



NEW YORK STATE BAR ASSOCIATION

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November 9, 2015

John W. McConnell, Esq.
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Dear John:

I write in response to the Office of Court Administration’s request for comments on the report issued by the Commission on Statewide Attorney Discipline (COSAD), which report was sent to NYSBA by the Administrative Board of the New York courts. The report contains eleven recommendations designed to eliminate the disparities in the procedures and sanctions among the four Appellate Divisions who have independent jurisdiction over the discipline of lawyers in the four judicial departments, and to foster openness and consumer protection in the disciplinary process. The recommendations are set forth in the Executive Summary of the Report, which is attached to this memorandum.

We asked our Committee on Professional Discipline to review the report and prepare a report for consideration by our House of Delegates. At its meeting on November 7, 2015, the House approved the following comments with respect to the commission’s report. Our Association generally is in agreement with nine of the eleven recommendations, although some members of our Committee had comments on some of the proposals. Those comments are noted in this report. NYSBA opposes Recommendation (3), a compromise recommendation by COSAD to unseal the disciplinary proceedings upon application to the Court by a grievance committee and upon a finding by the Court that the attorney’s conduct places clients at significant risk, or presents an immediate threat to the public interest, and Recommendation (9), which recommends the appointment of a statewide coordinator of discipline.

As to the other recommendations, our members agree that the COSAD Report sets forth necessary and long overdue changes to the patchwork disciplinary system we currently have. Below are specific comments with respect to the COSAD recommendations.

Recommendation 1. – Adoption of Uniform Rules and Procedures

We are in full support of statewide, uniform rules for the disciplinary process.

We note that the recommendation includes most of the uniform discovery rules as contained in the Discovery Report written by our Committee, approved by our Executive Committee, and submitted by our President to COSAD. Among other things, our Discovery Report recommended depositions of witnesses upon order of the hearing referee in a disciplinary hearing. However, COSAD recommended that all disciplinary hearings be designated Special Proceedings (CPLR Article 4) where discovery is specifically upon application to the Court. (Three of the four judicial departments treat disciplinary proceedings as special proceedings.) A minority of members of the COSAD Subcommittee tasked with uniformity issues was in favor of full discovery as set forth in the NYSBA Discovery Report, believing that successful application to the Court was not as easily accomplished as application to a Referee.

Members of our Committee, who authored the NYSBA discovery recommendations strongly recommend that the proper application for deposition of a witness should be to the disciplinary hearing Referee, who is in a better position to make a knowledgeable and expeditious decision than the Court. Further, some of our members agreed with the COSAD minority, that discovery in Special Proceedings is rarely, if ever granted. We are unaware of any application to the Court for deposition of witnesses under Special Proceedings in those judicial departments where disciplinary proceedings are designated Special Proceedings. One of our members felt that since apparently no discovery depositions of witnesses take place under current rules, if deposition of witnesses is specifically addressed in new rules, even in the context of a Special Proceeding by application to the Court, there may be more opportunity and willingness to order depositions upon good cause than there is currently.

Recommendation 2. -- Adoption of Guidelines for Imposing Disciplinary Sanctions

We endorse the adoption of Standards for Imposing Discipline as guidelines in sanctioning attorneys, and believe that standards will promote uniformity of sanctions statewide. Currently, as the COSAD report states clearly, there is very little uniformity with respect to sanctions imposed upon respondents throughout the state, and the use of Standards as guidelines, will bring the four courts closer in their determinations in disciplinary matters. We note that the standards should be used as guides only, and not constitute mandatory dispositions. Use of standards in sanction will also foster ease and uniformity in plea bargaining in disciplinary cases throughout the state. (See discussion below with respect to Recommendation 7)

Recommendation 3. – Unsealing the Disciplinary Proceedings

NYSBA opposes this recommendation. The COSAD Report states that its compromise recommendation of allowing grievance committees to apply to the Court to unseal disciplinary proceedings upon a showing that the attorney's conduct places clients at significant risk, or presents an immediate threat to the public interest will effectively balance the competing interests of protecting the legal consumer contemplating retaining an attorney while ensuring that the reputations of innocent attorneys are not unjustly tarnished.

Our Association has grave reservations with respect to this recommendation. First, we do not believe that unsealing the disciplinary process, which is confidential under Judiciary Law Section 90(10), prior to a finding of misconduct by a Court is necessary to protect the public. Our members expressed concern that there was no detail or discussion in the COSAD Report with respect to who would have the authority to approve an application by the Grievance Committee i.e., Chief Counsel, full Committee, or two members of the Committee as is currently

done in the First Department. A second serious concern was what would be the standard of proof of significant risk or immediate threat. Finally, there was no significant discussion in the recommendation of disclosure of mental health or substance abuse problems which might be raised during the proceedings, and which would be damaging to an attorney respondent.

Some members of our Committee felt that rather than an early unsealing, an expedited proceeding for an attorney deemed to be a threat would ensure due process and protect the public interest. A specific comment reads, "In service of the public good, the legal profession has high standards of professional conduct, often higher than general societal norms (e.g., civility, advertising, client confidentiality, conflicts, client loyalty, etc.). Disciplinary enforcement improves the legal profession which serves the public good, sans publicity. Attorneys may run afoul of such standards without culpable mindset, without intent to cause harm to a client or the public, and without in fact causing harm to a client or the public. The full course of due process should come to a conclusion before a casting public doubt on an attorney's fitness to practice law."

We believe that these are serious concerns and must be addressed by any rule-making body charged with the drafting of uniform disciplinary rules.

Recommendation 4. -- Expansion of LAP Diversion Program

Three of the four judicial departments currently have programs to divert an attorney accused of minor misconduct to an assistance program where alcohol or substance abuse is a contributing factor to the misconduct. We strongly urge the implementation of diversion programs statewide, and the expansion of diversion to mental health problems or illness. We support the NYSBA Lawyers Assistance Committee proposal which was approved by our Executive Committee, submitted by NYSBA to COSAD, and forms the basis of COSAD's recommendation.

Recommendation 5. -- Administrative Suspension for Failure to Register

We strongly support COSAD's recommendation of an automatic "administrative" suspension for failure to timely register or pay registration fees. Currently the grievance and disciplinary committees are tasked with chasing down delinquent attorneys, many of whom are in other jurisdictions. In cases where notice has been attempted or given, and the attorney remains delinquent, the grievance committees must devote resources to a formal proceeding for a disciplinary suspension. We believe that there is a very real distinction between failure to pay registration fees and actual misconduct in the course of legal practice, and such a distinction is not recognized or noted on the OCA website where attorney sanctions are listed. Lateral consequences of such discipline, which must be reported and explained by attorneys seeking admission or appointments would be ameliorated with the "administrative" suspension, including automatic reinstatement upon registration without Court involvement.

Recommendation 6. -- Disciplinary Website

We support the recommendation that a statewide, consumer friendly, website be established by OCA, with telephone support for those consumers who may not have access to the internet.

Recommendation 7. -- Plea Bargaining in Disciplinary Cases

We support the recommendation that plea bargaining, or discipline upon consent, using standards for sanctions, be specifically permitted by the Courts. Currently there is no plea bargaining, or process for agreeing to short circuit the disciplinary hearing process even in cases where respondent admits misconduct. Further, the use of standards in such cases would promote uniformity of sanctions and would greatly assist the Court in determining whether to approve an agreement by the grievance committee and respondent. Such agreements with approval by the Court would greatly expedite many proceedings.

Recommendation 8. -- Court Referral of Prosecutorial Misconduct

Our Association generally approves the COSAD recommendation that Court decisions finding prosecutorial misconduct be mandated to refer those decisions to the appropriate grievance committee for determination, and that the grievance committees keep appropriate records with respect to the disposition of these referrals. However, we are concerned that a disciplinary referral in the case of inadvertent, or unintentional violation of law governing prosecutors, may be unnecessary, and even unjust. Some of our Committee members noted that in the context of criminal proceedings a finding of misconduct is not personally appealable by an individual prosecutor, and that consideration of this fact should be made in the context of a referral to a grievance committee.

Recommendation 9. -- Statewide Coordinator of Discipline

NYSBA opposes this recommendation. Appointment of a statewide coordinator is unnecessary as the Appellate Divisions are capable of maintaining and publishing statistics. Publication of a statewide annual report does not require the appointment of a coordinator. There is concern on the part of our membership that the appointment of a coordinator to encourage communication and consistency among the Departments represents an encroachment into the judicial powers of the Appellate Division.

Also, all grievance committees need more staff and more funding, and if uniform rules are adopted and uniform web pages offer the information which a coordinator would collect, there would be no need for such a position.

Recommendation 10. -- Establishment of Statewide Advisory Board on Attorney Discipline

We agree that OCA should implement as quickly as possible the appointment of members to a Statewide Advisory Board on Attorney Discipline to implement the COSAD recommendations, especially with respect to drafting uniform rules and standards throughout the state.

Recommendation 11. -- Increase Funding to Disciplinary Committees

Our Association is strongly in favor of increasing funding and staffing throughout the state. Our disciplinary and grievance committees are generally understaffed, and backlogs abound. Increasing funding for staff and support would assist in eliminating undue delay in the processing of disciplinary matters.

Despite some of the concerns noted in this report, our Association supports the COSAD proposals to unify and expedite the disciplinary process and revise the system to be more responsive to the legal consumer. The vast majority of the COSAD recommendations are long overdue, and we are encouraged that these proposals for reform emanate from the Court. Thank you for your attention and courtesies throughout this process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David P. Miranda". The signature is written in a cursive style with a large, stylized initial "D".

David P. Miranda

November 6, 2015

**COMMENTS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION
TASK FORCE ON PROFESSIONALISM REGARDING REPORT OF THE
COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE**

The Task Force on Professionalism (the “Task Force”)¹ of the New York County Lawyers Association met on October 6, 2015 and discussed the Report of the Commission on Statewide Attorney Discipline (COSAD Report). Most of the eleven recommendations would be improvements upon the current disciplinary system, and we support them. Our exceptions and other comments are set forth below.

1. The Task Force strongly supports adoption of uniform rules of attorney discipline statewide as set forth in Recommendation One. The widely divergent rules governing attorney discipline among the four appellate divisions lead to unfair processes and divergent outcomes, the most egregious of which are described in the COSAD Report. Thus, the recommendation of adoption of uniform procedural rules is a long overdue and welcome change.

As part of Recommendation One, COSAD stated that uniform rules of discovery, as submitted by the New York State Bar Association, should also be adopted. However, COSAD did not recommend, as did NYSBA, and as NYCLA testified at the August 11, 2015 COSAD hearing, that depositions of witnesses be included in the discovery rules. Rather, COSAD stated that disciplinary proceedings should be deemed Special Proceedings under CPLR Article 4, and that discovery requests should be made to the Court, as set forth in Article 4, rather than to a Hearing Referee, as recommended by both NYSBA and NYCLA. There are several reasons why this is less than optimal – 1) application to the Court may be time consuming while an application to a Referee would most likely be much more expeditious; 2) application to the Court is less

¹ The views expressed are those of the Task Force on Professionalism only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

likely to result in discovery being granted, as anecdotally, deposition discovery is rarely granted in Special Proceedings; and 3) applications to the trial court are generally not subject to sealing orders, *see* 22 NYCRR §216.1, and thus applications to the trial court may create tension with the sealing requirements of N.Y. Jud. Law § 90.

2. Recommendation Three of the COSAD Report recommends unsealing the disciplinary process upon the issuance of a court order, based on an application by a grievance committee, finding that the grievance committee has made a showing that the attorney's conduct places clients at significant risk, or presents an immediate threat to the public. The Task Force does not support this recommendation as we believe that the public interest will not be better served by making public the disciplinary hearing, or the existence of disciplinary proceedings, prior to a Court determination that misconduct has occurred. There are significant problems with opening the hearing at an earlier stage, including exposure of personal information which might be offered in mitigation, such as mental illness, family concerns or other similar information. The rationale that opening the hearing will allow the legal consumer to know that an attorney has been accused of misconduct, and therefore will not unwittingly hire that attorney, does not withstand scrutiny. There is no evidence that a significant number of legal consumers have hired attorneys who are accused of misconduct; therefore, opening the process would not necessarily reduce that possibility. Besides, where the alleged harm is egregious and the perceived risk to the public imminent, the grievance committee often will request an interim suspension which, when granted, will make the proceedings public.
3. Recommendation 8 of the COSAD Report suggested that because the perceived failure of the disciplinary system to charge criminal prosecutors with misconduct was a very large component of the COSAD public hearings, courts should more readily refer prosecutorial misconduct cases to the relevant grievance committees directly, and the grievance committees should keep statistics and records of prosecutorial misconduct cases. In general, the recommendations are a good step forward. There are some clarifications that would assist and some additional recommendations.

First, the Report should clarify what it means by prosecutorial misconduct in this context. It should cover not only “dishonesty,” as the Report states, but also any violation of the Rules of Professional Conduct by a prosecutor where “knowingly” or “intentionally” are the required *mens rea*. Thus, a prosecutor who contacts a party he knows to be represented by counsel violates Rule 4.2, and should be reported. This may not be what the Commission contemplated as “dishonest,” and the use of that concept remains unclear. We understand and agree that merely negligent conduct would not fall into the contemplated category of referrals, but with respect to discovery violations, Rule 3.8(b) does not make a distinction.

Second, the statistical summary concept is important. It should be by Department with types of violations, not solely aggregate numbers. There should also be some data by type of alleged violation to determine whether similar violations are treated similarly.

We support reporting of any sanction, even private sanctions, as long as the information is sufficiently redacted to eliminate identification of the prosecutor respondent.

As noted above, we support the remainder of the recommendations as contained in the COSAD report.



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2015 – 2016

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November 9, 2015

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Dear Mr. McConnell:

I am the Chair of the ABA Standing Committee on Professional Discipline (Discipline Committee). The Discipline Committee recently reviewed the Report of the Commission on Statewide Attorney Discipline, including the written submission from then ABA Standing Committee on Professional Discipline Member (now Special Advisor to the Discipline Committee) Nancy Cohen and Center for Professional Responsibility Deputy Director Ellyn S. Rosen. The Discipline Committee appreciates not only the Commission's inclusion of that letter as an appendix to its Report to Chief Judge Lippman, but also its discussion of ABA disciplinary policies in the context of the subjects under Commission review.

The work that the Commission accomplished within a compressed timeframe and the transparency with which it has conducted itself are laudable. The Committee members understand the substantive and political complexity of the task with which the Commission was charged, and, given the size and diversity of the group, that some compromise on recommendations would be necessary.

The Discipline Committee commends the Commission for highlighting the previous attempts at meaningful change to the system, including the Discipline Committee's 1982 Consultation Report, and for recognizing that, despite those efforts, the system remains ripe for reform. While the Discipline Committee agrees with many of the Commission's recommendations for improvement, and appreciates those that are consistent with ABA policy (e.g., a statewide diversion program, enhanced resources for disciplinary counsel, and the adoption of guidelines modeled after the ABA Standards for Imposing Lawyer Sanctions), it respectfully suggests that in other respects the Commission should have gone and still could go further. The Discipline Committee recognizes that in many ways the recommendations in the Report represent what the Commission views as possible reforms that are achievable in the near future, versus what might be desirable if it were working from a blank slate. However, that the Commission and Court are not operating from a blank slate does not, in the Committee's view, mean that deeper structural reforms should be taken off the table for continued consideration and action.

That the Commission has urged as a priority the development and adoption of statewide uniform rules and procedures governing disciplinary matters is, in the Discipline Committee's view, an excellent and necessary first step. As Ms. Cohen and Ms. Rosen noted, "lawyers should be treated the same by the system no matter where their office is located or where the alleged misconduct occurs. Complainants and the public should also not be subject to disparate treatment and standards depending on which Department is handling a matter."

The Discipline Committee queries, however, whether the Commission, Court of Appeals, and Administrative Board of the Court would consider going further and creating a standing entity that includes public membership, that could work separately, but in consultation with the proposed new Statewide Coordinator of Attorney Discipline, to study how to merge in the future the decentralized New York system into a unitary agency. The creation and adoption of uniform statewide rules and procedures can facilitate such future move toward a unitary agency. This is a structure that the Discipline Committee has found through its discipline system consultations and state adoption of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE) to be optimal in terms of resource utilization, effectiveness, efficiency, and consistency. Concerns with the decentralized structure have arisen time and again throughout the history of New York's system. Without detracting from the reforms recommended by this Commission, the Discipline Committee believes, as it did in 1982, that the retention of the departmental structure remains a primary impediment to New York being able to hold itself out to the public as having an exemplary disciplinary system.

The Discipline Committee also urges the Court of Appeals to consider adopting the recommendation of the Commission Subcommittee on Transparency and Access and open disciplinary proceedings to the public after a finding of probable cause and the filing and service of formal charges. This would be consistent with Model Rule for Lawyer Disciplinary Enforcement (MRLDE) 16. The Subcommittee recommended a delay of 30 days from the service of formal charges to allow a respondent time to show cause why the record or any portions of it should not be open to the public. MRLDE 16 does provide for the issuance of protective orders to keep confidential, upon good cause shown, the disclosure of specific information.

The Discipline Committee suggests that the compromise position adopted by the Commission offers little change from the status quo while creating additional and, in the Committee's opinion, unnecessary work for disciplinary committees and the Court. The creation of an additional process requiring a disciplinary committee to request that a matter be made public, and the Court to find that the respondent lawyer's conduct places clients at significant risk or presents an immediate threat to the public interest before doing so, seems to create opportunity for further delay rather than enhanced efficiency.

A showpiece of our nation's justice system is transparency. That the public cannot attend hearings on formal disciplinary charges or view the pleadings in those matters until after the proceedings are completed and a public sanction imposed runs contrary to how matters are conducted throughout the rest of our justice system. ABA policy has long

struck the right balance, consistent with such transparency. As highlighted by Ms. Cohen and Ms. Rosen, what the 1992 Report of the ABA Commission on Evaluation of Disciplinary Enforcement (the McKay Commission) provided remains true today, “[S]ecret records and secret proceedings create public suspicion regardless of how fair the system actually is.”¹

Under the confidentiality provisions for disciplinary proceedings set forth in longstanding ABA policy, lawyers are protected from public airing of unfounded charges because the investigation is confidential. Public access occurs only after a finding of probable cause that the lawyer has committed the violation of the rules of professional conduct and service of formal charges. Such probable cause finding is based upon a thorough and complete investigation by professional disciplinary counsel, with the respondent lawyer having been afforded the opportunity to respond to the allegations (MRLDE 11B(2)). As noted by Ms. Cohen and Ms. Rosen in their letter, and exemplified by the news reports they appended, the fears of the bar that opening proceedings would result in unjust reputational harm to lawyers have consistently proven unfounded.

The Discipline Committee understands that implementing the Subcommittee’s recommendation would entail legislative involvement. However, the Discipline Committee believes that, despite any challenges in that regard, the Subcommittee’s recommendation is highly worthy of pursuit.

Finally, the recommendation of the Commission for development and adoption of a statewide diversion rule is highly commendable. Ms. Rosen and Ms. Cohen’s letter discusses in some detail how and why diversion of a matter from the disciplinary system is appropriate to address limited instances of lesser misconduct where the lawyer’s behavior is remediable and there is little danger of recidivism if a lawyer successfully completes the diversion program. Consistent with their experience, the Discipline Committee believes that an optimal disciplinary and disability system should include diversion/alternatives to discipline programs that are not just limited to instances involving alcohol, substance abuse and mental health issues. Law practice management issues should also be covered by a diversion program, as would be consistent with national practice and ABA policy.² For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

The Commission’s Report asks what such a rule might look like, and notes that the New York City Bar submitted a proposed rule with its August 28, 2015 letter to the Commission that is a good starting point. To assist the Court and Administrative Board in developing a rule, the Discipline Committee suggests that the following components be included:

- 1) In matters involving lesser misconduct, prior to the filing of formal charges, the disciplinary counsel may refer a lawyer to the Alternatives to Discipline Program.

¹ *McKay Report* at 38.

² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.11G.

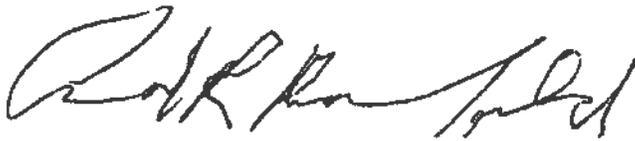
Lesser misconduct is conduct that does not warrant a sanction restricting the lawyer's license to practice law. Acts involving the misappropriation of funds; conduct causing, or likely to cause, substantial prejudice to clients or others; criminal conduct; and conduct involving dishonesty, fraud, deceit or misrepresentation are not minor misconduct;

- 2) The complainant, if any, should be notified of the referral and should have a reasonable opportunity to submit new information about the respondent. This information should be made part of the record;
- 3) Disciplinary counsel should consider the following factors in deciding whether to refer a lawyer to the program:
 - (1) whether the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for the alleged misconduct is likely to be no more severe than reprimand or censure;
 - (2) whether participation in the program will likely benefit the lawyer and accomplish the program's goals;
 - (3) whether aggravating and mitigating factors exist; and
 - (4) whether diversion has already been tried;
- 4) Disciplinary counsel and the respondent should negotiate a contract, the terms of which should be tailored to the unique circumstances of each case. The agreement should be signed by disciplinary counsel and the lawyer, should set forth with specificity the terms and conditions of the plan, and should provide for oversight of fulfillment of the agreement, including the reporting of any alleged breach to disciplinary counsel. A practice and/or recovery monitor should be identified where necessary, and the monitor's duties set forth in the contract. If a recovery monitor is assigned, the contract should include the lawyer's waiver of confidentiality so that necessary disclosures may be made to disciplinary counsel. The contract should include a specific acknowledgment that a material violation of a term of the contract renders voidable the lawyer's participation in the program for the original charge(s) filed. The contract should be amendable upon agreement of the lawyer and disciplinary counsel. The agreement should also provide that the respondent pay all costs incurred in connection with the contract;
- 5) The lawyer should have the right not to participate in the program. If he or she chooses not to participate, the matter should proceed as if no referral had been made. While a respondent should suffer no adverse consequences for refusing to participate, that refusal is a factor that may be considered by disciplinary counsel in determining whether to recommend the filing of formal charges. Disciplinary counsel may recommend formal charges even if the original grievance alleged lesser misconduct, and also retains the discretion to dismiss the complaint;
- 6) After an agreement is reached, the complaint should be held in abeyance pending successful completion of the terms of the contract;

- 7) The contract should be terminated automatically upon successful completion of its terms and the complaint dismissed. This constitutes a bar to further disciplinary proceedings based upon the same allegations; and
- 8) A material breach of the contract terminates the lawyer's participation in the program and disciplinary proceedings may be resumed or reinstated.

The Discipline Committee hopes that the Commission, Court and Administrative Board find these comments helpful, and would be happy to provide further input should the Chief Judge so desire.

Sincerely,



Arnold R. Rosenfeld, Chair
ABA Standing Committee on Professional Discipline

cc: Standing Committee on Professional Discipline
Arthur H. Garwin, Director
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**To: John W. McConnell, Esq.
Counsel, Office of Court Administration**

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

**Re: Report and recommendations of the Chief Judge's Commission
on Statewide Attorney Discipline**

Date: November 9, 2015

The Committee on Professional Standards, Appellate Division, Third Department, respectfully submits the following comments with respect to the report and recommendations of the Chief Judge's Commission on Statewide Attorney Discipline dated September 2015.

The Committee agrees with so much of the conclusion of the subcommittee on Uniformity and Fairness that a new statewide disciplinary system is unnecessary. However, the Committee disagrees with the "uniformities" which are suggested to be adopted across the four Appellate Divisions.

The Committee has not seen any evidence that the current procedure for handling complaints concerning attorneys either discourages complainants from submitting complaints or is procedurally or substantively unfair to the attorneys who are the subject of those complaints.

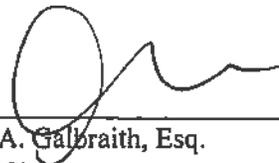
In this State we have the Judiciary Law which regulates the conduct of attorneys across the State and the Rules of Professional Conduct have been promulgated as joint rules of the Appellate Divisions. Within that structure each of the Appellate Divisions has developed a somewhat different procedure for implementing the Judiciary Law and the Rules of Professional Conduct in respect to attorney discipline.

The Committee see this as analogous to the relationship between the Federal Constitution and the laws of the various states. The Federal Constitution and Bill of Rights prescribe a minimum level of due process which must be observed by state and local governments throughout this country. However, based upon regional attitudes and traditions not all state laws are procedurally or substantively identical. For example, some states employ the death penalty in the case of convictions for murder while others do not. Gun control laws in Arizona are different from those in Illinois. New York has adopted a stricter standard for probable cause for search and seizure than that required by the United States Supreme Court.

Therefore, the Committee suggests that "professional misconduct" may legitimately be interpreted differently in each of the four judicial departments so long as the interpretation does not conflict with either the Judiciary Law or the Rules of Professional Conduct. In the experience of the members of the Committee on Professional Standards, the attitudes and traditions of those who practice law in Ithaca differ in many ways from those who practice law in the Bronx. For the same reason it does not shock the Committee that the range of sanctions which may be imposed in one locale may differ from those in another.

Within the strictures of the Judiciary Law and the Rules of Professional Conduct it is the Committee's opinion that each of the departments of the Appellate Division should be free to adopt procedural rules for attorney discipline and impose such discipline at levels deemed appropriate based upon what has been the accepted practice within each of the departments.

Respectfully Submitted,



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October 19, 2015

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Dear Mr. McConnell:

I am commenting on the report of the Commission on Statewide Attorney Discipline. I was a member of the Commission. In addition, my study, "Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public," is cited in the Commission's report at footnote 33.

The attorney discipline system in New York fails to protect the public. It is in need of serious repair. Here, I want to stress four ways to improve it. None is in the Commission's report. The Commission was composed almost exclusively of lawyers and judges. It is understandable and no criticism to say that it was disposed to define issues and balance interests from the bar's perspective. This is human nature. It is, after all, why we have conflict of interest rules. The court is in a different position.

TRANSPARENCY

While section 90 of the judiciary law makes disciplinary matters secret until a court orders a public sanction, section 90, paragraph 10, gives the Appellate Divisions authority to make exceptions "upon good cause being shown." It provides:

Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in

the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records. (Emphasis added.)

On at least one occasion, a court has lifted the veil of secrecy in a specific matter, using the authority in the second sentence of this paragraph. In re The New York News, Inc., 113 A.D.2d 92 (1st Dep't 1985). The underscored (fourth) sentence permits the four Departments to make a rule that is not specific to a particular matter but applies to all matters that the rule describes. I urge the court to do just that under the following circumstances.

Charges against a lawyer on a finding of probable cause will lead to a hearing. Some charges will cite violation of a professional conduct rule that is intended to protect clients specifically. Three obvious examples are a charge that a lawyer has converted escrow funds or property, a charge of neglect of client matters, and a charge of lying to clients. I urge the court to use its authority in the underscored sentence to lift secrecy whenever there is probable cause, warranting a hearing, to find that a lawyer has violated a rule intended to protect clients.

Imagine a conscientious person investigating the discipline history of a lawyer she might retain. She finds no record of public discipline. What she doesn't know and today cannot know is that the lawyer she is considering has been charged with theft of escrow money or serious neglect. That is surely a factor she would wish to consider in selecting a lawyer. But the discipline process is slow, too slow, as discussed below. Even at its most efficient, it will not be speedy. Resolution of the charge can take a year or more, too late for the prospective client. The transgression may be one likely to result in suspension or disbarment, but meanwhile (because interim suspension authority is used spottily), the lawyer will continue to practice. Prospective clients should be able to learn about these pending charges.

The Commission, informed by the ABA, acknowledges that forty American jurisdictions end all secrecy, for any charge, on a finding of probable cause. My recommendation is more modest. End secrecy when there is probable cause to find violation of a duty to a client.

What reason is there to maintain secrecy even then? At the Commission, and in the broader professional debate about secrecy, the justification offered is that the lawyer may eventually be exonerated. Meanwhile, the existence of the charge will have become public and hurt the lawyer's practice. So the balance is struck in favor of the lawyer.

I think this balance is wrong generally but especially when the misconduct alleged is harm to a client. Further, even if we were to balance the interests of prospective clients against those of the lawyer who may eventually be exonerated, I would think that we would want to know how many lawyers are exonerated after a hearing. What is the probability of exoneration? The Commission was never told. Maybe the number is not readily available. But we were told that the number is very low, that nearly all lawyers against whom formal charges have been filed

are not exonerated. So to protect a very small number of lawyers, we deny prospective clients critical information that would reasonably influence their selection of counsel.

Furthermore, testimony from ABA witnesses told us, based on their experience, that the practices of exonerated lawyers do not suffer from disclosure of a pending matter that is then dismissed. The Commission's contrary view is based on no investigation.

At pages 71-72 of its report, the Commission recommends a different remedy. It is to give the disciplinary committees authority to ask the court to make a proceeding public "upon a finding by the Court that the attorney's conduct places clients at significant risk or presents an immediate threat to the public interest."

This remedy is grossly inadequate for two reasons. First, the committees have that authority right now. Just as newspapers successfully moved for openness in *In re The New York News, supra*, the committees can also move under section 90, paragraph 10, for an order that the court is today empowered to make. It cannot be that newspapers (acting for the public) have this standing but the committees, charged with protecting the same public, do not. So the Commission's recommendation adds nothing.

Worse, the recommendation appears actually to *narrow* the ability of the courts to protect clients. Today, a court can lift secrecy on a finding of "good cause." The Commission's recommendation would require more – i.e., a finding "that the attorney's conduct places clients at significant risk or presents an immediate threat to the public interest." The recommendation actually makes things worse for clients. It reduces transparency. Furthermore, if indeed there is a "significant risk" to clients or an "immediate threat to the public interest," merely lifting secrecy is entirely inadequate. Interim suspension, already permitted, should be the immediate response.

UNIFORMITY

My research revealed that sanctions varied significantly among the four Departments. The Commission was unwilling to reach this conclusion, finding instead that there is a *risk* of disparity. I think significant disparity is incontrovertible. The Commission did no empirical work to support its different conclusion. Of course, no one expects identity of outcomes. Uniformity, however, should be a goal toward which we work. Today, the system is structured to produce substantial disparity, which is what we have.

I was able to study only public discipline, but we must assume disparity for non-public discipline as well because the disciplinary committees operate independently and their work is secret. Of course, the Appellate Divisions, with access to the files, can authorize a study of uniformity in private discipline in the state.

New York is the only state that administers discipline at the intermediate appellate court level. A move to a statewide body can be accomplished *without* amending section 90 of the

Judiciary Law and the State Constitution, but there may be little appetite for doing so. (I would be happy to explain how it could be done if the court is interested.) With decentralized discipline, disparity is not only likely, it is a fact.

The Commission recommends adoption of statewide sanctioning standards as a way to reduce the "risk" of disparity. The ABA promulgated (and then amended) its sanctioning standards after many years of study of what states actually do. California has its own standards. Many states cite to the ABA standards. Standards define both misconduct warranting a sanction and the effect of mitigating and aggravating circumstances. The Appellate Divisions have cited the ABA standards just six times since 1993, three times in each of the First and Third Departments. There are no published standards in New York.

Sanctioning standards are a good start but inadequate by themselves to reduce the disparity. Courts must consult, implement, and cite the standards in fact. Court opinions should explain their sanctions in light of the standards. In addition, even without sanctioning standards, court opinions should cite relevant decisions of other Departments describing similar conduct. And an opinion should harmonize its sanction with the sanctions in the same court's prior decisions.

The statewide coordinator that the Commission recommends should, as part of an annual report, aggregate dispositions from all four Departments and address the goal of uniformity. (The Commission writes that the Administrative Board should define the coordinator's "precise powers and functions." Here and below, I recommend several "functions" the coordinator should have.)

Separately, the disciplinary committees (not only the courts) must be tasked to use the sanctioning standards in identifying appropriate private discipline. This will advance consistency among the committees. I don't think anyone has any idea of the level of disparity among the committees. Every committee should be required to publish an annual report (on line) summarizing the cases of private discipline and the sanctions, referencing the sanctioning standards. This disclosure should identify not only the misconduct with as much detail as possible consistent with section 90, but also the mitigating and aggravating circumstances. Only with more disclosure can the work of the committees that does not lead to formal charges be evaluated. The committees' annual reports should also provide aging statistics for the matters, as discussed below.

The state coordinator should implement these requirements. The coordinator should include an analysis in his or her annual report of accomplishments in achieving uniformity and where more work is needed.

In short, today, lawyers in the Bronx, Brooklyn, Buffalo, and Albany can be treated differently for the same misconduct and the same aggravating and mitigating circumstances. This

is not a theory. It is, I suggest, incontrovertibly true. It is also unacceptable. We are one state with one bar.

EFFICIENCY

Disciplinary proceedings take an unconscionably long time to conclude. This hurts the public (especially given New York's secrecy rules) and it hurts lawyers, who may find it hard to change firms or renew malpractice policies during long delays. My research revealed lengthy delays that could not be explained by any complexity in the underlying matter. The data the Commission discloses at page 51 of its report should eliminate any doubt about the problem of delay.

Furthermore, the four Departments are inconsistent in whether their opinions include the data needed to evaluate efficiencies. The First Department usually provides some (but not all) data but the other Departments do so only occasionally or rarely. Every public disciplinary opinion should identify: (a) when the underlying conduct occurred; (b) when that conduct came to the attention of the disciplinary committee; (c) when charges were filed; (d) the dates of any hearings; (e) the date of the hearing committee's recommendation; (f) the date the case was filed in court; and (g) the date of the decision. The statewide coordinator should aggregate this information and provide charts disclosing the aging statistics in his or her annual report.

Annual summaries of complaints ending in private discipline should contain the information in paragraphs (a) and (b) and the date that the sanction was imposed. Again, the statewide coordinator should aggregate this data in his or her annual report.

Only with these aging statistics can the quality and efficiency of the attorney discipline system in New York be fairly evaluated.

PUBLIC EDUCATION

The Commission recommends easier access to data that is now available from OCA. But it does not offer the public *more* information. At the very least, lawyers should be required to tell prospective clients how to learn the information about lawyers that OCA now makes available on line, including disciplinary history.* How might this be done?

* Until last year, the OCA database of lawyers did not reveal a lawyer's serious public discipline. So a lawyer who had been suspended then reinstated would simply be listed as "currently registered."

Putting the information in the required Statement of Client's Rights is inadequate by itself. Those statements are placed in the reception areas of law offices, usually on a wall. But clients may never visit a lawyer's office. Even when they do, they may not have the opportunity while awaiting an appointment to locate and read the statement or to recall its contents. The rule should mandate that the statement of rights be given to the client in hardcopy or electronically before the lawyer is hired. That is true today for matrimonial clients. The same information ought to be required in the written letter of engagement that New York lawyers are currently required to provide to most clients.

Even these solutions have limited value because clients may not receive or read the statement of rights and written fee agreement until they have already retained a lawyer. They certainly will not have received this information while searching for a lawyer. So a third way to ensure early notice of whatever information OCA provides, including a lawyer's disciplinary history, is to require all law firm websites *conspicuously* to include identification of the courts' website and instructions on how to access it. Perhaps: "Information about any New York lawyer including his or her disciplinary history can be found at _____."

CONCLUSION

New York should be a leader in protecting the public from the misconduct of lawyers. Today and for far too long, it has been a laggard. There is opportunity now to change that.

Sincerely,



Stephen Gillers

SG:sg

NASSAU COUNTY BAR ASSOCIATION



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

Carolyn Reinach Wolf, Chair
Marian C. Rice

November 10, 2015

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REPORT OF THE NCBA TASK FORCE ON UNIFORM LAWYER DISCIPLINE

Introduction

Steven Eisman, President of the Nassau County Bar Association (NCBA), appointed a Task Force to review and report to the Executive Committee and Board of Directors with respect to the recommendations of the NYS Commission on Statewide Attorney Discipline (“COSAD”) appointed by Chief Judge Jonathan Lippman in March 2015. COSAD had been charged with making recommendations to enhance the effectiveness of the system. In exercising its charge, COSAD held three public hearings and received oral and written testimony from a number of interested parties. On September 24, 2015, COSAD issued its report entitled “Enhancing Fairness and Consistency - Fostering Efficiency and Transparency” (the “Report”) containing recommendations for a number of significant changes.

The Office of Court Administration issued a request for comments on the Report due no later than November 9, 2015. At the request of Executive Director Keith Soressi, the comment deadline was extended until November 11, 2015 in order to allow review by the NCBA Board of this Task Force’s comments. Any resolution by the Board must be communicated to OCA no later than November 11, 2015.

The Task Force met and reviewed the significant materials accompanying the COSAD Report, together with prior positions taken by various bar associations, scholars and practitioners on topics related to the subjects reviewed by COSAD. President Eisman also sent two communications to the membership providing a link to the COSAD Report and requesting comment from NCBA members. Comments received from the membership have been incorporated into this summary.

For the reasons set forth herein, the Task Force expresses its support or conditional support for eight of the recommendations made by the Commission (1, 4, 6, 7, 8, 10, 11) and urges rejection of three recommendations (2, 3, 9). The Task Force Report was adopted by unanimous vote of the NCBA Board of Directors on November 10, 2015.

The Commission’s Recommendations and the Task Force’s Response

The eleven recommendations made by COSAD are set forth in the Executive Summary in the Report, a copy of which is annexed as Appendix 1. The Report in its entirety may be accessed at <https://www.nycourts.gov/attorneys/discipline/Documents/AttyDiscFINAL9-24.pdf>. The Task Force’s comments on each of the recommendations are separately stated below each COSAD recommendation. The overarching purpose of the recommendations, according to COSAD, is to (1) ensure consistency in the disciplinary process; (2) encourage uniformity in the imposition of sanctions; (3) reduce the time frame in which a complaint is adjudicated; and (4) increasing transparency of the process for the public and, presumably, the profession. The goals articulated by COSAD are laudable and it is clear significant thought and effort went into the development of the Report. Many of the recommendations are clearly necessary and address issues in the current system that need significant overhaul and we thank COSAD for undertaking

this herculean task. Nevertheless, the Task Force believes that some of the recommendations are misguided or do not adequately address the issue.

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

The Task Force whole-heartedly recommends the adoption of uniform procedural rules for attorney discipline process in each of the four Appellate Divisions. The divergent procedural paths presently existing do not advance the goals of fairness and consistency.

It is critical that the adoption of consistent state-wide procedural rules include detailed discovery procedures. New York is only one of six jurisdictions that allow attorneys who are the subject of a complaint little to no discovery (depending on the Department). The Task Force believes that allowing attorney-respondents discovery will result in the improvement of the accuracy and balance of the fact-finding upon which disciplinary decisions are based. The public interest in the enforcement of the attorney disciplinary rules is only aided by more accurate, more balanced fact-finding process.

In a thorough and thoughtful report submitted by NYSBA President David Miranda to the Office of Court Administration last summer, five fundamental suggestions as to the respondent attorney's discovery rights were made including:

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.

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.

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

The NYSBA recommendations still fall far short of what most states provide respondent-attorneys as of right and require less disclosure than that specified by the ABA Model Rules for Lawyer Disciplinary Enforcement. The majority of states authorize discovery pursuant to state rules of civil procedure, and subpoena power is available in aid of rule-authorized discovery. The Task Force believes the NYSBA recommendations are a starting point for the discussion on expanding the discovery rights of respondent attorneys in disciplinary proceedings.

As to disclosure reforms, the COSAD Report endorsed:

1. Reciprocal disclosure of all prior statements of witnesses, including experts, and
2. Disclosure to the respondent of all statements submitted by the complainant or other source which forms the basis for an investigation, all statements obtained from the respondent during the course of the investigation, and any exculpatory evidence (excluding staff counsel work product).

COSAD did not endorse the respondent attorney's ability to seek from the presiding referee the right to depose witnesses in advance of a hearing. The COSAD consensus was that disciplinary proceeding should proceed as a "special proceeding" under Article 4 of the CPLR – as is the case in three out of the four Departments. In a special proceeding either side could make application to the court for discovery. Having to address discovery/deposition requests to the court is unwieldy and will further delay in these already protracted proceedings. The hearing referee is in a better position to make a knowledgeable and expeditious decision and should have the authority to rule on deposition and other discovery requests.

The Task Force firmly believes that the five fundamental discovery rights recommended by NYSBA should be adopted in their entirety in the interests of due process and as a base for future discussion with the ultimate goal of approximating the discovery rights already in place for attorneys in the majority of other states.

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

The 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 the recommendation to adopt guidelines modeled after the ABA Standards for Imposing Lawyer Sanctions¹ *provided* the guidelines are adopted solely as advisory 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.

On this subject, opposition has been voiced with respect to the mandatory felony disbarment rule codified at Judiciary Law § 90(4)(a) and (e) which mandates the disbarment of an attorney upon conviction of a felony. There are no exceptions to this rule. The opinion has been voiced that uniform application of this rule without consideration of the facts presented or the attorney's right to appeal is barbaric. Putting aside the due process considerations, it was noted that inflexible application of the rule upon conviction has the unhealthy effect of causing attorneys charged with felonies to plea to misdemeanors out of fear that a felony conviction – even if not warranted – would end their career. It is reported that this concern is not unnoticed by prosecutors and can harden the stance on plea negotiations.

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

The Task Force rejects this recommendation in COSAD's report.

In the first instance, we do not believe that the unsealing of the record in a disciplinary proceeding prior to a finding of misconduct is necessary to protect the public. However, the likelihood of destroying the future career prospects of an attorney in the event of such disclosure is real and unwarranted. It is the Task Force's suggestion that the public's interest is best served by streamlining the disciplinary process so as to obviate the reported extended delays in bringing complaints to conclusion.

Second, Judiciary Law § 90(10) provides that “any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential.” The statute further provides a mechanism under which the justices of the Appellate Division “are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents.” COSAD's recommendation that a court rule be enacted permitting disclosure under circumstances less stringent runs contra to the precise terms of existing law than the existing law.

Third, the profession is finally coming to grips with the devastating effects of addiction and mental health issues that have impaired otherwise qualified and worthy attorneys. Unsealing

¹ A complete copy of 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.

records of attorneys actively participating in sincere rehabilitative efforts would destroy the effect of these laudable programs.

Along these lines, NCBA membership raised the concern that in these days ruled by the wealth of information available on the internet, imposition of public censure as a “mild” remedy should be reassessed. In years gone by, the imposition of the formal discipline of censure was mailed to the respondent and appeared as a reported decision in the New York Law Journal on one day. In light of the availability of the internet to virtually all and the Chief Judge’s decision to publish all forms of sanction on the Attorney Directory website, the sanction now follows the attorney throughout his or her career. The long term ramifications of public censure now may no longer be suited to the conduct being redressed and consideration should be given to referrals back to the disciplinary authority for private sanction rather than the public censure that will follow the attorney for the rest of his or her career.

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

The NCBA has a long and rich history of supporting alternatives to 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. For lawyers, 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 often traced to alcohol, drug abuse, gambling, economic pressures, mental illness, marital, professional and medical problems.²

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. We need to address the problems of our lawyers in need. 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.

The Second, Third and Fourth Department currently implement Diversion Rules originally modeled on a proposed rule developed by the New York State Lawyer Assistance Trust. Although applied differently, the general purpose allows the respondent attorney who can demonstrate a causal connection between misconduct and an alcohol/drug problem, to be diverted into a monitoring program sponsored by a Lawyer Assistance Program as an alternative to traditional discipline. If the respondent attorney successfully completes the monitoring program, the underlying disciplinary matters may be dismissed by the Appellate Division. Should the respondent attorney fail to comply with the conditions of the monitoring program, the

² 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>.

Disciplinary Committee is notified immediately and continued monitoring with a more restrictive plan may be required or traditional discipline proceedings resumed.

The Task Force believes the current Diversion Rules do not adequately address the needs of our profession or advance the interests of the clients. The New York City Bar and NYSBA have drafted a proposed Uniform Diversion Rule which expands the much needed diversionary option to attorneys suffering from mental health issues, in addition to debilitating addictions. The practice of law is stressful. Statistics demonstrate lawyers suffer from significantly higher rates of depression than the general population.³ The Task Forces urges that the proposed Uniform Diversion Rule, found at Appendix 2, be adopted in all four Departments.

A comment was raised by the NCBA membership to the effect that the inclusion of “serious misconduct” as a factor in determining the applicability of diversion negates the purpose of the Rule and may result in inequitable application. Under the current Rule in some Departments, any allegation involving escrow accounts summarily disqualifies the respondent attorney from participation in diversion programs. Attorneys suffering from depression make bad decisions – that the decisions may involve escrow accounts as opposed to sacrificing the rights of their client in court - should not be treated differently when the root cause of the bad decision-making is the same.

The Task Force also notes 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 We suggest that in many cases, the failure to timely respond is caused not by a disregard for the disciplinary process but from psychological 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.

³ A study by Johns Hopkins University found that among more than 100 occupations studied, lawyers were three times more likely to suffer from depression than any other profession. Ted David, *Can Lawyers Learn to Be Happy?*, 57 No. 4 Prac. Law 29 (2011).

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 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.”).

The Task Force proposes 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.

Providing attorneys with the opportunity to rehabilitate is not only paramount for the lawyer, but also benefits the profession and the public. Adopting a Unified Diversion Rule would send a vital message that the profession is ready to address and remedy the problems that most frequently result in client complaints, lawyer misconduct and disciplinary proceedings.

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

The Task Force urges the adoption of COSAD's recommendation that the court rules be amended to allow for the administrative suspension of attorneys who fail to timely register or pay the registration. The Task Force further believes that reinstatement of the attorneys should be automatic – without the involvement of the court system – once the delinquent filing and fees have been paid.

We believe that the time of staff attorneys is wasted chasing down delinquent attorneys. We recognize that there is a real difference between lawyer misconduct and administrative delinquency. Staff attorney time should be freed to concentrate on the latter. This is particularly true going forward as the proposed Rules contemplated will require staff attorneys to interact more with the respondent attorneys and their counsel.

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

The Task Force supports the development of a user friendly website which addresses not only the remedies for lawyer misconduct and the logistics on how the consumer may file a complaint, but also information regarding alternatives to the filing of complaints, the availability of bar-sponsored mediation and education on problem-solving for issues that do not warrant the attention of the disciplinary authorities.

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

The Task Force agrees that court rules and procedures should be implemented that permit the parties, where appropriate, to agree on a statement of facts, enter into “discipline on consent” to resolve charges of misconduct, or agree on a proposed sanction.

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

The Task Force has concern with respect to COSAD’s recommendation regarding prosecutorial misconduct. While the issues raised by witnesses at the hearings conducted by COSAC clearly warrant further exploration and serious consideration, mandatory referral by courts issuing decisions finding prosecutorial misconduct may engender unjust results. In the first instance, allegations of misconduct may arise decades after the alleged conduct. Second, a finding of misconduct may not be appealed by the prosecutor. Third, the potential for referral of an inadvertent or unintentional violation of law governing prosecutors exists. The role of prosecutor in our judicial system is that of a public servant; programs designed to avoid abuse should be the focus of budgetary resources.

The Task Force would prefer that the presiding court finding prosecutorial misconduct have some discretion in making the decision to refer in the event it is found that the misconduct resulted from unintentional or inadvertent error. The Task Force concurs that the grievance committees should keep appropriate records with respect to the disposition of referrals related to prosecutorial misconduct.

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

Administrative Board of the Courts should select a suitable candidate as soon as is practicable.

The Task Force does not agree that the cost of creating another level of administrative bureaucracy by establishing a Statewide Coordinator of Attorney Discipline is necessary or advisable given the patent need for additional funding within the grievance committees. We further disagree with the suggestion that there should be slavish uniformity of sanctions as discussed above.

The Task Force has considerable faith that the individual grievance committees aided and encouraged by the Appellate Divisions and the Advisory Board, discussed below, will implement the consistency in procedure overwhelming recommended by those examining the issue. While statistical reporting is a useful tool, the Task Force does not believe a Statewide Coordinator is necessary to achieve this goal given the current budgetary issues faced by OCA and the need to allocate additional funds to those directly involved in the disciplinary process

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

The Task Force agrees that OCA should implement as quickly as possible the appointment of voluntary members to a Statewide Advisory Board on Attorney Discipline to implement the recommendations accepted following the comment period on the COSAD Report. Uniform procedural rules should be the Advisory Boards priority focus.

It is critical, however, that the Advisory Board be representative of *all* attorneys licensed to practice law in New York. There should be qualified representatives from the all geographic regions within the State, all sizes of law firms – keeping in mind that a substantial majority of the attorneys in New York are sole practitioners or associated in firms of less than five lawyers - and representing diverse areas of practice.

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

The Task Force believes that increased funding and staffing throughout the state must be a priority. The disciplinary and grievance committees are understaffed resulting in unacceptable backlogs in investigations and dispositions. It is simply unfair to the complainant and the attorney to endure the extended average delays in resolution noted in the Report. Increasing funding for staff is critical if the undue delay in completing the disciplinary process is to be eliminated and the reforms recommended here and in the Report are to be implemented.

Conclusion

While the Task Force supports many of the COSAD proposals to unify and expedite the disciplinary process, we remain 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 by OCA. It is further disappointing to learn that at the direction of the Chief Judge, proposed rules implementing the COSAD recommendations have been drafted even before the abbreviated comment period expired. Having said that, we are grateful for COSAD's work in undertaking this long overdue review and hope that a rush to action does not override measured consideration of the issues.

Dated: November 6, 2015

Respectfully submitted,

NCBA TASK FORCE ON UNIFORM LAWYER DISCIPLINE

Carolyn Reinach Wolf, Chair
Marian C. Rice

Adopted by the NCBA Board of Directors November 10, 2015

Appendix 1

EXECUTIVE SUMMARY

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

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

After rigorous deliberation, three public hearings in different regions of the state and input from a myriad of stakeholders—legal consumers, lawyers, bar associations, affinity and specialized bar groups, advocates and others—the Commission recommends, through consensus³, a series of critical reforms, including but not necessarily restricted to the following:

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

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

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

2. Adoption of guidelines modeled after the ABA Standards for Imposing Lawyer Sanctions to ensure more consistent, uniform results statewide.
3. Amendment of the current rules of the Appellate Division to expressly authorize each disciplinary committee to seek, either separately or in conjunction with an application for interim suspension and upon notice to the affected attorney, an order unsealing proceedings to permit the publication of charges pursuant to Judiciary Law §90(10), upon a finding by the Court that the attorney's conduct places clients at significant risk or presents an immediate threat to the public interest. The amendment would be approved by the Administrative Board of the Courts and approved by each Department of the Appellate Division.
4. Implementation of a statewide diversion/alternatives to discipline program to address matters involving alcohol, substance abuse and mental illness.
5. Revision of court rules to uniformly allow for "administrative" suspension and reinstatement of attorneys who are delinquent in timely registering or paying registration fees. Such "administrative" suspension should occur automatically after a period of delinquency and following written notice to the attorney. In revising these rules, particular attention should be paid to streamlining the process as well as to enhancing coordination and the exchange of information between each Department of the Appellate Division and the Office of Court Administration (OCA).

6. Creation of a more easily accessible, searchable, consumer-friendly, statewide website geared toward the legal consumer. Critical information, such as where to file a grievance, should be available in languages in addition to English. Consideration should also be given to establishing a telephone “hot line” to accommodate individuals who do not have access to the internet.
7. Revision of court rules and procedures to allow “plea bargaining,” or discipline upon consent, to encourage prompt resolution of disciplinary charges, where appropriate.
8. Action by the Administrative Board of the Courts to ensure that judicial determinations of prosecutorial misconduct are promptly referred to the appropriate disciplinary committee. Further, appropriate record management practices and procedures should be revised (or adopted) to allow each Department of the Appellate Division to better record and track disciplinary matters involving prosecutorial misconduct with a view toward generating annual statistical reports.
9. Establishment of a new position of Statewide Coordinator of Attorney Discipline. The Coordinator would function as a liaison/ resource for each Department of the Appellate Division. The precise powers and functions of the new position are to be further defined by the Administrative Board of the Courts. The Commission envisions, however, that the Coordinator would be tasked with assisting the Administrative Board of the Courts in fostering uniformity in procedures and sanctions, encouraging communication and consistency among the Departments of the Appellate Division, producing an annual statistical report providing statewide data on the administration of attorney discipline, and recommending

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

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

Appendix 2

Proposed Uniform Diversion Rule:

If during the course of an investigation, the consideration of charges by a grievance committee, or the course of a formal disciplinary proceeding, it appears that the attorney whose conduct is the subject thereof is or may be impaired by alcohol and/or other substance use and addictive disorders and/or mental illness, the court may upon application of the attorney or committee, or on its own motion, stay the investigation, charges, or proceeding and direct the attorney to complete a monitoring program sponsored by the New York State Bar Association or the New York City Bar Association or a lawyers' assistance program/committee that monitors lawyers under supervision by the State or New York City Bar LAP, uses a monitoring agreement that is applicable to the presenting impairment and is approved by the court.

In determining whether to divert an attorney to a monitoring program, the court shall consider:

- (i) whether the alleged misconduct occurred during a time period when the attorney was impaired by alcohol and/or other substance use and addictive disorders and/or mental illness;
- (ii) whether the alleged misconduct is related to such impairment by alcohol and/or other substance use and addictive disorders and/or mental illness;
- (iii) the seriousness of the alleged misconduct; and
- (iv) whether diversion is in the best interests of the public, the legal profession and the attorney.

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 attorney fails to enter into and/or fails to successfully complete the monitoring program as ordered by the court, or the attorney commits additional misconduct after diversion is directed pursuant to this subdivision, the court may, upon notice to the attorney affording him or her the opportunity to be heard, rescind the order diverting the attorney to the monitoring program and reinstate the investigation, charges or proceeding, or take other appropriate action.

Any costs associated with the attorney's participation in a monitoring program pursuant to this subdivision shall be paid by the attorney.

The diversion to monitoring option is not available under circumstances governed by those sections of these rules relating to proceedings to determine incapacity or that may result in disbarment.



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Hon. Jonathan Lippman
New York State Court of Appeals
20 Eagle Street
Albany, New York 12201

Dear Judge Lippman,

This letter is written at the direction of the Board of Directors of the Bar Association of Nassau County ("NCBA"), the largest suburban bar association in the country.

For the past few years, it is our observation that the Office of Court Administration has imposed court rules on matters striking at the core of our profession without the meaningful participation of many active vibrant bar associations across the state, including our own.

In the recent past, the trend continued with the announcement of the mandatory *pro bono* requirements for attorneys seeking admission in the courts of New York. This rule was enacted without any comment period, based upon the recommendations of a Committee charged with the task of implementation. The 166,000 attorneys admitted to practice in New York State were not provided a meaningful opportunity to weigh in on whether the concept itself was appropriate. While we were gratified that our past president, William Savino, was appointed to the Committee, the Committee was not representative of the lawyer population in New York in geographic terms, areas of practice or firm size.

While our opinion was not sought, the NCBA did convene a Task Force and filed a report with the Committee expressing the views of our membership on the issue of mandatory *pro bono* requirements for any attorney, but also providing thoughtful recommendations on how the already announced rule could be more fairly implemented.

The second unfortunate exclusion came in the form of the recent amendments to Part 118 mandating that voluntary *pro bono* hours and donations to qualified legal services organizations be reported on attorney registration statements. The intention of the Office of Court Administration to provide public access to the charitable donations of attorneys runs contra to any accepted notion of charity. Again, the concerns of the attorney population were neither solicited nor considered. In so stating, it is recognized that the Office of Court Administration is not required to solicit comments.

Putting aside the intrusive nature of the rule, discussions with local and state bar associations may have brought to the forefront the collateral consequences of the mandatory reporting requirement. By way of example, since the Lawyer Assistance Trust ceased funding for Lawyer Assistance Programs statewide, NCBA has limped along seeking funding for its award-winning program helping countless judges, attorneys, their families and their clients. The narrow definition of the qualifying legal services specified in Part 118 excludes such programs, and as such, misses out on an opportunity to support the profession's laudable efforts to protect the families and clients of attorneys and judges suffering from a myriad of debilitating addictions and conditions. Compared to the significant cost of access to justice, inclusion of lawyer assistance funding in this rule would have facilitated fund-raising efforts for the comparably modest funds required to supplement and continue the NYSBA, NYC Bar and NCBA Lawyer Assistance Programs. Discussion of the larger picture may have resulted in changes to the rules that would have served the dual purposes of these worthy goals.

Finally, the most recent appointments to the Committee on Non-Lawyers and the Justice Gap wholly ignore practicing attorneys from the geographic areas of Long Island and upstate New York. Additionally, more than 75% of attorneys in New York (and in NCBA) practice as solo practitioners or in small law firms. These attorneys, comprising the majority of the attorneys regulated by OCA, are not represented on this Committee reviewing a subject striking at the core of our profession. Excluding Mr. Maldonado, the remaining private attorneys practice at New York City mega-firms – clearly not representing the problems faced by most New York attorneys and clearly not representing the interests of the shameful number of under and unemployed attorneys in New York. The remaining representatives from legal service providers, law schools and active access to justice advocates do not provide the balanced canvass of representative attorneys upon which thoughtful discussion of the issue may be conducted, notwithstanding the addition to the Committee after the fact of Thomas Maligno, the inspiration for the NCBA's annual *pro bono* legal services award, whose experience, respectfully, is not that of a practicing attorney.

Changes to our profession are inevitable. While *pro forma* compliance with the initiatives adopted without input from the attorney constituents in this state may be compelled, meaningful change cannot be. Failing to solicit the valuable opinions of the attorneys regulated by OCA will not foster the culture of service intended by these changes.

We ask that the Office of Court Administration invite a dialogue with - and the active participation of - the attorneys it regulates on a representative basis so that together we can identify programs and initiatives that support your efforts with respect to access to justice while considering the legitimate concerns and the enormous contributions of the members of our profession and our bar associations. Together we can accomplish much.

Very truly yours,



Peter J. Mancuso, President



Marian C. Rice, Immediate Past President

NASSAU COUNTY BAR ASSOCIATION