American Bar Association

January 4, 1983

Honorable Lawrence H. Cooke
Court of Appeals Chambers
Monticello Courthouse
Monticello, New York 12701

Dear Chief Judge Cooke:

I am pleased to provide you with the Final Report of the Evaluation of the Lawyer Discipline System in the State of New York, which has been approved by the Standing Committee on Professional Discipline of the American Bar Association.

On behalf of the team, I extend our appreciation to you, the Court and all the individuals who assisted us during the evaluation process. We hope this document will provide meaningful guidance in the reform and improvement of the New York discipline system.

Very truly yours,

Jeanne P. Gray

Jeanne P. Gray

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Presiding Justice A. Franklin Mahoney
Presiding Justice Milton Mollen
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Chairman, Third Judicial Department Committee on Professional Standards
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EVALUATION OF THE LAWYER DISCIPLINARY SYSTEMS OF THE STATE OF NEW YORK

FINAL REPORT

December, 1982

Sponsored by the
American Bar Association
Standing Committee on Professional Discipline

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TABLE OF CONTENTS

TABLE OF CONTENTS

INTRODUCTION

In 1980, the Standing Committee on Professional Discipline of the American Bar Association initiated a national pilot project to evaluate, upon invitation, lawyer disciplinary enforcement programs. In aid of the evaluation process, the Standing Committee developed 112 criteria adapted from the American Bar Association Standards for Lawyer Discipline and Disability Proceedings[1] to be applied by a team of experts in lawyer discipline during its evaluation of the disciplinary system. The Lawyer Standards reflect the best policies and procedures drawn from the collective experience of disciplinary agencies throughout the country, and were unanimously adopted by the House of Delegates of the American Bar Association in 1979, and amended in 1982.

The evaluation process involves sending a team to the jurisdiction to observe the disciplinary system in operation, to conduct extensive interviews, to make an assessment of the degree to which the system conforms to the Lawyer Standards, and to prepare a report summarizing its findings and recommendations for dissemination to the disciplinary authorities on a confidential basis.

By a letter dated December 19, 1980, Honorable Francis T. Murphy, Jr., Presiding Justice of the Supreme Court of the Appellate Division, First Department, invited the Standing Committee to conduct an evaluation of the disciplinary system in the First Department.[2] Thereafter, on May 6, 1981,

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1. American Bar Association Joint Committee on Professional Discipline, Professional Discipline for Lawyers and Judges, (1979) [hereinafter cited as Lawyer Standards].

2. The invitation was extended by Presiding Justice Murphy just six months after his widely publicized speech to the Association of the Bar of the City of New York in which he advocated a statewide disciplinary system based on the ABA Lawyer Standards (for a complete text of the speech see 52 N.Y. St. B. J. 362 (1980).

Honorable Lawrence H. Cooke, Chief Judge of the Court of Appeals of New York, invited the Standing Committee to conduct an evaluation of the disciplinary systems of all four judicial departments in New York. Accordingly, a statewide evaluation team of six members was sent to visit the four judicial departments on March 4-5, and 8-11, 1982. The members who visited the First and Second Departments were Mark I. Harrison, Chairman-designate of the Standing Committee and a private practitioner; Jeanne P. Gray, Director of the ABA National Center for Professional Responsibility; and John C. McNulty, past Chairman of the Standing Committee and a private practitioner. The members who visited the Third and Fourth Departments were Michael Franck, Chairman of the Standing Committee and the Executive Director of the State Bar of Michigan; Herbert M. Rosenthal, past member of the Standing Committee and General Counsel of the State Bar of California ; and Robert S. Wells, Research Counsel for the ABA National Center for Professional Responsibility. As a general rule, the Committee has completed its evaluations within 90 days of its on-site inspections. Because of the complexity of this evaluation which involved an analysis of four separate disciplinary systems, the evaluation took longer than anticipated.

The team was not restricted to reported decisions and public documents, but was permitted access to confidential information, and was thereby able to examine carefully all stages and practices of the disciplinary process. The team examined case records, observed office practices and procedures and reviewed all rules governing discipline. The team also reviewed prior studies of the lawyer disciplinary system to insure a proper historical perspective.[3]

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3. In its review the team carefully examined three prior studies of disciplinary enforcement in New York, annual statistical reports, and a law review article, as follows:
   (a) Administrative Board of the Judicial Conference of the State of New York, Disciplinary Enforcement against

The team conducted extensive interviews with individuals concerned with and affected by the disciplinary process. In the First and Second Departments these included the Presiding Justices, lawyer and nonlawyer members of the Departmental Disciplinary Committee and the Joint Bar Grievance Committees, members of the Association of the Bar of the City of New York, the New York County Lawyers' Association, the New York State Bar Association, and the Kings County Bar Association, the chief counsel and members of their staffs, referees, respondents, counsel for respondents, complainants, an investigative reporter, an assistant district attorney, representatives of the Crime Prevention Institute and the Office of Court Administration. In the Third and Fourth Departments, interviews were conducted with the Chief Judge of the Court of Appeals, the Presiding Justices, lawyer and nonlawyer members of district and bar association Grievance Committees, the chief counsel and members of their staffs,

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Attorneys in New York: An Evaluation and Recommendation, 18th Annual Report of the Judicial Conference of the State of New York (1973) [hereinafter cited as Christ Report];

(b) Economic Development Council of New York City Task Force, Analysis of the Grievance System of the Association of the Bar of the City of New York, reprinted in 34 Record of the Ass'n of the Bar of the City of New York 61 (1979) [hereinafter cited as Economic Development Council Report];

(c) Ad Hoc Committee on Grievance Procedures, Report on the Grievance System of the Association of the Bar of the City of New York, (January 26, 1976) [chaired by Leon Silverman, hereinafter cited as Ad Hoc Committee on Grievance Procedures];

(d) New York Bar Association, Current Status of the Statewide Disciplinary System, Report of the Committee on Professional Discipline (1982) (incorporating annual reports on the state of discipline in New York State from 1976 through 1980); and

(e) Presiding Justice Francis T. Murphy, Jr., Appellate Division of the Supreme Court, First Judicial Department, Grievance Counsel for the Public, 26 N.Y.L. Sch. L. Rev. 221 (1981) [hereinafter cited as Murphy].

referees, members of the New York State Bar Association Committee on Professional Discipline, representatives of the state and local bar associations, former respondents, counsel for respondents, and complainants. Those interviewed were assured confidentiality to promote candor.

We are grateful to members of the bar, the public and the judiciary for their candor and cooperation in the evaluation effort. We are especially grateful to the chief counsel and their staffs for their assistance in the preparation and coordination required for the team's visits.

This report is intended to assist those responsible for the administration of lawyer discipline by providing findings and recommendations based upon the team's investigation and collective knowledge and experience. As previously noted, the team used criteria adapted from the Lawyer Standards as a principal guide. The report generally excludes those areas of the system which are operating effectively and which are consistent with the Lawyer Standards. The report bears the endorsement of the Standing Committee on Professional Discipline.

OVERVIEW

General

New York is the only jurisdiction in the country in which ultimate and exclusive responsibility for the administration of lawyer discipline is not vested in the highest court of the state, the Court of Appeals. The legislature has delegated to the intermediate appellate courts the responsibility for the regulation of the legal profession by Section 90 of the Judiciary Law of New York. Section 90 states that the Supreme Court shall have power and control over lawyers, and that the Appellate Division in each department is authorized to censure, suspend from practice or disbar any lawyer "who is guilty of

professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."[4] In New York the ultimate power to regulate the legal profession is vested in the state legislature.[5] Under New York law, appeals from disciplinary decisions of the Appellate Division to the Court of Appeals are permitted only in limited circumstances.[6]

The lawyer population of New York is 71,750 distributed as follows:[7]

First Department	34,191
Second Department	27,500
Third Department	4,259
Fourth Department	5,800

A lawyer admitted to practice by the Appellate Division is entitled to practice before all courts in the state.[8]

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4. Chief Judges' Administrative Delegation No. 1, effective April 1, 1978, stated in part that supervision of the administration and operation of certain programs, including admission to the bar, disciplining of lawyers and regulation of the practice of law would remain the responsibility of the Appellate Divisions or Presiding Justices as then provided by statute.

5. See In re Bercu, 188 Misc. 406, 69 N.Y.S.2d 730 (N.Y. Sup. Ct. 1947). But see In re Anonymous, 21 A.D.2d 48, 248 N.Y.S.2d 368 (App. Div. 1964) (N.Y. Jud. Law merely declares a power that is already inherent in the courts).

6. N.Y. Const. Art. VI, §3. An appeal from a decision by the Appellate Division to the Court of Appeals is permitted only in those matters which involve a question of the validity of a provision of the state or federal constitutions, or when a justice dissents on a question of law in favor of the party taking the appeal, or by permission of the Appellate Division or the Court of Appeals.

7. ABA, 1981 National Center for Professional Responsibility Statistical Reporting and Time Factor Questionnaire (1981) (unpublished) [hereinafter referred to as NCPR Questionnaire].

8. N.Y. Jud. Law §90(1) (McKinney 1967).

The First Department consists of the first judicial district, which is comprised of the borough of Manhattan, and the twelfth judicial district which is comprised of the Bronx. The Second Department consists of the second, ninth, tenth, and eleventh judicial districts, which are comprised of the boroughs of Brooklyn, Queens, Staten Island, and seven counties located in the southeast portion of the state. The Third Department consists of the third, fourth, and sixth judicial districts, which are comprised of 28 counties extending from the northern-most through the center and southern central portions of the state. The Fourth Department consists of the fifth, seventh and eighth judicial districts, which are comprised of 22 counties extending over the western and northwestern portions of the state.

A unified court system was established in New York on November 7, 1961 by Article 6, §1(a) of the New York Constitution, effective September 1, 1962. Section 28 of Article 6 vested responsibility for the supervision of the unified court system in the Administrative Board of the Judicial Conference, consisting of the Chief Judge of the Court of Appeals and the Presiding Justices of the four departments of the Appellate Division. The Administrative Board was authorized to establish standards and administrative policies which the Appellate Division was to administer.

On November 8, 1977, Section 28 was amended to provide that: (1) the Chief Judge of the Court of Appeals serve as the chief judicial officer of the state; (2) there be an Administrative Board of the Courts consisting of the Chief Judge and the Presiding Justices of the Appellate Divisions to provide consultation and recommendations to the Chief Judge of the Court of Appeals regarding standards and administrative policies; and (3) the Chief Judge, with the advice and consent of the Administrative Board, appoint a chief administrator of the courts to supervise the administration and operation of the unified court system and establish and direct the Office of

Court Administration [hereinafter the OCA]. This reformation in the management of the unified court system divested the presiding justices of extensive administrative responsibility and control, including direct access to the legislature.

The OCA administers an annual budget of approximately $494.9 million. The unified court system employs more than 11,000 persons, not including judicial personnel. Of this total, less than 100 are involved principally in lawyer discipline.[9] The Office of Management Support of the OCA provides centralized administrative services for all aspects of the court system. Consequently, the four departments of the Appellate Division have only limited control of budget, and planning operations.

Since 1981 all lawyers admitted to practice in New York must register biannually with the OCA and, if engaged in the practice of law, pay a $50 registration fee.[10] The $3.5 million generated in each registration period is not used to fund disciplinary operations but is allocated to the state treasury and the Clients' Security Fund of the State of New York. Funding for lawyer discipline is provided by the legislature as part of the annual appropriation to the OCA. The appropriation to disciplinary enforcement in 1982-83 is $2,348,926 divided among the four departments as follows:[11]

First Department	$902,200	($26/lawyer)
Second Department	825,458	($30/lawyer)
Third Department	213,979	($47/lawyer)
Fourth Department	407,289	($70/lawyer)

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9. There are so few people involved in professional discipline that there is no special classification for disciplinary counsel, who are tied to a civil service classification for mental health information services.

10. 1981 N.Y. Laws 714.

11. 1982 N.Y. Laws 51.

The average allocation per lawyer spent on disciplinary enforcement in New York is $29 compared to $63.22 for California, the only jurisdiction with a comparable lawyer population of 72,762.[12] The New York statistics not only indicate less funding for lawyer discipline than a comparable jurisdiction but also reveal a significant disparity in funding allocation among the four departments.

First Department

Lawyer discipline in the First Department is governed by 22 Codes, Rules and Regulations of the State of New York §§603.1 to 603.23 (hereinafter NYCRR) and the Rules and Procedures of the Departmental Disciplinary Committee, as amended July 1, 1982, (hereinafter Committee Rules).[13]

On April 1, 1980 the Appellate Division, First Department reconstituted the Departmental Disciplinary Committee to be under the direct administrative oversight of the court. Prior to 1980, the Association of the Bar of the City of New York administered discipline through its Grievance Committee in the First Department. The Departmental Disciplinary Committee (hereinafter DDC) is authorized to investigate and prosecute matters involving alleged misconduct by lawyers who are admitted to practice, reside in, commit acts in or who have

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12. ABA National Center for Professional Responsibility, Annual Disciplinary Enforcement Survey (1981) (unpublished). California has 72,762 lawyers required to pay dues averaging $140 to its unified state bar, $63.22 of which is allocated to discipline. ABA National Center for Professional Responsibility, Annual Disciplinary Enforcement Survey (1981) (unpublished).

13 Note, however, that at the time of the Team's visit the governing Committee Rules were the Rules and Procedures of the Committee on Grievances (as amended January 15, 1979).

offices in the department.[14] The DDC receives complaints against lawyers from all sources, and through its chief counsel, may initiate investigations sua sponte. Through its hearing panels, the DDC conducts formal proceedings and disposes of matters by dismissal, letter of caution, admonition, reprimand, or referral to the court.

The DDC is composed of 34 members, 23 lawyers and 11 nonlawyers. Members serve terms of three years, with no member serving more than six consecutive years. The DDC is divided into two entities. There is a policy committee (comprised of five lawyers and two nonlawyers) presided over by the chairperson of the DDC and responsible for administration, management, and policy development. The policy committee also assists the chief counsel upon his request in the formulation of prosecutorial decisions. The adjudicative function of the DDC is discharged by four hearing panels (each comprised of five lawyers and two nonlawyers) which conduct hearings after formal charges have been filed. Each member of the DDC serves on a rotation basis to review counsel's recommendations for dismissals, letters of caution, and admonitions. Counsel's decision to file formal charges against the respondent, however, is not subject to DDC review.

The investigative and prosecutorial functions are performed by the chief counsel who is appointed by the Appellate Division in consultation with the DDC. The Office of the Chief Counsel screens and investigates all matters, prosecutes formal charges before hearing panels, and represents the DDC before the Appellate Division and the Court of Appeals.

Following screening, the chief counsel may recommend dismissal, the issuance of a letter of caution, or the

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14. App. Div. Rules, §603.1 extends jurisdiction also to legal consultants, lawyers admitted to practice in another jurisdiction who regularly practice as agency or corporate house counsel, or who are admitted pro hac vice.

imposition of an admonition subject to review and approval by a member of the DDC. In the event of a disagreement between the chief counsel and the reviewing member concerning the recommended disposition, counsel may appeal to the chairperson of the DDC for a final resolution. The chief counsel may file formal charges and institute proceedings against a respondent without review.

Upon issuance of a letter of caution, the respondent may petition the chairperson for reconsideration. When counsel has recommended an admonition, the respondent may either petition the chairperson for reconsideration, or demand a formal hearing.

Formal disciplinary proceedings are instituted by the chief counsel by service of a notice setting forth the charges of misconduct, the time and place of the hearing and the composition of the hearing panel. The respondent is entitled to be represented by counsel, to cross-examine witnesses and to present evidence. Charges are normally conducted before a hearing panel. Alternatively, upon petition of the DDC, or in the discretion of the court, the court may appoint a referee, justice or judge to conduct hearings in lengthy, complex prosecutions.

The hearing is bifurcated to keep separate evidence relating to guilt from evidence relating to the appropriate sanction. Hearing panels receive evidence of prior discipline only after charges have been sustained. A panel may impose a reprimand with or without referral to the court; or may refer it to the court with or without a recommendation of censure, suspension or disbarment. The imposition of a reprimand without referral to the court is subject to the right of the respondent to petition the court to vacate the reprimand.

When the DDC petitions the court to impose sanctions, it forwards, without review, the opinion of the hearing panel together with the record of the proceedings. The respondent

may petition the court to disaffirm the findings of the hearing panel. Cases are submitted by brief only; the court does not permit oral argument. Confidentiality is maintained until the Appellate Division issues a formal order of discipline.

Although an Appellate Division rule permits committees of the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association to investigate and prosecute matters involving alleged misconduct of lawyers, the rule has not been invoked. However, the Association of the Bar operates an ad hoc Professional Discipline Oversight Committee, which reviews disciplinary procedures and proposes rule and statutory changes to the court and the legislature. The New York County Lawyers' Association operates the Joint Committee on Fee Disputes for reconciliation of attorneys' fees.

The staff operates in one office and includes twelve lawyers, twelve clerical/administrative assistants, one investigator, and three paralegals.

Second Department

Lawyer discipline is governed by 22 NYCRR §§691.1 to 691.13. Section 691.1 vests the department with jurisdiction over all lawyers who are admitted to practice, reside in, commit acts in or who have offices in the department, who regularly practice as agency or corporate house counsel, or who are admitted pro hac vice in any court in the department.

The Appellate Division, Second Department appoints three Grievance Committees, one for the second and eleventh judicial districts, and one each for the ninth judicial district and the tenth judicial district. Each committee has twenty members, including a chairman and four nonlawyers. Terms are four years, and no member may serve more than two consecutive terms. Each Grievance Committee directs the investigation and

prosecution of complaints concerning lawyers practicing or residing in the respective judicial district. The court also appoints, in consultation with each committee, a chief counsel. The chief counsel hires and supervises a professional and support staff.

Investigations are initiated upon complaint or sua sponte. All complaints are filed with the chief counsel of the judicial district. After preliminary investigation by counsel, the committee may, upon majority vote, dismiss the matter, issue a letter of caution, privately admonish the lawyer, or authorize formal charges with or without an investigatory hearing. A quorum is 12; the vote needed to act ranges among committees from 2/3 to 3/4. Two of the three committees permit the complainant to appeal the disposition, but the third does not.

The respondent need not accept an admonition or letter of caution but has a right to a hearing before the committee or subcommittee. If the committee, after hearing, affirms the admonition, the respondent has a right to a formal proceeding.

All proceedings before the committee are confidential. Records of admonition and letters of caution are permanently maintained and, under Rule 691.6(b), may be considered in determining the extent of subsequent discipline. Exchange of information among the committees is permitted.

Formal charges are tried by a judge or referee appointed by the Appellate Division. A petition to institute formal proceedings is reviewed by a justice of the court. If the court approves the petition, formal charges are prosecuted by counsel before a judge or referee. The standard of proof is a fair preponderance of credible evidence. Presentation of evidence is permitted only before the referee; only briefs are filed with the court. No one is permitted to recommend a sanction to the court.

Local bar associations are frequently used to process fee disputes and minor disciplinary matters in the second, tenth and eleventh districts, but not in the ninth. Local bar associations may dismiss or issue letters of caution or letters of admonition, and such action is reported to the appropriate district committee.

The committees' staffs within the department are allocated as follows:

	2nd & 11th	9th	10th
Lawyers	6	3	4
Investigators	0	1	1
Law clerks	2[15]	0	0
Administrative			
- full-time	3	3	3
- part-time	1[15]	0	0

There is no mechanism for coordination among counsel and the Grievance Committees.

Third Department

Lawyer discipline in the Appellate Division, Third Department, is governed by 22 NYCRR 806.1 to 806.14. The rules apply to all lawyers who reside or have an office in, or who are employed or transact business in the department.

There is a single Committee on Professional Standards appointed by the Court. The committee consists of a chairman and nineteen members, two of whom are nonlawyers. Appointees are from each of the judicial districts in the Department. Terms are three years, and no person may serve more than two consecutive terms. The committee directs the investigation of all matters and supervises the professional staff. A quorum is

15. The team was informed that the law clerks are not staffed positions but employed on a pro bono basis and the part-time administrative position is not regularly funded.

seven; and the concurrence of six is required for action. The court also appoints, in consultation with the committee, a chief attorney. The chief attorney hires and supervises assistants and support staff.

Investigations are initiated upon complaint or sua sponte. All complaints are filed with the chief attorney. The chief attorney may require the respondent to appear for examination under oath. Upon request of the respondent, the examination is held in the presence of a committee member. Upon completion of the investigation the chief attorney files a report with the committee, together with a summary of prior discipline, if any.

Matters which in the chief attorney's viewpoint have no merit are summarized and forwarded monthly to the full committee. If any member disagrees with the recommendation that the matter be closed, the matter is presented to the full committee at its next meeting.

Matters presented to the committee are first reviewed by an individual member. The reviewing member (who participated in any investigatory hearing) reviews the entire file.

Cases in which counsel has recommended the imposition of a sanction are reviewed first by a member and presented to the full committee. The committee may dismiss the matter, privately admonish the lawyer, or authorize formal charges. The respondent need not accept an admonition but may demand a formal hearing. In addition, the committee may also issue letters of caution and letters of education, which do not constitute discipline. All proceedings before the committee are confidential.

Formal charges are tried by a judge or referee appointed by the court. If no factual issue is raised, the court may, upon application of either party, hear the respondent or refer the matter to a referee.

County bar associations are used in the processing of complaints concerning undue delay, fee disputes, inadequate representation and similar matters. County bar associations must complete investigations within sixty days of receiving a complaint and report each complaint and related correspondence quarterly. The chief attorney approves or disapproves the proposed action.

The staff operates in one office and includes three lawyers, one investigator, and three administrative personnel.

Fourth Department

Lawyer discipline in the Appellate Division, Fourth Department is governed by 22 NYCRR 1022.1 to 1022.34. The rules apply to all lawyers admitted to practice or who have offices or practice within the department.

The court appoints three grievance committees, one each for the fifth, seventh and eighth districts. Each committee has 21 members, including a chairman and three nonlawyers. Terms are three years, and no member may serve more than two consecutive terms. The committees direct the investigation and prosecution of complaints concerning lawyers practicing or residing in the judicial districts.

The committee chairmen appoint a chief attorney and staff attorneys with the approval of the court.[16] The chief attorney employs additional staff. The professional staff investigate and prosecute all cases and dispose of all matters by dismissal, letter of caution by chief attorney, letter of admonition by committee, or filing formal charges with the court.

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16. The Chief Administrator assures that personnel to be employed by the disciplinary committee conform with the statewide personnel classification plan.

During the investigation the chief attorney may request written explanation from the respondent which is forwarded to the complainant. The chief attorney may also request or require the appearance of the respondent for examination under oath. The respondent at any time may apply to the court for relief.

Matters not warranting a hearing may be dismissed by the chief attorney or a staff attorney, with the consent of a chairman. Letters of caution (not considered discipline) are also issued with the consent of the chairman. The respondent and complainant are advised in each instance. Respondent may appeal a letter of caution to the committee.

An admonition is issued only after the respondent has an opportunity to appear before the committee. The respondent and the chief attorney may appeal an admonition to the three committee chairmen.

Though authorized, hearing panels are not used in the system. If used, panels' proceedings could result in dismissal, issuance of a letter of admonition, or the filing of formal charges.

The staff recommends to the committee that formal disciplinary proceedings be instituted if there is a prima facie case of serious misconduct, public interest requires prompt action or a respondent is convicted of a misdemeanor involving moral turpitude. After a respondent has had an opportunity to be heard, the committee may authorize the chief attorney to bring the action. If the committee rejects counsel's recommendation to institute formal proceedings, counsel may appeal that decision to the three committee chairmen.

When charges are filed with the court, the court directs the respondent to appear and answer. Factual issues raised by

the answer are referred to a judge or referee to hear and report without recommendation. The court then hears the respondent in mitigation.

County and local bar associations are authorized to process all complaints with respect to allegations of minor delay without loss to client, fee disputes, allegations of personality conflicts, and other minor matters. Local bar associations must furnish the chief attorney, within twenty days, copies of the complaint and letters to the complainant and respondent and report the final action taken quarterly.

The committees' staffs operates in three offices and includes four lawyers, five investigators, and four administrative persons. The chief attorney and one assistant are located in Buffalo; one assistant each is located in Rochester and Syracuse.

Major Concerns

Two major deficiencies pervade lawyer discipline in New York: the lack of a centralized system and inadequate funding.

There is no permanent statewide agency to administer the lawyer discipline system. As a result, complaints against lawyers are processed differently and sanctions for similar misconduct vary significantly among and even within the four departments.

The recommendations which follow deal with the disparities within and among the departments. Set forth on the following pages are charts showing some of these disparities.

DISPARITY OF TREATMENT

	FIRST DEPT.	SECOND DEPT.	THIRD DEPT.	FOURTH DEPT.
Local bar involvement in discipline process	No	Yes, 2nd, 10th & 11th No, 9th	Yes	Yes
Local bar action subject to review by disciplinary agency	N/A	No, 2nd, 10th & 11th N/A, 9th	Yes, by Counsel	Yes, by Counsel and Chairman
Counsel's recommended disposition subject to review:				
dismissal	Yes, Committee member	Yes, full Committee	Yes, full Committee	Yes, Committee Chairman
ltr of education	N/A	N/A	Yes, full Committee	N/A
ltr of caution	Yes, Committee member	Yes, full Committee	Yes, full Committee	Yes, Committee Chairman
admonition	Yes, Committee member	Yes, full Committee	Yes, full Committee	Yes, full Committee
formal charges	No	Yes, full Committee	Yes, full Committee	Yes, full Committee

	FIRST DEPT.	SECOND DEPT.	THIRD DEPT.	FOURTH DEPT.
.sclosure of prior				
omplaints before				
letermination of guilt				
n pending matter:				
lismissals	No	No	No	Yes
tr of education	N/A	N/A	No	N/A
tr of caution	No	Yes	Yes	Yes
dmonition	No	Yes	Yes	Yes
ublic discipline	No	Yes	Yes	Yes
spondent's appeal of:				
tr of education	N/A	N/A	No	N/A
tr of caution	Yes, to Chairman	Yes	No	Yes, to committee
dmonition	Yes, to Chairman or to formal hearing	Yes	Yes, to formal hearing	To 3 chairmen
unsel permitted to				
ppeal:				
tr of education	N/A	N/A	No	N/A
tr of caution	Yes, Chairman	No	No	No
dmonition	No	No	No	Yes, To 3 chairmen

	FIRST DEPT.	SECOND DEPT.	THIRD DEPT.	FOURTH DEPT.
nsequences of failure o answer formal charges	Separate offense	Separate offense	None	None
spondent required to ppear before court prior o referral for trial	No	No	No	Yes
view of recommendation for formal charges	None	Committee, Justice Court	Committee, Court	Committee, Court
rmal Charges tried by	Hearing panel	Referee	Referee	Referee
unsel permitted to ecommend specific anctions	Yes	No	No	No

62K
26K

reject an amendment to the New York State Bar Association Code of Professional Responsibility creates additional potential for disparate standards.

If there were a structured system to facilitate communication concerning disciplinary enforcement among the courts, professional staff, and volunteers, existing disparities might be lessened. Such a system, however, does not exist, in part because of the confidentiality requirements of Section 90 of the Judiciary Law.

The second major concern is the inadequacy of funding for discipline throughout the state. The average allocation per lawyer is insufficient to ensure effective discipline. The 1981 legislative appropriation resulted in a budgetary allocation of less than half the amount allocated per lawyer in California. As a result, some departments are without an investigative staff and are unable to pay competitive salaries for disciplinary personnel.

The appropriations were also allocated unevenly across the departments on a per lawyer basis. While some fluctuation is to be expected, the dramatic disparity among departments--which exceeds 100%--cannot be justified. Inadequate funding results in inadequate staffing and undermines vigorous prosecution.

STRUCTURE AND STAFF

The following recommendations urge centralization of lawyer discipline, but substantially draw upon the personnel presently in place.

Centralization

The Lawyer Standards recommend that the highest court of the state assert its inherent power to exercise ultimate and

exclusive responsibility for the structure and administration of the lawyer discipline system.

Lawyer discipline in New York is not administered by the state's highest court, the Court of Appeals. Section 90 of the Judiciary Law assigns that responsibility to the Appellate Division. Since the Appellate Division is divided into four departments, the administration of discipline is thereby automatically fragmented.

1. Recommendation: The ultimate and exclusive authority for the administration of lawyer discipline should be vested in a court with statewide jurisdiction (hereinafter the Disciplinary Court). Lawyer Standard 2.1.

The Lawyer Standards provide that the Court of Appeals, as the state's highest court, be the Disciplinary Court. This could be accomplished either by the assertion of inherent power by the Court of Appeals or by legislative enactment.

If, as some have suggested, this is practically or politically impossible at this time, a Disciplinary Court consisting of the four presiding justices or their designees could be established. A fifth justice should be added to avoid having an even numbered court. This could be achieved by having the four members of the Disciplinary Court elect a fifth justice also from the Appellate Division for a fixed term. To ensure rotation of that position among the Departments, his successor could not be from the same Department.[20]

With more than 70,000 lawyers in New York, the Disciplinary Court must be assisted by a centralized statewide agency. The

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20. If the Appellate Divisions by cooperative action lack the power under §90(2) of the Judiciary Law to implement this proposal, the statute will have to be amended.

Lawyer Standards recommend an agency responsible for the initial review of cases and the daily administration of the disciplinary system. That agency consists of a statewide board, hearing committees, counsel and staff. The board proposes rules of procedure, establishes hearing committees and allocates their work, performs review functions, appoints counsel and staff, supervises the operations of the agency and periodically reviews the operation of the system with the court.

The Disciplinary Court appoints the members of the board. The Lawyer Standards provide for a board of six lawyers and three nonlawyers, authorized to elect its chairman from the lawyer members.

A statewide disciplinary board, working with a statewide Disciplinary Court, can develop procedures and apply sanctions more uniformly, and can utilize the same criteria in monitoring the operation of the disciplinary system throughout the state.

2. Recommendation: A statewide disciplinary board (Board) should be created. The Board should be appointed by the Disciplinary Court from recommendations supplied by the state and local bar associations. The membership should be two-thirds lawyers and one-third nonlawyers. The Board should elect its chairman from among its lawyer members. Lawyer Standard 3.4.

3. Recommendation: The Board should perform review functions (see Recommendation 17), appoint hearing committees (see Recommendation 11), appoint counsel (see Recommendation 4), and periodically review the operation of the system with the Disciplinary Court. Lawyer Standard 3.5.

The Lawyer Standards recommend that counsel be appointed by the Board to conduct all prosecutorial and investigative

functions. (See Recommendation 18). It is essential that the prosecutorial functions be administered by a statewide chief counsel. Otherwise, prosecutorial discretion may be exercised inconsistently by local disciplinary counsel; the expertise of local counsel cannot be effectively coordinated, and without centralization, the entire statewide system may be adversely affected by the actions of a single local counsel.

4. Recommendation: The Board should appoint a statewide bar counsel (Chief Counsel). The Chief Counsel should appoint regional counsel, coordinate all regional office budget requests and develop a communication system among all regional counsel. Each regional counsel should appoint and supervise his staff in consultation with the Chief Counsel. Lawyer Standards 3.8 and 3.9.

Budget

Funding for lawyer discipline is included in the statewide OCA budget. The disciplinary budget of each department is prepared by its chief counsel and reviewed by the committee or chairman. That budget is incorporated into the departmental budget, which in turn is included in the total Appellate Division budget submitted to the Chief Administrator. The departments do not have an administrative officer in the OCA to advocate their fiscal needs. As a result, the fiscal needs of the four departments, including discipline, are shortchanged in the appropriation process.

The Disciplinary Court should submit its own budget directly to the OCA and the Chief Judge. Segregation of the disciplinary budget will increase its visibility and make it more difficult politically to impose drastic cuts. The Board and Chief Counsel should jointly participate in the budget preparation.

Greater financial independence and increased control over costs are essential to an effective, efficient system. If necessary, the lawyer registration fee could be increased and/or required annually.[21]

5. Recommendation: The Disciplinary Court should implement an annual budget process and establish a formal liaison with the OCA through the Board to effectively coordinate and communicate the needs of the disciplinary system to the legislature.

6. Recommendation: Additional funding should be secured to permit improvements in the system.

It is essential that the disciplinary agency be able to hire and retain competent counsel. To do so, counsel should be provided with competitive pay, adequate benefits and long term security so that practical economics do not impair the efficiency of the system through constant lawyer turnover.

The salaries of all lawyers in the disciplinary systems are presently tied to an unrelated civil service classification. This has resulted in inadequate compensation which does not fairly reward either the training or expertise of disciplinary counsel. The Disciplinary Court and the Board should secure reclassification of lawyer positions to provide compensation competitive with that received by lawyers practicing in state and federal government.

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21. Registration states with large lawyer populations and annual assessments are Illinois (36,500 lawyers at $30.00), Massachusetts (23,504 lawyers at $70.00 for lawyers admitted five or more years and the balance at $30.00), and Pennsylvania (26,700 lawyers at $40.00). See also footnote 11. Annual Survey, supra. An annual registration fee of $50 would generate $3,587,500. Reducing this amount by 12.5% to fund the Clients' Security Fund would leave a balance of $2,870,000 to fund the lawyer discipline system. This amount is greater than the $2,119,386 allocated to discipline in 1981-82, and should be adequate to meet the ongoing and growing needs of the enforcement effort.

7. Recommendation: Disciplinary counsel should be provided with compensation and benefit plans competitive with those provided in government practice. Lawyer Standard 3.18.

Counsel must also be provided a research capacity and continuing education to enhance their performance and expertise. The efficiency of any disciplinary system suffers when an essential element - the counsel - are deprived of a national perspective about problems in lawyer discipline and are unable to anticipate trends in the enforcement field.

8. Recommendation: Funding should be provided to maintain adequate state and national research materials and to permit participation by all counsel in state and national training seminars.

Board Attorney

The Lawyer Standards recommend the separation of prosecutorial and adjudicatory functions within the agency. The Board, which adjudicates, should not be staffed by counsel who prosecutes. Therefore, the Board should be provided with its own attorney to assist in drafting reports, drafting rule revisions, long range planning, budget monitoring and in the appointment of committee members.[22]

9. Recommendation: The Board should employ its own attorney to facilitate the separation of the adjudicative and prosecutorial functions. Lawyer Standard 3.2.

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22. This separation of functions has been implemented in other jurisdictions with large lawyer populations (such as California and the District of Columbia) and appears to work well.

Hearing Committees

The Lawyer Standards recommend hearing committees of two lawyers and one nonlawyer to perform the adjudicative functions of reviewing counsel's recommendations for disposition and conducting hearings into formal charges. Members of existing grievance committees could be reassigned to as many hearing committees as are required.

The hearing committees recommended by the Lawyer Standards are preferable to the existing grievance committees for several reasons. The twenty member grievance committees perform multiple functions and generally are convened monthly. Reconstituting grievance committees to three member hearing committees would reduce the burden on these members by limiting their involvement to adjudicative functions and by increasing the number of committees to perform the work. A reduction in the size of committees should decrease the difficulty in convening quorums and facilitate deliberations by requiring the concurrence of fewer members. The larger number of hearing committees could dispose of a larger caseload with less time demands on its members than those of existing grievance committees. Further, hearing committees assure different perspectives in the resolution of disciplinary matters, not just the view of a single adjudicator, and provide more meaningful involvement for lawyer and public members.

10. Recommendation: The grievance committees should be disbanded and their members reassigned to hearing committees of two lawyers and one nonlawyer. Lawyer Standard 3.6.

11. Recommendation: The hearing committees should be appointed by the Board. Lawyer Standards 3.5 and 3.6.

12. Recommendation: The Board should assign hearing committees to hear matters and issue written findings of fact, conclusions of law and recommendations for discipline. Cases should be reassigned in the event of conflicts of interest or undue delay. Lawyer Standards 3.5 and 3.7.

13. Recommendation: The use of judges and referees to conduct formal hearings should be discontinued.

PRACTICE AND PROCEDURES

Review of Recommended Disposition

In the First Department, a member of the DDC reviews all dispositions recommended by counsel except the filing of formal charges; in the Second and Third Departments the entire grievance committee reviews counsel's recommended disposition in all cases; in the Fourth Department the chairman alone does so.

In the First Department, only counsel recommends a disposition which is reviewed solely on the basis of the investigative file. In all of the districts in the Second Department, the full grievance committee acts either on the recommendation of a subcommittee which has held an investigative hearing, or upon the recommendation of counsel based solely upon the investigative file. In the ninth and tenth districts, however, subcommittee investigative hearings are rarely held. In the Third and Fourth Departments, the full grievance committee reviews counsel's recommended disposition and the respondent has a right to appear. The Third Department also provides an initial review of counsel's recommended disposition by a member of the grievance committee, and the Fourth Department provides a review of counsel's recommendation for dismissal by the committee chairman.

The Lawyer Standards provide that the recommendation of counsel should be reviewed by the chairman of a hearing committee.[23] That review preserves the bifurcation of the prosecutorial and adjudicative functions and eliminates the delay involved in convening the full committee.

The Lawyer Standards also provide that, if the reviewing chairman modifies or disapproves counsel's recommended disposition, counsel may appeal that action to the chairman of another hearing committee. The second chairman approves either counsel's recommended disposition or the action of the first chairman, and the decision of the second chairman is final.

The initial recommendation for disposition of a complaint following investigation should made by counsel. Counsel has the expertise and, as the individual who has conducted the investigation, is most familiar with the facts and evidence available.

14. Recommendation: The initial recommendation for disposition of a case following investigation should be made by counsel and reviewed by a chairman of a hearing committee. Lawyer Standard 8.11.

15. Recommendation: If the reviewing chairman modifies or disapproves counsel's recommendation, counsel should be authorized to appeal to a second reviewing chairman whose decision is final. Lawyer Standard 8.12.

Under the Lawyer Standards, once formal charges have been filed, the proceeding is no longer confidential. Consequently, once formal charges have been filed, there can no longer be private discipline. The Standards provide that private

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23. Some of the jurisdictions that have a single member review counsel's recommended disposition include: Alaska, Arizona, Georgia, Hawaii, Idaho, Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Pennsylvania, and South Carolina.

discipline may be imposed upon the recommendation of counsel, approval of the reviewing member, and consent of the respondent.

There is a panoply of private sanctions employed in the existing system. The First Department issues letters of caution, which do not constitute discipline, as well as admonitions. The Second Department issues letters of caution, which do not constitute discipline, as well as admonitions.[24] The Third Department issues letters of education, which do not constitute discipline, letters of caution, which are, and admonitions. The Fourth Department issues letters of caution, which do constitute discipline, as well as admonitions.

The multitude of private dispositions does little to further the primary goal of disciplinary enforcement--protection of the public. The primary goal can be realized by using a single form of private discipline--the admonition. Another problem involved in the use of private dispositions is the dilemma which they can create in the system. If they reflect a determination of misconduct, however slight, a record should be made of them for use in the event of a future offense. If however, there is no express or implied determination of misconduct, no action is warranted at all.

16. Recommendation: All private dispositions should be replaced by the admonition administered by counsel with the consent of the respondent and the approval of the hearing committee chairman. Lawyer Standard 6.10.

The Board

The Board reviews the reports and recommendations of all hearing committees, thereby assuring consistency in the

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24. 22 NYCRR 691.6. Though letters of caution are not considered discipline, they may be used in subsequent proceedings to determine the appropriate sanction.

application of standards and in the imposition of sanctions. The Board may approve, modify or disapprove the committee recommendations. The Board receives no additional evidence. Briefs and oral arguments are permitted. The Board prepares a written report containing its findings of fact, conclusions of law and recommended disposition which is filed with the Disciplinary Court. If the Board terminates the case by reprimand, either counsel or the respondent may appeal to the Disciplinary Court.

17. Recommendation: The Board should perform its appellate review functions in accordance with the procedures summarized in the preceding paragraphs. Lawyer Standards 8.42 through 8.48.

Counsel

At the present time, disciplinary counsel in some departments in New York are not permitted to make a recommendation concerning the sanction to be imposed when the matter is presented to the court. We were advised that in the Fourth Department counsel may not even respond to a respondent's assertion that the misconduct warrants no sanction beyond a censure.

Counsel is in a position to advise the court of sanctions imposed in similar cases. A disciplinary proceeding involves a determination of two important issues - guilt and the sanction to be imposed. The court should not be deprived of the opportunity to hear both sides on both issues.

18. Recommendation: Counsel should be permitted to advocate specific sanctions before both the Board and the Disciplinary Court. Lawyer Standards 8.43 and 8.51.

Complainant

Our interviews disclosed that some complainants were not advised about the disposition of their complaints. Complainants are entitled to know of the disposition of their complaints, and the existing rules require such notice.

19. Recommendation: Rules requiring notice to the complainant of the disposition of their complaint should be strictly observed. Lawyer Standard 8.53.

The Lawyer Standards recommend that the complainant be afforded an opportunity to appeal the disposition of his complaint following investigation. The appeal should be submitted to a panel of the Board. If the complainant disagrees with the decision of the Board panel, he may appeal to the Disciplinary Court, but only if he can show that the Board panel acted arbitrarily, capriciously, or unreasonably.

20. Recommendation: Procedures should be adopted assuring the complainant a right to appeal a disposition with which he disagrees. Lawyer Standards 8.15 and 8.16.

Respondent

In the First Department, failure of the respondent to cooperate in an investigation of a complaint filed against him may be the basis for additional charges. The same is true in the Second Department. In the Third and Fourth Departments failure to cooperate does not expressly constitute misconduct warranting additional charges. Failure to cooperate could, however, have adverse consequences for the respondent. For example, in the Third Department a lawyer's failure to appear for examination when ordered to do so may result in a suspension of the lawyer pending disposition of the complaint or further order of the court. In the Fourth Department failure to respond without a satisfactory excuse may result in

the charges against the lawyer being deemed admitted. The duty to cooperate in an investigation concerning the lawyer's license to practice law is an incident of the license granted to the lawyer as an officer of the court.[25]

21. Recommendation: Failure to cooperate should be grounds for imposing discipline. Lawyer Standard 5.1(f).

Local Bar Association Discipline

Local bar associations are authorized to process complaints of minor misconduct. Local bar associations have made contributions in the mediation of disputes between lawyers and disgruntled clients. The role of local bar associations in the disciplinary process is, however, inappropriate.

Those involved in the local bar believe that their investigation of minor misconduct relieves disciplinary agencies of performing that work. The evidence demonstrated, however, that in some instances the delay by the local bar associations in processing matters impeded a timely investigation by counsel.

The Lawyer Standards do not contemplate use of such a secondary system. Professional counsel and investigators are used to ferret out misconduct which might otherwise go undetected. A statewide agency is employed to eliminate the parochialism that made discipline ineffective decades ago. The Lawyer Standards provide that counsel has responsibility to screen all complaints against lawyers. Where counsel

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25. See, e.g., In re Andrews, 51 A.D.2d 50, 378 N.Y.S.2d 408 (App. Div. 1976) (failure to cooperate with the grievance committee basis for suspension); Livadas v. Monroe County Bar, 43 A.D.2d 120, 350 N.Y.S.2d 35 (App. Div. 1973) (lawyer's dilatoriness in responding can be a factor weighed in determining severity of discipline).

determines that there is no potential violation of the code, the local bar associations may play a useful role in resolving the nondisciplinary problem between the lawyer and the client.

22. Recommendation: Local bar association involvement in the disciplinary process should be discontinued. In the alternative, involvement of local bar associations should be continued in nondisciplinary matters upon referral from disciplinary counsel.

Case Law Standards

Many aspects of the disciplinary system have been established by case law or practice. The bar is better served, however, by establishing governing principles by rule. Better notice would be given by explicit court rules. Principles which should be promulgated as rules include immunity for the complainant, the ability to stay disciplinary proceedings during pending criminal or civil litigation, the need to set an effective date of discipline in a court order, the applicability of rules of discovery, the lack of a statute of limitations, the admission of charges by the respondent upon failure to answer formal charges, and the right of respondent to counsel.[26]

These principles are important elements in a fair, effective discipline system. Complainant immunity encourages submission of matters to the disciplinary agency for impartial investigation without fear of reprisal. A stay is appropriate in extraordinary cases where the respondent might suffer prejudice in the pending proceeding. An effective date of discipline triggers the protections afforded by existing court rules requiring notice to clients, withdrawal from matters and precluding retention in new matters. Respondents should be

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26. Only the Third Department does not by rule ensure a right to counsel, but a form is sent to the respondent advising him of that right.

advised of the liberal discovery afforded by the offices of counsel, and counsel should have adequate discovery mechanisms in addition to the current subpoena and deposition procedures.

The absence of a statute of limitations protects the public by ensuring that the agency's power to investigate conduct relevant to the question of fitness to practice is not limited; the time between commission of the alleged misconduct and the filing of a complaint, however, may be pertinent in determining whether and to what extent discipline should be imposed.

A respondent impedes timely adjudication of a disciplinary matter by failing to file an answer; no useful purpose is served by requiring proof of issues which duly served respondent has not contested. Requiring proof in such situations wastes the limited resources of the agency.

23. Recommendation: The Board should recommend adoption of specific rules on immunity for the complainant, stay of proceedings, effective date of discipline, discovery, the absence of a statute of limitations, the effect of failure of the respondent to answer charges, and right to counsel consistent with Lawyer Standards 4.6, 6.15, 8.3, 8.10, 8.28, 8.29 and 8.34.

Rules of Evidence

Rules of evidence protect the integrity of a proceeding against admitting evidence of doubtful reliability. They should be strictly adhered to in a proceeding as serious as one with the potential of resulting in the revocation of a lawyer's right to practice law, particularly when the adjudicators include nonlawyers.

The team was advised that there is no clear requirement that the rules of evidence be adhered to. They in fact

appeared not to be. Otherwise inadmissible evidence is occasionally admitted into the record for "whatever it may be worth."

24. Recommendation: The rules of evidence applicable to nonjury civil trials should be adhered to in the course of the disciplinary hearing. Lawyer Standard 8.32

Standard of Proof

Disciplinary proceedings are sui generis falling somewhere between civil suits seeking to resolve disputes between private parties and criminal proceedings. The standard of proof applied in disciplinary proceedings in New York is "a fair preponderance of the credible evidence," the standard for civil proceedings[27]. The Lawyer Standards, recognizing that disciplinary proceedings may result in substantially more serious consequences than mere monetary awards but less than incarceration, recommend the application of a more strenuous standard of proof of "clear and convincing evidence."

25. Recommendation: The standard of proof applicable to disciplinary proceedings should be "clear and convincing evidence." Lawyer Standard 8.40

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27. The standard of proof in lawyer disciplinary proceedings is a fair preponderance of the evidence and reasonable inferences drawn therefrom. See Gunderson v. Committee on Professional Standards, 75 A.D.2d 706, 427 N.Y.2d 307 (App. Div. 1980) (Third Department); In re Feola, 37 A.D.2d 789, 324 N.Y.S.2d 654 (App. Div. 1971) (Third Department); In re Mogel, 18 A.D.2d 203, 238 N.Y.S.2d 683 (App. Div. 1963) (First Department); In re Phillies, 17 A.D.2d 93, 231 N.Y.S.2d 601 (App. Div. 1962) (Fourth Department). But see In re Anonymous, 175 A.D. 653, 161 N.Y.S. 504 (App. Div. 1916) (Third Department). This case held that the respondent is presumed to be innocent and proof of his guilt should be clearly established. "The evidence to sustain charges . . . in a proceeding of this kind [disbarment based on pending criminal charges] should be clear and satisfactory and convincing." Id. at 659.

Immunity

Agency personnel are an integral part of the judicial process and should be entitled to the same immunity afforded to prosecuting attorney.[28]

Immunity protects the independent judgment of the agency and avoids diverting the attention of its personnel as well as its resources resisting collateral attack and harassment. The Lawyer Standards recommend absolute privilege rather than qualified privilege: qualified privilege does not provide protection against harassment made possible by simply alleging malice and a law suit. Contact on the part of the agency personnel which is not authorized or exceeds assigned duty should not be protected.

The status of immunity for agency personnel in New York is unsettled. The First Department relies on its Court Rule 603.4(a)(3), and the Second Department relies on its Court Rule 690.4(b); the Third Department relies on the indemnity provisions of the Public Officers Law; the issue does not appear to be addressed in the Fourth Department.[29]

The relevant provisions of the Public Officers Law - Sections 17 and 18 - only provide for defense and indemnification. Section

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28. See Clark v. State of Washington 366 F.2d 678 (9 Cir. 1966).

29. See Sinhogar v. Perry, 74 A.D.2d 204, 427 N.Y.S.2d 216 (App. Div. 1980) (citing Movable Homes, Inc. v. City of North Tonawanda, 56 A.D.2d 718, 392 N.Y.S.2d 722 (App. Div. 1977), in which the court stated the general rule in New York relating to a public official's immunity as follows: a public official may be held liable in damages for a wrongful act only where such act is ministerial in nature; where, however, an act is discretionary or quasi-judicial in nature no liability attaches even if the act was wrongfully performed). See also, Weiner v. Weintraud, 22 N.Y.2d 330, 239 N.E.2d 456, 292 N.Y.S.2d 667 (1968) (immunity for complainant).

17 has, moreover, been interpreted as excluding members of the Joint Bar Association Grievance Committees.[30]

26. Recommendation: The Disciplinary Court should adopt a rule making all persons serving within the agency absolutely immune from civil liability for all acts committed in the course of their official duty. Lawyer Standard 3.10.

Prior Disciplinary Record

Prior discipline is relevant and material to the issues of the degree of discipline to be imposed for the conduct which is the subject of pending charges. Prior discipline is, except in unusual circumstances, not relevant or material to the issue of whether the conduct alleged has occurred. Consequently, introduction of evidence of prior discipline before finding that the present charges have been sustained is prejudicial and should not ordinarily be introduced until a finding has been made.

If evidence of prior discipline is necessary to prove the present charges (e.g., allegation that the respondent continued to practice despite suspension) or to impeach (e.g., respondent falsely testified he has never been in trouble before), it may be offered. However, it should not be used as a substitute for proving the allegation at issue.

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30. Members of the Joint Bar Association Grievance Committee of the Second Judicial Department are not employees or officers of the state for purposes of indemnification and representation pursuant to Pub. O. Law §17. Op. Atty. Gen. (Oct. 31, 1977). It has also been held, however, that members of the Joint Bar Association Grievance Committees of the Second Judicial Department can be made eligible for indemnification and representation, pursuant to Pub. O. Law §17. Op. Atty. Gen. (Sept. 28, 1978).

Simply stated, the potential prejudicial effect of the disclosure of the existence of prior misconduct and the imposition of discipline so outweighs its relevance that it should be barred. There appears to be no rule in the Second, Third and Fourth Departments making such evidence unavailable. There is even a practice in the Third Department of summarizing the prior disciplinary record of a respondent facing charges and making it available upon request to both the grievance committee when it seeks to determine whether probable cause exists and to the referee adjudicating a formal disciplinary proceeding.

Another department routinely summarizes all prior complaints made against the respondent together with their disposition - including dismissal - for consideration by the members of the grievance committee in determining the disposition of a pending complaint. The fact that a lawyer has been the subject of a prior complaint which, upon investigation, was found not to have validity has no probative value relevant to a new complaint whatsoever. Its disclosure to persons having adjudicative responsibilities can, therefore, be prejudicial and should under no circumstances be tolerated.

27. Recommendation: A rule should be adopted absolutely prohibiting the disclosure of a prior unsubstantiated complaint and prohibiting the disclosure of prior discipline of a respondent, absent usual circumstances, until after there has been a finding of misconduct in a pending matter. Lawyer Standard 8.39

Confidentiality

Section 90(10) of the Judiciary Law prohibits the public disclosure of the pendency of any disciplinary proceeding until formal charges have been sustained by the Appellate Division and discipline imposed. This is true even in disciplinary proceedings predicated upon criminal convictions, which are themselves a matter of public record.

Until a complaint has been fully investigated its validity is not known. The confidentiality that attaches prior to a finding of probable cause and the filing of formal charges is primarily for the benefit of the respondent to protect him against publicity predicated upon unfounded accusations.

The Lawyer Standards provide that prior to the filing of formal charges, the proceeding should be confidential, except the subject matter and status of an investigation may be disclosed if the respondent has waived confidentiality; the proceeding is based upon conviction of a crime; or the proceeding is based upon allegations that have become generally known to the public. If the respondent waives confidentiality or if the nature of the accusation is already known to the public, the basis for confidentiality no longer exists. Moreover, refusal of the agency to acknowledge the existence of an investigation when allegations of misconduct against a lawyer are publicly known only serves to embarrass the agency by implying it is unaware of or uninterested in allegations of misconduct, without in any way protecting the reputation of the lawyer.

The Lawyer Standards recommend that, except for committee, board or court deliberations, proceedings be public after formal charges are filed and served on the respondent.[31]

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31. Ten jurisdictions currently provide public access to lawyer disciplinary proceedings upon a finding of probable cause to file formal charges: Arkansas, 260 Ark. 910, III Rules of the Supreme Court of Arkansas Regulating Conduct of Attorneys at Law (as amended February, 1980); Florida, 11.12 Integration Rule of The Florida Bar (as amended July, 1981); 4-221(d) Rules and Regulations for the Organization and Government of the State Bar of Georgia (as amended and codified by order of the Supreme Court of Georgia, June 26, 1979); Indiana, 23 Indiana Rules of Admission and Discipline §22(b) (1976); Kansas, 222(d) Rules of the Supreme Court of Kansas Relating to Discipline of Attorneys (1979); Kentucky, 3.150, 4.130 SCR (as amended April 27, 1981); Michigan, 975.2 General Court Rules for the Attorney.

Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to assure the integrity of the disciplinary process in the eyes of the public requires that at this point further proceedings be open to the public. An announcement that a lawyer accused of serious misconduct has been exonerated after a hearing behind closed doors will be suspect. The same disposition will command respect if the public has had access to the evidence.

Upon a showing of good cause, any individual should be able to seek a protective order requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information which is the subject of the request.

28. Recommendation: Confidentiality should be removed once formal charges have been filed and served on a respondent. Lawyer Standard 8.25.

29. Recommendation: Disclosure of the pendency, subject matter and status of an investigation should be permitted when a respondent has waived confidentiality, the proceeding is based upon conviction of a crime or the allegations are generally known to the public. Lawyer Standard 8.24.

Sanctions

None of the departments have rules permitting the imposition of probation. There is no specific provision for probation in Section 90.

Grievance Commission and Attorney Discipline Board, Supreme Court of Michigan (1978); North Carolina, IV General Statutes of North Carolina Applicable to Discipline and Disbarment, Rule 29 (1978); Oregon, 45(b) Rules of Procedure Relative to Admission, Discipline, Resignation, and Reinstatement (1981); Wisconsin, 22.24 Wisconsin Supreme Court Rules and Procedures for the Board of Attorneys Professional Responsibility, Chapters 11, 21, 22 (1981).

Lawyer Standards 6.7 and 6.8 provide for probation. Probation is appropriate where the lawyer can perform legal services with supervision and the misconduct does not require greater public protection. Probation is being increasingly and creatively used in most jurisdictions. Probation has been used for respondents with alcohol or chemical dependency problems; respondents who require additional legal education or accounting training; and respondents who committed isolated, minor misconduct due to emotional distress or other factors, but who are unlikely to err again. California has established a probation department, and Massachusetts has begun to establish probation standards. The team recognizes that a commitment of staff resources is required to provide adequate supervision but believes that such a commitment should be made.

30. Recommendation: The disciplinary system should include provisions for probation consistent with Lawyer Standards 6.7 and 6.8.

There are no rules specifically permitting the court to require reimbursement to victims of the respondent's misconduct, to the clients' security fund, or to the agency for costs of the proceedings. Both forms of reimbursement should be available as sanctions, and respondents should be notified of their availability.

The routine collection of costs is one method of allocating the cost of the disciplinary system against those who require its operation rather than the bar at large. The requirement of restitution, if only as a condition of reinstatement, protects some of the limited resources of the clients' security fund for those claimants whose lawyers are unable to make reimbursement, and also diminishes the burden of having to recover from respondents through civil litigation.

31. Recommendation: Reimbursement of misappropriated monies and costs should be available as disciplinary sanctions. Lawyer Standards 6.12 and 6.13.

Discipline By Consent

The only discipline by consent presently permitted is resignation while charges are pending. There is little rationale for so limiting the disciplinary sanction which can be imposed with the consent of counsel, respondent and an appropriate adjudicatory body. To the contrary, mandating that all allegations of misconduct not warranting disbarment be tried to conclusion is counter-productive.

Permitting the acceptance of the stipulated discipline by a lawyer who has been guilty of misconduct and desires to avoid the trauma and expense of a proceeding is in the interest of the public and the agency. The public is immediately protected from further misconduct by the lawyer who otherwise might continue to practice until a formal proceeding is concluded. The agency is relieved of the time-consuming and expensive necessity of prosecuting a formal proceeding.

The respondent should be required to admit the charges before discipline is stipulated so that evidence of guilt will be available if he later claims that he was not in fact guilty. Petitions for reinstatement are often filed years after the discipline has been imposed, and if there is no admission, it may be difficult for the agency to establish the misconduct because relevant evidence and witnesses may no longer be available.

The extent of discipline to be imposed should be subject to review. If an agreement providing for admonition or probation has been reached, prior to the filing of formal charges, the agreement must be approved by the chairman of the hearing committee.

If an agreement provides for reprimand, suspension or disbarment, or if any agreement is reached after formal charges have been filed, the agreement must be approved by a panel of the board. The members of the panel are disqualified from any future consideration of the matter in the event the stipulated discipline is for any reason not imposed. If a stipulated discipline provides for suspension or disbarment, it must also be approved by the Disciplinary Court.

Discipline by consent which results in the lawyer withdrawing from the practice of law should be recorded and treated as disbarment, not as a resignation.

In the event that the proposed stipulated discipline is disapproved by the reviewing entity or the matter is returned to formal proceedings for any reason, the respondent's admission of the charges should not be used against him.

32. Recommendation: A rule should be adopted providing for the imposition of discipline by consent for a respondent who admits in writing the truth of the charges against him. The respondent and counsel should agree on the nature and extent of the discipline to be imposed, and the proposed discipline should be approved by the appropriate adjudicative body. Lawyer Standards 11.1 and 11.2

The team notes that the rules on resignation while charges are pending differ. The First and Third Departments, if they accept the resignation, enter an order striking the name of the respondent from the registration list (Rule 603.11; Rule 806.8); the Fourth Department enters an order of disbarment (Rule 1022.25); and the Second Department may take either action (Rule 691.9).

The team believes that the final action should be treated uniformly. The matter should clearly reflect that discipline

was imposed or warranted so that reciprocal discipline can be promoted in other jurisdictions. The reporting form for the American Bar Association National Discipline Data Bank includes a category for resignation while charges pending.

33. Recommendation: The Board should recommend a uniform reporting method for processing resignation while charges are pending.

Interim Suspension

Section 90(4)(f) provides for automatic suspension of a lawyer convicted of a serious crime (as therein defined) and for a hearing as to the appropriate sanction after all criminal appeals are complete. (Section 90 also provides for automatic felony disbarment.) The procedures for implementing this interim suspension requirement are incorporated in each department's rules.

None of the departments have a specific mechanism for placing on interim suspension a lawyer who is causing great harm to the public. A lawyer who displays a pattern of dangerous misconduct, such as conversion of client funds, should be subject to immediate suspension.

34. Recommendation: The procedures for implementing automatic felony disbarment and interim suspension for conviction of a serious crime should be vested in the Disciplinary Court.

35. Recommendation: The Board should recommend a rule which permits counsel, with the approval of a hearing committee chairman, to seek immediate suspension of a lawyer who is causing great harm to the public. Lawyer Standard 6.5.

Reinstatement

All the Departments require that any lawyer who has been suspended regardless of the limit of time must petition for reinstatement. Yet, reinstatement proceedings may take months to complete. Requiring such a proceeding before a lawyer can be reinstated after a suspension of six months or less unfairly prolongs the period of suspension. Consequently, reinstatement following a suspension for six months or less should be automatic upon the expiration of the prescribed period of time and the filing of an affidavit alleging compliance with all the terms of the order of suspension.

36. Recommendation: A rule should be adopted providing for automatic reinstatement upon the filing of an affidavit that the lawyer has compiled with all applicable orders and rules for those suspended for six months or less. Lawyer Standard 6.4

The team finds that there are no standards or established procedures governing petitions for readmission following disbarment or reinstatement following suspension. Respondents are, therefore, subject to the varying demands and attitudes of the adjudicatory body to which the petition has been assigned.

All petitions for reinstatement or readmission should be filed with the Board and served on counsel. Factual issues underlying petitions for readmission or reinstatement should be assigned by the Board to a hearing committee for the determination of factual issues.

The disbarred or suspended lawyer should be required to establish by clear and convincing evidence as a condition of readmission or reinstatement, his rehabilitation, fitness to practice, adequate current learning in the law, and compliance with all provisions of the disbarment or suspension order, including restitution, and may be required to pass an

examination in professional responsibility and to pay the costs of the disciplinary proceeding resulting in his discipline or the readmission or reinstatement proceeding.

37. Recommendation: A rule should be adopted setting forth the criteria and standards which a respondent is required to establish in order to be readmitted or reinstated. Lawyer Standard 6.2 and 6.4.

Records Retention

There is presently no defined policy concerning retention of disciplinary records. This has resulted in the indefinite retention of dismissed complaints. The recently adopted Lawyer Standard 3.12.1 provides for automatic expunction of all dismissed complaints after a reasonable period from the date of dismissal. The standard suggests three years, but the reference is bracketed so that each jurisdiction can make its own decision. The expunction standard accommodates those who are concerned that the mere existence and indefinite retention of a record of a dismissed complaint will unfairly stigmatize the lawyer and those who believe that such records should be retained and available for a reasonable period of time in case further evidence substantiating the earlier complaint is received later. The retention period would also protect the agency and respondent from accusations relating to whether the matter was investigated. The standard permits counsel to apply, with notice to the respondent and an opportunity to be heard, for an extension of the period of time that records of a specific dismissed complaint will be retained.

38. Recommendation: Consistent with Lawyer Standard 3.12.1, the Board should recommend a records retention policy to address dismissed matters. The policy should include all nondisciplinary dispositions previously issued.

Federal Court Discipline

There appears to be no interrelationship between discipline at the state level and discipline in the federal court system. Such an interrelationship is needed and desirable for effective reciprocal discipline. Rules of disciplinary enforcement for the Second Circuit Court of Appeals were recently promulgated[32] which authorize the appointment of a special counsel to investigate and prosecute complaints against members of the federal bar in New York.

The federal district courts and the Court of Appeals for the Second Circuit should consider the adoption of the Model Federal Rules of Disciplinary Enforcement.[33] The Model Federal Rules contemplate reliance upon the developed expertise of the state disciplinary agency, which avoids unneccessary duplication of proceedings and conserves limited resources. Disciplinary matters which come to the attention of a federal court would be referred to the Chief Counsel for investigation and, if investigation indicates that a formal complaint is warranted, the matter would proceed through the normal disciplinary process. The federal court retains ultimate jurisdiction for the imposition of sanctions. In order to compensate the state disciplinary authority for its services, financing may be provided by the federal court through a periodic assessment of lawyers.

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32. United States Court of Appeals for the Second Circuit, Rules of Disciplinary Enforcement and Operating Procedures of the Committee on Admissions and Grievances of the Court of Appeals for the Second Circuit, 46(f) Federal Rules of Appellate Practice (1979).

33. ABA Standing Committee on Professional Discipline, Model Federal Rules of Disciplinary Enforcement (ABA 1978).

39. Recommendation: The Disciplinary Court should seek adoption of the Model Federal Rules of Disciplinary Enforcement by the United States district courts in New York and the Second Circuit Court of Appeals to facilitate a coordinated, unified system for discipline with consistent standards and sanctions.

EDUCATION

Court Role

The overwhelming majority of the members of the legal profession seek to conduct themselves ethically. They require guidance particularly in those complex areas which often get lawyers into trouble. The decisions of the disciplinary entities have an important educational function in this regard. It is therefore essential that they be carefully and fully articulated so that when they are published they serve not only to dispose of the particular matter at hand, but to inform all other members of the profession as well.

Written opinions of the Disciplinary Court not only serve an educational function, but also provide precedent for subsequent cases. A requirement that court opinions be issued in every case and that the underlying facts and rationale be fully articulated is manageable; the courts in the jurisdictions with the heaviest caseloads currently write opinions in every disciplinary case they decide.

40. Recommendation: The opinions of the Disciplinary Court and all public disciplinary cases should be carefully drafted to provide both precedential value in subsequent matters and to educate the profession. Lawyer Standard 8.52

Board Role

The public interest is served by wide publication of the availability of a process for investigating and disposition of substantial allegations of lawyer misconduct.[34] Care should be taken in doing so to avoid encouraging frivolous or unfounded complaints.

Increasing the public awareness of the discipline and disability process can be accomplished in many ways. The agency can prepare a short fact sheet or pamphlet describing what it does or does not do, explaining where and how to get information. The rules governing the agency's operation should be readily available. Information about the system and cases within, which is public, should be easily accessible upon request.

Press releases should be issued publicizing the appointment of public members and the imposition of public discipline. Members of the board, particularly public members, should be encouraged to accept speaking engagements to discuss the operation of the lawyer disciplinary system within the limits of applicable rules governing confidentiality. Public members are likely to be perceived by the public as being more credible and objective about the integrity and effectiveness of the lawyer disciplinary system than lawyer members.

Public confidence in the discipline and disability process will be increased as the profession acknowledges the existence of lawyer misconduct and shows the public that effective action is being taken.

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34. See National Organization of Bar Counsel, Standards for Dissemination of Disciplinary Information (ABA 1980).

41. Recommendation: The Board should coordinate public and bar education efforts and encourage the dissemination of information about the disciplinary system and the imposition of discipline. Lawyer Standard 3.16.

Training

New members of hearing committees and the Board require orientation at an early date to ensure that no unnecessary delays occur in the system. Successful orientation programs are conducted in other jurisdictions through seminars which utilize experienced members and counsel, and prepared materials which define the role of the member, set forth the operating procedures, and review recent dispositions and sanctions.

42. Recommendation: All new volunteers in the system should receive training in the mechanics of the system and developments in the law relating to lawyer discipline.

Training is even more important for new or inexperienced staff counsel. Formal training programs are required. Equally useful are seminars, such as those employed in the Fourth Department, designed to familiarize counsel with techniques in different areas of practice. The ability of new staff counsel must be continually assessed by both the Chief Counsel and regional counsel.

43. Recommendation: Formal training programs should be developed for counsel.

Case Law Digest

Many jurisdictions, such as Illinois and Massachusetts, have developed or are developing digests of case law to assist

both the private practitioner and those involved in the disciplinary system. Other jurisdictions, such as Ohio, have published annotated state disciplinary codes. Such compendiums lessen the reliance currently placed upon experienced members in the system. A digest would also facilitate the evaluation of trends in sanctions.

44. Recommendation: The Board should develop a digest of New York lawyer discipline case law.

Conclusion

Our examination revealed a concern for and dedication to effective disciplinary efforts. The fragmentation of the disciplinary mechanism and the inadequate devotion of resources, however, have prevented the coordinated effort necessary for efficient and thorough regulation of the profession.

As noted, inconsistencies abound in sanctions imposed and procedures employed across the departments. These disparities cannot be justified. Likewise, inadequate funding of the system does not provide the required measure of public protection demanded of a self-regulated profession.

Those presently involved in the systems and aware of the problems addressed herein must make the cooperative and dedicated effort needed to meaningfully improve regulation of the profession in New York.

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