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November 9, 2015

John W. McConnell, Esq.
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Office of Court Administration
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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 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,

David P. Miranda

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NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Ronald C. Minkoff
Chair
Task Force on Professionalism

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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Defending Liberty
Pursuing Justice

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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.

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[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;

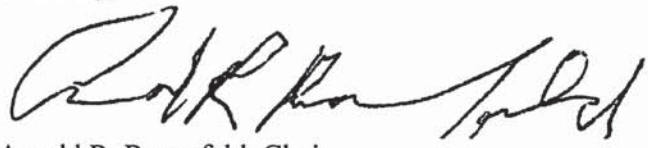
6) After an agreement is reached, the complaint should be held in abeyance pending successful completion of the terms of the contract;

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 reinstituted.

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.

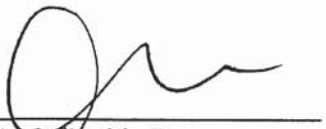
In this State we have the Judiciary Law which regulates the conduct of attorneys across the State and the Rules of Professional Conduct have been promulgated as joint rules of the Appellate Divisions. Within that structure each of the Appellate Divisions has developed a somewhat different procedure for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

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?

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* 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."

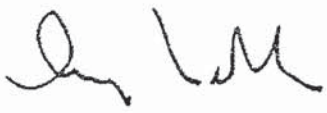
Putting the information in the required Statement of Client's Rights is inadequate by itself. Those statements are placed in the reception areas of law offices, usually on a wall. But clients may never visit a lawyer's office. Even when they do, they may not have the opportunity while awaiting an appointment 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 has 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