

Memorandum in Opposition

NYSBA #19

June 5, 2017

S. 6321

By: Senator Alcantara
Senate Committee: Labor
Effective Date: Immediately

AN ACT to amend the workers' compensation law, in relation to increasing penalties for dilatory tactics and broadening application of penalty for violations of rule of professional conduct.

LAW AND SECTIONS REFERRED TO: Section 25 of the workers' compensation law.

This bill would authorize Referees at the Workers' Compensation Board to impose financial penalties against attorneys whom they find to have engaged in dilatory tactics. Under the bill, a Referee would be permitted to consider the issue of whether the attorney violated the Rules of Professional Conduct, decide whether an attorney has engaged in dilatory tactics, and impose a monetary sanction against an attorney who is found to have done so.

The Introducer's Memorandum in Support of the bill states that: "While the Board does not have contempt power, there should be some consequence for the impact caused by a violation of the Code of Professional Responsibility." What this ignores is that a Referee already has the ability to take action when an attorney engages in dilatory tactics and that New York State Judiciary Law vests in the Appellate Divisions of the New York State Supreme Court the sole power to discipline attorneys for violation of the Rules of Professional Conduct, as discussed below. The New York State Bar Association opposes this bill because it unjustly would allow a Referee to impose sanctions on an attorney without due process and inappropriately would derogate from the power vested in the Appellate Divisions.

Rule 3.2 of the Rules of Professional Conduct (the memo mentions the "Code of Professional Responsibility," but this was replaced in 2009 by the Rules of Professional Conduct, which is now the effective set of ethical rules applicable to lawyers) prohibits a lawyer from engaging in actions that "have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." Thus, a lawyer engaging in dilatory tactics can be disciplined by the Appellate Division with jurisdiction over the lawyer. Any Referee can refer any matter to the appropriate Attorney Grievance Committee, which committee has full authority to consider the matter for the purpose of imposing discipline. Consequently, a Referee is not helpless to address dilatory behavior under current law.

The authority to sanction attorneys is contained in Section 90 of Judiciary Law of the State of New York. Under this section, the four Appellate Divisions of the New York State Supreme Court have been granted the authority to discipline attorneys for violations of the Rules of Professional Conduct (22 NYCRR Part 1200).

The Appellate Divisions promulgated 22 NYCRR Part 1240, Rules for Attorney Disciplinary Matters, which establishes procedures for the adjudication of charges brought against an attorney in New York State. Those rules provide an extensive procedure to discipline attorneys for violation of the Rules of Professional Conduct. These procedures allow for due process, with a multi-level review of the charges. The process includes hearings before the Attorney Grievance Committee, with the final determination regarding discipline made by the Appellate Division.

The procedures provide for four preliminary stages:

1. Initial Complaint
2. Investigation of Complaint
3. Response to the Complaint
4. Initial Determination on the Complaint

If the proceeding goes further, there are full evidentiary hearings with the right of cross examination of accusers and eventually proceedings before the appropriate Appellate Division for final resolution of the complaint. At all phases of the procedure, a different person or persons acts as the accuser, prosecutor, and determiner.

Even courts of record do not have the power to sanction for any violation of the Rules of Professional Conduct. Courts may sanction parties or attorneys pursuant to 22 NYCRR §130-1.1, *et seq.* but only for frivolous conduct which falls into three categories: 1) if "it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law"; 2) if "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another"; or 3) if it asserts material factual statements that are false." Even when sanctioning such conduct, the court must afford the parties a reasonable opportunity to be heard, and the court's decision must be rendered in writing, setting forth the conduct, the reasons the court found the conduct frivolous, and the reason for the amount of the costs and/or sanctions imposed. Like all decisions, the court's decision to sanction is reviewable by the appellate court.

By contrast, this bill would fail to afford any element of due process, as it includes no right on the part of the attorney to be heard on the matter of the sanction, no requirement that the Referee explain the reasons for the sanction or the specific acts that led to the imposition of a sanction, and no right of review.

The New York State Bar Association opposes this bill because it would (a) deprive attorneys of due process as required by Judiciary Law, Section 90 and 22 NYCRR Part 1240 when the attorney is subject to penalty for violation of the Rules of Professional Conduct, and (b) deviate from the rules of the Appellate Divisions of New York State's Unified Court System, with respect to making findings of violation of the Rules of Professional Conduct and imposing sanctions.

Based on the foregoing, the New York State Bar Association **OPPOSES** this legislation.