



**NEW YORK STATE**  
**Unified Court System**

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS  
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL  
COUNSEL

**MEMORANDUM**

November 4, 2015

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Uniform Attorney Disciplinary Rules  
of the Appellate Division

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Public comment is requested on the Unified Court System's proposed Uniform Rules of the Appellate Division on Attorney Discipline (Exh. A). Those proposed rules present a harmonized approach to the attorney disciplinary process within the four Departments of the Appellate Division on a broad range of issues in disciplinary practice, including: definitions of "professional misconduct" and other pertinent terms; standards of jurisdiction and venue; appointment of committees and quorum requirements; conflicts and disqualifications of current and former committee members and staff; procedures for filing complaints; investigatory authority of the Committee chief attorneys; disclosure of complaints to attorneys; disposition of matters by the Chief Attorney, and by the Committee; mandatory disclosure requirements prior to adverse Committee action; Admonitions and Letters of Advisement; review of Committee dispositions; review of dismissals or decisions not to investigate; commencement and conduct of proceedings before the Appellate Division; discipline by consent of the parties; interim suspensions; attorney resignations; diversion to monitoring programs; discipline based on criminal convictions or misconduct in another jurisdiction; suspension for incapacity; conduct of disbarred or suspended attorneys; reinstatement procedures; confidentiality provisions and applications to unseal confidential records; abatement of proceedings; restitution; appointments of attorneys, in appropriate cases, to protect the interest of clients or other attorneys; and indemnification of volunteers in disciplinary programs.

If ultimately approved, the uniform rules would replace the separate court rules on disciplinary practice currently in place in each of the four Departments.

The proposed rules, 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, address many of the issues raised by various commentators on New York's disciplinary practices over the last two decades, and should be read in conjunction with the recent report and recommendations of the Chief Judge's Commission on Statewide Attorney Discipline (available at <http://www.nycourts.gov/rules/comments/PDF/AD-SWDiscCommittee.pdf>).

Persons wishing to comment on the proposed rules should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than 10:00 a.m. on December 18, 2015.**

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

**EXHIBIT A**

Proposed Uniform Disciplinary Rules of the Appellate Division  
[November 4, 2015]

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## 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).

##### (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 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) **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 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.

(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.

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.

5. Committee Counsel and Staff

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

6. Conflicts; Disqualifications from 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 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.

## 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 acting sua sponte.

(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, and materials previously provided to the Committee by the respondent.

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.

(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.

(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.

(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), 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. The Court shall permit or require such appearances as it deems necessary in each case.

(2) Statement of Disputed Facts. Within 20 days after service of the answer or, if applicable, a reply, 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 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;
- (3) gives the consent freely and voluntarily without coercion or duress; and
- (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. 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.

(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.

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 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).

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;

(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).

#### 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 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.

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, 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.1(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.

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

(1) If the Committee concludes that the crime in question is 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.

(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.

#### 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. 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.

(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 II.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. The Committee shall serve a copy of the order upon the respondent, a guardian appointed on behalf of the respondent or upon the director of the appropriate facility, as directed by the Court.

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

## 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.

(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.

## 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 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.

(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, of a declaration of competency or of the respondent's capacity to practice law; a completed questionnaire in a form approved by the Court; a copy of a letter to The Lawyers' Fund for Client Protection notifying the Fund that the application has been filed; and such other proofs as the Court may require. A copy of the complete application shall be served upon the Committee.

(c) Such application shall be granted by the Court upon showing by clear and convincing evidence that the respondent's disability 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.

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

(e) Waiver of Doctor-Patient Privilege Upon Application for Reinstatement. The filing of an application for reinstatement by a respondent suspended for incapacity shall be deemed to

constitute a waiver of any doctor-patient privilege existing between the respondent and any psychiatrist, psychologist, physician or hospital who or which has examined or treated the respondent during the period of disability. The respondent shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital by whom or at which the respondent has been examined or treated since the respondent's suspension, and the respondent shall furnish to the Court written consent to each to divulge such information and records as may be requested by court-appointed experts or by the Clerk of the Court.

(f) The necessary costs and disbursements of an agency, committee or appointed attorney in conducting a proceeding under this section shall be paid in accordance with 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 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, 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 a respondent on criminal charges, or a verdict, judgment, settlement or compromise in a civil litigation involving material allegations substantially similar to those at issue in the disciplinary matter, shall not require termination of a disciplinary investigation.

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

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 stating the non-disciplinary nature of the resignation.

(b) Reinstatement. An attorney who has resigned from the bar for non-disciplinary reasons may apply for reinstatement by filing with the Court an affidavit 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, 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.

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).