should not accept the other court’s result; that imposition of the same discipline would result in a grave injustice; or that the conduct would warrant a substantially different discipline in the district. Id. 83.4(d).

A Northern District bar member convicted of a misdemeanor by another court may be disbarred, suspended, or censured. Id. 83.4(e). A district bar member disbarred or suspended by the state court that admitted him will be disbarred or automatically suspended for a like

period by the district court. Id. 83.4(f). A district court bar member may also be disbarred or otherwise disciplined, after a hearing, “for cause.” Id. 83.4(g). A visiting attorney admitted to argue or try a case who has been found guilty of misconduct by the court will be precluded from again appearing in the district, with notice of the order provided to the court that admitted the attorney to practice. Id. 83.4(h). Unless otherwise ordered by the court, no action may be taken pursuant to L. P. R. 83.4(e) or 83.4(f) where the state has brought disciplinary proceedings against the attorney. Id. 83.4(i).

(5). Western District of New York Local Rule of Civil
Procedure 83.3(a), (c): Disbarment, Suspension,
Censure, “Sanction” and other “Discipline”

As indicated in Section 1(c)(7) regarding the Western District’s grounds for discipline, its rules provide that an attorney admitted to the district may, after a hearing, be censured, suspended, disbarred, or “otherwise disciplined” (including revocation of a pro hac vice admission) for cause. L. Civ. P. R. 83.3(e). An attorney who has been admitted to the court’s bar who has been convicted of a felony, as defined by federal or New York law, or convicted of a felony under the law of another state, commonwealth, or territory, if it would constitute a felony in New York (Id. 83.3(b)(3)), will be suspended. Id. 83.3(b)(1). When the conviction becomes final,³⁰ the attorney will be disbarred. Id. 83.3(b)(2). A Western District bar member who has been suspended, disbarred or disciplined in any way by any court, or has resigned from the bar of a court while an investigation into allegations of misconduct are pending there against the attorney, will be disciplined to the same extent in the Western District, except the discipline may be set aside by a majority of active and senior judges when the evidence in the original record “clearly and convincingly” discloses that 1) the attorney so lacked notice or an opportunity to be heard as to violate due process, 2) the proof establishing the misconduct was so infirmed that there was a clear belief that the conclusion could not be accepted as final, or 3) imposition of the same discipline would result in a grave injustice. Id. 83.3(c).

d. Other Penalties Considerations: Reciprocity, Variations in
Sanctions among the Courts

In the federal courts, three circumstances justify a decision not to impose reciprocal discipline: 1) the originating state court’s proceeding’s notice or opportunity to be heard lacked due process; 2) an infirmity in the proof of facts clearly leads to a failure of the

³⁰ “Final” means that either the time to appeal has lapsed or that the conviction has been affirmed on appeal. Id. 83.3(b)(2).

evidence to support the conclusion; and 3) there is some other serious reason in the interest of justice to preclude imposing reciprocal disciplinary sanctions. In re Edelstein, 214 F.3d 127, 131 (2d Cir. 2000), citing Selling v. Radford, 243 U.S. 46, 50-51 (1917). Moreover, some of the Supreme Court's Justices would require that a court considering reciprocal discipline give plenary consideration to the facts regarding the attorney's conduct. See 214 F.3d at 131 n.2 (citing cases).

The range of penalties provided by the Appellate Division Department and Southern/Eastern District rules allow for standardized schemes that mesh penalties with kinds and levels of the infraction.

4. Procedures

a. Due Process Requirements

Procedures for determining whether conduct should be sanctioned must comport with minimum due process requirements, including duly served notice of specific charges and an opportunity to be heard in opposition to them. New York state and federal rules appear to have met these basic requirements.

b. Standards of Proof Issues: Preponderance of the Evidence v. Clear and Convincing Evidence

While the general standard of proof of misconduct in the state and federal courts is by a preponderance of the evidence, some exceptions exist. The Southern/Eastern District of New York opts to impose a higher standard of proof of misconduct – clear and convincing evidence – which affects the finding of misconduct and the level of penalty applied. Southern/Eastern District of New York Local Civil Rule (L. Civ. R.) 1.5(b). In the Third Department under § 806.4(c)(1)(ii), conduct warranting admonishment must be established by clear and convincing evidence, and pursuant to Southern/Eastern District L. Civ. R. 1.5(b), proof of misconduct must be established by clear and convincing evidence.

The New York State Court of Appeals has announced the state standard. In re Capoccia, 59 N.Y.2d 549, 551, 453 N.E.2d 497, 498, 466 N.Y.S.2d 268, 269 (1983) (“fair preponderance of the evidence” and not the higher standard of clear and convincing evidence applies in determining whether an attorney has committed professional misconduct); see also In re Friedman, 196 A.D.2d 280, 296, 609 N.Y.S.2d 578, 587 (1st Dep’t 1994) (disbarment of attorney under fair preponderance standard for thirteen counts of misconduct arising from his

representation of personal injury claims in three cases did not violate due process under the federal or state constitutions; referee's recommendation for suspension rejected as inadequate), appeal dismissed, 83 N.Y.2d 888, 635 N.E.2d 295, 613 N.Y.S.2d 126, cert. denied, 513 U.S. 820, 115 S.Ct. 81 (1994). In Capoccia, the court held that the privilege of practicing law by an individual was more akin to a property interest than a right and thus did not require the higher standard. The court found that the protection of society, the public interest, and the court itself "as an instrument of justice" far outweighed the interests of the attorney subject to discipline. Mitchell v. Association of the Bar of New York City, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 746, 386 N.Y.S.2d 95, 97 (1976) (quoting In re Isserman, 345 U.S. 286, 289 (1953)), quoted in Appell, cited in the paragraph below at 282 n.62.

One student commentator has vigorously contested this result. David M. Appell, Note, Attorney Disbarment Proceedings and the Standard of Proof, 24 Hofstra L. Rev. 275 (1995). Appell argues that the severity of the disbarment disciplinary sanction, which damages the attorney's ability to earn a living and her reputation, does affect a liberty interest implicating Fourteenth Amendment due process rights. On the other hand, it can be argued that although statute or the courts may provide otherwise, neither common nor statutory law, or the federal or New York State constitution impose a higher standard of proof on the courts' exercise of their power to allocate property interests, including the power to control licensing of the practice of law.

c. State Procedures

(1). General Procedures Under Judiciary Law § 90

Under Jud. L. § 90, before being sanctioned, an attorney must be served with a written notice of charges and given an opportunity to be heard in defense. Id. § 90(6). Moreover, in any disciplinary proceeding, the petitioner and the respondent, including a bar association, corporation, or other association, have the right to appeal an Appellate Division final order concerning questions of law to the Court of Appeals (subject to limitations prescribed in N.Y. Constitution, Article 6, Section 3). Id. § 90(8).³¹ In addition, records of the disciplinary complaint, inquiry, investigation, and other proceedings are sealed and are deemed to be private and confidential. However, for good cause shown, the appellate division department having jurisdiction over the disciplinary proceeding may within its discretion, with or without notice, divulge any part of a record. But if the charges are sustained the records are deemed

³¹ Article 6, Section 3 of the New York State constitution grants the legislature the power to regulate proceedings in the courts, and to delegate to the courts, including the Appellate Division, its legislative authority to adopt regulations consistent with practice and procedures "provided by statute or general rules."

public records and are available. Id. § 90(10).³²

Pursuant to authority granted by Jud. L. § 90(2), each Appellate Division department has established its own set of procedures for determining whether the challenged conduct is sanctionable.

(2). First Department Disciplinary Committee and Office of Chief Counsel: Structure and Duties

The First Department's procedural rules are the most elaborate of the Departments.³³ They provide for a Departmental Disciplinary Committee, appointed by the court,³⁴ which investigates and prosecutes complaints against attorneys who are admitted to practice in, work in or live in the department. 1st Dep't R. § 603.4(a)(1). The committee is assisted by the Office of Chief Counsel, which investigates complaints or grievances referred to it by the court, the committee or other sources. The office may also initiate investigations of matters coming to its attention that are within the jurisdiction of the committee. Id. § 605.6(a). Should the office consider that allegations warrant a response, the attorney is given an opportunity to answer them.

(3). First Department Procedures

Following the conclusion of an investigation, in cases where there is no jurisdiction, the office refers the case to the authorities in the appropriate jurisdiction; otherwise the office refers it to the Disciplinary Committee, with a recommendation for dismissal, admonishment

³² The Association of the Bar of the City of New York has twice recommended that once the appropriate body makes a determination to bring a formal misconduct proceeding against an attorney, the proceeding should be open to the public. Procedural rights of attorneys facing discipline, 40 The Record of the ABCNY 323 (1985); Committee on Professional Discipline, Confidentiality of disciplinary proceedings, 47 The Record of the ABCNY 48 (1992). The rationale was that opening up the process to public scrutiny is likely to alleviate suspicion and resentment of what the public sometimes perceives to be a mutual "back-scratching" process without external checks. The report also argues, on the other hand, that publication at too early a stage of the process might jeopardize client interests as the result of premature exposure, with the possibility of breaching the attorney-client privilege, or might undermine resolution of claims through mediation or the use of lesser sanctions, such as letters of caution or admonishment, which might be all the case warrants. The report argues, as well, that limitations on opening the process would protect attorneys from frivolous or vindictive complaints, since the large majority of complaints are without merit. Id. at 62.

³³ Because the Department's extensive procedures are not easily summarized, the rules themselves ought to be consulted, Rules and Procedures of the Departmental Disciplinary Committee, Parts 603 and 605.

³⁴ The First Department Departmental Disciplinary Committee is structured as follows. Attorneys, who are members of the New York State bar in good standing with offices or residences in New York City, must make up at least two thirds of the committee. Appointments to the committee may be made from lists of nominees of the Association of the Bar of the City of New York, the Bronx County Bar Association or the New York County Lawyers' Association or by other means deemed by the court to be in the public interest. Up to one third of the members need not be members of the bar. 1st Dep't R. § 603.4(a)(2).

or a formal hearing. 1st Dep't R. § 605.6(e). Depending on the type of recommendation, one or more attorney members of the committee selected by the chair reviews the office's recommendation and approves or modifies it and returns it to the office. 1st Dep't R. §§ 605.6(f), 605.7(a)-(b). On approval of the office's recommendation or its acceptance of the reviewing attorney(s)' modification, or after determination of the appropriate discipline by the committee chair, except where formal proceedings are to be instituted, the respondent is notified of the determination to dismiss or to admonish. If an admonishment is determined to be the appropriate disposition, the respondent may not appeal, but may seek reconsideration or demand a formal hearing before a referee. Id., § 605.8(a)-(b). If the reviewing attorney(s) of the Disciplinary Committee approve(s) the Office of Chief Counsel's recommendation to institute formal proceedings, the office will prosecute the case at a hearing before a court-appointed referee. Id., §§ 605.12 - 13. After taking evidence, the referee makes a report to the court stating findings of fact and conclusions of law and recommendations for sanctions, if any. Id. § 605.13(q).

A hearing panel composed of Disciplinary Committee members reviews the referee's report and recommendation. After taking written and oral argument from office counsel and the respondent, the panel determines whether to affirm, dismiss, or modify the referee's report and recommendation. Panel determinations are submitted to the court for final decision where they may be disputed by the respondent or the office or when the referee and hearing panel find it appropriate to do so. Id. §§ 605.14 and 605.15; see In re Brooks, 271 A.D.2d 127, 708 N.Y.S.2d 22 (1st Dep't 2002) (referee conducts hearing on charges and issues a report and recommendation; a panel of the court, after hearing argument and reviewing the record may confirm or reject the report and recommendation and submit them to the court for final decision), lv. to appeal denied, 95 N.Y.2d 955, 745 N.E.2d 388, 722 N.Y.S.2d 468 (2000). An attorney who has been disbarred or suspended for more than six months may apply to the court for reinstatement. If the chief counsel opposes reinstatement, she requests that the court either deny the application or appoint a referee and refer the matter to the Disciplinary Committee. 1st Dep't R. § 605.10(b).

(4). Second Department Grievance Committees and Their Staffs: Structure and Duties

Second Department rules provide for the court to appoint three twenty-person grievance committees for the different judicial districts within the department, and sixteen of each twenty must be attorneys. The grievance committees are responsible for investigating and prosecuting matters concerning attorneys who practice in or reside in their district or, at the time of admission to the bar, resided there. One committee is responsible for attorneys

from the Second and Eleventh Judicial Districts. Another is responsible for attorneys from the Ninth Judicial District. The third is responsible for attorneys in the Tenth District. The court may draw committee members from lists of attorneys submitted by the bar associations in the counties that make up the department. The court, in consultation with the bar associations, appoints for each committee a chief counsel and such assistant chief counsel and support staff as the court deems necessary. 2d Dep't R. §§ 691.4(a)-(b).

(5). Second Department Grievance Committee Procedures and
Court Review

Second Department misconduct investigations may be commenced pursuant to written complaints made to the court or to one of the grievance committees, or by the court or a committee sua sponte. A three-member subcommittee of a grievance committee may be appointed to conduct hearings on complaints and report its findings of fact to the full committee for further disposition. A full committee may, after preliminary investigation, dismiss the complaint, conclude the matter by issuing a letter of caution to the attorney or by privately admonishing the attorney, or serve the attorney with written charges and hold a hearing if the matter is deemed to be of sufficient importance. Where the public interest demands prompt action and the available evidence show probable cause for such action, the committee will recommend that the court institute a disciplinary proceeding. 2d Dep't R. §§ 691.4(a)-(f), 691.4(h). The grievance committees' proceedings are sealed and deemed private and confidential, unless otherwise provided by the court. Id. § 691.4(j).

If during the course of a misconduct investigation or proceeding it appears that the attorney suffers from substance abuse, the attorney or the committee may seek from the court or the court on its own motion may grant a stay of the investigation, charges or proceedings and direct the attorney to complete a court approved monitoring program. In making the determination the court will consider whether the alleged misconduct occurred while the attorney suffered from substance abuse dependency, whether the conduct related to substance abuse dependency, the seriousness of the alleged misconduct and whether diversion into the program is in the best interests of the public, the legal profession and the attorney. On successful program completion the court may direct discontinuance or resumption of proceedings or take other action. The attorney must pay for any costs associated with participation in the program. Id. § 691.4(m). An attorney subject to a grievance committee hearing or is subject to a pending disciplinary proceeding before the court may offer medical or psychological evidence in mitigation of charges on notice to grievance committee counsel. Id. § 691.4(n).

In event of a formal disciplinary proceeding, petitioner and respondent attorney may subpoena attendance of witnesses or production of documents. Depositions may be taken of witnesses likely to be unavailable at the hearing. Id. § 691.5-a.

An attorney under investigation for misconduct may resign if he or she 1) acknowledges that the resignation was freely and voluntarily made and not coerced, 2) was aware that there is a pending misconduct investigation and knows the nature of the allegations, and 3) acknowledges that if charges were predicated on the conduct under investigation, the attorney could not defend him or herself on the merits. Id. § 691.9. An attorney disbarred after a hearing, or on consent, or whose name has been stricken from the roll of attorneys, or who resigned while under investigation for misconduct may not apply for reinstatement prior to at least seven years from the date of disbarment or removal. Id. § 691.11(a); see also In re Wachtler, Panel Denies Wachtler's Bid of Reinstatement, N.Y.L.J. at 1 (Apr. 18, 2003)(Second Department denies application for reinstatement of former Chief Judge who resigned from the bench and plead guilty to federal felony of threatening in 1993 to kidnap teenaged daughter of former lover). A suspended attorney may apply after such interval as the court may direct in the suspension order or any modification of the order. Id. § 691.11(a). An application for reinstatement may be granted on a showing, by clear and convincing evidence, that the applicant has complied with the order of disbarment or suspension, and possesses the character and general fitness to practice law. Id. § 691.11(c)(1). If the applicant has been disbarred or suspended for more than one year, that subsequent to the controlling order, the applicant must show that he or she has passed the Multistate Professional Responsibility Examination and has completed one hour of CLE credit for each month of disbarment or suspension up to a maximum of 24 credits, to be completed during the period of disbarment or suspension and within two years preceding reinstatement. On request the court may conditionally grant reinstatement, subject to completion of the CLE requirement. Id. § 691.11(c)(2). If the applicant was suspended for one year, he or she must complete during that period 18 CLE credit hours, six of which must be in legal ethics and professionalism, or must complete 12 CLE credit hours and pass the Multistate Professional Responsibility Examination. Id. § 691.11(c)(3). If an applicant is suspended for less than one year, during the period of suspension he or she must complete one CLE credit hour for each month of suspension. Id. § 691.11(c)(4). The court shall refer an application for reinstatement after a suspension of more than one year or disbarment to a Character and Fitness Committee, referee, justice or judge for a character and fitness review and report before granting reinstatement. The court may, in its discretion, make such a referral regarding an application for reinstatement after a suspension of one year or less. Id. § 691.11(d).

An application for reinstatement after voluntary resignation may be made on notice to

the grievance committee in the judicial district here the attorney last maintained an office, or if none, to the committee where the attorney resided when admitted. The applicant must show the circumstances of the resignation, the reason for seeking reinstatement, whether he or she is or has been subject to disciplinary proceedings in any jurisdiction and any results, that he or she is in good standing in every bar admitted to, and that one hour of CLE credit has been received for each month since the effective date of resignation up to a maximum of 24 credits. The court may refer an application for a character and fitness review and report by a character and fitness committee, referee, justice or judge. Id. § 691.11-a.

Third Department Committee on Professional Standards and Staff: Structure and Duties

Third Department disciplinary rules provide for a court-appointed twenty-one member Committee on Professional Standards, three members of which are to be non-attorneys. The court, in consultation with the committee, appoints a professional and support staff headed by a chief attorney. The committee investigates all matters concerning attorney misconduct brought to its attention. 3d Dep't R. § 806.3. The chief attorney determines whether a complaint made against an attorney, if true, is sufficient to warrant an investigation. An attorney who is the subject of a complaint is expected to cooperate in the investigation and may be required to submit to an examination by a staff attorney. Failure to do so may result in suspension from practice. 3d Dep't R. §§ 806.4(a)-(b).

If, after investigation, the committee determines that no further action is warranted, the complaint is dismissed. Otherwise the committee may 1) direct that a disciplinary proceeding be commenced against the attorney, or 2) admonish the attorney orally or in writing, if the misconduct has been established by clear and convincing evidence and the committee determines in its discretion in the light of all the circumstances that the misconduct is not serious enough to warrant prosecution in a disciplinary proceeding, or 3) issue a letter of caution, if the misconduct has been established by clear and convincing evidence and the committee determines in the light of all the circumstances that the misconduct is not serious enough to warrant disciplinary prosecution or an admonishment, or 4) issue a letter of education, if the committee determines in its discretion that the attorney's actions warrant comment. Prior to imposition of the admonishment, the attorney may challenge the proposed action at a disciplinary proceeding before the court, which is not bound by the committee's determination. The attorney may ask the committee to reconsider a letter of caution. Id. § 806.4(c). If a disciplinary proceeding before the Court is instituted, the Court refers issues of fact to a judge or referee to hear and report. If no factual issue is raised, on request, the Court may hear arguments for and against the merits or mitigation. Id. §

806.5.

(6). Third Department County Bar Associations: Addressing
Complaints Not Constituting Misconduct

County bar associations have special roles in the Third Department misconduct process. A bar association that receives a complaint about an attorney refers it to the Committee on Professional Standards' chief attorney for review. If the chief attorney determines that the complaint is a minor matter not constituting misconduct – for example, a fee dispute or a claim of inadequate representation not constituting professional misconduct, or a claim that legal services have been delayed not constituting neglect – the matter is referred back to the bar association for resolution. If the association is unable to resolve the complaint within ninety days, at the chief attorney's request, it refers the case again to the chief attorney for further consideration. 3d Dep't R. § 806.6(a). Upon receipt of a complaint from any source, the committee or the Chief Attorney may refer it, if appropriate, to a county bar association for mediation. Id. § 806.6(b).

(7). Third Department: Resignations by Attorneys Subject to
Disciplinary Proceedings; Reinstatement; Discipline by
Non-New York Jurisdictions

An attorney who is subject to disciplinary proceedings or a misconduct investigation may resign upon stating that he or she 1) does so freely with knowledge of the specific charges of misconduct and the consequences of resignation and 2) does not contest the allegations and recognizes that the failure to do so precludes claiming innocence of the misconduct charged. 3d Dep't R. § 806.8. An attorney disbarred for a felony or a serious crime may seek reinstatement after seven years. A suspended attorney may seek reinstatement upon expiration of the period of suspension. Reinstatement may be granted on a showing by clear and convincing evidence that the disbarment or suspension order has been complied with, that the attorney possesses the character and fitness to resume the practice of law, and that the attorney has attained a passing grade on the Multistate Professional Responsibility Examination. Id. § 806.12. An attorney disciplined by a non-New York State jurisdiction may be disciplined by the 3rd Department for conduct that gave rise to the discipline imposed by the jurisdiction. The attorney must file a copy of the jurisdiction's order within 30 days of its issuance. Failure to do so may be deemed misconduct. On filing the other jurisdiction's order or on receipt of its record of proceedings, the attorney may submit any defense or opposition to discipline being imposed by the 3rd department. The department will examine the papers before it and such other evidence it admits and may

impose discipline unless it finds 1) that procedures in the other jurisdiction denied the attorney due process, or 2) there was such an infirmity in the proof in the other proceeding that the result can not accepted, or 3) that imposition of discipline would be unjust. If the attorney raises either 1) or 2) or both the attorney must file the record or relevant portions of the record of proceedings in the other jurisdiction deemed necessary to determine the issues. Id. § 806.19.

(8). Fourth Department Attorney Grievance Committee and
Staff: Structure and Duties; Responsibilities of County
or Local Bar Associations for Minor Complaints

In the Fourth Department, each judicial district has its own Attorney Grievance Committee. The members of a district's committee are recommended by the presidents of the bar associations in the district; each grievance committee must have one member from each county in the judicial district. 4th Dep't R. § 1022.19(a)(1). The committees investigate misconduct complaints regarding attorneys practicing in their respective districts, supervise the committee legal staffs, and refer cases directly to the Appellate Division requiring prompt action, where the attorney has committed a felony or a crime that adversely affects the attorney's honesty, trustworthiness, or fitness to practice. Id. § 1022.19(b).

The judicial district's chief attorney initiates investigations of all complaints. If the complaint involves a minor matter such as a personality dispute between attorney and client, a fee dispute, or a delay that did not harm the client, the matter is referred to the county or local bar association for investigation and determination. Where the bar association can not resolve the matter within sixty days of receipt of the complaint or after a sixty-day extension, the judicial district grievance committee assumes jurisdiction of the matter. Id. §§ 1022.19(c)-(e).

A Fourth Department judicial district chief attorney may recommend to the district committee that an attorney be formally charged when there is probable cause to believe that the attorney has committed misconduct or has been convicted of a crime that adversely reflects upon the attorney's honesty, trustworthiness, or fitness to practice. The attorney can challenge the charge before the committee, which votes to decide whether charges should be filed with the court for a hearing. The court refers any factual issues raised to a justice or referee to hear and report on them. On a finding by the court that the misconduct of the attorney under investigation immediately threatens the public interest, the attorney is suspended from practice pending resolution of the case. Id. § 1022.20(d).

(9). Fourth Department Procedure

On receipt of proof of conviction of a felony, as defined in Jud. L. § 90(4)(e),³⁵ the attorney will be disbarred. 4th Dep't R. § 1022.21(a). On receipt of conviction of a serious crime, as defined in Jud. L. § 90(4)(d),³⁶ the attorney will be suspended pending entry of a final order of disposition. Id. § 1022.21(b)(1). If the court determines that the crime of which the attorney was convicted was not serious, the court may refer the matter to a district grievance committee for investigation and appropriate disciplinary action. Id. § 1022.21(c)

The attorney under misconduct investigation may resign during its pendency pursuant to his or her statement that the resignation was voluntary, was not coerced and was made with full knowledge of the consequences, that the charges are true, that the attorney has no defense to them, and that if the charges relate to misappropriation or misapplication of client funds or property the attorney consents to an order of restitution. Id. § 1022.26(a). A disbarred attorney or one who has resigned as a result of misconduct may seek reinstatement after seven years. The court may require that the person disbarred pass the New York State Bar Examination and will require passage of the Multistate Professional Responsibility Examination. A suspended attorney may apply for reinstatement at the end of the suspension period. If the suspension has been for more than one year, the court may require passage of the bar examination and will require passage of the Multi-state Professional Responsibility Examination. Id. §§ 1022.28(a)- (b).³⁷

d. Federal Procedures

(1). Federal Rules of Appellate Procedure 46 and 47: No Specific Procedural Rules; Local Circuit Rules Authorized

The Federal Rules of Appellate Procedure do not provide specific procedural rules governing the disciplining of members of the circuit court bars. Fed. R. App. P. 46(b)(2). However, Fed. R. App. P. 47(a) permits each circuit court to promulgate its own local practice rules.

(2). Second Circuit Committee on Admissions and Grievances:

³⁵ See Section 3(b)(1) for a discussion of the felony definition under Jud. L. § 90(4)(e).

³⁶ See footnote 21 for the definition of a serious crime under Jud. L. § 90(4)(d).

³⁷ Currently, there appears to be no movement toward a unified New York State misconduct procedural system comparable to the Appellate Division's Joint Disciplinary Rules of the Code of Professional Responsibility.

Structure, Duties and Procedures

In the Second Circuit, procedural rules concerning attorney discipline are found at Second Circuit Rule 46(f)-(h). Pursuant to 2d Cir. R. 46(h)(1)-(2), a court-appointed Committee on Admissions and Grievances, composed of seven members of the bar, initially addresses accusations and evidence of attorney misconduct involved in any matter before the court. The committee investigates, hears, and reports on allegations referred by the court regarding violation of professional responsibility rules in effect in the state or other jurisdiction where the attorney maintains his principal office. The matters referred may include not only acts of affirmative misconduct but also negligent acts.

The committee provides a written statement of charges regarding the matter to the attorney, who is entitled to a plenary hearing at which witnesses and other evidence in support of and in opposition to the charges may be presented. Unless otherwise ordered by the court, the committee has discretion to make its own rules of procedure. Id. 46(h)(3). The committee provides the court with a record of the proceedings and its recommendations with a statement of supporting reasons. The respondent attorney may present a statement in opposition to or in mitigation of the recommendation. The court, consisting of its active members, must act within a reasonable time on the recommendation by a majority vote. Id. 46(h)(4).

(3). Second Circuit: Effect of Disbarment By One Court on Other Courts

Although an attorney must be admitted to a state bar to be admitted to one of the federal district courts in New York, subsequent revocation of state bar membership does not automatically disqualify the attorney from continued practice in the district court. In re Gouiran, 58 F.3d 54, 57 (2d Cir. 1995). This is so, the Court held, because the state and federal judicial systems each have autonomous control of their officers, and none of the local federal courts' rules provides for automatic disbarment of an attorney who has lost his or her bar membership. Id. at 58.

(4). Southern and Eastern District of New York Committees on Grievances: Structure and Duties

Under the Southern/Eastern District Courts' detailed disciplinary rules, each district has its own Committee on Grievances, a committee of the board of judges appointed by and under the direction of the district's chief judge, which is in charge of attorney discipline. Each

chief judge also appoints a panel of attorneys admitted to the district's bar to advise and assist the committee. At the direction of the committee or its chair, members of the attorney panel may investigate complaints, prepare and support charges, or serve as members of hearing panels. Local Civil Rule 1.5(a).

(5). Southern and Eastern Districts of New York: Procedures
Related to Local Civil Rules 1.5(1)-(3)

If it appears that there exists a ground for discipline set forth in L. Civ. R. 1.5(b)(1) by being convicted of a felony or misdemeanor, or L. Civ. R. 1.5(b)(2) by being disciplined by another court, or L. Civ. R. 1.5(b)(3) by resigning from the bar of another court while under a misconduct investigation by that court, the district's Committee on Grievances will serve notice on the attorney to show cause in writing why discipline should not be imposed. In all such cases in which a federal or state court has disbarred or suspended the attorney or he or she has resigned while under investigation for misconduct, the committee will serve the notice on the attorney with an order of the district court, effective 24 days after service, on comparable terms disbaring or suspending the attorney, or deeming the attorney to have resigned. The attorney may move within 20 days of service of the notice to modify or revoke the order. Timely filing of the motion will stay the order until further order of the court. If good cause is shown for holding an evidentiary hearing, the committee may proceed to "impose discipline or take such other action as justice and this rule may require." In all other cases, notice shall be served with an order of the Committee on Grievances directing the attorney to show cause in writing why discipline should not be imposed. Id. 1.5(d)(1).

(6). Due Process Rights to an Evidentiary Hearing

The contours and extent of the due process right to an evidentiary hearing are examined in In re Jacobs v. Grievance Committee of the E.D.N.Y., 44 F.3d 84, 86, 90-1 (2d Cir. 1994) (under the predecessor of L. Civ. R. 1.5(d)(1), the risk of erroneous deprivation of evidentiary hearing extremely low, because attorney already had opportunity in the Appellate Division to present the evidence he sought to present to the district court advisory hearing panel), citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (when deciding whether to grant or deny an evidentiary hearing, private interests must be balanced against public interests), cert. denied 516 U.S. 817 (1995).

In Jacobs, the state court sanctioned an attorney for over billing a client he was representing in a divorce proceeding, for unlawfully obtaining and filing confessions of judgment from her, and for improperly attempting to limit his malpractice liability. Jacobs

claimed that the Eastern District attorney advisory panel appointed to his case pursuant to the then-local disciplinary rule, Rule 4 violated due process by failing to accord him a full evidentiary hearing and merely taking oral argument. The district court attorney advisory panel (composed of three retired judges) found the Appellate Division decision proper and recommended suspension; the Grievance Committee affirmed.

Relying on Mathews to determine whether Jacobs had been deprived of due process as a result of being denied an evidentiary hearing, the circuit court balanced his private interest in practicing law in the district court against the court's interest in forgoing an evidentiary hearing. The risk of an erroneous deprivation was found to be extremely low because the attorney had availed himself of the opportunity to present evidence to the Appellate Division referee and to appeal the referee's alleged error to the court. In addition, the district court advisory panel had carefully reviewed the attorney's summary of evidence and properly determined that the evidence had either been already introduced in the state proceeding, could have been introduced there, or was of no significance, and therefore would have resulted in a replication of the state proceeding, resulting in a waste of valuable time and effort. 44 F.3d 90-1.

(7). Southern and Eastern Districts of New York Local Civil
Rules 1.5(d)(2)-(3): Procedures Related to Discipline
By Other Courts and Resignation from the Bar of
Another Court

If an attorney has been disciplined by another court or has resigned from the bar of another court while under investigation, discipline will not be imposed if the attorney establishes by "clear and convincing evidence" that there was such an infirmity of proof of misconduct that the district court could not accept as final the other court's conclusion, that the procedures used in the other court's investigation or discipline so lacked notice or an opportunity to be heard as to constitute a deprivation of due process, or that the imposition of the same discipline would result in a grave injustice. Id. 1.5(d)(2). Complaints and any files are treated as confidential, unless otherwise ordered by the chief judge for good cause. Id. 1.5(d)(3).

(8). Southern and Eastern Districts of New York Local Civil
Rule 1.5(d)(4): Procedures Related to L. Civ. R.1.5
(b)(4)-(6) Disciplinary Grounds

With respect to disciplinary or other grounds stated in L. Civ. R.1.5(b)(4)-(6) (i.e., (a)

an infirmity preventing the practice of law, (b) a violation of the New York Code of Professional Conduct, as adopted by the Appellate Division, or (c) appearing in the district court without being a member of the court without permission) the subject attorney will be served with an order to show cause why discipline should not be imposed. On receipt of the attorney's response, an evidentiary hearing will be held before a magistrate judge or a sub-panel of three attorneys selected from the panel of attorneys who assist the Committee on Grievances. The findings and recommendations of the magistrate judge or sub-panel are reported in writing to the committee. After affording the respondent attorney an opportunity to respond to the report in writing, the committee proceeds "to impose discipline or to take such action as justice or this rule may require." L. Civ. R.1.5(d)(4).

(9). Southern and Eastern District of New York Local Civil
Rules 1.5(e) and (g): Procedures Related to
Reinstatement and Providing Notice of Discipline to
Other Courts

An attorney disbarred, suspended, or precluded from appearing in court may seek reinstatement for good cause. The application is referred to the Committee on Grievances, which may refer it to a magistrate judge or a panel of attorneys for findings and a recommendation. The committee may also act on the application without making a referral. L. Civ. R.1.5(e). When an attorney is known to be a member of the bar of another state, territory, or federal court, the district court will send the other court a certified copy of the judgment and opinion, if any, of the conviction, disbarment, preclusion, suspension, or censure. Id. 1.5(g).

(10). Northern District of New York Local Practice Rule 83.4:
Procedures

The Northern District local rules provide that the chief judge has charge of all matters relating to the discipline of members of its bar. L.P.R. 83.4(a). A Northern District bar member will be suspended from practice when convicted of a felony. The attorney will be disbarred when the conviction becomes final. Id. 83.4(b). An attorney disciplined by another jurisdiction for misconduct will be disciplined to the same extent in the Northern District. The attorney may apply for an order to show cause why the reciprocal discipline should not be imposed on grounds of lack of a) notice or an opportunity to be heard sufficient to constitute a deprivation of due process, b) that there was such an infirmity of proof as to give rise to the clear conviction that the discipline should not be accepted as final, c) that imposition of the same discipline would constitute a grave injustice, or d) that the misconduct

warrants a substantially different discipline. Id. 83.4(d).

A Northern District bar member convicted of a misdemeanor in any jurisdiction may be disbarred, suspended, or censured. Id. 83.4(e). The chief judge may designate a bar association to prosecute a disciplinary proceeding against an attorney and may temporarily suspend the attorney for good cause during the proceeding's pendency. The chief judge may have the matter heard by a court of one or more judges or by a master to hear, report, and make a recommendation, after which the court takes such action "as justice requires." Id. 83.4(e)(1). An attorney disbarred or suspended by the court which admitted the attorney shall be disbarred or suspended for a like period. Id. 83.4(f).

In addition to any other disciplinary sanction imposed under the Northern District rules, an attorney admitted to the district's bar may also be disbarred or otherwise disciplined "for cause" after a hearing and as the court may direct. The chief judge may appoint a magistrate judge or attorney(s) to investigate, advise, or assist regarding any grievance or complaint or request by an attorney for relief from discipline. Except after a felony conviction (or for a pro hac vice admission, which may be revoked for cause by the judge who granted the admission), no censure, suspension, or disbarment may be imposed unless approved by a majority of the district's active judges. Id. 83.4(g). Complaints, grievances, and related files are treated as confidential. Discipline imposed may be made public within the court's discretion. Id. A visiting attorney found guilty of misconduct will be precluded from appearing in the district, and other courts that have admitted the attorney will be notified. Id. 83.4(h). Unless otherwise ordered by the court, no proceedings shall be commenced pursuant to L.P.R. 83.4(e) or L.P.R. 83.4(f) where disciplinary proceedings have been brought against the attorney in the New York State. Id. 83.4(i). The court enforces the Appellate Division's Code of Professional Responsibility, as interpreted by the United States Court of Appeals for the Second Circuit. Id. 83.4(j).

(11). Western District of New York Local Rule of Civil
Procedure 83.3: Procedures

Under the Western District local rule, the chief judge may appoint a magistrate judge or attorney(s) to investigate, advise, or assist on grievances, complaints, and attorney applications for relief from sanctions. In addition to any other sanction, an attorney admitted to the court's bar may be censured, sanctioned, suspended, disbarred, or otherwise disciplined "for cause" on notice, an opportunity for a hearing, and the approval of a majority of the active and senior judges of the court, except for pro hac vice admissions, felony convictions, or situations where the attorney has been disciplined by another court or has resigned while

under investigation for misconduct. L. R. Civ. P. 83.3(a)-(c). A district judge may revoke for cause a pro hac vice admission granted by that judge. Id. 83.3(a).

When the court is notified of a felony conviction,³⁸ the chief judge suspends the attorney. The suspension may be set aside for good cause by a majority of the active and senior judges, in their discretion, and after oral argument or evidentiary hearing, if desired by the court. Id. 83.3(b)(1). When the conviction becomes final, the court will order the attorney disbarred. The court may consider an application to set aside the disbarment on the papers submitted, schedule oral argument, or hold an evidentiary hearing. For good cause shown, a majority of the active and senior judges may set aside the disbarment when it is in the interests of justice to do so. Id. 83.3(b)(2).

Upon notice that an attorney admitted to the Western District bar has been suspended, disbarred, or disciplined in any way in any district, state, commonwealth, or territory or has resigned from such jurisdiction while under investigation for misconduct, the court will discipline the attorney to the same extent. A majority of the active and senior judges may set the discipline aside when the record shows by clear and convincing evidence that 1) notice and opportunity to be heard was so lacking as to violate due process rights, 2) there was such an infirmity of proof as to give rise to the clear conviction that the other court's conclusion should not be accepted as final, or 3) the imposition of the same discipline would result in grave injustice. The court in its discretion may consider the application for relief on the papers submitted, schedule oral argument, or hold an evidentiary hearing. Id. 83.3(c). Complaints, grievances, and related files are confidential. Any discipline imposed shall or shall not be made public, within the discretion of the court. Id. 83.3(a).

(12). Western District of New York Local Rule of Civil
Procedure 83.3(b): Procedural Issues Regarding the
Felony Conviction Disciplinary Rule

Procedural issues arose with the Western District's felony disciplinary local civil rule, L. R. Civ. P. 83.3(b), in In the Matter of Tidwell, 139 F. Supp. 2d 343 (W.D.N.Y. 2000), aff'd 295 F.3d 331 (2d Cir. 2002), before the rule was revised in 2003. In Tidwell, the district court had reciprocally disbarred an attorney who pleaded guilty to a state felony on a charge of leaving the scene of an accident at which the victim bicyclist died. At the state court sentencing, the attorney accepted a one-year prison term and did not contest losing his license

³⁸ "Felony" means any criminal offense classified as a felony under federal or New York law, or under the law of any other state, commonwealth or territory, which, if committed in New York, would constitute a felony. L. R. Civ. P. 83.3(b)(3).

to practice pursuant to Judiciary Law § 90(4), which provides for automatic disbarment when convicted of a New York felony. When the Western District received notice of the state conviction and disbarment from the Fourth Department, the chief judge, pursuant to former L. R. Civ. P. Rule 83.3(b), issued an order without notice or a hearing, automatically disbaring the attorney.

On his release from prison, the attorney moved under F. R. Civ. P. 60(b) to set aside the order on grounds, among other things, that the district court's automatic disbarment process and the Fourth Department disbarment order lacked due process for want of notice and an opportunity to be heard. On appeal to the Second Circuit from the denial of the motion, the attorney also alleged that while incarcerated he had unsuccessfully attempted, through his wife and son, to appeal the district court disbarment order.

The Second Circuit held that because there was no dispute that New York was entitled to disbar him because of the uncontested felony conviction, there was no factual issue for the district court to resolve, and the attorney had no valid complaint that he did not receive prior notice and a hearing from that court. The circuit court found that, in any event, any procedural defect in the district court was overcome by the full hearing it provided on the Rule 60(b) motion. Moreover, the circuit held, whether the district's automatic reciprocal-discipline rule would present due process issues in other circumstances did not have to be addressed because the district court chief judge, referring to Southern/Eastern District Local Civil Rule 1.5(d) (providing for notice and an opportunity to be heard in reciprocal discipline cases) and District of Connecticut Local Civil Rule 3(f)(same), informed the circuit that the Western District felony rule would be changed. The new rule, promulgated in 2003, is described above.

e. Appellate Review

(1). Authority to Review Lower Court Misconduct Decisions On Grounds of "Fundamental Notions of Fairness"

Because of a court's inherent power to sanction attorneys for misconduct, the authority of an appellate court to review a lower court's decision to sanction is not self-evident. Matter of Jacobs, 44 F.3d at 87-88. In Jacobs, discussed in Section 4(a) above, the court held that the Supreme Court and circuit courts have always assumed jurisdiction to review lower court decisions to discipline attorneys practicing in their courts, probably on grounds that to preclude review would be contrary to "fundamental notions of fairness." Although courts, including lower courts, have independent discretion to sanction misconduct,

recourse must be available to prevent abuse of discretion. Id. at 88. In the Second Circuit, the standard of review of a misconduct sanctions order is clear abuse of discretion. Id.; In re Edelstein, 214 F.3d 127, 130- 31 (2d Cir. 2000); In re Gouiran, 58 F.3d 54, 56 (2d Cir. 1995). In New York State, “discipline imposed by a unanimous order of the Appellate Division is not subject to an appeal as of right in the absence of a substantial constitutional question.” Edelstein, 214 F.3d at 131 n.1.

5. Conclusions

This review points out the variety of disciplinary rules and practices among the state and federal courts in New York. There has doubtlessly been great value in the experience acquired by the bench and bar with the different approaches to the disciplinary rules. But in our increasingly large and complex society, the federal district courts and the Appellate Division Departments may want to consider the advantages of a further codification and unification of the rules. Anecdotal evidence suggests that uniform procedural and substantive disciplinary rules for the state and federal courts save time and expense for the litigants, the courts, and the public, and may be needed to address problems of substantive law arising from the differences. The Appellate Division’s joint Disciplinary Rules of the Code of Professional Responsibility and the Southern/Eastern District Court joint rules demonstrate the feasibility and utility of joint rules in that they have eased attorney disciplinary case law and practice across the state. The efficacy of the Appellate Division’s codification of the disciplinary rules is demonstrated by its adoption as part of the misconduct rules of three of the four federal district courts in New York.³⁹ The Eastern and Southern Districts have had long and fruitful experience with their own joint local rules. Their coordinated joint local rule making allows for the promulgation of effective, efficient, more comprehensive rules and suggests the value and feasibility of further efforts of this kind.

Co-Chair: Lewis F. Tesser

Co-Chair: Michael Hilf**

Igou M. Allbray*

Irwin Kahn

William Aronstein**

George Kontogiannis

Judith Bader-York

Martin Minkowitz

Thomas Cirone

Roy Nemerson

Robert Dembia

Raymond M. Patt

Leslie A. Eisenberg

Christine M. Radman

Naomi Goldstein

Michael Scott

³⁹ The Southern, Eastern and Northern District Courts have adopted the joint Appellate Division Code of Disciplinary Rules. See discussion in Section 1(c).

Marti Granizo-O'Hare

Sherrie B. Thompson

Paul Green

David M. Wirtz

* Chair of Survey Subcommittee and Author of Report

** Member of Survey Subcommittee