



MEMORANDUM

TO: New York State Office of
Court Administration

FROM: New York State Bar Association
David P. Miranda, President

RE: Proposed Uniform Rules of the Appellate Division

DATE: December 16, 2015

Introduction

This memorandum is written in response to the Office of Court Administration's request for public comment on Proposed Uniform Attorney Disciplinary Rules of the Appellate Division (the "Proposed Rules"). We fully support the concept of uniform rules and we agree that the proposed rules represent a very significant improvement in the process of attorney discipline. They have been a long time in coming. We welcome most of the new rules, and in the interests of brevity, we will not comment on proposed rules with which we agree. However we do see problems with some of the specifics.

The Proposed Rules would be a sea change in attorney disciplinary procedures and warrant careful, detailed study of their potential impact. The review by the New York State Bar Association however, was substantially limited by the tight time frame afforded for public comment. Because of this tight time frame, we recommend that the Administrative Board should proceed with great caution, and should consider delaying the implementation of the Proposed Rules to allow a more appropriate period of review. Nevertheless, the NYSBA has done its best to develop constructive comments on the Proposed Rules during the short time allowed for public comment. Our comments are set forth below *seriatim*.

I

Application; Appointment of Committees

Section I 1(c) Application

Issue: Subsection I 1(c) states that the proposed rules of procedure apply to law firms *or other entities that have as a member, retain, or otherwise employ any person covered by these rules*.

First, we do not see how the rules of attorney disciplinary procedure would apply to non-law firm entities, whether they have a lawyer as a member, whether they retain an attorney, or otherwise employ an attorney. The rules do apply to an attorney member of a non-law firm entity, and to lawyers who are retained or employed by such entities. We believe this rule needs amendment to delete the quoted language above, and thus apply only to law firms or to lawyers. If left unchanged, the rules would literally cover business corporations and other collective entities that are not law firms.

Second, applying the rules to lawyers who do not practice in New York to any extent, but merely live in New York State, goes too far.

Third, the reference to “commit[ting] professional misconduct” also seems too narrow. The rules should apply whenever there is an *issue* of New York professional misconduct that needs to be addressed, whether or not such misconduct actually occurred.

Finally, the proposed provision is arguably too limited in its reference to lawyers who commit professional misconduct “in” the State of New York. A lawyer who is not admitted in New York (*i.e.*, not admitted generally or *pro hac vice*) may be physically located in another state when engaging, in connection with a New York transaction or litigation matter, in conduct that would violate the New York Rules of Professional Conduct. For example, now that New York has adopted the temporary practice rules in Part 523, a Pennsylvania lawyer not admitted in New York could commit professional conduct “in” New York while physically practicing outside New York, by serving a New York client in a New York transaction pursuant to Part 523. Similarly, a non-New York lawyer who is co-counsel to a New York lawyer in a transaction involving a New York company or lender could commit professional conduct “in” New York without ever setting foot in New York. The proposed rules should be written broadly enough to capture these and similar situations.

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

Section I 2(b) Definitions

Issue: Section I 2(b) includes definitions of some terms, but not others, relating to various forms of discipline. For example, “Admonition” and “Letter of Advisement” are defined, but “censure,” “suspension,” and “discipline” are not, nor is “chief attorney.” For completeness and clarity, they should be defined.

Suggested Revision: The following four definitions should be added to section 2(b), and the affected subparagraphs should be renumbered accordingly:

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

(3) Chief attorney: one or more attorneys designated as such by a Committee, and having the powers and duties conferred by these rules.

(8) Discipline: includes private discipline (admonition) and public discipline (censure, suspension and disbarment).

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

Next we turn to terms that are already defined in the Proposed Rules but that the NYSBA believes could be improved.

(a) Professional Misconduct

Issue: This definition includes the violation of an “announced standard” governing the personal or professional conduct of attorneys. The term “announced standard” is far too broad, is vague, has no recognized or customary meaning, and would need a definition itself. Misconduct should be defined only as the violation of the Rules of Professional Conduct (or the predecessor Code of Professional Responsibility for misconduct before April 1, 2009). To be more specific, the only source of discipline for attorneys in New York should be the black letter text of the New York Rules of Professional Conduct. Other rules or standards should be actionable only if they otherwise fit within a Rule of Professional Conduct, such as Rule 3.3(f)(3) (“lawyer shall not knowingly ... intentionally or habitually violate any established rule of procedure or evidence”); Rule 3.4(c) (“lawyer shall not disregard ... a standing rule of a tribunal”); Rule 8.4(d) (prohibiting “conduct that is prejudicial to the administration of justice”) and Rule 8.4(h) (prohibiting “any other conduct that adversely reflects on the lawyer’s fitness as a lawyer”). Disciplinary authorities are, of course, free to interpret the Rules by looking to the Comments, case law, ethics opinions, commentary, and other sources, but standards outside the Rules of Professional Conduct, whether announced or not, should not by themselves become additional sources of professional discipline. We therefore recommend removal of the “announced standard” language.

We are aware that “Announced standard” is currently contained in 22 NYCRR § 603.2 (defining professional misconduct in the First Department) and is further described there as an attorney’s failure to conduct himself in conformity with “standards imposed upon the bar as conditions for the privilege to practice law.” We recommend removal of the “announced standard” language but, at the very least, if “announced standard” is not deleted then the entire language of § 603.2 1 concerning announced standards should be included in the proposed rule.

(b) Other Definitions

(1) Admonition

The definition of “Admonition” should state that it is private discipline subject to § 90(10) of the Judiciary Law.

(7) Letter of Advise ment

A Letter of Advise ment is a new creation, consisting of an amalgam of a Letter of Caution used by some departments and a Letter of Education in the Third Department. It does not constitute discipline. The language defining a Letter of Advise ment states that it may issue upon a finding that the respondent has engaged in inappropriate behavior, or other behavior requiring comment. The language which currently defines a Letter of Caution in the Second Department should be applied to a Letter of Advise ment. That definition is: “*A letter of caution [here Letter of Advise ment] may issue when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment.*” 22 NYCRR §691.6. Also, the definition should state that the Letter of Advise ment is confidential.

(8) Respondent

The definition of “Respondent” should include law firms, as stated in Rule I 1 relating to Application.

Section II 4 Appointment of Committees

Proposed Rule II 4 states that a quorum for Committee business is two thirds of the membership. A two-thirds quorum for the conduct of business may be difficult to obtain in some jurisdictions, which would delay all action by the committee until a two-thirds quorum could be had. We recommend that a quorum should consist of a majority of the membership of the Committee, and that action should require a majority of the quorum.

Section I 6(a) Conflicts; Disqualifications from Representation

Issue: OCA has proposed that certain persons are prohibited from representing “a respondent in a matter investigated or prosecuted before that Committee.” This language is inconsistent with the definition of “respondent” in § 2(b)(8), which refers to “an investigation or a proceeding before the Committee.”

Suggested Revision: [Certain persons are prohibited from representing] “a respondent in an investigation or a proceeding ~~matter investigated or prosecuted before that Committee.~~”

(c) certain persons prohibited from representing “a respondent in an investigation or a proceeding before ~~matter investigated or prosecuted by~~ that Committee” for a certain period.

Section I 6 Conflicts: Disqualification from Representation

- (a) The prohibitions against committee members, their partners, committee staff, or family members of committee members or staff representing a respondent set forth in this section should be extended to include representation of complainants.
- (b) The prohibition against referees representing respondents in matters in which the referee was appointed should be extended to include representation of complainants.
- (c) The prohibition in subsection (c) should extend beyond two years to prohibit representation of respondents and complainants in all matters where the person personally participated in the matter, if the matter in which the committee or staff member participated is still pending.

II

Proceedings Before Committees

Section II 2(a)(1) Investigation; Disclosure

Issue: Subsection II 2(a)(1) sets forth the authority of the Chief Attorney with respect to investigations as follows: “The Chief Attorney is authorized to: (1) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint.”

Paragraph 2(a)(1) is ambiguous in that it can be read to suggest that only the Chief Attorney may interview witnesses and obtain records, inasmuch as paragraph (2) empowers the Chief Attorney to direct respondents to appear and produce records either before her *or a staff attorney*. The intention here is likely to allow staff attorneys also to interview witnesses and obtain records and reports, and in any event allowing staff attorneys to do that would promote the efficient investigation of complaints.

Suggested Revision: “The Chief Attorney is authorized to: (1) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint, or authorize a staff attorney or paralegal or investigator to do so.”

Section II 2(b) Disclosure

This section, which authorizes the Chief Attorney to apply to the Clerk of the Court for a subpoena, should be amended to authorize the respondent to apply to subpoena third parties to produce documents to the Grievance Committee for inspection by respondent.

Section II 3(a) Disposition by Chief Attorney

Section 3(a)(1) authorizes specific bases for the Chief Attorney to decline to investigate a complaint. The brief description authorized by § 3(a)(3), which is provided to the complainant, should refer specifically to those bases, and use the specific language as set forth in II 3 (a) (1).

Section II 3(a)(3) Disposition and Review

Issue: OCA has proposed that the “complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.” In the NYSBA’s view, however, both the complainant *and* the respondent should be informed of the disposition of a complaint in a timely manner.

Suggested Revision: “The complainant and the respondent shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.”

Section II 3(b)(1)(i) Disposition by the Committee

Section II 3(b)(1)(i) permits the Committee to dismiss a complaint as unfounded. However the Committee should also have the prosecutorial discretion to dismiss the complaint upon good cause shown for reasons other than those listed, and we recommend that language in this section be amended to read “dismiss the complaint as unfounded *or for good cause shown* by letter to the complainant and to the respondent.”

Section II 3(b)(1)(iv) Disposition by the Committee

Section II 3(b)(1)(iv) permits “inappropriate behavior” to be a basis for a Letter of Advisement. That phrase should be changed to the language used in a Letter of Caution, “*when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment.*” See 22 NYCRR §691.6.

Section II 3(b)(1)(vi) Disposition by the Committee

Section II 3(b)(1)(vi) authorizes a Committee to approve the institution of a formal disciplinary proceeding when it finds, “by a fair preponderance of the evidence, that there is probable cause to believe that the respondent engaged in professional misconduct...” This definition is confusing. A grievance or disciplinary committee’s action is limited to authorizing the filing of a disciplinary proceeding where disciplinary charges will be adjudicated at a hearing. There is no need to mention a “preponderance of the evidence” at this stage, since discipline will not be imposed until after a hearing and Court action. (Probable cause is the common standard for recommending or authorizing prosecution of charges, so that phrase should remain in the rule, but the rule should leave the burden of proof issue to be resolved at a hearing.) Significantly, the preponderance standard proposed by OCA for initiating charges would impose a higher hurdle for confidential

disciplinary charges against lawyers than the law imposes for public criminal charges against the general public. We see no basis for according lawyers such special treatment at the charging stage, especially given that disciplinary charges against lawyers – unlike criminal charges and many other types of administrative actions – remain confidential unless and until public discipline is imposed.

Suggested Revision: (vi) when the Committee finds, ~~by a fair preponderance of the evidence, that there is~~ probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section III of these Rules.”

Section II 3(b)(2) Disposition by the Committee

Section II 3(b)(2) authorizes a brief description of the basis of any disposition of a complaint be provided to a complainant. Only necessary facts of the basis of any disposition should be provided to a complainant. We recommend the following language in the “brief description”:

“As may be permitted by law, the complainant shall be provided with a brief description, *including only necessary facts*, of the basis of any disposition of a complaint by the Committee.”

Section II 3(c)(1)(ii) Review [of Committee actions]

Issue: This subsection states that if a respondent has been unsuccessful in a request for reconsideration of a Letter of Advisement, the respondent may seek further review by application to the Court, the grounds for which is that the Letter was issued in violation of a “fundamental constitutional right.” These grounds are too narrow, and the grounds for Court review should be that the Letter was issued *“without basis.”*

Another problem is that § 3(c)(1)(ii) does not define how strong the link must be between the violation of a “fundamental constitutional right” and the issuance of a Letter of Advisement. Consequently, this provision could result in unintended consequences. For example, once the respondent establishes such a violation, is the Court required to overturn the decision to issue the Letter? And what about violations of constitutional rights that may not have directly resulted in the issuance of the Letter but that did contribute to some of the evidence against the respondent?

A safety valve mechanism could avoid undesirable ancillary litigation over issues such as harmless error, suppression of evidence, proximate cause, and attenuation. Rather than delving into any of these areas, a simple way to remedy the uncertainty is to make clear that establishing a violation of a fundamental constitutional right does not require any particular course of action by the Court, but rather simply grants the Court the discretion to rescind the Letter of Admonition.

Suggested Language: “Within 30 days of the final determination denying a request for reconsideration, the respondent may seek review of a Letter of Advisement by submitting an application to the Court, on notice to the Committee, upon a showing that the issuance of the letter was without basis or in violation of a fundamental constitutional right. The respondent has the burden of establishing a violation of such a right. If the respondent establishes a violation of such right, the Court may take whatever action it deems appropriate.”

III

Proceedings in the Appellate Division

Section III 1(a) Formal Disciplinary Proceedings

The proposed procedure for formal disciplinary proceedings includes a provision that the Committee and Respondent file statements of disputed and undisputed facts with the Court, and thereafter make disclosure with respect to disputed facts. The very short time frames set forth for filing statements of facts and disclosure with respect to those facts are impractical, and we recommend the following instead:

- (2) Statement of Disputed Facts.
The rule should provide 45 days rather than 20 days for filing a statement of disputed and undisputed facts with the Court.
- (3) Disclosure Concerning Disputed Facts.
The rule should provide that the parties be allowed 30 days rather than 20 days for disclosure concerning disputed facts.

Section III 1(b)(1) Hearing

Issue: This section does not articulate a standard of proof to sustain a determination against a respondent. In *New York Attorney Discipline*, the authors observe as follows:

In New York, the standard of proof required to establish professional conduct is “fair preponderance of the evidence,” the civil standard. In this respect, New York is unlike most state and federal jurisdictions, which apply “clear and convincing evidence” as the standard. ...

In sum, because the Court of Appeals has categorized the right to practice law as a “property interest” rather than a “personal or liberty right,” the Appellate Divisions only require proof by a “fair preponderance of the evidence” in order to establish professional misconduct.¹

Notably, although the Proposed Rules inject two standards at the charging stage, they contain no standard at all for adjudication of a formal charge by the referee. Compare II 3(b)(1)(v) and (vi) with III 1(b)(1) and (b)(2). It would be appropriate to make the standard of proof explicit.

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

¹ HAL R. LIEBERMAN, J. RICHARD SUPPLE, HARVEY PRAGER, *NEW YORK ATTORNEY DISCIPLINE: PRACTICE AND PROCEDURE*: 2016 (New York Law Journal) (“*New York Attorney Discipline*”), at 118-119 (footnotes omitted).

Section III 4 Resignation While Investigation or Proceeding is Pending

Permitting Respondents to resign in the face of charges, which is tantamount to disbarment, is designed to speed up the process of that disbarment. The requirement that a respondent who wishes to resign admit the charges or allegations of misconduct is counter-productive, since requiring such admissions will greatly reduce the number of resignations, thus necessitating hearings, and eliminating the efficiency of resignations. If respondents were permitted to state only that they could not defend against the charges or allegations, rather than admit the charges or allegations, there would be more resignations tantamount to disbarment, and these resignations would eliminate a number of hearings and speed up the process of disbarring respondents.

Section III 7(b) Discipline for Misconduct in Another Jurisdiction

Issue: Subparagraph (b) of the Proposed Rule lists the defenses that may be raised in opposition to reciprocal discipline, while subparagraph (c) lists the reasons why the Court may decline to impose reciprocal discipline. Each contains three reasons, but only two – lack of due process and lack of proof – overlap. Subparagraph (b) says that a defense may be raised to the effect “that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York,” while subparagraph (c) allows the Court to reject reciprocal discipline if “the imposition of discipline would be unjust.” This appears to be an oversight; it is likely that all four factors were meant to be both allowable as defenses and allowable as grounds to deny reciprocal discipline. For that reason, each subparagraph should include the additional factor that is currently missing.

Additionally, OCA’s use of the word “or” in between each factor could lead to the conclusion that only one such defense may be used in any reciprocal discipline proceeding. The NYSBA’s suggested revision clarifies that any or all may be used.

Suggested Revision:

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

- (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;~~or~~
- (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct;~~or~~
- (3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York;
- (4) that the imposition of discipline would be unjust.

(c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds one or more of the following: (i) that the procedure in the foreign jurisdiction deprived the respondent of due process of law, (ii) that there was insufficient proof that the respondent committed the misconduct, (iii) that the misconduct in the foreign jurisdiction does not constitute

misconduct in New York, or (iv) that the imposition of discipline would be unjust.

IV

Post-Disciplinary Proceedings

Section IV 1 Conduct of Disbarred, Suspended or Resigned Attorneys

Issue: The notice provision in (b) does not address what the full protocol should be where the respondent is serving as counsel appointed by the court. In these circumstances, notice should also be provided to the appointing court. Otherwise, the respondent's client may not understand how to obtain new counsel, and the court may be unaware that it needs to appoint substitute counsel.

The language in (b) would also be clearer if it stated directly that the required notice to the "client" is to a *respondent's* client. Similarly, in (c) the word "respondent's" should be inserted before the phrase "all clients," and in (d) the phrase "of respondent's" should be inserted before the word "clients." Finally, in (h) the word "respondent's" should be inserted before the word "client" in the second sentence.

Suggested Revision:

(b) "Duty to Notify Clients and Others. When a respondent is disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, the respondent shall promptly notify, by registered or certified mail, (i) each client of the respondent, and (ii) the attorney for each party in any pending matter, and (iii) the Office of Court Administration for each action where a retainer has been filed pursuant to court rules. The notice shall state that respondent is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a respondent's client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent's client. Where counsel has been appointed by a court, notice shall also be provided to the appointing court."

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

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

(h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation may not share in any fee for legal services rendered by another attorney during the period of disbarment, suspension or removal from the roll of attorneys but may be compensated on a quantum meruit basis for services rendered prior to the effective date of the disbarment, suspension or removal from the roll of attorneys. On motion of the respondent, with notice to the respondent's client, the amount and manner of compensation shall be determined by the court or agency where the action is

pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.”

Section IV 2 Reinstatement of Disbarred Attorneys

Issue: To be consistent, references to “attorney” in § 2(c)(1) and § 2(d) should use the term “respondent” rather than simply “attorney.” Thus, in § 2(c)(1) the word “respondent’s” should replace the word “attorney’s” before the word “name,” and in the second sentence of § 2(d), the word “attorney” should be deleted.

Suggested Revision:

(c)(1) “A respondent disbarred by order of the Court for misconduct, or stricken from the roll of attorneys for any reason other than resignation for non-disciplinary reasons, may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment or the order striking the respondent’s ~~attorney’s~~ name from the roll of attorneys.

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

V

Additional Rules Applicable to Disciplinary Matter

Section V 1 Confidentiality

Issue: OCA’s proposed heading is simply “Confidentiality.” However, this section covers not only confidentiality but also related matters such as an application to unseal records or to gain access to closed proceedings, and reimbursement for injured parties. Someone searching for the law might find it helpful to see a longer heading.

Suggested Revision: “Confidentiality; Application to Unseal Records or Gain Access to Closed Proceedings”

Sections V 1(b); 1(e) Confidentiality

Issue: For greater clarity and specificity, and to distinguish between a claimant and a respondent, the word “person” should be changed to the word “respondent” in both § (1)(b) and § (1)(e).

Suggested Revision:

(b) “All papers, records, and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any ~~person~~ respondent under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).

* * * *

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

Section V 3 Appointment of Attorney to Protect Interests of Clients or Attorney

Issue: OCA's proposed heading – "Appointment of Attorney to Protect Interests of Clients or Attorney" – does not fully capture the contents and therefore requires more information.

Suggested Revision: "Appointment of Attorney to Protect Interests of Clients or Attorney; Compensation; Confidentiality"

Section V 3(a) Appointment of Attorney to Protect Interests of Clients or Attorney

Issue: Subsection V 3(a) does not distinguish between two very different classes of attorneys whose clients may be at risk, although the remedy is the same. The classes would better be identified as "respondents" or "incapacitated attorneys," and their category references should be kept separate. In addition, the attorneys appointed by the Court to assist with client matters should also be clearly identified.

Suggested Revision: "When ~~an attorney is a respondent has been~~ suspended or disbarred or incapacitated from practicing law pursuant to these rules, or has resigned for disciplinary reasons, or when ~~the Court determines that~~ an attorney is ~~otherwise~~ incapacitated and the Court has determined that the attorney is otherwise unable to protect the interests of his or her clients, and, in either instance, has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct appointing one or more designated attorneys to: (i) take possession of the ~~attorney's respondent's files or the incapacitated attorney's files~~; (ii) examine the files; (iii) advise the clients to secure another attorney; and (iv) take any other action necessary to protect the clients' interests. An application for an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney (or attorneys) to be appointed, and the suspended, disbarred or incapacitated attorney."

Section V 4(a)(1) Resignation for Non-Disciplinary Reasons; Reinstatement

Issue: Proposed Rule V 4(a)(1) creates minor confusion by using "application" in the second sentence rather than "affidavit or affirmation," which it used in the first sentence.

Suggested Revision: "An attorney may apply to the Court for permission to resign from the bar for non disciplinary reasons by submitting an affidavit or affirmation in the form included in Appendix B to these rules. A copy of the ~~application~~ affidavit or affirmation shall be served upon the Committee and The Lawyers Fund for Client Protection, and such other persons as the Court may direct."

NEW YORK
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December 18, 2015

VIA E-MAIL

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Attn: John W. McConnell, Esq.
Counsel, Office of Court Administration

**Re: Comments of the New York City Bar Association's
Committee on Professional Discipline to the Uniform
Court System's Proposed Uniform Rules of the Appellate
Division on Attorney Discipline**

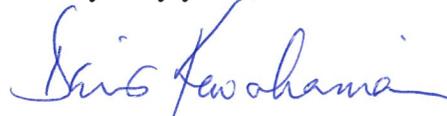
Dear Mr. McConnell:

In a memorandum dated November 4, 2015, you circulated to interested persons and organizations a draft of the proposed new statewide rules on attorney discipline procedure to replace the rules currently existing in the four Appellate Divisions.

Attached is the New York City Bar Association's Committee on Professional Discipline's analysis of OCA's proposed new rules with recommended changes. For ease of review, the Committee's comments are offered in a red-line format together with a brief explanation of its reasoning for each recommended change.

All in all, the Committee believes that the OCA draft marks an excellent start to the difficult process of crafting a reform measure that has eluded policymakers for many years. The Committee's comments are accordingly intended to be constructive and encouraging.

Very truly yours,



Devika Kewalramani

Rules for Attorney Disciplinary Matters

I.

Application; Appointment of Committees

1. Application

These rules shall apply to (a) all attorneys who are admitted to practice, reside in, commit professional misconduct in or who have offices in the State of New York; (b) all in-house counsel, attorneys admitted pro hac vice, and licensed legal consultants who reside in, have an office in or commit professional misconduct in the State of New York; and (c) the law firms or other entities that have as a member, retain, or otherwise employ any person covered by these rules.

2. Definitions

(a) Professional Misconduct Defined. A violation of any of the Rules of Professional Conduct as set forth in 22 NYCRR Part 1200, ~~including the violation of any rule or announced standard governing the personal or professional conduct of attorneys,~~ shall constitute professional misconduct within the meaning of Judiciary Law § 90(2).

EXPLANATION FOR CHANGE: The omitted language is vague and unnecessary. Rule 8.4(h) already prohibits attorneys from engaging in conduct “that adversely reflects” on their “fitness as a lawyer.”

(b) Other Definitions

(1) Admonition: discipline issued at the direction of a Committee or the Court upon a finding that the respondent engaged in professional misconduct that does not warrant public discipline by the Court. An Admonition shall constitute private discipline, and shall be in writing, ~~but may be delivered to a recipient by personal appearance before the Committee.~~

EXPLANATION FOR CHANGE: The omitted language is unnecessary and potentially confusing as it might be mistakenly construed to permit a Committee to deliver an Admonition orally while retaining the written Admonition without providing the writing to the respondent.

(2) Committee: an attorney grievance committee established pursuant to these rules.

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

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

(5) Censure: public discipline issued at the direction of the Court pursuant to Judiciary Law §90(2) that does not order Suspension or Disbarment.

EXPLANATION FOR CHANGE: All forms of discipline should be defined.

(6) Suspension: suspension from office pursuant to Judiciary Law §90(2).

EXPLANATION FOR CHANGE: All forms of discipline should be defined.

(75) Disbarment: removal from office pursuant to Judiciary Law §90(2).

EXPLANATION FOR CHANGE: For sake of consistency, the definition should be of a noun, not a verb.

(87) Letter of Advisement: letter issued at the direction of a Committee pursuant to section II.3(b)(1)(iv) of these Rules, upon a finding that the respondent has engaged in inappropriate behavior, or other behavior requiring comment, not warranting the imposition of discipline. A Letter of Advisement shall not constitute discipline, but may be considered by a Committee or the Court in determining the extent of discipline to be imposed or action to be taken upon a subsequent finding of misconduct.

EXPLANATION FOR CHANGE: A Letter of Advisement is intended to educate an attorney and warn him or her not to engage in conduct that could be reasonably viewed as improper. If it is to be used later as evidence in aggravation of future misconduct, fundamental notions of fairness (if not constitutional requirements) dictate that the affected lawyer be able to challenge the finding of inappropriate behavior. In view of its limited use, and given the significant time and small benefit inherent in litigating an issue of non-disciplinary “inappropriateness,” it would be better simply to issue a Letter of Advisement without any potential for using it in a subsequent proceeding.

(96) Foreign jurisdiction: a legal jurisdiction of a state, territory, or district of the United States outside of New York State or foreign country.

EXPLANATION FOR CHANGE: With increasing numbers of New York lawyers admitted to overseas bar associations or practicing overseas, the definition of “foreign jurisdiction” should be expanded for reciprocal discipline and “serious crimes” purposes.

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

EXPLANATION FOR CHANGE: The amendments are intended to tighten and clarify the language in the rule, standardize identification of the “Rules,” and remove an unnecessarily vague reference to “other person.”

3. Discipline Under These Rules Not Preclusive

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

4. Appointment of Committees

Each Department of the Appellate Division shall appoint such Attorney Grievance Committee or committees (hereinafter referred to as "Committee") within its jurisdiction as it may deem appropriate. Each Committee shall be comprised of at least 21 members, of which no fewer than 3 members shall be non-lawyers. A lawyer member of a Committee shall be appointed to serve as chairperson. All members of the Committee shall maintain an office for the practice of law, or reside, within the geographic jurisdiction of the Committee. Two-thirds of the membership of a Committee shall constitute a quorum for the conduct of business. ~~;~~ All Committee action shall require the affirmative vote of at least a majority of the members present, except that the Committee may pre-designate one or more individual members to review and approve recommendations by the Chief Counsel to dismiss a complaint, issue a Letter of Advisement or issue an Admonition.

EXPLANATION FOR CHANGE: Requiring a majority of Committee members to review and approve all determinations to reject or dismiss complaints or to issue Admonitions and Letters of Advisement seems unnecessarily cumbersome and may delay adjudications unnecessarily. Such a broad review should be reserved for matters where public discipline is recommended.

5. Committee Counsel and Staff

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

6. Conflicts; Disqualifications form Representation

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

EXPLANATION FOR CHANGE: Committee-connected lawyers should not appear to be in a position to use their influence to assist either a respondent or a complainant. (See also subdivisions (b) and (c) immediately below.)

(b) No referee appointed to hear and report on the issues raised in a proceeding under these Rules may, in the Department in which he or she was appointed, represent a respondent or

complainant until the expiration of two years from the date of the submission of that referee's final report.

EXPLANATION FOR CHANGE: Harmonize references to the "Rules." (This amendment shall be made hereafter without repeating this comment.)

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

EXPLANATION FOR CHANGE: The stricken language is unnecessary and inconsistent with Rule 1.11, which prohibits only former government lawyers from representing private clients in cases that they worked on as government lawyers "personally and substantially." We are aware of no evidence suggesting that former staff counsel in private practice have exercised improper influence in matters where they represent respondents or advise complainants. While employed by the Committee, staff counsel exclusively work to enforce the Rules of Professional Conduct. Prohibiting them from thereafter accepting employment and applying their expertise would constitute an unnecessary impediment to attracting talented attorneys to public service while precluding respondents from retaining skilled advocates.

II.

Proceedings Before Committees

1. Complaint

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

EXPLANATION FOR CHANGE: The word "original" is unnecessary since it could be interpreted to require a "mailed" complaint with a fresh signature and preclude electronically-scanned complaints or facsimile letters. In addition, the Court should be permitted to authorize a sua sponte complaint.

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

2. Investigation: Disclosure

(a) The Chief Attorney is authorized to:

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

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

(3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein; and

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

(b) Disclosure. The Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint. Prior to the taking of any action against a respondent pursuant to sections II.3(b)(1)(iv), (v) or (vi) of these Rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, as well as ~~and~~ materials previously provided to the Committee by the respondent and exculpatory information in the Committee's possession or control.

EXPLANATION FOR CHANGE: A respondent should be permitted to review all of the Committee's non-privileged file materials, including any materials that qualify as exculpatory under Rule of Professional Conduct 3.8.

(c) Third Party Evidence. Unless manifestly unreasonable, the Chief Counsel shall, upon the respondent's written request, apply to the Clerk of Court for a subpoena to compel production by a third party of potentially exculpatory books and papers in accordance with the procedure described in section II.2(a)(3).

EXPLANATION FOR CHANGE: A respondent should have the ability during the investigation stage to reasonably request from a third party a production of potentially exonerating documents for the Committee's consideration.

3. Disposition and Review

(a) Disposition by the Chief Attorney.

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

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

(3) The complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.

(b) Disposition by the Committee.

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

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

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

(iii) make an application for diversion pursuant to section III.5 of these Rules;

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

(v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, and that it is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, to seek reconsideration of the proposed Admonition. Where the respondent exercises this right, the Chief Counsel shall be afforded a similar opportunity to oppose or otherwise comment upon the reconsideration request. The Committee's or subcommittee's resolution of the respondent's application shall be limited to sustaining or vacating the Admonition and will not be subject to further review by the Court.

EXPLANATION FOR CHANGE: As currently drafted, this proposed rule does not state clearly the procedure for reconsidering an Admonition. The new proposed language tracks the procedures already used effectively in the First Department, except that it provides for personal appearances rather than a submission of writings.

(vi) when the Committee finds, by a fair preponderance of the evidence, that there is probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section III of these Rules.

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

(c) Review.

(1) Letter of Advisement.

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

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

EXPLANATION FOR CHANGE: Because a Letter of Advisement is in the nature of a private non-disciplinary communication intended to educate a respondent against questionable conduct in the future, no “fundamental constitutional right” should be implicated by its issuance, provided that, as we recommend elsewhere, the Letter of Advisement remains private and will not be used or cited against the respondent in a future proceeding. This additional review process is therefore unnecessary.

(2) Admonition. Within 30 days of the issuance of an Admonition, the respondent may make an application to the Court, on notice to the Committee, to vacate the Admonition. Upon such application, the Court may consider the entire record and take whatever action it deems appropriate, including, if warranted, referral of the matter to the Committee for commencement of proceedings pursuant to section III.

EXPLANATION FOR CHANGE: The additional language makes clear what the proposed rule already permits; namely, that the Court can, in response to an application to vacate, grant the application but order the commencement of formal proceedings, which could conceivably result in a public sanction.

(3) Review of Dismissal or Declination to Investigate. Within 30 days of the issuance of notice to a complainant of a Chief Attorney’s decision declining to investigate a

complaint, or of a Committee's dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

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

III.

Proceedings in the Appellate Division

1. Commencement; Procedure

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

(1) Formal disciplinary proceedings shall be deemed special proceedings within the meaning of CPLR Article 4, and shall be conducted in a manner consistent with the rules of the Court, the rules and procedures set forth in this Part, and the requirements of Judiciary Law §90. There shall be a notice of petition and petition, which the Committee shall serve upon the Respondent in a manner consistent with Judiciary Law §90(6). Respondent shall file an answer to the petition within 20 days, an answer, and a reply if appropriate. No other pleadings, or amendment or supplement of pleadings, shall be permitted without leave of the Court. All pleadings shall be filed with the Court. Upon receipt of the statement described in section III.1.(a)(3), the Court shall, where appropriate, appoint a Referee at random from a list of qualified persons maintained by the Clerk of the Court. The Court shall permit or require such appearances as it deems necessary in each case.

EXPLANATION FOR CHANGE: A respondent's time to answer the petition should be stated explicitly. Replies, which are rarely if ever done now, are unnecessary. There should be a clear provision setting forth when and how a Referee will be appointed.

(3)2) Statement of Disputed and Undisputed Facts. Within 30 days after service of the answer ~~or, if applicable, a reply,~~ each party shall file with the Court a statement of facts that identifies those allegations that the party contends are undisputed and those allegations that the party contends are disputed and for which a hearing is necessary. In the alternative, a party may file a statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or the parties may jointly file a stipulation of disputed and undisputed facts.

EXPLANATION FOR CHANGE: The headnote for this subdivision should reflect that the "Statement" will relate to both disputed and undisputed facts. The parties should have 30 days to prepare the Statement in view of our recommendation that the parties exchange initial disclosures 14 days after an answer is filed. To ensure that the Rules are ordered chronologically, this subdivision should appear below the subdivision immediately below.

~~(2)3~~ Disclosure Concerning Disputed Facts. Except as otherwise ordered by the Court, the Chief Counsel and respondent a party must, within 14 days after an answer is filed, no later than 14 days after filing a statement of facts with the Court as required by section III.1(a)(2) of these rules, provide to each other any other party a written list of disclosure concerning the allegations that each intends to prove or disprove the party contends are disputed. The disclosure shall identify the following:

EXPLANATION FOR CHANGE: The proposed changes clarify that initial disclosures should be made at the outset, before the Statement of Disputed and Undisputed Facts is prepared.

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

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

(4) Discipline by Consent.

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

(1) a stipulation of facts;

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

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

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

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

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

(2) consents to the agreed upon discipline;

and (3) gives the consent freely and voluntarily without coercion or duress;

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

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

(b) Disposition by Appellate Division.

(1) Hearing. Following his or her appointment, upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The Referee may grant requests for additional disclosure as justice may require, including examinations under oath of witnesses. Charges must be proven by a preponderance of the evidence and the rules of evidence applicable to CPLR Article 4 proceedings shall apply. Unless otherwise directed by the Court, the Referee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, with 45 days of any following post-hearing submissions, file with the Court a written report setting forth the Referee's findings and recommendations. Within 30 days of the parties' receipt of the Referee's findings and recommendations, the Chief Counsel shall file a motion with the Court to affirm or disaffirm the Referee's report as permitted by the Court. The respondent shall be afforded an opportunity to oppose or consent to the Chief Counsel's motion to affirm or disaffirm. The timing of the respondent's submission shall be governed by the control date of the motion.

EXPLANATION FOR CHANGE: These amendments clarify the procedures for the hearing and set forth appropriate time limits. The standard of proof and rules of evidence should be expressly stated. Finally, to improve the current system, which now incentivizes parties to race to file a motion to affirm/disaffirm in order to give themselves a reply opportunity, the Chief Counsel, as the party with the burden of proof, should be designated to make the first motion.

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

EXPLANATION FOR CHANGE: In deciding an appropriate measure of discipline, the Court's prior cases should be at least as persuasive as the ABA Standards.

2. Applications and Motions to the Appellate Division

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

3. Interim Suspension While Investigation or Proceeding is Pending

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

EXPLANATION FOR CHANGE: The "as justice may require" standard is too vague. Interim suspensions should be reserved for situations where the respondent threatens the public interest.

(b) Unless otherwise ordered by the Court, aAn application for suspension pursuant to section III.3(a)~~this rule shall~~ may provide notice that a respondent who is suspended under this rule and who has failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of the order of suspension may be disbarred by the Court without further notice.

EXPLANATION FOR CHANGE: The amendment clarifies that the notice provision applies only to interim suspension motions. Notice should be required in every case unless the Court orders otherwise.

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

EXPLANATION FOR CHANGE: Interim suspension is a drastic measure and should be followed by a prompt hearing.

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

4. Resignation While Investigation or Proceeding is Pending

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

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

~~(2) the respondent admits the charges or allegations of misconduct;~~

~~(23) the respondent cannot successfully defend against the charges or allegations of misconduct; and~~

EXPLANATION FOR CHANGE: A statement by the respondent that he or she cannot defeat the charges has the same value for disciplinary purposes as an express admission of guilt.

~~(34) when the charges or allegations include the willful misappropriation or misapplication of funds or property, the respondent consents to the entry of an order of restitution.~~

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

5. Diversion to a Monitoring Program

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

(1) the nature of the alleged misconduct;

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

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

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

EXPLANATION FOR CHANGE: As currently worded, the Rule suggests to respondents that, even if they do everything required (including paying all costs), the Court might, for any reason, decide to continue prosecuting them. The proposed change encourages use of diversion by making clear that successful completion of a monitoring program shall normally result in abatement of an ongoing disciplinary matter.

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

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

6. Attorneys Convicted of a Crime

(a) An attorney to whom the rules of this Part shall apply who has been found guilty of any crime in a court of the United States or any state, territory or district thereof, or foreign country, whether by plea of guilty or nolo contendere, or by verdict following trial, shall, within 30 days thereof notify the Committee having jurisdiction pursuant to section II.I(b) of these Rules of the fact of such adjudication. Such notification shall be in writing and shall be accompanied by a copy of any judgment, order or certificate of conviction memorializing such finding of guilt. The attorney shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

EXPLANATION FOR CHANGE: "Foreign country" should be added to make this subdivision consistent with the proposed definition of "foreign jurisdiction" above.

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

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

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

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

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

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

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

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

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

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

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

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

(d) A certificate of the conviction of a respondent for any crime shall be conclusive evidence of the respondent's guilt of that crime in any disciplinary proceeding instituted against the respondent based on the conviction. At a hearing held pursuant to section III.6(c)(2)(iii) or (iv), the respondent may not introduce evidence in mitigation that is inconsistent with the elements of the respondent's conviction unless it is first established that the evidence was unavailable at or before the time of the conviction.

EXPLANATION FOR CHANGE: This proposed amendment would promote fairness by allowing a respondent to cite new evidence in mitigation in the rare instance where the evidence was not available at the time of conviction.

(e) Applications for reinstatement or to modify or vacate any order issued pursuant to this section shall be made pursuant to section IV.2 of these Rules.

(f) Absent compelling circumstances, pendency of an appeal shall not be grounds for postponing a determination of discipline under this subdivision.

EXPLANATION FOR CHANGE: This additional provision makes explicit that, while a certificate of conviction is conclusive, an imminent determination of a compelling appeal might provide a fair ground for a short postponement of proceedings.

7. Discipline for Misconduct in Another Jurisdiction

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

(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Unless unavailable to the respondent at the time discipline in the foreign jurisdiction was imposed, the affidavit may recite only facts pertaining to underlying conduct that were previously raised in the foreign disciplinary proceeding. Only the following defenses may be raised:

EXPLANATION FOR CHANGE: This provision seeks to ensure that respondents do not seek to rely on alleged facts that could have been cited in the prior proceeding unless such facts were then unknown.

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

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

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

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

there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.

(d) Any attorney to whom these rules shall apply who has been disciplined in a foreign jurisdiction shall, within 30 days after such discipline is imposed, advise the appropriate Court (as described in section 11.1(b) of these rules) and Committee of such discipline. Such notification shall be in writing and shall be accompanied by any judgment, order or certificate memorializing the discipline imposed. The respondent shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

8. Attorney Incapacity

(a) ~~Upon application by a Committee that includes proof of a judicial determination that a respondent is in need of involuntary care or treatment in a facility for the mentally disabled, or is the subject of an order of incapacity, retention, commitment or treatment pursuant to the Mental Hygiene Law, the Court may enter an order immediately suspending the respondent from the practice of law upon application by a Committee containing sufficient proof that:~~

(1) the respondent has been adjudicated an incompetent person or a person in need of a guardian within the meaning of Mental Hygiene Law Article 81; or

(2) a Temporary or Permanent Guardian has been appointed for the respondent pursuant to Mental Hygiene Law Article 81; or

(3) a court of competent jurisdiction has rendered a factual determination that the respondent is mentally incompetent, incapacitated, is in need of involuntary care or treatment, or has otherwise ordered the respondent's retention or commitment for treatment.

~~The Committee shall serve a copy of the order upon the respondent, a Temporary or Permanent Guardian appointed on behalf of the respondent or upon the director of the appropriate facility where the respondent resides, as directed by the Court.~~

EXPLANATION FOR CHANGE: These amendments are consistent with the substantive laws, procedure and terminology used in guardianship proceedings pursuant to Mental Hygiene Law Article 81.

(b) At any time during the pendency of a disciplinary proceeding or an investigation conducted pursuant to these ~~R~~rules, the Committee, or the respondent, may submit an application apply to the Court for a stay of the proceedings and an order immediately suspending determination that the respondent is incapacitated from practicing law by reason of incapacity due to mental disability or condition, alcohol or substance abuse, or any other mental or emotional condition that detrimentally impacts renders the respondent's ability incapacitated from to practicing law. Such applications by the respondents shall include medical proof of the respondent's alleged demonstrating incapacity. The Court may appoint a medical expert to examine the respondent and render a report. Upon a finding by ~~When~~ the Court finds that a

respondent ~~lacks mental capacity to is incapacitated from practicing~~ law, the Court shall enter an order immediately suspending the respondent from the practice of law and may stay the pending proceeding or investigation.

EXPLANATION FOR CHANGE: See the comments to subsection (a) immediately above.

IV.

Post-Disciplinary Proceedings

1. Conduct of Disbarred, Suspended or Resigned Attorneys

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

(b) Notification of Clients. Within 10 days of the effective date of an order of~~When a respondent is disbarred, suspended~~ from the practice of law or removed from the roll of attorneys after resignation, the respondent shall promptly notify, by ~~registered or certified mail and, where practical, electronic mail~~, each client, ~~and the attorney for each party in any pending matter, the court in any pending matter~~ and the Office of Court Administration for each action where a retainer statement has been filed pursuant to court rules. The notice shall state that the respondent is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent's client. Communications to the court shall request immediate leave to withdraw as counsel for the client.

EXPLANATION FOR CHANGE: These amendments specify a time limit for the notices, delete "registered" mail as a means of delivering notices (insofar as that method is now rarely used), add email as an additional means of communication where practical, and add the court as a recipient of the notice while requiring the disbarred/suspended attorney to move to withdraw in conformance with the Rules of Professional Conduct.

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

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

EXPLANATION FOR CHANGE: This subdivision is not necessary in view of the proposed change to subdivision (b) above.

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

EXPLANATION FOR CHANGE: The proposed language updates and clarifies the draft Rule.

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

EXPLANATION FOR CHANGE: The stricken language is confusing and redundant. The reference to a "secure pass" should precisely state its actual title.

(g) Affidavit of Compliance. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, shall file with the Court, no later than 45 days after being served with the order of disbarment, suspension or removal from the roll of attorneys, an affidavit showing a current mailing address for the respondent and that the respondent has complied with the order and these rules. The affidavit shall be served on the Committee and proof of service shall be filed with the Court.

(h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys ~~after resignation~~ may not share in any fee for legal services rendered by another attorney during the period of disbarment, suspension or removal from the roll of attorneys but may be compensated ~~on a quantum meruit basis~~ for services rendered prior to the effective date of the disbarment, suspension or removal from the roll of attorneys. On motion of the respondent, with notice to the client, the amount and manner of compensation shall be determined by the court or agency where the underlying action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.

EXPLANATION FOR CHANGE: The court presiding over the matter where the respondent provided pre-disbarment or pre-suspension services should have discretion to award a contingency fee under appropriate circumstances. See also subdivision (f) above.

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

EXPLANATION FOR CHANGE: The new proposed language is more specific, mandatory and inclusive. See also subdivision (f) above.

2. Reinstatement of Disbarred or Suspended Attorneys

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

EXPLANATION FOR CHANGE: The new language clarifies the Rule.

(b) Necessary papers. Papers on an application for reinstatement of a respondent who has been disbarred or suspended for more than six months shall include a copy of the order of disbarment or suspension, or the order striking the respondent from the roll of attorneys, and any related decision; a completed questionnaire in the form included in Appendix C to these rules; proof that the respondent has, no more than one year prior to the date the application is filed, successfully completed the Multistate Professional Responsibility Examination described in 22 NYCRR § 520.9. After the application has been filed, the Court may deny the application with leave to renew upon the submission of proof that the respondent has successfully completed the New York State Bar Examination described in 22 NYCRR § 520.8, or a specified requirement of continuing legal education, or both. A respondent who has been suspended for a period of six months or less shall not be required to submit proof that the respondent has successfully completed the Multistate Professional Responsibility Examination, unless otherwise directed by the Court.

(c) Time of application

(1) A respondent disbarred by order of the Court for misconduct, or stricken from the roll of attorneys for any reason other than resignation for non-disciplinary reasons may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment or the order striking the attorney's name from the roll of attorneys.

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

(d) Respondents suspended for a fixed term of six months or less. Unless the Court directs otherwise, a respondent attorney who has been suspended for six months or less pursuant to

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

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

3. Reinstatement of Incapacitated Attorneys

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

(b) Necessary papers. Papers on an application for reinstatement following suspension on incapacity grounds shall include: a copy of the order of suspension; and any related decision; proof, in evidentiary form, that the incapacity no longer exists, has been removed or no longer adversely impacts the applicant's fitness as a lawyer ~~of a declaration of competency or of the respondent's capacity to practice law~~; a completed questionnaire in a form approved by the Court; a copy of a letter to The Lawyers' Fund for Client Protection notifying the Fund that the application has been filed; and such other proofs as the Court may require. A copy of the complete application shall be served upon the Committee.

EXPLANATION FOR CHANGE: Courts generally do not make declarations of competency, but instead will terminate a guardianship or take other similar steps.

(c) Such application shall be granted by the Court upon showing by clear and convincing evidence that the incapacity that formed the basis of the suspension no longer exists, has been removed or no longer adversely impacts the applicant's fitness as a lawyer. ~~respondent's disability has been removed and the respondent is fit to resume the practice of law.~~ Upon such application, the Court may take or direct such action as it deems necessary or proper for a determination as to whether the respondent's disability has been removed, including a direction of an examination of the respondent by such qualified experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the respondent. In a proceeding under this section, the burden of proof shall rest with the suspended respondent.

EXPLANATION FOR CHANGE: See subdivision (b) immediately above.

(d) Where a respondent has been suspended by an order in accordance with the provisions of section III.8 of these Rules and thereafter, has made the showing required under section IV.3(c) in proceedings duly taken, ~~the respondent has been judicially declared to be competent~~, the Court may dispense with further evidence that the respondent's disability has been removed and may direct the respondent's reinstatement upon such terms as are deemed proper and advisable.

EXPLANATION FOR CHANGE: See subdivision (b) above.

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

EXPLANATION FOR CHANGE: Treatment facilities in addition to hospitals should be included in the waiver and releases should be HIPAA compliant.

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

V.

Additional Rules Applicable to Disciplinary Matters

1. Confidentiality

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

(b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any person under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).

(c) All proceeding before a Committee or the Court shall be closed to the public unless the respondent submits to the Court a written waiver of confidentiality and there exists no due cause for closing the hearing notwithstanding the waiver, or the Court issues absent a written order pursuant to Judiciary Law § 90(10) of the Court opening the proceedings in whole or in part.

EXPLANATION FOR CHANGE: In *Matter of Capoccia*, 59 N.Y.2d 549 (1983), the Court of Appeals ruled that upon “a duly executed waiver of confidentiality by th[e] attorney and his demand therefor, the hearings in his disciplinary proceeding must be made open to the public in the absence of a determination by the Appellate Division that for due cause demonstrated the hearings should be closed in whole or in part.” The new proposed language tracks the holding in *Capoccia*, which remains controlling decisional law in New York.

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

- (1) the nature and scope of the inquiry or investigation for which disclosure is sought;
- (2) the papers, records or documents sought to be disclosed, or the proceedings that are sought to be opened; and
- (3) other methods, if any, of obtaining the information sought, and the reasons such methods are unavailable or impractical.

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

2. Abatement; Effect of Pending Civil or Criminal Matters; Restitution

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

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

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

3. Appointment of Attorney to Protect Interests of Clients or Attorney

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

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

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

4. Resignation for Non-Disciplinary Reasons; Reinstatement

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

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

(2) When the Court determines that an attorney is eligible to resign for non-disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and note that the resignation is voluntary and not a consequence of discipline. stating the non-disciplinary nature of the resignation.

EXPLANATION FOR CHANGE: The proposed language is confusing. Unless discipline is involved, no public policy purpose is served by stating the "nature" of the resignation.

(b) Reinstatement. An attorney who has resigned from the bar for non-disciplinary reasons may apply for reinstatement by filing with the Court an affidavit or affirmation in a form approved by the Court. The Court may grant the application and restore the attorney's name to the roll of attorneys; or deny the application with leave to renew upon proof that the applicant has successfully completed the Multistate Professional Responsibility Examination described in 22 NYCRR § 520, certain continuing legal education programs described in 22 NYCRR § 1500, or the New York State Bar Examination described in 22 NYCRR § 520.8 of this Title; or take such other action as it deems appropriate.

EXPLANATION FOR CHANGE: Depending on the circumstances presented, the Court could determine that a resigned attorney seeking non-disciplinary reinstatement should re-familiarize him or herself with substantive New York law principles or procedures.

5. Volunteers/Indemnification

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

NASSAU COUNTY BAR ASSOCIATION



SUFFOLK COUNTY BAR ASSOCIATION



REPORT AND RECOMMENDATIONS OF THE JOINT TASK FORCE ON UNIFORM LAWYER DISCIPLINE, AS ADOPTED BY THE NCBA BOARD OF DIRECTORS ON DECEMBER 8, 2015 AND SCBA BOARD ON DECEMBER 10, 2015

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Appendix

Executive Summary of Changes Proposed By The Joint Task Force of the NCBA and SCBA to the Proposed Rules on Uniform Attorney Discipline of the Appellate Divisions

Reference Materials

Proposed Uniform Attorney Discipline Rules of the Appellate Division

<https://www.nycourts.gov/rules/comments/PDF/ProposedUniformDisciplinaryRules-11-04-15.pdf>

New York State Commission on Statewide Attorney Discipline Report “Enhancing Fairness and Consistency - Fostering Efficiency and Transparency”

<https://www.nycourts.gov/attorneys/discipline/Documents/AttyDiscFINAL9-24.pdf>.

Nassau County Bar Association Report on Uniform Lawyer Discipline

https://www.nassaubar.org/UserFiles/NCBA_Task_Force_Report_approved_11_10_1

5.pdf

NYSBA Report and Recommendations Concerning Discovery in Disciplinary Proceedings <https://www.nysba.org/DownloadAsset.aspx?id=57725>.

ABA Standards for Imposing Lawyer Sanctions

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf

Annual Report of the Board of Trustees for Calendar Year 2014, The Lawyers' Fund for Client Protection of the State of New York

<http://www.nylawfund.org/AR%202014.FINAL.2.11.15.pdf>

REPORT OF THE JOINT NCBA AND SCBA TASK FORCE ON PROPOSED UNIFORM ATTORNEY DISCIPLINARY RULES

Introduction

The Nassau County Bar Association (“NCBA”) and the Suffolk County Bar Association (“SCBA”), representing over 8,000 attorney members, have jointly appointed a Task Force (the “Joint Task Force”) to comment on the Proposed Uniform Attorney Discipline Rules of the Appellate Division (“Proposed Rules”) issued on November 4, 2015¹ –five days *before* the Office of Court Administration comment period ended in connection with the recommendations of the NYS Commission on Statewide Attorney Discipline (“COSAD”) appointed by Chief Judge Jonathan Lippman contained in a September 24, 2015 report entitled “Enhancing Fairness and Consistency - Fostering Efficiency and Transparency” (the “COSAD Report”).²

The COSAD Report contained eleven recommendations involving significant changes to the current system of attorney discipline in New York. The comment period on this important topic was inadequate for breadth of the subject reviewed. Despite the abbreviated time period, the New York State Bar Association (“NYSBA”), NCBA and many other bar associations timely submitted their members thoughtful comments.

At the direction of the Administrative Board of the Courts, a working group of senior staff of the Appellate Division and the Office of Court Administration (“OCA”) issued the Proposed Rules which, according to the memorandum distributed by OCA on November 4, 2015 “should be read in conjunction with the” COSAD Report. The fact that the Proposed Rules were issued without consideration of the comments on the COSAD Report by the attorneys of this state is disheartening.

Notwithstanding this affront, the working group’s efforts should be commended. It has undertaken an effort which should have the benefit of detailed analysis and comment over a period of time well in excess of its imposed limitations and attempted with much success to address the daunting task of unifying the disparate procedures of the four appellate departments in this state.

The memorandum distributed with the Proposed Rules on November 4, 2015 required comment by December 18, 2015. Requests for extension went unanswered.

This is unfortunate. Revamping the disciplinary process of New York State warrants thoughtful and detailed study. In its report, COSAD acknowledged that the six month time constraint imposed by the Chief Judge on its review was insufficient for it to recommend a uniform set of procedures to be followed in all four departments. Yet the working group was tasked by OCA with exactly that - but in a fraction of the time. While the Proposed Rules are a positive step forward, the impact on current processes has not been adequately addressed. The

¹ The Proposed Rules and accompanying Memorandum seeking comment may be accessed at <https://www.nycourts.gov/rules/comments/PDF/ProposedUniformDisciplinaryRules-11-04-15.pdf>.

² The COSAD Report in its entirety may be accessed at <https://www.nycourts.gov/attorneys/discipline/Documents/AttyDiscFINAL9-24.pdf>.

thoughts and comments of the thousands of lawyers in New York who are vested in the process and make their voices heard through the state and local bar associations and professional associations should have been taken into consideration.

Notwithstanding the truncated comment period, the Joint Task Force has attempted a meaningful review of the Proposed Rules in order to refine areas of concern to the profession and to include changes that will inure to the benefit of the public, the clients and the profession.

The Joint Task Force met and reviewed the significant content contained in the Proposed Rules as well as the COSAD Report, the Report approved by the NCBA board of directors on the recommendation contained in the COSAD Report (“NCBA Report”),³ together with prior positions taken by various bar associations, scholars and practitioners on topics related to the subjects reviewed by NCBA and COSAD and the procedures currently in place in the four appellate departments.

The Proposed Rules, Joint Task Force Comments and Recommended Revisions

A. Section I - Application; Appointment of Committees

1. Section 1 - Application

OCA Proposed Language:

“These rules shall apply to (a) all attorneys who are admitted to practice, reside in, commit professional misconduct in or who have offices in the State of New York; (b) all in-house counsel, attorneys admitted pro hac vice, and licensed legal consultants who reside in have an office in or commit professional misconduct in the State of New York; and (c) the law firms or other entities that have as a member, retain, or otherwise employ any person covered by these rules.”

Comments:

The Joint Task Force questions the breadth of the definition of those subject to the application of the Proposed Rules. Attorneys who reside – but do not practice – in New York are not subject to the New York Rules of Professional Conduct (“RPC”). Similarly, the reference in (c) to “other entities” is vague and confusing and could be interpreted to apply to client entities which “retain” an attorney covered by the Rules. Furthermore, use of the term “professional misconduct” is imprecise.

Proposed Revision(s):

“These rules shall apply to (a) all attorneys who are admitted to practice, ~~reside in, commit professional misconduct in or who have offices~~ in the State of New York; (b) all in-house counsel registered in the State of New York; (c) all, ~~attorneys admitted pro hac vice, and licensed~~

³ The NCBA Report may be accessed at https://www.nassaubar.org/UserFiles/NCBA_Task_Force_Report_approved_11_10_15.pdf.

legal consultants licensed in the State of New York; (d) all attorneys who ~~reside in,~~ have an office in, practice in, or seek to practice in the State of New York, including those admitted pro hac vice or who otherwise engage in conduct subject to the New York Rules of Professional Conduct or commit professional misconduct in the State of New York; and (e) the law firms or ~~other entities~~ that have as a member, retain, or otherwise employ any person covered by these rules.”

2. Section 2(a) - Definitions

OCA Proposed Language:

“Professional Misconduct Defined. A violation of any of the Rules of Professional Conduct as set forth in 22 NYCRR Part 1200, including the violation of any rule or announced standard governing the personal or professional conduct of attorneys, shall constitute professional misconduct within the meaning of Judiciary Law § 90(2).”

Comments:

Use of the phrase “announced standard” is vague and undefined. Professional misconduct should be defined as violations of the Rules of Professional Conduct or court rule governing the conduct of attorneys.

Proposed Revision(s):

“Professional Misconduct Defined. A violation of any of the Rules of Professional Conduct as set forth in 22 NYCRR Part 1200, including the violation of any law or court rule ~~or announced standard~~ governing the personal or professional conduct of attorneys, shall constitute professional misconduct within the meaning of Judiciary Law § 90(2).”

3. Section 2(b) - Definitions

OCA Proposed Language:

“(b) Other Definitions:

- (1) Admonition: discipline issued at the direction of a Committee or the Court upon a finding that the respondent engaged in professional misconduct that does not warrant public discipline by the Court. An Admonition shall constitute private discipline, and shall be in writing but may be delivered to a recipient by personal appearance before the Committee.
- (2) Committee: an attorney grievance committee established pursuant to these rules.
- (3) Complainant: a person or entity that submits a complaint to a Committee.

- (4) Court: the Appellate Divisions of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over a complaint, investigation, proceeding or person covered by these Rules.
- (5) Disbar: remove from office pursuant to Judiciary Law § 90(2).
- (6) Foreign jurisdiction: a legal jurisdiction of a state, territory, or district of the United States outside New York State.
- (7) Letter of Advisement: letter issued at the direction of a Committee pursuant to section II.3(b)(1)(iv) of these rules, upon a finding that the respondent has engaged in inappropriate behavior, or other behavior requiring comment, not warranting the imposition of discipline. A Letter of Admonition shall not constitute discipline but may be considered by a Committee or the Court in determining the extent of discipline to be imposed or action to be taken upon a subsequent finding of misconduct.
- (8) Respondent: an attorney or other person who is the subject of an investigation or a proceeding before the Committee or the Court pursuant to these rules.

Comments:

First, the Joint Task Force believes the definitions of “Admonition” and “Letter of Advisement” should directly address the confidentiality provided under Judiciary Law § 90. Second, a concern expressed throughout the Proposed Rules is that service upon the respondent should also be made upon the respondent’s attorney, if any. Third, it is the position of the Joint Task Force that service of an “Admonition” may be made by delivery to the respondent (or the respondent’s attorney) or by personal appearance before the Committee. Personal appearance should not be required in every circumstance. Fourth, the definition of “Letter of Advisement” should track the definition of the former “Letter of Caution.” Fifth, the term “parties” is used through Part III of the Proposed Rules without definition. Sixth, Section 2(b) includes definitions of some terms related to various forms of discipline but omits other terms that are regularly used in the process. While “Admonition” and “Letter of Advisement” are defined, the regularly used terms “censure,” “discipline” and “suspension,” remain undefined.

Seventh, the NCBA Report on the COSAD Report noted that a significant number of reported disciplinary decisions cite the failure of the respondent attorney to respond to disciplinary authorities results in sanctions sometimes far greater than the original charge.⁴ In many cases it

⁴ See e.g., *In re Blank*, 110 A.D.3d 112 (1st Dep’t 2013). (Disbarment was appropriate discipline for the professional misconduct of attorney (who had suffered a series of health problems, including malignant melanoma, two surgeries to remove abscesses from her pelvis, surgery on both wrists to treat carpal tunnel syndrome, bowel surgery, cataract surgery, and depression with the result of a law practice from which she earned less than \$1000 in the prior year) for, *inter alia*, neglecting two separate client matters, failing to return unearned fees and satisfy two judgments, and failing to cooperate with the Grievance Committee’s investigation, although had she contested the charges she would have likely been subject only to a suspension. “In keeping with precedents of this Court, we are constrained to

is apparent that the failure to timely respond is caused not by a disregard for the disciplinary process but from psychological or addiction issues and a failure to know how to ask for help. The majority of the attorneys in New York are sole practitioners that lack the support of partners who may be in a position to discern when an attorney needs help. The effort expended by staff attorneys prosecuting failure to cooperate charges operates as a drag on the already inundated system. The Joint Task Force joins in the NCBA proposal that consideration be given to establishing an ombudsman process in each county or judicial district's Lawyer Assistance Program ("LAP") upon whom the disciplinary authorities may provide copies of notices sent to attorneys who have failed to respond to inquiries from the disciplinary authorities. The LAP Ombudsman may then reach out to the affected attorney and ascertain whether the attorney may benefit at an early stage from the varied levels of assistance LAP is uniquely qualified to provide. On a practical side, many attorneys are unaware that the vast majority of lawyer professional liability policies provide a supplemental payment in varying – but significant – amounts that enable an attorney to obtain reimbursement for legal fees incurred in responding to a grievance. This monetary assistance is an invaluable resource for members of the profession and would similarly benefit the disciplinary authorities by focusing their attention on true misconduct that presents a danger to the public in each judicial district or local bar.⁵

The senior staff of the Appellate Division and the Office of Court Administration whose hard work resulted in the Proposed Rules obviously did not consider this suggestion since the Proposed Rules were issued before the comment period on COSAC's Report terminated. The Joint Task Force believes that including a definition of the "LAP Ombudsman" is appropriate as the first step in institutionalizing the concept.

Finally, grammatical changes have been made to conform to usage throughout the remainder of the Proposed Rules.

Suggested Revision(s):

“(b) Other Definitions:

- (1) Admonition: private discipline subject to the confidentiality provided by Judiciary Law § 90(10), issued at the direction of a Committee or the Court upon a finding that the respondent engaged in professional misconduct that does not warrant public discipline by the Court. An Admonition shall be in

disbar respondent based solely on her failure to answer the charges, respond to the Committee's requests and appear at the hearings . . . This is unfortunate, because had respondent contested the charges she would have likely been subject only to a suspension, albeit a significant one . . . What makes this matter even more unfortunate is that, as pointed out by the Referee, respondent felt sincere remorse for her actions and wanted to make things right for her clients, but her crippling mental illness prevented her from even beginning to take steps to do so. Indeed, it is likely that the very mental illness which respondent appears to suffer from, and which seems to have led to the neglect charges in the first instance, prevented her from appearing in this proceeding and establishing her illness as a mitigating factor justifying suspension, or, at the very least, seeking an interim suspension pending a determination of her capacity to continue the practice of law, pursuant to 22 NYCRR 603.16. Nevertheless, because she did not take those actions, we have no choice but to uphold the sanction recommended by the Referee and the Hearing Panel.”).

writing and served upon respondent or respondent's attorney, where appropriate, but may be delivered to a respondent recipient by personal appearance before the Committee.

- (2) Censure: censure pursuant to Judiciary Law §90(2).
- (3) Committee: an attorney grievance committee established pursuant to these rules.
- (4) Complainant: a person or entity that submits a complaint to a Committee.
- (5) Court: the Appellate Divisions of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over a complaint, investigation, proceeding or person covered by these Rules.
- (6) Disbar: remove from practice pursuant to Judiciary Law § 90(2).
- (7) Discipline: includes private discipline (admonition) and public discipline (censure, suspension and disbarment).
- (8) Foreign jurisdiction: a legal jurisdiction of a state, territory, or district of the United States outside New York State.
- (9) LAP Ombudsman: the individual or subcommittee designated in each judicial district or local bar jurisdiction's Lawyers Assistance Program ("LAP") who shall be notified by the Chief Attorney of unanswered requests for information from respondents. Communications between the respondent and the LAP Ombudsman shall be afforded the confidentiality protections under Judiciary Law § 499.
- (10) Letter of Advisement: letter issued at the direction of a Committee pursuant to section II.3(b)91)(iv) of these rules, upon a finding that the respondent acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment. has engaged in inappropriate behavior, or other behavior requiring comment, not warranting the imposition of discipline. A Letter of Admonition shall not constitute discipline and shall be afforded the confidentiality required under Judiciary Law § 90(10) but may be considered by a Committee or the Court in determining the extent of discipline to be imposed or action to be taken upon a subsequent finding of misconduct.
- (11) Party: a Committee or respondent.
- (12) Respondent: a law firm, an attorney or other person who is the subject of an investigation or a proceeding before the Committee or the Court pursuant to these rules.

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

5. Section 4 – Appointment of Committees

OCA Proposed Language:

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

Comment:

At present each Judicial District maintains an independent Committee. The Proposed Rule does not indicate that the appointment of a Committee shall be made for each Judicial District. Given the sheer number of attorneys in at least the First and Second Departments, the Joint Task Force believes that appointment of Committees should track those of the respective Judicial Districts at a minimum in order to promote efficiency of the process and to reduce the delay in resolution identified but the COSAD Report. In addition, while the Joint Task Force approves of the two-thirds quorum requirement, it is urged that the majority requirement for the conduct of business track the requirement of General Construction Law § 41, *i.e.*, “For the purpose of this provision the words “whole number” shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting.” To provide otherwise would permit potential discipline of a respondent upon the vote of as little as eight Committee members.

Proposed Revision(s):

“Each Department of the Appellate Division shall appoint such Attorney Grievance Committee or committees (Committees”) within its jurisdiction as it may deem appropriate but in no event less than the number of Judicial Districts within each Department. Each Committee shall be comprised of at least 21 members, of which no fewer than 3 members shall be non-lawyers. A lawyer member of a Committee shall be appointed to serve as chairperson. All members of the Committee shall maintain an office for the practice of law, or reside, within the geographic jurisdiction of the Committee. Two-thirds of the membership of a Committee shall constitute a quorum for the conduct of business; all Committee action shall require the affirmative vote of at least a majority of the whole number of the Committee ~~membership present.~~”

6. Section 6(a) - Conflicts; Disqualification from Representation

OCA Proposed Language:

- “(a) No (1) current member of a Committee, (2) partner, associate or member of a law firm associated with such member of the Committee, (3) current member of the Committee’s professional staff, or (4) immediate family member of a current Committee member or Committee staff member, may represent a respondent in a matter investigated or prosecuted before that Committee.
- (b) No referee appointed to hear and report on the issues raised in a proceeding under these rules may, in the Department in which he or she was appointed, represent a respondent until the expiration of two years from the date of the submission of that referee's final report.
- (c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent in a matter investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service.”

Comments:

The proposed language contained in Section 6 is narrow with respect to two issues. Assuming – as it appears is the case – that OCA perceives a conflict exists that should bar a former Committee member or staff attorney from thereafter representing a respondent, the two year bar should extend to the representation of a complainant on a matter being investigated or prosecuted against the respondent. To the extent that a former Committee member or staff attorney actually participated in a meaningful manner in the investigation or prosecution of a respondent, it is the opinion of the Joint Task Force that the personal bar to representation of the respondent in the same manner should extend beyond the proposed two year period.

Proposed Revision(s):

- “(a) No (1) current member of a Committee, (2) partner, associate or member of a law firm associated with such member of the Committee, (3) current member of the Committee’s professional staff, or (4) immediate family member of a current Committee member or Committee staff member, may represent a respondent or complainant in a matter investigated or prosecuted before that Committee.
- (b) No referee appointed to hear and report on the issues raised in a proceeding under these rules may, in the Department in which he or she was appointed, represent a respondent or complainant until the expiration of two years from the date of the submission of that referee's final report.
- (c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent or complainant in a matter investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service. In the event the former member of the Committee, or former member of the Committee’s professional

staff participated in a material way in a matter investigated or prosecuted against respondent before that Committee, then the bar imposed upon the former member of the Committee or former member of the Committee's professional staff extends beyond the two year period."

B. Section II – Proceedings Before Committee

1. Section 1(a) (Complaint)

OCA Proposed Language:

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

Comments:

The COSAD Report identified significant delays in adjudicating complaints against attorneys. Many of its recommendations were designed to streamline the process and enhance efficiency thereby eliminating or reducing the identified delays. Imposing the requirement that only the full Committee may authorize or initiate an investigation into alleged professional misconduct will further burden the already taxed process. The Joint Task Force believes that allowing the Chief Attorney the authority to initiate an investigation, subject to consultation with the Committee Chair, enhances the goal of efficiency.

Proposed Revision(s):

“Investigations of professional misconduct may be authorized upon receipt by a Committee of a written original complaint, signed by the complainant, which need not be verified. Investigations may also be authorized by the Chief Attorney or the ~~a~~-Committee acting *sua sponte*; provided that the Chief Attorney shall consult with the Chair of the Committee before proceeding *sua sponte*.”

2. Section 2 - Investigation; Disclosure

OCA Proposed Language:

“(a) The Chief Attorney is authorized to:

- (1) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint;
- (2) direct the respondent to appear and produce records before the Chief Attorney or a staff attorney for a formal interview or examination under oath. In the event the respondent fails to respond to such a direction, the Chief Attorney shall provide a copy of such requests to the appropriate LAP Ombudsman;

- (3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein; and
 - (4) take any other action deemed necessary for the proper disposition of a complaint.
- (b) Disclosure. The Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint. Prior to the taking of any action against a respondent pursuant to sections II.3(b)(l)(iv), (v) or (vi) of these rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent.”

Comments:

In June 2015, NYSBA issued its Report and Recommendations Concerning Discovery in Disciplinary Proceedings (“NYSBA Recommendations”)⁶ which reviewed in detail the discovery available to respondent attorneys throughout the country and noted that of the fifty-one states surveyed, New York was one of only seven states which provided little to no discovery in disciplinary proceedings. The five NYSBA Recommendations are:

1. In the Pre-Charge/Investigative phase, a Respondent should be provided with the initial Complaint, even if submitted by a member of the judiciary or a governmental employee, and to any responses/supplemental materials submitted by the Complainant.
2. In the Pre-Charge/Investigative Phase, Respondents should have access to exculpatory material and the non-work product portions of Disciplinary Counsel’s files except where the Staff Attorney determines that such access might jeopardize the investigation.
3. In the Post-Charges Phase, to the extent that it is not already the practice in a jurisdiction, Respondents should have the ability to request documents from third-parties via so-ordered subpoena.
4. In the Post-Charges Phase, Respondents should have the ability to request documents from Disciplinary Counsel.

⁶ The NYSBA Recommendations may be found at

5. In the Post-Charges Phase, for good cause shown and in appropriate circumstances, the Respondent may request the Referee to permit the depositions of complainant and any fact witnesses or experts that Disciplinary Counsel intends to call at a hearing, regardless of the availability of the witness to testify at the hearing.

While the Joint Task Force is gratified that the Proposed Rules allow for limited discovery by the respondent, we believe that all of the recommendations should be implemented in the Proposed Rules. Even with the implementation of all of the NYSBA Recommendations, New York would still be far behind the discovery options offered by the majority of states as well as the discovery provided in the ABA Model Rules for Lawyer Disciplinary Enforcement. The Joint Task Force believes measured discovery must be allowed the respondent at both the investigatory and post charge phases and is pleased the Proposed Rules acknowledge that fundamental principle of fairness. Yet it is urged the proposals do not go far enough in providing the respondent attorney access to information critical to explain circumstances in the investigatory process as well as after charges have been filed.

This is one of the many areas where the insistence on an abbreviated comment period does not serve the profession. A robust dialogue on fair yet measured discovery processes is warranted but time simply does not permit this common sense approach to a much needed overhaul of the existing rules. The Joint Task Force believes that at a minimum all of the NYSBA Recommendations should be incorporated into the Proposed Rules and offers the following revisions. Other revisions are offered to clarify what it is believed was implicitly intended by the Proposed Rules.

Proposed Revision(s):

“(a) The Chief Attorney is authorized to:

- (1) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint or authorize a staff attorney to do so;
- (2) direct the respondent to appear and produce records before the Chief Attorney or a staff attorney for a formal interview or examination under oath;
- (3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein; and
- (4) take any other action deemed necessary for the proper disposition of a complaint.

(b) Disclosure.

(1) The Chief Attorney shall provide a copy of a pending complaint and all documents accompanying the complaint to the respondent within 60 days of receipt of that complaint even if submitted by a member of the judiciary or a governmental employee. In the event the investigation was sua sponte, initiated by a Committee, respondent shall be provided with a written statement of the facts supporting the investigation.

(2) Upon the written request of the respondent, and in any event pPrior to the taking of any action against a respondent pursuant to sections II.3(b)(1)(iv), (v) or (vi) of these rules, the Chief Attorney shall provide the respondent with the opportunity to review and duplicate all written statements and other documents that form the basis of the proposed Committee action, including but not limited to transcripts of the testimony taken from any witnesses or documents obtained pursuant to subpoena, excepting material that is attorney work product or otherwise deemed privileged by statute or case law. In the event that material is withheld on the basis of attorney work product or other privilege, the Chief Attorney shall designate such documents in a privilege log, and materials previously provided to the Committee by the respondent.”

(3) Upon a showing of good cause, the respondent may apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary to respond to the complaint or to develop issues raised by the testimony or documents obtained by the Committee. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein.”

3. Section 3(a)(3)- Disposition and Review

OCA Proposed Language:

“The complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.”

Comments:

It is the position of the Joint Task Force that the respondent (or respondent’s counsel) should be provided with the brief disposition description. Further, the description need not go beyond the basis for disposition such as those designated in Proposed Rule 3(a)(1)(i)-(iv).

Proposed Revision(s):

“The complainant and the respondent or respondent’s counsel shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney such as noted in this rule at (a)(1)(i)-(iv).”

4. Section 3(b) - Disposition and Review

OCA Proposed Language:

- (1) After investigation of a complaint, with such appearances as the Committee may direct, a Committee may take one or more of the following actions:
 - (i) dismiss the complaint as unfounded by letter to the complainant and to the respondent;
 - (ii) when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant;
 - (iii) make an application for diversion pursuant to section III.5 of these Rules;
 - (iv) when the Committee finds that the respondent has engaged in inappropriate behavior that, under the facts of the case, does not warrant imposition of discipline, or other behavior requiring comment, issue a Letter of Advisement to the respondent;
 - (v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, and that it is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, to seek reconsideration of the proposed Admonition.
 - (vi) when the Committee finds, by a fair preponderance of the evidence, that there is probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section III of these Rules.

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

Comments:

The Committee has the right to dismiss a complaint for any reason. The language “as unfounded” is superfluous. The Joint Task Force believes that “fostering the public’s confidence in the bar” better articulates the purpose behind Committee action rather than “preserving the reputation of the bar.” Additional revisions have been suggested to conform to prior suggestions by the Joint Task Force.

Proposed Revision(s):

- (1) After investigation of a complaint, with such appearances as the Committee may direct, a Committee may take one or more of the following actions:
- (i) dismiss the complaint ~~as unfounded~~ by letter to the complainant and to the respondent;
 - (ii) when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant;
 - (iii) make an application for diversion pursuant to section III.5 of these Rules on notice to the respondent and the LAP Ombudsman;
 - (iv) when the Committee finds that the respondent has acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring in inappropriate behavior that, under the facts of the case, does not warrant imposition of discipline, or other behavior requiring comment, issue a Letter of Advisement to the respondent;
 - (v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, and that it is appropriate to protect the public, foster the public’s confidence in ~~preserve the reputation of the bar~~, and deter others from committing similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, to seek reconsideration of the proposed Admonition.

- (vi) when the Committee finds, by a fair preponderance of the evidence, that there is probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, foster the public's confidence in ~~preserve the reputation of~~ the bar, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section III of these Rules.
- (2) As may be permitted by law, the complainant and the respondent or respondent's attorney shall be provided with a brief description of the basis of any disposition of a complaint by the Committee. This description shall not include bases not included in the original complaint filed by the complainant.

5. Section 3(c)(1)(ii) - Disposition and Review

OCA Proposed Language:

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

Comments:

The Joint Task Force is of the opinion that following the issuance of a Letter of Advisement review is rarely sought from a denial of a reconsideration request. Since that is the case, it is unclear why a greater standard of review, *i.e.* “violation of a fundamental constitutional right.” Under the circumstances, the current standard of “abuse of discretion” seems appropriate.

Proposed Revision(s):

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

6. Section 3(c)(3) - Review of Dismissal or Declination to Investigate

OCA Proposed Language:

“Within 30 days of the issuance of notice to a complainant of a Chief Attorney’s decision declining to investigate a complaint, or a Committee’s dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration,

or refer the request to the full committee, or a subcommittee thereof, for whatever action it deems appropriate.”

Comment:

Based upon the statistics involving dismissal of unfounded complaints, the review process afforded complainants in the Proposed Rules will further encumber the over-taxed system. Once the Chief Attorney has found reason to decline and investigate a complaint and the Committee has agreed, the Joint Task Force sees no purpose to continued review.

Proposed Revision(s):

“Within 30 days of the issuance of notice to a complainant of a Chief Attorney’s decision declining to investigate a complaint, ~~or a Committee’s dismissal of a complaint~~, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full committee, or a subcommittee thereof, for whatever action it deems appropriate.”

C. Section III – Proceedings in the Appellate Division

1. Section 1(a)(2) – Statement of Disputed Facts

OCA Proposed Language:

“Within 20 days after service of the answer or, if applicable, a reply, each party shall file with the Court a statement of facts that identifies those allegations that the party contends are undisputed and those allegations that a party contends are disputed and for which a hearing is necessary. In the alternative, the parties may file a statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or the parties may jointly file a stipulation of disputed and undisputed facts.”

Comments:

The Joint Task Force takes the position that the 20 day period specified is not realistic. In addition, it is proposed that the parties may elect to proceed on one of two tracks: either they make the submission to the Court independently or jointly. If independent filings are employed, the Committee should be required to set forth its statement in the first instance followed by respondent. It is hoped this process would prompt the parties to submit a joint submission. It is further noted that including a provision that allows either party to unilaterally file a statement that the pleadings raise no question of fact requiring a hearing would appear to have no real application and it therefore suggested that if such a filing is employed, it be done jointly.

Proposed Revision(s):

“Within ~~20~~ 30 days after service of the answer or, if applicable, a reply, the Committee ~~each party~~ shall file with the Court a statement of facts that identifies those allegations that the

Committee party contends are undisputed and those allegations that the Committee a party contends are disputed and for which a hearing is necessary. Within 30 days following submission by the Committee, the respondent shall respond to the Committee's statement and, if appropriate, set forth respondent's statement of facts identifying those allegations that respondent contends are undisputed and those allegations that the respondent contends are disputed and for which a hearing is necessary. In the alternative, within 45 days after service of the answer or, if applicable a reply, the parties may (i) file a joint statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or (ii) the parties may jointly file a stipulation of disputed and undisputed facts.”

2. Section 1(a)(3) – Disclosure Concerning Disputed Facts

OCA Proposed Language:

“Except as otherwise ordered by the Court, a party must, no later than 14 days after parties have filing a statement of facts with the Court as required by section III.1(a)(2) of these rules, provide to any other party disclosure concerning the allegations that the party contends are disputed. The disclosure shall identify the following:

- (i) the name of each individual likely to have relevant and discoverable information that the disclosing party may use to support or contest the disputed allegation and a general description of the information likely possessed by that individual; and
- (ii) a copy of each document that the disclosing party has in its possession or control that the party may use to support or contest the allegation, unless copying such documents would be unduly burdensome or expensive, in which case the disclosing party may provide a description of the documents by category and location, together with an opportunity to inspect and copy such documents.”

Comments:

The Joint Task Force again notes that the post-charge disclosure options contained in the NYSBA Recommendations should be included in the Proposed Rules and offers the following revisions on that basis. It is also believed that allowing the applications for discovery to be made to the Hearing Referee will streamline the process. Other revisions are suggested to conform to prior comments or to address what appear to be unrealistic time periods.

Proposed Revision(s):

“(i) Except as otherwise ordered by the Court, a party must, no later than 2014 days after both parties have filing a statement of facts with the Court as required by section III.1(a)(2) of these rules, provide to any other party disclosure concerning the allegations that the party contends are disputed. The disclosure shall identify the following:

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

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

(ii) For good cause shown and in appropriate circumstances, either party may make application to the Court or any Hearing Referee appointed by the Court to permit the deposition of any fact witness, the complainant or expert or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is relevant to the disputed facts. Upon issuance of an order permitting such discovery, appearances and production may be compelled by subpoena issued by either party.

3. Section 1(a)(4) - Discipline by Consent

Comments:

The Joint Task Force applauds the inclusion of the Discipline by Consent procedure in the Proposed Rules. This initiative will expedite the disciplinary process and allows the parties to control the outcome pending approval of the Court, yet return the parties to their original positions in the event the joint application to the Court is denied.

4. Section 1(b)(1) - Hearing

OCA Proposed Language:

“Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The referee may grant requests for additional disclosure as justice may require. Unless otherwise directed by the Court, the referee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, following post-hearing submissions, file with the Court a written report setting forth the referee's findings and recommendations. The parties may make such motions to affirm or disaffirm the referee’s report as permitted by the Court.”

Comments:

The Joint Task Force believes the 60 day period specified in the Proposed Rule is unrealistic and would adversely impact on what should be the respondent’s right to seek discovery. The proposed revision reflects this position.

Proposed Revision(s):

“Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The referee may grant requests for additional disclosure as justice may require. Unless otherwise directed by the Court, the referee shall complete the hearing within 120~~60~~ days, following the date of the

entry of the order of reference (unless good cause is shown to extend this period), and shall, following post-hearing submissions, file with the Court a written report setting forth the referee's findings and recommendations. The parties may make such motions to affirm or disaffirm the referee's report as permitted by the Court."

5. Section 1(b)(2) – Discipline

OCA Proposed Language:

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

Comments:

The Joint Task Force firmly believes that mandatory uniform sanctions for enumerated disciplinary offenses are not appropriate. The circumstances and mitigation factors surrounding each disciplinary offense should be judged on its own merits based upon the factors presented in each case. The Task Force does not oppose reference to the ABA Standards for Imposing Lawyer Sanctions⁷ *provided* the reference is solely as guidelines. The Task Force vehemently opposes a rigid application of any attempt to uniformly apply lawyer sanctions and supports the ability of the Appellate Division to treat each case individually and pass judgment based upon the facts and merits of each individual case. Other revisions are proposed to be consistent with the Joint Task Force's prior comments.

Proposed Revision(s):

"In presenting arguments on the issue of appropriate discipline for misconduct, the parties may cite any relevant factor, including but not limited to the nature of the misconduct, aggravating and mitigating circumstances, and other factors impacting on the issue of discipline, including the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions with the understanding that the ABA Standards are referenced solely as a guideline and do not have mandatory application. Upon a finding that any person covered by these rules has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, foster the public's confidence in ~~preserve the reputation of~~ the bar and deter others from committing similar misconduct."

6. Section 3 – Interim Suspension While Investigation or Proceeding is Pending

⁷ The ABA Standards for Imposing Lawyer Sanctions may be accessed at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf.

OCA Proposed Language:

- “(a) A respondent may be suspended from practice on an interim basis during the pendency of an investigation or proceeding on application or motion of a Committee, following personal service upon the respondent, or by substitute service in a manner approved by the Presiding Justice, and upon a finding by the Court that the respondent has engaged in conduct immediately threatening the public interest. Such a finding may be based upon: (1) the respondent's default in responding to a petition, notice to appear for formal interview, examination, or pursuant to subpoena under these rules; (2) the respondent's admission under oath to the commission of professional misconduct; (3) the respondent's failure to comply with a lawful demand of the Court or a Committee in an investigation, charges or proceeding under these rules; or (4) the respondent's willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, judgment, or other clear and convincing evidence. The Court may additionally suspend a respondent based on other uncontroverted evidence of professional misconduct as justice may require.
- (b) An application for suspension pursuant to this rule may provide notice that a respondent who is suspended under this rule and who has failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of the order of suspension may be disbarred by the Court without further notice.
- (c) Any order of interim suspension entered by the Court shall set forth the basis for the suspension and provide the respondent with an opportunity for a post-suspension hearing.
- (d) An order of interim suspension together with any decision issued pursuant to this subdivision shall be deemed a public record. The papers upon which any such order is based shall be deemed confidential pursuant to Judiciary Law §90(10).”

Comments:

It is the position of the Joint Task Force that an interim suspension – which effectively deprives an attorney of his or her livelihood, should not be imposed based upon non-payment of an alleged debt to a client absent evidence that the debt has been reduced to judgment. The proposed revisions reflect this position and also insert the requirement of proof of service of the interim suspension order on the respondent and LAP Ombudsman (as defined in Section I(2)(b)(9)) before the serious sanction of disbarment is imposed without further notice to the respondent.

Proposed Revision(s):

- “(a) A respondent may be suspended from practice on an interim basis during the pendency of an investigation or proceeding on application or motion of a Committee, following personal service upon the respondent, or by substitute service in a manner approved by the Presiding Justice, and upon a finding by the Court that the respondent has engaged in conduct immediately threatening the public interest. Such a finding may be based upon: (1) the respondent's default in responding to a petition, notice to appear for formal interview, examination, or pursuant to subpoena under these rules; (2) the respondent's admission under oath to the commission of professional misconduct; (3) the respondent's failure to comply with a lawful demand of the Court or a Committee in an investigation, charges or proceeding under these rules; or (4) the respondent's willful failure or refusal to pay money owed to a client, which debt is demonstrated by ~~an admission, judgment, or other clear and convincing evidence~~. The Court may additionally suspend a respondent based on other uncontroverted evidence of professional misconduct as justice may require.
- (b) An application for suspension pursuant to this rule may provide notice that a respondent who is suspended under this rule and who has failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of the order of suspension and proof of service of same upon respondent and the LAP Ombudsman may be disbarred by the Court without further notice.
- (c) Any order of interim suspension entered by the Court shall set forth the basis for the suspension and provide the respondent with an opportunity for a post-suspension hearing.
- (d) An order of interim suspension together with any decision issued pursuant to this subdivision shall be deemed a public record. The papers upon which any such order is based shall be deemed confidential pursuant to Judiciary Law §90(10).”

7. Section 4 – Resignation While Investigation or Proceeding is Pending

OCA Proposed Language:

- (a) A respondent may apply to resign by submitting to a Court an application in the form prescribed by the Court, with proof of service on the Committee, setting forth the nature of the charges or the allegations under investigation and attesting that:
- (1) the proposed resignation is rendered voluntarily, without coercion or duress, and with full awareness of the consequences, and that the Court's approval of the application shall result in the entry of an order disbarring the respondent and striking the respondent's name from the roll of attorneys;

- (2) the respondent admits the charges or allegations of misconduct;
 - (3) the respondent cannot successfully defend against the charges or allegations of misconduct; and
 - (4) when the charges or allegations include the willful misappropriation or misapplication of funds or property, the respondent consents to the entry of an order of restitution.
- (b) Upon receipt of an application for resignation, and after affording the Committee an opportunity to respond, the Court may accept the resignation and remove the respondent from office pursuant to Judiciary Law §90(2).”

Comments:

Under the current procedure a respondent need not “admit the charges or allegations of misconduct” when applying for permission to resign. Resignation in the face of disciplinary charges and admitting that the charges cannot be successfully defended is tantamount to disbarment. The Joint Task Force believes adding the requirement that all charges must be admitted will result in a significant decrease in voluntary resignations thereby overburdening the disciplinary system with no discernable benefit to the public.

Proposed Revision(s):

- (a) A respondent may apply to resign by submitting to a Court an application in the form prescribed by the Court, with proof of service on the Committee, setting forth the nature of the charges or the allegations under investigation and attesting that:
- (1) the proposed resignation is rendered voluntarily, without coercion or duress, and with full awareness of the consequences, and that the Court's approval of the application shall result in the entry of an order disbarring the respondent and striking the respondent's name from the roll of attorneys;
 - ~~(2) the respondent admits the charges or allegations of misconduct;~~
 - ~~(3)~~ the respondent cannot successfully defend against the charges or allegations of misconduct; and
 - ~~(4)~~ when the charges or allegations include the willful misappropriation or misapplication of funds or property, the respondent consents to the entry of an order of restitution.

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

8. Section 5 – Diversion to a Monitoring Program

OCA Proposed Language:

- (a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, depression or other mental health issues, the Court, upon application of any person or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider:
 - (1) the nature of the alleged misconduct;
 - (2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and
 - (3) whether diverting the respondent to a monitoring program is in the public interest.
- (b) Upon submission of written proof of successful completion of the monitoring program, the Court may direct the discontinuance or resumption of the investigation, charges or proceeding, or take other appropriate action. In the event the respondent fails to comply with the terms of a Court-ordered monitoring program, or the respondent commits additional misconduct during the pendency of the investigation or proceeding, the Court may, after affording the parties an opportunity to be heard, rescind the order of diversion and direct resumption of the disciplinary charges or investigation.
- (c) All aspects of a diversion application or a respondent's participation in a monitoring program pursuant to this rule and any records related thereto are confidential or privileged pursuant to Judiciary Law §§ 90 (10) and 499.
- (d) Any costs associated with a respondent's participation in a monitoring program pursuant to this section shall be the responsibility of the respondent.

Comments:

The Task Force strongly supports alternatives to traditional discipline for attorneys suffering from the effects of alcoholism, substance abuse and mental health problems which can impair any professional's judgment and ability to function. If these problems are not addressed at an early stage, their progressive nature can result in significant harm to the attorneys, their clients, their families and the public. According to the latest Annual Report of the Lawyer's Fund for

Client Protection of the State of New York, the apparent causes of misconduct for most of the lawyers involved in awards between 1982 and 2014 were traced to alcohol, drug abuse, gambling, economic pressures, mental illness, marital, professional and medical problems.⁸

The purpose of a Diversion Rule for lawyers whose misconduct is related to a mental health, alcohol, substance abuse or other addiction is to encourage lawyers to address and remedy the underlying causes that contributed to the misconduct in a structured and supervised education and rehabilitation LAP Monitoring Program. Advocating for lawyers to self-identify and address these issues can result in lasting benefits to that attorney, the public and the profession. It also helps to confront the stigma and shame that all too often accompany these problems, preventing lawyers from coming forward and getting the assistance they need.

For these reasons, the NCBA Report recommended adoption of the New York City Bar and NYSBA proposed Uniform Diversion Rule which expands the much needed diversionary option to attorneys suffering from mental health issues, in addition to debilitating addictions. The Joint Task Force joins in the recommendation and applauds the incorporation of a similar rule in the Proposed Rules. Minor revisions are suggested.

Proposed Revision(s):

- (a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, depression or other mental health issues, the Court, upon application of any ~~person~~ party or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider:
 - (1) the nature of the alleged misconduct;
 - (2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and
 - (3) whether diverting the respondent to a monitoring program is in the best interests of the public, the legal profession and the attorney-interest.
- (b) Upon submission of written proof of successful completion of the monitoring program, the Court may direct the discontinuance or resumption of the investigation, charges or proceeding, or take other appropriate action. In the event the respondent fails to comply with the terms of a Court-ordered monitoring program, or the respondent commits additional misconduct during the pendency of the investigation or proceeding, the Court may, after affording the parties an opportunity to be heard, rescind the order of diversion

⁸ Annual Report of the Board of Trustees for Calendar Year 2014, The Lawyers' Fund for Client Protection of the State of New York, at 14, available at <http://www.nylawfund.org/AR%202014.FINAL.2.11.15.pdf>.

and direct resumption of the disciplinary charges or investigation. Notice of the potential for rescission shall be provided to the LAP Ombudsman.

- (c) All aspects of a diversion application or a respondent's participation in a monitoring program pursuant to this rule and any records related thereto are confidential or privileged pursuant to Judiciary Law §§ 90 (10) and 499.
- (d) Any costs associated with a respondent's participation in a monitoring program pursuant to this section shall be the responsibility of the respondent.

9. Section 6(a) – Attorneys Convicted of a Crime

OCA Proposed Language:

“An attorney to whom the rules of this Part shall apply who has been found guilty of any crime in a court of the United States or any state, territory or district thereof, whether by plea of guilty or nolo contendere, or by verdict following trial, shall, within 30 days thereof notify the Committee having jurisdiction pursuant to section II. I (b) of these Rules of the fact of such adjudication. Such notification shall be in writing and shall be accompanied by a copy of any judgment, order or certificate of conviction memorializing such finding of guilt. The attorney shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.”

Comments:

Minor changes to this Proposed Rule are made to conform to the precise language of Judiciary Law § 90(4)(c) and to clarify that the attorney is under no obligation to provide the Committee with documents not in his or her possession.

Proposed Revision(s):

“An attorney to whom the rules of this Part shall apply who has been found guilty of ~~any~~ crime in a court of the United States or any state, territory or district thereof, whether by plea of guilty or nolo contendere, or by verdict following trial, shall, within 30 days thereof notify the Committee having jurisdiction pursuant to section II. I (b) of these Rules of the fact of such adjudication. Such notification shall be in writing and shall be accompanied by a copy of any judgment, order or certificate of conviction memorializing such finding of guilt. The attorney shall thereafter provide the Committee with any further documentation, transcripts or other materials in the attorney’s possession the Committee shall deem necessary to further its investigation.”

10. Section 7 - Discipline for Misconduct in Another Jurisdiction

OCA Proposed Language:

- “(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Only the following defenses may

be raised:

- (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
 - (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or
 - (3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.
- (c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds that the procedure in the foreign jurisdiction deprived the respondent of due process of law, that there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.”

Comments:

The Joint Task Force suggests the following revisions that make the available defenses under this subparagraph (b) of the Proposed Rule consistent with subparagraph (c).

Proposed Revision(s):

- “(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Only the following defenses may be raised:
- (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
 - (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or
 - (3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York; or
 - (4) that the imposition of discipline would be unjust.
- (c) After the respondent has had an opportunity to be heard, and upon review of

the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds (i) that the procedure in the foreign jurisdiction deprived the respondent of due process of law, (ii) that there was insufficient proof that the respondent committed the misconduct, (iii) that the misconduct does not constitute misconduct in New York, or (iv) that the imposition of discipline would be unjust.”

D. Section IV – Post Disciplinary Proceedings

1. Section 1 - Conduct of Disbarred, Suspended or Resigned Attorney

OCA Proposed Language:

- (b) “Notification of Clients. When a respondent is disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, the respondent shall promptly notify, by registered or certified mail, each client and the client for each party in any pending matter, and the Office of Court Administration for each action where a retainer has been filed pursuant to court rules. The notice shall state that the respondent is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer has been filed pursuant to court rule, shall include the name and address of respondent’s client.
- (c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.”
- (d) Duty to Withdraw From Pending Action or Proceeding. If a client in a pending action or proceeding fails to obtain new counsel within 30 days following entry of the order of disbarment, suspension or removal from the roll of attorneys, the respondent shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.

* * *

- (h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation may not share in any fee for legal services rendered by another attorney during the period of disbarment, suspension or removal from the roll of attorneys but may be compensated on a quantum meruit basis for services rendered prior to

the effective date of the disbarment, suspension or removal from the roll of attorneys. On motion of the respondent, with notice to the client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.”

Comments:

Minor revisions to this Proposed Rule are suggested by the Joint Task Force in order to clarify that the “client” referenced in the Proposed Rule refers to the “respondent’s client.” In addition, there are many situations in which attorneys are appointed by the courts to represent their clients. In that event, notification to the client should include notification to the appointing court in order to ensure that the court is aware new counsel must be appointed in order to protect the disbarred or suspended respondent’s client’s interests.

Proposed Revision(s):

- (b) “Notification of Clients. When a respondent is disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, the respondent shall promptly notify, by registered or certified mail, each client of the respondent and the attorney for each party in any pending matter, and the Office of Court Administration for each action where s retainer has been filed pursuant to court rules. The notice shall state that respondent is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a respondent’s client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent’s client where counsel has been appointed by a court, notice shall also be provided to the appointing court.”
- (c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all respondent’s clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.
- (d) Duty to Withdraw From Pending Action or Proceeding. If a respondent’s client in a pending action or proceeding fails to obtain new counsel within 30 days following entry of the order of disbarment, suspension or removal from the roll of attorneys, the respondent shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.

* * *

- (h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation may not share in any fee for legal services rendered by another attorney during the period of disbarment, suspension or removal from the roll of attorneys but may be compensated on a quantum meruit basis for services rendered prior to the effective date of the disbarment, suspension or removal from the roll of attorneys. On motion of the respondent, with notice to the respondent's client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.”

2. Section 2 – Reinstatement of Disbarred or Suspended Attorneys

OCA Proposed Language:

- (a) “Upon motion by a respondent who has been disbarred, suspended, or otherwise removed from the roll of attorneys for any reason other than resignation for non-disciplinary reasons, with notice to the Committee and the Lawyers' Fund for Client Protection, and following such other proceedings as the Court may direct, the Court may issue an order reinstating such respondent upon a showing, by clear and convincing evidence, that: the respondent has complied with the order of disbarment, suspension or the order removing the respondent from the roll; the respondent has complied with the rules of the court; the respondent has the requisite character and fitness to practice law; and it would be in the public interest to reinstate the respondent to the practice of law.
- (b) Necessary papers. Papers on an application for reinstatement of a respondent who has been disbarred or suspended for more than six months shall include a copy of the order of disbarment or suspension, or the order striking the respondent from the roll of attorneys, and any related decision; a completed questionnaire in the form included in Appendix C to these rules; proof that the respondent has, no more than one year prior to the date the application is filed, successfully completed the Multistate Professional Responsibility Examination described in 22 NYCRR § 520.9. After the application has been filed, the Court may deny the application with leave to renew upon the submission of proof that the respondent has successfully completed the New York State Bar Examination described in 22 NYCRR § 520.8, or a specified requirement of continuing legal education, or both. A respondent who has been suspended for a period of six months or less shall not be required to submit proof that the respondent has successfully completed the Multistate

Professional Responsibility Examination, unless otherwise directed by the Court.

(c) Time of application

- (1) “A respondent disbarred by order of the Court for misconduct, or stricken from the roll of attorneys for any reason other than resignation for non-disciplinary reasons may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment or the order striking the attorney’s name from the roll of attorneys.

* * *

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

Comments:

The Joint Task Force believes that in seeking reinstatement, the respondent should not be held to a higher standard of proof than that which resulted in the respondent’s discipline, *i.e.*, a fair preponderance of the evidence. In addition, while the Joint Task Force has no issue with making reinstatement contingent upon completion of the MPRE, the institutionalization of a procedure whereby the application for reinstatement may be denied with leave to renew upon the completion of the New York bar exam seems excessive. Finally, requiring a respondent seeking reinstatement to demonstrate the reinstatement is “in the public interest” leaves one wondering what type of proof this would entail. Clearly the Court will not re-admit a respondent whose conduct is antithetical to the public interest but it is unclear how public interest is served by the reinstatement of an individual attorney. The remaining revisions are suggested to be consistent with use of the term “respondent” as it appears throughout the Proposed Rules.

Proposed Revision(s):

- (a) Upon motion by a respondent who has been disbarred, suspended, or otherwise removed from the roll of attorneys for any reason other than resignation for non-disciplinary reasons, with notice to the Committee and the Lawyers' Fund for Client Protection, and following such other proceedings as the Court may direct, the Court may issue an order reinstating such respondent upon a showing, by a fair preponderance of the evidence ~~clear and convincing~~

evidence, that: the respondent has complied with the order of disbarment, suspension or the order removing the respondent from the roll; the respondent has complied with the rules of the court; the respondent has the requisite character and fitness to practice law; ~~and it would be in the public interest to reinstate the respondent to the practice of law.~~

(b) Necessary papers. Papers on an application for reinstatement of a respondent who has been disbarred or suspended for more than six months shall include a copy of the order of disbarment or suspension, or the order striking the respondent from the roll of attorneys, and any related decision; a completed questionnaire in the form included in Appendix C to these rules; proof that the respondent has, no more than one year prior to the date the application is filed, successfully completed the Multistate Professional Responsibility Examination described in 22 NYCRR § 520.9. ~~After the application has been filed, the Court may deny the application with leave to renew upon the submission of proof that the respondent has successfully completed the New York State Bar Examination described in 22 NYCRR § 520.8, or a specified requirement of continuing legal education, or both.~~ A respondent who has been suspended for a period of six months or less shall not be required to submit proof that the respondent has successfully completed the Multistate Professional Responsibility Examination, unless otherwise directed by the Court.

(c) Time of application

(1) A respondent disbarred by order of the Court for misconduct, or stricken from the roll of attorneys for any reason other than resignation for non-disciplinary reasons may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment or the order striking the ~~attorney's~~ respondent's name from the roll of attorneys.

* * *

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

3. Section 3 – Reinstatement of Incapacitated Attorneys

OCA Proposed Language:

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

Comments:

The Joint Task Force believes that the standard of proof for an incapacitated attorney seeking reinstatement should not be higher than the standard of proof required to impose discipline or an incapacity designation and proposes the revision accordingly.

Proposed Revision(s):

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

E. Section V – Additional Rules Applicable to Disciplinary Matter

1. Sections 1(b); 1(e) - Confidentiality

OCA Proposed Language:

- (b) “All papers, records, and documents upon any complain, inquiry, investigation or proceeding relating to the conduct or discipline of any person under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).

* * *

- (e) Upon written request of a representative of The Lawyers' Fund for Client Protection (“Fund”) certifying that a person or persons has filed a claim or

claims seeking reimbursement from the Fund for the wrongful taking of money or property by any person who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto.”

Comments:

Revisions to this Proposed Rule are solely for the purpose of advancing the continued use of the term “respondent” when referring to an attorney who is the subject of discipline by the Court.

Proposed Revision(s):

- (b) “All papers, records, and documents upon any complain, inquiry, investigation or proceeding relating to the conduct or discipline of any ~~person~~ respondent under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).

* * *

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

2. Section 3(a) - Appointment of Attorney to Protect Interests of Clients or Attorney

OCA Proposed Language:

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

Comments:

This Proposed Rule seeks to provide a single remedy protecting the clients of two very different classes of attorneys: “respondents” and “incapacitated attorneys”. The Joint Task Force strongly believes that the issue of a Caretaker Attorney Rule should be separated from the situation where

action is required by the Court as a result of a discipline imposed upon a respondent or while the propriety of discipline is being investigated. As applied to “incapacitated attorneys”, the Proposed Rule does not provide sufficient detail on the procedure for declaring an attorney incapacitated, the burden of proof and many other considerations which require thorough analysis and further comment. The proposed revisions submitted by the Joint Task Force look to separate the two categories, to address only the clients of respondents who have been disciplined or where incapacitation has been declared while disciplinary charges were pending and to include a requirement of service upon the proposed LAP Ombudsman in appropriate circumstances. The issue of how to protect clients of attorneys under medical or psychological disability who are not the subject of disciplinary charges should be separately reviewed.

Proposed Revision(s):

~~“When an attorney is a respondent has been suspended, disbarred, or has been declared incapacitated from practicing law pursuant to Section III.8 of these rules, or has resigned for disciplinary reasons, the Court may enter an order, upon such notice as it shall direct (including, where appropriate, service on the LAP Ombudsman): (i) appointing one or more designated attorneys to take possession of the attorney’s a respondent’s files; (ii) examine the files; (iii) advise the respondent’s clients to secure another attorney; or (iv) take any other action necessary to protect the clients’ interests. An application for an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney to be appointed and the suspended, disbarred or incapacitated attorney.”~~

Conclusion

The Task Force supports many of the initiatives contained in the Proposed Rules which seek to unify and expedite the disciplinary process. The Joint Task Force remains disappointed that the review of this long overdue examination of the system has been mandated in a time frame that did not allow for measured examination of the issues and an extended period of comment. The issues addressed are of critical importance to the public and our profession and warrant more in depth discussion and review than the abbreviated comment period allotted and should have permitted inclusion of the many comments made during the COSAD Report comment period. Having said that, we are grateful for the work of both COSAD and the working group of the Appellate Division and OCA in undertaking this long overdue review and hope that a rush to action does not override measured consideration of the issues.

Dated: December __, 2015

Respectfully submitted,

THE JOINT NCBA AND SCBA TASK FORCE ON
PROPOSED UNIFORM ATTORNEY DISCIPLINARY RULES

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Appendix

**EXECUTIVE SUMMARY OF CHANGES PROPOSED BY THE JOINT TASK FORCE
OF THE NCBA AND SCBA TO THE PROPOSED RULES ON UNIFORM ATTORNEY
DISCIPLINE OF THE APPELLATE DIVISIONS**

The following are highlights of the changes proposed by the Joint Task Force to the Proposed Rules on Uniform Attorney Discipline of the Appellate Division drafted by a working group of senior staff of the Appellate Division and the Office of Court Administration at the direction of the Administrative Board of the Courts. A full statement of the Proposed Rules, Joint Task Force Comments and Proposed Revisions are included in the Joint Task Force's Report.

I. APPLICATION; APPOINTMENT OF COMMITTEE

Section 1 – Application

- Limits application of the Proposed Rules to attorneys admitted to practice or who have offices in NYS. The proposed inclusion of attorneys who reside in NYS (but do not practice or have offices is overbroad and likely unconstitutional.

Section 2 – Definitions

- Refines the definition of “professional conduct” to eliminate the vague phrase “announced standard”
- Includes definitions of “Discipline”, “Censure”, “Suspension” and “Party”.
- Introduces and defines the concept of a LAP Ombudsman to be notified of unanswered requests for information from respondents.
- Revises the definition of “Letter of Advisement” to conform to the language of the current “Letter of Caution”, thereby eliminating the ambiguous phrase “inappropriate conduct.”
- Reemphasizes the confidentiality attached to the imposition of an Admonition or letter of advisement
- Corrects the definition of “respondent” in light of the fact that law firms may be the subject of discipline under the NY Rules of Professional Conduct.

Section 4 – Appointment of Committees

- Makes clear that each Department must at a minimum appoint at least one Committee (of at least 21 in the number) for each Judicial District within the Department,.
- Increases the vote for action to a majority of the Committee – not just a majority of those present.

Section 6 – Conflicts; Disqualification from Representation

A member of the Grievance Committee or a staff attorney is barred from representing respondents. This was extended to including complainants. Also, if a member of the committee

or staff attorney materially participated in the investigation of the respondent, it was felt the personal ban should exceed two years

II. PROCEEDINGS BEFORE THE COMMITTEE

Section 1 – Complaint

- Allows the Chief Attorney to also initiate *sua sponte* investigations provided the Chief Attorney consult with the Chair of the Committee before doing so

Section 2 – Investigation: Discovery

- Provides for notice to the LAP Ombudsman in the event the respondent fails to appear or produce records
- Provides the respondent is to get copies of all papers accompanying the complaint, that in the event the complaint is *sua sponte*, whether filed by a member of judiciary or governmental employee, a written statement of the facts supporting the investigation
- Incorporates the NYSBA recommendations as to discovery from the Chief Attorney and requires identification of documents withheld pursuant to privilege
- Allows for respondent's deposition or discovery of non-parties upon a showing of good cause.

Section 3 – Disposition and Review

- Provides that the brief statement of the basis for disposition the Proposed Rules requires be provided to the complainant also be provided to the respondent or respondent's attorney.
- Limits the type of description required by the Chief Attorney
- Removes the words "as unfounded" as superfluous.
- Changes the phrase "preserve the reputation of the bar" to "foster the public's confidence in"
- Confirms conduct standard for Letter of Advisement to coordinate with proposed revision to definition
- Provides that the brief description of the committee's action sent to the complainant also be provided to the respondent or respondent's attorney and specified that the brief description should just address issues raised by the complainant and not include any additional issues raised by the Chief Attorney or Committee in the course of the investigation.
- Provides that all forms of public discipline be made upon a finding of clear and convincing evidence while private discipline may be imposed based upon a fair preponderance of the evidence.

- Changes the basis for reversal of the issuance of a Letter of Advisement from the Committee’s “violation of a fundamental constitutional right” to “abuse of discretion.”
- Deletes the complainant’s right to review the Committee’s decision to dismiss the complaint (while allowing the complainant to review the Chief Attorney’s declination to investigate).

III. PROCEEDINGS IN THE APPELLATE DIVISION

Section 1 – Commencement Procedures

- Alters the proposed simultaneous submission of disputed and undisputed facts by providing the Committee have 30 days after service of the answer to set forth its contentions to be followed by the respondent’s statement.
- Alternatively provides for a joint statement to be provided 45 days after filing of the answer or reply.
- Eliminates the ability of one party to file a statement saying no issue of fact requiring a hearing exist on the theory that one party is not in a position to do so.
- Incorporates the NYSBA recommendations on discovery in the post-charge phase by explicitly providing that either party may make application for good cause shown to the Court or the Referee to permit the depositions of any fact witness, complainant or expert or the production of records to be implemented by subpoena following permission by the Occur tor Referee.
- Increases the time period in which a designated Hearing Referee must complete the hearing from 60 to 120 days and allows the Hearing Referee to extend this time period upon a showing of good cause.
- Expands the factors the parties may cite and specifically provides the ABA Standards for Imposing Lawyer Sanction are to be referenced as a guideline only and are not to be mandatorily imposed.
- Provides that the Court impose public discipline upon a finding of clear and convincing evidence that respondent has engaged in professional misconduct.

Section 3 – Interim Suspension While Investigation or Proceeding is Pending

- Eliminates the ability of the Court to impose an interim suspension as a result of a respondent’s willful failure to pay a debt allegedly owed by a respondent to a client unless it has been reduced to a judgment.
- Provides proof of service on the respondent and LAP Ombudsman of any order of suspension upon which an automatic order of disbarment is sought.

Section 4 – Resignation While Investigation or Proceeding is Pending

- Eliminates the new requirement that a respondent seeking resignation while an investigation is pending admit the charges or allegations of misconduct.

Section 5 – Diversion to a Monitoring Program

- Provides that a “party” rather than a “person” may make application for diversion.
- Includes that the factors to be considered in deciding the appropriateness of diversion include the best interests of the attorney and legal profession, as appeared in the Uniform Diversion Rule propped by NYSBA and the NYC Bar.

Section 6 – Attorneys Convicted of a Crime

- Clarifies that the obligation of an attorney who has been convicted of a crime is limited to the documents in the attorney’s possession.

Section 7 – Discipline for Misconduct in Another Jurisdiction

- Adds to the list of available defenses when an attorney is being investigated for misconduct in another jurisdiction that the imposition of discipline would be unjust and that the conduct would not be considered misconduct in New York

IV. POST DISCIPLINARY PROCEEDINGS

Section 1 – Conduct of Disbarred, Suspended or Resigned Attorney

- Clarifies the persons to be notified upon disbarment, suspension or removal from the roll of attorneys after resignation and provides for notice to a court that may have appointed the respondent to represent a client so that the client’s rights are protected.

Section 2 – Reinstatement of Disbarred or Suspended Attorney

- Concurs that the burden of proof on reinstatement should be “clear and convincing” evidence *provided* the Court adopts the “clear and convincing” standard for the imposition of public discipline. However, in the event the Joint Task Force’s recommendation is rejected and the Court adopts a rule permitting the imposition of public disposition upon a finding of a “fair preponderance of the evidence”, the Joint Task Force urges a reduction of respondent’s burden on reinstatement from “clear and convincing” to a “fair preponderance” – the same burden of proof that resulted in the discipline.
- Eliminates the respondents burden on reinstatement of demonstrating reinstatement would be in the public’s interest.
- Deletes a provision institutionalizing the concept that the Court may deny an application for reinstatement with leave to renew upon proof of successful completion of the New York bar exam.

Section 3 – Reinstatement of an Incapacitated Attorney

- Reduces the respondent’s burden on reinstatement from “clear and convincing” to a “fair preponderance” – the same burden of proof that resulted in the discipline.

V. ADDITIONAL RULE APPLICABLE TO DISCIPLINARY MATTER

Section 1 – Confidentiality

- Changes the ability of the Committee to provide the Lawyer’s Fund for Client Protection information on a respondent who has been disciplined by the Court where the Fund certifies a claim has been filed by a person claiming the respondent wrongfully took money or property.

Section 3 – Appointment of Attorney to Protect Interests of Clients or Attorney

- Limits the procedure for the appointment of counsel to the situations where a respondent has been suspended, disbarred, resigned for disciplinary reasons or been declared incapacitated under the Proposed Rules while disciplinary charges were pending or being investigated and defers the concept of appointment of a “Caretaker Attorney” for incapacitated attorneys to another review at which time the procedure and burden of proof of such a proceeding can be defined with greater precisions than the cursory treatment provided in the Proposed Rules.

(7) Letter of Advisement: letter issued at the direction of a Committee pursuant to section II.3(b)(1)(iv) of these Rules, upon a finding that the respondent has engaged in **inappropriate behavior**, or other behavior requiring comment, not warranting the imposition of discipline. A Letter of Advisement shall not constitute discipline, but **may be considered by a Committee of the Court in determining the extent of discipline** to be imposed or action to be taken upon a subsequent finding of misconduct. (emphasis added.)

NYCLA's Comment: The Courts have adopted a Letter of Advisement to replace the various non-disciplinary Committee dispositions that currently differ in the four departments (e.g., Letter of Caution, Letter of Education, Dismissal with Cautionary Language). However, NYCLA disagrees that the decision to issue a Letter of Advisement should be based upon a determination that the attorney has engaged in "inappropriate" behavior. This standard is ambiguous and could be enforced in a subjective way, which would reduce, not foster, uniformity. It also implicitly suggests that the underlying conduct constituted some level of misconduct, which is contrary to the purpose of an Advisement, which is simply to warn the lawyer to change the conduct (as reflected in the current Letter of Caution, Letter of Education and Dismissal with Cautionary Language).

In addition, if the conduct is deemed "inappropriate" attorneys would have a greater incentive to challenge the Advisement to avoid such a finding, which could place a further burden on the grievance committee prosecutors.

We suggest that the basis for an Advisement track the First Department's prior Letter of Caution rule, which stated that the attorney's conduct, "while not constituting clear professional misconduct, is behavior requiring comment." This standard would be the proper balance for a non-disciplinary disposition that is replacing Letters of Caution (2nd, 3rd and 4th Departments), Letters of Education (3rd & 4th Departments.) and Dismissals with Guidance (1st Department).

The Proposed Rule also allows an Advisement to be used as an aggravating circumstance in a subsequent prosecution. This repercussion may compel respondents to challenge the Advisement, which would place a greater burden on grievance committees and their staff. More important, an Advisement should not be considered as an aggravating circumstance, as a non-disciplinary disposition, unless the Advisement reflects notice to the attorney not to engage in certain type of conduct and the attorney engages in similar conduct again. NYCLA recommends that the Proposed Rule allow an Advisement to be used as an aggravating factor in a subsequent prosecution only where the conduct that prompted the Advisement is substantively relevant to the conduct in a later prosecution.

PR 6 Conflicts: Disqualifications from Representation

* * *

- (c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent in a matter

investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service.

NYCLA's Comment: There is no dispute that eliminating any appearance of favoritism to former staff is an important consideration. Of course, no staff prosecutor should be permitted to represent a respondent in a matter for which the prosecutor had personal and substantial responsibility. However, this potential conflict is already covered by the Rules of Professional Conduct. Rule 1.11(a) states in pertinent part:

(a) except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer **participated personally and substantially as a public officer** or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a). (emphasis added.)

Prohibiting former grievance prosecutors from representing *anyone* in a subsequent disciplinary matter—regardless of the former prosecutor's involvement with a particular matter—for two years after leaving the Committee is overly restrictive, and may reduce the already limited pool of experienced lawyers considering a position with the committees.

Given that a similar restriction is not applied by the Manhattan District Attorney's office or the United States Attorney's Office, we do not believe this Proposed Rule is necessary for grievance committee staff.

II.

Proceedings Before Committees

PR 2 Investigation: Disclosure

* * *

(b) Disclosure. The Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint. **Prior to the taking of any action against a respondent pursuant to sections II.3 (b)(1)(iv), (v) or (vi) of these rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action,** excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and material previously provided to the Committee by the respondent. (emphasis added.)

NYCLA's Comment: This is the system's new basic discovery rule. It is inadequate for three reasons.

One, it does not require a staff prosecutor to provide exculpatory evidence as soon as discovered. Rule 3.8(d) of the Rules of Professional Conduct requires "timely" disclosure of exculpatory evidence by criminal prosecutors. That standard should be codified here as well. "Timely disclosure" in a disciplinary prosecution should be as soon as discovered so that a respondent-attorney ("respondent") can prepare for a deposition or written submissions to the Committee. The criminal "Rosario" rule that requires the production of all witness statements, including complainants, should also be codified in the Court rules requiring "timely" disclosure. This is necessary because a written statement or memorialization of a witness/complainant statement may not "form the basis for the proposed committee action" but may be very important and relevant from a respondent's perspective. Committee staff should not be the gatekeeper of this information.

Two, there should also be "timely" disclosure for all other inculpatory evidence, not simply disclosure "prior to the taking of any action against a respondent." This should include disclosure before a respondent is deposed under oath. This standard is no different than civil practice, and would allow a respondent to have notice of the subjects and evidence against him or her. Timely disclosure is particularly important in a disciplinary investigation because a staff prosecutor can change the focus and basis for an investigation after the respondent answered allegations filed by a layperson whose description and assessment of the attorney's alleged misconduct may be limited or misguided.

Three, a respondent should be permitted to subpoena documents from third parties as soon as necessary to pursue all pertinent evidence.

PR 3 Disposition and Review

(a) Disposition by the Chief Attorney

* * *

(3) The complainant shall be provided with a **brief description of the basis of any disposition** of a complaint by the Chief Attorney. (emphasis added.)

(b) Disposition by the Committee

* * *

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

(c) Review

* * *

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

NYCLA's Comment: These rules describe the manner in which complainants are notified of non-public dispositions. There is no question that it is important to provide transparency to complainants in the disciplinary process. However, the Proposed Rules must balance this transparency with sensitivity to a respondent's reputation with respect to less egregious and non-disciplinary Committee dispositions.

Stating the obvious, any "description" or "basis" can be easily published on the Internet the moment a complainant receives a closing letter. Thus, to the extent the above-referenced sections suggest that a complainant should be provided a detailed precise factual "basis of any disposition" or a "brief description of the basis of any disposition" the disclosure should be narrowly drafted to eliminate the chance that the explanation with respect to a disposition will be misinterpreted or manipulated by a complainant. NYCLA recommends that such letters track the language of the rules without a specific factual description. For instance, for a Letter of Advisement, the complainant's letter could state that "the attorney's behavior required comment, but did not warrant the imposition of discipline." For rejection letters, the complainant's letter could track the rule's basis for the rejection (e.g., "the matter involves a person or conduct not covered by these rules.")

Omission from the Proposed Rules: Disclosure of Suspension for Failing to Register

Currently, when an attorney is suspended for a failing to re-register or pay registration dues, it is publically noted as a "suspension." The Office of Court Administration Attorney Registration Directory (accessible on the internet) notes the action as a suspension with the effective date and end date of the suspension. This notation may reflect that a suspension lasted for years, which may have been caused by the fact that the attorney did not realize there was a suspension because the lawyer left the jurisdiction and forgot to provide an updated address. There are many reasons for this, such as, lawyers moving from government or large firm practitioners whose prior firm managed these issues. In addition, the OCA directory then directs the viewer to another cite to obtain the decision. At that point, the viewer/potential client will probably not be interested in the details.

However, when the public views a suspension spanning many years it suggests the lawyer engaged in egregious misconduct, which could be devastating for the lawyer's reputation and can dramatically affect the lawyer's livelihood. The Final Report by the Chief Judge's Commission on Statewide Attorney Discipline (the "Commission"), dated September 2015, p. 59, recommends treating such violations outside the disciplinary system and deem it "administrative." NYLCA believes this is a very good idea because it more accurately reflects the actual violation and it will reduce the burden on the disciplinary system, which already is overburdened and should reserve its resources for more appropriate matters.

In line with this approach, NYLCA recommends that any disclosure of a registration suspension not be included in the public record as a “suspension” but only as failure to register, as an administrative matter, which is more appropriate.

III.

Proceedings in the Appellate Division

PR 1 Commencement: Procedure

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

* * *

(2) Statement of Disputed Facts. Within 20 days after service of the answer or, if applicable, a reply, each party shall file with the Court a statement of facts that identifies those allegations that the party contends are undisputed and those allegations that the party contends are disputed and for which a hearing is necessary. In the alternative, a party may file a statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or the parties may jointly file a stipulation of disputed and undisputed facts.

(3) Disclosure Concerning Disputed Facts. Except as otherwise ordered by the Court, a party must, no later than 14 days after filing a statement of facts with the Court as required by section III.1(a)(2) of these rules, provide to any other party disclosure concerning the allegations that the party contends are disputed. The disclosure shall identify the following:

- (i) The name of each individual likely to have relevant and discoverable information that the disclosing party may use to support or contest the disputed allegation and a general description of the information likely possessed by that individual; and,
- (ii) A copy of each document that the disclosing party has in its possession or control that the party may use to support or contest the allegation, unless copying such documents would be unduly burdensome or expensive, in which case the disclosing party may provide a description of the documents by category and location, together with an opportunity to inspect and copy such document.

NYCLA’s Comment: It is clear this rule is intended to curtail delays in the disciplinary process. Unfortunately, this section attempts to eliminate delay at the cost of a respondent’s right to defend, and limits a respondent’s full opportunity to be heard.

In considering the proposed time restrictions for the hearing process, it must be noted that the Drafting Group seems to have relied upon two erroneous assumptions. One, the majority of the delay is during the hearing process. This is not true and a close scrutiny of the timeline of a

disciplinary matter would support the contention that it is the investigative stage and appellate process that is responsible for more of the delay. Two, there is a perception that lawyers who engaged in egregious misconduct continue to engage in additional misconduct during disciplinary proceedings and it is permitted due to long delays in the prosecution of attorneys. This is also not true.

Specifically, when a lawyer is deemed a danger to current clients, legal consumers, the courts or the public the response by grievance committees is to move for an interim suspension, which then becomes public. *See* PR III (1)(b)(3). In addition, there is strong anecdotal evidence that lawyers under investigation are not engaging in extensive additional misconduct (e.g., a lawyer who converted funds, converts additional funds during an investigation). A representative of the Lawyers' Fund for Client Protection briefly referenced this at one of the Commission's public hearings.

Thus, in considering the need to expedite the hearing process, these inaccurate perceptions should not compel a procedural timeline that unfairly restricts a respondent's fair and full opportunity to be heard. Although it is true that justice delayed is justice denied, it is also true that, justice rushed is justice denied.

As to the Proposed Rule, the first example of an overly restrictive time limitation involves a respondent's deadline to disclose undisputed facts after a formal disciplinary proceeding has been commenced. It must be remembered that before a formal disciplinary proceeding is commenced, a respondent may not know all of the precise conduct that will ultimately be included in the charges or how the conduct will be charged (e.g., intentional or neglectful). On occasion, the respondent may not be aware charges will be filed. Moreover, a respondent may not know the true seriousness of the ultimate charges and may not even have retained counsel until charges are filed. In light of these considerations and common sense, providing a respondent only twenty days to be ready to identify all undisputed facts after an answer has been filed is unreasonable.

In addition, under the Proposed Rule, 14 days later a respondent must disclose all witnesses (including their precise testimony). The respondent must also identify every document to support their case. In other words, within 34 days of answering charges, a respondent has to be fully ready for trial, after a staff prosecutor had as much time as necessary to construct a case, which could be a year or more. These artificial time constraints are draconian and extremely unfair to respondents when the proceeding may destroy the attorney's entire livelihood.

In addition, a respondent may have to seek discovery from the Referee and this process will take some time, particularly if it is from a third party. Thus, any time limitations regarding stipulations should begin on the completion of discovery before the Referee. NYCLA suggests that the parties have 45 days from the closure of discovery to complete a stipulation that would include stipulated facts, disclosure of documents and identification of witnesses. This is much fairer and realistic.

(b)(1) Disposition by Appellate Division

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

NYCLA's Comment: Similarly problematic and completely unrealistic is the related requirement that a referee complete the hearing within 60 days from the date of appointment. For the same reasons noted above, 60 days is not sufficient time to complete a hearing since the referee is typically appointed approximately when charges are served. Thus, under the Proposed Rule within 60 days a respondent would have to: answer, identify and stipulate as to the disputed facts, identify witnesses, disclose all the documents to be submitted into evidence, complete an extensive stipulation, conduct a hearing, obtain a transcript and prepare a post-hearing memorandum. There is no dispute that delay is not good, but bulldozing a respondent through a hearing process is much worse. To insert some reason into this schedule, a hearing should be completed within 45 days after a pre-hearing stipulation is completed.

The rule should also clarify how post-hearing submissions fit within the procedural timeline. Specifically, the time in which to complete the hearing should not include post-hearing submissions or the schedule becomes unworkable. This is because it takes at approximately 2 ½ weeks (sometimes longer) to obtain the transcript of a hearing which is necessary to prepare a post-hearing brief.

A knee-jerk reaction is to assume that if a respondent needs more time an application can be submitted more time will "probably" be granted. However, it is not appropriate to create an unfair and unworkable codified schedule, leaving a respondent the options of hoping that it will be adjusted at the discretion of a Referee and/or submitting a burdensome application to the Appellate Division

PR 1

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

NYCLA's Comment: Under the Proposed Rules, and the current rules, the burden of proof for a finding of misconduct pursuant to Formal Charges is not defined. It has been established only by case law and it is currently a "fair preponderance of the evidence."¹ NYCLA contends that the burden of proof should be specifically defined in the Rules and the standard should be "clear and convincing evidence."

Historically, the New York Appellate Divisions have applied a "fair preponderance of the evidence" standard. The New York Court of Appeals reviewed a challenge to this standard in 1983 by a respondent who argued that the "clear and convincing" standard should be applied in disciplinary proceedings. *See, Matter of Capoccia*, 59 N.Y.2d 549 (1983). The Court confirmed that the application of "fair preponderance" did not raise a substantial constitutional question and there was no requirement that a higher standard be applied. However, the Court did not preclude the courts applying a higher standard if deemed appropriate. In fact, this is a standard applied by many states in the country.

NYCLA suggests that considering what is at stake-- a respondent's livelihood and a professional and personal reputation that will be affected forever-- that a "clear and convincing" standard would be more appropriate. The amended rule should read:

(b) (2) Discipline. In presenting arguments on the issue of appropriate discipline for misconduct, the parties may cite any relevant factor, including but not limited to the nature of the misconduct, aggravating and mitigating circumstances, and the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions. **Upon a finding by clear and convincing evidence** that any person covered by these rules has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, preserve the reputation of the bar and deter others from committing similar misconduct. (emphasis added.)

NYCLA further contends that this standard should be consistent throughout the Rules, including for finding probable cause to proceed to Formal Charges and private discipline. Thus, the corresponding Proposed Rules must be amended. See, PR II 3 (b)(1)(vi) [authorization of Formal Charges]; PR II, 3(b)(1)(v) [the issuance of a private Admonition]

PR 4 Resignation While Investigation or Proceeding is Pending

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

* * *

¹ The only exception is the current Third Department rule that has a clear and convincing standard, but only for private admonitions. See, 22 N.Y.C.R.R. §806.4(c)(1)(ii).

(2) the respondent admits the charges or allegations of misconduct

(3) the respondent cannot successfully defend against the charges of allegations of misconduct

NYCLA's Comment: The purpose of allowing a respondent to resign in the face of a disciplinary proceeding is to shorten the process, reduce the burden on staff and remove cases from the system that will end up in the same place – disbarment. Most important, it is to quickly remove the respondent from the practice of law, which benefits the public, legal consumers and the Bar.

The current rule in most departments is allow a resignation if the respondent states in an affidavit, among other things, that the respondent “cannot successfully defend” against the allegations noted in the in affidavit. PR 4(a)(3) has added the demand that the respondent also “admit the charges or allegations of misconduct.”

This additional requirement could defeat the whole purpose of the resignation rule because a respondent facing civil or even criminal charges cannot “admit” the charges and defend in a subsequent proceeding. If there is no resignation, the grievance committee staff member will be forced to proceed with a prosecution. Since the resignation focuses upon taking a respondent’s license, the respondent should be permitted to fully defend a civil or criminal action without being affected by his or her acceptance of a bar to the right to practice law.

Omitted from the Proposed Rules: Proposed Evidentiary Rule

The Proposed Rules do not include a rule regarding the parameters for admitting evidence at a hearing. In order to provide proper due process only relevant and competent evidence should be admissible against a respondent. The First Department currently has such a rule. *See*, 22 N.Y.C.R.R. § 605.13(j).² The United States Supreme Court has held that disciplinary proceedings are “quasi-criminal” requiring basic due process. *See, In re Ruffalo*, 390 U.S. 544 (1968). Therefore, allowing rank hearsay or other unreliable evidence would not be in line with basic due process. The rule allowing only competent evidence has always been relaxed with respect to mitigation evidence and this exception should continue.

PR 5 Diversion to a Monitoring Program

- (a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, depression or other mental health issues, the Court, upon application of any person or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and

² 22 N.Y.C.R.R. § 605.13(j) reads in pertinent part: General Rule. All evidence which the Referee deems relevant, competent and not privileged shall be admissible in accordance with the principles set out in section 605.1 of this Part.

monitoring program approved by the Court. In making such a determination, the Court shall consider:

- (1) the nature of the alleged misconduct;
- (2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and
- (3) whether diverting the respondent to a monitoring program **is in the public interest**. (emphasis added.)

NYCLA's Comment: NYCLA strongly supports this focus on monitoring programs. There is only one minor suggestion. Subdivision (3) should read "whether diverting the respondent to a monitoring program would **not be adverse to the public interest**." This change is necessary because it would not necessarily be "in the public interest" to allow an individual attorney to be admitted to such a program. However, in order to protect the public, an attorney's admission to a program should not endanger the public.

IV.

Post-Discipline Proceedings

PR 2 Reinstatement of Disbarred or Suspended Attorneys

(b) Time of Application

* * *

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

NYCLA's Comment: There is a silent acceptance by the disciplinary system that when an attorney seeks reinstatement the process could add 1 - 1 ½ years to a suspension. The Proposed Rule should allow an attorney suspended for one year or longer or who is disbarred to apply for reinstatement 90 days before the expiration of the period of suspension or disbarment. This would allow a suspension or disbarment to approximate the actual time that the suspension ordered by the Court.

V.

Additional Rules Applicable to Disciplinary Matters

PR 1 Confidentiality

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

* * *

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

NYCLA's Comment: NYCLA strongly urges that PR 1 be adopted as written. There have been many prominent commentators, including one Commission member, who have publically and strongly suggested the process should be open at the hearing stage, which admittedly is allowed in many other jurisdictions. However, protecting the reputation of a respondent should be deemed an important goal.

One reason for not allowing public disclosure at the formal hearing stage is because the initial charges could be significantly different from the sustained charges. A not uncommon example is a lawyer who is charged with intentional conversion of client funds who establishes mere poor bookkeeping. It would be even worse if charges are not sustained, harkening back to the famous comment after a dismissal of a famous criminal case, "where do I go to get my reputation back?"

The rationale for opening the process is that the public is not protected from respondents who are "charged" although admittedly not yet found guilty of misconduct. As stated above, there is no empirical or anecdotal evidence that respondents in the middle of a disciplinary prosecution are engaging in additional misconduct. In fact, the anecdotal evidence is to the contrary. Thus, the rationale by vocal supporters of opening the process before post-hearing findings of specific misconduct is not supported by the facts.

CHEMUNG COUNTY BAR ASSOCIATION

December 15, 2015

At the December 2015 meeting of the Chemung County Bar Association the members debated and considered the Proposed Uniform Attorney Disciplinary rules of the Appellate Division, 3rd Department. Without dissent, the membership has asked that, as President of the Chemung County Bar Association (CCBA), I transmit to you our position on these rules.

One of the arguments put forth in support of these new rules is the proposition that uniformity among the departments is paramount. However, the departments are not in fact uniform - not in the demography of the attorneys, not in the courtroom manner of their attorneys, not in the culture and character of their populations, and not in the size and structure of the typical laws firms serving the public. One size does not fit all.

The Chemung County Bar Association highly recommends that the Letter of Caution be retained as a disciplinary option in the 'tool bag' of the Third Department's disciplinary responses. The CCBA believes that it is essential that distinctions in the degree of violation be maintained in order to balance both the need to protect the public and the requirement to be fair to the attorney. The Letter of Caution provides that intermediate step wherein that balance can be struck with a greater degree of precision. Often a Letter of Education does not adequately address an ethical violation. A Letter of Caution may be appropriate when an Inquirer's interest (or the public's interests) is not adversely affected yet the violation is such that it needs to be addressed more stringently. Indeed, the retention of the Letter of Caution would not place a burden on the disciplinary system but rather continue to provide a solid and useful means of drawing real and equitable distinctions which enhance the administration of the disciplinary system.

Therefore, the Chemung County Bar Association respectfully requests that the Letter of Caution be retained in the disciplinary process.



John P. Brennan
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President, Chemung County Bar Association

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Supreme Court, Appellate Division
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To: John W. McConnell, Esq.
Counsel, Office of Court Administration

From: Executive Committee
Committee on Professional Standards
Appellate Division, Third Department

Re: Proposed Uniform Attorney Disciplinary Rules of the Appellate Division

Date: December 14, 2015

The Committee on Professional Standards, Appellate Division, Third Department (“Committee”) agrees with the desire for a “harmonized approach to the disciplinary process within the four Departments of the Appellate Division”, and understands the need for the procedural rules to be the same amongst the four Departments. However, the Committee is concerned that some of the Proposed Rules will go far beyond procedural uniformity and instead, will result in substantive changes to the existing disciplinary process in the Third Department which has been in place for decades and has successfully served both attorneys and the public in the Third Department.

Removal of the Third Department’s Letter of Caution

Presently, and for decades, the premise of the current Third Department rules governing private discipline, with the use of a Letter of Caution, Letter of Admonition and Oral Admonition, is a progressive, or tiered, approach to the imposition of private discipline. The role of the Committee is to determine the degree and severity of the misconduct and rule violation at issue. The severity of the misconduct and subsequent rule violation at issue are often the subject of much debate at Committee meetings and the level of past discipline is also considered should a circumstance arise requiring determination as to whether an attorney’s current misconduct will result in the referral for a formal disciplinary proceeding.

A review of our Committee's statistics over the last decade reveals that while the Caution and the Admonition are both used, the Caution is imposed more often, therefore, demonstrating that a progressive/tiered approach is a useful and meaningful tool in the Third Department's imposition of private discipline.

Even though the current rules allow for progressive discipline, the Committee is not precluded from issuing a written or oral Admonition, or directing that a Petition of Charges be brought, despite the fact that a respondent may not have a disciplinary history. Review of recent statistics from our Committee confirms that matters have arisen where the seriousness of the misconduct at issue has resulted in the Committee issuing a Letter of Admonition, Oral Admonition or authorizing a disciplinary proceeding where there has been no prior disciplinary history. The flexibility inherent in having more, rather than fewer, options available to a disciplinary committee better serves both the public and attorneys.

The Committee anticipates that if the progressive/tiered approach is removed and the Committee is left with only one level of private discipline known as an "Admonition", the Committee will have no means to distinguish and document the severity of the misconduct at issue. No two complaints are the same and no two resolutions are the same. In many cases there are varying degrees of the severity of the misconduct and rule violation at issue, as well as the harm that may or may not have resulted from said violation. Further, aggravating and/or mitigating factors typically exist in many cases and if there is only one level of private discipline, what effect do these factors have on the decision to impose private discipline?

The Committee struggles with the concern that if there are no distinctions as to the degree of the misconduct and violation, how does the system protect the public while still being fair to the attorney? The Committee offers this example to demonstrate the disparity that would exist with only one level of private discipline: An attorney who committed misconduct by failing to obtain a written conflict waiver, when there was no harm to any client, would receive the same level of private discipline as the attorney who neglected several client matters, harming several clients. In this example, both attorneys will have the same private discipline letter issued to them, an Admonition under the Proposed Rules, and thus, the same disciplinary record, but clearly, one attorney's misconduct is more egregious than the other. Thus, the Committee submits that all private discipline is not equal and should not be as proposed in the new Rules.

Lower Burden of Proof in Private Discipline Cases

Presently, and for decades, the Committee has used the clear and convincing standard regarding the imposition of private discipline (Letter of Caution, Letter of Admonition, and Oral Admonition) and authorization of a disciplinary proceeding. This standard of proof, which is higher than a "fair preponderance of the evidence" standard, which is proposed, has served the Committee well in those situations involving the

imposition of private discipline. It is the Committee's position that such a higher standard is more appropriate for the imposition of discipline by a Committee whose power to impose private discipline is limited, unlike a court's. In addition, corroborating evidence should be required in situations where the classic "he says, she says" situation exists, in fairness to both the complainant and the respondent. Moreover, if there is a concern that the existing standard ("clear and convincing") may result in risk of error to the detriment of the complainant, the Proposed Rules include a new procedure which allows a complainant to "submit a written request for reconsideration" of the Chief Attorney's decision declining to investigate a complaint and the Committee's dismissal of a complaint (*See*, Proposed Rule II.3(c)(3)). Finally, is it contradictory that under the Proposed Rules the standard for private discipline is a "fair preponderance of the evidence" but the reinstatement standard is "clear and convincing"?

The Committee respectfully submits that the proposed lower burden of proof, taken in conjunction with the removal of the tiered/progressive approach to private discipline in the Third Department, will create a new and completely different private disciplinary system in the Third Department with no empirical data to support the need for such a radical change. Most importantly, said proposed changes would create a system whereby mitigating and aggravating factors are of little or no consequence to the imposition of private discipline and there would be no need to determine the severity of harm to the public, if any.

Disclosure of Committee Action to Complainants

The Committee is very concerned about Proposed Rules II.3 (a)(3) [Disposition by the Chief Attorney] and II.3(b)(2) [Disposition by the Committee] which would require that a complainant be provided with "*a brief description of the basis of any disposition of a complaint*", especially as it relates to the disposition of private confidential discipline by the Committee. Currently, consistent with the current rules of the Third Department, the Committee does notify in writing each complainant that the Committee has imposed private confidential discipline but limits the information provided to the complainant as follows: "*After consideration of the entire investigation, this Committee has now taken appropriate action with respect to the attorney*". The Committee also explains why the information is limited as follows: "*We regret that we cannot be more specific about the nature of the action taken, but New York State Judiciary Law §90 and New York Court Rules §806.4(c)(5), copies of which are enclosed, require that the records be confidential*". There is no information provided to the complainant as to the level of private confidential discipline imposed and which rule violations were found.

The Committee understands the need to communicate with the complainant as to the conclusion of the matter and that action was taken. However, the Committee submits that in today's world, with social media and the Internet, any more specific information provided to the complainant could reveal the underlying private discipline imposed and could ultimately result in the unintentional, and possibly, the intentional, posting of the specific discipline taken, and the underlying facts of the matter, on the Internet and social

media, thereby circumventing the existing rules which provide for confidential private discipline and creating the potential for a respondent to defend themselves with respect to discipline that is confidential and private.

The Committee submits that using the language, “*The Committee has now taken appropriate action with respect to the attorney*”, is more than sufficient and recommends that this Proposed Rule be modified to include this language with respect to the notifications to a complainant as to the Committee’s disposition of private confidential discipline.

Definitions

The Committee notes that although the word, “disbar”, is defined in the Proposed Rules, the following words are not defined: “suspension”, “stayed suspension”, “censure” and “censure with conditions”. If these are proposed disciplinary dispositions to be imposed by the Courts, the Committee submits that said words should be defined in the Proposed Rules.

Disposition by Committee

The Committee questions the need for the Committee, rather than the Chief Attorney, to refer matters involving a fee dispute or a matter suitable for mediation or review by a bar association grievance committee. Currently, under the existing rules of the Third Department, these referrals are made by the Chief Attorney when the complaints are initially filed with the Committee’s office. To require that these referrals be made by the Committee, which meets monthly, rather than by the Chief Attorney, will result in unnecessary delay to the processing of complaints, and ultimately, to complainants.

Proceedings in the Appellate Division Needing Committee Action

Although the Committee is in favor of Proposed Rule III.3 [Interim Suspension While Investigation or Proceeding is Pending], it submits that the making of an application or motion to the Court should not be limited to the Committee and instead, such power should also be provided to the Chief Attorney in conjunction with the Chairperson (“or his or her designee”) of the Committee. Limiting the power to the Committee, which meets only once a month, may result in the unnecessary delay in moving for an interim suspension.

With respect to Proposed Rule III.6. [Attorneys Convicted of a Crime] and Rule III.7 [Discipline for Misconduct in Another Jurisdiction], the Committee submits that with respect to crime convictions and/or “reciprocal” discipline, it should be the Chief Attorney that is authorized to make such application or motion, and not the Committee. Please be advised that currently in the Third Department, such applications are routinely made by the Chief Attorney without Committee approval or authorization, thereby increasing the efficiency of processing these types of matters. If Committee authorization were needed

and with the Committee meeting only once a month, there is the likelihood that the processing of these matters would result in unnecessary delay.

Investigation

The Committee supports the authority provided to the Chief Attorney with respect to its investigations in Proposed Rule, II.2(a), but recommends that the Third Department's existing rule which provides, "Attorneys shall be expected to cooperate with all investigations", should also be included in the Proposed Rules.

Disclosure

The Committee is extremely concerned over the language regarding disclosure set forth in Proposed Rule II.2(b) which states: "Prior to taking of any action against a respondent pursuant to ... the Chief Attorney shall provide the respondent with an opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law..." (emphasis added). This language is extremely broad and could very easily be interpreted to mean that prior to the issuance of a Letter of Advisement or Admonition or the authorization of a formal disciplinary proceeding by the Committee, the Chief Attorney would have been required to allow the respondent to review and inspect the Committee's file, excepting its work product. We anticipate that respondents and their counsel will be "lining up" and, as a matter of course, be expecting an automatic inspection of the Committee's file, excepting its work product, with respect to a majority of Committee's cases. Moreover, if such an inspection were mandated automatically by the new Rule, the Committee's ability to efficiently process complaints and impose discipline would certainly be impeded. Further, the Committee anticipates that if a question were to arise regarding whether the Rule was followed, it would provide an additional basis for reconsideration by the respondent after the Committee imposed discipline.

The Committee understands from the perspectives of due process and fairness the need to disclose information to the respondent which may ultimately be used by the Committee to support its determination with respect to the imposition of private discipline and/or the authorization of a disciplinary proceeding. Please note that in the Third Department, the Committee discloses information regarding alleged rule violations throughout its investigations in the majority of cases, if not all, by exchanging copies of the complaint and the attorney's response, and any other pertinent documents received by either or the Committee, to each other. However, please note that there are instances where copies of documents are not exchanged due to them containing confidential or sensitive information which is not related to the underlying complaint and therefore, not necessary to share. In those instances, the information from the document, excluding the sensitive or confidential information, is provided to each other by paraphrasing the relevant and necessary information. Further, the Committee anticipates that respondents, and certainly their attorneys, will interpret the broadness of the rule to mean that it will be the

responsibility of the Committee to move for a protective order from having to disclose certain information and/or documents from its file to the respondent. The Committee does not believe this is the intent of the new Rule and urges that this particular Rule be clarified to limit the disclosure of, and access to, Committee files, while at the same time respecting the need for due process and fairness to the respondent.

The Committee respectfully suggests the following modified language:

“2. Investigation; Disclosure

(b) Disclosure. Prior to the taking of any action against a respondent pursuant to sections II.3(b)(1)(iv), (v) or (vi) of these rules, and upon the written request of the respondent, or respondent’s counsel, the Chief Attorney shall provide the respondent with copies of the complaint, including any subsequent writings from the complainant, and copies of all written statements of the complainant, that form the basis of the proposed Committee action, to the extent not previously provided.”

Letter of Advisement

Proposed Rule II.3(b)(1)(iv) provides in part: “when the Committee finds that the respondent has engaged in inappropriate behavior, ... or other behavior requiring comment, issue a Letter of Advisement” (emphasis added). The Committee submits that the underlined language, “inappropriate behavior”, is too broad and would allow the Committee to issue a Letter of Advisement with respect to conduct unrelated to any ethical standard or rule of professional conduct. For instance, would the Committee have the authority to issue a Letter of Advisement if the attorney uses vulgar language while at a restaurant that is overheard by their client, another attorney, or other member of the public? Further, under the existing rules of the Third Department, the Committee oversees the professional “conduct” of an attorney not their behavior. The Committee recommends that the proposed language be clarified by using the words, “inappropriate conduct” and “or other conduct requiring comment”, and by limiting the “conduct” to that which is related to an ethical standard or rule of professional conduct.

Confidentiality

With respect to Proposed Rule V.1(a), if Court personnel, Committee members, staff and their agents, are required to keep all disciplinary investigations and proceedings confidential, then both the respondent and complainant should be required to do the same.

With respect to Proposed Rule V.1(b), the word, “information”, should be added to this paragraph as follows: “All papers, records, documents *and information*, upon any complaint, inquiry,”

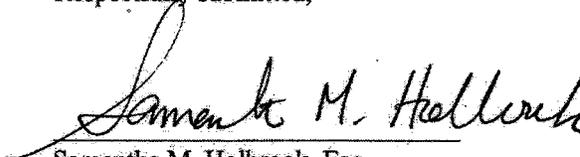
Addition of Certain Proposed Rules

The Committee takes this opportunity to provide its written support to Proposed Rule III.1(a)(4) [Discipline by Consent], Rule III.5 [Diversion to a Monitoring Program], and Rule V.2 [Abatement; Effect of Pending Civil or Criminal Matters; Restitution], especially subsection (b).

Conclusion

The Committee is thankful to the Administrative Board of the Courts for its consideration of its comments.

Respectfully submitted,

A handwritten signature in cursive script that reads "Samantha M. Holbrook". The signature is written in black ink and is positioned above the printed name.

Samantha M. Holbrook, Esq.

Chairperson

Committee on Professional Standards

Appellate Division, Third Department

The Lawyers' Fund for Client Protection

of the State of New York

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December 15, 2015

BY E-MAIL & OVERNIGHT MAIL
rulecomments@nycourts.gov

John. W. McConnell, Esq., Counsel
Office of Court Administration
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New York, New York 10004

Timothy J. O'Sullivan,
Executive Director

Michael J. Knight,
Deputy Counsel

Ray Wood,
Investigator

RE: Proposed Uniform Attorney Disciplinary Rules

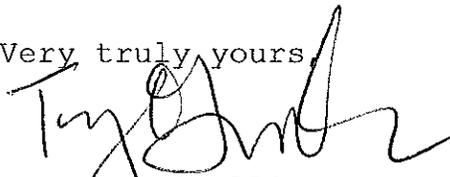
Dear Mr. McConnell:

Our Board of Trustees respectfully submits the enclosed comments and recommendations with respect to the proposed Uniform Rules of the Appellate Division on Attorney Discipline.

Our Trustees' comments pertain to the proposed Rules concerning (1) interim suspensions of attorneys deemed a public threat; (2) disbarment by resignation; (3) conduct of disbarred, suspended or resigned attorneys; (4) confidentiality with respect to the Lawyers' Fund; and (5) the appointment of attorneys to protect clients of disciplined attorneys.

Our Trustees appreciate the opportunity to participate in the Court system's ongoing review of the attorney disciplinary system. Our Trustees are available to answer any questions or provide any additional information which may be helpful.

Very truly yours,



Timothy O'Sullivan
Executive Director

TO/jk

cc: Eric A. Seiff, Chairman
Nancy Burner, Trustee
Peter A. Bellacosa, Trustee
Anthony J. Baynes, Trustee
Stuart M. Cohen, Trustee
Patricia L. Gatling, Trustee
Charlotte G. Holstein, Trustee



INTERIM SUSPENSIONS OF ATTORNEYS DEEMED A PUBLIC THREAT

Proposed Rule: The proposed rule below, like current rules of the Appellate Divisions, allows for the interim suspension of an attorney deemed an immediate threat to the public interest.

Lawyers' Fund Recommendation: In order to protect clients and safeguard escrow funds, the proposed rule should also grant the Appellate Divisions the authority to restrain attorney escrow accounts of an attorney who is a public threat. There have been situations where suspended attorneys continued to maintain, control and jeopardize client escrow accounts.

Recommended Rule Amendment: Below is the current proposed Rule which includes the amendment recommended by the Lawyers' Fund which would add a new subsection (e) .

(Matter in brackets [] to be deleted; matter underscored to be added)

SECTION III. PROCEEDINGS IN THE APPELLATE DIVISION

3. Interim Suspension While Investigation or Proceeding is Pending

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

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

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

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

(e) (i) The Committee may request in its application, and the order of suspension or a preliminary order prior to suspension may include, an order of restraint on the respondent's trust, escrow, special or IOLA account in order to safeguard client funds, and or a provision designating a successor signatory in place and stead of the respondent who is the subject of the proceedings for all attorney trust, escrow, special and IOLA accounts as to which such respondent was a signatory. Such successor signatory shall be a member of the bar in good standing admitted to the practice of law in New York State and shall maintain an office for the practice of law within the Department.

(ii) Such order may direct the safeguarding of funds from such trust, escrow, special or IOLA account and the disbursement of such funds to the persons entitled thereto and may order that funds in any such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto. All disputes and questions as to entitlement to the funds shall be determined by order of the Supreme Court within the judicial district where the respondent maintained his office for the practice of law, upon application by any claimant to such funds, the successor signatory, the Committee, or the Lawyers' Fund for Client Protection.

DISBARMENT BY RESIGNATION

Proposed Rule: The proposed rule below allows an attorney to be disbarred by resignation if certain conditions are met, and authorizes a restitution order to be entered for a wilful misapplication or misappropriation of funds or property.

Lawyers' Fund Recommendation: To protect unsuspecting potential clients from being defrauded by the resigning attorney, the attorney's affidavit of resignation should include a specific provision prohibiting the resigning attorney from accepting any new clients and any new advance legal fees.

Affidavits of resignation should also be expedited by the Appellate Division since there are no contested issues and any delay will only expose law clients to possible harm. Continuing confidentiality once the resigning attorney has submitted their resignation affidavit also jeopardizes unsuspecting law clients.

A clear example of such harm to a client was present in the Claim of Delaurenzo recently before the Lawyers' Fund. On March 27, 2014, resigning attorney Philip Teplen submitted his

affidavit of resignation admitting he had no defense to converting \$500,000 from other clients. On April 22, 2014, Teplen received a \$50,000 settlement check for his client Delaurenzo who was unaware of Teplen's pending resignation. Teplen then converted this \$50,000 settlement which the Fund later reimbursed. Teplen was later disbarred by resignation on June 24, 2014. If Teplen's disbarment had been expedited, and if confidentiality had been lifted with the submission of the resignation, this loss could have been prevented.

Recommended Rule Amendment: Below is the current proposed Rule which includes the Fund's recommended amendment to section 4 (a) (2).

SECTION III.
PROCEEDINGS IN THE APPELLATE DIVISION

(Matter in brackets [] to be deleted; matter underscored to be added)

4. Resignation While Investigation or Proceeding is Pending

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

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

(2) the respondent admits the charges or allegations of misconduct; and respondent agrees that he will not accept any new clients and will not accept any new advance legal fees;

(3) the respondent cannot successfully defend against the charges or allegations of misconduct; and

(4) when the charges or allegations include the willful misappropriation or misapplication of funds or property, the respondent consents to the entry of an order of restitution.

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

CONDUCT OF DISBARRED, SUSPENDED OR RESIGNED ATTORNEYS

Proposed Rule: The proposed rule below governs the conduct of, and required steps to be taken by, attorneys who are disbarred, suspended or removed from practice by resignation.

Lawyers' Fund Recommendations:

The Fund's Trustees applaud the new proposed codified requirement that the suspended or disbarred attorney shall return to all clients or third persons, or to a successor attorney, all money and property (including legal files) held by the disciplined attorney.

The Trustees recommend the following to further safeguard clients and escrow funds:

(1) that the proposed Rule be amended by clearly stating that the disciplined attorney shall cease all use of their attorney escrow, special, trust or IOLA accounts. This proposed amendment to section 1 (c) is set forth below.

(2) that the proposed Rule be further amended by granting the Appellate Divisions the authority to restrain attorney escrow accounts of the suspended or disciplined attorney who may pose a serious threat to their clients and escrow funds, and to appoint a successor signatory where appropriate. This proposed amendment is set forth below with the addition of a new subsection (j).

Recommended Rule Amendments: Below is the current proposed Rule which includes the amendments recommended by the Lawyers' Fund to subsection 1(c) and adding a new subsection (j) .

(Matter in brackets [] to be deleted; matter underscored to be added)

SECTION IV POST-DISCIPLINARY PROCEEDINGS

1. Conduct of Disbarred, Suspended or Resigned Attorneys

(a) Prohibition Against Practicing Law. Attorneys disbarred, suspended or resigned from practice

shall comply with Judiciary Law §§ 478, 479, 484 and 486.

(b) Notification of Clients. When a respondent is disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, the respondent shall promptly notify, by registered or certified mail, each client and the attorney for each party in any pending matter, and the Office of Court Administration for each action where a retainer statement has been filed pursuant to court rules. The notice shall state that the respondent is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent's client.

(c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled. The respondent shall then cease all use of their attorney escrow, special, trust or IOLA accounts.

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

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

(f) Forfeiture of Secure Pass. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, shall immediately surrender to the Office of Court Administration any secure pass issued to him or her.

(g) Affidavit of Compliance. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, shall file with the Court, no later than 45 days after being served with the order of disbarment, suspension or removal from the roll of attorneys, an affidavit showing a current mailing address for the respondent and that the respondent has complied with the order and these rules. The affidavit shall be served on the Committee and proof of service shall be filed with the Court.

(h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation may not share in any fee for legal services rendered by another attorney during the period of disbarment, suspension or removal from the roll of attorneys but may be compensated on a quantum meruit basis for services rendered prior

to the effective date of the disbarment, suspension or removal from the roll of attorneys. On motion of the respondent, with notice to the client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.

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

(j) The Committee may request in its application, and the order of suspension or disbarment may include, an order of restraint on the respondent's trust, escrow, special or IOLA account in order to safeguard client funds, and or a provision designating a successor signatory in place and stead of the respondent who is the subject of the proceedings for all attorney trust, escrow, special and IOLA accounts as to which such respondent was a signatory. Such successor signatory shall be a member of the bar in good standing admitted to the practice of law in New York State and shall maintain an office for the practice of law within the Department.

(ii) Such order may direct the safeguarding of funds from such trust, escrow, special or IOLA account and the disbursement of such funds to the persons entitled thereto and may order that funds in any such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto. All disputes and questions as to entitlement to the funds shall be determined by order of the Supreme Court within the judicial district where the respondent maintained his office for the practice of law, upon application by any claimant to such funds, the successor signatory, the Committee, or the Lawyers' Fund for Client Protection.

CONFIDENTIALITY AND THE LAWYERS' FUND

Proposed Rule: The proposed rule below governs the confidentiality of attorney disciplinary proceedings, and the authorization for a Disciplinary Committee to share some information with the Lawyers' Fund concerning an attorney who has been disciplined.

Lawyers' Fund Recommendations:

While this authority to share information with the Lawyers' Fund is helpful, the Trustees recommend that this authority be expanded.

The proposed authority to share information applies only to an attorney who has been disciplined. In order for the Lawyers' Fund to properly investigate claims for reimbursement, this authority should be expanded to apply to the sharing of information on attorneys who are the subject of pending disciplinary investigation or proceedings.

Section 7200.10 (h) of the Fund's Regulations requires that the Fund await the completion of pending disciplinary investigations or proceedings before awarding any reimbursement. The Fund therefore coordinates its investigations of filed claims with investigations by the Attorney Disciplinary Committees. It is therefore necessary for the Fund's staff to regularly contact the staffs of the Committees requesting the status of pending disciplinary investigations or proceedings, as well as information on disciplined attorneys.

The proposed Rule should also be expanded to authorize the disclosure of **documentation**.

The proposed Rule is limited to authorizing the disclosure of "information". For the Fund to properly investigate and determine claims for reimbursement, the Fund often requests Committees to provide **documentation** in addition to "information". For example, to support all alleged losses, the Fund must obtain proof of payment such as copies of receipts or canceled checks. The Fund will regularly request Committees to provide such **documentation** if the Fund can not easily obtain such records elsewhere.

The Trustees recommend the following:

(1) that the proposed Rule be amended to allow a Committee to disclose information on pending disciplinary investigations or proceedings and to disclose necessary documentation required by the Lawyers' Fund. All disclosed information and documentation will remain sealed and confidential. These proposed amendments are set forth below in subsection 1 (e).

(2) that a uniform disciplinary policy or rule be adopted that a Disciplinary Committee will secure a sharing order authorizing a prompt referral to the local District Attorney when the Committee has admitted or uncontested evidence of theft by a lawyer. Lawyers who steal should be criminally prosecuted. Such a policy or rule will protect law clients and promote public confidence in our justice system.

Recommended Rule Amendments: Below is the current proposed Rule which includes the amendments recommended by the Lawyers' Fund to subsection 1(e) .

(Matter in brackets [] to be deleted; matter underscored to be added)

V.

ADDITIONAL RULES APPLICABLE TO DISCIPLINARY MATTERS

1. Confidentiality

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

(b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any person under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).

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

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

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

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

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

(e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or claims seeking reimbursement from the Fund for the wrongful taking of money or property by any person who has been disciplined by the Court, or who is the subject of a pending disciplinary investigation or proceeding, the Committee is authorized to disclose to the Fund such information and documents as it may have on file relating thereto. All information and documentation provided by the Committee shall remain sealed and confidential to the extent required by section 90 of the Judiciary Law.

APPOINTMENT OF ATTORNEYS TO PROTECT CLIENTS OF DISCIPLINED ATTORNEYS

Proposed Rule: The proposed rule below allows for the appointment of attorneys to protect the interests of suspended, disbarred or incapacitated attorneys.

Lawyers' Fund Recommendations:

The proposed rule only authorizes the appointment of an attorney to take possession of legal files which are in jeopardy.

This authority should be expanded to include the appointment of a successor signatory attorney to take possession of escrow funds which may be in jeopardy in order to safeguard and disburse those fiduciary funds.

Recommended Rule Amendments:

Below is the current proposed Rule which includes the amendment recommended by the Lawyers' Fund to subsection 3 (a) .

(Matter in brackets [] to be deleted; matter underscored to be added)

V.

ADDITIONAL RULES APPLICABLE TO DISCIPLINARY MATTERS

3. Appointment of Attorney to Protect Interests of Clients or Attorney

(a) (i) When an attorney is suspended, disbarred or incapacitated from practicing law pursuant to these rules, or has resigned for disciplinary reasons, or when the Court determines that an attorney is otherwise unable to protect the interests of his or her clients and has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct, appointing one or more attorneys to take possession of the attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the clients' interests. The Court may also enter an order, upon such notice as it shall direct, appointing a successor signatory to take possession and control of the attorney's escrow funds, in order to safeguard and disburse those funds to clients or persons entitled thereto. Such successor signatory shall be a member of the bar in good standing admitted to the practice of law in New York State and shall maintain an office for the practice of law within the Department. An application for such an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney to be appointed and the suspended, disbarred or incapacitated attorney.

(ii) Such order may direct the safeguarding of funds from such trust, escrow, special or IOLA account and the disbursement of such funds to the persons entitled thereto and may order that funds in any such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto. All disputes and questions as to entitlement to the funds shall be determined by order of the Supreme Court within the judicial district where the respondent maintained his office for the practice of law, upon application by

any claimant to such funds, the successor signatory, the Committee, or the Lawyers' Fund for Client Protection.

MEMORANDUM

TO: Hon. Luis A. Gonzalez
NYS Supreme Court
Appellate Division, First Department
27 Madison Avenue
New York, New York 10004

John W. McConnell, Esq.
NYS Unified Court System
Office of Court Administration
25 Beaver Street
New York, New York 10010

FROM: Ernest J. Collazo, Esq.
Charlotte Moses Fischman, Esq.

DATE: November 23, 2015

RE: Comments on Proposed Uniform Attorney Disciplinary Rules
of the Appellate Division (“Proposed Rules”)

This submission is made in response to the invitation to “interested persons” dated November 4, 2015 to comment on the Proposed Rules. We write in our individual capacities as attorneys who have been intimately involved in the disciplinary process in the First Department; Mr. Collazo serves as Chair of the Departmental Disciplinary Committee and Ms. Fischman serves as Special Counsel. We applaud the speed, thoughtfulness and spirit of compromise that have generated the Proposed Rules so quickly after the publication of the report and recommendations of the Commission on Statewide Attorney Discipline, on which Ms. Fischman was privileged to sit. The thrust of these comments are addressed to aspects of the Proposed Rules that would expand the role and work of the Court in the disciplinary process; confuse any distinction between the Court’s judicial role in imposing sanctions and its administrative role in

managing the disciplinary process; and significantly delay the process in the First Department, sacrificing efficiency.¹

A. **Letter of advisement**: Since a letter of advisement is not discipline and is not the result of extensive investigation or fact-finding, it should not “be considered...in determining the extent of discipline to be imposed or action to be taken upon a subsequent finding of misconduct.” (Proposed Rule I.2(b)(7)) Previously named a letter of caution (or education) and serving the same function as a dismissal with guidance, such a letter serves the useful purpose of educating and warning lawyers before disciplining them. Such lawyers may have engaged in “inappropriate behavior” or “other behavior requiring comment,” but not clear and/or provable violations of the Rules of Professional Conduct (“RPC”).

Under the Proposed Rules, the issuance of a letter of advisement has to be approved by a Committee (II.3(b)(1)(iv)), and there is now a proposed post-issuance procedure: reconsideration by the Chair or the Committee and application to the Court (II.3(c)(1)). This is too much process for the sending of a cautionary letter to a lawyer who may have narrowly escaped discipline. If we deleted from the definition of letter of advisement the right to “consider” it in a subsequent discipline case, then we can eliminate rights of reconsideration or judicial review. In fact, how can there even be a justiciable issue if no discipline has been imposed, and the lawyer has simply been educated? The Committee and the Court would basically be reviewing and revising a draft letter. Since evidence of prior bad acts is admissible in certain circumstances under well-established rules of evidence, we might just leave it to that

¹ This submission addresses the principle aspects of the Proposed Rules that are problematic; it is not an edit; and it does not point out the issues that are currently addressed in 22 NYCRR Parts 603 and 605 that are not addressed by the Proposed Rules.

pre-existing body of law to determine if and when the incident leading to the letter of advisement may be taken into consideration in a subsequent disciplinary proceeding.

The proposed new procedure, taking up the time of the Committee and the Court for NON disciplinary matters, does not serve the Commission's goal of efficiency. In the First Department, there were 121 non-discipline letters issued in 2014²; in 2015, there are 141 to date. The number of applications these will generate to the Court, with briefing on either side as to whether a lawyer should be warned that his conduct is close to the line, cannot be justified. Similarly, the volunteer lawyers and lay people who man the Committees will have to review this volume of letters (and the back-up file which contains the evidence generating what is, at most, a letter of criticism), first in approving the issuance, and then, on reconsideration.

B. Admonitions. Proposed Rule II.3(b)(1)(v) requires that Admonitions be issued by the Committee (not merely 2 members as is now the case in the First Department), that respondents be provided an opportunity "to appear personally before the Committee" (or a subcommittee) "to seek reconsideration of the proposed Admonition," and that respondents may make an application to the Court, to vacate the Admonition (Rule II.3(c)(2), a right of judicial review that does not presently exist in the First Department. In the First Department, 71 Admonitions were issued in 2013 and 75 in 2014; in 2015, there are 74 Admonitions issued to date. The requirement that the Committee sign off on each Admonition will add a tremendous layer of work for the Committee because of the additional members reviewing the admonition and supporting papers. That change may make sense in the interest of statewide uniformity.

² The First Department's dismissal with caution is the functional equivalent of the "letter of advisement."

However, respondents should not be provided a pre-Admonition right of review that includes the opportunity for a personal appearance for “reconsideration of the proposed Admonition.” If the Committee sticks to its proposed course of action and actually issues the Admonition, then the respondent gets another bite at the apple by going directly to Court “to vacate the Admonition.” In doing so, “the Court may consider the entire record and take whatever action it deems appropriate.” (II.3(c)(2))

The handling of Admonitions in the Proposed Rules would dramatically affect the goal of efficiency in the First Department where admonitions account for the most frequent kind of discipline imposed. The proposal overlooks the substantial work and investigation that staff undertakes before recommending the issuance of an Admonition -- often meetings with respondent’s counsel, depositions, review of records, and significant letter writing back and forth. A respondent has had a full opportunity to raise any mitigating factors or defenses by the time an Admonition issues. It may (and does) take years to reach the point of preparing an Admonition for issuance. As a practical matter, the respondent has already had ample opportunity to avoid discipline. To now suggest that the respondent can demand what is tantamount to a hearing before the Committee before the issuance of private discipline is to legislate further, substantial delays into the disciplinary process. Consider: a personal appearance has to be offered in writing; there will be a written response; a meeting of the Committee has to be convened; Committee members have to be sent a copy of the investigative record so they are familiar with the facts; a hearing date has to be set with the respondent, maybe his counsel, and the Committee; some type of hearing (not articulated) occurs before the Committee; the Committee has to reach a determination; that determination has to be communicated to the respondent; and finally, and maybe, an Admonition will issue. Anyone

familiar with the extent of delay experienced whenever a respondent has a deadline -- to submit a response, to be deposed, to produce requested documents, to appear before a Referee, to appear before a Panel -- will appreciate just how severely a pre-Admonition right of review will effect the DDC's ability to issue Admonitions and move on.

Nor can one overestimate the effect of judicial review on the admonition process. Unlike the situation where cases go to the Court after formal charges have resulted in written decisions and records that the Court may review, in the case of an Admonition there is usually nothing more than the letter and the staff's file reflecting its investigation. There are no briefs. There are no decisions by fact finders. There is a raw file with correspondence; handwritten notes; maybe a deposition transcript; perhaps some subpoenaed documents. Is the Court supposed to review all this material on an application to vacate an Admonition pursuant to Proposed Rule II.3(c)(2) which says "the Court may consider the entire record and take whatever action it deems appropriate"? The judicial review of Admonitions in the First Department will potentially add a new judicial proceeding for each Admonition issued. That represents a significant increase in the Court's work on disciplinary matters.

C. Formal proceedings: The Proposed Rules would involve the Court in formal disciplinary proceedings in a way that far exceeds its current role and which places obligations on the Court as "trial judge" which are inconsistent with its present appellate role in which it fixes the final sanction. The Court would now receive all pleadings; "permit or require" appearances; review statements of facts and disputed contentions; supervise disclosure of disputed facts; decide whether a referee will be appointed; determine which issues the referee is to hear and determine; and then ultimately consider the parties cross-motions "to affirm or disaffirm the referee's report as permitted by the Court."

These Proposed Rules, reflected in III.1(a) and (b) reflect a sea change. The Court will now be charged with “running” the formal charges process. At present, at least in the First Department, other than the appointment of a referee, the Court does not normally get involved in formal disciplinary proceedings until decisions of the referee or Panel are presented to it for review and determination. What is proposed is the micromanagement of special proceedings by the Court, without the benefit of a trial judge or an empowered referee to police and manage the proceedings.

This is a grave mistake and will impose obligations on the Court that are well beyond the availability of its resources.

D. Disclosure: Under the Proposed Rules, voluntary disclosure will enter the disciplinary process. See II.2(b) and III.1(a)(3). However, the Proposed Rules do not include the normal framework that accompanies discovery: the forms, the deadlines, the motions to compel or for sanctions, the respective roles of the referee or the Court in supervising this entire, messy process. Respondents’ counsel will have a field day unless we anticipate some of the problems and the consequences. Suppose a party fails to identify a witness, to timely produce a document or requests e-discovery? Suppose the staff fails to produce exculpatory (as opposed to inculpatory) material? Unlike a normal civil proceeding, there is no authority to impose sanctions for noncompliance or effectively deal with spoliation.

We need to think through these issues and anticipate them. We don’t want to involve the Court in discovery disputes or motion practice, adding untold delay and effort to the disciplinary process.

E. Conflicts; disqualifications: The provisions of Proposed Rule 6 are too restrictive and would discourage lawyers from serving on Committees or referees from hearing cases -- both of which are normally done on a *pro bono* basis. Proposed Rule 1.6(a) would impute the disqualification of a current member of the Committee from representing a respondent to her entire law firm, much like RPC 1.10(a) operates to impute the disqualification of a single lawyer to her entire firm. There are better analogies. RPC 1.11, which applies to former or current government officers and employees, does not impute a government lawyer's disqualification to her entire firm so long as there are adequate screening procedures. RPC 6.3 states that a lawyer who serves as a director or officer of a not-for-profit legal services organization shall not knowingly participate in a decision of the organization which adversely impacts a client of the lawyer's firm or which would be incompatible with the lawyer's obligations to a client of the firm. In other words, the Rule adopts a recusal remedy rather than an imputed disqualification remedy.

RPC Rules 1.11 and 6.3 recognize that in the case of government service and participation in legal services organizations, lawyer participation should be encouraged and the rules of imputed disqualification relaxed. That is the case here. Many law firms either represent their lawyers or themselves *pro se* or now have Professional Responsibility practice groups that represent respondents. Any rule which would disqualify the entire law firm from participation in DDC proceedings because a firm lawyer serves on a Committee or occasionally serves as referee is too draconian.

Further, the proposed two-year disqualification period of former Committee members or former referees is similarly too harsh. It's enough to say that such former members or referees may not represent respondents whose cases were pending at the time they left office.

CONCLUSION

There are very significant changes reflected in the Proposed Rules. The net effect of discovery, hearings before the Committee, and applications to the Court will be significant delay between complaint and disposition. Committee staff will be severely handicapped because of limited resources and experience in dealing with the many new procedural obligations placed upon them. And the Court will be adversely affected most of all by its increased role in the disciplinary process and the resources that will have to be devoted to fulfilling its new obligations: supervising disclosure; reviewing Admonitions; reviewing the issuance of Letters of Advisement; managing formal disciplinary proceedings as special proceedings under CPLR Article 4; determining joint motions dealing with discipline by consent; considering diversion requests; and continuing to deal with all of the motions and applications it has previously handled.

You will hear from the private bar and the bar associations within the relatively brief comment period that has been provided. You will probably not hear from the DDC staff or existing Committee members who work in the trenches because they are likely to be uncomfortable in criticizing Proposed Rules that have been hammered out and negotiated by OCA and representatives of the Presiding Justices. This silence should not be interpreted as

acquiescence by the attorneys with the most hands-on experience about how the Proposed Rules will affect their ability to get the work done.

cc: Liaison Committee:

Justice Peter Tom
Justice Angela M. Mazzarelli
Justice David Friedman
Justice John W. Sweeny, Jr.
Justice Rolando T. Acosta
Justice Rosalyn H. Richter

Jorge Dopico, Chief Counsel

MEMORANDUM

TO: John W. McConnell, Esq.
NYS Unified Court System
Office of Court Administration
25 Beaver Street
New York, New York 10010

FROM: Sheila S. Boston
John M. Callagy
Peter C. Harvey
Myron Kirschbaum
Karen Patton Seymour
John L. Warden

DATE: December 18, 2015

RE: Comment on Proposed Uniform Attorney Disciplinary Rule 6(a)

In response to your request for public comment on the United Court System's proposed Uniform Rules of the Appellate Division on Attorney Discipline (the "Proposed Rules"), we are writing to comment on Proposed Rule 6(a).

Proposed Rule 6(a), which deals with conflicts and disqualification from representation, provides:

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

Proposed Rule 6(a) therefore bars all attorneys in a law firm from representing a respondent on any matter investigated or prosecuted before an Attorney Grievance Committee (a "Committee") if one of the firm's members, partners, or associates serves on that Committee.

We believe that this Proposed Rule will have the unintended effect of chilling and in some cases preventing Committee service by requiring a firm with an attorney on a Committee to retain outside counsel whenever any matter involving the firm or any of its attorneys is brought before that Committee, regardless of the lack of any involvement in the matter by the Committee member. Requiring firms to retain outside counsel for such matters from the very outset of the matter, regardless of the gravity of the matter, would deprive firms of the often-chosen option of handling disciplinary matters through in-house ethics and professional

responsibility counsel, especially when the matters are not highly serious and/or may be resolved at an early stage of the disciplinary process. In addition, to the extent a firm practices before a Committee, the Proposed Rule would prevent it from doing so as long as any attorney in the firm serves on that Committee. Attorneys, who serve on such Committees *pro bono*, will be reluctant to do so, and their firms may prevent them from serving, if doing so precludes anyone in their firms from working on any matter before that Committee, including in-house matters.

Moreover, any concern with respect to conflicts and/or the appearance of impropriety can be addressed adequately by mandating that a Committee member recuse him or herself on any matter involving his/her firm.¹ Indeed, in other areas in which attorneys provide public service, such as government and not-for-profit service, the Rules of Professional Conduct promote service by avoiding automatic imputation as long as a firm follows certain prescriptive measures.² These Rules recognize that the public interest can best be served by adopting a balanced approach that encourages qualified candidates to serve by avoiding automatic imputation while maintaining high ethical standards. *See* Rules of Prof'l Conduct R. 1.11 cmt. 4 ('This Rule represents a balancing of interests . . . the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards.') A balanced approach should work equally well here.

These Proposed Rules should promote, not discourage, public service. We believe that, by creating an alternative to automatic imputation, the Committee will benefit from a broader applicant pool while safeguarding its integrity should a conflict arise.

¹ For instance, the Rule could be revised to provide: "No (1) current member of a Committee, (2) partner, associate or member of a law firm associated with such a member of the Committee, (3) current member of the Committee's professional staff, or (4) immediate family member of a current Committee member or Committee staff member, may represent a respondent in a matter investigated or prosecuted before that Committee unless the Committee member recuses him or herself from the matter."

² *See* Rules of Prof'l Conduct R. 1.11 (no imputation in matters involving former government officers and employees provided 1.11(b) is followed), Rules of Prof'l Conduct R. 1.12 (no imputation in matters in which a lawyer acted in a judicial capacity provided 1.12(d) is followed); Rules of Prof'l Conduct R. 1.18 (no imputation for prospective clients, in which no client-lawyer relationship ensues, provided 1.18(d) is followed); *see also* Rules of Prof'l Conduct R. 6.3 (permitting service on a non-for-profit legal services organization even if the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm); Rules of Prof'l Conduct R. 6.4 (permitting service on an organization involved in law reform even those efforts may affect a client of the lawyer).

From: Joseph R. Sahid
Sent: Thursday, November 5, 2015 9:05 AM
To: rulecomments
Subject: Proposed Uniform Attorney Disciplinary Rules

I am reminded of what Benjamin Franklin said about the proposed U.S. Constitution and Winston Churchill's comment about democracy. If I may paraphrase, the proposal is far better than what we now have. Bravo!

Joseph R. Sahid, Esq.
1065 Park Avenue
New York, NY 10128

646.657.0486 Telephone
212.214.0998 Fax

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STEPHEN GILLERS

**NEW YORK UNIVERSITY
SCHOOL OF LAW
40 WASHINGTON SQUARE SOUTH
NEW YORK, N.Y. 10012**

December 10, 2015

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street
New York, NY 10004

By email to rulecomments@nycourts.gov
and regular mail

Dear Mr. McConnell:

I am writing to address the proposed Uniform Attorney Disciplinary Rules of the Appellate Division.

Delay is one of the most serious problems confronting the New York attorney discipline system. I urge the courts to provide disciplinary procedures, fair to all, that will not tolerate the unacceptable delays now far too common. Page 51 of the report of the Commission on Statewide Attorney Discipline (attached), showing aging data, confirms my own findings. The current system is far too slow. This hurts the public and it also hurts lawyers under investigation.

I have three suggestions.

First, I urge that the rules make it clear that decisions of the Committees (see paragraph 4 on page 3) may be reached in a password protected on line discussion or via telephone. In person meetings should not be required. A quorum of two-thirds will create unnecessary delay if the Committees must meet in person. The word "present" is ambiguous and could be understood to require in person presence. "Participating by telephone or equivalent method" can be substituted. Many "discussions" in modern life now occur via email or through password protected discussions.

Second, I urge the Board, either in this document or elsewhere, to publish presumptive (if non-binding) deadlines within which tasks will be expected to be completed.

Third, aging statistics on complaints, disclosing the dates of all events, from the time a complaint is received (or if sua sponte a file is opened) through final disposition, should be required and made public. This should be done for cases leading to private and public discipline. Today, this information is often missing. It is impossible to evaluate the efficiency of those who perform this public function without it.

Sincerely,

A handwritten signature in black ink that reads "Stephen Gillers". The signature is written in a cursive style with a large, prominent 'S' and 'G'.

Stephen Gillers

Table A – Average Time Frames for Disciplinary Proceedings

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

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December 17, 2015

John W. McConnell, Esq.
Counsel,
Office of Court Administration
25 Beaver Street,
11th Fl.,
New York, New York 10004

RE: Uniform Disciplinary Rules

Dear Mr. McConnell:

While I sit on the Committee of Professional Standards, these comments are mine and mine alone. I am not authorized to speak for the Committee and I do not speak for the Committee in this writing. However, these comments are informed both by research and by five years of reviewing with great care matters that have come before the Committee.

I see a system that needs improvement to ensure that the public is well-served by the legal profession. I think some of the proposed changes in the rules are an improvement; they simply do not go far enough to truly protect the public.

1. I applaud the change that would reduce the burden of proof for private discipline to preponderance of the evidence. In the Family Court, I have clients who can lose custody of their child on this reduced burden. While certainly this reduced burden of proof will lead to some erroneous factual determinations against a lawyer, the higher burden leads to some erroneous factual determinations in favor of the lawyer and against either a specific inquirer or the public at large. The fact is as long as human beings perform the adjudication, there will always be risk of error. I see no compelling reason to place the risk of error in favor of the lawyer and against the public. I certainly see nothing more compelling than so many other areas of law

(including public discipline of a lawyer, *see Matter of Capoccia*, 59 N.Y.2d 549 [1983]) where preponderance is the burden of proof.

2. I agree with the elimination of the letter of caution, as it is presently used in the Third Department. The multiple levels of private discipline (letters of education, caution, admonition and then oral admonition¹) have been used to delay the filing of charges against lawyers who pose a danger to the public as some committee members feel an obligation to let a lawyer hit the entire cycle before they feel comfortable bringing charges. Yet charges are the only way to bring to the court's attention the actions of a lawyer who poses a danger.
3. I agree with the use of diversion programs, which should be encouraged as these will often protect the public more effectively than any form of discipline short of suspension or disbarment. They may have the added benefit not only of saving a career, but of saving a life.

But as stated above, in my view, New York needs more changes than are proposed.

1. We presently have three non-lawyers on a committee of twenty-one. Not only does this invite the perception that lawyers are protecting lawyers, I fear that in some cases that is the actuality. Non-lawyers should constitute ½ of the committee, and they should chair the committee in alternate years. This will help the committee move from lawyer-centric to public-centric. I cannot understand why a jury of mostly non-lawyers can decide a murder case, but only a lawyer-dominated committee can decide if a lawyer charged an excessive fee. We should never deprive lawyers of due process; but it is the public we need to protect, and to allow more input from that public we seek to protect will serve that purpose.²

¹ I understand the proposed rules allow an admonition to be delivered orally. I urge you to retain this option as there are times that a simple letter is unlikely to catch the lawyer's attention before he or she commits a more serious harm against the public.

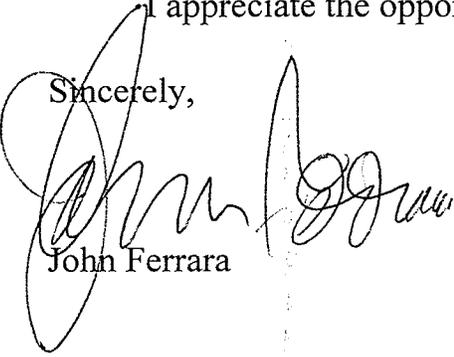
² Putting such persons as a mental health professional and a Credentialed Alcoholism and Substance Abuse Counselor on the Committee would have the added benefit of providing insight and early detection of the warning signs that may help the Committee employ intervention before irreparable harm

2. There needs to be a hearing process for private discipline when crucial facts that will turn the outcome are in dispute. While sometimes it is easy to determine which set of facts one should believe from the letters and documentary evidence, this is not always true.³ If we could conduct an abbreviated hearing on the contested fact(s) that cannot be decided on papers, everyone could have more confidence in the decision. The committee could create a subcommittee to take testimony on those disputed facts to help the full committee make a determination.

3. While I understand my next proposal will require a statutory amendment, after a lawyer reaches three findings of professional misconduct in a finite period of time (I think 10 years would be reasonable), those findings should all be made public. The committee does not protect the public by making repeated findings of professional misconduct that nobody ever learns about. Clients continue to retain lawyers who have multiple findings of professional misconduct and they have no way to learn this fact. I do not want to ruin careers. But there are objectives at stake greater than the protection of individual careers. Consumers of legal services should not be deceived about the quality of lawyer they hire because repeated findings of professional misconduct cannot be disclosed. This statutorily imposed secrecy works contrary to the public's best interest.

I appreciate the opportunity to comment.

Sincerely,



John Ferrara

occurs. A lawyer dominated committee deprives the entire Committee the professional insights that follow from intensive training in other fields.

³ Lawyers are often skilled at writing persuasive documents, giving them yet another procedural advantage.

From: Frank Rosiny
Sent: Monday, November 9, 2015 9:20 AM
To: rulecomments
Subject: Proposed Uniform Attorney Disciplinary Rules

The definition of "Professional Misconduct" should be amended by adding the phrase "of the court" or "of this court" after the words "announced standard." This change would exclude such announced standards as bar association ethics opinions and NYSBA's commentary. It would also make the uniform rule more consistent with existing standards. See Third Dep't Ruke 806.2.

From: Carl Becker
Sent: Sunday, November 8, 2015 9:53 AM
To: rulecomments
Subject: Prposed Uniform Rules for Attorney Discipline

The proposed rules for proceedings before the Appellate Divisions do not expressly address whether a referee appointed to conduct a hearing on disputed facts may nevertheless entertain a motion for summary judgment in an appropriate case.

Respectfully submitted,
Carl F. Becker
Delaware County Judge (Retired)

From: Walter Schwartz
Sent: Saturday, November 7, 2015 9:43 PM
To: rulecomments
Subject: Proposed Uniform Attorney Disciplinary Rules of the Appellate Division

As a practicing attorney for 52 years, village justice for 33 years, former 10-year member of the Westchester County Attorney Grievance Committee, former 8-year member of the Attorney Grievance Committee for the Ninth Judicial District, and former member of the Krausman Committee established by former Presiding Justice Prudente, I applaud the long overdue effort to present a "harmonized approach to the attorney disciplinary process within the four Departments," and lament that it has taken so long and has resulted for so long in an unfair and unequal process with different rules and procedures throughout the State, based solely on an accident of geography. In perusing the proposed uniform rules, I do, however, question the necessity of confidentiality, at least in those matters that result in some form of disciplinary action, and I would favor greater transparency in the process. Thank you for affording me the opportunity to comment. Kindly acknowledge receipt of this email. - Walter Schwartz, attorney

From: Howard Woronov
Sent: Friday, November 6, 2015 9:18 AM
To: comments@nysba.org.
Subject: Attorney Discipline

I served on the 5th District Grievance Committee for six years and the State Bar Committee on Professional Discipline for four.

During the latter service we were charged with drafting Uniform Rules for Reinstatement (after disbarment or resignation). After a year of work we presented the result to Judge Kay, who replied that each Appellate Division should create their own rules.

New York State is unique: there are cities and rural areas in each Department; someone charged in Plattsburgh may have a different outcome than in Wampsville.

Let's keep it that way.

"If it ain't broke..."

From: Roberta Kolar
Sent: Monday, November 16, 2015 5:45 PM
To: rulecomments
Subject: Comment on Proposed Rules

I am submitting this Comment with regard to the question of creating a statewide coordinator for the attorney grievance system. I support the establishment of such a coordinator as the only hope for an equitable grievance system for New York attorneys. Without any participation of a representative who is not acting on behalf of a particular Judicial Department, New York is likely to continue its uneven regulation of lawyers' conduct. The goal is uniformity in procedures and sanctions, as well as interdepartmental communication.

Since the beginning of time the four New York Appellate Divisions have been uneven in their imposition of discipline. In my opinion it will not be sufficient to simply change the rules. There needs to be an independent voice to assure that the four departments do not operate under four different interpretations of the same rules.

There will undoubtedly be years of transition to the new ideal. The transitional period requires an administrative entity/individual/committee to monitor the four departments' not for purposes of gathering data, but for ensuring that the goal of establishing a functional constitutional statewide attorney grievance system. The failure of the NYSBA's House of Delegates to approve a state coordinator evidences a failure of that body to understand the current disparate implementation of New York's attorney disciplinary rules. We note that the spokespeople leading the move against a statewide coordinator are both First Department Justices, present and former, and that the First Department is generally the odd one out, separating itself from the rest of the state.

Monday, December 14, 2015

John W. McConnell, Esq.,
Counsel, Office of Court Administration,
25 Beaver Street, 11th Fl.,
New York, New York 10004
rulecomments@nycourts.gov

Re: Comments to Proposed Rules.

Dear Mr. McConnell,

I am responding to your "Request for Public Comment on Proposed Uniform Attorney Disciplinary Rules of the Appellate Division" memorandum of November 4, 2015. This input is in addition to my previous submissions in this process as follows, 1) September 3, 2015 "Citizen input to the Commission on Statewide Attorney Discipline"; 2) November 18, 2015 "Follow up citizen input to the Commission on Statewide Attorney Discipline".

In general, reading the proposed rules I question if any of the drafters are non-attorney citizens of New York effected by the current Attorney Grievance system? Unfortunately after reading the proposed rules, I feel the translation has lost the direction set out in Judge Lippman 2015 State of the Judiciary address to "offer recommendations on fundamentally reshaping attorney discipline in New York." The proposed rules as they stand provide more protection for attorneys operating in New York, at the detriment of protecting citizens from unethical attorneys. You need to broaden the scope of the working group developing these rules. As they currently stand the changes necessary are to extensive for written comments only. As I stated in my September 3, 2015 letter, I would like to personally participate in this effort to utilize my experiences bringing about positive changes consistent with Judge Lippman's direction. Until I am afforded the opportunity to personally participate, I offer the following two written comments as an example of changes required, which do not represent my complete review.

First, regarding "Section II Proceedings Before Committees Item 3. Disposition and Review (a) Disposition by the Chief Attorney" (II.3(a)). This provision provides the Chief Attorney with sole discretion to dismiss a complaint at this screening stage.¹ It will lead to Chief Attorneys making the statement as I received February 1, 2012 from Mr. Huether Chief Attorney of the Fourth Department - "as Chief Counsel is vested with ultimate authority to determine whether an investigation is warranted."² then dismissing my complaint regarding an attorney that committed perjury. Providing one person this discretion is very

¹ As an example of my point of the narrow scope of drafters – prior to these rules the Chief Attorney sole discretion to dismiss complaints was inconsistent across the departments. This draft now makes that function consistent across the departments which is an error when considering the complaints perspective.

² February 1, 2012 letter and additional information demonstrating attorney misconduct submitted with September 3, 2015 comments

troubling, most importantly when you couple this statement with ex-parte communications between the Chief Attorney and the Respondent attorney. The rules must provide the complainant the option to have the Chief Attorney's decisions reviewed by the Grievance Committee for a vote, or a Chief Attorney from another department. The latter suggestion would be an innovative way to demonstrate consistency across the Grievance Committees of the four Judicial Departments of New York.

Second, sections II.3(a)(l)(iv) allows for the Chief Attorney to dismiss a complaint when "the allegations are intertwined with another pending legal action or proceeding". Here again from a citizen's point of view, who is required to act pro-se in a legal action which the opposition is represented by a attorney. This is exactly the point at which the Grievance Committee must intervene to assure that the attorney has not abused its inherent creditability with the Court and the attorneys understanding of procedure to deny the pro-se litigant access to the court. The impact of denying a complaint at this point is demonstrated in the May 18, 2010 letter from Mr. Huether³ regarding a second complaint filed. In this letter Mr. Huether dismisses my complaint and instructs me to obtain "a written judicial determination that this attorney engaged in professional misconduct, please feel free to notify this office and we will consider whether action is appropriate at that time." Isn't this the attorney Grievance Committee's responsibility? Realizing the credibility a Court provides and attorney in a proceeding, requesting a pro-se litigant to obtain a judicial ruling of misconduct is impossible. Again coupling this with the ex-parte communications between the Chief Attorney and the respondent attorney these actions discredit the entire process. Having an attorney act consistent with the rules of Professional Conduct is fundamental to the proper execution of the Judicial process and a complaint should not be dismissed because it questions attorneys actions in an ongoing proceeding. As such this reason should be removed from the screening process.

Starting with my July 4, 2012 letter to Judge Lippman requesting his assistants in resolving these issues with the Attorney Grievance Committees and continuing today as demonstrated above. I have sought to provide positive input based on my actual experiences with the attorney Grievance Committees of New York. I am concern that denying me direct personal input to this process, is in fact denying the citizens of New York a balanced quality review of the attorney Grievance Committees of New York. I feel that direct personal input is most important at this stage of drafting the final rules that will define the operations of the Attorney Grievance Committees of New York.

Regards,



Lawrence Frumusa

³ May 18, 2010 2012 letter and additional information demonstrating attorney misconduct submitted with September 3, 2015 comments.

Tuesday, December 15, 2015

John W. McConnell, Esq.,
Counsel, Office of Court Administration,
25 Beaver Street, 11th Fl.,
New York, New York 10004
rulecomments@nycourts.gov

Re: Follow up comments to Proposed Rules.

Dear Mr. McConnell,

I had the opportunity to re-review the final report of the Commission on Statewide Attorney Discipline. To my amazement, the exact point #1 I made in my response to you yesterday was a recommendation of the Commission's subcommittee on Uniformity and Fairness (see page 45 of the report attached here and highlighted). Why was this not incorporated into the proposed rules prior to your circulation for public comment?

Please provide the detail of the process used to incorporate the recommendations of the Commission on Statewide Attorney Discipline into the proposed rules and identify the "working group of senior staff of the Appellate Division" who generated the proposed rules.

Finally please advise on how I may be able to provide direct input to this process, to avoid any further disconnects in this very important step. I would ask for a response at your earliest convenience.

Regards,



Lawrence Frumusa

- Adopt a uniform rule which codifies a collateral estoppel procedure (see generally *Matter of Dunn*, 24 NY3d 699 [2015]), likely similar to the procedures employed in the felony/serious crime conviction process.
- Promulgate statewide policy reasons for rejecting complaints at the threshold stage of the screening process, and standardize the process to ensure that complainants are provided with the reason(s) for that determination.
- **Afford complainants the right to seek further review when the complaint is rejected upon initial screening, especially if rejection is permitted on authority of the Chief Attorney alone.**
- Because the decision to commence a formal proceeding exposes the attorney to the severest of consequences, the process should be uniform statewide to avoid disparate treatment among the Departments.
- Bring the process in the First Department into conformity with the remainder of the state by requiring complaints to be disposed of upon a majority vote of the full committee, and eliminating the use of “hearing panels” in formal disciplinary proceedings.
- Harmonize the rules of all Departments to make clear that the authority to commence a *sua sponte* investigation does not vest in the Chief Attorney alone, but requires the additional approval of either the full Committee or the Chair.

Wednesday, December 16, 2015

John W. McConnell, Esq.,
Counsel, Office of Court Administration,
25 Beaver Street, 11th Fl.,
New York, New York 10004
rulecomments@nycourts.gov

Re: Second follow up comments to proposed rules.

Dear Mr. McConnell,

As an additional follow up to my comments on item 3(a) of your proposed rules. Currently in the Fourth Department the Chief Attorney does not have sole authority to dismiss complaint upon initial screening, as per 22 CRR-NY 1022.19(d)(2) stated here in part:

“After an investigation of a complaint and consultation with the appropriate committee chairperson, the chief attorney or designated staff attorney may..”

Clearly the chief attorney is to consult with the chairperson on dismissal of complaints. The recommendation of the Committee on Statewide Attorney Discipline was not to increase the authority of the chief attorney as you have done in your proposed rules. Further, your providing a means for the complainant to request the chairperson to review the chief attorney's decision, effectively changes nothing except causing additional delays for the complainant. Additionally, you have eliminated the requirement for the chief attorney to first investigate the complaint. Clearly your draft was written to optimize the efforts required for a complaint to be dismissed and not to protect the citizens of New York.

I would request that we use the current definition as defined in 22 CRR-NY 1022.19(d)(2). Then as a path for further review, we provide the complainant an opportunity to request his/hers complaint be review by another New York State Attorney Grievance Department of their choosing. This process creates a favorable dynamic by providing a real means of review that will foster consistency across the four departments in New York. Further, it requires the chief attorney to perform a complete investigation and with the chairperson provide proper grounds for their decision to dismiss a complaint at the screening stage. Once the grounds for the decision are presented to the complainant, request for reviews to alternate departments should be minor.

I believe innovative solution such as above can be developed once we work together in a balance working group, I am awaiting your response to how we can accomplish this positive working environment.

Regards,



Lawrence Frumusa