SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

The New(est) Rules of Attorney Discipline

PRESENTERS

Hon. A. Gail Prudenti
Robert P. Guido, Esq.
Donna England, Esq.
Harvey Besunder, Esq.
Marian C. Rice, Esq.
Mitchell T. Borkowsky, Esq.

Program Coordinators: Harry Tilis, Esq.

May 12, 2016
SCBA Center - Hauppauge, NY

A. GAIL PRUDENTI
Chief Administrative Judge

The Honorable A. Gail Prudenti was appointed Chief Administrative Judge of the Courts of New York State, by Chief Judge Jonathan Lippman effective December 1, 2011. As Chief Administrative Judge, she oversees the administration and operation of the statewide court system, with a budget of over $2.7 billion, 3,600 State and locally paid Judges and 15,000 non-judicial employees in over 350 court locations around the state.

Prior to her appointment as Chief Administrative Judge, she served as the Presiding Justice of the Appellate Division for the Second Judicial Department in New York State, the first woman to hold that position, having been appointed thereto, in February 2002, by then-Governor George E. Pataki. Before that, she was the first woman from Suffolk County to serve as an Associate Justice of the Appellate Division for the Second Judicial Department. Prior to ascending to the Appellate Division, Judge Prudenti was the Administrative Judge for the Tenth Judicial District (Suffolk County) for almost three years. At the time of her appointment as a District Administrative Judge, in February of 1999, Judge Prudenti was also the Surrogate of Suffolk County and was the first and only Surrogate in New York to hold the position of a District Administrative Judge.

In August 2011, then-Presiding Justice Prudenti was designated to serve as a Judge of the Court of Appeals for the hearing and determination of the appeal and any related motions in the case of Matter of World Trade Center Bombing Litigation.

Judge Prudenti's judicial career began in 1991 when she was elected to the New York State Supreme Court where she served until 1995, at which time she began her term as the first woman elected Surrogate of Suffolk County. In 1996, during her tenure as Surrogate, Judge Prudenti was also designated as an Acting Supreme Court Justice and received the additional responsibilities of presiding over a dedicated Guardianship Part. After six years as the Surrogate, Judge Prudenti was reelected to the Supreme Court bench.

She earned her law degree from the University of Aberdeen, in Scotland, which also awarded her an honorary Doctorate of Laws in 2004. She graduated from Marymount College with honors. Her first position was in the Suffolk County Surrogate's Court where she was a Clerk and then a Law Assistant. For two years following her service in the Surrogate's Court, she served as an Assistant District Attorney for Suffolk County. Over the next decade, she was a private practitioner specializing in trusts and estates and was special counsel to the New York City Patrolmen's Benevolent Association's Widows and Orphans Fund. She has had extensive litigation experience in all the Surrogate's Courts in the metropolitan area.

Her legal writings are extensive. Over 1,000 of Judge Prudenti's decisions have been published and she has contributed articles to many publications, such as "The New York Law Journal," "Newsday," "The Suffolk Lawyer" and "The Jurist." She has also published handbooks for guardians ad litem and has written extensively on guardianship proceedings.

Additionally, Judge Prudenti has been a frequent lecturer throughout Suffolk County, Long Island, and the State, appearing at seminars and other functions sponsored by the Suffolk Academy of Law, the New York State Bar Association, the New York State Surrogate's Association, the Office of Court Administration, the University of the State of New York at Stony Brook, Touro Law Center, the Diocese of Rockville Centre, and the Roman Catholic Diocese of Brooklyn, to name a few.

The judge is a member of the Advisory Panel of Judges of the New York State Lawyer Assistance Trust Program, a member of the Council of Chief Judges of the National Center for State Courts, a former chairperson of the Office of Court Administration's Mental Health Curriculum Committee for Trial Judges, co-chair of the Chief Judge's Task Force on Delay in the Courts, a member of the Chief Judge's Commission on Public Access to Court Records, a former member of the Chief Administrative Judge's Judicial Legislative Group and a member of the OCA's Gender Bias and Anti-Discrimination Panel. In addition, the judge is a member of the Judicial Section of the American Bar Association, the former Presiding Member of the Judicial Section of the New York State Bar Association, a member of the New York State Trial Lawyers Association and the New York State Women's Bar Association, a former co-chair of the Surrogate's Court Committee of the Suffolk County Bar Association, a member of the Suffolk County Women's Bar Association, which she helped found, and a member of the Board of Directors of the Suffolk County Columbian Lawyers Association.

Judge Prudenti is an accomplished administrator and an experienced supervisor of large-scale court operations, including one of the busiest appellate courts in the United States. As Presiding Justice, she served on the Judiciary's primary decision-making body, the Administrative Board of the Courts, which provides direction and establishes statewide policies and practices for New York State's Unified Court System. In her various leadership roles, the judge has developed innovative programs and instituted many initiatives to enhance the administration of justice and promote the public's trust and confidence in the courts.

In her current role as Chief Administrative Judge, Judge Prudenti acts as the final authority on all administrative actions and services in the New York State Unified Court System, is the sole appointive authority for members of numerous statewide committees, and, in collaboration with the Presiding Justices, determines the annual assignment of over 3,300 justices and judges in the trial courts of the State of New York. She also serves as a member of the Oversight Board for Judiciary Civil Legal Services Funds in New York, which grants annual awards totaling $25 million to legal services providers to the indigent throughout New York State, and as a member of the New York City Advisory Board for Administration for Children's Services. She recently established the Annual Judicial Excellence Awards to acknowledge two outstanding jurists for their extraordinary contributions to New York's judiciary and for their dedication and leadership in advancing the quality of justice.

While appreciative of the recognition and numerous awards she has received throughout the years from assorted groups and organizations, Judge Prudenti feels her greatest honor has been the opportunity to serve the people of the State of New York. The judge lives with her husband and fellow lawyer and former Suffolk County Attorney, Robert J. Cimino, in the Village of Bellport.

Information about Judge Prudenti is also available on the Executive Officers page and in the Judicial Directory.

DONNA ENGLAND
President

Donna England is honored to serve as the 107th President of the Suffolk County Bar Association. Donna is a partner of the law firm, England & England P.C., located in Centereach, New York. For twenty-eight years Donna has concentrated her practice in the area of matrimonial and family law. In addition, Donna has served as an Attorney for the Child, representing children in both the Family and Supreme Courts of Suffolk County.

Donna received her undergraduate degree in 1975 from Regis College in Weston Massachusetts and her *Juris Doctorate* from Hofstra University Law School in 1985.

Donna practiced with both her mother, Catherine T. England, the founder of their law firm, and her brother, Louis C. England. Catherine T. England served as President (1983-84) and Louis C. England served as President (1998-99) of this great association. Catherine T. England was the first woman to serve as president.

This past year Donna and the Hon. Derrick Robinson served as co-chairs of the Bench Bar committee. One of the committee's greatest achievements was creating a system that significantly improved communication between judges and attorneys in the Family and Supreme Courts. In addition, the committee initiated a program in the District Court for Defendant's at the time of their arraignment. Donna would like to thank all of the committee members who have worked very hard to make this practice of law in the Courthouse more efficient and less stressful.

Last June Donna was appointed to the Matrimonial Practice Advisory and Rules Committee. The Committee is one of the standing advisory Committees established by the Chief Administrative Judge consisting of Judges and Attorneys from around the State. The Committee annually recommends to the Chief Administrative Judge legislative proposals in the field of Matrimonial law to be considered for the Chief Administrative Judge on the pending legislative proposals concerning matrimonial law. Donna serves with the Hon. Andrew Crecca as the representatives from Suffolk County. As part of the Committee, Donna was able to participate in the annual Judicial Institute for Matrimonial Justices throughout the State of New York.

On March 30, 2015, Donna was appointed to the Commission on Statewide Attorney Discipline, chaired by the Chief Administrative Judge A. Gail Prudenti. The Commission will conduct a comprehensive review of the state's attorney disciplinary system and offer recommendations to enhance the efficiency and effectiveness of New York's attorney discipline process.

Donna looks forward to collaborating not only with SCBA members but the Court Administration as well to bring together and strengthen our great law community.

Marian C. Rice

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For nearly 30 years, Ms. Rice has concentrated her practice on the representation of attorneys and risk management for lawyers. Ms. Rice holds the AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability, has been designated a Super Lawyer annually since 2008 and was assigned "superb" AVVO rating. In 2012, Long Island Business News named Ms. Rice as one of the 50 most influential women on Long Island.

Ms. Rice is currently President of the 6,000 member Nassau County Bar Association, the largest suburban bar association in the country. In addition to being a columnist for the American Bar Association Law Practice Management Journal, Ms. Rice also serves as an ABA Presidential appointee to the ABA Standing Committee on Lawyer's Professional Liability and has been Chair of the New York State Bar Association - Committee for Insurance Programs since 2008. Ms. Rice is a member of the Professional Liability Underwriting Society; the Defense Association of New York and the Defense Research Institute. In addition to being a New York State Bar Association Presidential appointee to the Task Force on Non-Lawyer Ownership and the Special Committee on Legal Specialization, Ms. Rice has served on the Law Practice Management Committee and the Torts, Insurance and Compensation Law Section. Her prior roles at the Nassau County Bar Association include President Elect 2011-2012, First Vice President 2010-2011, Second Vice President 2009-2010, Treasurer 2008-2009, Secretary 2007-2008, Director 2004-2007, Judiciary Committee (Chair 2006-2007) Vice-Chair (2005-2006), Strategic Planning Committee (Chair 2005-2006) (Vice-Chair 2003-2005), Nassau Lawyer/Publications Committee (Editor in Chief 2006-2007) (Co-Managing Editor 2005-2006). She is also a member of the Nassau-Suffolk Trial Lawyers Section; and the Suffolk County Bar Association.

Ms. Rice has authored materials for numerous publications and newsletters, including the New York Law Journal, the New York State Bar Journal and Nassau Lawyer, and has lectured for the Professional Liability Underwriting Society, the ABA Standing Committee on Lawyer's Professional Liability, the Nassau and Suffolk County Bar Associations, the New York State Bar Association, the New York City Bar and the American Conference Institute, as well as for various law firms, insurers and trade associations, at seminars covering such diverse topics as Risk Management and Loss Prevention for Attorneys, The Elements of and Defenses to a Legal Malpractice Action, Legal Malpractice Principles and Trial Strategy, representing the Client with Greater Concerns, Preparing, Defending and Preventing Claims Stemming From Tax Shelter Advice, Whither Privity?, Defending Attorneys with Psychological Difficulties, Can the Jury Award That? Beyond Out of Pocket Damages in Professional Liability Cases, Avoiding Malpractice and Client Grievances, Protecting Your Practice, Disqualification of Legal Malpractice Experts, Identification and Resolution of Conflicts of Interest, Risk Management for Defense Attorneys, Ethics in the Wake of the New Rules of Professional Conduct; Law Practice Management under the New York Rules of Professional Conduct; Ethics in the Profession, Anatomy of a Legal Malpractice Action, Don't Make Malpractice Your Nightmare, Improving Communication Skills with Clients, Legal Malpractice Issues and Trends, Risks Presented by Law Firm Mergers, Risk Management Techniques for Real Estate Attorneys, Risk Management Techniques for Matrimonial Attorneys, Starting Your Own Law Practice, Ethical Issues Confronting Claims Attorneys in Handling and Evaluating Claims and Attorney Liability under the Fair Debt Collection Practices Act.

From 1999 to 2003, Ms. Rice administered the Attorney Loss Prevention Hotline Service for the

broker responsible for the NYSBA sponsored professional liability insurer.

Ms. Rice received her Juris Doctorate from St. John's University School of Law, Jamaica, New York in 1979 and a Bachelor of Arts degree from Fordham College at Fordham University in 1976. She was admitted to practice before the Courts of the State of New York in 1980 and is also admitted before the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit, as well as several other jurisdictions on a pro hac vice basis.

From 1984 to 2000, Ms. Rice was a Governor-appointed member of the Council for the State University of New York Maritime College at Fort Schuyler.

HARVEY B. BESUNDER

Mr. Besunder was admitted to the practice of law in 1967, and from 1991-2010 had had his own law practice in Suffolk County. In September 2010 he merged his firm with that of Bracken & Margolin, to form Bracken Margolin Besunder LLP. Prior to that time, he was a member of the firm of Cruser, Hills, Hills & Besunder, an Assistant County Attorney for Suffolk County in the Condemnation Department, a member of the Suffolk County Attorney's Office and a Law Assistant in the Suffolk County District Court.

From 1993-1994, Mr. Besunder served as President of the Suffolk County Bar Association, and has been a member and/or Chair of that Association's Condemnation Committee, Grievance Committee, Judiciary Committee, and Bench-Bar Committee.

Mr. Besunder is also an active member of the New York State Bar Association. From 1993 to 1997, he served on the Executive Committee of the Association's Real Property Section, and was a member of the Association's House of Delegates, Committee on Lawyer Discipline, By-Laws Committee and the Nominating Committee. From 1996-1999, he served as Chair of the Committee on Lawyer Discipline.

From 1988 to 1996, he served as a member of the Grievance Committee for the Tenth Judicial District, and in 1997, he was appointed to serve on the Judicial Salaries Commission and served on the Independent Judicial Qualifications Commission from 2007-2011. He is currently a member of the Committee on Character and Fitness.

He has lectured extensively on behalf of the Suffolk Academy of Law, on such topics as ethics and the disciplinary process, real property issues, and for the State Bar on Condemnation valuation issues.

Mr. Besunder has received several awards of Recognition including a Special Award of Recognition, as well as two awards for Pro Bono service. In 2010 Mr. Besunder received the prestigious Presidents Award for Service to the Legal Profession.

HARVEY BRUCE BESUNDER
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EDUCATION

Brooklyn Law School
LL.B June, 1967 (By permission of the State of New York, this degree is now changed to Juris Doctor).

Adelphi University
Bachelor of Arts, History, 1964

ADMISSION

New York (Second Department), December, 1967.
U.S. District Court, Southern District of New York, February, 1973.
U.S. District Court, Eastern District of New York, February, 1973.
United States Supreme Court, May, 1974.
U.S. Court of Military Appeals, May, 1993.
U.S. Court of Federal Claims, May 1993.
U.S. Court of Appeals for the Federal Circuit, July 1993.

EMPLOYMENT RECORD

Bracken Margolin Besunder--- Partner-2010-Present

Law Offices of Harvey B. Besunder, P.C. 2006 - 2010

Partner, Pruzansky & Besunder, LLP, 2001 - 2005

Law Offices of Harvey B. Besunder, 1993 - 2001

Partner, Besunder and Burner, 1991 - 1993

Partner, Cruser, Hills, Hills & Besunder, 1979 - 1990

Partner, Bazell & Besunder, 1975 - 1979

Assistant County Attorney, Condemnation Department, Suffolk County Attorney's Office, 1972 - 1979

Assistant County Attorney, Chief, Family Court Department, 1971 - 1972

Judicial Law Clerk, Suffolk County District Court, 1969 - 1971

AFFILIATIONS

Suffolk County Bar Association
Member, Suffolk County Bar Association

President	1993 - 1994
President Elect	1992 - 1993
First Vice President	1991 - 1992
Second Vice President	1990 - 1991
Treasurer	1989 - 1990
Secretary	1988 - 1989
Director	1986 - 1988

Condemnation Committee	1978 - present
Member	1978 - present
Chairman	1978 - 1980

Grievance Committee	
Co-Chair	1982 - 1984
Overall Chair	1984 - 1986

Judiciary Committee	
Member	1982 - 1986

Bench Bar Committee	
Chair	1991-1993
Member	1993-present

Professionalism Committee and Ethics	1998 - present

New York State Bar Association
Member, New York State Bar Association

Member, Condemnation and Tax Certiorari Committee of the Real Property Section

Real Property Section, Executive Committee	
Member	1993 - 1998

House of Delegates	
Delegate	1990 - 1994
	1996 - 1998

Committee on Lawyer Discipline	
Member	1999 - present
Chair	1996 - 1999

By-Laws Committee	
Member	1999 - 2003

APPOINTMENTS

Tenth Judicial District Grievance Committee	
Member	1988 - 1996
Judicial Salaries Commission	1997 – 1998
Character and Fitness Committee	2006-Present
Independent Judicial Election Qualification Commission	2007-2011
Commercial Division Advisory Council	2013

AWARDS-

Awards include several awards of Recognition of the Suffolk County Bar Association, Two Pro Bono Awards, A special award of Recognition and the President's Award in 2010; Suffolk County Bar Association Lifetime Achievement Award (2014)

LECTURES & PROGRAMS

Suffolk Academy of Law

- Legal Ethics and Disciplinary Process
- The Effect of New York State Wetlands Act on Valuation in Condemnation
- Valuation of Special Purposes Properties
- Trial Demonstration of a Condemnation Involving Wetlands
- Contested Wills and Estates
- A General Law Practice, a lecture on the general practice of law to high school students and for adult education programs given by the Lions Club and Kiwanis Club, Suffolk County Chapters
- Judge, New York State Bar Association Moot Court Competition
- Tax Grievance Procedure, Suffolk County Women's Bar Association
- Basics of Eminent Domain

Association of the Bar, City of New York

- Effect of Eminent Domain Procedure Law on Villages, Towns and Cities

Lorman Education Services

- Trial Preparation and Trial-Eminent Domain

NY State Bar Association

- Ethics
- Condemnation

Mitchell T. Borkowsky, Esq. has been Chief Counsel to the New York State Grievance Committee for the Tenth Judicial District since February 2015, having previously served as Deputy Chief Counsel since October 2006 and Staff Counsel since January 2000. In addition to administrative and supervisory responsibilities over a staff of 12 attorneys, two investigators, and seven administrative assistants, Mr. Borkowsky investigates, evaluates, and prosecutes allegations of attorney misconduct and provides legal counsel and guidance to the Appellate Division, Second Department, Grievance Committee. He reviews and analyzes grievance complaints on intake to determine if investigation is warranted, collaborates with Staff Counsel concerning issues of inquiry, strategies, and potential dispositions, drafts confidential legal memoranda, examines litigants and witnesses, audits and reconstructs financial activity in escrow accounts, drafts pleadings and motions, and organizes and presents cases before the Grievance Committee, Special Referees, and administrative tribunals.

Prior to joining the staff of the Grievance Committee, Mr. Borkowsky engaged in the general practice of law on Long Island and in New York City, both for small and large firms, and as a solo practitioner concentrating in the areas of real estate and commercial transactions, general litigation, and trusts and estates. Before embarking on his solo practice, Mr. Borkowsky was employed as an associate with a major Long Island law firm in the corporate and real estate department where he handled complex transactions and provided support to the bankruptcy and litigation departments. Upon his graduation from law school, he joined a boutique real estate litigation firm in New York City where he negotiated and drafted commercial leases and handled commercial landlord-tenant matters and general litigation.

Mr. Borkowsky was admitted to practice in May 1994, having received his J.D. from the evening division of Brooklyn Law School in February of that same year. Prior to attending law school, Mr. Borkowsky earned an undergraduate degree in accounting from Brooklyn College in January 1987 and worked as an auditor for a large New York City public accounting firm and as a mortgage loan officer for a major New York lending institution. He has taught real estate and other courses at Hofstra University and at the Real Estate Training Center of Greater New York. Mr. Borkowsky regularly lectures on attorney ethics and disciplinary matters at various Continuing Legal Education programs sponsored by the Nassau, Suffolk, and New York State Bar Associations, local law schools, and other venues.

Robert P. Guido currently serves as the Executive Director for Attorney Matters for the Appellate Division, Second Judicial Department, acting in the dual capacities as both the Executive Director of the Committees on Character & Fitness and as Special Counsel to the Court on all matters related to the lawyer disciplinary system. Mr. Guido previously served for 22 years as a staff attorney with the Grievance Committee for the Tenth Judicial District, rising through the ranks to the position of Chief Counsel from 2001 -2005. He has also worked as an Assistant District Attorney in Nassau County, and in private practice. Mr. Guido has served by appointment of the Chief Judge as a member of the New York State Commission on Statewide Attorney Discipline, the New York State Lawyer's Assistance Trust, and the Commission on Alcohol and Substance Abuse in the Legal Profession. He is a Life Member of the New York Bar Foundation, and has received awards for his service to the New York State, Nassau County, and Suffolk County Bar Associations, where he held numerous positions on various committees over the course of three decades. He is a frequent CLE presenter on lawyer regulatory matters. Mr Guido was in admitted to practice in 1979 and holds his B.A. and J.D. from Hofstra University.

Supreme Court, Appellate Division, All Departments

Part 1240. RULES FOR ATTORNEY DISCIPLINARY MATTERS

(effective July 1, 2016)

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§ 1240.

Supreme Court, Appellate Division, All Departments

Part 1240. RULES FOR ATTORNEY DISCIPLINARY MATTERS
(effective July 1, 2016)

§ 1240.1 Application

These Rules shall apply to (a) all attorneys who are admitted to practice in the State of New York; (b) all in-house counsel registered in the State of New York; (c) all legal consultants licensed in the State of New York; (d) all attorneys who have an office in, practice in, or seek to practice in the State of New York, including those who are engaged in temporary practice pursuant to Part 523 of this Title, who are admitted pro hac vice, or who otherwise engage in conduct subject to the New York Rules of Professional Conduct; and (e) the law firms that have as a member, retain, or otherwise employ any person covered by these Rules.

§ 1240.2 Definitions

(a) Professional Misconduct Defined. A violation of any of the Rules of Professional Conduct, as set forth in Part 1200 of this Title, including the violation of any rule or announced standard of the Appellate Division governing the personal or professional conduct of attorneys, shall constitute professional misconduct within the meaning of Judiciary Law §90(2).

(b) Admonition: discipline issued at the direction of a Committee or the Court pursuant to these Rules, where the respondent has engaged in professional misconduct that does not warrant public discipline by the Court. An Admonition shall constitute private discipline, and shall be in writing, and may be delivered to a recipient by personal appearance before the Committee or its Chairperson.

(c) Censure: censure pursuant to Judiciary Law §90(2).

(d) Committee: an attorney grievance committee established pursuant to these Rules.

(e) Complainant: a person or entity that submits a complaint to a Committee.

(f) Court: the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over a complaint, investigation, proceeding or person covered by these Rules.

(g) Disbar; Disbarment: to remove, or the removal, from office pursuant to Judiciary Law §90(2). Such terms shall also apply to any removal based upon a resignation for disciplinary reasons, a felony conviction, or the striking of an attorney's name from the roll of attorneys for any disciplinary reason, as stated in these Rules.

(h) Foreign jurisdiction: a legal jurisdiction of a state (other than New York State), territory, or district of the United States, and all federal courts of the United States, including those within the State of New York.

(i) Letter of Advisement: letter issued at the direction of a Committee pursuant to section 1240.7(d)(2)(iv) of these Rules, upon a finding that the respondent has engaged in conduct requiring comment that, under the facts of the case, does not warrant the imposition of discipline. A Letter of Advisement shall be confidential and shall not constitute discipline, but may be considered by a Committee or the Court in determining the extent of discipline to be imposed or action to be taken upon a subsequent finding of misconduct.

(j) Respondent: a law firm, an attorney or other person that is the subject of an investigation or a proceeding before the Committee or the Court pursuant to these Rules.

(k) Suspension: the imposition of suspension from practice pursuant to Judiciary Law §90(2).

§ 1240.3 Discipline Under These Rules Not Preclusive

Discipline pursuant to these Rules shall not bar or preclude further or other action by any court, bar association, or other entity with disciplinary authority.

§ 1240.4 Appointment of Committees

Each Department of the Appellate Division shall appoint such Attorney Grievance Committee or Committees (hereinafter referred to as "Committee") within its jurisdiction as it may deem appropriate. Each Committee shall be comprised of at least 21 members, of which no fewer than 3 members shall be non-lawyers. A lawyer member of a Committee shall be appointed to serve as Chairperson. All members of the Committee shall reside or maintain an office within the geographic jurisdiction of the Committee. Two-thirds of the membership of a Committee shall constitute a quorum for the conduct of business; all Committee action shall require the affirmative vote of at least a majority of the members present.

§ 1240.5 Committee Counsel and Staff

Each Department of the Appellate Division shall appoint to a Committee or Committees such chief attorneys and other staff as it deems appropriate.

§ 1240.6 Conflicts; Disqualifications from Representation

(a) No (1) current member of a Committee, (2) partner, associate or member of a law firm associated with a current member of a Committee, (3) current member of a Committee's professional staff, or (4) immediate family member of a current Committee member or Committee staff member, may represent a respondent or complainant in a matter investigated or prosecuted before that Committee.

(b) No referee appointed to hear and report on the issues raised in a proceeding under these Rules may, in the Department in which he or she was appointed, represent a respondent or complainant until the expiration of two years from the date of the submission of that referee's final report.

(c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent or complainant in a matter investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service.

(d) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent or complainant in any matter in which the Committee member or staff member participated personally while in the Committee's service.

§ 1240.7 Proceedings Before Committees

(a) Complaint

(1) Investigations of professional misconduct may be authorized upon receipt by a Committee of a written original complaint, signed by the complainant, which need not be verified. Investigations may also be authorized by a Committee acting sua sponte.

(2) The complaint shall be filed initially in the Judicial Department encompassing the respondent's registration address on file with the Office of Court Administration. If that address lies outside New York State, the complaint shall be filed in the Judicial Department in which the respondent was admitted to the practice of law or otherwise professionally licensed in New York State. The Committee or the Court may transfer a complaint or proceeding to another Department or Committee as justice may require.

(b) Investigation; Disclosure. The Chief Attorney is authorized to:

(1) interview witnesses and obtain any records and other materials and information necessary to determine the validity of a complaint;

(2) direct the respondent to provide a written response to the complaint, and to appear and produce records before the Chief Attorney or a staff attorney for a formal interview or examination under oath;

(3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a respondent or witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a

complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein; and

(4) take any other action deemed necessary for the proper disposition of a complaint.

(c) Disclosure. The Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint. Prior to the taking of any action against a respondent pursuant to sections 1240.7(d)(2)(iv), (v) or (vi) of these Rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent.

(d) Disposition.

(1) Disposition by the Chief Attorney.

(i) The Chief Attorney may, after initial screening, decline to investigate a complaint for reasons including but not limited to the following: (A) the matter involves a person or conduct not covered by these Rules; (B) the allegations, if true, would not constitute professional misconduct; (C) the complaint seeks a legal remedy more appropriately obtained in another forum; or (D) the allegations are intertwined with another pending legal action or proceeding.

(ii) The Chief Attorney may, when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant.

(iii) The complainant and the respondent or respondent's counsel shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.

(2) Disposition by the Committee. After investigation of a complaint, with such appearances as the Committee may direct, a Committee may take one or more of the following actions:

(i) dismiss the complaint by letter to the complainant and to the respondent;

(ii) when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant;

(iii) make an application for diversion pursuant to section 1240.11 of these Rules;

(iv) when the Committee finds that the respondent has engaged in conduct requiring comment that, under the facts of the case, does not warrant imposition of discipline, issue a Letter of Advisement to the respondent;

(v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, but that public discipline is not required to protect the public, maintain the integrity and honor of the profession, or deter the commission of similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, on such terms as the Committee deems just, to seek reconsideration of the proposed Admonition.

(vi) when the Committee finds that there is probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, maintain the integrity and honor of the profession, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section 1240.8 of these Rules.

(3) As may be permitted by law, the complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Committee.

(e) Review.

(1) Letter of Advisement.

(i) Within 30 days of the issuance of a Letter of Advisement, the respondent may file a written request for reconsideration with the chair of the Committee, with a copy to the Chief Attorney. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

(ii) Within 30 days of the final determination denying a request for reconsideration, the respondent may seek review of a Letter of Advisement by submitting an application to the Court, on notice to the Committee, upon a showing that the issuance of the letter was in violation of a fundamental constitutional right. The respondent has the burden of establishing a violation of such a right.

(2) Admonition. Within 30 days of the issuance of an Admonition, the respondent may make an application to the Court, on notice to the Committee, to vacate the Admonition. Upon such application and the Committee's response, if any, the Court may consider the entire record and take whatever action it deems appropriate.

(3) Review of Dismissal or Declination to Investigate. Within 30 days of the issuance of notice to a complainant of a Chief Attorney's decision declining to investigate a complaint, or of a Committee's dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

(4) As may be permitted by law, the respondent and the complainant shall be provided with a brief description of the basis of disposition of any review sought or objection submitted pursuant to this section.

§ 1240.8 Proceedings in the Appellate Division

(a) Procedure for formal disciplinary proceedings in the Appellate Division.

(1) Formal disciplinary proceedings shall be deemed special proceedings within the meaning of CPLR Article 4, and shall be conducted in a manner consistent with the rules of the Court, the rules and procedures set forth in this Part, and the requirements of Judiciary Law §90. There shall be (i) a notice of petition and petition, which the Committee shall serve upon the respondent in a manner consistent with Judiciary Law §90(6), and which shall be returnable on no less than 20 days' notice; (ii) an answer; and (iii) a reply if appropriate. Except upon consent of the parties or by leave of the Court, no other pleadings or amendment or supplement of pleadings shall be permitted. All pleadings shall be filed with the Court. The Court shall permit or require such appearances as it deems necessary in each case.

(2) Statement of Disputed Facts. Within 20 days after service of the answer or, if applicable, a reply, the Committee shall file with the Court a statement of facts that identifies those allegations that the Committee contends are undisputed and those allegations that the party contends are disputed and for which a hearing is necessary. Within 20 days following submission by the Committee, the respondent shall respond to the Committee's statement and, if appropriate, set forth respondent's statement of facts identifying those allegations that the respondent contends are undisputed and those allegations that the respondent contends are disputed and for which a hearing is necessary. In the alternative, within 30 days after service of the answer or, if applicable, a reply, the parties may (i) file a joint statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or (ii) file a joint stipulation of disputed and undisputed facts.

(3) Disclosure Concerning Disputed Facts. Except as otherwise ordered by the Court, a party must, no later than 14 days after filing a statement of facts with the Court as required by section 1240.8(a)(2) of these Rules, provide to any other party disclosure concerning the allegations that the party contends are disputed. The disclosure shall identify the following:

(i) the name of each individual likely to have relevant and discoverable information that the disclosing party may use to support or contest the disputed allegation and a general description of the information likely possessed by that individual; and

(ii) a copy of each document that the disclosing party has in its possession or control that the party may use to support or contest the allegation, unless copying such documents would be unduly burdensome or expensive, in which case the disclosing party may provide a description of the documents by category and location, together with an opportunity to inspect and copy such documents.

(4) Subpoenas. Upon application by the Committee or the respondent, the Clerk of the Court may issue subpoenas for the attendance of witnesses and the production of books and papers before Court or the referee designated by the Court to conduct a hearing on the issues raised in the proceeding, at a time and place therein specified.

(5) Discipline by Consent.

(i) At any time after the filing of the petition with proof of service, the parties may file a joint motion with the Court requesting the imposition of discipline by consent. The joint motion shall include:

(A) a stipulation of facts;

(B) the respondent's conditional admission of the acts of professional misconduct and the specific rules or standards of conduct violated;

(C) any relevant aggravating and mitigating factors, including the respondent's prior disciplinary record; and

(D) the agreed upon discipline to be imposed, which may include monetary restitution authorized by Judiciary Law §90(6-a).

(ii) The joint motion shall be accompanied by an affidavit of the respondent acknowledging that the respondent:

(A) conditionally admits the facts set forth in the stipulation of facts;

(B) consents to the agreed upon discipline;

(C) gives the consent freely and voluntarily without coercion or duress; and

(D) is fully aware of the consequences of consenting to such discipline.

(iii) Notice of the joint motion, without its supporting papers, shall be served upon the referee, if one has been appointed, and all proceedings shall be stayed pending the Court's determination of the motion. If the motion is granted, the Court shall issue a decision imposing discipline upon the respondent based on the stipulated facts and as agreed upon in the joint motion. If the motion is denied, the conditional admissions shall be deemed withdrawn and shall not be used against the respondent, Committee or any other party in the pending proceeding or any other proceedings.

(b) Disposition by Appellate Division.

(1) Hearing. Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The referee may grant requests for additional disclosure as justice may require. Unless otherwise directed by the Court, the referee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, following post-hearing submissions, file with the Court a written report setting forth the referee's findings and recommendations. Formal disciplinary charges may be sustained when the referee finds, by a fair preponderance of the evidence, each essential element of the charge. The parties may make such motions to affirm or disaffirm the referee's report as permitted by the Court.

(2) Discipline. In presenting arguments on the issue of appropriate discipline for misconduct, the parties may cite any relevant factor, including but not limited to the nature of the misconduct, aggravating and mitigating circumstances, the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions, and applicable case law and precedent. Upon a finding that any person covered by these Rules has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, maintain the honor and integrity of the profession, and deter others from committing similar misconduct.

(c) Applications and Motions to the Appellate Division

Unless otherwise specified by these Rules, applications and motions shall be made in accordance with the rules of the Court in which the proceeding is pending.

§ 1240.9 Interim Suspension While Investigation or Proceeding is Pending

(a) A respondent may be suspended from practice on an interim basis during the pendency of an investigation or proceeding on application or motion of a Committee, following personal service upon the respondent, or by substitute service in a manner approved by the Presiding Justice, and upon a finding by the Court that the respondent has engaged in conduct immediately threatening the public interest. Such a finding may be based upon: (1) the respondent's default in responding to a petition, notice to appear for formal interview, examination, or pursuant to subpoena under these Rules; (2) the respondent's admission under oath to the commission of professional misconduct; (3) the respondent's failure to comply with a lawful demand of the Court or a Committee in an investigation or proceeding under these Rules; (4) the respondent's willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, judgment, or other clear and convincing evidence; or (5) other uncontroverted evidence of professional misconduct.

(b) An application for suspension pursuant to this rule may provide notice that a respondent who is suspended under this rule and who has failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of the order of suspension may be disbarred by the Court without further notice.

(c) Any order of interim suspension entered by the Court shall set forth the basis for the suspension and provide the respondent with an opportunity for a post-suspension hearing.

(d) An order of interim suspension together with any decision issued pursuant to this subdivision shall be deemed a public record. The papers upon which any such order is based shall be deemed confidential pursuant to Judiciary Law §90(10).

§ 1240.10 Resignation While Investigation or Proceeding is Pending

(a) A respondent may apply to resign by submitting to a Court an application in the form prescribed by the Court, with proof of service on the Committee, setting forth the specific nature of the charges or the allegations under investigation and attesting that:

(1) the proposed resignation is rendered voluntarily, without coercion or duress, and with full awareness of the consequences, and that the Court's approval of the application shall result in the entry of an order disbarring the respondent; and

(2) the respondent cannot successfully defend against the charges or allegations of misconduct.

(b) When the investigation or proceeding includes allegations that the respondent has willfully misappropriated or misapplied money or property in the practice of law, the respondent in the application shall:

(1) identify the person or persons whose money or property was willfully misappropriated or misapplied;

(2) specify the value of such money or property; and

(3) consent to the entry of an order requiring the respondent to make monetary restitution pursuant to Judiciary Law §90(6-a).

(c) Upon receipt of an application for resignation, and after affording the Committee an opportunity to respond, the Court may accept the resignation and remove the respondent from office pursuant to Judiciary Law §90(2).

§ 1240.11 **Diversion to a Monitoring Program**

(a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, or other mental or physical health issues, the Court, upon application of any person or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider:

(1) the nature of the alleged misconduct;

(2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and

(3) whether diverting the respondent to a monitoring program is in the public interest.

(b) Upon submission of written proof of successful completion of the monitoring program, the Court may direct the discontinuance or resumption of the investigation, charges or proceeding, or take other appropriate action. In the event the respondent fails to comply with the terms of a Court-ordered monitoring program, or the respondent commits additional misconduct during the pendency of the investigation or proceeding, the Court may, after affording the parties an opportunity to be heard, rescind the order of diversion and direct resumption of the disciplinary charges or investigation.

(c) All aspects of a diversion application or a respondent's participation in a monitoring program pursuant to this rule and any records related thereto are confidential or privileged pursuant to Judiciary Law §§90(10) and 499.

(d) Any costs associated with a respondent's participation in a monitoring program pursuant to this section shall be the responsibility of the respondent.

§ 1240.12 Attorneys Convicted of a Crime

(a) An attorney to whom the rules of this Part shall apply who has been found guilty of any crime in a court of the United States or any state, territory or district thereof, whether by plea of guilty or nolo contendere, or by verdict following trial, shall, within 30 days thereof notify the Committee having jurisdiction pursuant to section 1240.7(a)(2) of these Rules of the fact of such finding. Such notification shall be in writing and shall be accompanied by a copy of any judgment, order or certificate of conviction memorializing such finding of guilt. The attorney shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation. The obligations imposed by this rule shall neither negate nor supersede the obligations set forth in Judiciary Law §90(4)(c).

(b) Upon receipt of proof that an attorney has been found guilty of any crime described in subdivision (a) of this section, the Committee shall investigate the matter and proceed as follows:

(1) If the Committee concludes that the crime in question is not a felony or serious crime, it may take any action it deems appropriate pursuant to section 1240.7 of these Rules.

(2) If the Committee concludes that the crime in question is a felony or serious crime as those terms are defined in Judiciary Law §90(4), it shall promptly apply to the Court for an order (i) striking the respondent's name from the roll of attorneys; or (ii) suspending the respondent pending further proceedings pursuant to these Rules and issuance of a final order of disposition.

(c) Upon application by the Committee, and after the respondent has been afforded an opportunity to be heard on the application, including any appearances that the Court may direct, the Court shall proceed as follows:

(1) Upon the Court's determination that the respondent has committed a felony within the meaning of Judiciary Law §90(4)(e), the Court shall strike the respondent's name from the roll of attorneys.

(2) Upon the Court's determination that the respondent has committed a serious crime within the meaning of Judiciary Law §90(4)(d),

(i) the Court may direct that the respondent show cause why a final order of suspension, censure or disbarment should not be made; and

(ii) the Court may suspend the respondent pending final disposition unless such a suspension would be inconsistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice; and

(iii) the Court, upon the request of the respondent, shall refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and

(iv) the Court, upon the request of the Committee or upon its own motion, may refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and

(v) after the respondent has been afforded an opportunity to be heard, including any appearances that the Court may direct, the Court shall impose such discipline as it deems proper under the circumstances.

(3) Upon the Court's determination that the respondent has committed a crime not constituting a felony or serious crime, it may remit the matter to the Committee to take any action it deems appropriate pursuant to section 1240.7 of these Rules, or direct the commencement of a formal proceeding pursuant to section 1240.8 of these Rules.

(d) A certificate of the conviction of a respondent for any crime shall be conclusive evidence of the respondent's guilt of that crime in any disciplinary proceeding instituted against the respondent based on the conviction.

(e) Applications for reinstatement or to modify or vacate any order issued pursuant to this section shall be made pursuant to section 1240.16 of these Rules.

§ 1240.13 **Discipline for Misconduct in a Foreign Jurisdiction**

(a) Upon application by a Committee containing proof that a person covered by these Rules has been disciplined by a foreign jurisdiction, the Court shall direct that person to demonstrate, on terms it deems just, why discipline should not be imposed in New York for the underlying misconduct.

(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Any or all of the following defenses may be raised:

(1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or

(3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.

(c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds that the procedure in the foreign jurisdiction deprived the respondent of due process of law, that there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.

(d) Any attorney to whom these Rules shall apply who has been disciplined in a foreign jurisdiction shall, within 30 days after such discipline is imposed, advise the appropriate Court (as described in section 1240.7(a)(2) of these Rules) and Committee of such discipline. Such notification shall be in writing and shall be accompanied by any judgment, order or certificate memorializing the discipline imposed. The respondent shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

§ 1240.14 **Attorney Incapacity**

(a) Upon application by a Committee that includes proof of a judicial determination that a respondent is in need of involuntary care or treatment in a facility for the mentally disabled, or is the subject of an order of incapacity, retention, commitment or treatment pursuant to the Mental Hygiene Law, the Court may enter an order immediately suspending the respondent from the practice of law. The Committee shall serve a copy of the order upon the respondent, a guardian appointed on behalf of the respondent or upon the director of the appropriate facility, as directed by the Court.

(b) At any time during the pendency of a disciplinary proceeding or an investigation conducted pursuant to these Rules, the Committee, or the respondent, may apply to the Court for a determination that the respondent is incapacitated from practicing law by reason of mental disability or condition, alcohol or substance abuse, or any other condition that renders the respondent incapacitated from practicing law. Applications by respondents shall include medical proof demonstrating incapacity. The Court may appoint a medical expert to examine the respondent and render a report. When the Court finds that a respondent is incapacitated from practicing law, the Court shall enter an order immediately suspending the respondent from the practice of law and may stay the pending proceeding or investigation.

§ 1240.15 **Conduct of Disbarred, Suspended or Resigned Attorneys**

(a) Prohibition Against Practicing Law. Attorneys disbarred or suspended shall comply with Judiciary Law §§478, 479, 484 and 486.

(b) Notification of Clients. Within 10 days of the effective date of an order of disbarment or suspension, the respondent shall notify, by certified mail and, where practical, electronic mail, each client of the respondent, the attorney for each party in any pending matter, the court in any pending matter, and the Office of Court Administration for each action where a retainer statement has been filed pursuant to court rules. The notice shall state that the respondent is unable to act as counsel due to disbarment or suspension. A notice to a respondent's client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent's client. Where counsel has been appointed by a court, notice shall also be provided to the appointing court.

(c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all respondent's clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.

(d) Duty to Withdraw From Pending Action or Proceeding. If a respondent's client in a pending action or proceeding fails to obtain new counsel within 30 days following entry of the order of disbarment or suspension, the respondent shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.

(e) Discontinuation of Attorney Advertising. Within 30 days after being served with the order of suspension or disbarment, the respondent shall discontinue all public and private notices through advertising, office stationery and signage, email signatures, voicemail messages, social media, and other methods, that assert that the respondent may engage in the practice of law.

(f) Forfeiture of Secure Pass. A respondent who has been disbarred or suspended from the practice of law shall immediately surrender to the Office of Court Administration any Attorney Secure Pass issued to him or her.

(g) Affidavit of Compliance. A respondent who has been disbarred or suspended from the practice of law shall file with the Court, together with proof of service upon the Committee, no later than 45 days after being served with the order of disbarment or suspension, an affidavit showing a current mailing address for the respondent and that the respondent has complied with the order and these Rules.

(h) Compensation. A respondent who has been disbarred or suspended from the practice of law may not share in any fee for legal services rendered by another attorney during

the period of disbarment or suspension but may be compensated on a quantum meruit basis for services rendered prior to the effective date of the disbarment or suspension. On motion of the respondent, with notice to the respondent's client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.

(i) Required Records. A respondent who has been disbarred or suspended from the practice of law shall keep and maintain records of the respondent's compliance with this rule so that, upon any subsequent proceeding instituted by or against the respondent, proof of compliance with this rule and with the disbarment or suspension order or with the order accepting resignation will be available.

§ 1240.16 Reinstatement of Disbarred or Suspended Attorneys

(a) Upon motion by a respondent who has been disbarred or suspended, with notice to the Committee and the Lawyers' Fund for Client Protection, and following such other notice and proceedings as the Court may direct, the Court may issue an order reinstating such respondent upon a showing, by clear and convincing evidence, that: the respondent has complied with the order of disbarment, suspension or the order removing the respondent from the roll of attorneys; the respondent has complied with the rules of the court; the respondent has the requisite character and fitness to practice law; and it would be in the public interest to reinstate the respondent to the practice of law.

(b) Necessary papers. Papers on an application for reinstatement of a respondent who has been disbarred or suspended for more than six months shall include a copy of the order of disbarment or suspension, and any related decision; a completed questionnaire in the form included in Appendix A to these Rules; and proof that the respondent has, no more than one year prior to the date the application is filed, successfully completed the Multistate Professional Responsibility Examination described in section 520.9 of this Title. After the application has been filed, the Court may deny the application with leave to renew upon the submission of proof that the respondent has successfully completed the New York State Bar Examination described in section 520.8 of this Title, or a specified requirement of continuing legal education, or both. A respondent who has been suspended for a period of six months or less shall not be required to submit proof that the respondent has successfully completed the Multistate Professional Responsibility Examination, unless otherwise directed by the Court.

(c) Time of application

(1) A respondent disbarred by order of the Court for misconduct may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment.

(2) A suspended respondent may apply for reinstatement after the expiration of the period of suspension or as otherwise directed by the Court.

(d) Respondents suspended for a fixed term of six months or less. Unless the Court directs otherwise, a respondent who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension upon an order of the Court. No more than thirty days prior to the expiration of the term of suspension the respondent must file with the Court and serve upon the Committee an application for reinstatement together with an affidavit stating that the respondent has fully complied with the requirements of the suspension order and has paid any required fees and costs. Within thirty days of the date on which the application was served upon the Committee, or within such longer time as the Court may allow, the Committee may file an affidavit in opposition.

(e) The Court may establish an alternative expedited procedure for reinstatement of attorneys suspended for violation of the registration requirements set forth in Judiciary Law §468-a.

§ 1240.17 Reinstatement of Incapacitated Attorneys

(a) Time of application. A respondent suspended on incapacity grounds pursuant to section 1240.14 of these Rules may apply for reinstatement at such time as the respondent is no longer incapacitated from practicing law.

(b) Necessary papers. Papers on an application for reinstatement following suspension on incapacity grounds shall include a copy of the order of suspension, and any related decision; proof, in evidentiary form, of a declaration of competency or of the respondent's capacity to practice law; a completed questionnaire in a form approved by the Court; a copy of a letter to The Lawyers' Fund for Client Protection notifying the Fund that the application has been filed; and such other proofs as the Court may require. A copy of the complete application shall be served upon the Committee.

(c) Such application shall be granted by the Court upon showing by clear and convincing evidence that the respondent's disability or incapacity has been removed and the respondent is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper for a determination as to whether the respondent's disability or incapacity has been removed, including a direction of an examination of the respondent by such qualified experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the respondent. In a proceeding under this section, the burden of proof shall rest with the suspended respondent.

(d) Where a respondent has been suspended by an order in accordance with the provisions of section 1240.14 of these Rules and thereafter, in proceedings duly taken, the respondent has been judicially declared to be competent, the Court may dispense with further evidence that the respondent's disability or incapacity has been

removed and may direct the respondent's reinstatement upon such terms as are deemed proper and advisable.

(e) Waiver of Doctor-Patient Privilege Upon Application for Reinstatement. The filing of an application for reinstatement by a respondent suspended for incapacity shall be deemed to constitute a waiver of any doctor-patient privilege existing between the respondent and any psychiatrist, psychologist, physician, hospital or facility who or which has examined or treated the respondent during the period of disability. The respondent shall be required to disclose the name of every psychiatrist, psychologist, physician, hospital or facility by whom or at which the respondent has been examined or treated since the respondent's suspension, and the respondent shall furnish to the Court written consent to each to divulge such information and records as may be requested by court-appointed experts or by the Clerk of the Court.

(f) The necessary costs and disbursements of an agency, committee or appointed attorney in conducting a proceeding under this section shall be paid in accordance with Judiciary Law §90(6).

§ 1240.18 Confidentiality

(a) All disciplinary investigations and proceedings shall be kept confidential by Court personnel, Committee members, staff, and their agents.

(b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any respondent under these Rules are sealed and deemed private and confidential pursuant to Judiciary Law §90(10). This provision is not intended to proscribe the free interchange of information among the Committees.

(c) All proceedings before a Committee or the Court shall be closed to the public absent a written order of the Court opening the proceedings in whole or in part.

(d) Application to Unseal Confidential Records or for Access to Closed Proceedings. Unless provided for elsewhere in these Rules, an application pursuant to Judiciary Law §90(10) to unseal confidential documents or records, or for access to proceedings that are closed under these Rules, shall be made to the Court and served upon such other persons or entities as the Presiding Justice may direct, if any, and shall specify:

(1) the nature and scope of the inquiry or investigation for which disclosure is sought;

(2) the papers, records or documents sought to be disclosed, or the proceedings that are sought to be opened; and

(3) other methods, if any, of obtaining the information sought, and the reasons such methods are unavailable or impractical.

(e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or claims seeking reimbursement from the Fund for the wrongful taking of money or property by any respondent who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto.

§ 1240.19 Medical and Psychological Evidence

Whenever a respondent intends to offer evidence of a medical or psychological condition in mitigation of allegations or charges, he or she shall give written notice to the Committee of the intention to do so no later than 20 days before the scheduled date of any appearance, argument, examination, proceeding, or hearing during which the respondent intends to offer such evidence to the Court, referee, Committee, subcommittee thereof, or counsel to a Committee. Said notice shall be accompanied by (a) the name, business address, and curriculum vitae of any health care professional whom the respondent proposes to call as a witness, or whose written report the respondent intends to submit; and (b) a duly executed and acknowledged written authorization permitting the Committee to obtain and make copies of the records of any such health care professional regarding the respondent's medical or psychological condition at issue.

§ 1240.20 Abatement; Effect of Pending Civil or Criminal Matters; Restitution

(a) Any person's refusal to participate in the investigation of a complaint or related proceeding shall not require abatement, deferral or termination of such investigation or proceeding.

(b) The acquittal of a respondent on criminal charges, or a verdict, judgment, settlement or compromise in a civil litigation involving material allegations substantially similar to those at issue in the disciplinary matter, shall not require termination of a disciplinary investigation.

(c) The restitution of funds that were converted or misapplied by a person covered by these Rules shall not bar the commencement or continuation of a disciplinary investigation or proceeding.

§ 1240.21 Appointment of Attorney to Protect Interests of Clients or Attorney

(a) When an attorney is suspended, disbarred or incapacitated from practicing law pursuant to these Rules, or when the Court determines that an attorney is otherwise unable to protect the interests of his or her clients and has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct, appointing one or more attorneys to take possession of the attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the clients' interests. An application for such an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney to be appointed and the suspended, disbarred or incapacitated attorney.

(b) Compensation. The Court may determine and award compensation and costs to an attorney appointed pursuant to this rule, and may direct that compensation of the appointee and any other expenses be paid by the attorney whose conduct or inaction gave rise to those expenses.

(c) Confidentiality. An attorney appointed pursuant to this rule shall not disclose any information contained in any client files without the client's consent, except as is necessary to carry out the order appointing the attorney or to protect the client's interests.

§ 1240.22 Resignation for Non-Disciplinary Reasons; Reinstatement

(a) Resignation of attorney for non-disciplinary reasons.

(1) An attorney may apply to the Court for permission to resign from the bar for non-disciplinary reasons by submitting an affidavit or affirmation in the form included in Appendix B to these Rules. A copy of the application shall be served upon the Committee and the Lawyers' Fund for Client Protection, and such other persons as the Court may direct.

(2) When the Court determines that an attorney is eligible to resign for non-disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and stating the non-disciplinary nature of the resignation.

(b) Reinstatement. An attorney who has resigned from the bar for non-disciplinary reasons may apply for reinstatement by filing with the Court an affidavit in a form approved by the Court. The Court may grant the application and restore the attorney's name to the roll of attorneys; or deny the application with leave to renew upon proof that the applicant has successfully completed the Multistate Professional Responsibility Examination described in section 520.9 of this Title, or the New York State Bar Examination described in section 520.8 of this Title; or take such other action as it deems appropriate.

§ 1240.23 Volunteers/Indemnification

Members of the Committee, as well as referees, bar mediators, bar grievance committee members when assisting the Court of the Committee, and pro bono special counsel acting pursuant to duties or assignments under these Rules, are volunteers and are expressly authorized to participate in a State-sponsored volunteer program, pursuant to Public Officers Law §17(1).

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

April 4, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendments to the New York Rules of Professional Conduct (22 NYCRR Part 1200)

Public comment is requested on several amendments to the New York Rules of Professional Conduct (22 NYCRR Part 1200) proposed by the New York State Bar Association (Exh. A). In brief, these proposals are as follows:

- Amend Rule 1.0(x) (definition of "writing" in "Terminology") to clarify that it encompasses evolving forms of electronic communications (Exh. A, p. 23).

- Amend Rule 1.6(c) ("Confidentiality of Information") to require lawyers to make "reasonable efforts" to safeguard confidential information against (i) inadvertent disclosure or use, (ii) unauthorized disclosure or use, and (iii) unauthorized access; and to make clear that Rule 1.6(c) extends to lawyers themselves (Exh. A, pp. 23-24).

- Amend Rule 1.18(a) (defining "prospective client") and Rule 1.18(e) (setting forth exceptions to the definition of "prospective client") to improve clarity (Exh. A, p. 25).

- Amend Rule 4.4(b) ("Respect for Rights of Third Persons") to clarify that it applies to "electronically stored information" (Exh. A, p. 26).

- Amend Rule 7.3 ("Solicitation and Recommendation of Professional Employment") to delete the phrase "prospective client" in subparagraph (b) and to replace it with "persons" in subparagraph (c) (Exh. A, pp. 26-27).

A fuller explanation of these proposed changes is set forth in a report of the NYSBA Committee on Standards of Attorney Conduct (COSAC), attached as Exh. B.

Persons wishing to comment on the proposed rules should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 1, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

For Public Distribution

REPORT OF THE
NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT ("COSAC")

LEGISLATIVE STYLE AND CLEAN VERSIONS OF

MARCH 2015 AMENDMENTS TO COMMENTS

AND

PENDING PROPOSALS TO AMEND BLACK LETTER TEXT

IN THE

NEW YORK RULES OF PROFESSIONAL CONDUCT

Based on COSAC's Comprehensive Review of
Changes to the ABA Model Rules of Professional Conduct
Resulting From the Work of the ABA Commission on Ethics 20/20

Roy D. Simon, Chair of COSAC
Final Revision October 15, 2015

Executive Summary

From 2009 to 2013, the ABA Commission on Ethics 20/20 drafted and recommended proposed amendments to the ABA Model Rules of Professional Conduct to account for increasing globalization and rapid changes in technology. In 2012 and 2013, the ABA House of Delegates adopted many of the proposed amendments.

From 2013 through early 2015, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") systematically reviewed all of the ABA amendments to assess whether New York should adopt similar amendments to the black letter text and the Comments in the New York Rules of Professional Conduct. In January of 2015, COSAC presented its recommendations to the House of Delegates, and the recommendations were circulated to the Bar for public comment. At its March 2015 Quarterly Meeting, after COSAC revised some recommendations in response to public comments, the State Bar's House of Delegates adopted COSAC's recommendations.

Amendments to the Comments took effect immediately (except the amendments proposed to Comments [16] and [17] to Rule 1.6, which are contingent on the Appellate Divisions' approval of proposed amendments to the black letter text of Rule 1.6(c)). Proposed amendments to the black letter text have been forwarded to the Appellate Divisions for their consideration but will not take effect unless and until the Appellate Divisions approve them.

Below is a summary of the amendments to the Comments, followed by a summary of the proposed amendments to the black letter text of various Rules that the State Bar is recommending to the Appellate Divisions. Following the summaries, this report reprints in both legislative style and clean versions the full text of each new or amended Comment. After the new and amended Comments, the report reprints in legislative style and clean versions each proposed amendment to the black letter Rules that the NYSBA is recommending to the Appellate Divisions.

Summary of Changes to Comments
(Effective Immediately)

Rule 1.0 ("Terminology"): A new Comment [1A] clarifies the scope of New York's unique defined term "computer-accessed communication."

Rule 1.1 ("Competence"): New and amended Comments [6] to [8] address three topics: (a) outsourcing, (b) co-counsel arrangements, and (c) the obligations to keep abreast of changes in law and technology and to engage in continuing study and education.

Rule 1.4 ("Communication"): Comment [4] has been amended to replace the narrow phrase "telephone calls" with the broader term "communications."

Rule 1.6 ("Confidentiality of Information"): New Comments [18A]-[18F] provide guidance on applying the duty of confidentiality to lawyers considering lateral moves and to law firms contemplating law firm mergers.

Rule 1.10 ("Imputation of Conflicts of Interest"): To complement new Comments [18A]-[18F] to Rule 1.6, new Comments [9H] and [9I] to Rule 1.10 offer guidance on the information a law firm may request in the context of a contemplated lateral hire or law firm merger.

Rule 1.18 ("Duties to Prospective Clients"): Amended Comments [1]-[2] and [4]-[5] to Rule 1.18 clarify how and when a person becomes a "prospective client" within the meaning of Rule 1.18.

Rule 4.4 ("Respect for Rights of Third Persons"): Amended Comment [2] to Rule 4.4 provides expanded guidance to lawyers regarding the scope of Rule 4.4(b) and the options available to a lawyer who receives an inadvertently sent document or other writing.

Rule 5.3 ("Lawyer's Responsibility for Conduct of Nonlawyers"): Amended Comment [2] and new Comment [3] to Rule 5.3 offer guidance on outsourcing. In particular, language in new Comment [3] identifies some circumstances a lawyer should consider when determining how to comply with Rule 5.3's requirement to make "reasonable efforts" to supervise nonlawyers. (Former Comment [3] is retained verbatim but is renumbered as Comment [2A] so that New York Comment [3] corresponds to ABA Comment [3].)

Rule 7.2 ("Payment for Referrals"): Amended Comment [1] to Rule 7.2 clarifies the situations in which a lawyer may pay others for generating client leads gathered from the Internet or elsewhere, and amended Comment [3] replaces the term "prospective clients" (which is defined in Rule 1.18) with the more accurate term "potential clients."

Rule 7.3 ("Solicitation and Recommendation of Professional Employment"): Amended Comment [9] to Rule 7.3 provides more guidance regarding the phrase "real-time or interactive communications" in Rule 7.3.

Summary of Proposed Black Letter Amendments Recommended to the Appellate Divisions

The New York State Bar Association ("NYSBA") is recommending that the Appellate Divisions approve the following amendments to the black letter text of the Rules of Professional Conduct:

Rule 1.0(x) (in "Terminology"): The NYSBA recommends that the Appellate Divisions amend the definition of "writing" to clarify that it encompasses evolving forms of electronic communications.

Rule 1.6 ("Confidentiality of Information"): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 1.6(c) to require lawyers to make "reasonable efforts" to safeguard confidential information against three things: (i) inadvertent disclosure or use, (ii) unauthorized disclosure or use, and (iii) unauthorized access. In addition, the NYSBA recommends that the Appellate Divisions amend Rule 1.6(c) to make clear that Rule 1.6(c) expressly extends to lawyers themselves. (The NYSBA has also approved amendments to Comments [16] and [17] to Rule 1.6 contingent on the Appellate Divisions' approval of the proposed black letter changes to the text of Rule 1.6(c) – see below.)

Rule 1.18 ("Duties to Prospective Clients"): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 1.18 by adding the phrase "Except as provided in Rule 1.18(e)" at the beginning of Rule 1.18(a) (which defines the term "prospective client"), and by slightly changing the wording and structure of Rule 1.18(e) (which states two exceptions to the definition of "prospective client") to make it easier to understand.

Rule 4.4 ("Respect for Rights of Third Persons"): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 4.4(b) to make explicit that it applies to "electronically stored information."

Rule 7.3 ("Solicitation and Recommendation of Professional Employment"): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 7.3(b) (which defines "solicitation") by deleting the phrase "of a prospective client" at the end of paragraph (b). The NYSBA also recommends that the Appellate Divisions amend the black letter text of Rule 7.3(c)(5)(ii) by replacing the phrase "prospective client" with the more precise and less confusing phrase "potential client."

New and Amended Comments
(Effective Immediately)

Each new and amended Comment is set forth below, first in legislative style and then in a clean version showing the final language now in effect.

Rule 1.0.
Terminology

New Comment [1A] to New York Rule 1.0

Legislative style version:

Computer-Accessed Communication

[1A] Rule 1.0(c), which defines the phrase "computer-accessed communication," embraces electronic and wireless communications of every kind and includes, without limitation, communication by devices such as cell phones, smartphones, and all other handheld or portable devices that can send or receive communications by any electronic or wireless means, including cellular service, the Internet, wireless networks, or any other technology.

Clean final version of Comment [1A] to New York Rule 1.0:

Computer-Accessed Communication

[1A] Rule 1.0(c), which defines the phrase "computer-accessed communication," embraces electronic and wireless communications of every kind and includes, without limitation, communication by devices such as cell phones, smartphones, and all other handheld or portable devices that can send or receive communications by any electronic or wireless means, including cellular service, the Internet, wireless networks, or any other technology.

Rule 1.1.
Competence

New and Amended Comments [6]-[8] to New York Rule 1.1

Legislative style version:

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client, the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routine calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. See Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, if a lawyer retains an outside lawyer or law firm to work under the retaining lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if

the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

Maintaining Competence

~~[6]~~ [8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in ~~the law and its practice~~ substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education ~~and~~ comply with all applicable continuing legal education requirements ~~to which the lawyer is subject. See~~ under 22 N.Y.C.R.R. Part 1500.

Clean final version of Comments [6]-[8] to New York Rule 1.1:

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client, the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routine calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. See Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil

Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, if a lawyer retains an outside lawyer or law firm to work under the retaining lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

Rule 1.4.
Communication

Amended Comment [4] to New York Rule 1.4

Legislative style version:

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged~~ A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

Clean final version of Comment [4] to New York Rule 1.4:

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

Rule 1.6.
Confidentiality of Information

New Comments [18A]-[18F] to New York Rule 1.6

Legislative style version:

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms through lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each client-lawyer relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not "confidential information" within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily *not* permitted, however, if information is protected by Rules 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (*e.g.*, an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with those fiduciary duties – see Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages, initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

Clean final version of Comments [18A]-[18F] to New York Rule 1.6:

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms through lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each client-lawyer relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not "confidential information" within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily not permitted, however, if information is protected by Rules 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed

possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with those fiduciary duties – see Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages, initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

Note on contingent approval of amendments to Comments [16]-[17] to Rule 1.6: The NYSBA House of Delegates also approved proposed amendments to Comments [16] and [17] to Rule 1.6, but those amendments were approved contingent on the Appellate Divisions' approval of the proposed black letter amendments to Rule 1.6(c). Proposed Comments [16]–[17] to Rule 1.6 are reprinted below after the proposed amendments to the black letter text of Rule 1.6(c).

Rule 1.10.
Imputation of Conflicts of Interest

New Comments [9H] and [9I] to New York Rule 1.10

Legislative style version:

Confidentiality Considerations in Lateral Moves and Law Firm Mergers

[9H] Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements. When lawyers move from one firm to another firm as lateral hires, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a). To fulfill the duty to check for conflicts before hiring laterals

or before merging firms, the hiring or merging firms should ordinarily obtain such information as: (i) the identity of each client that the lateral lawyers or the merging firms currently represent; (ii) the identity of each client that the lateral lawyers or the merging firms, within a reasonable period in the past, either formerly represented within the meaning of Rule 1.9(a), or about whom the lateral lawyers or the lawyers in the merging firms acquired material confidential information within the meaning of Rule 1.9(b); (iii) the identity of other parties to the matters in which the lateral lawyers or merging firms represented those clients; and (iv) the general nature of each such matter. The hiring or merging firms may also request aggregate financial data for all clients or from groups of clients (such as past billings, pending receivables, timeliness of payment, and probable future billings) to determine whether the employment or merger is economically justified.

[9I] Whether lawyers may disclose information in response to such requests depends on the nature of the information. Some of this information is ordinarily not confidential (*e.g.*, the names of clients and adversaries in publicly disclosed matters, the general nature of such matters, and *aggregate* information about legal fees from all clients or from groups of clients), but other information is ordinarily confidential (*e.g.*, non-public criminal or matrimonial representations, or client-specific payment information). The lateral lawyers or the merging firms should carefully assess the nature of the information being requested to determine whether it is confidential before asking lawyers to disclose it. Some measures to assist attorneys in abiding by confidentiality requirements in the lateral and merger context are discussed in Comments [18A]-[18F] to Rule 1.6.

Clean final version of Comments [9H] and [9I] to New York Rule 1.10:

Confidentiality Considerations in Lateral Moves and Law Firm Mergers

[9H] Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements. When lawyers move from one firm to another firm as lateral hires, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a). To fulfill the duty to check for conflicts *before* hiring laterals or before merging firms, the hiring or merging firms should ordinarily obtain such information as: (i) the identity of each client that the lateral lawyers or the merging firms currently represent; (ii) the identity of each client that the lateral lawyers or the merging firms, within a reasonable period in the past, either formerly represented within the meaning of Rule 1.9(a), or about whom the lateral lawyers or the lawyers in the merging firms acquired material confidential information within the meaning of Rule 1.9(b); (iii) the identity of other parties to the matters in which the lateral lawyers or merging firms represented those clients; and (iv) the general nature of each such matter. The hiring or merging firms may also request aggregate financial data for all clients or from groups of clients (such as past billings, pending receivables, timeliness of payment, and probable future billings) to determine whether the employment or merger is economically justified.

[9I] Whether lawyers may disclose information in response to such requests depends on the nature of the information. Some of this information is ordinarily not confidential (*e.g.*, the names of clients and adversaries in publicly disclosed matters, the general nature of such matters, and *aggregate* information about legal fees from all clients or from groups of clients), but other information is ordinarily confidential (*e.g.*, non-public criminal or matrimonial representations, or client-specific payment information). The lateral lawyers or the merging firms should carefully assess the nature of the information being requested to determine whether it is confidential before asking lawyers to disclose it. Some measures to assist attorneys in abiding by confidentiality requirements in the lateral and merger context are discussed in Comments [18A]-[18F] to Rule 1.6.

Rule 1.18.
Duties to Prospective Clients

Amended Comments [1], [2], [4] and [5] to New York Rule 1.18

Legislative style version:

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~As provided in paragraph (c), a person who~~ Such a person communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a). Similarly,~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client" – see Rule 1.18(e). ~~from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to communicate~~

~~with a lawyer or lawyers for that improper purpose. See Rules 3.1(b)(2), 1.4, 8.4(a).~~

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~ consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent," and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and if the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Clean final version of Comments [1], [2], [4] and [5] to N.Y. Rule 1.18:

Confidentiality Considerations in Lateral Moves and Law Firm Mergers

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who

communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client" – see Rule 1.18(c).

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent," and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and if the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client

Rule 4.4.
Respect for Rights of Third Persons

Amended Comments [2] and [3] to New York Rule 4.4

Legislative style version:

[2] Paragraph (b) recognizes that lawyers and law firms sometimes receive a documents, electronically stored information, or other "writing" as defined in Rule 1.0(x), that ~~were~~ was mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. A document, electronically stored information, or other writing is "inadvertently sent" within the meaning of paragraph (b) when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted. One way to resolve this situation is for lawyers and law firms to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer or law firm knows or reasonably should know that such a document or other writing was sent inadvertently, then this Rule requires only that the receiving lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the receiving lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence preclusion. Whether the lawyer or law firm is required to take additional steps, such as returning the ~~original~~ document or other writing, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document or other writing has been waived. Similarly, this

Rule does not address the legal duties of a lawyer who receives a document or other writing that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document, electronically stored information, or other writing" includes not only paper documents, but also email and other forms of electronically stored information – including embedded data (commonly referred to as "metadata") – that is subject to being read or put into readable form. *See* Rule 1.0(x).

[3] Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent, ~~to the wrong address~~ and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document or other writing, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document or other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both. Accordingly, in deciding whether to retain or use an inadvertently received document or other writing, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, the decisions to refrain from reading such a documents or other writing or instead to return or delete it ~~them~~, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4.

Clean final version of Comments [2] and [3] to New York Rule 4.4:

[2] Paragraph (b) recognizes that lawyers and law firms sometimes receive a document, electronically stored information, or other "writing" as defined in Rule 1.0(x), that was mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. A document, electronically stored information, or other writing is "inadvertently sent" within the meaning of paragraph (b) when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted. One way to resolve this situation is for lawyers and law firms to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer or law firm knows or reasonably should know that such a document or other writing was sent inadvertently, then this Rule requires only that the receiving lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the receiving lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence preclusion. Whether the lawyer or law firm is required to take additional steps, such as returning the document or other writing, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or other writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or other writing that the lawyer knows or reasonably should know may have been inappropriately obtained by the

sending person. For purposes of this Rule, "document, electronically stored information, or other writing" includes not only paper documents, but also email and other forms of electronically stored information – including embedded data (commonly referred to as "metadata") – that is subject to being read or put into readable form. *See* Rule 1.0(x).

[3] Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent, and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document or other writing, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document or other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both. Accordingly, in deciding whether to retain or use an inadvertently received document or other writing, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, the decision to refrain from reading such a document or other writing or instead to return or delete it, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4.

Rule 5.3.
Lawyer's Responsibility for Conduct of Nonlawyers

Amended Comment [2] and New Comment [3] to New York Rule 5.3

Legislative style version:

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm, including nonlawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and the firm. Lawyers typically employ nonlawyer assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such nonlawyer assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. Likewise, lawyers may employ nonlawyers outside the firm to assist in rendering those services. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm). A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information ~~relating to representation of the client, and~~ -- *see* Rule 1.6(c) (requiring lawyers to take reasonable care to avoid unauthorized disclosure of confidential information). Lawyers also should be responsible for the work done by their nonlawyer assistants ~~work product~~. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to ensure that the firm has in effect

measures giving ~~establish internal policies and procedures designed to provide~~ reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with ~~these Rules~~ the professional obligations of the lawyer. A lawyer with ~~direct~~ supervisory authority over a nonlawyer within or outside the firm has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

~~[3]~~ [2A] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include (i) retaining or contracting with an investigative or paraprofessional service, (ii) hiring a document management company to create and maintain a database for complex litigation, (iii) sending client documents to a third party for printing or scanning, and (iv) using an Internet-based service to store client information. When using such services outside the firm, a lawyer or law firm must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer and law firm. The extent of the reasonable efforts required under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; (e) the sensitivity of the particular kind of confidential information at issue; and (f) whether the client will be supervising all or part of the nonlawyer's work. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4 (professional independence of the lawyer), and 5.5 (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

Clean final version of Comments [2] and [3] to New York Rule 5.3:

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm, including nonlawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and the firm. Lawyers typically employ nonlawyer assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such nonlawyer assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. Likewise, lawyers may employ nonlawyers outside the firm to assist in rendering those services. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm). A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information -- *see* Rule 1.6(c) (requiring lawyers to take reasonable care to avoid unauthorized disclosure of confidential information). Lawyers also

should be responsible for the work done by their nonlawyer assistants. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer. A lawyer with supervisory authority over a nonlawyer within or outside the firm has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

[2A] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include (i) retaining or contracting with an investigative or paraprofessional service, (ii) hiring a document management company to create and maintain a database for complex litigation, (iii) sending client documents to a third party for printing or scanning, and (iv) using an Internet-based service to store client information. When using such services outside the firm, a lawyer or law firm must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer and law firm. The extent of the reasonable efforts required under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; (e) the sensitivity of the particular kind of confidential information at issue; and (f) whether the client will be supervising all or part of the nonlawyer's work. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4 (professional independence of the lawyer), and 5.5 (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

Rule 7.2.
Payment for Referrals

Amendments to Comments [1] and [3] to New York Rule 7.2

Legislative style version:

[1] Except as permitted under paragraphs (a)(1)-(a)(2) of this Rule or under Rule 1.17, ~~L~~lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. *See* Rule 8.4(a) (lawyer may not violate or attempt to violate a Rule, knowingly assist another to do so, or do so through the acts of another). A communication contains a recommendation if it endorses or

vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (a), however, does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of printing directory listings and newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~ Internet-based advertisements, search engine optimization, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyer, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (advertising) and 7.3 (solicitation and recommendation of professional employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (lawyer's responsibility for conduct of nonlawyers) ~~who prepare marketing materials for them~~).

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. *See* Rule 5.3. The lawyer must ensure that the organization's communications with ~~prospective~~ potential clients are in conformity with these Rules. For example, the organization's advertising must not be false or misleading, as would be the case if the organization's communications falsely suggested ~~of a qualified legal assistance organization would mislead prospective clients to think~~ that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

Clean final version of Comments [1] and [3] to New York Rule 7.2:

[1] Except as permitted under paragraphs (a)(1)-(a)(2) of this Rule or under Rule 1.17, lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. *See* Rule 8.4(a) (lawyer may not violate or attempt to violate a Rule, knowingly assist another to do so, or do so through the acts of another). A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (a), however, does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of printing directory listings and newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, search engine optimization, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as (i) the lead generator does

not recommend the lawyer, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (solicitation and recommendation of professional employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (lawyer's responsibility for conduct of nonlawyers).

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. The lawyer must ensure that the organization's communications with potential clients are in conformity with these Rules. For example, the organization's advertising must not be false or misleading, as would be the case if the organization's communications falsely suggested that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

Rule 7.3
Solicitation and Recommendation of Professional Employment

Amended Comment [9] to New York Rule 7.3

Legislative style version:

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure an individual to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication. These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone, or related electronic means – *see* Rule 1.0(c) (defining "computer-accessed communication") – and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communications do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, email communications and web sites are not considered to be real-time or interactive communications. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communications. However, instant messaging ("IM"),

chat rooms, and other similar types of "conversational" computer-accessed communications – whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media – are considered to be real-time or interactive communications.

Clean final version of Comment [9] to New York Rule 7.3:

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure an individual to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication. These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone, or related electronic means – see Rule 1.0(c) (defining "computer-accessed communication") – and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communications do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, email communications and web sites are not considered to be real-time or interactive communications. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communications. However, instant messaging ("IM"), chat rooms, and other similar types of "conversational" computer-accessed communications – whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media – are considered to be real-time or interactive communications.

Proposed Amendments to the Black Letter Text of the New York Rules of Professional Conduct Recommended by the NYSBA to the Appellate Divisions

The New York State Bar Association is recommending that the Appellate Divisions adopt the following amendments to the black letter text of the New York Rules of Professional Conduct. These proposed amendments cannot take effect unless and until the Appellate Divisions formally approve them. (The Appellate Divisions are also free to reject or modify the proposals.) Each proposed amendment is set forth below, first in legislative style and then in a clean version showing how the final language would appear if adopted as proposed.

Rule 1.0.
Terminology

Legislative style proposal for amending Rule 1.0(x):

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, ~~and~~ e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Clean final version of amended Rule 1.0(x) as proposed:

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule 1.6.
Confidentiality of Information

Legislative style proposal for amending Rule 1.6(c):

(c) A lawyer shall ~~exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee~~ make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Clean final version of amended Rule 1.6(c) as proposed:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Note on conditional approval of amendments to Comments [16]-[17] to Rule 1.6: The NYSBA House of Delegates approved amendments to Comments [16] and [17] contingent on the Appellate Divisions' approval of the proposed black letter amendments to Rule 1.6(c). If the Appellate Divisions approve the proposed or substantially similar amendments to the black letter text of Rule 1.6(c), then the following amended versions of Comments [16]–[17] to Rule 1.6 will take effect automatically:

> [16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].
>
> [17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

Rule 1.18.
Duties to Prospective Clients

Legislative style proposal for amending Rule 1.18(a), (b) and (e):

(a) ~~A~~ Except as provided in Rule 1.18(e), a person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client".

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(e) A person ~~who~~ is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client□lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter~~. is not a prospective client within the meaning of paragraph (a)~~.

Clean final version of amended Rule 1.18(a), (b) and (e) as proposed:

(a) Except as provided in Rule 1.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(e) A person is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client□lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.

Rule 4.4.
Respect for Rights of Third Persons

Legislative style proposal for amending Rule 4.4(b):

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that ~~the document~~ it was inadvertently sent shall promptly notify the sender.

Clean final version of amended Rule 4.4(b) as proposed:

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.

Rule 7.3.
Solicitation and Recommendation of Professional Employment

Legislative style proposal for amending Rule 7.3(b) and (c):

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request, ~~of a prospective client.~~

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions …

(5) The provisions of this paragraph shall not apply to …

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at ~~a prospective client~~ persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

Clean final version of amended Rule 7.3(b) and (c) as proposed:

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions ...

(5) The provisions of this paragraph shall not apply to ...

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons_affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

EXHIBIT B

May 8, 2015
For Publication

REPORT OF THE
NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT ("COSAC")

PROPOSALS TO AMEND BLACK LETTER RULES

IN THE

NEW YORK RULES OF PROFESSIONAL CONDUCT

Based on COSAC's Comprehensive Review of
Changes to the ABA Model Rules of Professional Conduct
Resulting From the Work of the ABA Commission on Ethics 20/20

Roy D. Simon, Chair, Committee on Standards of Attorney Conduct
May 8, 2015

Executive Summary

From 2009 to 2013, the ABA Commission on Ethics 20/20 drafted and recommended proposed amendments to the ABA Model Rules of Professional Conduct to account for increasing globalization and rapid changes in technology. In 2012 and 2013, the ABA House of Delegates adopted many of the Ethics 20/20 Commission's proposed amendments.

From 2013 through early 2015, the New York State Bar Association ("NYSBA") Committee on Standards of Attorney Conduct ("COSAC") systematically reviewed all of the ABA amendments to assess whether New York should adopt similar amendments to the New York Rules of Professional Conduct. In January of 2015, COSAC presented its recommendations to the NYSBA House of Delegates and circulated the recommendations to the Bar for public comment. At its March 2015 Quarterly Meeting, after COSAC revised some recommendations in response to public comments, the House of Delegates adopted COSAC's recommendations.

Amendments to the Comments that were not contingent on proposed changes in the black letter text of the Rules took effect immediately, but proposed amendments to the Rules themselves require approval by the Appellate Divisions. Below is a summary of amendments to the Rules that the NYSBA is recommending to the Appellate Divisions.

Summary of Recommended Amendments

The NYSBA recommends that the Appellate Divisions approve the following amendments to New York Rules of Professional Conduct:

Rule 1.0(x) (in "Terminology"): The NYSBA recommends that the Appellate Divisions clarify the definition of "writing" to make clear that it encompasses evolving and future forms of communications.

Rule 1.6 ("Confidentiality of Information"): The NYSBA recommends that the Appellate Divisions amend Rule 1.6(c) to require lawyers to make "reasonable efforts" to safeguard confidential information against three things: (i) inadvertent disclosure or use, (ii) unauthorized disclosure or use, and (iii) unauthorized access. In addition, the NYSBA recommends that the Appellate Divisions amend Rule 1.6(c) to make clear that Rule 1.6(c) extends to lawyers themselves.

Rule 1.18 ("Duties to Prospective Clients"): The NYSBA recommends that the Appellate Divisions amend Rule 1.18 in three ways: (i) by adding the phrase "Except as provided in Rule 1.18(e)" at the beginning of Rule 1.18(a) (which defines the term "prospective client"); (ii) by replacing the narrow phrase "had discussions with" in Rule 1.18(b) with the broader terms "consult" and "learned information from"; and (iii) by slightly re-ordering the wording of Rule 1.18(e) (which states two exceptions to the definition of "prospective client") to make it easier to understand.

Rule 4.4 ("Respect for Rights of Third Persons"): The NYSBA recommends that the Appellate Divisions amend Rule 4.4(b) to make explicit that it applies to "electronically stored information" as well as any "other writing."

Rule 7.3 ("Solicitation and Recommendation of Professional Employment"): The NYSBA recommends that the Appellate Divisions amend Rule 7.3(b) (which defines "solicitation") by deleting the phrase "of a prospective client" at the end of paragraph (b). The NYSBA also recommends that the Appellate Divisions amend Rule 7.3(c)(5)(ii) by replacing the words "prospective client" with the more accurate and less confusing word "persons."

Proposed Amendments Recommended by the NYSBA to the New York Rules of Professional Conduct

The following proposed amendments are presented first in legislative style, showing changes from the existing New York Rules of Professional Conduct, and then in "clean" versions as they will appear if the Appellate Divisions accept them as proposed.

Rule 1.0. Terminology

Legislative style proposal for amending Rule 1.0(x):

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, ~~and~~ e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Clean final version of amended Rule 1.0(x):

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COSAC Reporter's Explanation of proposed amendments to Rule 1.0(x):

In 2012, the ABA amended its definition of the term "writing" by eliminating the example of "e-mail" and substituting the words "electronic communication." The ABA amendments seek to encompass different types of electronic communications and to capture evolving

technologies.

COSAC agrees that the definition of "writing" should be expanded to encompass evolving types of electronic communications, but recommends two improvements to the ABA approach.

First, unlike the ABA, COSAC sees no reason to eliminate the word "e-mail," which COSAC considers to be a helpful example because email is currently a widely used method of electronic communication.

Second, COSAC believes that the phrase "electronic communication" standing alone may prove too restrictive to encompass future technologies, which may use methods that are not electronic.

Accordingly, the proposed COSAC revisions maintain the "e-mail" example, add the phrase "or other electronic communication," and include a more flexible catch-all phrase – "or any other form of ***recorded*** communication or ***recorded*** representation" (emphasis added). This catch-all phrase is designed to encompass whatever technologies may develop. At the same time, the revised definition of "writing" should make clear that telephone calls, though "electronic," are not within the scope of the definition unless they are "recorded."

In sum, COSAC recommends that the Appellate Division amend the definition of "writing" in Rule 1.0(x) to accommodate continued advances in technology, which are constantly producing new forms of recorded communication.

Rule 1.6. Confidentiality of Information

Legislative style proposal for amending Rule 1.6(c):

(c) A lawyer shall ~~exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee~~ make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Clean final version of amended Rule 1.6(c):

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

COSAC Reporter's Explanation of proposed amendments to Rule 1.6(c):

In 2012, the ABA amended ABA Model Rule 1.6 by adding a new paragraph (c) requiring a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." The ABA version goes beyond New York's current version of Rule 1.6(c) in three important ways.

First, the ABA version expressly requires lawyers to make reasonable efforts to guard against "inadvertent" disclosure.

Second, the ABA version requires lawyers to make reasonable efforts to guard against unauthorized "access" to information.

Third, by eliminating New York's reference to "employees, associates, and others whose services are utilized by the lawyer," the ABA version imposes the duty not only on employees, associates, and others but also on lawyers themselves.

References to "inadvertent" disclosure and unauthorized "access," and language imposing the duty of care on lawyers themselves, all go beyond the concept of "unauthorized disclosure" in New York's current version of Rule 1.6(c). COSAC believes that New York

should adopt the ABA language on all points.

COSAC also recommends that New York expand the ABA version of Rule 1.6(c) in two ways. First, New York should make clear that the duty to protect confidential information also applies to information protected by Rule 1.9(c) (which applies to former clients) and to information protected by Rule 1.18(b) (which applies to prospective clients). Second, New York should make clear that "reasonable efforts" are also required to prevent the inadvertent or unauthorized "use of" such information. This change would reflect the fact that both New York's Rule 1.6 (which is unlike ABA Model Rule 1.6) and New York Rule 1.8(b) (which is like its ABA counterpart) prohibit a lawyer from using confidential information "to the disadvantage of a client or for the advantage of the lawyer or a third person."

Arguably, the Rules already protect confidential information of former and prospective clients because Rule 1.9(c) refers to Rule 1.6, 1.8(b) prohibits improper "use," and Rule 1.18(b) refers to Rule 1.9(c). But making the point explicit by building it into Rule 1.6(c) is an efficient and a helpful reminder.

The rationale for the proposed amendments is compelling. When lawyers and law firms stored virtually all of their confidential information and client files on paper, unauthorized access or outright theft of the information was rare, and reasonable efforts to protect confidential information typically involved simple precautions such as not talking in public places, not leaving confidential papers exposed in a county law library, and locking file cabinets and file rooms where confidential files were stored. Today, in contrast, much of a lawyer's or law firm's data is stored electronically (including on smart phones, iPads, laptops, and other portable devices that can easily be lost or misplaced), and the threats to security are more complex. Hackers and criminals actively seek to gain unauthorized access to law firm computers and computer networks; lawyers frequently communicate electronically with clients, co-counsel, experts, and others; and relatively few lawyers are experts in technology or computers. All of this poses new and evolving risks to the security of confidential information.

The proposed amendments to New York Rule 1.6(c) address these concerns by imposing on lawyers a duty to "make reasonable efforts" (the ABA phrase) to prevent three types of breaches of confidential information: (i) *inadvertent* disclosure (such as when a lawyer or secretary accidentally sends an e-mail to the wrong person); (ii) *unauthorized* disclosure (such as when a paralegal reveals information to an opposing party without the client's consent); and (iii) unauthorized *access* (such as when hackers break into a law firm's computer network).

The reference in existing New York Rule 1.6(c) to "employees, associates, and others whose services are utilized by the lawyer" has been deleted. It has no equivalent in the ABA Model Rule, and deleting that phrase broadens the scope of Rule 1.6(c) by making clear that lawyers themselves – not just "employees, associates, and others whose services are utilized by the lawyer" – must make reasonable efforts to protect confidential information.

Rule 1.18. Duties to Prospective Clients

Legislative style proposal for amending Rule 1.18:

(a) ~~A~~ Except as provided in Rule 1.18(e), a person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client".

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(e) A person ~~who~~ is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client□lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter~~, is not a prospective client within the meaning of paragraph (a)~~.

Clean final version of amended Rule 1.18:

(a) Except as provided in Rule 1.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(e) A person is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client□lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.

COSAC Reporter's Explanation of proposed amendments to Rule 1.18(a), (b), and (e):

In 2012, the ABA amended Rule 1.18 in three ways: (i) the ABA replaced the word "discusses" in Rule 1.18(a) with the broader term "consults"; (ii) the ABA replaced the phrase "had discussions with" in Rule 1.18(b) with the broader term "learned information from"; and (iii) the ABA deleted the relatively narrow phrase "learned in the consultation" in Rule 1.18(b) because it would be redundant with the new phrase "learned information from" earlier in paragraph (b).

COSAC agrees that the words "discusses" and "discussions" are too narrow, and may be misleading because they imply face-to-face or live telephone conversations, whereas in reality a prospective client often "consults" with a lawyer by voice mail, e-mail, or other means. Similarly, COSAC agrees that the structural revisions to Rule 1.18(b) (including the use of the proposed phrase "learned information from" and the deletion of the old phrase "learned in the consultation") help to make Rule 1.18(e) easier to read.

COSAC therefore recommends that the Appellate Division amend Rule 1.18(a)-(b) to match amended ABA Model Rule 1.18 verbatim.

COSAC also recommends adding an express reference in New York Rule 1.18(a) to the exceptions articulated in New York Rule 1.18(e), which has no equivalent in ABA Model Rule 1.18. As a companion amendment, COSAC recommends amending New York Rule 1.18(e) to simplify the grammatical structure, without making any substantive changes to paragraph (e).

Rule 4.4. Respect for Rights of Third Persons

Legislative style proposal for amending Rule 4.4(b):

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that ~~the document~~ it was inadvertently sent shall promptly notify the sender.

Clean final version of amended Rule 4.4(b):

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.

COSAC Reporter's Explanation of proposed amendments to Rule 4.4(b):

The ABA amended ABA Model Rule 4.4(b) by adding the phrase "or electronically stored information" after both instances of the word "document" in Rule 4.4(b). COSAC generally agrees with the ABA change. However, COSAC has gone beyond the ABA provision by adding "or other writing" as a catch-all to account former future technological change.

Rule 7.3. Solicitation and Recommendation of Professional Employment

Legislative style proposal for amending Rule 7.3(b) and (c):

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request, ~~of a prospective client~~.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions ...

(5) The provisions of this paragraph shall not apply to ...

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a ~~prospective client~~ persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

Clean final version of amended Rule 7.3(b) and (c):

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions ...

(5) The provisions of this paragraph shall not apply to ...

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

COSAC Reporter's Explanation of proposed amendments to Rule 7.3(b) and (c):

In 2012, the ABA amended ABA Model Rule 7.3 by eliminating or replacing the phrase "prospective client" wherever it appears. The phrase "prospective client" is defined in ABA Model Rule 1.18(a) to mean something other than what it means in Rule 7.3, so deleting or replacing the phrase "prospective client" in the context of Rule 7.3 avoided confusion.

In the New York Rules of Professional Conduct, however, the phrase "prospective client" appears only in Rule 7.3(b) and (c), not in Rule 7.3(a). COSAC considered replacing the word "prospective" in New York Rule 7.3(c), with the word "potential," but the phrase "prospective client" in Rule 7.3(b) seems entirely unnecessary. Sending information in response to a specific request from any person, whether a potential client or a prospective client or someone else, is not solicitation. COSAC therefore recommends deleting the last four words – "of a prospective client" – from Rule 7.3(b).

Similarly, in Rule 7.3(c)(5)(ii), COSAC has replaced defined term "a prospective client" with the broader terms "persons." The meaning of Rule 7.3(c)(5)(ii) remains the same, but the confusion arising from the use of the phrase "prospective client" is eliminated.

Dated: May 8, 2015

Respectfully submitted,

Roy D. Simon
Chair, Committee on Standards of Attorney Conduct

NYS Commission on Statewide Attorney Discipline

Enhancing Fairness and Consistency

Fostering Efficiency and Transparency

Final Report to

Chief Judge Jonathan Lippman

the

Court of Appeals

and the

Administrative Board of the Courts

SEPTEMBER 2015

Commission on Statewide Attorney Discipline

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[1] The Commission was chaired by the Hon. A. Gail Prudenti, Chief Administrative Judge, until her resignation on July 30, 2015, when then-Vice Chair Cozier assumed the position of chairman.

[2] On Aug. 10, 2015, Chief Judge Lippman appointed Professor Wendel as vice chair.

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EXECUTIVE SUMMARY

In March 2015, Chief Judge Jonathan Lippman created the Commission on Statewide Attorney Discipline to conduct a comprehensive review of New York's attorney disciplinary system to determine what is working well, what can work better and to offer recommendations to enhance the efficiency and effectiveness of New York's attorney discipline process.

Among the issues considered by the Commission were whether New York's current departmental-based system leads to regional disparities in the implementation of discipline; if conversion to a statewide system is desirable; the point at which disciplinary charges or findings should be publicly revealed; and, how to achieve dispositions more quickly to provide much needed closure to both clients and attorneys.

After rigorous deliberation, three public hearings in different regions of the state and input from a myriad of stakeholders—legal consumers, lawyers, bar associations, affinity and specialized bar groups, advocates and others—the Commission recommends, through consensus[3], a series of critical reforms, including but not necessarily restricted to the following:

1. Approval by the Administrative Board of the Courts, and by each Department of the Appellate Division, of statewide uniform rules and procedures governing the processing of disciplinary matters at both the investigatory and adjudicatory levels, from intake through final disposition, which strike the necessary balance between facilitating prompt resolution of complaints and affording the attorney an opportunity to fairly defend the allegations. These new rules and procedures

[3] The Commission's recommendations reflect a clear consensus view. Although the Commission was unanimous in its approval of the majority of proposals, there are members who disagree with certain recommendations or portions thereof.

should include uniform discovery rules and information-sharing for attorneys who are the subject of a disciplinary complaint. This recommendation is of the highest priority and a firm deadline for adoption should be established.

2. Adoption of guidelines modeled after the ABA Standards for Imposing Lawyer Sanctions to ensure more consistent, uniform results statewide.

3. Amendment of the current rules of the Appellate Division to expressly authorize each disciplinary committee to seek, either separately or in conjunction with an application for interim suspension and upon notice to the affected attorney, an order unsealing proceedings to permit the publication of charges pursuant to Judiciary Law §90(10), upon a finding by the Court that the attorney's conduct places clients at significant risk or presents an immediate threat to the public interest. The amendment would be approved by the Administrative Board of the Courts and approved by each Department of the Appellate Division.

4. Implementation of a statewide diversion/alternatives to discipline program to address matters involving alcohol, substance abuse and mental illness.

5. Revision of court rules to uniformly allow for "administrative" suspension and reinstatement of attorneys who are delinquent in timely registering or paying registration fees. Such "administrative" suspension should occur automatically after a period of delinquency and following written notice to the attorney. In revising these rules, particular attention should be paid to streamlining the process as well as to enhancing coordination and the exchange of information between each Department of the Appellate Division and the Office of Court Administration (OCA).

6. Creation of a more easily accessible, searchable, consumer-friendly, statewide website geared toward the legal consumer. Critical information, such as where to file a grievance, should be available in languages in addition to English. Consideration should also be given to establishing a telephone "hot line" to accommodate individuals who do not have access to the internet.

7. Revision of court rules and procedures to allow "plea bargaining," or discipline upon consent, to encourage prompt resolution of disciplinary charges, where appropriate.

8. Action by the Administrative Board of the Courts to ensure that judicial determinations of prosecutorial misconduct are promptly referred to the appropriate disciplinary committee. Further, appropriate record management practices and procedures should be revised (or adopted) to allow each Department of the Appellate Division to better record and track disciplinary matters involving prosecutorial misconduct with a view toward generating annual statistical reports.

9. Establishment of a new position of Statewide Coordinator of Attorney Discipline. The Coordinator would function as a liaison/ resource for each Department of the Appellate Division. The precise powers and functions of the new position are to be further defined by the Administrative Board of the Courts. The Commission envisions, however, that the Coordinator would be tasked with assisting the Administrative Board of the Courts in fostering uniformity in procedures and sanctions, encouraging communication and consistency among the Departments of the Appellate Division, producing an annual statistical report providing statewide data on the administration of attorney discipline, and recommending

ongoing reforms as deemed necessary. The need for this position is immediate and the Administrative Board of the Courts should select a suitable candidate as soon as is practicable.

10. Appointment of members to a Statewide Advisory Board on Attorney Discipline, consisting of volunteers from around the state, to assist in implementing these recommendations and to study and propose additional recommendations to further the goals of uniformity, transparency and efficiency in the attorney disciplinary system.

11. Increase to funding and staffing across-the-board for the disciplinary committees.

Report of the Commission on Statewide Attorney Discipline

I. INTRODUCTION

As officers of the court, all attorneys are obligated to maintain the highest ethical standards, consistent with the New York Rules of Professional Conduct (Rules) as adopted by the Appellate Division of State Supreme Court and published as Part 1200 of the Joint Rules of the Appellate Divisions (22 NYCRR Part 1200). The preamble to the Appellate Division-adopted Rules clearly articulates the weighty responsibility attorneys carry by virtue of being granted an exclusive license to practice law:

> A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.[4]

[4] See "New York Rules of Professional Conduct," effective as of April 1, 2009, (https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671)

Attorneys who violate that trust risk discipline ranging from a private admonishment to a public censure to suspension to disbarment. However, as the Court of Appeals has made plain, the attorney disciplinary process is designed principally as a consumer protection measure.[5] With both the Rules and the Court of Appeals' interpretation of those strictures in mind, the Commission sought to address the broad question of whether New York's system of attorney discipline adequately protects the consuming public and the administration of justice, promotes the integrity and reputation of the bar and the public's confidence in the legal system, encourages adherence to high ethical standards and discourages misconduct—or if we can do better. To put it simply, we can indeed do better and we can make a functional system more efficient, more transparent, more responsive, more consistent and more credible with the public at large.

At the outset, it is important to note that New York has a uniquely decentralized system for handling attorney grievances, with four different sets of procedures administered by eight regional grievance offices. Virtually every jurisdiction outside New York has a central body responsible for attorney oversight. However, in New York professional conduct is managed independently by the four departments of the Appellate Division of State Supreme Court, each with its own distinctive nomenclature and rules:

- The First Department in New York County addresses attorney misconduct in Manhattan and the Bronx through a "Departmental Disciplinary Committee" under the Rules and Procedures of the Departmental Disciplinary Committee of the First Department, 22 NYCRR §§ 603, 605 (http://www.courts.state.ny.us/courts/AD1/Committees&Programs/DDC/index.shtml).

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[5] See *Levy v. Association of the Bar of New York*, 333 N.E. 2d 350, 1975.

- The Second Department, based in Brooklyn, has jurisdiction over discipline in 10 downstate counties, including three within the City of New York, and administers that responsibility through a Grievance Committee for the 2nd, 11th and 13th Judiciary Districts plus a Grievance Committee for the 9th Judicial District and a Grievance Committee for the 10th Judicial District as set forth in 22 NYCRR Part 691.1-691.25 (https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ice3dde60bbec11dd8529f5ff2182bffa&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)).

- In the Second Department, each Grievance Committee investigates misconduct complaints. Each Committee has the authority to serve charges and conduct a hearing, or it can ask the Appellate Division to institute formal disciplinary proceedings.

- In the Albany-based Third Department, which handles attorney discipline in 28 upstate counties, the tasks associated with disciplinary matters are assigned to the "Committee on Professional Standards" and the investigative duties are executed by the professional staff of the Committee under its supervision (see 22 NYCRR Part 806) to conduct investigations (http://www.courts.state.ny.us/ad3/cops/COPSRules.html).

- The Fourth Department, based in Rochester, has jurisdiction over attorney discipline in Central and Western New York through the "Grievance Committees" for the 5th , 7th and 8th judicial districts [see 22 NYCRR Part 1022.17-2.8, https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesan

dRegulations?guid=Id32f95d0bbec11dd8529f5ff2182bffa&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default]). Investigations are conducted by the Committees and their legal staff.

The separate disciplinary bodies in the four Departments screen and investigate the thousands of complaints that are filed each year alleging an array of attorney misconduct from neglect of client matters and misappropriation of funds, to dishonesty and deceit in matters before the courts, and criminal behavior. Consistently, more than 90 percent of the complaints are dismissed.[6] Others are resolved at the committee level when the misconduct does not warrant formal action by the court. But hundreds do annually result in formal disciplinary proceedings. Following these proceedings, each Department may issue sanctions ranging from public censure to suspension from the practice of law, to disbarment. Each Department, while bound by the same rules, operates independently, applying its own procedures. To this day, the state lacks a single definition on what constitutes professional misconduct.[7]

There are innumerable procedural inconsistencies, including the following examples: [8]

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[6] See the annual reports of the New York State Bar Association Committee on Professional Discipline (https://www.nysba.org/copdannualreports/).

[7] Although the language varies, the departments generally define professional misconduct the same way. However, the First Department adds a paragraph to define misconduct by law firms, a provision that the other three departments do not use. The provision in the First Department's court rules reads as follows: "Any law firm that fails to conduct itself in conformity with the Rules of Professional Conduct (22 NYCRR. Part 1200) with respect to conduct on or after April 1, 2009, or the former Disciplinary Rules of the Code of Professional Responsibility pertaining to law firms with respect to conduct on or before March 31, 2009, shall be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law." See Rules of the Court, sections 603.2, 691.2, 806.2 and 1022.7.

[8] For a more thorough discussion of the disparities, see Aug. 11, 2015 letter from Ellyn S. Rosen, Deputy Director, American Bar Association Center for Professional Responsibility, and Nancy Cohen, partner, MiletichCohen PC, Denver, http://www.nycourts.gov/attorneys/discipline/resources.shtml.

- The First and Second departments do not allow respondent attorneys to present oral arguments in disciplinary hearings, while the Third and Fourth departments do.

- Only the First Department conducts disciplinary proceedings with hearing panels.

- The Second, Third and Fourth departments have diversion programs for attorneys with a documented drug or alcohol addiction, but there is no such provision in the First Department.

- The First Department specifically provides for law firm discipline; the other three departments do not.

- In the First Department, the filing of formal charges requires approval of only two members of a policy committee; in the Second, Third and Fourth departments charges can be lodged only by the grievance or disciplinary committee itself.

- Complaints in the First Department can be dismissed after review of the chief attorney's recommendation by a single attorney member of the Disciplinary Committee. In the Second Department, a majority vote of the entire Grievance Committee is required. The Third Department's Committee on Professional Standards makes all dismissal decisions. And in the Fourth Department, the chief counsel or his/her designee can dismiss a charge after consulting with the Grievance Committee chair.

- Only the Third Department mentions the standard of proof necessary to sustain a misconduct charge (clear and convincing evidence). The other departments make no mention of standard of proof.

- An attorney in the First Department who is suspended for failing to cooperate with the Departmental Disciplinary Committee can be summarily disbarred if he or she does not apply for reinstatement within six months. There is no such rule or practice in the other three departments.

- The First and Second departments require attorneys to certify during their biennial registration that they are in compliance with rules governing escrow funds. The Third and Fourth departments do not have such a rule.

- The First and Second departments have adopted audit rules authorizing the random examination of financial records of attorneys in their jurisdiction. There is no such provision in the Third or Fourth department.

- The Second, Third and Fourth departments all authorize their respective grievance committee to issue a confidential letter of caution to attorneys in their jurisdiction, and the Third Department also authorizes a "letter of education"[9] to an offending attorney. The First Department does not permit cautionary or educational letters. However, it does issue "dismissals with guidance."

For many years, that fragmentation has prompted concerns that the attorney disciplinary process in New York is replete with regional disparities in the implementation of discipline and imposition of sanctions, raising obvious questions: Will the same or similar conduct in one region result in the same or similar discipline in another region, or are there unacceptable disparities in the way punishment is meted out by the Appellate Division departments?; Are

[9] See 22 NYCRR §806.4 (c)(iv).

consumers better protected in some areas and in some types of grievances in one region than another?

That confusion is exacerbated by the fact that disciplinary decisions are frequently terse and lacking even minimal detail that would enable the public to understand why a particular sanction was appropriate in a particular case. With so little information it is impossible to know whether the seemingly light sanction is defensible.

Additional concerns have been raised regarding lengthy delays between the time the alleged misconduct comes to the attention of the disciplinary committees and resolution. This breeds troublesome uncertainty for both clients and attorneys, the former whose interests may be prejudiced during the lengthy pendency of a disciplinary complaint, and the latter who may be significantly hindered when renewing malpractice insurance policies or seeking to change jobs. Prolonged delays can also result in lawyers who will and should be suspended or disbarred continuing to practice for years—and in some cases, continuing to engage in professional misconduct—before a sanction is implemented (despite existing rules permitting the interim suspension of attorneys who may pose a risk to clients), putting the consuming public at risk. Approximately 1 percent of the attorney-orchestrated thefts reimbursed by the Lawyers' Fund for Client Protection were committed by attorneys who were the target of pending disciplinary proceedings, [10] a fact likely unknown by the consumer because of existing confidentiality rules. Granted, that is a very small percentage and involves only 28 of 3,479 awards processed over a seven-year period.[11] Regardless, delay cost clients—and eventually the Lawyers' Fund—$131,000.[12]

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[10] See the testimony of Timothy J. O'Sullivan, executive director and counsel to the Lawyers' Fund, at page 11 of the transcript of the July 28 public hearing.
http://www.nycourts.gov/attorneys/discipline/Documents/AlbanyTranscript.pdf

[11] Ibid.

[12] Ibid.

Finally, New York deviates from the prevailing practice of opening the disciplinary process to the public on a finding of probable cause or sooner. New York does not make the discipline public unless and until a court imposes public discipline, a practice contrary to the ABA Model Rules for Lawyer Disciplinary Enforcement and inconsistent with the policies in a majority of states.[13] This practice, along with the relative difficulty of finding records of public discipline, has led critics to raise concerns about transparency and access, and created an atmosphere of public suspicion and skepticism. To begin addressing these concerns, the court system recently launched a more comprehensive "Attorney Directory," accessible directly on the Unified Court System's website, which provides attorneys' disciplinary history dating back decades and links readers to disciplinary orders issued since 2003 (see http://iapps.courts.state.ny.us/attorney/AttorneySearch).

A. Legal Authority

The jurisdiction for attorney discipline is articulated in §90 of the Judiciary Law and the dominion of the Court of Appeals. Paragraph 2 of §90 provides in part:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

[13] (N.Y. JUD.LAW §90(10) (McKinney Supp. 2014)

Paragraph 8 of §90 provides:

> Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by section three of article six of the constitution of this state.

The Court of Appeals long ago wrote in *In re Flannery:*[14]

> The Appellate Division has found the appellant guilty of gross unprofessional conduct and has decreed his disbarment. On this record our power of review is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it.... It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail.... If the conduct condemned is not wholly blameless, the extent to which it shall be reprobated is not for our determination.

In addition to §90, the state constitution limits the jurisdiction of the Court of Appeals in discipline matters to review of questions of law. Art. VI, section 3(a).

B. The Purpose of Discipline

The attorney discipline process has three primary objectives: first, protection of the public; second, deterrence of professional misconduct and preservation of the reputation of the bar; and third, to sanction those attorneys who violate the conditions of their exclusive privilege

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[14] *In re Flannery*, 212 N.Y. 610 (1914) (internal citation omitted).

to practice law in this state. Over the decades, the courts have addressed the *primary* purpose of the attorney disciplinary system, and an analysis of those rulings strongly suggests that the principal goal is consumer protection.

In 1975, the New York Court of Appeals wrote:

> The proper frame of reference, of course, is the protection of the public interest, for while a disciplinary proceeding has aspects of the imposition of punishment on the attorney charged, its primary focus must be on protection of the public. Our duty in these circumstances is to impose discipline, not as punishment, but to protect the public in its reliance upon the presumed integrity and responsibility of lawyers.[15]

Years later, the Court further distanced itself from a view of discipline as punishment:

> A disciplinary proceeding is concerned with fitness to practice law, not punishment. Criminal culpability is not, therefore, controlling . . . . The primary concern of a disciplinary proceeding is the protection of the public in its reliance on the integrity and responsibility of the legal profession . . . .[16]

Some statements by lower New York courts expand on, or even appear inconsistent with, the goal the Court of Appeals identified. One court, introducing a deterrence function, long ago wrote that "the purpose of a sanction in a disciplinary proceeding is to protect the public, to deter similar conduct, and to preserve the reputation of the bar."[17]

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[15] *Levy v. Ass'n of the Bar of N.Y.*, 333 N.E.2d 350, 352 (N.Y. 1975) (internal quotation marks omitted).

[16] *In re Rowe*, 604 N.E.2d 728, 730 (N.Y. 1992) (citation omitted). This view is consistent with primary and secondary authorities nationwide.

[17] *In re Casey*, 490 N.Y.S. 2d 287, 290 (Third Dep't 1985).

Nearly three decades later, the same Department cited the need "to deter similar misconduct" as among the purposes of discipline. *In re Van Siclen*, 997 N.Y.S.2d 842 (Third Department, 2014). *Van Siclen*, like other decisions, also cites the need to "preserve the reputation of the bar" as a separate goal of discipline. It is not clear how protecting the bar's reputation should influence the severity of sanction.

It is also unclear whether courts that speak of deterrence mean to deter the particular lawyer from relapsing (special deterrence), other lawyers from the same misconduct (general deterrence), or both. The First Department, long ago, opted for both general and special deterrence in *Rotwein*: [18]

> It has been repeatedly enunciated that the purpose of disciplinary proceedings is not punishment per se but protection of the public from the ministrations of the unfit.
>
> . . . Protection is afforded not only by the revocation of the license to practice but by a lesser sanction which would have the effect of a *deterrent* to the person at fault . . . and to others who might be similarly tempted . . . . An equally important factor is the preservation of the reputation of the bar. (Emphasis added.)[19]

As *Rotwein* recognized, deterrence of future misconduct advances the goal of protecting the public, too.

The courts sometimes suggest that a disciplinary sanction foster the purposes of punishment. In 2004, the First Department wrote that discipline serves the "punitive purpose of demonstrating that such unbridled misconduct will not go *unpunished*."[20] And yet in 2013,

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[18] *In re Rotwein*, 247 N.Y.S.2d 775, 777 (First Dep't, 1964) (citation omitted).

[19] Ibid.

[20] *In re Law Firm of Wilens & Baker*, 777 N.Y.S.2d 116, 119 (First Dep't, 2004) (citation omitted) (emphasis added).

citing precedent, the same court held: "As in all disciplinary proceedings '[our purpose] is not to punish the respondent attorney, but rather to determine the fitness of an officer of the court and to protect the courts and public from attorneys that are unfit for practice.'"[21]

The ABA's *Standards for Imposing Lawyer Sanctions* ("ABA Standards"), discussed further below, describes the purpose of discipline as follows:

> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.

C. The Matter of Delay

The "justice delayed is justice denied" adage is certainly applicable to attorney disciplinary matters, for both the lawyer and client.

Discipline often occurs years after the underlying event, sometimes as many as three or four (or even more) years. The courts then purport to calibrate the length of suspension to the need to protect the public prospectively for misconduct that occurred long ago. It might seem that in reality, the suspension is not meant to protect the public at all, since so much time has elapsed, but serves a different purpose: punishment or general deterrence – i.e., as a warning to all lawyers. The issue of delay and its relationship to the purpose of discipline is less acute if suspension is ordered closer in time to the violation, but the question persists even if the time lapse can be reduced to a year or two.

Prolonged delay also hurts lawyers who live with uncertainty during the delay and who may be harmed when renewing malpractice insurance policies or seeking to change firms.

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[21] *In re Samuel*, 959 N.Y.S.2d 471, 473 (First Dep't, 2013) (citation omitted).

D. Uniformity in Interim Suspensions and the Relationship to Delay

Each department's rules provide for the possibility of interim suspension in very limited circumstances, as authorized by *Matter of Padilla*, 67 N.Y.2d 440 (1986), and *Matter of Russakoff*, 79 N.Y.2d 520 (1992). In addition, §90 of the Judiciary Law automatically imposes an interim suspension on lawyers convicted of a "serious crime," a term that includes certain misdemeanor convictions and a felony conviction in a court other than a New York court if the crime would be a misdemeanor in New York. But the Appellate Division departments may set aside an interim suspension under §90.

Interim suspensions are public, but they are not regularly reported in commercial databases, so there is no easy way to identify the frequency with which an interim suspension is imposed or set aside in each department of the Appellate Division. Consequently, it is unclear whether the practice of interim suspensions or relief from them is uniform among the departments.

An interim suspension, when it occurs, will of course protect the public pending final hearing. But delay during an interim suspension will hurt the lawyer who is not ultimately sanctioned or whose sanction will be less harsh than the period of suspension.

E. ABA Model Rules for Lawyer Disciplinary Enforcement

The American Bar Association House of Delegates adopted the Model Rules of Lawyer Disciplinary Enforcement on Aug. 8, 1989, with amendments in 1993, 1996, 1999 and 2002. [22] These model rules cover a broad spectrum and include best practices covering the recommended structure of attorney discipline systems, the imposition of sanctions and procedural matters. New

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[22] See http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html

York has never adopted the rules and its practices are in many regards inconsistent with the ABA model (see Aug. 11, 2015 letter to the Commission from Rosen and Cohen, http://www.nycourts.gov/attorneys/discipline/resources.shtml)

II. RECENT HISTORY OF ATTORNEY DISCIPLINE IN NEW YORK

Over the years, New York's attorney disciplinary system has been roundly criticized as fragmented, inconsistent, lacking in transparency and ineffective in fulfilling its primary role of shielding consumers from unscrupulous or incompetent attorneys—in part because the process works so slowly. The issue has been the focus of myriad reports, studies, articles and legislative hearings.[23]

A 1985 report of the New York State Bar Association's Committee on Professional Discipline provides a helpful background on the New York State attorney disciplinary process.[24] It was inspired by a study of professional discipline published in 1970 by the American Bar Association. The so-called "Clark Report"[25] noted significant public dissatisfaction nationwide with attorney disciplinary procedures. Among the recommended reforms was statewide, centralized disciplinary systems—in sharp contrast to New York's system which, then and now, is divided among the four Appellate Division departments:

> A disciplinary system centralized on a statewide basis, with jurisdiction vested solely in the state's highest court and a single disciplinary agency with members distributed throughout the state provides the greatest degree

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[23] In 2009, the Senate Ethics Committee and Senate Judiciary Committee held hearings on the manner in which grievances against lawyers and judges are handled by their respective disciplinary watchdogs. At one of the hearings, in Albany, more than two dozen witnesses complained about the processes. See Stashenko, Joel, "Grievances Against Lawyer, Judge Discipline Panels Aired at Capital," *New York Law Journal*, June 9, 2009.

[24] See "A Comprehensive Study of the State of Discipline in New York State, " *New York State Bar Association Committee on Professional Discipline*, June 1985.

[25] The "Clark Report," formally titled "Problems and Recommendations in Disciplinary Enforcement," is posted to the "resources" section of the Commission's webpage at http://www.nycourts.gov/attorneys/discipline/resources.shtml

> of structural impartiality. Close personal relationships between accused attorneys and those who are to judge the charges against them are more likely to be avoided. A centralized disciplinary structure, moreover, provides uniformity in disciplinary enforcement throughout the state since only a single court and a single disciplinary agency are involved in the process. [26]

The "Clark Report" led to the creation of the New York State Committee on Disciplinary Enforcement, which was called the "Christ Committee." In 1972, the Christ Committee submitted a comprehensive report to the Judicial Conference calling for standardized and uniform procedural rules and regulations, adoption of the Code of Professional Responsibility, professional staffs, the maintenance of permanent records and other reforms. It did not, however, find any advantage in stripping the Appellate Division departments of their professional discipline jurisdiction and transferring that authority to the Court of Appeals.[27]

Eight years later, the Presiding Justice of the Appellate Division, First Department, Hon. Francis T. Murphy, invited the ABA's Standing Committee on Professional Discipline to evaluate the disciplinary system in that department. In 1981, Chief Judge Lawrence Cooke of the Court of Appeals extended that invitation to include the other three disciplinary systems in the state.[28] Pursuant to those invitations, in December 1982 the ABA Committee issued two reports, recommending a total dismantling of the current structure, to be replaced by a statewide court of discipline, a statewide administrative body, hearing committees and staff. [29] Those

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[26] See, "Problems and Recommendations in Disciplinary Enforcement," *American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, June 1970, p 26-27* (http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf).

[27] "A Comprehensive Study of the State of Discipline in New York State," *New York State Bar Association Committee on Professional Discipline*, June 1985. P.3, quoting from p. XI of the Christ Report.

[28] Ibid, p. 3-4.

[29] Ibid, p. 4.

recommendations were rejected in 1983 by the New York State Bar Association's Committee on Professional Discipline, which expressed concern that the ABA model "would establish a new bureaucracy with what our Committee believes would be a politicization of the disciplinary system." [30] In addition, the Brooklyn Bar Association, what was then the Association of the Bar of the City of New York and the New York County Lawyers Association issued separate reports, all opposing the ABA recommendation. [31]

In the subsequent decades, various studies and reports critiqued various aspects of the attorney disciplinary process in New York. One of the more recent critiques, authored by Professor Stephen Gillers (a member of this Commission[32]), the Elihu Root Professor of Law at New York University School of Law, was published in 2014 in the New York University Journal of Legislation and Public Policy. [33]

Gillers' research, which included analyzing 577 public disciplinary opinions issued between 2008 and 2013 and data dating back to the early 1980s, concluded that the current system is inconsistent in its application of disciplinary rules and the imposition of sanctions. For instance, he found that in the First Department conversion of client funds nearly always results in the attorney's disbarment, but a similar infraction in the Second Department is most often punished with a two-year suspension. Similarly, according to Gillers' research, the Second Department generally censures lawyers who commit tax fraud, while the First Department typically suspends attorneys for virtually identical misconduct. Yet, while generally finding that the First Department is the strictest in the state in its imposition of disciplinary sanctions, Gillers

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[30] Ibid, p. 5.

[31] Ibid, p. 6, footnote 3.

[32] Professor Gillers is a member of the Commission on Statewide Attorney Discipline and co-chair of the Subcommittee on Uniformity and Fairness.

[33] See Gillers, Stephen. "Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public," *New York University Journal of Legislation and Public Policy*, 17 N.Y.U. J. Legis. & Pub. Pol'y 485.

observed that the tribunal in Manhattan tends to be more tolerant of lawyers who are dishonest with their clients as opposed to those who mislead a court. Overall, he found that the Third and Fourth departments are generally considerably more lenient than their counterparts in Manhattan and Brooklyn.[34]

All New York lawyers are governed by the same Rules of Professional Conduct. And the First and Second Departments define "professional misconduct" in substantially identical language. But disciplinary cases—and sanctions—are adjudicated separately by the four Appellate Division departments. Gillers' examination of hundreds of disciplinary opinions from the four departments imply there are stark differences in the seriousness with which these courts regard the same misconduct, at least when measured by the sanctions they impose. He found that the courts opinions rarely if ever cite, let alone conform to, the sanctions imposed in the other departments, and that opinions outside the First Department often do not even attempt to harmonize a sanction with those of the same court's own precedent.[35]

Further, the New York State Bar Association's Committee on Professional Discipline regularly publishes a statistical analysis of disciplinary actions.[36] In its report for 2012 (the most recent posted to the Committee's web page, see https://www.nysba.org/copdannualreports/), the panel commented on the difficulty in evaluating and comparing disciplinary actions from department to department because the procedures are so varied:

> The multiplicity of disciplinary committees operating throughout the State results in each committee receiving a substantial number of inquiries and complaints that fall within the jurisdiction of other committees and which must then be referred out. Sometimes this is a

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[34] Ibid.

[35] Ibid.

[36] See https://www.nysba.org/copdannualreports/

> consequence of the complainant having chosen the wrong forum; other times it is a consequence of judicial policy requiring official staff review of all complaints relating to attorney conduct. For example, in the Second and Fourth Departments, all complaints received by the county bar association grievance committees (with the sole exception of those received by one association in the Fourth Department) are routinely referred to the professional staff of one of the district grievance committees. Even if the complaint appears to be nothing more than a fee dispute, by court rule in these Departments, a policy has been established to refer all inquiries to the district grievance committee's professional staff. Upon review, the district grievance committee, in turn, will refer a large portion of these matters to county bar association committees for further processing and investigation. Often a matter that was initially referred to the district committee will be referred back to the same county bar association.[37]

The Committee goes on to note that in the Second and Fourth Departments, "minor" complaints are generally processed by local bar association committees, while in the Third Department fewer than 10 percent of such matters are handled in that manner.[38] Further, it observes that since a portion—and in some departments, a substantial portion—of complaints are adjudicated by private, local bar groups rather than a court, statistical information on those matters is unavailable. All of this makes for a system where it is, as Gillers specifically states and the bar committee infers, virtually impossible to accurately compare processes and results in the four departments.

In short, this is a system that has been ripe for reform for many years.

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[37] See pages 3-4 of the 2012 Annual Report of the Committee on Professional Discipline at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=51302

[38] Ibid, page 5.

III. RECENT EFFORTS AT REFORM

There have been various recent efforts put forth to reform, revise or update the attorney disciplinary process in New York State. Those efforts, many of which necessitated legislative action, did not result in meaningful change.

Dating back at least to the early 1980s, a committee of what was then the Association of the Bar of the City of New York has endorsed greater transparency. A 1992 report of the Professional Discipline Committee of the City Bar (echoing another report by the committee a decade earlier), chaired by John M. Delehanty, proposed amending §90(10) to permit the public disclosure of disciplinary proceedings against lawyers after formal charges have been lodged.[39]

> We conclude that Section 90(10) advances the best interests of neither the public nor the bar and that it should be amended to provide for the opening of the proceedings when formal charges are filed...Section 90(10) is too restrictive. If it is true that the public is suspicious of the attorney discipline process because it is secret, then proceedings should be opened at the earliest practical point. Unless extenuating circumstances exist, there seems no compelling reason to keep secret charges against an attorney after a determination by an appropriate agency that the charge is one requiring adjudication. [40]

In 1995, the New York State Bar Association's Task Force on the Profession proposed a similar reform, and the Chief Judge's Committee on the Profession and the Courts followed suit the following year. Also in 1995, the New York State Bar Association's Committee on

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[39] See "The Confidentiality of Discipline Proceedings" in the January/February 1992 edition of *The Record of the Association of the Bar of the City of New York.*

[40] Ibid, p. 59.

Professional Discipline (issued after the committee was granted extraordinary behind-the-scenes access to sealed cases and the operations of the grievance committees) found that despite the lack of uniformity, underfunding and delays, the system was essentially working well.[41] In 1999, the Chief Judge's Committee to Promote Public Trust and Confidence in the Legal System supported openness, and a special committee of the State Bar did the same in 2000. At its annual January meeting in 2002, the State Bar debated a proposal that would have opened disciplinary records to the public once a prima facie case was established—on the condition that the four departments of the Appellate Division adopt uniform standards. But the bar declined to vote on the proposal and instead urged the Appellate Division to formulate statewide rules. That never happened.[42]

It bears noting that in 1986 the ABA adopted the Standards for Imposing Lawyers Sanctions to promote consistency.[43] It is also noteworthy that the American Bar Association has supported the concept of open disciplinary hearings since 1992 through its Commission on Evaluation of Disciplinary Enforcement. [44] The so-called "McKay Commission" report concluded: "[S]ecret records and secret proceedings create public suspicion regardless of how fair the system really is."[45] New York has, thus far, turned a deaf ear to the ABA's recommendations. As Professor Gillers notes in his article:

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[41] See "Lawyer Discipline in New York," a Feb. 10, 1995 report of the New York State Bar Association's Committee on Professional Discipline.

[42] Caher, John. "Study Urges Reform of 'Broken' Disciplinary System." *New York Law Journal* 27 May 2014.

[43] Gillers, 493.

[44] Caher, John. "Discipline Hearings a Hot Topic at Bar Meeting." *New York Law Journal* 23 Jan. 2002.

[45] Commission on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, Lawyer Regulation for a New Century 2 (1993), available at http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.

The Standards can be seen as the lawyer discipline counterpart to sentencing guidelines in the criminal context. The Standards state: "The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, or will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system and the legal profession.[46]

Some states use the Standards as a guide to determine sanctions. Other states never do, New York and California among them. But California has its own standards. New York has none. This is unfortunate. If there were statewide standards, or if the New York courts all used the ABA standards, the New York Appellate Division courts might come closer to imposing substantially the same sanction in similar circumstances throughout the state. Today, they are not.[47]

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[46] Standards for Attorney Sanctions for Professional Misconduct Section 1.3 (State Bar of Cal. 1986).

[47] Gillers, 493-494.

IV. THE COMMISSION'S WORK

Because of the breadth of its mandate and the size of Chief Judge Lippman's Commission, the group organized itself into three topical subcommittees, each led by three co-chairs, tasked with exploring the major issues before the panel: a Subcommittee on Uniformity and Fairness; a Subcommittee on Enhancing Efficiency; and a Subcommittee on Transparency and Access. The co-chairs and members of each subcommittee are noted on the Commission's website at http://www.nycourts.gov/attorneys/discipline/subcommittees.shtml. Initially, each subcommittee (and in several cases, working groups within the subcommittee) worked independently, each studying the issues within its particular orbit of concern. After the subcommittees had tentatively finalized their findings and proposals, the three reports were brought to the full Commission for discussion and debate, resulting in this report.

A. Initial Steps

Following its formation, the Commission or its subgroups met periodically (some meetings were conducted via teleconference) to formulate its plan to fulfill the Chief Judge's mandate. One of these meetings included a presentation by Ellyn S. Rosen, Deputy Director of the American Bar Association Center for Professional Responsibility, and Nancy L. Cohen, a member of the ABA Standing Committee on Professional Discipline and partner at MiletichCohen PC in Denver, and former chief deputy regulation counsel with the Colorado Supreme Court Office of Attorney Regulation Counsel. Ms. Rosen and Ms. Cohen provided the Commission with a broad national perspective on attorney discipline, offering insight into how New York's system differs from those of other states and how it compares to what the ABA would consider a model system.

In essence, Ms. Rosen and Ms. Cohen advised the Commission that New York's disjointed system has resulted in serious discrepancies in the manner in which professional

discipline is carried out in the four departments. A review of those four systems persuaded Ms. Rosen and Ms. Cohen that New York's procedures lack uniformity, that the rules of evidence are inconsistent and what may be admissible in one locale may be inadmissible in another, that the standard of proof necessary to sustain various charges of professional misconduct vary from region to region and that the potential range of penalties is erratic; for example, three of the departments have diversion programs in which attorneys whose misconduct is attributable to alcoholism or substance abuse, can be diverted outside the disciplinary system. But there is no such formal program in the First Department. They recommended a revised, centralized system with a consistent burden of proof, separate investigative and adjudicative functions and consistent standards.

On the issue of transparency, Ms. Rosen and Ms. Cohen stated that records on public discipline of attorneys remain difficult to access and recommended a more user-friendly and accessible website where consumers could readily determine if an attorney has been the subject of professional discipline. Further, Ms. Rosen and Ms. Cohen indicated that New York's system is almost singularly secretive, allowing the public to access disciplinary information only after a penalty is imposed by a court. In contrast, most other states make the information public at the point at which there is an official finding of probable cause and official disciplinary charges are lodged (a follow up letter from Ms. Rosen and Ms. Cohen is posted to the Commission's webpage at http://www.nycourts.gov/attorneys/discipline/resources.shtml).

B. Public Outreach

The Commission pursued input and insight from a broad spectrum of stakeholders—including consumers as well as attorneys—and made a concerted effort to publicize its public

hearings and encourage commentary (either at a hearing or through a written submission). Dozens of comments were received and reviewed.[48]

C. Public Hearings

The Commission held a series of public hearings around the state. A notice of the public hearings, which listed the date and location of the hearings, was released on June 25, 2015, and was: (1) published in the *New York Law Journal*; (2) posted on the Commission's website; (3) repeatedly "tweeted" through the Office of Court Administration Twitter social media account (NYSCourtsNews); (4) e-mailed to all ABA-approved law school deans; (5) emailed to approximately 100 representatives of state, local and affinity bar associations in New York State; (6) published in the Albany *Times Union*; (7) published in the *Daily Record*; and (8) published in the *Legislative Gazette*. The Commission invited oral and written testimony on the proposal from individuals, organizations and entities. Witness lists were posted on the Commission's website prior to each hearing. A podcast interview with then-Commission Vice Chair Cozier was prominently posted on the court system's website in June (audio and transcript available at http://www.nycourts.gov/admin/amici/index.shtml).

Testimony at the public hearings was somewhat restricted by time constraints and the Commission was unable to accommodate every individual who sought an invitation (even after extending the time for the New York City hearing from two to approximately four hours duration). However, the Committee made clear from the outset that anyone wishing to comment

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[48] A considerable number of the comments received by the Commission dealt with complaints which, if true, could form the basis for a claim of legal malpractice. The Commission finds it advisable to briefly address misconduct vis-à-vis malpractice, beginning with the acknowledgment that those two concepts are not necessarily mutually exclusive nor mutually inclusive: legal malpractice may well include professional misconduct; professional misconduct may well give rise to a parallel complaint of malpractice. On the other hand, malpractice and misconduct, while perhaps parallel, are different issues. Quite simply, attorney malpractice is a failure to exercise ordinary skill and knowledge, where that negligence results in damages to a client. By contrast, attorney misconduct is the failure to comply with the rules of conduct adopted by the courts. This Commission's focus was exclusively on attorney misconduct and, more specifically, the process from the initiation of a complaint through a finding of misconduct through the imposition of a sanction.

but unable to attend any of the hearings was free to submit a written statement. A total of 31 individual witnesses appeared at the hearings and approximately 50 interested parties submitted written comment.

Recurring topics at the hearings and in written submissions included: how to strike an appropriate balance between shielding an innocent attorney from reputation-damaging publicity while simultaneously providing the consuming public with the information it needs to make an informed decision on whether to retain a particular lawyer; whether the current disciplinary system should be replaced by a centralized system, thus removing attorney discipline from the control of the four separate Appellate Division departments; whether the current system could be retained while adopting more uniform procedures; whether a new entity, modeled after the Commission on Judicial Conduct, should be created to investigate allegations of prosecutorial misconduct; and an apparent crisis in confidence with at least some members of the public, who view the discipline system as it now exists as insular and designed more for the protection of attorneys than the protection of consumers. In general, attorneys and bar associations strongly favored retaining the existing confidentiality protections of §90 of the Judiciary Law while legal consumers urged more transparency. Several bar groups and attorneys suggested that the current disciplinary system should be replaced by a centralized system, and several others opposed that proposal (there was little comment from legal consumers on whether the process should be centralized or remain regional). But virtually all the witnesses who commented on the issue agreed that unified statewide rules and procedures should be adopted, that consistency among the four departments is paramount and that, to the extent feasible, the process should be streamlined to result in more prompt resolutions.

The Commission wishes to express its gratitude for the insight provided by the individuals and groups that took the time and made the effort to share their views and expertise on this topic. Complete transcripts of all three hearings are available on the Commission's website http://www.nycourts.gov/attorneys/discipline/.

1. Albany

The first public hearing was held at Court of Appeals Hall in Albany on July 28, 2015. At that hearing, the Commission heard from: (1) the executive director of the Lawyers' Fund for Client Protection (2) the deputy executive director of the Fund for Modern Courts; (3) the former chief attorney for the Commission on Judicial Conduct; (4) the president of the Albany County Bar Association; (5) a private citizen; (6) a member of the board "It Could Happen to You"; (6) and the president of the New York State Bar Association. Attendees included local attorneys, representatives of the New York State Senate and Assembly, a representative of the Third Department Committee on Professional Standards, private citizens and several members of the media. The hearing resulted in articles in the *New York Law Journal* (http://www.newyorklawjournal.com/id=1202733332962/Committee-Explores-Uniform-Attorney-Discipline-System?mcode=1202615704879), Albany *Times Union* (http://www.timesunion.com/local/article/Lawyers-Fund-Disbar-all-lawyers-who-steal-6410952.php), *Legislative Gazette* and *New York Daily Record.* In addition, the Associated Press transmitted an article about the hearing to its clients (see http://www.newsobserver.com/news/business/article29116984.html),Law360 posted an article on its website (http://www.law360.com/articles/684497) and the Albany *Times Union* published a subsequent editorial (http://www.timesunion.com/tuplus-opinion/article/Editorial-A-closer-eye-on-lawyers-6420735.php).

Also at the Albany hearing, the New York State Bar Association released a new report and recommendations by its Committee on Professional Discipline. The report, "Concerning Discovery in Disciplinary Proceedings" (available online at http://www.nysba.org/DownloadAsset.aspx?id=57725), recommended a series of changes to discovery procedures within the disciplinary framework.

A full transcript of the Albany public hearing was posted to the Commission's website within several days, and its availability was "tweeted" via the Unified Court System's Twitter feed (NYSCourtsNews) to more than 800 followers.

2. Buffalo

On Aug. 4, 2015, the Commission held a public hearing at the Erie County Ceremonial Courtroom in Buffalo. Testifying were: (1) the president of the Erie County Bar Association; (2) the president of the Minority Bar Association of Western New York; (3) the founder and chair of the organization "It Could Happen to You"; (4) the former chair of the Eighth Judicial District Attorney Disciplinary Committee; (5) a local attorney who represents lawyers accused of misconduct; (6) a law professor; (7) a legal consumer from Buffalo; and (8) a representative of the Western Mohegan Tribe and Nation of New York.

Twenty two people noted their attendance by signing a sign-in sheet, including representatives of the Erie County Bar Association, the Attorney Grievance Committee for the Fourth Judicial Department and the New York State Assembly. Media included a reporter and photographer with the *New York Daily Record* (http://nydailyrecord.com/blog/2015/08/05/ny-attorney-discipline-system-under-review/) and a reporter with the National Public Radio affiliate in Buffalo (http://news.wbfo.org/post/state-panel-visits-buffalo-hears-opinions-lawyer-discipline).

Again, the transcript was produced and posted promptly and prominently and noted in social media.

3. New York City

The third and final public hearing was held on Aug. 11, 2015, at the New York County Lawyers' Association in Manhattan. The witnesses were: (1) two representatives of the New York State Academy of Trial Lawyers; (2) an attorney in private practice; (3) an attorney who represents lawyers facing misconduct allegations; (4) a law professor; (5) two representatives of the Richmond County Bar Association; (6) the administrator/ counsel to the state Commission on Judicial Conduct; (7) the president of the Women's Bar Association of the State of New York; (8) a representative of the New York County Lawyers Association; (9) a representative of the New York City Bar Association; (10) a sociology professor/ legal consumer; (11) a retired

attorney/ legal consumer; (12) a legal consumer; (13) an attorney who had been the subject of disciplinary action; and (14) the director of a judicial reform organization, the Center for Judicial Accountability. The *New York Law Journal* published an advance article about the upcoming hearing on Aug. 10, 2015 (http://www.newyorklawjournal.com/id=1202734271410?keywords=stashenko&publication=New+York+Law+Journal).

Although the hearing was initially scheduled for two hours, the Commission members continued to hear testimony for approximately four hours. Roughly 80 people attended the hearing, including representatives of various reform organizations, private citizens, a representative of the New York State Assembly, a representative of the Suffolk County Board of Ethics, a reporter and photographer for the *New York Law Journal,* a representative of *Our Time Press* and an investigative reporter and photographer with *Long Island Backstory* (https://www.youtube.com/channel/UCtWOavnShvC6eY6n28FXfrA). A videographer producing a documentary on attorney discipline filmed the entire proceeding. The *Law Journal* published an article the following day. (http://www.newyorklawjournal.com/id=1202734518665/Commission-Hears-Pros-Cons-of-Uniform-Attorney-Discipline?mcode=1202615704879). *Law360* followed up with an online report on Aug. 24, 2015 (http://www.law360.com/articles/692868/ny-bar-seeks-elemental-rules-on-atty-discipline-discovery).

As with the other two hearings, a full transcript was promptly made available to the public on the Commission's webpage, and its availability was "tweeted" to more than 800 followers.

The following three sections of this report summarize the work, findings and recommendations of each of the subcommittees. It should be noted that while the subcommittee recommendations, as well as those of the full Commission, represent a consensus view, not all members agreed with each element of each proposal.

V. REPORT OF THE SUBCOMMITTEE ON UNIFORMITY AND FAIRNESS[49]

Today, each Appellate Division department administers discipline separately. Ordinarily, lawyers are subject to discipline in the Department in which they practice. The four Departments have their own rules and procedures, and rarely cite cases from the other Departments. There is variation between Departments in the extent to which they cite to the facts of their own precedent. There is also variation in the extent to which they detail the lawyer's misconduct and the aggravating and mitigating factors in the matter before them.

In other states, a statewide body—typically, the state's highest court or a statewide body under that court—has ultimate jurisdiction for lawyer discipline. California, for example, imposes most discipline through its State Bar Court, which has a hearing (trial) and a review (appeal) department and statewide jurisdiction. The California Supreme Court retains authority to review the State Bar Court's decisions.

Against that backdrop, the subcommittee divided its mission into two parts: uniformity and fairness as it relates to procedures and rules; and uniformity and fairness as it relates to sanctions. It is axiomatic that violations of the New York Rules of Professional Conduct should be dealt with similarly, regardless of region, and that consumers and lawyers should have the same procedural rights and responsibilities no matter where they happen to reside in this state of

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[49] The Subcommittee is co-chaired by Professor Stephen Gillers, Robert P. Guido, Esq., and Peter J. Johnson, Jr., Esq. The members are: Lance Clarke, Esq., Hon. Jeffrey Cohen, John P. Connors, Esq., Rita DiMartino, Vincent Doyle, Esq., Donna England, Esq., Nicholas Gravante, Esq., Sarah Jo Hamilton, Esq., Samantha Holbrook, Esq., Glenn Lau-Kee, Esq., Hal Lieberman, Esq., William T. McDonald, Sean Michael Morton, Esq., Hon. Fred Santucci, Eun Chong Thorsen, Esq., Mark Zauderer, Esq.

49,112-square-miles. Further, fundamental fairness requires that a transgression in one corner of the state should be dealt with in the same manner as a similar transgression that occurs in another corner, and that an attorney accused of misconduct in one region has the same procedural rights and remedies as an attorney in another locale.

A. Uniformity and Fairness in Procedure

The procedural disparities of the current system are described in a prior section of this report and documented in the follow-up letter from Ms. Rosen and Ms. Cohen (http://www.nycourts.gov/attorneys/discipline/resources.shtml). There can be no doubt that New York State's attorney disciplinary systems lack consistency and uniformity, leaving only the question of how best to remedy that problem. At the outset, the Subcommittee is persuaded that the inconsistency is indeed a problem, despite the contentions of some who argue that the regional differences are rooted in historic and cultural distinctions. Undeniably, the practice of law is different in Kings County, the largest county in the state by population, than it is in Hamilton, the smallest county in the state by population. That said, the Subcommittee observes that attorneys in Brooklyn and Lake Pleasant are governed by the exact same Rules of Professional Conduct, and concludes that those rules should, and must, be applied equally and consistently.

B. Uniformity and Fairness in Sanctions

On this prong of its analysis, the Subcommittee began its inquiry questioning whether there is in fact a lack of uniformity in sanctions. Because of a dearth of data and because public disciplinary opinions often lack even basic detail, the subcommittee was left largely with anecdotal evidence of disparity. However, there is no question that the *risk* of disparity is substantial, given that the four Departments decide lawyer discipline cases without reference to standards or precedents in similar cases from the other Departments and without statewide advisory guidelines on sanction. The following remedies were discussed:

- Give the Court of Appeals, the state's highest court, discretionary review of sanctions in disciplinary matters. That in itself would tend to foster consistency. However, it would require an amendment to §90 and possibly to the State Constitution provision defining the court's jurisdiction.

- Follow the California example and create a State Bar Court, with both hearing and review departments to handle all discipline statewide from complaint to conclusion, entirely displacing the Appellate Division departments. That would require an act of the Legislature.

- Create a statewide tribunal with limited and discretionary jurisdiction to review Appellate Division decisions (or certain categories of decision) on appeal by the respondent or the disciplinary agency. The composition of such a tribunal and its jurisdiction would have to be defined and established in statute.

- Create a statewide tribunal, responsible for all public discipline, with members chosen from among the four departments of the Appellate Division. For example, each department could designate one justice, and the four justices, perhaps aided by a dedicated law clerk or clerks, would administer all discipline in the state for a defined period. Overlapping terms for the justices would help ensure continuity. The court would be expected to make findings of fact and cite precedent. It may be possible to accomplish this change through court rules.

- Assign to a single Department the authority to administer all discipline in the state, rotating the responsibility periodically.

- Adopt an appropriately modified version of the ABA Standards for imposing lawyer sanctions. The ABA Standards address the nature of the misconduct and mitigating circumstances like substance abuse and depression. They are not binding, but there would be an expectation that they would be consulted and cited and that deviation from those guidelines would be explained.

- Urge each Appellate Division department, in its disciplinary rulings, to detail the facts of the violation and to describe the mitigating and aggravating circumstances, in the hope that simply providing a statewide repository of decisions would encourage consistency.

C. Discovery and Disclosure

While the Commission was conducting its inquiry, the New York State Bar Association Committee on Professional Discipline issued a report "Concerning Discovery in Disciplinary Proceedings."[50] The report, and the testimony of NYSBA President David Miranda at the July 28th public hearing in Albany,[51] revealed that New York State currently has perhaps the nation's most restrictive rules on the information that is available to attorneys who are the subject of a disciplinary complaint. NYSBA offered five recommendations:

- The respondent attorney should always receive the initial complaint and supplemental materials.

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[50]See http://www.nysba.org/DownloadAsset.aspx?id=57725

[51] See Albany Public Hearing Transcript at http://www.nycourts.gov/attorneys/discipline/Documents/AlbanyTranscript.pdf, pages 55-63

- The respondent attorney should have access to exculpatory materials and portions of the investigatory file that would not jeopardize the investigation or constitute work product.

- The respondent attorney should have the right to subpoena third-party documents that are relevant to the complaint and not in the possession of a disciplinary committee.

- The respondent attorney should be allowed to obtain certain, carefully delineated materials submitted to the disciplinary committee.[52]

- The referee should have the authority to compel depositions of the complainant. The Subcommittee can support this proposal, with the caveat that depositions should only be compelled upon a showing of good cause. Concerns were raised by Commission members that an unrestricted or insufficiently monitored deposition rule could tend to have a chilling impact on complainants. If those concerns—ensuring fairness for the respondent as well as the complainant without stifling the ability of consumers to pursue a complaint—can be balanced, this Subcommittee can support mandatory depositions in appropriate, carefully screened instances.

The Subcommittee recommends, in the event the Administrative Board adopts uniform, statewide rules regulating and standardizing disciplinary procedure, that those rules include discovery reform providing, at a minimum, the following: (1) reciprocal disclosure of all prior

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[52] The Subcommittee urges great caution in this regard, and would oppose any rule requiring or even allowing disclosure of the confidential work product of the disciplinary committee staff.

statements of witnesses, including experts, and (2) disclosure to the respondent of all statements submitted by the complainant or other source which forms the basis for an investigation, all statements obtained from the respondent during the course of the investigation, and any exculpatory evidence.

A minority of the Subcommittee urged that the rules for discovery should allow the respondent to examine witnesses under oath in advance of any hearing; however, the majority of the Subcommittee disagreed, with the understanding that disciplinary proceedings should be uniformly treated as "special proceedings" governed by CPLR Article 4, and thereby allowing either party to seek such additional discovery as it deems necessary, upon motion to the court.

D. Conclusion

The Chief Judge, in a press release announcing the formation of the Commission, asked that it address "whether conversion to a statewide system is desirable." Certainly, if this Commission were starting from scratch and creating an attorney disciplinary system in the first instance, there is no question it would establish a single, statewide structure rather than the existing four-part configuration. However, it is not starting from scratch and the question distills to whether the current system is so dysfunctional and so unworkable that the only remedy is to tear it down and start over. On the contrary, the Subcommittee is of the view that while the system is most definitely in need of re-examination and reform, a complete dismantling is unwarranted and unnecessary. The Subcommittee is confident that many of the ills and perceived ills of the current system, which are clearly described in this report, can be addressed and remedied with fairly simple reforms that can be implemented administratively and expeditiously, without the need for constitutional amendment or statutory revision.

While the Subcommittee does not find a need to create a new statewide disciplinary system, it finds a pressing need for rejuvenation, coordination and uniformity in both procedure and sanction. Unfortunately, this Commission does not have the luxury of time to unilaterally determine, *in toto*, which procedures and practices of the various Appellate Division

Departments should be adopted statewide, whether there should be a uniform penalty for, say, escrow thefts or violations of the advertising regulations, or what those sanctions should be. However, it recommends the following uniformities as a starting point, and with the suggestion that the ABA guidelines would provide a good model for New York:

- Adopt a statewide, uniform definition for what constitutes "professional misconduct."

- Adopt statewide, uniform range of sanctions that may be issued upon the disposition of a disciplinary complaint, with standardized terminology and definitions, from dismissal through disbarment.

- Ensure that all complainants are entitled to the same type of information in every department.

- Harmonize the rules to regarding the process for acceptance of a resignation.

- The Departments should uniformly provide a procedure for the circumstance where an attorney has been judicially declared incompetent or has been involuntarily committed. To the extent they are inconsistent, the Departments' rules concerning an incapacity adjudication should be fully harmonized. Appointment of an attorney to safeguard client interests should be uniformly authorized, as in the Appellate Division, Third Department, "whenever there are reasonable grounds to believe that an attorney has abandoned or is seriously neglecting his practice to the prejudice of his clients." Likewise, the Departments should uniformly adopt a procedure for suspension of an attorney under investigation who contends that he or she is suffering from a disability or

incapacity that makes it impossible for him or her to adequately mount a defense (see e.g. 22 NYCRR 806.10 [b]).

- The Departments should uniformly adopt procedures for the adjudication of felony/serious crime cases. Such procedures should establish the role of the Committee at the beginning stages of the adjudication, set forth the notice to be provided to the attorney at the inception of the proceeding and define the Committee's role where the crime does not constitute a felony/serious crime. Uniform rules should also provide that, upon a showing of good cause by the respondent attorney, the Court has the discretion, but not the obligation, to suspend a respondent who has committed a serious crime pending determination of final discipline (see Judiciary Law § 90 [4] [f]).

- Synchronize the rules of the Departments with a regard to the rights a respondent attorney has to be heard before a court in defending against a misconduct charge or in offering evidence in mitigation.

- The disparate rules of the Departments should be harmonized to require that all reinstatement applications are to be made on motion in the context of the proceeding giving rise to the suspension or disbarment. The Committee should be afforded an opportunity to be heard as a matter of course, and reference to a referee or the Committee on Character & Fitness should be in the Court's discretion. The Departments should uniformly adopt the "six-month rule" currently in use in the Appellate Division, First Department, to provide for expedited reinstatement from short-term suspensions.

- Adopt a uniform rule which codifies a collateral estoppel procedure (see generally *Matter of Dunn*, 24 NY3d 699 [2015]), likely similar to the procedures employed in the felony/serious crime conviction process.

- Promulgate statewide policy reasons for rejecting complaints at the threshold stage of the screening process, and standardize the process to ensure that complainants are provided with the reason(s) for that determination.

- Afford complainants the right to seek further review when the complaint is rejected upon initial screening, especially if rejection is permitted on authority of the Chief Attorney alone.

- Because the decision to commence a formal proceeding exposes the attorney to the severest of consequences, the process should be uniform statewide to avoid disparate treatment among the Departments.

- Bring the process in the First Department into conformity with the remainder of the state by requiring complaints to be disposed of upon a majority vote of the full committee, and eliminating the use of "hearing panels" in formal disciplinary proceedings.

- Harmonize the rules of all Departments to make clear that the authority to commence a *sua sponte* investigation does not vest in the Chief Attorney alone, but requires the additional approval of either the full Committee or the Chair.

- Amend the rule in the First Department to allow for the threshold determination to be made on the authority of the Chief Attorney alone, so long as a mechanism remains in place for the complainant to seek further review.

- Retain the statewide practice of fixing venue based upon the registered office address, and secondarily on the residence address.

- Ensure that the bases for both jurisdiction and venue account for the increasing use of the "virtual office" for conducting a practice (no physical presence).

- Inasmuch as the Admonition is the most serious action the Committee can take short of recommending the commencement of a formal proceeding, and because it constitutes "discipline," the process for issuing same, and the available remedies, should be the same for attorneys statewide, and thus should be harmonized. The harmonized process should allow discretion for the Admonition also to be issued orally to the respondent in appropriate cases.

Details should be worked out among the departments, with the assistance of a newly created statewide Coordinator of Attorney Discipline[53], who would function as a liaison/ resource for the four judicial departments and whose precise powers and functions would be defined by the Administrative Board of the Courts. The Commission envisions that the Coordinator would be tasked with assisting the Board in fostering uniformity in procedure and sanction, encouraging communication and consistency among the separate departments,

[53] Approximately five members of the Commission opposed the creation of this position.

producing an annual statistical report providing statewide data on the administration of attorney discipline, and recommending ongoing reforms as deemed necessary.

The Subcommittee and full Commission wrestled with the issue of whether there should be, in effect, "sentencing guidelines" to provide the disciplinary bodies with at least a frame of reference in which to administer sanctions. Cognizant that a "one-size-fits-all" approach rarely succeeds, the Subcommittee recommends the adoption of non-binding standards and general guidelines for imposing sanctions; non-binding, essentially advisory guidelines are of course inadequate without some expectation that they will be followed. Again, the details—such as what the usual sanction should be for an escrow theft, for a violation of the advertising rules, for client neglect, etc.—should be established jointly by the four Departments of the Appellate Division, with the assistance of the Statewide Coordinator. The Statewide Coordinator of Attorney Discipline should promptly issue a report to the Administrative Board and the public documenting disparities in sanction and recommending guidelines. Going forward, deviations from those guidelines should be explained in the Court's decisions and orders. That could be accomplished simply by stating mitigating or aggravating factors that warranted a lesser or greater sanction than would be the norm for a particular offense.

In sum, the Commission recommends approval by the Administrative Board of the Courts, and by each Department of the Appellate Division, of statewide uniform rules and procedures governing the processing of disciplinary matters at both the investigatory and adjudicatory levels, from intake through final disposition, which strike the necessary balance between facilitating prompt resolution of complaints and affording the attorney an opportunity to fairly defend the allegations. These new rules and procedures should include uniform discovery rules and information-sharing for attorneys who are the subject of a disciplinary complaint. This recommendation is of the highest priority and a firm deadline for adoption should be established.

VI. REPORT OF THE SUBCOMMITTEE ON ENHANCING EFFICIENCY[54]

The Subcommittee on Enhancing Efficiency evaluated how to achieve dispositions in attorney disciplinary matters fairly and efficiently so as to provide closure to both attorneys and complainants.

A. Methodology

To determine whether undue delay exists in the disciplinary process, the Subcommittee considered testimony received during hearings held by the Commission in Albany, Buffalo and New York City from July 28 through August 11, 2015, and written submissions from numerous bar leaders, attorneys and legal services consumers. The Subcommittee additionally considered data collected from the four Departments of the Appellate Division with respect to disciplinary matters that resulted in a final court order of sanction during a three-year period (2012 to 2014). We appreciate the efforts of the Chief Counsel and the Clerks of the four Departments in providing all of this information to us. It was no easy task to gather all of the requested information.

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[54] The Subcommittee is co-chaired by: Hon. Peter B. Skelos, Hon. Stephen K. Lindley and Milton L. Williams, Jr., Esq. The members are: Hon. James Catterson, Ronald Cerrachio, Esq., Monica A. Duffy, Esq., Charlotte Moses Fischman, Esq., Emily Franchina, Esq., Fredrick Johs, Esq., Christopher Lindquist, Esq., Hon. Eugene Nardelli.

B. Summary of Evidence

From the hearings and submissions, the Subcommittee heard numerous complaints, much of them anecdotal, suggesting, inter alia that: delays in the resolution of disciplinary matters are exacerbated by inadequate funding; too much time is expended on certain types of complaints (such as those involving failure to communicate) that could be resolved expeditiously and satisfactorily though mediation; the use of hearing panels in the First Department contributes to delay because of the difficulty accommodating various schedules; time is unnecessarily expended during the reinstatement process, the result being that a one-year suspension may end up being a two-year suspension simply because disciplinary authority is backlogged; and the lack of any sort of "speedy trial" rule means there is no incentive to expedite resolution. Again, this commentary (while compelling) was largely anecdotal and the Subcommittee sought more concrete data.

Consequently, in addition to the witness testimony and written submissions summarized herein, the Subcommittee considered data received from the Clerks of the Appellate Division departments and Chief Counsels to the disciplinary committees with respect to a total of 458 disciplinary matters that resulted in a final court order of public discipline (i.e., censure, suspension or disbarment) entered between 2012 through 2014. The data received allowed the Subcommittee to calculate a best estimate of the average time the disciplinary committees took to conduct investigations and the courts took to enter a final order of discipline after proceedings were filed. Those best estimates are as follows:

Table A – Average Time Frames for Disciplinary Proceedings	**AD1**	**AD2**	**AD3**	**AD4**	**AVG**
Total Matters Determined (2012-2014)	156	163	88	51	115
Average Total Days for All Matters – Date of Opening of Investigation through Final Order	963	1072	767	620	856
Average Total Days for Investigation of All Matters - Date of Opening of Investigation through Proceeding Filed in Court	655	646	430	365	524
Average Total Days for Court Proceedings in All Matters – Date of Proceeding Filed through Final Order	308	426	337	255	332
Average Total Days for Court Proceedings for Convictions – Date of Proceeding Filed in Court through Final Order	260	215	119	357	237
Average Total Days for Court Proceedings for Charges of Misconduct- Date of Petition Filed in Court through Final Order	515	761	277	295	462

As set forth in Table A, disciplinary proceedings took an average total time of 856 days (Row 2) from beginning to completion, which represents the average time across the four Departments between the opening of a disciplinary investigation by the disciplinary committees and the entry of a final court order by the Appellate Division department. The investigation phase took an average of 524 days (Row 3), which represents the average time between the opening of an investigation and the commencement of a proceeding with the Appellate Division. Of the 458 matters that were considered by the Subcommittee, almost all of the proceedings were initiated in the Appellate Division by the filing of a petition alleging professional misconduct or a notice that an attorney had been convicted of a crime. Once proceedings were filed with the Appellate Division, the proceedings took an average of 332 days (Row 4), with proceedings arising from a conviction resulting in a final order after 237 days (Row 5) and petitions alleging misconduct resulting in a final court order after 462 days (Row 6).

The Subcommittee notes that the average time frames in Table A concern only those matters that resulted in a final court order of public discipline and, thus, those averages do not take into account any of the other work of the disciplinary committees or the Appellate Divisions, which is substantial. Such other matters include the disciplinary committees processing and investigating complaints that ultimately are dismissed or disposed of with a private letter of discipline, and the committees and the courts processing applications for reinstatement, incapacity, diversion, or interim suspension.

Because several witnesses testified that the disciplinary authorities lacked adequate staffing and funding and that increased staffing or funding may enhance the efficiency of the disciplinary process the Subcommittee evaluated the staffing levels of the disciplinary committees compared to the average number of matters processed by the committees during the time period from 2012 through 2014 and the total number of attorneys under the jurisdiction of those committees. Other than the number of attorneys under the jurisdiction of the committees, the Subcommittee obtained the relevant data from the annual reports filed by the disciplinary committees with OCA.

Table B – Data from Annual Reports of the Committees	**AD1**	**AD2**	**AD3**	**AD4**
Total Attorneys	134,956	82,669	64,958	18,277
Total New Matters	3,530	5,187	1,895	1,927
Matters Dismissed - Failure to State a Claim	318	2,347	596	1,017
Matters Disposed	2,920	5,236	1,875	1,903
Matters Pending - End of Period	991	2,601	1,541	530
Counsel on Staff	20	31	6	7
Investigators on Staff	4	5	2	5

C. Issue 1: Is There Undue Delay?

Overall, the proof before the Subcommittee indicates that disciplinary investigations and proceedings, on average, take longer in the First and Second Departments, as compared to the Third and Fourth Departments. The Subcommittee recognizes, however, that simply calculating a best estimate of the average days it took for the disciplinary committees to investigate and determine disciplinary complaints, or the average number of days a matter was pending in the Appellate Division, does not establish that "undue" delay exists. Indeed, some delay may be productive (e.g., diversion for low-level offenders who suffer from substance abuse or mental health issues). In addition, the Subcommittee agrees that the speedy resolution of disciplinary complaints should not be sought at the expense of the due process rights of the accused attorney. Thus, the Subcommittee evaluated the proof and potential remedies for any undue delay that may exist in the process with those principles in mind.

D. Issue 2: Potential Causes of Undue Delay

Remedies suggested by witnesses and other proof indicate that there are several potential causes of undue delay in the disciplinary process in New York:

- Inadequate resources for the disciplinary authorities.
  Testimony and comments reviewed by the Subcommittee suggests that all of the disciplinary committees are understaffed, both in terms of the number of investigators and attorneys. It is apparent that caseloads far exceed the ability of the attorneys and investigators to process claims quickly.

- Lack of actual or perceived discretion to dispose of complaints that lack merit.
  Although the Second, Third and Fourth Departments reject approximately 30 to 50 percent of disciplinary complaints as failing to state a claim, in the First

Department the rejection rate is only 9 percent. This indicates that the disciplinary authorities in the First Department may want to reevaluate the process by which complaints are evaluated and either rejected or referred for further action.

- Inefficiencies in the disciplinary process.

  Aside from inadequate resources afforded to the disciplinary committees, the most common concern raised in the hearing testimony was procedural impediments to the efficient resolution of disciplinary complaints.

Certain witnesses recommended that the Courts adopt procedures whereby, after a grievance committee determines that formal charges are warranted, the parties may agree on a statement of facts, enter into a "plea bargain" to resolve charges of misconduct, or agree on a proposed sanction. It was suggested that such procedures would remove lower level offenses from the time-consuming and expensive process of resolving contested matters.

Similarly, certain witnesses recommended that more formal discovery rules be adopted by the courts. It was suggested that information sharing early in the investigation could reduce disputed issues of fact. It was additionally suggested that the rules of the court be revised to allow for expedited procedures for "routine" proceedings such as felony disbarments, applications for subpoenas by the grievance committees, applications for resignation, and applications for reinstatement, particularly where the matters are uncontested or likely will not involve extensive fact finding.

In addition, the lack of an "administrative" suspension procedure for attorneys who are delinquent in registering or paying registration fees likely causes unnecessary work for the disciplinary authorities.

On that point, the Subcommittee members note that, within the past 10 years, the disciplinary committees in New York have been tasked with pursuing attorneys who are

delinquent in registering and paying the related registration fee. The disciplinary committees report that these matters are extremely time consuming and, in many cases, the delinquent attorneys are no longer in New York or are no longer residing or practicing law at the address that is on file with the Office of Court Administration, causing the committees to spend an inordinate amount of time and resources locating and serving them with disciplinary charges.

Specific to disciplinary proceedings that arise after an attorney is convicted of a crime, certain members of the Subcommittee note that, although Judiciary Law § 90 (4)(c) requires that the attorney report the conviction to the Appellate Division within 30 days, convicted attorneys routinely fail to comply with that requirement and, in many cases, the courts or the disciplinary committees do not otherwise become aware of a conviction, leading to undue delay in the processing of those matters. Regarding disciplinary proceedings that concern alleged trust account violations, certain members of the Subcommittee note that the processing of such matters would be much more efficient if the disciplinary committees and their counsel were provided with resources to facilitate trust account audits and trust account reconciliations in contested matters.

Finally, with regard to the First Department, it was suggested that the use of the two-tiered hearing process (i.e., hearing officers followed by hearing panels) may result in undue delay because of the difficulties in scheduling the proceeding before the numerous members of the hearing panels.

E. Conclusion

Based on the evidence submitted to the Commission, research and analysis conducted by the members of the Subcommittee, and their personal experience with the disciplinary process, the Subcommittee on Enhancing Efficiency makes the following recommendations:

- Additional funding and staffing must be made available to the disciplinary committees. Inasmuch as the Subcommittee believes that the public's confidence in the disciplinary process and the attorney's due process interests are best served by the prompt investigation and resolution of disciplinary complaints. The disciplinary committees are not able to improve their efficiency in the handling of disciplinary cases without additional staff and resources.

- The disciplinary authorities should be provided resources to enhance their ability to enforce the trust account requirements imposed on all attorneys. Accounting training or additional staff with accounting expertise should be provided to the committees, allowing for an increase in the number of trust account audits conducted and enhancing the efficiency of disciplinary investigations and contested proceedings that concern an alleged violation of the trust account rules.

- Court rules and procedures should be revised to allow the grievance committees and respondent attorneys to adopt stipulated facts or a statement of agreed upon facts, and to allow "plea bargaining" or discipline on consent whereby the parties could agree to a predetermined sanction, subject to approval by the appropriate grievance committee or Appellate Division department. In addition, the Subcommittee recommends that the court rules be revised to facilitate information sharing between staff counsel and an attorney accused of misconduct. Such revisions could include mandatory document disclosure at an early stage in the process, whereby each party is obligated to disclose the proof upon which they intend to rely in the event formal charges are sought by the committee.

- The Appellate Division should adopt uniform procedures to be followed by the grievance committees in evaluating new matters, including uniform circumstances

under which the Chief Counsels to the grievance committees may dismiss a disciplinary complaint before an investigation is conducted by the committee. Such circumstances may include when a committee lacks jurisdiction over the complaint or when the complaint, even if accepted as true, fails to allege professional misconduct by the attorney.

- Each grievance committee should adopt procedures to be followed at the outset of any investigation that strike a balance between facilitating the prompt resolution of complaints and affording the attorney an opportunity to defend the allegations. Particular attention should be paid where the attorney fails to respond to a complaint or provides an incomplete response. Thus, upon such a failure to respond, the committee should have the authority to issue a subpoena within 60 days and, upon the attorney's failure to comply with the subpoena, promptly move for an order suspending the attorney on an interim basis.

- Staff counsel should be required to provide to the grievance committees status reports that detail the work that has been performed and the anticipated work remaining and estimated time to complete investigations or disciplinary proceedings that have been pending for more than one year. Whether any matter is experiencing undue delay should be evaluated against a uniform standard, developed by an appropriate authority and applicable to all four Departments, and after considering any particular circumstances relevant to the matter.

- Court rules should be evaluated and revised where appropriate to streamline procedures and to eliminate duplication for certain disciplinary proceedings that, by their very nature, do not require extensive fact-finding. Examples include

reciprocal discipline, felony disbarments, applications for resignation from the practice of law, and uncontested reinstatement applications.

- Court rules should be revised to allow for an "administrative" suspension for attorneys who fail to register or pay registration fees. The administrative suspension should be imposed automatically after a set time period and a set number of written notices have been sent to the attorney, without a requirement that the attorney be personally served with such notices or the threat of suspension. The administrative suspension could be lifted without court involvement when the attorney is no longer delinquent. Although failure to register and pay registration fees may technically constitute professional misconduct in New York, the Subcommittee believes that the disciplinary expertise and resources of the committees are unnecessarily expended on this purely administrative function. Thus, the Subcommittee recommends that these matters be removed from the disciplinary process altogether and the court rules be revised to uniformly allow for "administrative" suspension and reinstatement of attorneys who are delinquent in timely registering or paying registration fees. Such "administrative" suspension should occur automatically after a period of delinquency and following written notice to the attorney. In revising these rules, particular attention should be paid to streamlining the process as well as to enhancing coordination and the exchange of information between each Department of the Appellate Division and the Office of Court Administration.

- Court rules should be revised to provide for a statewide reporting requirement whereby judges and district attorneys are required to file a report to the Appellate Divisions or disciplinary committees whenever they become aware that an attorney has been convicted of a crime.

- The Appellate Division departments may consider utilizing volunteer special counsel or pro bono counsel in complex disciplinary matters.

- The First Department may consider re-evaluating its two-tier hearing process which utilizes both hearing officers and hearing panels.

VII. REPORT OF THE SUBCOMMITTEE ON TRANSPARENCY AND ACCESS[55]

In considering whether the attorney disciplinary process in New York should be opened to the public, the Subcommittee recognized that the primary purpose of the disciplinary system is to protect the public. The Subcommittee also recognized that the system has important regulatory, educational and rehabilitative goals, as well as fostering public confidence in the system. Its mission was to consider whether each of these goals would be served by permitting the public to be privy to disciplinary proceedings, and also to explore some of the specific ways in which an open system would work, and what changes or improvements might need to be implemented to effectuate it.

At the initial meeting of the Subcommittee, specific topics were identified as requiring study, and members were divided into groups to research those topics and report back at a later meeting. The topics were as follows:

- Rules governing confidentiality of disciplinary proceedings in jurisdictions outside of New York and American Bar Association recommendations.

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[55] The Subcommittee is co-chaired by Co-chairs: Hon. Angela M. Mazzarelli, Devika Kewalramani, Esq., and Professor W. Bradley Wendel. The members are: Harvey Besunder, Esq., Hon. Carmen Beauchamp Ciparick, Robert Giuffra, Esq., Hon. E. Michael Kavanagh, Jerold Ruderman, Esq., Sheldon K. Smith, Esq., Akosua Garcia Yeboah.

- Mechanics of how an open disciplinary process would work in New York (the "when, what and how").

- Dissemination to the public of information concerning attorney discipline.

- Functioning of the four Departments/Uniformity of process.

A. Other Jurisdictions

The Subcommittee reviewed a survey conducted by the ABA Center for Professional Responsibility of all 50 states and the District of Columbia concerning the stage of a disciplinary proceeding at which the process becomes open to the public. Although the nuances may differ, the vast majority of jurisdictions open proceedings upon the filing of a formal charge following a finding of probable cause. New York is one of only 9 jurisdictions[56] which do not permit public dissemination of information concerning disciplinary proceedings until, at the earliest, a recommendation that discipline be imposed, and usually upon a final adjudication.

B. Mechanics

The Subcommittee studied the final reports of the American Bar Association's Commission on Evaluation of Disciplinary Enforcement (the McKay Commission), which released its report in 1992, and the New York State Committee on the Profession and the Courts (the Craco Committee), which released its report in 1995. The McKay Commission recommended that "[a]ll records of the lawyer disciplinary agency except the work product of disciplinary counsel should be available to the public" and that "[a]ll

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[56] The information in the survey was current as of May 27, 2014. The eight other states are Alabama, Delaware, Iowa, Kentucky, Mississippi, South Dakota, Tennessee and Wyoming.

proceedings except adjudicative deliberations should be public." The Craco Committee recommended opening up the disciplinary process in this State. The Craco Committee was not as clear as the McKay Commission in delineating between disciplinary records and public hearings, but recommended that "the Legislature . . . amend Judiciary Law Section 90(10) to open disciplinary proceedings to public scrutiny," with a provision enabling the Appellate Division, in its discretion, "to close the proceedings for good cause shown."

The McKay Commission and the Craco Committee proposed benchmarks that differ in terminology but are similar in substance as to when a case against an attorney may be deemed strong enough to justify publicizing it. The former group recommended that records become available, and proceedings be opened, to the public, "after a determination has been made that probable cause exists to believe misconduct occurred." It did not define the term "probable cause."[57] The latter panel proposed a uniform standard across the Departments, to wit:

> "that formal charges be filed against a lawyer upon a finding that a prima facie case exists against the lawyer. We define prima facie purpose (sic) as sufficient evidence, if not contradicted, to support the conclusion that a lawyer has committed an ethical violation recognized by the Lawyer's Code of Professional Responsibility. Stated in other terms, for a prima facie case to exist, all the elements comprising a violation of a disciplinary rule must be established by sufficient evidence, if it is not contradicted by other credible evidence, to the satisfaction of the entity making the determination."

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[57] In 1995, the New York State Bar Association's Task Force on the Profession also recommended opening disciplinary proceedings on a showing of probable cause, defining the standard as "requiring disciplinary counsel to show that it is more likely than not that serious misconduct has occurred."

The Subcommittee, again looking to the work of the other bodies that studied the issue,[58] considered ideas for how to make attorney discipline public. Although the McKay Commission did not make any concrete suggestions on this subject, the Craco Committee did. First, it recommended that the grievance committee, upon a finding of probable cause and the filing of charges, add the attorney's name to a list to be maintained by the committee with a caution to the public that charges have not yet been proven. The committee would be required to remove the attorney from the list in the event the charges are dismissed. Presumably, if this proposal were adopted today, the list would be maintained online and updated, as necessary. The Craco Committee further suggested that the prima facie determination be made by a group of disciplinary committee members (as opposed to members of the staff) or the Appellate Division. Finally, it recommended that, before charges were filed, the target attorney be afforded some due process to challenge any conclusion that a prima facie case exists.

C. Dissemination of Information

The Subcommittee studied the current system for notifying the public about disciplinary action against attorneys. Presently, the only method for members of the public to determine the disciplinary status of an attorney is online. There are no printed materials or telephonic system for accessing such information. Further, all available information is currently exclusively available in English.

The website for the Office of Court Administration has a link on its home page for "Legal Profession." A sub-link is entitled, "Attorney Directory." Clicking on that sub-link takes one to an "Attorney Search" page that contains a "captcha box," where one

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[58] The Subcommittee recognizes that the McKay Commission and the Craco Committee issued their reports long before the advent of social media, which has the potential to cast a much broader spotlight on attorneys who are subjected to disciplinary proceedings.

must enter a series of arbitrary characters (there is an option to listen to the characters) to prove that he or she is not an automated program (or "bot") designed to extract or mine data for commercial or other purposes. Once the actual search page is accessed and an attorney is selected, the results page (which reports name, registration number, professional affiliation, address and telephone number, year and department of admission, law school attended and registration status) will show whether there is any public disciplinary history, and if there is, state what the history is and include a link to any available reported decisions.

D. Confidentiality

Judiciary Law §90(10) governs confidentiality of disciplinary proceedings and applies to all four judicial departments. However, the respective rules of the departments further refine the practices and procedures for investigation and, if necessary, prosecution, of grievances against attorneys. First Department Rule 605.24 ("Confidentiality") provides as follows:

> (a) **Confidentiality**. Disciplinary committee members, committee lawyers, committee employees, and all other individuals officially associated or affiliated with the committee, including pro bono lawyers, bar mediators, law students, stenographers, operators of recording devices and typists who transcribe recorded testimony shall keep committee matters confidential in accordance with applicable law.
>
> (b) **Waiver**. Upon the written waiver of confidentiality by any Respondent, all participants shall thereafter hold the matter confidential to the extent required by the terms of the waiver.

The Second Department has its own confidentiality rule (Section 691.4(j) – "Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential.").

The Third Department's rules do not contain a broad confidentiality provision. They do state, however, that where an attorney has been admonished or cautioned, "[t]he committee's records relating to its investigation and sanction shall be confidential" (Section 806.4 [c][5]). They further provide that, where an attorney has been suspended on an interim basis, "[t]he papers submitted in connection with the application therefor shall be deemed confidential until such time as the disciplinary matter has been concluded and the charges are sustained by the court" (Section 806.4 [f][3]).
The Fourth Department does not have any specific rules related to confidentiality.

E. Filing of Formal Charges

The four departments also differ in the manner in which a determination is made to institute formal charges against an attorney after the filing of a preliminary complaint. For example, there are differences in how the committees approve the filing of formal charges. In the First Department, two members of the Policy Committee approve the filing; in the Second, Third and Fourth Departments, it must be a committee determination. Further, only the Second and Fourth Departments apply a probable cause standard to determine whether to file formal charges, and only the Second Department appears to permit a probable cause hearing before a subcommittee of the committee. There are also dissimilar "majority" voting requirements for approval of filing of formal charges. The Second Department requires a majority vote of the full committee; the Fourth Department requires a vote of the majority of committee members present; and the First and Third Departments do not specify any such requirement. Finally, only the Fourth Department allows the attorney to appear before the committee and be heard before the issuance of formal charges.

F. Conclusion

The Subcommittee recognizes that the paramount concern of the attorney disciplinary process is the protection of the public, and that the public would be better served if the disciplinary process is structured so that it is more accessible to the public. Engaging the public in the process can only serve to advance that fundamental and important goal that underlies the system of attorney discipline. Accordingly, the Subcommittee recommends that New York join the vast majority of United States jurisdictions which permit public access to disciplinary proceedings.

It is important to recognize that the primary purposes underlying the attorney disciplinary system are regulatory, educational and rehabilitative. In addition to sanctioning attorneys with disbarment, suspension, and public censure for crimes or serious misconduct, the system offers diversion programs for less serious misconduct, such as substance abuse and alcohol-related counseling. There is a need to delineate between young or wayward lawyers who would be best served by positive action that steers them to the right path, and those who are "rotten apples" who should be removed from the bar either temporarily or permanently. Those attorneys who mostly need a helping hand may not be best served if their involvement with the disciplinary system is made public. There are also concerns that important factors (such as mental or physical health issues, family issues, dependency and other significant mitigating or diversion factors) only come to light after a probable cause or similar charge finding has been made, or perhaps even during a trial, and that any publicity of such information could unnecessarily cause irreparable harm to the respondent attorney. Additionally, there is a concern that complainants might be deterred from lodging complaints against attorneys if they knew the matter would expose them to the media or otherwise make their private concerns public. Some mechanism may need to be devised to deal with these practical considerations.

It was the consensus of the Subcommittee, with two strong dissents, that no disciplinary proceeding should become open, and no disciplinary records (except for the work product of disciplinary counsel), should become available to the public until after an initial complaint is filed against the attorney, based on a clearly demarcated standard of evidence. This could be "probable cause," the term used by the McKay Commission, or "prima facie case," which the Craco Committee used. In either case, the terminology would need to be clearly defined to ensure that no proceeding is opened to the public until a sufficiently solid case has been assembled against the attorney-respondent. Giving attorneys an opportunity to appear before the disciplinary committee before formal charges are filed, as currently allowed in the Fourth Department, might also be considered, as the personal stakes for an attorney are heightened when such charges would expose the attorney's predicament to the public.

It is noted, however, that, although the Subcommittee unanimously agrees that confidentiality of the process should remain, at a minimum, through at least some sort of probable cause or evidentiary finding, certain Subcommittee members also believe, based on their experiences on grievance committees or otherwise, that confidentiality should remain until a finding on conduct and discipline is ultimately made by a court (i.e., confirmation or dismissal of formal charges), even if efforts are made at statewide uniformity and efficiency regarding the underlying processes. These Subcommittee members think that most matters should take their full course, so as not to in any way usurp the Court's powers or chill any party's rights, and because the presumptions of innocence and other discovery tools and evidentiary/procedural/due process rules that exist in other contexts are not present in the grievance process, particularly not in a sufficient enough manner to outweigh potential irreparable reputational damage (also a paramount concern of the grievance process) or to guard against unfairly slanting the process either way.

Two members also believe that letters of caution and admonition, and the like, determined by grievance committees or chief counsel, should remain confidential, regardless of changed uniformity and other procedural rules or guidelines. These Subcommittee members also note that there are rules that permit exceptions to Judiciary Law §90 and allow disclosure (e.g., obtaining a "sharing order" under certain circumstances to disclose to other authorities certain facts that the grievance committee has uncovered). It has been suggested that efforts be made toward courts considering the use of sharing orders and interim suspensions more frequently, as reasonable steps toward more protection for the public, rather than the current overhaul suggestions. Other reasons stated by these Subcommittee members as to why the process should not be opened to the public at any time earlier than currently allowed include:

- That the consequences of opening the system have not been properly studied and there is no empirical data to support the proposition that opening up the process will enhance the public image of lawyers or the legal profession.

- That, assuming the primary purpose of the disciplinary system is to protect the public, it is unclear how an open system protects the public any more than the current system does. Currently, if there are "serious" violations of the Rules, and a continuing danger to the public, an application for an interim suspension can be made and if granted will result in notice to the public.

- That, to the extent one of the purposes of the disciplinary system is to educate lawyers and guide them toward compliance with the Rules of Professional Conduct, there is no basis to believe that opening the system to the public would be more effective in meeting that goal than the current system of requiring new

attorneys to pass the MPRE and requiring all attorneys to achieve a minimum number of continuing legal education credits in legal ethics.

- That any recommendation that attorneys have the opportunity to show good cause as to why proceedings should be closed to the public merely creates an additional burden upon the accused attorney.

- That the Appellate Division Departments presumably have the power at this point to "open the proceedings" if there is need for public awareness of an individual proceeding.

- That a change in the current system may subject the grievance committees to the Executive Law regarding compliance with the open meetings and Freedom of Information laws, which would place an additional burden on the committees.

- That the terms "probable cause" and "prima facie" proof of a violation have not been clearly defined.

In sum: This Subcommittee recommends legislation that would allow public dissemination of disciplinary charges after a finding of probable cause or prima facie evidence and the service of formal charges. The information would become public 30 days after the service of charges, providing the attorney time to show cause why the record should not be opened to the public. The aforementioned Statewide Coordinator of Attorney Discipline would track all instances in which an attorney requested continued sealing of the record and publicly report annually the number of requests made and granted. The precise legislation should be promulgated by the Chief Administrative

Judge, in conjunction with the Administrative Board, and presented to the Chief Judge and Chief Administrative Judge for inclusion in the 2016-17 legislative agenda.

G. The Position of the Full Commission on a More Open System

Whether to open the disciplinary process to the public and, if so, when and how, was the first issue debated by the Commission and proved to be the most difficult and divisive.

The main argument in favor centered on the legal consumer's interest in knowing if the attorney he or she may hire has a pending disciplinary charge—possibly in the same type of case the client presents—and the societal importance of governmental transparency. The supporters noted that 40 states currently disclose disciplinary charges at the probable cause stage or earlier and that it is exceedingly rare for misconduct charges, once lodged, to be dismissed. They argued that public confidence and trust in the disciplinary system requires a greater element of openness.

The main argument in opposition centered on the danger that an attorney exonerated after a charge was lodged (and made available to the public) would be exposed to career-damaging publicity which, in the era of social media, could never be fully retracted. Opponents noted that of the roughly 13,000 new disciplinary complaints filed annually against lawyers, only about 2 percent result in public discipline, and a high percentage of those involve attorneys who either resigned without a disciplinary hearing or were automatically disbarred because of a felony conviction. Additionally, the opponents observed that courts already have the authority to order the interim suspension (which are public) of an attorney when there is evidence the attorney is a threat to the public interest.

A compromise was reached that the members believe will ensure the consuming public is protected from potentially unscrupulous lawyers, while also ensuring that the

reputations of innocent attorneys are not unjustly tarnished.[59] The compromise proposal is as follows: "Amend the current rules of the Appellate Division to expressly authorize each disciplinary committee to seek, either separately or in conjunction with an application for interim suspension and upon notice to the affected attorney, an order unsealing proceedings to permit the publication of charges pursuant to Judiciary Law §90(10), upon a finding by the Court that the attorney's conduct places clients at significant risk or presents an immediate threat to the public interest. The amendment would be proposed by the Chief Administrative Judge, approved by the Administrative Board of the Courts, and approved by each Department of the Appellate Division."

The disclosure issue has lingered for decades and has been addressed repeatedly by various bar groups and others, without legislative resolution. The Commission believes that this compromise, which can be implemented immediately and without legislative action, properly balances the competing interests at hand. However, several members stressed that the four Departments of the Appellate Division should, consistent with this report, establish consistent standards and guidelines for the application of this provision.

H. Subcommittee Recommendation on Transparency and Access

Although an initiative earlier this year by Chief Judge Lippman, who required the addition of already public attorney disciplinary records to the attorney registration website, made this information much more accessible, it remains, in the opinion of this Subcommittee, too cumbersome. It observed that the current mechanism for accessing disciplinary data is complicated because it requires multiple steps to obtain the desired information. The Subcommittee strongly recommends a new, consumer-oriented web

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[59] One member opposed the compromise, arguing that it does not adequately protect the public and that the recommendation is "superfluous since a broader authority already exists in Judiciary Law 90(10)."

presence that makes it much easier to review existing public records on attorney discipline. It should include:

- A more easily locatable, searchable, consumer friendly and robust website for the disciplinary system.

- Information (especially complaint forms) available in languages other than English.

- The website should centralize links to the Rules of Professional Conduct, disciplinary rules and procedures, forms for the Lawyers' Fund for Client Protection, and other relevant New York legal resources and publications.

- The website should provide a searchable library of the Court of Appeals' disciplinary opinions and those of the four departments of the Appellate Division, grievance committees and referees.

- Consideration should be given to including e-news alerts, summaries of recent cases of interest and import, and information about available continuing legal education programs relating to the system and ethics and professional responsibility generally.

The Subcommittee recommends that, in addition to the public website maintained by the Unified Court System, the private intranet available to judges and court personnel should also include information concerning attorney discipline. For those without access to the internet, a telephone hotline should be created whereby those members of the public could verify an attorney's disciplinary status and history. Also, literature

concerning the disciplinary process and structure, such as how and where to file a complaint against an attorney suspected of violating the Rules of Professional Conduct, should be available online and in printed form, also in several languages, at courthouses, bar associations, and other locations.

VIII. OTHER ISSUES

A. Prosecutorial Misconduct

An issue that arose repeatedly was whether there should be a separate disciplinary mechanism to address claims of prosecutorial misconduct. That issue was raised at all three public hearings and centers on the fact that some wrongful convictions have resulted from unethical or illegal conduct by prosecutors. Witnesses and critics have suggested that prosecutors are rarely disciplined for professional misconduct, and noted that judicial determinations that a prosecutor behaved unethically or inappropriately are not automatically referred to a disciplinary committee. Some witnesses proposed a separate disciplinary panel, modeled after the Commission on Judicial Conduct, to review and prosecute claims of prosecutorial misconduct. Legislation to that effect is pending in both houses of the State Legislature.[60]

At the outset, the Commission recognizes that prosecutorial misconduct can stem from a good-faith but errant application of the law that is later rectified by a trial or appellate court. To that extent, the Commission restricts its analysis to those instances where a violation is intentional and evincing not a judgmental or legal error by a prosecutor, but an act of dishonesty.

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[60] See S24 (DeFrancisco) and A1131 (Perry).

In 2009, the New York State Bar Association's Task Force on Wrongful Convictions published a final report in which it addressed, among many other issues, prosecutorial misconduct. [61] Among its recommendations:

> Where there is no effective procedure already in place for preventing, identifying and sanctioning misconduct, prosecutor's offices should establish such a procedure appropriate to its staffing. In cases in which a state or federal court has concluded that an Assistant District Attorney has violated the rules, the prosecutor's process should determine the appropriate sanction, including dismissal from employment. If the court has not made such a finding, where questions about an assistant's behavior are raised, the office should undertake an investigation of the conduct and determine if there has been unconstitutional conduct and, if so, the appropriate sanctions to be imposed...
>
> Although court decisions provide a source of information about *Brady*[62] and truthful evidence issues, there is no standardized procedure for sending cases from the Appellate Divisions involving lawyer conduct to the committees. The Appellate Division clerks do not forward to the disciplinary committees opinions of the courts dealing with prosecutorial misconduct.
>
> The Task Force recommends that cases in which a state court finds there has been intentional or reckless prosecutorial misconduct based on a *Brady*

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[61] See Final Report of the New York State Bar Association's Task Force on Wrongful Convictions, April 4, 2009, at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663.

[62] See *Brady v. Maryland*, 373 U.S. 83, 1963, where the Supreme Court held that a prosecutor's suppression of exculpatory evidence constitutes a denial of due process.

> or truthful evidence rule violation be referred by the clerk of the court to the appropriate disciplinary committee for examination, investigation and further processing where appropriate. Where there are vacatures of convictions by federal courts, upon the remand to the state court, the state court clerk should likewise forward the case to the committee for consideration of sanctions.[63]

The Task Force observed in a footnote that it had received a letter from the First Department Disciplinary Committee confirming that "[i]f the Committee learns of a judicial decision criticizing a prosecutor for intentionally failing to provide the defense with exculpatory materials or a defendant's attorney for gross ineffective assistance of counsel, the Committee might open an inquiry to determine whether discipline were appropriate. These decisions are made on a case-by-case basis."[64]

In sum: the State Bar Association calls on district attorneys to address the issue internally; the pending legislation would require a new bureaucracy to monitor the conduct of prosecutors.[65] While the aims of the bill are laudatory, this Commission favors another simpler, more efficient and less costly potential remedy: Ensure that every matter in which a court has found that a prosecutor engaged in misconduct is referred to a disciplinary committee. The Commission stresses, again, the difference between prosecutorial misconduct that results from a good-faith error and prosecutorial

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[63] Ibid, pages 31, 34-35.

[64] Ibid, footnote 9 on page 35.

[65] It bears noting that while several witnesses at the public hearings and several individuals who submitted written statements to the Commission supported the concept of a new disciplinary apparatus designed solely to address prosecutorial misconduct, the Commission received no comment or testimony from any prosecutor.

misconduct that evinces unethical or malicious behavior, and recognizes that the vast majority of such judicial findings involve the former.

Still, the Commission is convinced, as a matter of public trust and confidence, that it would be valuable to at least have these matters reviewed by the appropriate disciplinary committee. Hearing testimony and written materials indicate that professional misconduct claims grounded in prosecutorial misconduct receive the same attention and scrutiny from the disciplinary and grievance committees as any other complaint—*if the committee receives a complaint or becomes aware of an instance of prosecutorial misconduct.* If there is a problem, it lies therein. The Commission has no reason to doubt that the grievance and disciplinary committees diligently examine claims of prosecutorial misconduct that come to their attention, often by defendants. This proposed compromise between the State Bar position and the pending legislation would simply ensure that each and every matter in which a prosecutor in New York is found liable for prosecutorial misconduct is brought to the attention of disciplinary authorities.

It is the position of this Commission that the Administrative Board should take immediate action to ensure that judicial determinations of prosecutorial misconduct are promptly referred to the appropriate disciplinary committee. Of equal importance, given the perception or misperception, that claims of prosecutorial misconduct are routinely "swept under the rug," the coordinator of attorney discipline, proposed earlier in this report, should compile, and release as part of an annual report, a statistical summary including, inter alia, the number of complaints of prosecutorial misconduct received and reviewed, the number resulting in public discipline and the number resulting in private discipline.

One final point re prosecutorial misconduct: It is abundantly clear from the public hearings and comments received by the Commission that there is a perception of rampant prosecutorial misconduct which is ignored by the disciplinary committees. As stated earlier, the Commission finds no support for that contention. However, given that

prosecutors are public officials, and given that the public has every right to scrutinize the conduct of those it entrusts with public office, this Commission believes that in all cases in which a prosecutor is sanctioned for misconduct, even if the sanction is a private one, appropriately redacted details should be publicly released. The public must be able to make an informed judgment about whether the result of a complaint of prosecutorial misconduct is fair, whether the disciplinary committee did its job and whether the system is working.

B. Dealing with Attorney Mental Illness and Addiction

Several witnesses raised concerns over the way the attorney disciplinary process deals with lawyers suffering with mental illness or an addiction.[66] All four departments have rules for how to deal with an attorney lacking capacity. However, the rules are inconsistent. The First and Second Departments have identical rules.[67] A different rule applies in the Third Department. [68] The Fourth Department has two separate rules addressing the issue.[69] Only the Second Department has a specific rule covering medical and psychological evidence at a mitigation hearing.[70] As previously indicated, the Second, Third and Fourth Departments all have diversion rules, but the First Department does not.

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[66] In particular, see the testimony of Deborah A. Scalise, Scalise Hamilton & Sheridan at the Aug. 11 public hearing in Manhattan, http://www.nycourts.gov/attorneys/discipline/Documents/NYCTranscript.pdf. Also, see Ms. Scalise's article, "Ethically Dealing with Clients, Witnesses and Attorneys with Diminished Capacity" at http://www.nycourts.gov/attorneys/discipline/resources.shtml.

[67] See 22 NYCRR §603.16 and 22 NYCRR §691.13.

[68] See 22 NYCRR §806.10.

[69] See 22 NYCRR §1022.23 AND 22 NYCRR §1022.24.

[70] See 22 NYCRR §691.4 (n).

As a first step, the First Department must join the rest of the state and adopt a diversion rule. The second question, of course, is what should that rule be? That is a decision the Administrative Board should make. However, it should be noted that the New York State Bar Association's Lawyer Assistance Program and the New York City Bar Association Lawyer Assistance Program collaborated on a proposed unified diversion rule that could be adopted by all four departments. Again, that is a task rightly entrusted to the Administrative Board, but it need go no further for a potential model than the bars' proposed unified diversion rule.[71] If nothing else, it is a good starting point.

[71] The proposed rule is contained in an Aug. 28, 2015 letter the Commission was sent by the New York City Bar. That letter is available on the "resources" page of the Commission's website: http://www.nycourts.gov/attorneys/discipline/resources.shtml

IX. CONCLUSION

This Commission's thorough examination of the attorney disciplinary process in New York suggests that the existing system is not "broken." In many ways, it works quite well. By and large, the work done on a daily basis by the staff and volunteer lawyers and lay members is laudable, especially given the inadequate resources and lack of guidelines. But the system is antiquated, inefficient and far too opaque—a flaw which undermines public confidence. Most of the recommendations in this report can be achieved administratively and, since the court system can implement reforms on its own, the Commission urges both prompt action and an ongoing commitment to review and, where necessary, revise the rules and procedures.

Going forward, the Commission recognizes that modernizing and improving the attorney disciplinary system is an enduring process and recommends the formation of a permanent, volunteer long-range planning panel that would continue to evaluate the system, with the benefit of being able to review what the Commission perceives as very detailed annual reports of the proposed coordinator. The current state of the disciplinary system is a result, largely, of a lack of ongoing "maintenance." It is the Commission's belief that regular and diligent monitoring of the system, largely through the Statewide Coordinator of Attorney Discipline and the Administrative Board but also through what we view as a long-range planning advisory board, would bring and keep the system up-to-date.

ACKNOWLEDGMENTS

The Commission is deeply appreciative of the individuals and groups that provided their thoughts and insight on attorney discipline in New York State. The diverse and informed commentary was invaluable to the Commission as it considered the relevant issues. Whether by way of written comment sent via e-mail, ideas shared at a focus group or stakeholder meeting, or through formal testimony at a public hearing, the Commission considered each and every viewpoint in making its recommendation to the Court. Without the well-reasoned input of the members of the legal community, including judges, practitioners, bar leaders, law school faculty, and students, the Committee would have been unable to fulfill its mandate.

The Commission also would like to express its appreciation to the staff at the New York State Court of Appeals, the New York County Lawyers' Association and Erie County who provided space for and helped facilitate the three public hearings.
Finally, the Commission expresses its sincere gratitude to former Chief Administrative Judge A. Gail Prudenti, who initially served as chair of the Commission and guided it through its formative stages. Judge Prudenti's outstanding leadership and guidance through July 30, 2015, when she resigned from the Judiciary after 23 exemplary years of service, is evident on every page of this report.

APPENDICES (AVAILABLE ONLINE)

Appendix 1: List of subcommittees and members
(http://www.nycourts.gov/attorneys/discipline/subcommittees.shtml)

Appendix 2: Notice of Public Hearings
(http://www.nycourts.gov/attorneys/discipline/PublicHearings.shtml)

Appendix 3: Gillers article, "Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public"
(http://www.nycourts.gov/attorneys/discipline/Resources/Gillers-Lowering-the-Bar-17NYUJLPP2.pdf)

Appendix 4: Simon article Part 1, "Confidential Disciplinary Proceedings & First Amendment"
(http://www.newyorklegalethics.com/confidential-disciplinary-proceedings-first-amendment-part-1/)

Appendix 5: Simon article Part 2: "Confidential Disciplinary Proceedings & First Amendment" (http://www.newyorklegalethics.com/confidential-disciplinary-proceedings-first-amendment-part-ii/)

Appendix 6: Podcast Interview with Judge Barry Cozier and transcript
(http://www.nycourts.gov/attorneys/discipline/resources.shtml)

Appendix 7: Abel article 1, "Lawyers in the Dock: Learnings from Attorney Disciplinary Proceedings"
(http://www.nycourts.gov/attorneys/discipline/Documents/Lawyers%20in%20the%20Dock.pdf)

Appendix 8: Abel article 2, "Lawyers on Trial: Understanding Ethical Misconduct"
(http://www.nycourts.gov/attorneys/discipline/Documents/Lawyers%20on%20Trial.pdf)

Appendix 9: Scalise article, "Ethically Dealing with Clients, Witnesses and Attorneys with Diminished Capacity"
(http://www.nycourts.gov/attorneys/discipline/Documents/Ethics%20update%202015%20--%20%20Incapacity.pdf)

Appendix 10: Letter from New York City Bar re uniform diversion rules
(http://www.nycourts.gov/attorneys/discipline/resources.shtml)

Appendix 11: Letter from Ellyn Rosen and Nancy Cohen, members of ABA Standing Committee on Professional Discipline
(http://www.nycourts.gov/attorneys/discipline/Documents/RosenCohenLetter.pdf)

Appendix 12: Albany Public Hearing Transcript
(http://www.nycourts.gov/attorneys/discipline/Documents/AlbanyTranscript.pdf)

Appendix 13: Buffalo Public Hearing Transcript
(http://www.nycourts.gov/attorneys/discipline/Documents/BuffaloTranscript.pdf)

Appendix 14: New York City Public Hearing Transcript
(http://www.nycourts.gov/attorneys/discipline/Documents/NYCtranscript.pdf)

Harvey B. Besunder

From: Milton Williams <mwilliams@Vladeck.com>
Sent: Friday, September 25, 2015 12:58 PM
To: John Caher
Cc: Akosua Garcia Yeboah; Angela Badamo; Caterina Madaffari; Charlotte Fischman; Christina Geraci; Christina Ryba; Christopher D. Lindquist; Devika Kewalramani; Donna England; E. Michael Kavanagh; Emily Franchina; Eun Chong Thorsen; 'Fred Santucci; Frederick Johs; Glen Lau-Kee; Hal Lieberman; Harvey B. Besunder; Hon. Angela Mazzarelli; Hon. Barry A. Cozier; Hon. Carmen Ciparick; Hon. Eugene L. Nardelli; Hon. James Catterson; Hon. Jeffrey A. Cohen; Jerold Ruderman; John P. Connors, Jr.; Lance Clarke; Mark Zauderer; Matthew G. Kiernan; Monica Duffy; Nicholas Gravante, Jr.; Peter J. Johnson, Jr.; Peter Skelos; Prof. Stephen Gillers; Prof. W. Bradley Wendel; Rita DiMartino; Robert J. Giuffra, Jr.; Robert P. Guido; Ronald Cerrachio; Samantha Holbrook; Sarah Jo Hamilton; Sean Morton; Sheldon K. Smith; Stephen K. Lindley; Vincent E. Doyle, III; William T. McDonald
Subject: Re: NY Law Journal

Thanks! Have a great weekend!

Sent from my iPhone

On Sep 25, 2015, at 12:45 PM, John Caher <jcaher@nycourts.gov> wrote:

Commission Calls for Uniform Lawyer Discipline Standards

Joel Stashenko, New York Law Journal
September 25, 2015

A commission appointed by Chief Judge Jonathan Lippman recommended Friday that uniform standards for attorney discipline and punishment be adopted throughout New York state and follow guidelines developed by the American Bar Association.

While the existing machinery of disciplining attorneys would remain in place in each of the four Appellate Division departments, adopting uniform discipline rules would ensure that lawyers from Long Island to Buffalo would be subject to the same punishments for the same misconduct, according to the recommendations of the Commission on Statewide Attorney Discipline.

The committee said the ABA's standards for imposing lawyer sanctions should serve as the template for disciplinary standards throughout the state. That single set of standards should be adopted by the administrative board of the courts and by each appellate division, the commission recommended.

Overall, the commission said the current attorney discipline system was not broken. "In many ways, it works quite well," the report said.

However, it found that the system is "antiquated, inefficient and far too opaque—a flaw which undermines public confidence."

The group proposed creating a new position of statewide coordinator of attorney discipline, who would be a liaison among the disciplinary committees in each of the four appellate divisions to ensure that disciplinary rules are being enforced uniformly, to

"encourage" communication between four disciplinary panels and to recommend improvements as a more uniform statewide discipline system is adopted.
The overarching theme of the commission's report—to reduce inconsistencies on how the four departmental committees discipline lawyers for wrongdoing—was expected when Lippman appointed the statewide panel in March. In fact, when announcing the formation of the commission, Lippman said, "if this commission were starting from scratch and creating an attorney disciplinary system in the first instance, there is no question it would establish a single, statewide structure."
A subcommittee of the commission found a "pressing" need for "rejuvenation, coordination and uniformity in both procedure and sanction" regardless of in which appellate department the attorney is registered.
The commission said most of its recommended improvements could be approved by the courts administratively and "expeditiously," without the need for legislation or amendments to the state Constitution.
Other recommendations included:
• Allowing each of the four disciplinary committees to seek a court order for the interim suspension of attorneys and the publication of charges against them in cases where lawyers' conduct places clients at "significant risk or presents an immediate threat to the public interest."
• Establishing a diversion or alternative-to-discipline program for attorney misconduct attributable to alcohol abuse, substance abuse or mental illness.
• Creating an "administrative" suspension and reinstatement process for attorneys who are delinquent in timely payment of their registration fees.
• Devising a better system of informing the "legal consumer" how to bring disciplinary accusations against lawyers.
• Improving tracking of disciplinary matters involving alleged misconduct by prosecutors, and making the administrative board of the courts adopt rules ensuring that judge's determinations of prosecutorial misconduct are promptly referred to departmental discipline panels.
The commission was chaired by Barry Cozier, senior counsel at LeClair Ryan and a former Second Department justice. Its members included current and former judges, attorney disciplinary officials, litigators and academicians (NYLJ, March 31).
Lippman noted that the appellate division-based disciplinary system has been criticized for the inconsistent application of standards and for inconsistent punishments for the same misconduct, depending on where in New York the offending attorney is practicing.
The commission developed its recommendations after conducting public hearings in Albany, Buffalo and Manhattan (NYLJ, July 29, Aug. 12).
Lippman proposed the review of the disciplinary system in his 2015 State of the Judiciary address (NYLJ, Feb. 18). Its relatively tight deadline for producing recommendations was seen by many as a reflection of Lippman's desire to revamp attorney discipline procedures as one of his final major administrative initiatives while head of the state courts.
Lippman must step down as chief judge at the end of 2015 due to the Court of Appeals' mandatory retirement rules.

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