

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**



**A REPORT TO THE PUBLIC AND THE BAR
ON THE
ADMISSION, DISCIPLINE, AND REINSTATEMENT OF ATTORNEYS
IN THE
SECOND JUDICIAL DEPARTMENT**

July 27, 2005

INTRODUCTION

Upon my appointment as Presiding Justice in February of 2002, I initiated a review of the practices and procedures of the Appellate Division for the Second Judicial Department and of its ancillary agencies. Comments received from the bench, bar, and public indicated that some of the areas that warranted attention concerned the admission to practice, discipline, and reinstatement of attorneys. I appointed Associate Justice Gabriel M. Krausman to chair a panel to review the procedures of the Departmental Committees on Character and Fitness, the Grievance Committees, and the court in these critical areas.

In the fall of 2002 the Krausman Committee began an intensive process of meetings and study to fulfill its mandate. In June 2004 the committee issued a thorough report containing 50 recommendations of its three subcommittees, a discussion of each recommendation, and the conclusion of the Committee of the Whole with respect to each. The report was made available for public comment and extensive input was received from bar associations, practitioners, and public interest groups. After the public comment period closed, I directed the court's staff to review the report and recommendations and the public comments, and to prepare briefing materials for use by the Justices of our court. In April and May of this year the court met in conference to discuss and decide, over many hours, whether and how to implement each of the committee's 50 recommendations.

The result of this long process is now in your hands. The following pages summarize the significant procedural and substantive changes adopted by the court that are designed to improve and streamline the process of attorney admission, discipline, and reinstatement. The advances made in these crucial areas will benefit not only the attorneys who practice in the Second Judicial Department but also the public that we all serve.

The court owes a great debt of gratitude to Justice Krausman and the members of his committee, to the members of the public, bar associations and interest groups who submitted comments on the committee's report, and to the court's staff who worked tirelessly to support the committee's work and to prepare the analytical materials so essential to the deliberations of the Justices.

Brooklyn, New York
July 27, 2005

A. Gail Prudenti
Presiding Justice

Krausman Committee Membership

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| Hon. Gabriel M. Krausman (Chair) | Peter J. Johnson, Jr. (Admission) |
| Prof. John Q. Barrett (Admission) | Frederick C. Johs (Discipline) |
| Dr. Renay Bevins (Reinstatement) | Barry Kamins (Co-Chair, Discipline) |
| Fred A. Bodoff (Reinstatement; Admission) | Jerome Karp (Discipline) |
| John P. Bracken (Co-Chair, Reinstatement) | John L. Kase (Discipline) |
| Gary L. Casella (Discipline) | Diana M. Kearse (Discipline) |
| Jeffrey Cohen (Admission) | Hon. Joseph J. Kunzeman (Reinstatement) |
| Hon. Barry A. Cozier (Co-Chair, Admission) | John Z. Marangos (Discipline) |
| Hon. Stephen G. Crane (Co-Chair, Reinstatement) | Hon. Milton Mollen (Discipline) |
| Antoinette D'Orazio (Discipline) | Grace Moran (Discipline) |
| Hon. Sandra J. Feuerstein (Co-Chair, Reinstatement [resigned; appointed to Federal Bench]) | Dr. Greta Rainsford (Admission) |
| Paul Gianelli (Admission) | Jerold R. Ruderman (Reinstatement) |
| Robert P. Guido (Reinstatement) | Walter Schwartz (Reinstatement) |
| Edward W. Hayes (Reinstatement) | Hon. Nancy E. Smith (Co-Chair, Discipline) |
| Hon. Charles J. Hynes (Co-Chair, Admission) | Stephen J. Singer (Discipline) |

Staff Assistance

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| James Edward Pelzer, Clerk of the Court | Robert Margolin, Law Clerk to Presiding Justice |
| Susan Harkavy, Deputy Clerk | Donna Sosna, Principal Appellate Court Attorney |
| Mary-Ellen Skenyon, Deputy Clerk | Joan Hannon, Principal Appellate Court Attorney |
| Matthew Kiernan, Associate Deputy Clerk | Regina Saat, Principal Appellate Court Attorney |
| Aprilanne Agostino, Associate Deputy Clerk | |

THE ADMISSION PROCESS

Establishment of the Orientation to the Profession Program

Perhaps the most significant new development in the area of attorney admissions is the court's decision to institute an Orientation to the Profession Program which, by the adoption of a new § 690.21 of its rules regarding the admission to practice of attorneys and counselors-at-law, is mandatory for all applicants admitted to the bar after January 1, 2006. Loosely modeled after the program currently in place in the Appellate Division for the First Judicial Department, the Second Department's Orientation Program will focus on the profession of law as a calling whose practitioners must maintain the highest standards of ethics and personal behavior.

The program will be administered by Robert Guido, Esq., Special Counsel to the court for attorney admission and grievance matters, and will cover (1) the concept of civility among lawyers, (2) common disciplinary pitfalls, such as maintaining communication with clients, fee disputes, and bank and bookkeeping responsibilities, (3) the lawyer's pro bono obligation, (4) available resources to deal with alcohol and other substance-abuse problems, and (5) the significance of the oath taken by an attorney upon his or her admission to the bar.

Expediting Applications for Admission

Expediting the admission process was one of the goals set forth in the Mission Statement of the Krausman Committee. During the course of its work, the Krausman Committee learned that the two Departmental Committees on Character and Fitness use different methods to vote upon applications for admission to the bar. The different methods result in disparities in the time it takes to process applications. The Krausman Committee considered whether it ought to recommend a uniform practice for holding meetings and voting on applications and how best to accelerate the voting process and eliminate delays. It considered, among other things, instituting paper ballots, requiring more frequent meetings, and recommending that some Committee business be conducted telephonically.

The court deliberated on the matters considered by the Krausman Committee and weighed the available options. It ultimately decided that, rather than direct the individual Committees on Character and Fitness on how best to conduct their internal business, the court would simply

establish a time frame for all Committees within which applications for admission are to be determined. In the future, all such applications should be acted upon within 60 days of their submission. Undoubtedly, this new bright-line requirement will result in determinations being made in a more timely fashion.

Supporting and Enhancing the Work of the Committees on Character and Fitness

The composition of the Committees on Character and Fitness, the manner in which those committees conduct their business, and the quality of the service they render are all important factors that influence the admission process. The Krausman Committee considered these matters and proposed a variety of recommendations which the court has now adopted in several significant areas.

Retaining the Personal Interview

The personal interview of an applicant for admission to the bar by a member of the Committee on Character and Fitness has long been the tradition in the Second Judicial Department. It is widely believed that the personal interview is the best way to explore the information set forth in the candidate's application papers. It also has the advantage of impressing each candidate with the fact that active members of the bar take an interest in seeing that those who are admitted to practice are men and women of good character.

The suggestion that prompted the recommendation to abolish the personal interview was that it would be possible to expedite admissions if personal interviews of candidates were eliminated. The court determined, however, that the benefits of the personal interview process far outweigh the slight increase in the speed with which candidates might be admitted if interviews were eliminated. Accordingly, the personal interview has been retained.

Providing Assistance to Committee Members

The court is deeply indebted to the members of the Committees on Character and Fitness, who continue to give selflessly of their time and energy to assist the court in performing the crucial function of evaluating applicants for admission to the bar, and it is profoundly appreciative of their efforts. It was in this spirit that the court considered the Krausman Committee's recommendation to institute a training program for committee members on how to conduct the applicant interview.

The court is committed to providing whatever assistance and resources the Committees on Character and Fitness require in order to function as efficiently and smoothly as possible. Accordingly, the court has decided to implement an informal, voluntary training program that will award credit towards each committee member's continuing legal education (CLE) requirement. In addition, a best procedure protocol, including suggested standard questions, is being developed to assist the committee members in performing the important duty of conducting applicant interviews.

Promoting Active Participation & Achieving Diversity

CPLR 9401 provides that members of the Committee on Character and Fitness shall serve until death, resignation, or the appointment of a successor. The provisions of the statute notwithstanding, the Krausman Committee recommended that term limits be imposed on the service of members of the Committees. This recommendation was based, in part, on the belief that a periodic change in the membership of the committee would provide an opportunity to increase diversity and, in those instances where a member was less than productive, a vehicle for removal and replacement.

While supportive in principle of the Krausman Committee's objective to increase diversity on the Committees on Character and Fitness, the court was reluctant to implement the recommendation with respect to term limits, not only because it would require an amendment to the CPLR, but principally because the services of hard-working, experienced members who make a valuable contribution to the work of the Committees would be lost by the mechanical application of term limits. The goal of achieving diversity can be accomplished through the enlargement of the Committees and the appointment of a wider range of persons of different gender, race, and ethnicity. Furthermore, in those instances where the court is advised that a member of a Committee has lost interest or has not contributed significantly, the CPLR provides that a successor may be appointed. Consequently, the recommendation to impose term limits was not adopted.

It is one of the court's objectives to maintain the status of its Committees on Character and Fitness as a model for others to emulate. The court believes that its continuing commitment to support the Committees, as demonstrated by the steps outlined above, is consistent with and in furtherance of that goal.

Reintroducing Criminal Background Checks of Applicants for Admission to the Bar

Criminal background checks were once a part of the application process. The applicant obtained a certificate as to his or her record from the police department in the locality in which he or she resided. The requirement was eliminated many years ago. Recognizing that computerization has made statewide criminal background checks much easier and faster, the Krausman Committee recommended that they be reinstated.

The court has approved the recommendation to reinstate criminal background checks. However, pursuant to § 520.12(c) of the rules of the Court of Appeals, the four Appellate Divisions have adopted a uniform process and set of forms for use in applying for admission to the bar. Implementation of the recommendation to reinstate criminal background checks will require a change in the present uniform application process and supporting forms. Accordingly, the court has referred the issue to the Statewide Committee on Bar Admissions.

Retaining Court Review of Certain Applications

The Krausman Committee considered whether a candidate whose application receives only a majority of affirmative votes of committee members, but not unanimous approval, should be admitted to practice without independent consideration by the court. In the Second Department the practice has been that an application that receives even a single negative vote is referred to the court for careful consideration and determination. The court determined that this sound practice ought to be continued, finding that it should make the final determination whenever there is a legitimate concern about the character and fitness of a candidate for admission to the bar.

THE ATTORNEY DISCIPLINARY PROCESS

Imposing Suspensions of Less than One Year

The Krausman Committee recommended the adoption of a policy permitting the imposition of a suspension from practice for a period shorter than one year but not less than six months as a sanction for professional misconduct. Although the court's rules do not specify a minimum time period for a suspension, it has been the court's established practice to impose suspensions of not less than one year. Recognizing that this practice may have unduly restricted its discretion in appropriate cases, the court has approved the use of shorter suspensions. Such suspensions are not intended, however, to replace public censures. Rather, the new policy supplies an additional option to consider when misconduct warrants a sanction more severe than a public censure but less than a suspension from practice for a full year. It also allows the court to exercise its discretion in such matters and impose the term of suspension it deems appropriate to the circumstances of each case.

To insure that these shorter suspensions do not result in de facto longer suspensions due to delays in the reinstatement process, the court has adopted measures to expedite and simplify that process. Those measures are discussed more fully below in the section on reinstatement.

Utilizing a Combination of Sanctions

The court approved a recommendation of the Krausman Committee to utilize a combination of sanctions for certain minor violations, such as the failure to register with the Office of Court Administration and the commission of minor tax offenses. Possibilities that the court is considering are combining a censure with a requirement that an attorney take a stated number of hours of continuing legal education (CLE), provide community service, or undertake pro bono representation.

According Credit for Time Served Under an Interim Suspension

The court agreed to consider exercising its discretion to accord credit for time served under an interim suspension when determining the final measure of discipline to impose upon an attorney at the conclusion of a disciplinary proceeding. This represents a marked change in the court's practice. In the past, the court has declined to accord such credit in any cases. Although it

concluded that according credit is a matter of fundamental fairness, the court has reserved to itself the discretion to deny credit in appropriate cases. This change will apply prospectively only.

Diversion to Monitoring in Cases Involving Alcohol and Substance Abuse or Dependency

The issue of alcoholism and substance abuse or dependency among attorneys was addressed by the court by the adoption of a new subdivision (m) to § 691.4 of its rules. This new subdivision authorizes the court to defer a disciplinary investigation or proceeding in an appropriate case to enable the attorney to enter a court-approved monitoring program if he or she claims a disability due to alcohol or substance abuse or dependency. Sobriety monitoring programs are worthwhile, have widespread support, and are in place in the other three Departments of the Appellate Division.

Functions and Appointments of Special Referees in Disciplinary Proceedings

Careful consideration was given to the recommendations of the Krausman Committee which pertain to the functions and the appointment of special referees.

Recommendations by Referees as to an Appropriate Sanction

It was the unanimous opinion of the court that special referees assigned to conduct a hearing on the issues raised in a formal disciplinary proceeding should continue to focus on the important task of fact-finding. Special referees should refrain from making recommendations with respect to final sanctions, an area best left as the exclusive province of the court because it alone is in the position to evaluate the charges in all the cases that come before it and to insure consistency in the severity of the discipline imposed.

Bringing Disciplinary Hearings to a Speedy Conclusion

The court approved the recommendation of the Committee with respect to requiring special referees to complete and submit their reports within 60 days after the conclusion of the hearing or the submission of post-hearing memoranda. This requirement will assist in reducing delays in the disciplinary process.

Recruiting Additional Special Referees

With respect to the recommendation that there be a recruitment initiative to solicit additional special referees, the court noted that such an initiative has already been implemented. The roster of special referees includes many retired justices of the Appellate Division and the Supreme Court and other individuals who have dedicated their time and special talents to assisting the court in conducting disciplinary hearings. The list of active special referees is flexible and open to additions. Interested parties, both retired members of the judiciary and practicing attorneys, are encouraged to convey their interest and to submit a formal application to the Presiding Justice. There is an initial interview and orientation session at which prospective special referees are advised of their responsibilities and are given copies of the court rules. Periodic review of the list of active special referees is undertaken by the Presiding Justice and vacancies are filled on an ongoing basis.

Formal Disciplinary Hearings

A number of the recommendations of the Krausman Committee concerned discovery and procedure in formal disciplinary proceedings.

Medical & Psychological Evidence in Disciplinary Proceedings

Attorneys often wish to offer medical or psychological evidence in mitigation of pending charges of misconduct. The Krausman Committee recommended that the respondent attorney should be required to give notice to counsel for the Grievance Committee of the intent to offer psychological or medical evidence so as to prevent surprise and permit review of applicable records and the preparation of appropriate questions in advance of a hearing. The court agreed with this recommendation and has adopted a new subdivision (n) of § 691.4 of its rules to require such written notice to counsel for the Grievance Committee accompanied by authorization to obtain and make copies of the records of the treating physician, psychiatrist, psychologist, or other such health care professionals regarding the attorney's physical or mental condition at issue. In addition, the new subdivision requires the respondent attorney to provide grievance counsel with a copy of the written reports, if any, of the health care professionals the attorney proposes to call as witnesses.

Disclosure of Reports of Qualified Medical Experts in Incapacity Proceedings

The Krausman Committee recommended that the court allow respondent attorneys and counsel for the Grievance Committee access to medical reports prepared by court-appointed medical experts in proceedings pursuant to § 691.13(b) of the court’s rules to determine whether an attorney is incapacitated from continuing to practice law by reason of mental infirmity or illness, or addiction to drugs or intoxicants. The court accepted this recommendation and has adopted a new clause (3) to § 691.13(b) to require that such reports be filed in the office of the clerk of the court and made available to counsel for the respective parties.

Subpoenas, Depositions, & Motions in Formal Disciplinary Proceedings

The court adopted the recommendation of the Krausman Committee with respect to amending its rules to include provisions regarding the procedures to be employed to subpoena witnesses, take depositions, and make motions relating to formal disciplinary proceedings. New § 691.5-a of the rules authorizes the clerk of the court to issue subpoenas for witnesses and for the production of books and papers, permits depositions of potential witnesses who may be unavailable to testify at a hearing, and requires that motions in the proceeding be made to the court, which may decide them or refer them to the special referee assigned to the matter.

Disqualification of Former Grievance Counsel, Committee Members, and Special Referees

The Krausman Committee’s recommendation that the court prohibit former staff counsel and former Grievance Committee members from accepting employment to represent a respondent attorney on any matter pending during the period of the former staff member’s or committee member’s term of service was accepted by the court. The recommendation is consistent with Canon 9 of the Code of Professional Responsibility that a lawyer avoid even the appearance of impropriety, but goes farther than DR 9-101(b)(1), which provides, in relevant part, that “[a] lawyer shall not represent a private client in connection with a matter in which the lawyer *participated personally and substantially* as a public officer or employee [emphasis added].”

New subdivision (o) of § 691.4 of the rules provides that no former staff counsel to a grievance committee or former member of such a committee may accept a retainer or otherwise represent an attorney who is the subject of an investigation, or of charges of professional misconduct

by a grievance committee, or of a disciplinary proceeding in this court, if such investigation, charges, and/or proceeding were pending before the committee during the term of service of the former staff counsel or committee member. In addition, a person appointed to serve as a special referee to hear and report on the issues raised in a formal disciplinary proceeding may not serve as counsel for an attorney with respect to an investigation, charges, and/or proceeding in this Department until the expiration of two years from the submission of the final report on the matter to which he or she was appointed.

THE REINSTATEMENT PROCESS

Requiring Applicants for Reinstatement to Remain Current in their Knowledge of the Law

The Krausman Committee recommended that suspended attorneys be excused from the duty to pay the biennial registration fee during the period of suspension and be required to complete a program of continuing legal education. The court concluded that it did not have the authority to dispense with the payment of the biennial registration fee for suspended attorneys because payment of that fee is required by Judiciary Law § 468-a(4) and § 118.1(g) of the rules of the Chief Administrator of the Courts. With respect to the issue of CLE, however, the court strongly endorsed the need for suspended attorneys to remain current in their knowledge of the law.

The policy of the Unified Court System is that “[i]t is of the utmost importance to members of the Bar and the public that attorneys maintain their professional competence by continuing their legal education throughout the period of their active practice of law” (22 NYCRR 1500.21). The rationale behind that policy extends to all those who seek to resume practice after a hiatus in the form of a suspension or disbarment. Accordingly the court has adopted new rules that require suspended or disbarred attorneys to take CLE and, in certain cases, to specially demonstrate their knowledge of the rules governing attorney ethics.

Upon seeking reinstatement, an attorney suspended for less than one year must establish that during the period of suspension he or she has successfully completed one credit hour of accredited CLE for each month of that suspension (*see* 22 NYCRR 691.11[c][4]). An attorney suspended for one year must establish either that during the period of suspension he or she has (1) successfully completed 18 credit hours of CLE, 6 of which must be in the field of attorney ethics and professionalism, or (2) successfully completed 12 credit hours of CLE and attained a passing score on the Multistate Professional Responsibility Examination (*see* 22 NYCRR 691.11[c][3]). An attorney who has been disbarred or suspended from practice for more than one year must establish that during the period of disbarment or suspension he or she attained a passing score on the Multistate Professional Responsibility Examination and, during that period and within two years prior to reinstatement, he or she completed one credit hour of CLE for each month of disbarment or suspension up to a maximum of 24 credits (*see* 22 NYCRR 691.11[c][2]).

Providing Clear Directions for the Form of the Reinstatement Application

The Krausman Committee expressed the concern that the directions concerning the information to be provided in a reinstatement application were not readily available to suspended or disbarred attorneys and their counsel. To address that concern, the court has now adopted detailed instructions regarding the form of reinstatement applications that are available on its website and in the office of the clerk of the court (*see* 22 NYCRR 691.11[b]; 691.11-a[a]).

Reinstatement Applications by Voluntary Resignees

The court has adopted the recommendation of the Krausman Committee to create a simple and expeditious process by which attorneys who have voluntarily resigned from the bar may seek reinstatement. New section 691.11-a of the court's rules governs such applications and requires such an applicant to explain the circumstances of his or her resignation and the reason for applying for reinstatement; to state whether he or she has been the subject of a disciplinary complaint or proceeding elsewhere since the effective date of the resignation and, if so, the results thereof; to establish that he or she is in good standing in any other jurisdiction in which he or she is admitted to practice; and to demonstrate that he or she has taken one credit hour of accredited New York CLE for each month since the effective date of the resignation, up to a maximum of 24 credits. The application is to be made in the form of a motion on notice to the Departmental Grievance Committee in the judicial district in which the applicant last maintained an office for the practice of law.

Expediting Action by the Committees on Character & Fitness

In the past, significant delays have been experienced in the processing of some applications for the reinstatement of suspended or disbarred attorneys. The court is committed to eliminating delay wherever possible. Applications for reinstatement by suspended or disbarred attorneys are to be made by motion on notice to the appropriate Departmental Grievance Committee and the Lawyers' Fund for Client Protection, which will be asked to promptly respond to such applications.

Prior practice required that the court, before granting an application for reinstatement, refer that application to a Committee on Character and Fitness or to a judge or referee for investigation and review. The court's rules have been amended to provide that such a reference is no longer

required in cases involving a suspension for one year or less or reinstatement after a voluntary resignation. However, the court has retained the discretion to do so in appropriate instances (22 NYCRR 691.11[d]; 691.11-a[d]). In those cases in which a reinstatement application is referred to a Committee on Character and Fitness, the reference will be accompanied by a request that its investigation and review be completed within 60 days; compliance will be carefully monitored by the court.

As a result of these new procedures, it is expected that an attorney whose professional misconduct has resulted in a suspension of one year or less, who has complied with the order of suspension in all respects, and who has demonstrated that he or she is fit to resume the practice of law, will be reinstated to the bar in a very timely fashion. Those attorneys with longer suspensions or who have been disbarred will also experience proportionately less delay in the reinstatement process.

Providing the Applicant for Reinstatement with Access to the Court's File

In the cases of *Matter of Anonymous* (97 NY2d 332) and *Matter of Citrin* (94 NY2d 459), the Court of Appeals held that the papers relied upon by the Appellate Division in denying an application for admission or reinstatement should be made available to the applicant. In light of those cases, the Krausman Committee's subcommittee on reinstatement recommended that the applicant be advised of any information in the court's possession that played a significant role in deciding the application for reinstatement, with appropriate redactions. The Committee of the Whole disapproved that recommendation. The court concluded that an affirmative duty to advise an applicant and to reach a determination as to the significance of each item of information in the file was impractical. However, the court stresses that its clear policy is that if an application for reinstatement is denied, the attorney is entitled to see the complete file on his or her application, with only the minimal redactions authorized by law.

Time Limit on Renewed Reinstatement Applications

The Krausman Committee recommended that a disbarred attorney who has been denied reinstatement by this court be prohibited from making a subsequent application for reinstatement until the expiration of a minimum of one year from the date of the order denying his or her previous

application for that relief. The court agreed that allowing an unlimited number of renewed reinstatement motions, made without a sufficient interval between them to allow the applicant to demonstrate the occurrence of a change of circumstances, can result in a fruitless expenditure of the time and resources of both the applicant and the court. Accordingly, it has adopted a new subdivision (e) of § 691.11 to require an interval of one year between successive reinstatement applications, unless the court's order denying the prior application provides otherwise.

CONCLUSION

The mission of the Krausman Committee has been fulfilled and its work completed. However, the obligation of the court with respect to the admission, discipline, and reinstatement of attorneys remains ongoing. The court takes very seriously the mandate inherent in Judiciary Law § 90 to periodically update its practices and procedures in these critical areas.

In adopting the measures described herein, the court's intention was to improve and streamline the areas of attorney admission, discipline, and reinstatement. These improvements represent the cumulative result of study by the Krausman Committee, the court's staff, and ultimately, the Justices of the court, of the concerns raised by the bench, bar, and public. The court is confident that what has been achieved demonstrates its continuing commitment to the needs of the practicing bar as well as the community at large.

As the experience of the Krausman Committee has demonstrated, meaningful reform is best achieved when governmental agencies work in concert with the private sector to achieve mutual objectives. For that reason, here at the Appellate Division for the Second Judicial Department, public comment with respect to any issue of concern is always welcome and invited.

ADDENDA

1. Administrative Order ADM 2005-0722.1 - Amending Rules Relating to Attorney Admission, Discipline, and Reinstatement.
2. Administrative Order ADM 2005-0722.2 - Adopting Instructions for Applications for Reinstatement to the Bar:
 - a. Instructions, Application for Reinstatement to the Bar after Disbarment or Suspension of More than One Year;
 - b. Instructions, Application for Reinstatement to the Bar after Suspension of One Year or Less;
 - c. Instructions, Application for Reinstatement to the Bar after Voluntary Resignation.