M E M O R A N D U M

TO: **Anthony R. Perri, Esq., Acting Counsel, Office of Court Administration**

FROM: **NYSBA Committee on Standards of Attorney Conduct**

DATE: **November 22, 2022**

RE: **Proposed Amendments to New York's Biennial Registration Rules Regarding Attorney Reporting of Foreign Admission and Discipline**

The Administrative Board of the Courts has solicited public comments on proposed rule changes regarding attorney reporting of foreign admission and discipline. This memorandum sets forth comments from the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"). COSAC appreciates the opportunity to submit these comments, which COSAC intends to be constructive.

The Administrative Board's Proposals

On October 11, 2022, the Office of Court Administration ("OCA") circulated a memorandum requesting public comments on a proposal to amend 22 NYCRR §§ 118.1(e) and 118.2 (b)(2) to require attorneys to set forth, on each biennial registration form, two new categories of information: (i) "a list of all jurisdictions other than New York State where the attorney is admitted to practice" and (ii) "an accounting of all findings of professional misconduct and/or disciplinary sanctions imposed against such attorney within the preceding two years by a jurisdiction other than New York State." The memorandum explained the rationale for the proposed amendments as follows:

> Attorneys admitted to practice in New York are not currently required to advise the Departments of the Appellate Division, any Grievance Committee, or the Office of Court Administration concerning their licensure in any other jurisdiction. Nonetheless, all New York attorneys are affirmatively obligated, by Court rule of statewide applicability, to advise both the Appellate Division and the applicable Grievance Committee of any discipline imposed upon the attorney by a "foreign jurisdiction" ….
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> Due to concern that New York-licensed attorneys may be underreporting the imposition of foreign discipline to New York authorities, either as a consequence of ignorance of the existing reporting rule or due to affirmative concealment, it is proposed that information pertaining to an attorney's foreign licensure and foreign discipline be made a part of every New York attorney's statutory biennial registration obligation. By affirmatively requiring all New York attorneys to provide up-to-date foreign licensure and discipline information in a sworn statement every two years, it is anticipated that the Courts

and Grievance Committees will be afforded more reliable and current information which may bear upon each attorney's licensure in New York.

In addition, because the Administrative Board recognizes that "foreign discipline may be imposed confidentially in the attorney's home jurisdiction or may be founded upon conduct which is not misconduct under New York law," the Administrative Board has also proposed that "[a]ll findings of professional misconduct and/or disciplinary sanctions imposed against an attorney which have been reported to the Office of Court Administration pursuant to the Rules of the Chief Administrator 22 NYCRR § 118.1(e)(14) shall also not be made available to the public, except as may be otherwise authorized pursuant to Judiciary Law § 90(10)."

COSAC's Analysis and Comments

COSAC supports the Administrative Board's goal of encouraging and improving compliance with existing rules requiring New York attorneys to self-report discipline. COSAC has no information about the number of New York attorneys who fail to self-report discipline by foreign jurisdictions, but adding the proposed additional disclosure categories on the biennial registration form has the potential to uncover instances of discipline imposed by a foreign jurisdiction that otherwise might not be reported. The proposed amendments will thus increase the chances that the discipline imposed by another licensing jurisdiction does not escape review by the departmental Attorney Grievance Committees. Attorneys who have been disciplined in foreign jurisdictions may be unaware of their reporting obligations (or may for other reasons not comply with those reporting obligations), and the proposed mandate to report foreign discipline on the biennial registration form will serve as a reminder of the reporting obligation.[1]

To the extent that attorneys admitted in New York are failing to report foreign discipline, the proposals might fill a gap. We understand that the various Attorney Grievance Committees in New York do not conduct foreign jurisdiction disciplinary "sweeps" routinely (or do not conduct such sweeps at all). We also understand that foreign jurisdictions often do not report that they have imposed disciplinary sanctions against New York attorneys. The proposed amendments will ensure that Attorney Grievance Committees receive this information on at least a biennial basis.

[1] Some attorneys practice exclusively in jurisdictions outside New York and before courts other than in the State of New York. Disclosure of discipline imposed on a New York lawyer by another state or federal jurisdiction almost invariably triggers the imposition of reciprocal discipline in New York pursuant to 22 NYCRR § 1240.13. The imposition of civil sanctions by a state or federal court, however, does not trigger the imposition of reciprocal discipline under § 1240.13 because civil sanctions are not "discipline" imposed by a licensing jurisdiction.

However, COSAC does not support the proposed additional requirement, in its present form, that lawyers provide "an accounting of all findings of professional misconduct" in the previous two years. COSAC has several objections to this language.

First, the proposal does not define the term "misconduct," so lawyers will have to determine on their own what needs be reported. This determination may be difficult. For example, would such "findings of professional misconduct" include supposedly confidential and unpublished non-disciplinary actions similar to Letters of Advisement in New York (which may be called letters of caution, letters of education, admonition, or similar terms in foreign jurisdictions)? COSAC hopes that such determinations would not have to be reported under the amended rules, because requiring such reports would undermine the constructive purposes of confidential and unpublished non-disciplinary actions. COSAC notes that New York's reciprocal discipline rule, 22 NYCRR § 1240.13 ("Discipline for Misconduct in a Foreign Jurisdiction"), does not require New York lawyers to report non-disciplinary actions. COSAC also notes that § 1240.2 ("Definitions"), defines an "Admonition" as "private discipline," but also says that a Letter of Advisement "shall be confidential and shall not constitute discipline …."

Second, the proposal requires that attorneys report not only actual discipline, but also "*all findings* of professional misconduct," whether or not those "findings" are the product of a disciplinary proceeding comporting with the Due Process Clause (giving the attorney notice and the right to be heard), whether or not the "findings" are memorialized in a judicial opinion, and whether or not the "findings" resulted in the imposition of professional discipline. Further, since the term "findings" is not defined, a lawyer will have to decide whether to report various types of actions falling short of professional discipline, such as a judge's critical comment, a judge's stern caution, or a judge's carefully honed non-disciplinary sanction.[2] If a lawyer fails to report such events, the lawyer may face penalties in New York for failing to self-report to OCA a "finding" that the lawyer was previously not required to report to any Attorney Grievance Committee or Appellate Division. The reciprocal discipline rule (§ 1240.13) requires a lawyer to self-report only if the lawyer has been "disciplined" by a foreign jurisdiction. Mere "findings" short of discipline currently do not have to be reported under § 1240.13.

[2] In the ABA Model Code of Judicial Conduct, which many states have adopted, Rule 2.15(D) provides: "A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Rules of Professional Conduct shall take appropriate action." In New York, this language appears in the New York Rules of Judicial Conduct at 22 NYCRR § 100.3(D)(2). Thus, a judge can simply warn or admonish the lawyer or can sanction a lawyer or hold the lawyer in civil contempt without referring the matter to the disciplinary authorities.

Third, the term "accounting" is not defined. COSAC recommends that the Administrative Board omit the term "accounting" and instead state precisely what information a lawyer is required to provide.

The phrase "foreign jurisdiction" is also not defined in the proposals, but COSAC assumes that the Administrative Board will cross-reference the definition in § 1240.2(h), which defines "Foreign jurisdiction" as "a legal jurisdiction of a state (other than New York State), territory, or district of the United States, and all federal courts of the United States, including those within the State of New York." Using that definition will avoid confusion and inconsistency.

COSAC's Specific Recommendations

COSAC believes that the goals of the proposed amendments can be accomplished by modifying the biennial registration report to require attorneys to report the following information:

A. all state and federal jurisdictions other than New York State where the attorney is admitted to practice (excluding *pro hac vice* admissions);
B. whether the attorney is in good standing in each listed jurisdiction;
C. the date(s) on which a foreign jurisdiction imposed discipline on the attorney;
D. the date(s) on which the attorney advised the appropriate Appellate Division and Attorney Grievance Committee of each such instance of discipline by a foreign jurisdiction; and
E. the Appellate Division and Attorney Grievance Committee that the attorney so advised.

Please note that COSAC's recommended language expressly *excludes* a requirement to report *pro hac vice* admissions. Many New York attorneys frequently litigate in jurisdictions outside New York, and it would impose substantial recordkeeping and reporting burdens on such attorneys to keep track of and report every *pro hac vice* admission. COSAC believes that the burden of such recordkeeping and reporting outweighs the benefit.

In contrast, requiring lawyers to list all state and federal jurisdictions other than New York State where the attorney is *permanently* admitted to practice should impose only a small burden on New York lawyers. The information about foreign admissions will assist the Office of Court Administration not only in monitoring foreign discipline, but also in reporting to those other jurisdictions for purposes of possible reciprocal discipline in those jurisdictions when New York attorneys have been disciplined in New York.

COSAC urges the Administrative Board to allow additional time for public comments so that others who practice in the field of ethics and professionalism, as well as bar association committees focusing on ethics and professionalism, will have an opportunity to consider COSAC recommended changes and will have more time to react to the Administrative Board's far-reaching proposals, which will affect many thousands of attorneys admitted in New York each time they complete the biennial registration forms.

Whether or not the Administrative Board adopts COSAC's suggested revisions to 22 NYCRR § 118.1(e)(14), COSAC supports the Administrative Board's proposal that information reported to the Office of Court Administration pursuant 22 NYCRR § 118.1(e)(14) regarding discipline in foreign jurisdictions "shall … not be made available to the public, except as may be otherwise authorized pursuant to Judiciary Law § 90(10)."

COSAC is grateful to the Administrative Board for permitting COSAC and others to comment on the Administrative Board's thoughtful proposals. COSAC's members come from all parts of New York State and practice in many areas of law and in firms of all sizes. COSAC spent substantial time studying the Administrative Board's proposals, and more than two dozen COSAC members took part in COSAC's internal discussion and debate. The comments below represent the views of a large majority of COSAC members. COSAC hopes these comments will be helpful to the Administrative Board.