COMMITTEE ON THE PROFESSION AND THE COURTS

FINAL REPORT TO THE CHIEF JUDGE

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I. INTRODUCTION

The late 1980's and early 1990's witnessed a conspicuous rise in public disparagement of lawyers and the judicial process. The diminished respect for the profession expressed itself in sour humor, opinion polls, editorial columns and in some reflective commentary. This was not an entirely new phenomenon; American lawyers, like their English forebears, had for centuries been vulnerable to periodic bouts of public disdain.

In some respects, however, the mood at the outset of the decade was different. For one thing, the lowered esteem of the legal profession coincided paradoxically with the arrival in its ranks of unprecedented numbers of new lawyers. These freshly-minted attorneys, turned out by a record number of law schools across the land, had chosen the law as their life's work at just the moment this choice was more and more held up to ridicule and criticism. At the same time, too, changes in the profession that had been long in the making were increasingly being felt. The sheer numbers of lawyers and the dissolution of traditional long-standing relationships between lawyer and client combined to increase sharply competition among lawyers. This in turn promoted more pervasive and aggressive advertising and heightened the commercialization of the "client-getting" process. Increased technology posed new opportunities and challenges for the practice of law. More severe economic pressures faced both young lawyers entering practice saddled with heavy student debts and start-up costs and established practitioners confronted with rising overheads, heavy competition and stiffer fee resistance. The rise in the mobility of lawyers weakened the ties to firms, institutions and communities in which professional standards traditionally had been articulated and enforced.

In 1993, a series of measures had been enacted in the wake of a Report to the Chief Judge and the Administrative Board of the Courts to address criticism of practices in the matrimonial field. But the crisis of confidence and morale generated by external disparagement and internal change seemed broader than one segment of the practice.

Accordingly, in the belief that an organized and systematic inquiry under official auspices would be useful, Chief Judge Judith Kaye appointed this Committee in 1993.

The Chief Judge, after noting the history of the matrimonial practice reforms, observed that "it is apparent that the discontent is broader, and that public confidence in the entire legal system has seriously eroded." The Committee was charged with considering wider application of the matrimonial reforms as well as other measures, and encouraged to consult widely with the bench, bar and public "in defining the sources of the public dissatisfaction and in devising recommendations to address it."[1]

In this Report, the Committee responds to that charge, and does so unanimously. After describing the Committee itself, and the approach it took to its work, the Report presents a general view of the current state of the legal profession in New York and its views on the principal sources of public discontent. In succeeding sections, the Report offers the Committee's recommendations -- necessarily addressed to several audiences -- for improvements required to raise both the actual level of professional and judicial responsiveness to the public and also the level of public confidence in the competence and integrity of the profession and the courts.

Many of the improvements we urge are made necessary by the aggregate impact of the forces mentioned at the outset of this section. Together they have produced a considerably more atomistic, competitive and impersonal kind of practice than was common a generation ago. This in turn has made it harder for clients to obtain lawyers they know well. It is thus easier for misunderstandings to arise between lawyer and client, and harder to resolve those frictions harmoniously and informally. The same forces have operated to make the risk of professional lapse greater at the same time that the formal and informal arrangements that had helped to prevent such lapses have weakened. All this makes it necessary, in a world where the calendar cannot be turned back, to create new arrangements to reinforce the old, to provide new measures that will increase clients' access to information, reduce the incidence of avoidable misunderstanding, resolve disputes fairly and quickly, prevent ethical violations from occurring where possible, and impose discipline when violations do occur, in a way

that is fair and commands public confidence. In doing all of this, the Committee is greatly encouraged by this single, most important finding: the actual level of professionalism brought to bear on clients' affairs by thousands of lawyers across the state, in court and office, day in and day out, is extraordinarily high. Overwhelmingly, the practicing lawyers of New York earn the respect of their clients on a daily basis.

But the essence of a self-governing profession is that it have and use the capacity for critical self-examination. It must then exercise its autonomous powers to improve its service and to meet new challenges generated by changing times. It is in that spirit that the Committee recommends the measures in this Report.

THE COMMITTEE

The sixteen members of the Committee are identified in Appendix A. All were appointed by the Chief Judge, but half of the members were proposed by the Presiding Justices of the four Appellate Divisions, each of whom designated a member of the court and an attorney practicing in the Department to serve. No member was selected as a representative of any organization or constituency, although several hold or have held key posts in the state or important local bar associations.

In the aggregate, the Committee and its accumulated experience is very diverse. In addition to Appellate Division justices from across the state, two trial court judges serve on the Committee, one from Brooklyn and one from Rockland County. A recently retired judge of the Court of Appeals, with a long history of upstate practice and judicial service, also serves. The practicing lawyers come from all the major centers of legal activity in New York, practice in small and mid-sized firms as well as large, and work in a wide variety of fields. The Committee was thus ready from its inception to recognize the probability that conditions of practice -- and the measures appropriate to improve them -- would vary from place to place and from one kind of practice to another. In reaching the

recommendations set out in this Report, as will be seen, the Committee has drawn on its diversity of background to balance the desirability of uniform standards with the need to recognize important differences in local circumstance.

The Committee undertook its work as a whole. Members from all sectors of the state attended hearings wherever they were held. Everyone received and gave focused attention to all the written submissions and the background literature assembled by the staff and by Committee members themselves. All recommendations were fully discussed at meetings of the whole Committee and voted on a total of three times -- once preliminarily, once after having presented a tentative summary of proposals to forums of bar leaders from around the state, and finally in formally adopting this Report. In each case, after full discussion, the votes were unanimous.

THE METHOD OF INQUIRY

The Committee first approached its charge by supplementing its own considerable aggregate experience by study, interviews and hearings. Its objective was to gain as comprehensive and well considered a view as possible of the present actual condition of the profession and its reputation in the state. There were several parts to this threshold issue: What could be found out by study and inquiry about the actual quality of service to the public by the bar and the courts? What were the grievances the public held towards lawyers and the courts? Were these complaints based on realistic expectations of the role and function of the law and its instruments? What were the pressures felt by lawyers and judges in their daily functions that affected their ability to meet public requirements? To try to reach an understanding of these issues the Committee embarked on a program of study, public meetings, and consultation that lasted almost two years.

STUDY AND CONSULTATIONS

First, the Committee and its staff gathered and distributed, studied and reviewed in its meetings, a vast amount of published material. Some of this was from learned journals and dealt with considerations of sociology, economics, ethics, history and public policy that underlie the very notion of the law as a profession. Some were more popular works, by lawyers or lay persons viewing the current state of the profession. Some were the product of previous committees' efforts to address similar issues at the national level or in other states. Some were drawn from that large array of commentaries about law and lawyers -- editorials, cartoons, organizational newsletters -- that in part precipitated the creation of the Committee in the first place. A selective bibliography listing the most useful materials consulted by the Committee in its studies is set out in Appendix B.

Next, throughout its work, the Committee consulted with experts in areas of particular importance to its study. One of its meetings was devoted to a seminar conducted by leading academic ethicists of the profession. Each of the professors, after an initial presentation of his views as to the most important questions facing the profession, participated in a robust discussion with each other and the Committee over the views expressed. Taken with the review of the literature that had gone before, the Committee found this session particularly useful in allowing it to think through some of the more fundamental questions implicated in its work.

The Committee also met with the chief counsel of the departmental disciplinary committees and the director of the Client Security Fund. All supplemented their discussion with full written submissions. Taken as a whole, these materials gave the Committee an essential view of the principal problems generating disciplinary complaints, the practical constraints encountered in dealing with them, methods used in various parts of the state that seemed effective in handling the disciplinary function, and useful reactions to several suggestions for changes in the disciplinary process that the Committee took into account in formulating its own recommendations.

The Committee also met with the deans, or their representatives, of most of the law schools in New York and with a large number of administrative judges from districts around the state, who attended meetings in Syracuse, Buffalo, Albany and Central Islip and participated "en banc" at a full Committee meeting. Each of these groups furnished the Committee with concrete viewpoints on the profession and the courts, and an opportunity for dialogue and a testing of ideas that study alone could not have allowed.

This Committee was not alone working on interrelated subjects for the Chief Judge or the Office of Court Administration. Among those other groups were committees on Case Management, Legal Education, Electronic Recording of Court Proceedings, and Alternative Dispute Resolution. Through the generous cooperation of the chairs of those committees and some fortuitous overlapping memberships, a highly productive liaison between the Committee and its sisters was maintained throughout.

PUBLIC HEARINGS

The Committee held public hearings, limited to users of legal services, in the Fall of 1994. Separate, advertised hearings were conducted in Buffalo, Manhattan, Albany, Central Islip and Syracuse. The advertisements inviting interested individuals or groups to speak at the hearings also publicized a "1-800" telephone line that the Committee kept open to receive public commentary from those who could not or preferred not to appear at the hearings. The Committee also invited written materials from the public and received a substantial response, all of which was circulated to all the members. A list of those testifying at the hearings is contained in Appendix C.

Despite concerns in some quarters that these hearings would simply provide a respectable forum for "lawyer bashing" and that interest groups would overwhelm any useful testimony, the Committee concluded that the hearings were an indispensable part of its work. For one thing the Committee's charge had directed it to consult with the public. For another, it seemed illegitimate to set about an inquiry into the relations between lawyers and clients without creating an organized opportunity for clients to have their say. Further, the Committee members wanted the opportunity to see and hear

for themselves what disappointed clients and action groups thought about the profession, to sense from the emotional as well as the factual content of their presentations the depth of the chasm between such witnesses and the bar. Finally, the Committee members were reasonably satisfied that their own backgrounds and the dialogue among them could prevent the Committee from being swept away by a tide of ill-considered criticism.

In the end, the hearings proved very useful in a number of ways. They did describe a number of problems and suggested remedies that survived scrutiny and are addressed in this Report. They did point up some areas in which clients have unrealistic expectations of lawyers and other areas in which the bar needs to do a better job of educating the public about its role and limitations. They did serve as a reality check on some of the presuppositions members brought to the inquiry. Witnesses suggested practical ways in which both lawyers, and even overworked courts, can be more hospitable to those who have to use them. And, finally, the hearings left the Committee with the impression that there are indeed organized groups that are intractably hostile to the legal profession and the American legal system, whose criticisms are exaggerated and whose proposed reforms are unrealistic. The Committee concluded that its duty was to offer reasoned, practical suggestions that could in fact help the profession and the courts to meet the legitimate expectations of their clients.

CONSULTATION WITH THE BAR

The Committee was particularly eager to have the benefit of early and continuous consultation with the practicing bar. Its advice was seen as very important in developing the Committee's awareness of the diverse conditions of practice throughout the state. The Committee also hoped to receive recommendations from the bar for solutions to problems perceived by the public. And the Committee felt the need to test the practical ramifications of measures being considered for adoption by discussion with those who would have to carry them out. From the very outset, the Committee pursued its work in a spirit of genuine, open and receptive dialogue with the bar.

That dialogue took several forms. In the Fall of 1994, on the eve of the public hearings in Buffalo, Albany, Long Island and Syracuse, the Committee, using lists provided by the New York State Bar Association, invited all the local and regional bar organizations to send representatives to a meeting. At those meetings, which were for the most part well attended, the Committee laid out its approach and assured the bar leaders of its need and desire for their collaboration. In return, the Committee received extensive comments from those leaders as to local conditions, concerns they wished the Committee to bear in mind, and reciprocal promises of a collaborative approach to the Committee's work.

A second round of forums with bar representatives was held in late Spring and Summer 1995, after the Committee's recommendations had been tentatively adopted. At those meetings, in Rochester, Manhattan and Mineola, the Committee's views on key issues were presented and full and helpful commentary was received from the numerous bar representatives present.

In the interval between these two sets of formal meetings, continuous contact was maintained between Committee representatives and several major bar associations that had established special groups to consider and comment on this Committee's work. In particular, throughout the course of its life, the New York State Bar Association Task Force on the Profession, chaired by Haliburton Fales, 2d, Esq., furnished information, advice and constructive suggestions -- many of which this Committee has adopted. So, too, the Association of the Bar of the City of New York, the New York County Lawyers' Association, the Women's Bar Association, the bar associations of Brooklyn, and of Erie, Monroe, Nassau, Onondaga and Suffolk counties and key specialized bar groups furnished very useful materials and suggestions while the work was in process. In addition, many bar association reports prepared quite independently of this Committe, but addressed to topics within its mandate, proved very helpful in shaping the Committee's views on several key issues. (The bar association materials relied on by the Committee are included in Appendices B and D.)

Finally, the meetings with bar leaders, the public hearings, and coverage in the

legal and lay press about the Committee and its work prompted a substantial volume of written commentary from judges and lawyers from many corners of the state, offering their personal -- and often very illuminating -- views on the subjects the Committee was studying.

All in all, the Committee invited and received, as part of its consultative process, a wide range of highly useful formal and informal comment from the practicing bar in the state. That commentary has played an important role in the formation of the views this Report expresses and the measures it recommends.

* * *

In summary, the Committee sought to form its response to the Chief Judge's charge by a process that was persistently and diligently open and inclusive. It read widely, and consulted with all the principal sources of theoretical and practical wisdom it could identify. It went out to all corners of the state to meet in five hearings with the public and seven meetings with representatives of the profession. It listened attentively and deliberated carefully. What follows are the conclusions of that process, arrived at unanimously, and reflecting the collective best view of the Committee members as to the measures the profession must now take to ensure its effective response to the needs and expectations of the public.

II. THE PROFESSION EXAMINED

THE PROFESSIONAL IDEA

A consideration of ways to fortify professionalism among lawyers profitably begins with some notion of what the profession is. This Committee is far from the first to ponder that question; a considerable literature about the subject exists. We have found the definitions referred to in the 1986 Report of the American Bar Association Commission on Professionalism (the "Stanley Report") to be especially useful in directing our approach to our task.

Noting correctly that it had stood the test of time, the Stanley Report first quoted Roscoe Pound's classic definition of a profession:

> "The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."[1]

The Stanley Commission also developed a more elaborate, and perhaps more modernistic, definition of its own, describing a profession as:

> "An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:
>
> 1. That its practice requires substantial intellectual training and the use of complex judgments.

2. That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.

3. That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good, and

4. That the occupation is self-regulating -- that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest."[2]

This definition parallels the concepts laid out by the New York Court of Appeals in *Matter of Freeman,* 34 N.Y.2d 1, 7 (1974):

> "A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in nonprofessional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation."

Among the common notes of these definitions are a sense of purpose transcending self-interest expressed in the form of duties owed to clients and the public, together with a

collective means of self-governance that articulates and enforces the professional ideal.

Self-governance necessarily includes a commitment to continuous self-appraisal. That self-appraisal in turn necessarily encompasses a critical assessment of the success of the profession in sustaining the competence of its members upon whom clients trustingly depend. It entails, also, a review of the ability of the profession to assure the public of its reliability by effective means of disciplining errant members. And finally, since the authority to regulate itself is largely bestowed at the sufferance of the public, the duty of critical self-examination must involve measuring how well the profession as a whole reasonably satisfies the legitimate expectations of the public it serves.

The kind of continuing self-examination that is an ingredient of the idea of a profession requires attention to the performance of its members both individually and in groups. To most members of the public, individual lawyers and judges are the personal embodiment of the legal profession and the legal system. The impressions garnered from the interaction of lawyers and judges with clients, adversaries, witnesses, jurors and spectators inevitably affects -- for good or ill -- not only the professionals themselves, but also the profession and the justice system as well.

Similarly, lawyers and judges in groups - in bar associations and as courts - - also convey to the public a sense of the collective attitude of the bar and the justice system. As quintessential professional organizations, bar associations have a role far transcending that of trade or business associations. Unlike such associations, which are formed primarily to pursue their particular commercial interests, it is the essence of bar associations that they devote themselves to advancing the very notion of professionalism and to helping their members realize that ideal in the daily practice of the law. As Chief Judge Breitel put it in *Matter of Freeman,* 34 N.Y.2d at 8, "[P]rofessional associations justify their existence to the extent they further the standards and the ideal [of the profession]."

The duty of critical self-appraisal imposed by that professional ideal cannot be discharged by the intermittent work of committees such as this. It must be taken up by the bar associations and the courts around the state as a continuous and significant part of their agenda. And they must take a leadership role in carrying out many of the improvements that such an appraisal will inevitably suggest. As many recent and continuing projects

show, the New York State Bar and many other bar associations around the state have recognized this challenge and are striving to meet it.

Courts, too, communicate to the public a collective sense of the legal system. By the rules they adopt, the way they enforce those rules, by the practices they pursue on a daily basis, and the attitudes of their personnel, courts can create an impression of a legal system that tends either to enoble or debase the image of the profession held by the ordinary persons who encounter it. The court system, too, must therefore be open to a continuous process of appraisal and improvement. As the numerous committees and task forces now and recently at work on a variety of court-related reforms plainly show, the Unified Court System is not shirking its duty of self-examination. This report will add some items to the pending agenda and recommend still further studies beyond this Committee's scope and expertise. Like the bar associations', the courts' role in improvement of service to the public will require institutional stamina. But that practical and steady dedication of lawyers and judges -- in groups as well as individually -- is at the heart of the "spirit of public service" that Pound taught decades ago was the hallmark of our profession.

THE PROFESSIONAL IDEA IN PRACTICE

Despite the disparagement of the legal profession that caused this Committee to come into existence, its foremost conclusion is that, in fact, the professionalism of lawyers in New York, on the whole, is very high. There is ample evidence to support the view that the daily work of lawyers in service of their clients, in small towns and big cities, in firms large and small, is generally good, effective and ethical.

Some of that evidence is drawn from the everyday experiences of lawyers and clients who have shared their views with us. Some of the evidence is empirical, derived from studies such as the American Bar Association survey published in 1993 and the Nassau County Bar Association's analysis prepared this year. Some of that evidence derives from what the

Committee did *not* hear in its extensive effort to collect materials supporting public criticism of lawyers: while there are some hotspots in the practice where levels of client discontent are high, on the anecdotal evidence provided us, those levels of discontent did not seem to recur in the practice at large. It still seems to hold true that, with some notable exceptions, clients may distrust and dislike lawyers at large based on an amorphous anti-lawyer sentiment, but they trust and respect the lawyers who have worked for them.

Any recommendations for the improvement of professional performance must therefore take account of the fact that, for the most part, responsiveness by individual lawyers to individual clients is much better than the bar in general is given credit for by the public at large.

Moreover, collective efforts by lawyers to improve the profession in general and service to clients in particular abound. Over and over in the course of our work we discovered important initiatives in the public interest launched and maintained by lawyers and bar associations. It was the almost universal experience of the sponsors of these efforts that the media had no interest in publicizing their valuable and important activities. Just as the press gives deserved coverage to lawyers and judges who break the law or fail to adhere to the exacting standards of their calling, so too should the media focus on lawyers' efforts to serve the community. Taken together with the abundance of lawyer disparagement that has gained enthusiastic press attention, the silence on the really significant good that the profession regularly achieves produces a huge imbalance in the material available to the public at large on which it bases its general judgments of the profession.

Many of these projects are aimed at improving clients' access to quality legal services. Bar associations throughout the state sponsor lawyer referral services that match clients with lawyers who have joined panels requiring them to meet set standards. The Suffolk County Bar Association and a Joint Committee of the New York County Lawyers and the Association of the Bar of the City of New York have had conspicuously successful services for years.

Increased access to legal services for persons who cannot pay for a lawyer has been energetically promoted by professional groups across the state. A special committee established by former Chief Judge Sol Wachtler spent over two years monitoring and measuring the extent of the *pro bono* effort of the private bar, and found a substantial commitment to such service, especially in upstate counties, including, notably, Monroe. Downstate, organizations such as Volunteers of Legal Services, the Voluntary Committee of the State Bar, the McKay Outreach Program of the Association of the Bar, and the major commitments of the Nassau and Suffolk Bar Associations have contributed thousands of hours of legal service, free, to those who require that help.

And in urban and rural areas alike, New York has benefited from the dedication of thousands of lawyers who have made a career in legal services and legal aid offices, committing themselves full time and for scant pay and perquisites to the legal needs of the poor. Add to these whose legal help is rendered to private clients, the thousands more New York lawyers who serve the public as a client in federal, state and local government offices. The truth is that New York lawyers by career choice or *pro bono* commitment provide a huge volume of legal services to and for the public, often with little mention and less reward.

As another example, the bar has dedicated enormous efforts to promoting competent and ethical performance by practicing attorneys. The New York State Bar Association for years has been a national leader in the preparation and dissemination of continuing legal education courses. Institutions like the Nassau County Bar Academy of Law and initiatives like the Erie County Bar's introductory course on "Survival Strategies for Life After Law School" -- and many other similar programs elsewhere -- are aimed at raising the level of competence and learning of the practicing bar.

The same is true of the growing number of mentoring programs of various types being developed throughout New York. The Suffolk County and Monroe County bars have such programs, and the increasingly popular Inns of Court create an organized setting in which younger and more experienced lawyers can interact and increase their common commitment to professional excellence.

Still again, the organized bar in New York has recognized the need for vehicles to alleviate problems between clients and their lawyers. Everywhere the Committee went to solicit insights into the lawyer-client relations, it heard of programs in being that provide mediation and conciliation and, in some cases, fee arbitration services for troubled relationships.

The point of these examples, and many others that could be added is this: the professional ideal of service to the public transcending personal self-interest is in fact thriving in New York. It thrives, not because it has been given the general recognition it in fact has earned, but because New York lawyers, in vast numbers, believe it right.

THE PROFESSIONAL IDEA UNDER ATTACK

When Roscoe Pound authored his classic essay on "The Causes of Popular Dissatisfaction With the Administration of Justice" in 1906, he began his dissertation with a collection of ancient English barbs against the legal system and profession, featuring, among others, Wyclif, James I and Lord Campbell. When, a year later, John dos Passos wrote his monograph, "The American Lawyer," he reminded his readers that condemnation of lawyers resonated through the *pronunciamento* of the Papal Legate at the Council of London in 1237, who "heard the cry of Justice, complaining that it is greatly impeded by the quibbles and cunning of advocates."[3] Plato, Shakespeare, Dickens, Sandberg and countless others have contributed to the anthology of lawyer-bashing literary allusions.

Over the centuries, people have been moved not only to write, but to act on a spite for lawyers. When Shakespeare has Dick the Butcher tell the rebel leader Jack Cade, "The first thing we do, let's kill all the lawyers," he is echoing the actual agenda of 1381 revolutionaries as recounted in Holinshed's Chronicles.[4] History records that the rebels at least tried to make good on their campaign promise. So did the debt-burdened Massachusetts farmers who waged Shays' Rebellion some four centuries later, scorning lawyers as "the pests of society."[5]

Another approach to bridging the gap between the common folk and a bar perceived to be elite and predatory, was championed by Jacksonian democracy. At its zenith in New York, pressing its view that "every man can be a lawyer," it wiped away virtually all qualifications for admission to practice.[6] The Committee heard echoes of all those ideological themes during its public hearings.

Much of this public dissatisfaction with lawyers, as Pound noted, has originated from time immemorial in impatience with the restrictions and procedures of the law itself. Whether it was Cade's rebels in 1381, or the organizations of fathers dissatisfied with how they had been treated by the New York custody laws in 1994, the fundamental grievance has been with the law itself. As Pound noted, the intrinsic character of law as a restrainer and regulator -- uniform and gradual in its approach -- necessarily builds up impatience in those groups who see themselves as disadvantaged by its application. And, as law becomes more pervasive, causing, among other evils, "The Death of Common Sense," this impatience appears to grow and spread.[7] Coming at a time when institutions having custody of the vision and values of the society are felt to be in general disrepair and disrepute, a generalized climate of disdain is easy to achieve. In short, now as for centuries past, a major wellspring of disregard for lawyers has been a disappointment in the law itself, often generated by exaggerated expectations of what the law in reality can achieve.

Similarly, the expectations of individual clients as to what their counsel can achieve can also be unrealistic. A client may fix such hopes based on a generalized optimism about what law can do. Sometimes, however, the clients' exaggerated expectations may stem from an imperfect understanding of the engagement or from promises of counsel that cannot reasonably be kept.

To the perception that law does not work at all because it does not work perfectly, and that lawyers do not achieve what they should, another general impression -- equally exaggerated -- infects the public's view of lawyers. That is the belief that legal services are only realistically available to the moneyed class, that lawyers generally are wealthy and work in large firms serving the rich.

The profile of the legal profession in New York State bears out none of these impressions. In New York, 80 percent of all lawyers in private practice work in firms with fewer than ten attorneys; of these, 50 percent (40 percent of all the lawyers in the state) work in firms smaller than five, or as sole practitioners.[8] While 25 percent of the attorneys in New York earn over $120,000 a year, an equal percentage earn less than $45,000.[9] There are, of course, large firms providing expensive legal services to large corporate clients. Even those firms have felt the twin pressures of rising costs and client fee resistance; some old and distinguished firms have not survived those pressures. But the overwhelming reality of law practice in New York, whether measured by numbers of clients served or numbers of lawyers serving them, is that the practice is carried out by small firms, charging modest fees, and earning modest incomes.

Those lawyers have to deal with law of increasing volume and complexity; with demands that they be more and more proficient in specialty areas of practice; with heightened competition from more and more lawyers; with rising overheads and expenses and narrowing margins of net income. The technical demands and economic pressures of contemporary practice are very much at odds with the prevailing notions of lawyers' lives and practices. Any realistic proposals for improvement of professionalism in practice must take into account these realities, as we believe ours do.

The contemporary legal profession is thus beleaguered in large part by forces

beyond its control. Some have ancient pedigree and are ingrained in populist resistance to law as a stabilizing force or lawyers as a learned elite. Others spring from the inherent qualities of law and some from its contemporary growth and pervasiveness. Still others spring from social and economic changes that have particularly affected law and lawyers. Some spring from gross misperceptions of what the actual profile of the profession in the state really is.

THE PROFESSION'S PROPER RESPONSE

It is an insufficient response to our charge, however, to rest on this catalog of influences that lie beyond the profession's control, because some of the public discontent is well founded, and is within the profession's power to correct. We have already noted the centrality, in our view, of critical self-examination as a hallmark of professionalism. As then-Judge Arlin Adams put the same point:

> "All professions, especially one as central to American life as the legal profession, should undergo a continuing process of examination and self-evaluation. Any group that does not engage in such an exercise loses much that makes it a profession: a shared set of principles and customs that transcend self-interest and speak to the essential nature of the particular calling or trade."[10]

The legal profession has not lacked for assiduous self-examination in recent years. Committees of the American, New York State and myriad local bar associations have published important and illuminating reports on areas in which the performance of the bar can be improved. The Committee is in debt to these forerunners whose insights and proposals have been most helpful.

The Committee's proposals are aimed at achieving two objectives. First, there are areas in which genuine reform of present practice is required in the public interest. Second, there are areas in which modest improvements in current practice are likely to raise substantially the level of public confidence in the profession.

Our review of the materials available to us and the data we accumulated persuades us that significant opportunities to improve professional performance and to raise the confidence of the public in the profession lie in the areas we treat in this Report. We conclude that improvements in pre- and post-admission training are important to inculcating and preserving professional values and skills. There are numerous ways in which client dissatisfaction can be reduced or more satisfactorily redressed. Hypercompetitive behavior by lawyers, whether in obtaining clients through misleading advertising, stirring up frivolous controversies, or engaging in inappropriate, uncivil or misleading tactics, all can be stemmed. A discipline system that offers more options to prevent as well as to sanction unethical behavior, and balances concerns of public knowledge with basic fairness badly needs to be enacted. Some new approaches to increasing the efficiency of the court system and to providing appropriate alternative methods of resolving disputes should be attempted.

In recommending the proposals that follow in ensuing sections of this Report, the Committee is motivated by the conviction that it is the urgent duty of the bar to respond fairly to fair criticism. There are areas in which its performance can be improved. The enactment of such recommendations, coupled with the continued steady adherence to the professional idea that already marks the character of the New York lawyer, is the best response the bar can give to contemporary public criticism.

III. RECOMMENDATIONS TO IMPROVE PROFESSIONALISM

IMPROVED TRAINING FOR NEW LAWYERS

The substantive legal and ethical skills that comprise a lawyer's stock in trade are acquired and refined during a lifetime of practice. A lawyer entering the profession commits to a career of studying new law, practicing advocacy and client relation skills and discerning the ethical implications of a complex world. It is an educational process which the American Bar Association *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (the "MacCrate Report") described as a "continuum." Commencing with entry to law school, the continuum progresses through various stages of apprenticeship. Eventually, the once junior lawyer becomes the mentor, charged with passing on professional verities to a neophyte.

Law schools, as the gatekeepers of the profession, are entrusted with the responsibility to ensure that prospective candidates for admission to the bar possess a solid background in reasoning and ethics, essential skills in successful lawyering. This responsibility mandates that law schools impose rigorous admissions standards and teach curricula that immerse students in the life of law. It is an enormous task given that in 1994, 127,441 students attended 177 law schools across the country; of those, approximately 44,000 were first year students.[1]

Chief Judge Kaye has formed a committee to explore ways to incorporate into New York's system of legal education the ideas raised in the MacCrate Report. Chaired by Justice Joseph Sullivan of the Appellate Division, First Department, that Committee is conducting a multi-phased inquiry and expects to issue its report in 1996. To the extent that Justice Sullivan's Committee is not addressing ethical training for law students, we do so here.

Every area of law is defined by the ethical dimensions raised in its application. It is not enough for a law school to include in its curriculum only one professional responsibility

course taught independently of its other courses, and too often geared to preparation for the Multi-state Professional Responsibility Examination. In addition to the standard professional responsibility course, each substantive and procedural course should incorporate material addressing the ethical obligations and conflicts a practitioner faces in applying the legal principles pertaining to that area of law. Several law schools, most notably Brooklyn Law School, have been developing course syllabi that include such ethical dimensions. In addition, the Fordham University School of Law has opened the Stein Center for Ethical and Public Interest Law, an institute dedicated to the exploration of ethical issues and law.

Law school ethics education is similarly incomplete unless it imparts to students the historical underpinnings of the profession. Knowledge of the development of our legal culture and the individuals who have made meaningful contributions to the profession is essential if a lawyer is to be more than a mere legal technician. And we emphasize, there *is* such a thing as a professional culture -- a sense of shared traditions and history of the legal profession, of its purpose and its responsibility to society. Law schools must strive to inspire in each student an intellectual and emotional feeling for the greatness and nobility of the profession and an understanding of this culture. A lawyer so trained will better recognize the obligations of the profession and will be better prepared to respond to the legal needs and emotional expectations of each client.

Law schools can more readily achieve these goals, given the crowded course loads they must already deliver, by forging greater partnership with bar associations. Several law school deans who consulted with this Committee pointed to increased interaction with local bar associations as a way to better prepare students for practice. Early exposure to bar associations will encourage students to attend programs that address practical substantive and ethical issues. Moreover, bar members provide an invaluable resource to students, who, prior to graduation, usually have minimal exposure to the daily rigors of practice. Students, for their part, provide an important resource to bar associations interested in expanding *pro bono* programs.

The financial predicament of law school graduates deserves special attention. Law schools are regarded as major sources of revenue for the universities with which they are affiliated. At least one university in the state ranks its law school as its third revenue producer, behind the football and basketball teams. To maximize this lucrative role, classes entering law school have been filled to capacity. In turn, record numbers of law graduates, some 6,000 annually in New York alone, are entering a profession that is already saturated and suffering a market-forced contraction.[2] That law schools are beginning to recognize their obligation to tailor class size to market demands is evidenced by the recent decisions of Syracuse and Creighton Universities to reduce the size of next year's entering class. In announcing the reduction, the Creighton University Law School dean observed that the decision was a "moral, ethical response" to a saturated lawyer market. Moreover, he noted that the smaller class would prevent an erosion of admission standards.[3]

An estimated 85% of law school graduates enter this downsizing profession carrying an average debt of $60,000.[4] Unable to find employment, increasing numbers of recently graduated lawyers "hang up a shingle" without the benefit of any apprenticeship. Predictably, these lawyers are the subject of a significant percentage of complaints filed with the attorney grievance committees. The allegations raised range from client neglect, to conversion, to malpractice; many can be attributed to simple ignorance of law office management and attorney-client relations often caused by the lack of any practical apprenticeship. Frequently, pressed by economic necessity, the lawyer has simply accepted a matter beyond his or her level of expertise.

The Committee proposes several initiatives to address this situation. Each proposal is a substitute for the nurturing process of acculturation newly admitted attorneys traditionally experienced when they joined a firm or public service. In those settings, senior attorneys imparted the lessons learned by their experience to associates, who came of age by joining the partnership or rising to a policymaking position. Taken together, the Committee's proposals attempt to reconstruct that tradition, by emphasizing the crucial role of education by example and peer review.

The Committee proposes that practitioners be instructed in law office management and client relation skills at a seminar conducted at the time of admission. The Appellate Division, Fourth Department, in conjunction with the Erie County Bar Association, recently sponsored such a program, aptly titled "Survival Strategies for Life After Law School." Newly admitted lawyers attended a two and a half day program that took place immediately after the Spring, 1995 admission ceremony. They heard a variety of practitioners and judges address practical topics such as developing professional relationships, common ethical pitfalls, how to communicate effectively with clients, the basics of establishing and managing a law practice, and the fundamentals of simple legal transactions.

At least eight states include in their bar admission requirements some degree of such specific training in practical skills. California, Maryland, Michigan, Missouri, New Mexico and North Carolina require between three and thirty-four hours of course work to be completed in varying time-frames within the first year of admission. New Jersey mandates a three year program, beginning with an intensive core curriculum consisting of ethics, real estate, will drafting and probate practice, family law, and a trial preparation course. This requirement must be completed either prior to admission or within the first year following the taking of the bar examination. The second year curriculum consists of another trial preparation course and administrative law. During the last year, an attorney selects two of the following courses: small business law; bankruptcy practice; collection practice; municipal court practice; worker's compensation practice, and landlord/tenant practice.[5] The Committee recommends that each Department, in cooperation with State and local bar associations initiate programs similar in content to those described above, to be taken at or near the point of a new attorney's admission.

The Committee also recommends the adoption of internship programs developed with the cooperation of law schools, law firms and local bar associations. Ideally, such programs would be available to students throughout their law school careers and prior to their admission to the bar. An apprenticeship of even short duration will enable a newly-minted attorney to learn rudimentary, yet sound, business procedures which are essential to

running a successful solo practice. Such an internship will also enable a young lawyer to become part of the practicing legal community, thereby acquiring a sense of belonging and the confidence that makes it easier to ask questions before making a mistake.

The Delaware Board of Bar Examiners currently requires candidates for admission to the bar to perform a clerkship of at least 5 months' duration some time after admission to law school and within a year of taking the bar examination. The clerkship experience is further amplified by the requirement that the candidate be personally sponsored by a practicing lawyer, known as a preceptor, who reviews the clerkship in the context of evaluating the application for admission.

Local bar associations can play a key role in the professional development of young attorneys by forming long-term mentoring programs. Several bar associations across the state have sponsored mentoring programs in the past few years, with varying degrees of success. The Monroe and Erie County Bars matched senior practitioners with new members in an effort to cultivate relationships. Similarly, in Suffolk County, the bar association conducts an on-going effort to match new members with seniors. That association's news bulletin runs advertisements for the mentor program and periodic get-togethers are held to enable interested members to develop relationships. Experienced practitioners also are listed in the association's membership book, according to area of expertise, as being available to mentor a new practitioner. In a slightly different approach, the Capitol District Chapter of the New York State Women's Bar Association operates a mentoring program in conjunction with its *pro bono* effort, as do several other pro bono organizations around the state. Lawyers who volunteer in an area of law outside their expertise attend a training session and then are teamed with an attorney knowledgeable in that field. This format provides a context for mentoring that affords the otherwise artificial relationship an opportunity to evolve into a mutually rewarding endeavor.

The recent proliferation of American Inns of Court, patterned on the four English Inns of Court, also reflects the profession's recognition of the importance of creating alternatives to the traditional legal structure. Introduced in the late 1970's by Chief Justice Warren E. Burger, there are now approximately 300 Inns functioning across the country. Comprised of no more than 80 attorneys of varying levels of experience, the inns conduct mock proceedings in addition to sponsoring seminars on matters of interest to its members. Both mentoring programs and the Inns provide a forum for peer review, which a number of ethicists note is an important element in the self-regulation of the profession.

MANDATORY CONTINUING LEGAL EDUCATION

A lawyer's obligation to continually hone professional skills and keep abreast of developments in the law is a central element of professionalism. Notwithstanding the many educational programs available to the bar and judiciary, practitioners, judges, clients and grievance committee counsel each identified incompetence as a substantial deficiency within the profession.

For this reason, the Committee endorses previous proposals for the adoption of a mandatory continuing legal education requirement. Topics such as accounting, drafting, ethics, law office management, and communication, as well as procedural and substantive law should be included in the roster of courses which comprise a CLE program.

To the extent that a continuing legal education requirement imposes yet another obligation on overburdened practitioners, the Committee urges the development of alternatives to the standard lecture format. The development of videotape and computer software training packages that could be shared among lawyers and studied at their own convenience would immeasurably reduce the cost and inconvenience of CLE. Lawyers, especially those in small firms or solo practice, would be more inclined to integrate CLE into

their professional lives. In addition, insurers of legal practices can contribute an added incentive for CLE participation by offering premium rebates to subscribers.

Cognizant of the funding issues that stalled implementation of mandatory CLE in the past, the Committee recommends that courses sponsored by the Unified Court System, law schools and local bar associations be denominated by court rule as satisfying the requirement. Compliance with the CLE requirement can be monitored by including a certification to that effect on the biennial registration form.

ESTABLISHMENT OF AN ETHICS INSTITUTE

This Committee's mandate covers ground well-trod by others interested in the profession's development. As the bibliography indicates, the topics addressed during our inquiry and deliberations have been examined by a number of task forces, academicians, and committees, whose recommendations parallel some of our own. From their many thoughtful treatises and reports we have discerned one salient point: issues pertaining to the legal profession relate not only to law, but to the very society we are and aspire to become. No committee of limited duration can adequately address matters of such scope and that, by their nature, require continuity of attention. Deborah L. Rhode, Esq., Professor of Ethics at Stanford University Law School, has observed that well-meaning efforts at reform of the profession are often piecemeal and skirt more fundamental questions about our system of law with the result that they easily degenerate into exercises in rhetoric.[6]

Mindful of these considerations, the Committee recommends the creation of a permanent entity to study and speak to issues pertaining to professionalism. In 1993, the Texas Bar Foundation founded The Texas Center for Legal Ethics and Professionalism, dedicated to advancing the bar's awareness and understanding of ethical issues. The Center has outlined seven specific goals to be achieved by 1997, which will afford the bar a comprehensive program of ethics, research resources and instruction. We recommend that the

Chief Judge cause to be established, with the participation of the courts, the bar and law schools, a similar institute in New York which would greatly foster our understanding of professionalism and inform the public debate regarding the role of law in our society.

REAFFIRMING STANDARDS OF CIVILITY

The adversarial nature of our legal system has always engendered a degree of tension that, traditionally, was kept in check by the cultural mores of the relatively small legal community. Members of the bar and bench observed a code of etiquette and decorum that facilitated the resolution of disputes just as contentious as the ones we see today. Moreover, the routine courtesies lawyers extended to their colleagues enabled lawyers to distance themselves from the acrimony conflict inevitably spawns. That in turn enabled them to serve their clients more objectively and effectively and to preserve collegial relationships with other members of the bar.

In recent years, as society has become inured to violence on television, on the streets, in the workplace and in our homes, etiquette and decorum have been accorded less and less value. At times, ordinary civility seems to have become a quaint anachronism. Prime time television's "Rambo" image of effective lawyering dictates not only the client's expectation of attorney behavior, but also, unfortunately, some lawyers' image of themselves. Lawyers who are otherwise inclined to observe common courtesies often forego this opportunity for fear that opposing counsel will use the concession as a weapon, or that their clients will believe them less than whole-hearted in their zeal.

The bench, too, is affected by this trend. As Benjamin Cardozo noted, and the 1991 Seventh Circuit Court of Appeals' *Interim Report on Civility* recalled, "Judges are never free from the feelings of the times."[7] Pressured by heavy calendars and hampered by inadequate resources, judges also sometimes contribute to the "coarsening" of practice.[8]

Incivility commonly manifests itself as rudeness, refusal to accommodate a colleague's schedule, judge baiting, or harassment during depositions. As a New York County Lawyers' Association report has noted, also included under the umbrella are sharp practice tactics such as misrepresenting facts to the court or an adversary and including false information in unsworn documents.[9] Examples of judicial incivility range from excessive delays in commencing scheduled proceedings, to public *ad hominem* attacks that humiliate counsel, witnesses or litigants.

This Committee recognizes that neither incivility nor sharp practice tactics are institutional problems: they are a product of individual behavior. But that behavior has always been influenced, for better or worse, by the collective viewpoint of the community in which it occurs. As the ever-increasing size of the bar attenuates the sense of collegiality that exists among lawyers, and as economic pressures spur more competitive behavior, substitutes for the unwritten rules of appropriate behavior must be found.

In recent years, several inquiries into incivility and sharp practice have resulted in the adoption of codes of conduct that explicitly set forth behavior standards to which the bar and the bench should aspire. The Committee urges the Unified Court System to adopt a code of conduct, similar to those promulgated by the American College of Trial Lawyers and the United States Court of Appeals for the Seventh Circuit, that will reorient the bar and bench toward the observance of courtesies that long have enhanced the quality of professionalism in New York. Aspirational in tone and content, such a code will form a frame of reference to assist both bench and bar in discerning the bounds of civility among other things.

The claim that courtesy must be sacrificed to the demands of zealous advocacy is expressly contradicted by Disciplinary Rule 7-101 of the *Lawyer's Code of Professional Responsibility*, which states, " A lawyer does not violate [the obligation to zealously represent a client] by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by avoiding offensive tactics, or by treating with courtesy and consideration all personal involved in the legal process."

The fundamental principles articulated in the Ethical Considerations and Disciplinary Rules which flow from Canons 1 and 7 of the *Lawyer's Code* reflect the profession's recognition of the critical role etiquette and honorable practices play in our system. Indeed, the *Lawyer's Code* can form the basis for a code of conduct.

In addition, the Committee recommends that the Canon 7 Disciplinary Rules be amended to include "gross and persistent" incivility as a violation of the *Lawyer's Code*. This recommendation recognizes the increasing willingness of the Appellate Divisions to sanction, in the context of disciplinary proceedings, conduct that exceeds the bounds of propriety. An example of this willingness is the Second Department's recent suspension from practice of an attorney whose courtroom behavior was adjudged to evince "a flagrant disrespect for the judiciary and a fundamental disregard for the judicial process which he has been sworn to uphold." *Matter of Richard L. Giampa, a Suspended Attorney*, 211 AD.2d 212 (2d Dept. 1995). Explicit proscription of a pattern of conduct that the profession finds offensive sends clear notice that there is no room in the profession for individuals who mistreat colleagues and misuse the legal process. This message will be underscored if the proposed extension of the disciplinary rules to law firms is adopted by the Appellate Divisions.

The profession's success in reorienting itself to the principles of etiquette and decorum depends not only upon individual observance of those principles, but also upon each judge's commitment to upholding, as an exercise of judicial authority, the principles articulated in the *Lawyer's Code*. A judge's failure to insist upon compliance with the letter and spirit of the behavioral standards governing litigation erodes society's respect for, and confidence in, the law.

The elimination of incivility and sharp practice tactics can only assist overburdened judges in managing bulging calendars. The Civil Practice Law and Rules and rules promulgated by the Chief Administrative Judge provide vehicles for a judge to ensure that the calendar is not cluttered with submissions that divert attention from the essential aspects of a

dispute. Those who argue that application of these existing provisions generates unnecessary litigation miss the point. Once judges create the expectation that lawyers who appear before the court must act courteously and honorably, all motion practice, including proceedings related to attorney conduct, will be reduced.

TRUTHFUL, INFORMATIVE ADVERTISING

Issues pertaining to lawyer advertising have long generated impassioned debate. Practitioners, the public, regulating authorities, and the courts grapple with balancing the First Amendment's guarantee of free speech against the need to protect the public and the profession from unscrupulous, if not unseemly, advertising. Other issues concern the role of advertising in affording the public informed access to legal services and the feeling in some quarters that all advertising denigrates the profession.

In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the United States Supreme Court developed a four-part analysis for determining whether state regulation of advertising is constitutionally barred. First, in order to qualify for protection, the advertisement must "concern lawful activity and not be misleading." If this threshold is met, the state must demonstrate that it has a substantial interest in supporting the regulation; that the restriction "directly and materially advances that interest"; and that the regulation itself is "narrowly drawn."

New York's restrictions pertaining to lawyer advertising are set forth in Disciplinary Rules 2-101 through 2-105 of the *Lawyer's Code of Professional Responsibility*. In addition, some local government agencies, such as the New York City Department of Consumer Affairs, consider lawyer advertising to fall within the ambit of their authority.

At the heart of the United States Supreme Court rulings and the New York regulations is the requirement that advertisements be truthful and not misleading. It is imperative that members of the public seeking counsel through advertising have the reasonable expectation of

finding competent ethical representation. The rationale supporting lawyer advertising -- the public's improved access to counsel -- depends entirely on the public's being fairly informed about the services on offer.

The anecdotal evidence presented to this Committee confirms the data presented in the American Bar Association Report, *Lawyer Advertising at the Crossroads: Professional Policy Considerations*: most people retain lawyers based upon personal referral or by thumbing through yellow page advertisements. In addition, the ABA found that although most people are generally satisfied with the services rendered by their own attorney, many hold the view that advertising, especially intrusive television or billboard ads, sullies the profession.[10] More particularly, as the American Bar Association's 1993 Survey found, much of the public believes that lawyer advertising is motivated by greed and is "just another way to generate more lawsuits and, therefore, more fees."[11]

Given the prevalence of these seemingly contradictory views, lawyers who advertise, and the profession at large, must take scrupulous care to ensure that advertisements are truthful and free from any statements that could be regarded as misleading or confusing to a potential client. To assist lawyers in maintaining high professional standards in advertising, the Erie County Bar Association has published the *Lawyer's Guide to Advertising in New York State*. The pamphlet sets out a lawyer's obligations and describes ways an ad can conform to or violate those standards.

A particularly troublesome problem is caused by those advertisements that fail to disclose accurately that the attorney placing it does not intend to handle the matter. The advent of the virtual office has contributed to the increase in the number of lawyers who broker cases, after soliciting those cases through misleading advertisements. The broker conducts the initial interview with the client, in effect screening the case for referral to another lawyer, based upon the latter's geographic location, expertise, or mere availability and willingness to pay a forwarding fee. During the initial interview, the broker sets the terms of the representation and the client commits, blindly, to be represented by an unknown person.

The Committee, having perceived an increase in the brokering of cases, recommends amendment of the *Lawyer's Code of Professional Responsibility* to require disclosure if an attorney places advertisements as a broker. This required disclosure conforms with the *Central Hudson* analysis in that such advertising, absent disclosure, is inherently misleading, and the state has a substantial interest in protecting the public from the risks it poses. Indeed, many states have promulgated regulations to ensure the accountability of the attorney placing the ad. In addition, the restriction is narrowly drawn to ensure that only those lawyers who parcel out cases are affected by the disclosure requirement.

IV. RECOMMENDATIONS TO IMPROVE CLIENT SATISFACTION

Traditionally, a person chose a lawyer on the basis of a pre-existing relationship or on the strength of the lawyer's reputation in the local community. Today, the sheer number of lawyers and the isolation of local community life increase the likelihood that client and lawyer meet as strangers at the outset of their relationship. It is not a propitious start to a relationship that is often occasioned by a crisis in the client's life.

In examining the relationship between client and lawyer, the Committee identified several common flashpoints of conflict in the attorney-client relationship. Some have characterized these issues as "consumer complaints". However, insofar as the term "consumer" depicts the anonymous relationship that exists between the buyer and seller of a commodity, it is a misnomer. The client, in hiring a lawyer, purchases legal services that, by virtue of the lawyer's professional oath, include a fiduciary commitment to safeguard the client's trust and interest.

The proposals that follow aim to reduce the opportunities for misunderstandings to arise during this multi-faceted, yet often stressed, relationship.

ENGAGEMENT LETTER

Communication is the essential ingredient of a successful relationship between lawyer and client. A number of clients and lawyers who addressed the Committee described conflicts that could have been managed harmoniously, if not totally avoided, had the parties fully discussed their expectations and obligations at the beginning of the relationship. From the outset of the representation both parties should have a clear understanding of what services are

to be rendered, the effort required to perform those services, and the fee to be charged. Failure of the minds to meet on these critical issues underlies many accounts of client dissatisfaction and the demise of many attorney-client relationships.

The Committee urges the adoption of a disciplinary rule requiring a lawyer to provide the client with an engagement letter upon the commencement of the representation of an individual where the fee to be charged is expected to be $1,000 or more.

An engagement letter encourages the lawyer to explain the details and realities of the representation to the client; moreover, it sets the stage for the lawyer to periodically update the client regarding the status of the matter. The letter serves as a permanent record of the understanding between the parties, and each can refer to it in the future.

The Committee's proposal has several nuances that spring from its belief that the rule should be tailored to the cases in which it is most useful and that the rule should not be unduly burdensome. The rule is limited to representation of individuals. The Committee believes that, in general, corporations and other entities are likely to be sufficiently sophisticated to enter into a relationship with counsel as an equal, and therefore, can chart their own course without necessarily receiving a letter of engagement. The minimum fee of $1,000 reflects the Committee's assessment, based upon discussions held across the state, that services rendered for less than that amount tend to be of a sufficiently transitory nature as not to require the formality of an engagement letter. A $1,000 threshold also reflects the Committee's concern that the solo practitioner not bear an excessive burden imposed by a rule of general application. This is especially pertinent in many upstate jurisdictions where, as one practitioner said, the school bus driver is often the most economically secure person in the community. We also mean the threshold to be high enough that the encounter between a lawyer and longstanding client in any of the many casual situations in which advice can be sought and given is not covered by the rule. But where a transaction of sufficient size to attract a fee of $1,000 is involved, it is in the interest of both the attorney and the client to record their understanding.

The length of the letter should be determined by the nature of the services to be rendered. It is the Committee's view that an adequate letter can and should be succinct. It does not seem necessary to make the engagement letter itself a complex legal instrument, and the interests of lawyer-client clarity are not served by doing so. The Committee considered but rejected the suggestion that it propose a model letter. The circumstances of engagements differ so widely that no such form seems useful. Rather, as clients and the legal community adapt themselves to the rule, the marketplace will play a role in developing the terms to be included in the letter.

A letter of engagement need not be filed with the trial court or with the Office of Court Administration, unless the services to be rendered pertain to personal injury or domestic relations. The filing of an engagement letter in those cases is necessary since the lawyer's fee constitutes part of the litigation. Enforcement of the rule will be a function of the disciplinary process. If a fee dispute arises and the lawyer did not provide the client with an engagement letter, a rebuttable presumption will be drawn against the lawyer that precludes the lawyer from recovering more than $1,000 from the client.

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

The attorney-client relationship, founded as it is upon the trust the client places in the lawyer, is, as we have noted, multi-faceted. The lawyer's fiduciary duty to the client has many tangible and quantifiable manifestations: conservation of the client's funds, protection of the client's confidences and advancement of the client's interests. The client too, has certain responsibilities toward the lawyer: truthfulness in discussions with counsel and prompt payment of fees for services rendered.

The Committee proposes that these mutual rights and responsibilities be articulated for the client's benefit in a written statement of client's rights and responsibilities similar in content to the statement set forth in the Joint Rules of the Appellate Divisions,

Section 1400.2, that pertains to domestic relations matters. The Committee also endorses the American Bar Association's *My Declaration of Commitment to Clients* for its simple, straight-forward format that is easily understood by a client and not burdensome to a lawyer. Such statements are valuable educational tools that tend to inform clients accurately about what they may reasonably expect from their lawyer and what their lawyer can reasonably expect from them.

The statement should be available for the client to study at the lawyer's office. It should be conspicuously posted, just as hospitals post the statement of patient's rights, or the lawyer can give the client a copy of the statement.

ARBITRATION OF FEE DISPUTES

Fee disputes represent one of the most frequent and intense sources of public dissatisfaction with attorneys. To be sure, the reverse is often also true. The Committee concludes that a speedy, inexpensive and fair means of resolving such disagreements would greatly ease lawyer-client tensions. The method we propose is fee arbitration along the lines described below.

Fee disputes often arise when a case, especially a litigated matter, takes unexpected turns that escalate the cost beyond what the client anticipated. Such developments as extensive discovery, the hiring of experts, motion practice pertaining to ancillary issues and time lost in unproductive court sessions can quickly transform a seemingly simple matter into an expensive legal quagmire. Inadequate understanding of the services to be rendered, insufficient notice of mounting expenses and, perhaps, failure to prevail in the matter all exacerbate a disagreement regarding fees.

In order to remove the dispute from an adversarial posture and to facilitate speedy resolution, the Committee recommends adoption of a fee arbitration program according to the model set forth in the Rules of the Chief Administrator, Part 136 that governs arbitration of fee disputes in domestic relations matters.

Procedurally, fee arbitration takes place as follows: A matter is submitted to

arbitration at the election of the client; and, once that election is made, the lawyer's participation is mandatory. If the client does not file a request to arbitrate within 30 days of receiving notice of the fee dispute from the lawyer, the latter may commence an action to recover the fee. Disputes in excess of $100,000 are beyond the jurisdiction of the arbitration program.

The program's panel of arbitrators, who serve as volunteers, is comprised of lawyers and other members of the community. One arbitrator hears disputes where the amount in controversy is less than $3,000; three arbitrators sit on cases exceeding that amount. The result handed down by the arbitrator is binding upon both parties, subject to the limited judicial review permitted by Article 75 of the Civil Practice Law and Rules.

The Committee makes this recommendation, anticipating that the Unified Court System's extension of fee arbitration to all areas of practice may vary across the state as dictated by geographic considerations and by the availability of local resources to participate in the program.

LAWYER REFERRAL SERVICES

Adequate access to counsel is another flashpoint of frustration for clients trying to negotiate the legal system.

Anecdotal evidence presented to the Committee confirmed the finding of several studies, including a recent American Bar Association report, that most people hire their lawyers on the basis of a personal referral. Failing that, those of moderate means are often at a loss when hiring a lawyer to draft a will, negotiate a house closing or handle a divorce. A frequently heard complaint, particularly from the owners of small businesses, is that as laws governing their conduct multiply, their need for access to legal assistance increases; often they are frustrated by the difficulty of finding an attorney under auspices that give them

confidence. The profession has the obligation to develop innovative ways to connect clients with competent, affordable attorneys to handle the common life events that require the law's imprimatur.

Recognizing this responsibility, and to redress the shortcomings inherent in lawyer advertising, many bar associations have developed lawyer referral services that successfully direct those in need of a lawyer to knowledgeable counsel. The New York State Bar Association Lawyer Referral and Information Service (LRIS), started in 1981, operates a referral service in 39 counties where no service is otherwise provided. In 1994, LRIS handled more than 30,000 inquiries and made approximately 5,000 referrals.[1] In addition, at least 25 local bar associations provide a similar service. Model programs such as the one operated by the Suffolk County Bar Association establish standards for lawyers participating in a referral bank that ensure the competence of the lawyer it recommends to the public. In order to join the service, a lawyer must sign a grievance release waiver that authorizes the association's executive committee to examine the lawyer's grievance files and the lawyer must carry at least $100,000 in malpractice insurance. In addition, a participant in the service agrees to provide the client with a written letter of engagement and participate in fee arbitration if such a dispute arises during the representation.

It is the Committee's assessment that public awareness of bar association legal referral services is hampered by the limited funding that the associations are able to devote to publicizing the programs within the community. A Columbus, Ohio, referral program has had success in generating advertising itself by charging its members a percentage fee that is used exclusively for publicity.

The Committee recommends that existing referral services be reinforced and more amply financed and advertised, and that increased efforts be made to provide such services everywhere in New York.

PRO BONO EFFORTS

Those who cannot afford to hire a lawyer must often rely upon the *pro bono* services of public-spirited attorneys. Traditionally, lawyers in New York have contributed generously of their time and expertise to provide legal counsel to the poor. Much of this effort is quietly performed in fulfillment of a lawyer's obligation to serve the community; and it complements, but cannot replace, the indispensable work performed on behalf of the poor by staffed legal services organizations.

The need for increased levels of *pro bono* service and proposals to meet those needs were set forth by the Chief Judge's Committee to Improve the Availability of Legal Services, chaired by Victor Marrero, Esq. In 1990, that Committee recommended the adoption of a mandatory *pro bono* requirement for all lawyers in New York. Former Chief Judge Sol Wachtler subsequently appointed a second committee to monitor the performance of *pro bono* work being performed in the wake of the Marrero report, and that Committee, chaired by Justin Vigdor, Esq., presented its thorough report in 1993.

This Committee believes that the problems and opportunities involved in providing adequate *pro bono* services have been laid out for the Chief Judge in the thoughtful reports of its predecessors, to which it defers on this issue. Whatever disposition is made of those proposals, this Committee believes that *pro bono* service singularly benefits both the public and the profession. We strongly encourage continued, energetic efforts to make such help available as widely as needed.

PRO SE LITIGANTS

Whether by choice or from necessity, increasing numbers of litigants represent themselves before the court, without the benefit of counsel. This phenomenon is especially evident in landlord and tenant courts and in family courts across the state. The individuals who appear before these courts often lack education or the facility with English necessary to negotiate the labyrinth that is legal procedure.

The Committee recommends that the Office of Court Administration endeavor to develop avenues for informing *pro se* litigants of fundamental procedures and their rights in litigating matters before the court. In addition, *pro se* litigants often require basic information regarding the location of specific offices and courtrooms within the courthouse. They can also reduce the confusion and consumption of court time that ill-prepared *pro se* litigants often involve. The publication of multi-lingual informational booklets and the presentation of videos regarding various court practices can only assist the *pro se* litigant in successfully appearing before the court. Present efforts to make court personnel available to assist individuals in preparing their papers for submission to the court, and the drafting of special *pro se* forms for submission by unrepresented individuals are laudable. In urging these efforts, the Committee appreciates the concern expressed by several court administrators that court personnel not cross the fine line between assisting a litigant and becoming that litigant's advocate.

RELATIONSHIP OF RECOMMENDATIONS TO THE MATRIMONIAL RULES

As stated earlier, this Committee's genesis can be found in the 1993 adoption of procedural rules which altered some aspects of matrimonial practice. Indeed, the Chief Judge's mandate specifically charged the Committee with examining the applicability of those procedural rules to other areas of practice.

Many of the recommendations set forth in this Report have been drawn from the bar's successful experience with the matrimonial rules. In particular, the promulgation of a statement of client's rights and responsibilities, adoption of a letter of engagement, fee arbitration, early preliminary conferences, and stricter requirements for the certification of submissions to the court can be traced to those changes, although sometimes in slightly varied form.

Other rules adopted for the matrimonial bar have proven to be unsuitable for extension to general practice because the circumstances that give rise to the important role they play in matrimonial practice do not exist in other areas. These include the procedure

for obtaining a security interest and the requirement that a closing statement be filed with the court upon the conclusion of a matrimonial matter. In addition, the prohibition against non-refundable retainers is now a matter of case law. *Matter of Edward M. Cooperman*, 187 A.D.2d 56 (2d Dept. 1993), aff'd 83 N.Y.2d 465 (1994).

V. RECOMMENDATIONS TO IMPROVE ATTORNEY DISCIPLINE

The legal profession, by virtue of being accorded the privilege of self-regulation, is obligated to maintain an attorney discipline process that ensures the public's confidence in the legal system is both safeguarded and deserved.

Traditionally, as Professor Geoffrey Hazard, Esq., has observed, standards of ethics and competence were maintained by a combination of social pressures, such as commendation and ostracism, and long-term relationships that carried the promise of repeat business and professional success. Today, that collective social evaluation has fallen victim to the relative formlessness of a vastly larger bar. No longer part of the social fabric, attorney discipline has become institutionalized.[1]

It is the Committee's assessment that there are significant opportunities for improvements in the present system of attorney discipline that would enhance both its effectiveness and public confidence in its operation. Clients, practitioners, judges and ethicists all expressed serious reservations regarding the current disciplinary process. The experiences they recount, whether their own or others', whether understated or embellished, point to three areas of concern: the grievance committees' difficulty in communicating effectively with persons filing complaints; the limited options available to them in redressing complaints; and the secrecy with which the business of attorney discipline is conducted. These concerns are real, and they give rise to the perception, no less damaging by virtue of being a perception, that the profession is unable or unwilling to regulate itself. In short, the negative experience of filing a disciplinary complaint works a disservice upon not only the client who seeks grievance committee assistance, but also upon the lawyers who competently meet their responsibilities, the profession, and the public at large. The proposals that follow are urged as ways to better equip the grievance committees to respond meaningfully to the complaints filed, and to address the ethical and competence deficiencies of lawyers who are the subject of those complaints.

IMPROVED RESPONSIVENESS TO COMPLAINTS

In 1994, more than 10,000 complaints against lawyers were filed with the grievance committees in New York State. If statistics from prior years are an indication, almost 90% of these complaints will be rejected or dismissed for failure to allege conduct that violates a disciplinary rule, 8% will result in the imposition of a sanction by the grievance committee that is not disclosed to the public, and 2.5% will result in public censure, suspension from practice or disbarment by the Appellate Division.[2] Most of the rejected or dismissed complaints involve fee disputes or a form of neglect sufficiently irksome to the client to warrant the complaint, but not so egregious as to warrant the filing of charges. These complainants customarily receive a form letter tersely advising them of the committee's action; no explanation of the lawyer's conduct is offered and no suggestion regarding alternative avenues to resolve the disagreement is made. Receipt of such a letter can only compound the client's already considerable feelings of frustration and impotence. If these feelings are multiplied by the number of individuals who receive these letters and the number of people to whom they recount the experience, it is no wonder that the attorney discipline system is held in disregard.

The Committee believes several measures should be adopted that hold the promise of significantly improving the real and perceived responsiveness to client complaints. First, the Committee proposes adoption of mediation programs by each of the six grievance committees to handle complaints, that, although legitimate, are not sufficiently serious to warrant the imposition of a sanction by the grievance committee or Appellate Division. A client who files a complaint asserting, among other things, failure to return telephone calls, missed conferences, a lack of updated information in the case, or fee issues, is interested in quickly resolving the problem. A mediator, with a neutral ear attuned to the failure of communication that characterizes many complaints of this type, can often remedy the situation in one or two meetings with attorney and client. Mediation can perhaps even repair the attorney-client relationship.

As envisioned, the volunteer mediators, once identified by a bar association or the Appellate Division, would be appointed to their task by the Appellate Division. Following a mediation training program, the volunteers would be available for assignment to resolve the issues underlying a complaint which "falls below the radar screen" of sanctionable misconduct.

The grievance committee staff would evaluate incoming complaints for participation in mediation according to criteria devised by the Appellate Division, in consultation with the grievance committee. Assignments to mediation would be made by the grievance committee. A matter referred to a mediator would not be dismissed until the mediator certified to the grievance committee that the parties had reached an acceptable resolution. If upon examining the complaint, the mediator believed that the issues involve substantive violation of a disciplinary rule, the matter would be referred back to the grievance committee for further investigation in a disciplinary posture.

Mediation programs of various types are currently in operation in each of the judicial departments. Each, albeit with differing procedures and administrative sponsorship, provides an alternative to discipline. Of these, the mediation program sponsored by the Departmental Disciplinary Committee, First Judicial Department, most closely approximates the program proposed by the Committee. With a volunteer staff of 58 mediators, drawn from three local bar associations, the program handled 187 matters in 1994. Of these, 162 resulted in successful resolutions. The remaining complaints were either dismissed due to the client's failure to cooperate or referred back to the committee for formal disciplinary action.[3]

Second, the grievance committees' responsiveness to complainants also can be improved by rethinking the purpose of the letter rejecting or dismissing a complaint. However appropriate the committee's action is, the person who filed the complaint feels aggrieved by the conduct of the lawyer hired to represent his or her interests. A two-sentence form letter does little to assuage that feeling. Tailoring the letter to the specific complaint and

including with it an informational booklet explaining the discipline process would be a gesture of goodwill toward an important constituent of the legal process.

Finally, each of the grievance committees includes non-lawyers who participate fully in adjudicating complaints against lawyers. Their presence reflects the profession's recognition of its accountability to the society it serves. Lay members of the committees should be highly visible to the public to remind the community that, through them, the public does play a role in the attorney discipline process.

BROADER RANGE OF AVAILABLE SANCTIONS

The range of public and private sanctions currently available to the grievance committees is insufficient to meet the committees' responsibility to prevent misconduct and limit recidivism. A letter of education, letter of caution, letter of admonition and a reprimand/admonition after hearing are the types of discipline administered by the grievance committees pursuant to the procedural rules, without application to the Appellate Division. They are employed on occasions when the committee is of the view that the lawyer's violation of a disciplinary rule was not of sufficient gravity to warrant the filing of formal charges and their application is not disclosed to the public. Public censure, suspension and disbarment are the statutorily authorized sanctions imposed by the Appellate Division, following a hearing based upon formal charges. Although this sanction structure effectively redresses violations of the *Lawyer's Code of Professional Responsibility*, it does not include a vehicle for the rehabilitation of the errant lawyer that the changing demographics of the profession call for.

As increasing numbers of new lawyers have entered solo practice without the benefit of substantial apprenticeship, the profile of lawyers against whom complaints are made has changed. In years past, the typical respondent in a disciplinary matter was a middle-aged

practitioner who succumbed to the pressures of practice, often as a consequence of substance abuse. Today, although substance abuse may still be a factor, with increasing frequency, the typical respondent has been admitted to the bar no more than ten years, practicing mostly in circumstances involving no supervision.

It is the Committee's recommendation that the Appellate Division expand the spectrum of sanctions that can be imposed against respondents to include mandatory attendance at remedial classes, participation in a mentoring program, and acquiescence in a monitoring schedule. In different environments and with escalating degrees of supervision, each program affords an attorney whose lack of skills has resulted in the filing of charges, the opportunity to remedy the deficiency. Participation in these programs would be mandated by the grievance committee or the Appellate Division, in its discretion, as part of, or as an alternative to, the standard sanction.

Mandatory attendance at remedial classes in ethics, law office management, communication skills, advocacy, drafting, and substantive law will benefit the young practitioner who has wide gaps in training. At the grievance committee's option, the classes can be short-term, like the continuing legal education seminars sponsored by bar associations, or long-term, like the multi-month courses conducted under the auspices of law schools. In recent years, attorney discipline authorities in several states have founded ethics schools which all respondents in discipline matters must attend. California has operated such a school for several years. Following the California model, in May, 1995, the Departmental Disciplinary Committee, First Judicial Department, conducted a one-day experimental program focusing on ethics, safeguarding escrow funds, and law office management. Based upon the attendance, which was voluntary, two programs are planned for 1996.

Mentoring aims at preventing recidivism by matching the errant lawyer with a respected senior practitioner for a specified period of time. By meeting with the mentor and observing the way the mentor conducts practice, the lawyer/mentee has the opportunity to develop practical skills and ethical sensibilities. At the conclusion of the specified period, the mentor, who serves *pro bono*, would submit a written report to the

grievance committee, assessing the lawyer's progress and recommending a disposition of the matter. If the mentor's assessment is unfavorable, the disciplinary matter would be pursued.

Monitoring contemplates a more intensive level of supervision in the form of management and financial audits to which the attorney would submit for a designated period. Pursuant to court rule, the Appellate Division would most likely direct monitoring as part of the public sanction imposed following a hearing based upon formal charges. The conversion of funds is a serious defalcation that monitoring does not seek to minimize. It is suggested as an alternative, or adjunct, to discipline in circumstances where it is apparent that the conversion was the inadvertent result of incompetence. Where appropriately related to the issuance of private discipline, the grievance committee also could direct participation in a monitoring program. The concept of monitoring has precedent in New York. In recent years the Appellate Divisions occasionally have directed substance abuse monitoring for respondent attorneys whose misconduct relates to drugs or alcohol use. The lawyer facing discipline bears the cost of the monitoring. At the end of the designated period, if the audit results are positive, the sanction is avoided or lifted.

OPENING DISCIPLINARY PROCEEDINGS FROM A FINDING THAT A *PRIMA FACIE* CASE EXISTS

All but a few legal proceedings are open to the public. It is a cornerstone of our jurisprudence, derived from the legacy of the fifteenth century English Star Chamber, that legal action be taken in a public forum. Lawyers, who challenge the actions and reputations of others in the public forum, may not consistently shield themselves from that same scrutiny when their own conduct is questioned and found lacking. Thirty-two states, supported by a number of bar associations, including the American Bar Association and The Association of the Bar of the City of New York, presently conduct attorney discipline proceedings to some extent in public.[4] Some states, such as Oregon, open the process to the public from the time

the complaint against an attorney is filed; others, such as New Jersey permit public scrutiny of discipline proceedings from the time formal charges are filed against the lawyer.

It is the unanimous conclusion of the Committee that the confidentiality accorded attorney discipline in New York is an anachronism that burdens rather than enhances the profession. Accordingly, we urge the Legislature to amend Judiciary Law Section 90(10) to open disciplinary proceedings to public scrutiny once formal charges are filed against a lawyer, in accordance with the standards we propose.

This Committee's proposal would direct public disclosure of pending disciplinary action against a lawyer in the cases where formal charges are filed. It would be the responsibility of the grievance committees to maintain an alphabetical listing of the lawyers subject to charges alleging violation of the disciplinary rules. The list would include language advising the reader that the charges have yet to be proved at a hearing. In the event the charges are not sustained at the hearing, the lawyer's name will be dropped from the list. Additionally, amendment of Judiciary Law §90 or the grievance committee's procedural rules would include a provision enabling the Appellate Division, in the court's discretion, to close the proceedings for good cause shown.

The Committee further recommends that the Appellate Divisions adopt a uniform standard for determining when formal charges should be filed against a lawyer. As a result of the various geographic considerations and different cultures of practice in the four judicial departments, each has evolved its own procedure for the adjudication of attorney discipline matters. The Committee respects the evolution of differing procedures as an understandable response to the needs of the community served by each grievance committee. The Committee's recommendation contemplates that different means may be employed in different parts of the state to satisfy the jointly adopted uniform standard for evaluating a complaint against a lawyer.

The proposed uniform standard is that formal charges be filed against a lawyer upon a finding that a *prima facie* case exists against the lawyer. We define *prima facie* for this

purpose 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. Once the charges are filed, the allegations are subjected to the preponderance of the evidence standard of proof.

The Committee proposes that the *prima facie* determination be made by the Appellate Division or a multi-member panel of the grievance committee. Currently, the Appellate Divisions employ varying mechanisms for determining when to file formal charges. The court itself makes the determination in the Second Department. In the First Department the office of the chief counsel recommends that formal proceedings be commenced and a lawyer member of the policy committee reviews the recommendation. The full committee makes the finding in the Fourth Department; and a majority vote of the Committee is required in order to commence a disciplinary proceeding in the Third Department.

So long as a uniform standard for determining whether a *prima facie* case exists is adhered to, the Committee recognizes that variations in local procedures for making that determination may well be appropriate. The Committee, however, recommends that two minimum procedural requirements be adopted, whatever local variations otherwise occur.

First, the *prima facie* determination should not be made by the staff of the disciplinary committees, but by more than one of the committee members acting in concert, or by the Appellate Division.

Second, prior to determining whether a *prima facie* case exists to prefer charges, the lawyer who is the subject of the allegations should be permitted to appear before the grievance committee personally or in writing. As the committee deems appropriate, the lawyer also should be permitted to present witnesses on his own behalf.

The Committee unanimously concludes that a regime of controlled openness to public scrutiny is in the interest of both the public and the profession. The public gains the

knowledge, appropriate for it to have, both about particular cases and about the adequacy of the process. The profession, in turn, benefits from increased public confidence in the integrity and effectiveness of the bar's ability to police itself. The constraints suggested are consistent with fairness to accused attorneys, and the standards and procedures proposed accommodate the needs for uniformity of substance and diversity in local practice.

VI. RECOMMENDATIONS TO IMPROVE COURT MANAGEMENT

The operation of the court system stands at the forefront of any discussion regarding the legal profession. In 1994, overall civil filings in New York's courts totaled approximately 2.7 million.[1] The individuals who come before the court have every reason to expect a fair, expeditious, and cost-effective examination of their claim or defense. To the extent they experience delay, escalating expenses or even the appearance of an uneven playing field, public confidence in the legal process is eroded to the detriment of the individuals who participate in the system and to the detriment of the profession itself.

PROPOSALS FOR CASE MANAGEMENT AND CALENDAR CONTROL

The Unified Court System has recognized the need to develop procedures that enhance the administration of justice in the courts. Self-examination of the court process has led to the adoption of different procedures in matrimonial cases and reform of the jury system. The April, 1995, publication of the *Report of the Committee on Case Management to the Chief Judge and Chief Administrative Judge of the State of New York*, is but the judiciary's most recent effort to discern and implement improvements in the adjudicatory process. The report recommends establishment of a differentiated case management program; development of standards and goals that include the pre-note of issue stage of litigation; creation of a mediation program for the commercial parts; and establishment of dedicated parts for matrimonial cases that conduct trials on consecutive days and resolve custody issues early in the litigation. This Committee joins its sister committee in urging implementation of those measures, with the added suggestion that custody matters be decided within six months of filing the request for judicial intervention.

The Committee also proposes that task forces be created in each judicial district to identify ways to limit litigation costs. Increased motion practice and the time a lawyer spends in court have contributed to the escalation of expenses in litigated matters. The members of a local task force would well know the strength and weaknesses of the community's culture of practice. It is this intimate knowledge that would enable the task force to craft remedies that meet the needs of the community to be served.

In making its recommendations regarding court management, this Committee is mindful that the rendering of justice depends upon not only effective systemic management programs, but also upon the individual judge's ability to direct a case through discovery and trial to disposition. It is a talent assisted by appropriate procedural rules and enhanced by training. The Committee endorses the judiciary's efforts to develop meaningful educational programs that afford judges the opportunity to develop their skills.

In the course of the Committee's inquiry, one veteran judge commented that maintaining a current calendar is a judge's best tool in directing the litigation of any particular case. When a judge's calendar is current, lawyers know that motion practice will be tightly controlled and delays will be short-lived; little opportunity exists to divert attention from the issues underlying the dispute. As a result, dispositions are reached in an expeditious, cost-controlled fashion.

However overburdened they may be, judges should decide all submitted motions within the sixty day period specified in the Rules of the Chief Judge, Part 4, Section 4.1 (a). This management tool, employed by the federal courts too, reflects the awareness of judges and practitioners alike, that delay in the disposition of motions is a major contributor to the overall increase in motion practice during the course of a case. A motion is submitted to address a dispute within the litigation. Delay in the determination of that motion creates a vacuum in the case that encourages other disputes to arise and exacerbates the level of acrimony between the parties and lawyers. Expenses increase, attention is diverted from the underlying cause of action, and the lawyer's relationship with the client can deteriorate.

The measure of control a judge exercises over the calendar can be influenced to a great degree by the extent to which the judge invokes the statutes and rules that govern procedure. These provisions, enacted to maintain a level playing field between the parties and facilitate resolution of the matter in controversy, range from time limits for motion practice and discovery to preclusion and financial sanctions for abuse of the process. Professor Roger Cramton, Esq., Professor of Law at Cornell University, has aptly observed that procedures, especially sanction procedures, must be frequently and consistently applied if they are to have meaning to the bar and the judiciary.[2] If not applied, the standards lose potency and judicial authority is compromised. Conversely, a judge who enforces these provisions affirms the authority that reposes in the office, and should not suffer retribution from the parties, the bar or colleagues.

It is the Committee's recommendation that the judiciary's procedural repertoire be supplemented by two additional mechanisms for controlling a case. First, a preliminary conference held shortly after the filing of a request for judicial intervention would enable judges to direct the litigation from the outset of the case. At the conference the judge would set a schedule for the performance of specified tasks and a date by which they must be performed. A rule promulgated by the Chief Administrative Judge, similar to the preliminary conference rule in matrimonial cases, should set the time-frame for conducting the conference.

The Committee also recommends expansion of Part 130 of the Chief Administrator's Rules which provides for the assessment of a financial sanction not to exceed an aggregate of $10,000 in a case against a lawyer who is found to have engaged in frivolous conduct. We propose that conduct subject to sanction be expanded to include, among other things, judge baiting, ignoring court directives and discovery abuse. The allowable aggregate sanction amount also should be increased to an amount to be determined by the Chief Administrative Judge.

A "RULE 11" FOR NEW YORK COURTS

Believing that it is necessary and possible to purge frivolous claims, defenses and contentions from New York State litigation, the Committee strongly recommends legislative enactment of a provision similar to Rule 11 of the Federal Rules of Civil Procedure. There is no room in overcrowded New York courts for claims, defenses or contentions that are devoid of legal or evidentiary basis. In describing to the Committee the prevalence of these tactics, judges and lawyers alike pointed to the federal judiciary's successful application of Rule 11 to reduce abuses that pervert the legal process, despite initial objections that it would involve courts in "side shows" that would themselves cause delay.

Rule 11 provides that the act of submitting a pleading, motion or other paper to the court constitutes certification that "to the best of the lawyer's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances -- (1) it is not being presented for any improper purpose...; (2) ...the legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) ...[the] factual contentions have evidentiary support [or will have after discovery is conducted]; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." Procedurally, Rule 11 applications can be initiated by a party or, *sua sponte*, by the court. The section includes an opportunity to cure the abuse charged, without penalty, and does not apply to discovery motions that are regulated elsewhere in the Rules. Sanctions may be monetary or nonmonetary in nature, "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." The existing body of federal case law regarding the rule will make its application in state court quick and efficacious.

In essence, Rule 11 reminds all participants in the legal process and the public that a court of law searches for truth and in the course of the search, a lawyer serves as the

"truthteller." The Rule emphasizes the concept of service as much as truth. Since there is no area of litigation to which these principles are not relevant, Rule 11 should apply to all civil litigation. The suggestion that matrimonial matters should be exempt from Rule 11 because a lawyer may not be privy to intimacies of a failed marriage, should be unavailing. It is the lawyer's professional obligation to make "an inquiry reasonable under the circumstances" to satisfy the Rule.

STENOGRAPHIC TRANSCRIPTS

The importance of receiving from court stenographers timely, affordable and accurate transcripts and the widespread failure to achieve that objective were areas of concern highlighted to the Committee by parties, practitioners and judges. A March 1995, report on electronic reporting released by a joint committee of the Unified Court System and the New York State Bar Association contains recommendations for the extension of electronic recording throughout the state. This Committee views those proposals as contributing to improvement in the delivery of stenographic services in New York. In addition, the Committee urges that the Unified Court System undertake a fast-track study of ways to reduce the cost of transcripts and the often protracted delays in providing them, and of further ways modern technology can facilitate the creation of reliable, inexpensive and timely transcripts.

ALTERNATIVE DISPUTE RESOLUTION

Alternate dispute resolution programs have been in operation in New York's courts for some time. Pursuant to statute and rule, judicial hearing officers and referees have long played an important role in the resolution of disputes presented to the courts. In addition, since 1981 the Unified Court System has conducted a community dispute resolution program

in each of the state's 62 counties as an alternative to commencing formal court proceedings. During the 1993-94 fiscal year, these centers conducted more than 25,000 conciliations, mediations and arbitrations.[3]

During its examination of arbitration, mediation and other ADR models, the Committee heard divergent views regarding their fairness, especially in the area of family law. While proponents of alternate dispute resolution emphasize the benefits of removing family matters from the adversarial environment of the courts, others point out that ADR offers little protection to those too vulnerable to assert themselves.

Chief Judge Kaye has appointed a committee to examine in depth all aspects of alternate dispute resolution. Co-chaired by Fern S. Schair, Esq., and Margaret Shaw, Esq., the Committee on Alternate Dispute Resolution expects to issue a report in 1996. We defer to our sister committee's expertise and decline to make recommendations pertaining to this area.

VII. TOPICS BEYOND THE COMMITTEE'S MANDATE

As broad as this Committee's charge is, two matters brought to its attention fall beyond the scope of the Committee's mandate and competence. Workers' compensation and domestic relations law were the targets of almost universal criticism by lawyers, judges and the public. The breadth, frequency and emotional intensity of these complaints persuade the Committee that the problems described pertain less to professionalism than to the substantive and procedural nature of practice in those areas.

Recognizing the problems that appear to pervade the workers' compensation program, Governor George E. Pataki has ordered a full examination of the system. In a similar vein, the Committee recommends that the Unified Court System establish a task force of experts to examine the broad area of domestic relations. No single area of practice -- perhaps not all other areas of practice combined -- exhibited so much dissatisfaction between clients and lawyers, between both and the courts, and so little sense of personal or professional satisfaction. Judges, law guardians and other professionals representing the interests of litigants, described a litany of critical deficiencies in substantive as well as procedural aspects of family law that adversely affect the individuals who come before the court. The painful experiences recounted to the Committee by all these participants in domestic relations cases lead us to conclude that the problems are myriad and systemic; we recommend a formal, comprehensive and attentive study of them.

VIII. CONCLUSION

In this Report, the Committee has laid out a series of recommendations as to measures it is convinced should be taken now to improve the already strong professionalism of the New York bar and to restore the increasingly weak confidence of New Yorkers in that professionalism. That deterioration of public confidence results in significant part from many historical, social, economic and cultural forces lying beyond the reforming reach of the bar, the bench and the legislature. Some of it, however, stems from ways that lawyers and courts have traditionally done business. Some of those practices no longer serve well either the public or the bar, given major changes in the environment in which New York lawyers practice.

In the end, we strongly recommend that the measures we propose comprise an action agenda for the Unified Court System, the Legislature, the organized bar and the law schools. We believe such an agenda offers practical hope of addressing those sources of public dissatisfaction that are legitimate and within the reach of professional reform.

Respectfully submitted,

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November, 1995

ENDNOTES

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APPENDIX A

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APPENDIX B

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APPENDIX C

COMMITTEE ON THE PROFESSION AND THE COURTS

Public Hearing
Buffalo, New York
October 4, 1994

List of Speakers

Kenneth Bellet

John Bialik

Charles Cinley

William DeMarco

John Esposito

Carl Frank

Marianne Frank

Harold Glickstein

Raymond Hart

Mary Jeffords

Doris Kozin

Marsh Kozin

Rachel Lapp

Edmund P. McKibbins

Donald Metzen

Marcia C. Pfohl

Richard Sansone

Sheldon Weaver

Public Hearing
New York, New York
October 13-14, 1994

List of Speakers

Elizabeth Anderson

Brigid Barbaro

William Barnes

Tom E. Barrett

Arthur Berkowitz

Walter Chow

Gene Crescenzi

Mildred Curcio

Estella B. Diggs

Richard Donovan

Irwin Eisenstein

Howard Frank

Diane Furey

Maria Ganios

Jeffrey E. Glen, Esq.
Former Director, Harlem Legal Aid

Robert Goldberg

Marilyn Gopel

A. Greig

Bob Isaac

Harvey Kash
National Congress for Legal Reform

Anna M. Kimble

Helen Kraus

Alfred Kuhnle

Carl Lanzisera
Americans for Legal Reform

Judea Lawton

Charles R. Lepley

Lorraine Levy Dubois

Rose Locklin

Ruth Lombardi

Reverend Major

Anita Martin
Legal Action Center

Harriet Michaelson

Henry Miller

Rebecca Monroe

Wali Muhammad

Hyman Paster

Margaret Ragusa

Luana Robinson

Sharon Ruddy
Alliance For Family Court Justice

Arthur Sempliner

Ruth Denmark Shapiro

Jeffrey Y. Silver

Tom Soja
Ansonia Tenants Coalition

Alan Steinberg

Zelda Stewart
HIV Law Project

Margarita Tellado

Rochelle Thompson

Robert Uellendahl

Monty Weinstein, M.D.
Director of Mental Health Fathers' Rights Metro

Public Hearing
Albany, New York
October 25, 1994

List of Speakers

Judy Ayers

Burr Deitz

Jack Grogan

Marion McGuire

Fred Petenelli

Ralph Shields
Eastern Comprehensive Traumatic Brain Injury Clinic

Richard Vale

Dominick Valentine

Professor Martin Weinstein
Schenectady City Community College

Public Hearing
Central Islip, New York
November 2, 1994

List of Speakers

Marie Bruno

John Cioffi

Debra Colgan

Leslie Dalmases

Dorothy Davin

John Delgalvis

Chris DiMaggio

H.R. Dittmer

George W. Drance

William Eves

Susan Farrell

Charles Fink

Susan Frasca

Diane Furey

Eve Suzanne Gebel

Monica Getz
Coalition for Family Justice

Miss Glendora

Debra Gluck

Bonnie Green
Protection of the Family

Olga & George W. Greene

Jim Henaghan

Rose Jimenez

Gaylord Jonassen

Harvey Kash
National Congress Legal Reform

Anna Kimble

Alfred Kuhnle

Marsha Lampert

Carl Lanzisera
Americans for Legal Reform

Rose Locklin

Milton Louvaris
Family Advocates

Gloria Lovece

Frank McCarey
Family Advocates

Edmund Mann

Raymond Moore

John Pagac

Joseph Passaro

Robert Quaglio
Fathers' Rights Association

Peter Quinn

Meg Reilly

Mary Rogers

Kevin Ryan

Nanette Sachs

Carole Schadoff

Delores Sullivan

Barry Tramentano
Fathers' Metro

Christopher Tsombaris

Robert Uellendahl

Dr. Nicholas Velenti

Vincent J. Volpe

Stephen Walker

Public Hearing
Syracuse, New York
November 15, 1994

List of Speakers

Genise Benson

Kim Boedecker-Frey

George Ebert

Michael Fish
President, Injured Workers of New York

Howard Fisher
Injured Workers of New York

Bill Grant &
C.J. Betancourt

Frank Johnson

Bette Mammone

Jean Parks
Injured Workers of New York

Marcia Post

Virginia Ramsey

Jerry Scholder

Sophia Zerbious

APPENDIX D

SUBMISSIONS BY BAR ASSOCIATIONS

American Academy of Matrimonial Lawyers, Letter from Barbara Ellen Handschu, President, to Louis A. Craco, Esq. (June 21, 1995).

Association of the Bar of the City of New York, Letter from Jonathan Burman, Director of Legislative Affairs, to Louis A. Craco, Esq. (August 1, 1995).

Association of the Bar of the City of New York, Letter from Michael A. Cooper, to Louis A. Craco, Esq. (November 14, 1995).

Association of the Bar of the City of New York, Letter from Gregory T. Joseph, Chair of the Committee on Professional Responsibility to Louis A. Craco, Esq., (June 2, 1995).

Association of the Bar of the City of New York, Letter from Briscoe R. Smith, Chair of the Committee on Professional Discipline, to Louis A. Craco, Esq. (June 19, 1995).

Bar Association of Erie County, Letter from Raymond L. Fink, President, to Robert Pearl, Secretary, New York State Bar Association (May 25, 1995).

Bar Association of Erie County, Letter from Paul C. Weaver, President, to Louis A. Craco, Esq. (July 28, 1995).

Brooklyn Bar Association, Letter from Jeffrey Sander Sunshine, President, to Louis A. Craco, Esq. (August 1, 1995).

Federal Immigration Bar Association, Letter from Antonio C. Martinez, Secretary, to Louis A. Craco (June 8, 1995).

Monroe County Bar Association, Letter from C. Bruce Lawrence, President, to Catherine O'Hagan Wolfe, Esq. (June 19, 1995).

Monroe County Bar Association, Letter from Mary E. Ross, President, to Louis A. Craco, Esq., (August 9, 1995).

Nassau County Bar Association, Letter from Benedict J. Pollio to Grace D. Moran, President, Nassau County Bar Association (November 1, 1994).

Nassau County Bar Association, Letter from William F. Levine, President, to Louis A. Craco, Esq. (June 21, 1995).

Nassau County Bar Association, Letter from Benedict J. Pollio, to Louis A. Craco, Esq. (August 25, 1995).

New York State Bar Association, Letter from William J. Carroll, Executive Director, to Catherine O'Hagan Wolfe, Esq., (November 18, 1994).

New York State Bar Association, Letter from Elizabeth M. Derrico, Assistant Director of Communications, to Louis A. Craco, Esq. (July 28, 1994).

New York State Bar Association, Letter from L. Beth Krueger, Director of Administrative Services, to Catherine O'Hagan Wolfe, Esq. (September 29, 1995).

Onondaga County Bar Association, Letter from Marc Waldauer, President, to Louis A. Craco, Esq. (June 16, 1995).

St. Lawrence County Bar Association, Letter from Thomas J. Snider, President, to Louis A. Craco, Esq. (June 26, 1995).

Suffolk County Bar Association, Letter from John H. Gross, President, to Louis A. Craco, Esq. (November 4, 1994).

Suffolk County Bar Assocation, Letter from A. Craig Purcell, President, to Louis A. Craco, Esq. (July 8, 1995).

Women's Bar Association of the State of New York, Letter from Rachel Kretser, President, to Louis A. Craco, Esq. (June 20, 1995).