New York State Bar Asociation®

REPORT
OF THE
COMMITTEE ON PROFESSIONAL DISCIPLINE

A COMPREHENSIVE STUDY OF THE STATE OF DISCIPLINE IN NEW YORK STATE

June, 1985

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Resolution Adopted by the House of Delegates

of the New York State Bar Association

on June 22, 1985

RESOLVED, that the House of Delegates of the New York State Bar Association hereby endorses the recommendations proposed by the Committee on Professional Discipline, in its report dated March, 1985; and it is further

RESOLVED, that the House of Delegates of the New York State Bar Association does not approve that portion of the report which recommends amendment to Section 90 of the Judiciary Law to permit limited public access to disciplinary proceedings prior to the imposition of final discipline by the Appellate Division on the ground that the public's need to know is served by publication of the findings where misconduct is determined to have occurred, and confidentiality protects the innocent; and it is further

RESOLVED, that the officers of this Association are hereby authorized and directed to distribute the report to such agencies, groups and individuals as may be appropriate, and to take any other necessary action required in their judgment to implement the recommendations presented in said report and this resolution.

Background

BACKGROUND

In 1970, the American Bar Association published a study of professional discipline throughout the country which is known as the Clark Report. It found widespread public dissatisfaction with lawyers' disciplinary procedures. At the time of the Clark Report, as is still currently the situation, the four departments of the Appellate Division in New York State were vested not only with the authority to admit lawyers to practice, but also with the authority to mete out appropriate discipline in cases of lawyer misconduct. In 1970, however, the four judicial departments did not all have detailed rules and regulations governing the procedure or substance of lawyer discipline. In many instances, local bar associations, on an ad hoc basis, investigated complaints, dismissing, without report to the court, those they found without merit, keeping no records of their proceedings, and submitting only those for further action which were deemed to be serious enough for additional proceedings.

The Clark Committee made numerous recommendations for the purpose of achieving a structured, organized and professional disciplinary system. It also recommended that "disciplinary agencies within a state be centralized into a single unit".[1]

Stimulated by the Clark Committee Report, the New York State Committee on Disciplinary Enforcement, generally known as the Christ Committee, was appointed in New York. This committee was composed of distinguished judges from each department of the Appellate Division, as well as lawyer practitioners. This

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[1] Clark Report, p. 26.

committee submitted a most substantial report to the Judicial Conference of New York State in June of 1972. The Christ Committee made far-reaching proposals for the adoption of standardized procedural rules and regulations uniform as far as appropriate in the four departments. These rules called for the employment of professional staffs, the establishment and keeping of permanent records of complaints and disciplinary action, the submission of periodic reports, the authorization for sua sponte investigations, and called for a vehicle for consultation and exchange of information among the four departments, as well as the adoption of the Canon of Ethics, now the Code of Professional Responsibility, as the uniform statewide substantive guide.

The Christ Committee also expressly addressed itself to the question of centralizing the disciplinary agencies within a single statewide unit as recommended by the Clark Committee. With regard to that Clark Committee recommendation, the Christ Committee stated that it:

> . . . however, sees no significant advantage to be gained by removing this jurisdiction from the four Appellate Divisions where Section 90 of the Judiciary Law now places it, particularly so if the committee's proposed uniform rules and its recommendations for interdepartmental coordination and communication in the areas of procedure and policy are implemented.[2]

Essentially, all of the Committee's proposals were adopted and implemented by each department of the Appellate Division.

After about eight (8) years of operation under the Christ Committee disciplinary system, in 1980 Presiding Justice Murphy of the First Department invited the Standing Committee on

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[2] Christ Report, p. xi.

Professional Discipline of the American Bar Association (the "Standing Committee") to conduct an evaluation of the disciplinary system in that department, which invitation was enlarged by Chief Judge Cooke of the Court of Appeals in May of 1981 to include an evaluation of the disciplinary systems in the four judicial departments.

In December 1982, the Standing Committee issued two reports, one report (the "ABA Report") addressing the statewide disciplinary system, and the second report (the "First Department Report") addressing the disciplinary system in the First Department. The reports are substantially identical except that the First Department Report includes some additional recommendations applicable solely to the procedures of that department. The ABA Report recommended that the present system of lawyer discipline be dismantled. It urged that it be replaced with a statewide Court of Discipline, a statewide administrative body, multiple three-member hearing committees and supporting staff.

On February 23, 1983 the Committee on Professional Discipline (the "Committee") was requested by the President of the New York State Bar Association to submit its analysis of the ABA Report. The Committee, in accordance with that request, submitted its preliminary report on April 6, 1983, a copy of which follows, beginning on page 34.

The Committee rejected the recommendation of the ABA Report calling for a new disciplinary court with a centralized administration, a statewide disciplinary board with statewide chief counsel, more subordinate local disciplinary counsel and

the substitution of large numbers of three-person hearing committees for the current Grievance Committee system. The Committee specifically reported:

> The proposed ABA system would establish a new bureaucracy with what our Committee believes would be a politization of the disciplinary system. In fact, the system surely would cost substantially more than the present system, where the volunteer involvement of attorneys reduces the costs substantially. Furthermore, we believe the proposed structure would result in substantially more delay because disciplinary counsel would have to deal with the minor matters now disposed of on the local level, and the statewide board would have to review each decision of the local hearing panel. It would not guarantee that lawyer discipline would be funded more adequately. Our concern, of course, is that there is no guarantee that the proposed ABA system would address whatever problems exist, because, in fact, the ABA Report does not evaluate substantively the current operations of the disciplinary system. (See p. 47, below).

In reaching this conclusion, the Committee noted in its preliminary report that the ABA Report's approach was to make an assessment of the degree to which the disciplinary system in the State of New York conformed to the "Standards for Lawyer Discipline and Disciplinary Proceedings" (Lawyer's Standards"), adopted by the American Bar Association in 1979 and amended in 1982. Accordingly, its evaluation was not addressed to the effectiveness of the New York State Disciplinary System.

The Committee concluded that an evaluation of our Lawyer Disciplinary System must be made, not by comparing it to the theoretical Lawyer's Standards, but rather, by an analytical and empirical study of its operations. No such study had been made since the time that the recommendations of the Christ Committee were put into effect by the four judicial departments. The

Committee, therefore, recommended that it undertake a comprehensive study of the state of lawyer discipline in New York State. The Committee felt that only in this fashion could a determination be made as to any improvements required in the present system.

The Executive Committee of the New York State Bar Association approved the recommendation of the Committee and directed it to undertake a substantive evaluation of the Lawyer Disciplinary System. The Committee has completed that evaluation.

The Committee proposes that the current system not be discarded but rather that changes and additions be made to make it more responsive and more efficient.[3]

RECOMMENDATION

The Committee proposes that it be recommended to the Appellate Division that it adopt the "Proposed Uniform System of Professional Discipline" in the form annexed (the "System") - one that will be "uniform" throughout the state, yet will be administered independently by each of the four judicial departments.

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[3] The Brooklyn Bar Association, The Association of the Bar of the City of New York and the New York County Lawyer's Association have issued reports. These reports, while varying in degree, all reject the establishment of a new statewide court for discipline and/or enlarging the jurisdiction of the Court of Appeals for this purpose.

THE COMMITTEE AND ITS FUNCTIONING

The Committee is the Standing Committee of the New York State Bar Association known as the Committee on Professional Discipline. It commenced its study at the request of Bernard J. Reilly, then President of the New York State Bar Association, on February 23, 1983, and continued the study under Presidents Haliburton Fales, II and Henry G. Miller, and completed it at the request of the current President, Justin L. Vigdor.

The Committee consists of nineteen (19) members. These members represent a cross-section of the Bar of New York. They are from large firms, small firms and come from all parts of the state. Many of the Committee members have served as a member of departmental and/or local Bar Association Grievance Committees. Many have been involved as counsel before such Committees on behalf of Complainants and on behalf of Respondent attorneys. Committee members come from all four judicial departments of the state.

A list of the Committee members appears as Appendix 1 to this report. The Committee also received invaluable assistance from its counsel, Denise McCarthy Randall.

The Committee diligently devoted itself to its task. It reviewed all the reports for the last twenty (20) years on the subject, both national and local in scope. A subcommittee carefully analyzed and compared the rules on discipline in the four judicial departments, a copy of which analysis appears as Appendix 2 to this Report. This examination revealed that while in many basic ways the present system operates in substantial uniformity, a number of procedural differences exist which do not

appear to be a result of any special local need.

The Committee obtained orders from each department of the Appellate Division permitting a review of unpublished cases. Pursuant to the orders, a subcommittee examined and annotated over 500 of the unpublished cases of the departmental grievance committees. This examination included a review of inquiries resulting in dismissals as well as complaints in which sanctions were administered. A copy of the report dealing with this review appears as Appendix 3 to the Committee Report. This report demonstrates the need for establishing standard operating procedures, a need for common nomenclature of discipline and a need for the creation of a coordinating body for the disciplinary committees in the four departments.

A subcommittee's analysis of published cases appears as Appendix 4 to this Report.

Our Committee benefited from liaison representatives from each of the four judicial departments, as well as a representative from the Judiciary Committees of both the New York State Senate and the New York State Assembly.

Comments were also received from a variety of others having an interest, or involved in the grievance process. Those comments were duly considered.

Over the course of the many past months, our Committee has met innumerable times with its meetings attended by a substantial majority of the members who were fully prepared. Careful consideration was given to all reports and proposals. This process led the Committee to adopt its recommended "Proposed Uniform System of Professional Discipline".

UNDERLYING PRINCIPLE

The underlying principle of the proposals contained in the revised "System" is to establish, within the state, a uniform jurisdiction for each Judicial Department, a uniform standard of conduct within each Judicial Department and uniform procedures within each Judicial Department. The Committee believes that the model proposed is one which insures a prompt and timely review of all allegations of misconduct in a manner which protects both the public interest and the rights of respondent attorneys.

The ABA Report expressed a concern that the lack of a "centralized" statewide system in New York resulted in complaints being processed differently, leading to different sanctions for similar misconduct. Our Committee, in its preliminary report, indicated that the ABA Report did not document the dissimilarity of sanctions. Our exhaustive review since that time leads the Committee to believe that the system needs to be improved, needs to be more uniform, needs to be more efficient and needs to eliminate disparities in dispositions to the maximum extent possible. In 1972 the Christ Committee observed, in its report, that:

> The Committee extended its investigation into the area of punishment imposed in an attempt to determine whether standards of uniformity were needed and could be formulated for, at least, the more common types of misconduct. It discovered that a surprising degree of uniformity now exists in the four judicial departments although little or no conscious attempt has been made to achieve it. The Committee also found that the diverse nature and degree of the offenses involved, the personal and professional histories of the attorneys, their cooperation with or hostility to the disciplinary process, restitution or the lack of it, and many other

variants made it virtually impossible to formulate a "penal code" approach to punishment in grievance matters.[4]

Some disparity of sanctions is inevitable. The uniform procedures that the Committee recommends, however, will insure that the four departments receive a more uniform input from their respective committees, thus encouraging uniformity of sanctions. In addition, the level of sanctions in the four departments will tend to be the same by reason of the fact that the four departments will be connected directly to each other by the statewide disciplinary coordinating board, the creation of which is included in the recommendations of our Committee. This board will also be in a position to add its voice in the budgetary process to insure that adequate funding will exist for the disciplinary structure.

OUTLINE OF PROPOSED DISCIPLINARY SYSTEM

The basic recommendation is to provide a revised system of professional discipline which will be uniform throughout the state and yet will be administered independently by each of the four departments.[5] The Committee's model eliminates significant

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[4] Christ Report, p. xiii.

[5] The procedures in each department are now somewhat different. The proposed model does not select the rules of any one department but is similar in structure in many respects to rules now existing in all departments. The Committee proposes a model for all departments which it believes will be the most efficient.

variations in procedure among the departments which serve little useful purpose and may undermine the credibility of the disciplinary structure. The model also strengthens processing of matters at the early stage so that the system is not vulnerable to charges of abuse. The details of the model are fully set forth in its body, which includes a discussion of the major items.

An outline of the provisions of the model is as follows:

1. It calls for the establishment of a uniform rule of jurisdiction for each of the four judicial departments.

2. It calls for the establishment of a uniform rule on the standards of conduct for attorneys in each of the four judicial departments.

3. It provides for the establishment in each of the four judicial departments of a Departmental Disciplinary Committee consisting of not less than 21 members, at least 25% of whom shall be non-lawyers, the Chair of which Committee shall also be appointed by the court.

4. It provides that each Departmental Committee shall divide itself into not less than three subcommittees each of which shall consist of not less than seven members, at least of one whom shall be a non-lawyer. The subcommittees, the quorum for which shall not be less than four, shall hear all matters. The Chair of the Departmental Disciplinary Committee shall not be a member of any subcommittee but shall coordinate and be the administrator of the grievance process in the Judicial Department.

5. It provides that each department of the Appellate Division shall appoint the Chief Counsel for its Departmental Disciplinary Committee.

6. It provides that the Chief Counsel for each Departmental Disciplinary Committee shall hire staff with approval of the Chair of the Departmental Grievance Committee and the Court.

It provides that the counsel and staff shall investigate all matters. All investigations, including written responses from respondent attorneys, are to be completed within a specific time frame unless extended

by the Chair of the Departmental Disciplinary Committee.

It provides that upon completion of the investigation counsel is to make a recommendation on each matter to a subcommittee. The recommendation may be either:

(i) "No action".

(ii) A letter of caution.

(iii) A letter of admonition

(iv) A request to petition the Appellate Division for a formal hearing on specific charges of misconduct that, if proved, could lead to the sanction of suspension or disbarment.

7. It provides that each departmental subcommittee shall pass upon the recommendation of counsel. No action may be taken without the concurrence of the subcommittee. If the subcommittee concurs in the recommendation for "No action" the matter shall be deemed an inquiry and not a complaint of misconduct. An inquiry upon which "No action" is taken may be referred to the local Bar Association for resolution of disputes not involving misconduct, such as routine fee disputes, or other matters in which the involvement of the Bar Association would have a beneficial effect.

It provides that all actions by the subcommittee shall be final subject only to the limited process of review referred to in Paragraph 8, below.

8. It provides that each Departmental Disciplinary Committee shall establish a Review Committee. It shall be made up of the Chair of the Departmental Disciplinary Committee, the Chair of each Departmental Disciplinary subcommittee and one lay member of the Departmental Disciplinary Committee. The Review Committee shall:

(i) Decide appeals brought to it by counsel for the Departmental Disciplinary Committee when counsel's recommendation has been rejected by the subcommittee. The review shall be on papers and limited to whether the decision of the subcommittee was "clearly improper".

(ii) Decide appeals brought by respondent attorneys from an adverse subcommittee decision which was contrary to the recommendation of counsel for the Departmental Disciplinary Committee. The review shall be on papers and limited to whether the decision of the subcommittee was "clearly improper".

(iii) Hear appeals brought by respondent attorney concerning subcommittee decision to file a petition with the Appellate Division requesting a formal hearing on serious charges that might lead to suspension or disbarment. Appeals shall be heard upon papers with right to submit a brief and to make an oral argument before the Review Committee.

9. It provides that pursuant to an Appellate Division Order, based upon petition made by counsel for the Departmental Disciplinary Committee, after approval from a subcommittee and a review committee, a formal hearing is to be held before a Referee upon charges that might lead to suspension or disbarment.

The Referee is to be appointed in each Judicial Department from a panel of Referees consisting of active or retired members of the Judiciary and active members of the Bar for ten (10) years or more who are not members of the Departmental Disciplinary Committee.

10. The Referee appointed by the Appellate Division on serious matters which may lead to suspension or disbarment shall hear and report to the Appellate Division which shall make the final determination and order.

11. It calls for the establishment of a sixteen member Statewide Disciplinary Coordinating Board. Its membership shall be the four departmental disciplinary committee chairs, the four Chief Counsel to each Departmental Disciplinary Committee, four Court representatives (one from each department), and four representatives (one from each Judicial Department) who are not actively involved in administering the disciplinary system.

The Statewide Disciplinary Coordinating Board is to:

(i) Adopt a Uniform Practice and Procedures Manual to be utilized in every office and by all professional staff within the discipline system.

(ii) Establish the office of counsel to the statewide Disciplinary Coordinating Board consisting of a full time attorney to observe and monitor statewide the operations of the departmental Disciplinary Committees.

(iii) Establish the position of Chair of the statewide Disciplinary Coordinating Board to be paid per diem at a rate to insure that the position, while part-time, is not merely symbolic but one which involves major responsibility to which position, respect and prestige is to adhere.

(iv) Propose for adoption uniform rules for each of the Judicial Departments and such changes from time to time as are required for the effective operation and functioning of the disciplinary system.

(v) Act as a clearinghouse for the gathering and dissemination of statistics and take all action appropriate to assist in the securing of adequate funding for the disciplinary structure.

CONCLUSION

The Committee has concluded that its proposal will improve the disciplinary process without tearing up the present structure by its roots and substituting a new bureaucracy in its place. The Committee, accordingly, urges that its report be adopted.

Respectfully submitted,
The Committee on Professional Discipline

Proposed Uniform System

Of Professional Discipline

Proposed Uniform System of Professional Discipline

The heart of the final written report the Professional Discipline Committee ultimately presents -- and its basic recommendation -- will focus on a revised system of professional discipline in New York that will be uniform throughout the state, yet will be administered independently by each of the four departments. A model of this proposed uniform system was presented by the Subcommittee on Practices and Procedures to the Committee on April 26, 1984. The Committee approved the model as amended by various votes on April 26 and May 5, 1984. The model attached hereto reflects not only those amendments but also those adopted by the New York State Bar Association's House of Delegates on June 22, 1985.

In preparing the model, the Subcommittee reviewed in detail the conclusions in each of the reports concerning New York's disciplinary system that have been published over the past fifteen years; it analyzed the current rules in the departments and conferred with representatives from the disciplinary systems in each department. The Subcommittee concluded that there are significant variations in procedure among the departments which now serve little useful purpose and which tend to undermine the credibility of our disciplinary system. The Subcommittee concluded that in many cases procedural weaknesses relating mainly to the processing of matters at the early stage leave the

system vulnerable to abuse and charges of cronyism.

In proposing the attached model, the Subcommittee took into account the complaints of respondents and members of the public as lay members of the committee alike in connection with such important matters as timeliness and right of review.

In order to insure that all allegations of impropriety from the public are considered with reasonable dispatch and with the careful attention and participation of more than just a single member of professional staff and one or two disciplinary committee members, we have proposed a relatively formal structure that places staff counsel somewhat in the role of the public's lawyer, but also always under the control and guidance of a relatively large group of committee members. To do this, we propose that the full departmental disciplinary committee be broken into subcommittees of at least seven members each and that these subcommittees hear and approve counsel's recommendations as to every matter. In effect, on every matter counsel will be required to investigate, to recommend disposition and to get the approval of a reasonably-sized subcommittee of the full departmental disciplinary committee.

In order to permit a pervasive review process, we have proposed that a Review Committee -- composed of the Chairs of the Departmental Committee and each subcommittee, as well as one lay person -- be created in each department to hear appeals by counsel or by respondent from any decision to take no action, to

impose a sanction, or to file a petition for a hearing.

The model hereto attached is intended to reflect the basic structural outline of the proposed system. Many of the rules and procedures that will be required to make it work smoothly still must be created. We have proposed the creation of a statewide disciplinary coordinating board which will have this and other ongoing responsibilities in connection with the effective functioning of a uniform system of discipline.

Committee on Professional Discipline

Harold M. Halpern, Chair

Subcommittee on Practices and Procedures

Steven F. Goldstone, Chair

Model of Proposed

Uniform System

MODEL

Proposed Uniform System
of
Professional Discipline

1. Uniform Rule on Jurisdiction

minor differences appeared to be inadvertent; the broadest existing rule should be used.

2. Uniform Rule on Standards of Conduct

the Code of Professional Responsibilty should be the general standard; however, there are several important areas where differences exist in the rules promulgated by each department. The Disciplinary Coordinating Board (see p. 31 , below) should propose a uniform set of substantive rules of conduct to be considered for adoption by each department.

3. Departmental Committees and Counsel

a. Appointments

(i) The court will appoint the Departmental Disciplinary Committee, and the Chair of the Committee.

-we considered the "separation of function" arguments heretofore expressed, but concluded that an intervening body to appoint the

committee (which itself would be appointed by the court) would be a superficial solution at best. Moreover, we concluded the public would probably have more confidence in a committee appointed directly by the court. We also decided not to designate the sources from which the court would receive nominees.

(ii) Appointment of chief counsel by the court.

-Again, we did not perceive as a negative this theoretical lack of separation between prosecutor and court. The appointment by the court tends to lend greater credibility to the counsel's role in reviewing and prosecuting complaints brought by the public. Since the primary fact-finding role is given to subcommittees or to a panel of referees in serious cases that might lead to suspension or disbarment, as opposed to the courts (see p. 29, below), this theoretical conflict is reduced in any event.

(iii) The court will appoint a panel of referees consisting of active or retired members of the judiciary and active members of the Bar for ten years or more who are not

members of the Departmental Disciplinary Committee.

-Originally we concluded that the subcommittees should also perform the adjudicatory role and conduct full hearings. We have comments to the effect that, for scheduling and other logistical reasons, the subcommittees cannot perform such a role effectively. Instead, we propose that public hearings that are ordered by the Appellate Division on matters that could lead to suspension or disbarment be conducted before a single referee. In the revised model, the court in each department appoints a panel of referees.

-At least one member of the full Committee indicated that it was difficult to get available referees to hear cases. The member suggested that the department in question had considered widening the source from which referees could be appointed to experienced members of the Bar in good standing.

b. Each Department shall determine the maximum size of membership of the Departmental Committee. Each committee shall have at least 21 members.

c. The terms of Departmental Committee members will be three years. Each member is limited to two consecutive terms, although a former member may be reappointed after at least one year has passed since the expiration of the member's last term.

d. Each Departmental Committee will not, as a body, hear or adjudicate matters. Instead, each Departmental Committee will create at least three subcommittees composed of not fewer than seven members each, at least one of whom is not a lawyer. The Departmental Committee will hear all matters through these subcommittees. Each subcommittee shall have a chair who shall be nominated by the Departmental Committee Chair and approved by the full membership of the Departmental Committee.

e. Each Departmental Committee shall create a Review Committee which shall hear all appeals from decisions rendered by subcommittees. The Review Committee shall be composed of the Chair of each subcommittee, the Chair of the Departmental Committee, and one lay member of the Departmental Committee.

-We considered carefully comments to the

effect that matters should be heard by the full Departmental Committee. We have concluded that the system is better served by a subcommittee procedure for several reasons:

1. The full Committee may be often presented with too long an agenda to permit careful consideration of all the matters that we intend by our model to require it to consider; because of the use of a smaller subcommittee procedure, more constant committee-member participation, supervision and appellate review is possible than under the present systems.

2. We have broadened membership on subcommittees to a <u>minimum</u> of seven; this certainly should permit an adequate cross-section of views, considering an appealed matter would have involved the views of at least 12 committee members;

3. Geographic representation is easily possible by forming subcommittees which will operate out of certain locations.

4. Based on our common experience, the

review and decision process of a committee with seven members is likely to be at least as high as that conducted by a committee of thirty.

4. Function of Committees and Counsel

a. Counsel

(i) hire staff with approval of Chair of disciplinary committee and court

(ii) commence investigation sua sponte or on inquiry by member of public or bar.[1]

a. counsel shall have subpoena power which would permit access to relevant books and records and testimonial evidence.

b. if counsel, after investigation, has not previously recommended No Action (see p. 25, below), within 30 days of the date that counsel is in receipt of an inquiry

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[1]We propose that the Statewide Disciplinary Coordinating Board (see p. 31) prepare a detailed manual of rules and guidelines concerning investigation procedures, sanctions for non-compliance with mandated timetables and filings and the like.

that may allege an impropriety, counsel must seek further clarification concerning the allegation if it is unclear on its face or, if the allegations are sufficiently clear, seek a response in writing from respondent. Respondent must respond in writing within 30 days of notification of the matter by counsel.

(iii)present recommended dispositions to subcommittee

a. unless extended or shortened by the Chair, within 120 days after initial receipt of an inquiry, counsel must present a recommendation regarding disposition to a subcommittee.

b. All presentations to the subcommittee should be made without reference to the identity of the respondent.

-the committee believes that charges of cronyism can arise when those judging a matter are acquaintances of the respondent. The likelihood of these charges would be reduced if the

respondent's identify is not revealed while the case is being considered.

(iv) alternative dispositions counsel may recommend

a. If, after investigation, counsel concludes that there is no cause to believe misconduct has occurred, counsel shall decline to lodge a complaint and recommend No Action. If a subcommittee concurs in this conclusion and approves this recommendation, it shall so advise respondent with a copy to the originator of the matter. In such notice to respondent, the subcommittee may include educational language, or notify respondent that it intends to refer the matter to the appropriate local bar association for resolution of non-disciplinary matters such as fee disputes.

b. A matter on which a subcommittee has determined to take No Action shall thereafter continue to be deemed to be an inquiry.

-concern was originally expressed that lawyers might be required to report all "complaints" on out-of-state bar applications even if such complaints had no merit. Originally, balancing the possible harms, we concluded that a lawyer would not be severely prejudiced merely because of the requirement to report a dismissed complaint. The discretion to disregard an allegation by labelling it something else, such as "inquiry", without formally evaluating its merits, carries with it an undesirable vulnerability to abuse. We propose to require counsel to investigate and to make a recommendation concerning every inquiry and to require a subcommittee to pass on every inquiry (see p. 29). Counsel is required to lodge a complaint with a subcommittee if counsel concludes there is reason to believe misconduct has occurred. Before then, all allegations are merely "inquiries" under investigation. If after investigation, counsel concludes there is no reason to believe there has been a violation of the Code, counsel must decline to lodge a complaint and

recommend "No Action" to the appropriate subcommittee. If this No Action recommendation is approved by the subcommittee, the matter will thereafter continue to be considered to have been an inquiry, not a complaint, insofar as the respondent's files are concerned.

c. After investigation, if counsel concludes there is probable cause to believe misconduct has occurred, counsel shall lodge a complaint which shall seek one of the following: a letter of caution, the sanction of admonition or approval of a petition to the court for a public hearing before a single referee on specific charges of misconduct that, if proved, could lead to the sanction of suspension or disbarment. (see p. 29 for functions of subcommittee).

-under the original model there were only two sanctions or dismissal. The object was to simplify -- and therefore make more understandable and less vulnerable to abuse -- the entire process. Concern has been expressed that without an

additional lesser penalty, there might be an inordinate number of No Action decisions. To meet this objection, we have included the lesser penalty of letter of caution. In theory, if a respondent committed a single act that is not terribly serious, but is technically misconduct, the attorney would be cautioned that a repetition could lead to a more serious sanction. The letter of caution would be retained in the respondent's file.

(v) in the event the subcommittee does not agree with counsel's recommendation, counsel may appeal the decision of a subcommittee to the Review Committee whose decision shall be final. The Review Committee shall limit its review to whether the decision of the subcommittee was "clearly improper" (see p. 30).

(vi) counsel shall prosecute all petitions to the Appellate Division and all hearings heard by a referee and all proceedings in court in connection therewith.

b. (i) Function of Subcommittees

1. to obtain documents, to hear testimony and to review counsel's recommended disposition after investigation.

2. where it concludes that the specific misconduct outlined in the complaint has occurred, to issue proposed letters of caution and admonition which shall provide that Respondent, within 30 days, may file written opposition to the proposed sanction and appear to argue in opposition.

3. to issue final letters of caution and admonition.

4. where it concludes that there is probable cause to believe serious misconduct has occurred, to authorize petitions to the Appellate Division for authorization to conduct an adjucicatory hearing before a referee.

5. where it concludes there has been no adequate proof that misconduct has

occurred, or that there has been no adequate showing of probable cause in alleged serious cases of misconduct, to dismiss the complaint.

(ii) Function of Review Committee

1. to hear final appeals from counsel concerning adverse decision from subcommittee concerning recommended disposition (papers only).

2. to hear final appeals from respondent concerning adverse recommendation from subcommittee concerning proposed admonition (papers only).

3. to hear final appeals from respondent concerning authorization from subcommittee to file petition for commencement of formal disciplinary proceeding that might lead to suspension or disbarment.

-there was expressed concern that a respondent be absolutely assured adequate review of his case at the "probable

cause" stage. An opportunity for respondent's counsel to brief the evidence and argue orally before the Review Committee would seem to be significant protection.

(iii) Function of Referee

-to hear and report to the court findings on charges of professional misconduct that, if proved, could lead to imposition of the sanction of suspension or disbarment by the court based on the record of the hearing.

5. Statewide Disciplinary Coordinating Board

a. Function

(i) to act as clearing house and disseminate statistics re policy, sanctions, procedures, etc., to promote uniform, effective and fair procedures.

(ii) to propose revisions and additions in policy, rules, practices and procedures where appropriate.

(iii) to oversee operation and functioning of system in compliance with rules and procedures.

b. Composition

-16 members

(i) four representatives from the courts in each department

(ii) the four disciplinary committee chairs

(iii) the four counsel to each committee

(iv) representative from each Department who is not actively involved in administering the discipline system

-the chair of major bar association committees on professional discipline would be appropriate candidates.

(v) A professional staff will be needed to perform a coordinating role and to monitor the effectiveness of the rules and procedures in practice.

6. Miscellaneous Rules

-We propose that the Coordinating Board adopt needed rules in several areas, such as the requirement that all local bar associations as well as any member of the Bar promptly refer any and all allegations of professional impropriety to the appropriate Departmental Committee.

Preliminary Report of the

New York State Bar Association

Committee on Professional Discipline

April, 1983

Preliminary Report of the
New York State Bar Association
Committee on Professional Discipline

On the Final Report of the Evaluation of
the Lawyer Discipline System for the State of New York
Sponsored by the American Bar Association
Standing Committee on Professional Discipline

APRIL 1983

The Committee on Professional Discipline (the "Committee") in response to the request of President Bernard J. Reilly, dated February 23, 1983, herewith submits its preliminary report on the Final Report of the Evaluation of the Lawyer Discipline System for the State of New York (the "ABA Report") dated December, 1982, sponsored by the Standing Committee on Professional Discipline of the American Bar Association (the "Standing Committee").

By letter dated December 19, 1980, the Honorable Francis T. Murphy, Jr., Presiding Justice of the Appellate Division of the Supreme Court, First Department, issued an invitation to the Standing Committee to conduct an evaluation of the disciplinary system in the First Department. Thereafter on May 6, 1981, the Honorable Lawrence H. Cooke, Chief Judge of the Court of Appeals of the State of New York, invited the Standing Committee to conduct an evaluation of the disciplinary systems of all four judicial departments in New York.

As the result of such requests, the Standing Committee

undertook such evaluation. The team from the Standing Committee, which conducted the investigation and prepared the reports, consisted of six persons, two of whom were private practitioners and the remaining four of whom were bar association staff personnel, including two from the ABA National Center for Professional Responsibility. Their evaluation consisted of visits to the four judicial departments on March 4th and 5th, and March 8th through 11th, 1982. Three members visited the First and Second Departments and three members visited the Third and Fourth Departments. Our Committee was not invited to meet with the Standing Committee evaluation team as a group, but several members of our Committee were individually interviewed on an ad hoc basis.

As a result of its investigations, the Standing Committee issued two reports, both dated December, 1982, one report (the "ABA Report") addressing the state-wide disciplinary system and the second report (the "First Department Report") addressing the disciplinary system in the First Department.

This report of our Committee addresses only the ABA Report. We would note however that the First Department Report is substantially identical to the ABA Report in all major respects, but includes some additional recommendations applicable solely to the current procedures of the First Department. The ABA Report contains some forty-four recommendations. Because of limitations of time, our Committee has not attempted to review in

detail and comment on each of the forty-four recommendations. There are two major concerns expressed in the ABA Report and these we have addressed at length.

For the reasons stated below, the Committee believes that the entire ABA Report should be further reviewed as part of a more comprehensive study of the current status of the disciplinary system of the State of New York.

ABA Report in Perspective

The ABA Report recites that the approach of the Standing Committee was to make an assessment of the degree to which the disciplinary system in the State of New York conforms to the "Standards for Lawyer Discipline and Disciplinary Proceedings" (Lawyer's Standards") adopted by the American Bar Association in 1979 and amended in 1982. Thus the evaluation was not addressed to the effectiveness of the New York State disciplinary system. This presents a major problem if, as in the case of New York, our system, which long predates the adoption of the Lawyers' Standards, is based upon a materially different set of circumstances.

This major difference flows from the fact that we have an intermediate appellate court, the Appellate Division of the Supreme Court, having broad powers which is not parelleled in many other jurisdictions. Historically, and currently, New York

is the only jurisdiction in the country (as is noted in the ABA Report) which vests the exclusive responsibility for the administration of lawyer discipline in such intermediate appellate court, rather than its court of final jurisdiction, the Court of Appeals.

To put the ABA Report in perspective, we should recall earlier studies relating to professional discipline in New York State. A 1970 ABA study of discipline throughout the country (the "Clark Report") found wide-spread public dissatisfaction with discipline procedures relating to lawyers throughout the country. It recommended that "disciplinary agencies within a state be centralized into a single unit". At that time, much of the disciplinary function was found only at the local bar association level through grievance committees. At the same time however, the Clark Report cited with approval the system of New York State which had the disciplinary jurisdiction of its courts divided among the four departments of the Appellate Division. As a result of the Clark Report, the Administrative Board of the Judicial Conference of New York in 1971 established a committee to study New York's disciplinary system. It was composed of distinguished justices from each department of the Appellate Division (including the present Chief Judge of the Court of Appeals) as well as lawyer practioners, and was chaired by Justice Marcus Christ (The "Christ Committee"). In 1972 the Christ Committee Report accepted many of the Clark Report's recommendations, but rejected the idea of having disciplinary

matters in New York centralized in the highest court. The Christ Committee said that it saw "no significant advantage to be gained by removing the jurisdiction from the four appellate Divisions where Section 90 of the Judiciary Law now places it, particularly so if the [Christ Committee's] proposed uniform rules and its recommendations for inter-departmental coordination and communication in the areas of procedure and policy are implemented." The Christ Committee also made far-reaching proposals to professionalize the disciplinary system by establishing detailed rules and regulations, uniform as far as appropriate in the four departments, most of which proposals were subsequently implemented.

Major Issues

General

The two major concerns raised by the ABA Report are: (1) the lack of a centralized statewide system and (2) inadequate funding. With respect to the concern about the centralized system, it goes on to state:

> "There is no permanent statewide agency to administer the lawyer disciplinary system. As a result, complaints against lawyers are processed differently and sanctions for similar misconduct vary

significantly among and even within the four departments" (ABA Report p. 17)

On the funding issue, the Report alleges:

"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." (ABA Report p. 22)

A. Statewide Centralized System

As set forth infra, the ABA Report supports its concern over a lack of a statewide system, on two major grounds:

(A) Complaints are processed differently; and

(B) Sanctions for similar misconduct vary significantly.

Preliminary, we should note that in fact there is a "statewide" disciplinary system in New York, but not a "centralized system." The four judicial departments operate quasi - independently both for disciplinary as well as other matters. Yet, they do not operate in a vacuum. There is a interdepartmental coordination, and information exchange. In fact, our Committee plays a role in this process. Nevertheless, as noted below, improvements can be made.

With respect to differing procedures, the ABA Report examines in detail the procedures and sets forth what they call "disparities" (ABA Report p. 17-21). However, a careful examination reveals that in most basic ways the present system operates in substantial uniformity. For instance:

(1) Professional staff funded by the State is provided to each committee.

(2) The staff is hired by the court.

(3) The departmental grievance committees are appointed by the court with bar association participation.

(4) The committees have lay members.

(5) Complaints need not be verified.

(6) Sua sponte power exists for each committee.

(7) Complainants are advised of the action taken by the committee.

(8) Complainants receive acknowledgement of their complaint.

(9) Formal charges are required before a disciplinary proceeding can commence.

(10) The committees have power of subpoena with court and/or committee control.

(11) Committees meet regularly.

(12) Committee members are rotated and serve limited terms.

(13) Each committee issues private letters of caution and letters of admonition and recommends formal disciplinary proceedings.

In considering department differences, one should keep in mind the fact that the lawyer population in New York State is

heavily concentrated in the metropolitan New York City area, and within such area there are numerous large law firms, corporations, and governmental entities, having dozens and even hundreds of lawyers. The lawyers population statistics cited by the ABA Report are:

First Department	34,191	
Second Department	27,500	
Third Department	4,259	
Fourth Department	5,800	(ABA Report, p. 5)

Although alleging that there are some disparities in both disciplinary structure and procedure among the four departments, the only substantive assertion of adverse results arising from these "disparities" made by the ABA Report is that "sanctions for similar misconduct vary significantly among and even within the four departments" (ABA Report p. 17). They do not document this assertion. In the First Department Report, however, they attempt to document this assertion on page 17. Our Committee has reviewed in detail the decisions cited for such allegations and it is quite apparent that in the decisions cited the offenses involved were not at all similar, and that the variations in sanctions were appropriate. In fact, a system of discipline that led to identical sanctions in the cases cited by the First Department Report would surely be vulnerable to severe criticism.

The First Department Report concludes the "diverse treatment

is . . . apparent for similar offenses involving conversion of funds" (First Department Report at p. 17). In In re Nadel, 85 A.D.2d 8, one of the cases cited by the First Department Report, the respondent was found guilty of "dishonesty, fraud, deceit and misrepresentation." The record showed -- and the respondent did not deny -- that the respondent removed his client's money from an escrow account and used the money in connection with loan-shark transactions. The respondent was disbarred. In a Second Department case, cited in the First Department Report, In re Belovin, 82 A.D.278, the record shows that the respondent, although charged with conversion, was actually found to have committed less serious errors. He was found guilty of failing to keep records properly without any intent to convert. For this, the respondent was censured. In In re Donahue, the respondent was censured for committing a technical conversion in that he held back money from an escrow because of a dispute over his fee, but the balance of the escrow was paid the day after closing. The respondent was a 65 year old attorney, with a previously unblemished record who, the court found, testified candidly throughout the proceeding. A more serious violation was involved in In re Markowitz, 80 A.D.2d 422. There the respondent was found to have converted a $6,500 insurance draft received as a settlement of a claim. The evidence showed that at the time of the misconduct, the respondent was emotionally upset as a result of a difficult divorce; that there was confusion in his keeping of the accounts; and that at the time of the incident, he was ending his relationship with a former law firm. The respondent

was suspended from practice for three years.

The facts in these cases obviously differ markedly. In no sense can they be fairly said to involve "similar offenses involving conversion of funds" (First Department Report, p. 17). It certainly does not seem unreasonable that these cases gave rise to different penalties. In fact, serious questions about the effectiveness of a discipline system would arise if a single court were to impose identical sentences in the different cases cited by the First Department Report.

The same flaw exists in the First Department Report's conclusion that the "sanctions for neglect and incompetence range from censure to disbarment" (First Department Report p. 17). In In re Florsheim, 77 A.D.2d 9, cited by the First Department Report in footnote 22 on page 17, the respondent was found to have committed acts far in excess of mere neglect or incompetence. In fact, the respondent was also found to have engaged on three separate occasions in conduct involving misrepresentation and to have violated the terms of a previous suspension order. As a result of this misconduct, the respondent was disbarred. On the other hand, In Matter of Donahue, 77 A.D.2d 1112, cited by the First Department Report, the alleged acts involved neglect of an estate matter and a technical conversion (see description above) in which money from an escrow was held back because of a fee dispute. The Referee found that financially "it all worked out to the satisfaction of all parties

and there was no real financial loss sustained." The respondent was censured. Also, in In re Casey, 75 A.D.2d 664, the respondent was censured for failing to cooperate with the grievance committee in its investigation of a "relatively minor" complaint of neglect. The respondent was censured.

It does not require sophisticated analysis to conclude that the facts in the first so-called "neglect" case (In re Florsheim) -- which really centered on the additional charges of misrepresentation -- are very different from the facts in the Donahue and Casey matters. Therefore, it is not surprising, nor should it be a subject of concern, that the sanctions also differ.

We would also point out that the Christ Committee undertook a detailed analysis of disciplinary cases, and found that even with a system which had wide procedural differences, there was no substantial variation in the outcome or sanctions.

B. Inadequate Funding

The second major concern is an alleged inadequacy of funding. The ABA Report asserts that "the average allocation per lawyer is insufficient to insure effective discipline" (ABA Report, p. 22). It goes on to support this by noting that in 1981 the budgetary appropriations on a per lawyer basis in New York were less than half that of California and alleges that some

of the departments are without investigative staffs and unable to pay competitive salaries to their disciplinary personnel. They also note that the 1982-83 appropriation averages $26.00 a lawyer in the First Department, $30.00 per lawyer in the second Department, $47.00 per lawyer in the Third Department and $70.00 per lawyer in the Fourth Department (ABA Report, p. 7). The use of an average dollar spent per lawyer does not in fact indicate appropriate funding or lack thereof, of a disciplinary system. The heavy concentration of attorneys in the First and Second Department as noted above, with little geographic dispersion, may generate administrative economies. Thousands of lawyers located in large law firms, corporations, or governmental agencies who have little contact with the consuming public on legal matters, have a tendency not to be involved in the disciplinary system. As a result, use of average figures is not only deceptive but has little if any value. Indeed perhaps a more valuable measure might be the average dollars spent per complaint processed. (In 1981 these expenditures were First Dept. - $338; Second Dept. - $268; Third Dept. $270; and Fourth Dept. $254).

Our Committee has and continues to be concerned over adequate funding for the disciplinary system. In our annual reports we have set forth details of staffing and budgetary appropriations so as to share this information with the bench and bar alike. We continue to believe that adequate financial support must be given to this process and that some of the comments relating to better fiscal support and administration in

the ABA Report may have merit, particularly with respect to the suggestion that there be a representative at the Office of Court Administration to help insure adequate financial support of the disciplinary structure. Unfortunately the ABA Report is so superficial in this area that it provides no support for larger funding in a time, as we all recognize, of fiscal constraints on the state level.

Critique of ABA Recommendations

How does the ABA Report propose to address these "major concerns"? They propose to substitute for the current system a new disciplinary court with a centralized administration, eliminating all local involvement. This radically changed system would have under it a statewide disciplinary board with a state-wide chief counsel and subordinate local disciplinary counsel. In addition, to support the system, it would substitute for the current grievance committees a large number of three-person hearing committees which would meet throughout the state. The recommendations of these committees would then be reviewed by the state-wide disciplinary board, which the ABA Report asserts would insure consistency in "application of standards and in the imposition of sanctions" (ABA Report, p. 32).

A major concern of our Committee is the ABA Report's proposal to remove all involvement by local bar associations in minor misconduct matters. The ABA Report asserts that "a

statewide agency is employed to eliminate the parochialism that made discipline ineffective decades ago" (ABA Report, p. 34). It would delegate the screening process and dealings with the so-called minor misconduct and local issues to the enforcement counsel. Our Committee has grave reservations as to the propriety and necessity of removing the handling of such minor matters from the local level. To do so may become extremely burdensome in cost, could substantially delay responses to complainants, and would be highly inefficient. The possible result would be to clog the system with minor matters, which experience has shown are generally disposed of quickly at the local level.

It is our Committee's view that the concerns raised by the ABA, if documented after a thorough substantive investigation, can better be addressed not by creating an entirely new system, but by making improvements in the present system. The proposed ABA system would establish a new bureaucracy with what our Committee believes would be a politization of the disciplinary system. In fact, the system surely would cost substantially more than the present system, where the volunteer involvement of attorneys reduces the costs substantially. Furthermore, we believe the proposed structure would result in substantially more delay because disciplinary counsel would have to deal with the minor matters now disposed of on the local level, and the statewide board would have to review each decision of the local hearing panel. It would not guarantee that lawyer discipline

would be funded more adequately. Our concern, of course, is that there is no guarantee that the proposed ABA system would address whatever problems exist, because, in fact, the ABA Report does not evaluate substantively the current operations of the disciplinary system.

Additional Issues

Of the 44 recommendations in the ABA Report, time has permitted our Committee to review and comment in detail on only the two major concerns, that is lack of a "statewide centralized system" and "lack of proper funding." We would like to comment briefly on two other issues raised in the report; the first involves the secrecy provisions of Section 90 of the Judiciary Law, and the second relates to issues raised by the current role of the Appellate Division in selecting the prosecutorial personnel and adjudicating misconduct cases.

Under Section 90 of the Judiciary Law, all documents relating to "any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed" but the justices of the Appellate Division may, in their sole discretion, permit access to all or any part of such documents. However, ". . . 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 of discipline of any attorney, the

records and documents in relation thereto shall be deemed public records." (Judiciary Law, §90(10)).

For some time our Committee has been concerned with the fact that the confidentiality rules have been too stringent, have created undue suspicion, and have raised doubts about the integrity of the process in the minds of the public. At the same time, experience has shown that many complaints are unfounded (over 90% of those complaints processed in 1981), and that a lawyer who may be the subject of such a complaint deserves adequate protection. While supporting modification of these confidentiality rules, we feel that recommendations 28 and 29 of the ABA Report require further detailed study before we support their adoption.

It has been observed that each Department of the Appellate Division appoints its own Chief Counsel, as well as his staff, and all members of the disciplinary committees. This, it is argued, involves an inherent conflict of interest. We believe that the suggested conflict is theoretical rather than real. In practice, although the courts appoint the personnel, the committees are left free to handle the case load as they see fit. We have never seen a situation where the court has interfered with the prosecutorial function of the staff or the adjudicative function of a hearing panel. The prosecutors, in practice, act like district attorneys representing the public and the hearing panels act like judges. Neither attempts to control

or influence the function of the other.

We would suggest that those who fear this theoretical conflict might be content with a system under which each Department of the Appellate Division delegates the appointment of the prosecutor and his staff, as well as the appointment of committee members, to a voluntary independent board composed of lawyers and prominent citizens, leaving the final adjudicative function to the court.

Recommendations of the Committee on Professional Discipline

The ABA Report addresses many questions, but does not devote any substantial portion of its report to the most important one - "Does the system of lawyer discipline in the State of New York work?" The ABA Report is only a superficial evaluation of whether the New York system conforms with the Lawyers Standards, and not its effectiveness.

It has been some 11 years since the last comprehensive evaluation of the lawyer discipline system in New York State which resulted in the Christ Report. Since then, many changes in the legal profession have occurred and still continue to occur. There has been a dramatic increase in the numbers of lawyers, a rise in multi-state law firms, the addition of such concepts as legal clinics, a proliferation of legal support groups, a substantial increase in non-lawyer personnel involved in the

lawyering process, computers, lawyer advertising, and changing ethical standards. As a result, it is our Committee's feeling that a comprehensive and substantive study of the lawyer disciplinary system in the State of New York should be undertaken prior to making any substantial changes in the current system.

We therefore recommend:

1. That no action be undertaken by either the courts or legislature to implement the recommendations of the ABA Report at this time.

2. That, as soon as possible, a comprehensive study of the state of lawyer discipline in the State of New York be undertaken, sponsored by the New York State Bar Association, with an invitation to the Administrative Board of the Courts to join in our study. This should look to the effectiveness of the system, and the perception of the public as to such effectiveness. The recommendations of the ABA Report should be reviewed in detail as part of this process. Funding for the study could and should be provided by The New York Bar Foundation, with additional funds sought from private foundations. If, as we hope, there is participation by the Administrative Board of the Courts, then there should be supplemental funding from the Office of Court

Administration. The study should involve professional staff and, we would hope, draw on the resources of the many law schools in this state to provide research assistance. The study should include a comprehensive review of the assertions of the ABA Report, related funding requirements and the consistency of treatment of offenses and sanctions.

3. That the report of our Committee be adopted by the New York State Bar Association, and be transmitted to the Chief Judge of the Court of Appeals, and the Administrative Board of the Courts.

Respectfully submitted,

COMMITTEE ON PROFESSIONAL DISCIPLINE

Harold Halpern, Chair

Sanford J. Liebschutz, Report for the Committee

APPENDIX 1

Committee Members

APPENDIX 1
New York State Bar Association
Committee on Professional Discipline
1984-1985

HAROLD M. HALPERN, Chair
Erie County

JOHN D. ALLEN
Onondaga County

JOEL AURNOU
Westchester County

LEE CROSS
Kings County

DAVID I. FERBER
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RICHARD M. GERSHON
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SANFORD J. LIEBSCHUTZ
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RICHARD G. MOSER
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STEPHEN R. PASTORE
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Staff Attorney

APPENDIX 2

Analysis of Differences Between Disciplinary Rules of the Four Departments

ANALYSIS OF DIFFERENCES BETWEEN DISCIPLINARY RULES OF THE FOUR DEPARTMENTS

A Brief Overview

Attached to this report is a tabular display of the procedural, structural and other differences between the four departments but that table presents a very fragmented picture. It is easier to comprehend and appreciate the differences between the disciplinary rules of the four departments if they are held up against the backdrop of that which they have in common.

In all four departments the Code of Professional Responsibility is recognized and a serious complaint is processed by court appointed committees, working with a court appointed, state financed, full time professional staff. All have the power to relegate minor complaints to county bar associations (but that option is not exercised in the First Department and is given limited use in the Third Department). In all committees complaints must be in writing, need not be verified, must be answered by the respondent in writing and then may, by varying procedures, result in being rejected for failure to state a complaint (and therefore designated an "inquiry"), in a dismissal, or in a confidential sanction such as a letter of caution, admonition or reprimand, or a letter of education or dismissal with a caution. For the more serious sanctions of public censure, suspension or disbarment, the matter must be

adjudicated by the Appellate Division (which also has the option, rarely employed, of a private censure, or dismissal).

The basic procedures employed by seven committees, each with 20 or 21 members, in three departments of the appellate division, processing together about 60% of the complaints, are essentially uniform. In the Third Department there is only one committee, but in the Second and Fourth Departments, because of geographical problems, three committees have been created in each. In those seven committees, in each instance all decisions are made by the full committee except that in the Fourth Department the chief counsel with concurrence of only the chair can dismiss a complaint or issue a letter of caution. All seven committees have authorization to issue letters of admonition or of caution (but in the Second and Third Departments there are also letters of education, or dismissals with caution). Disciplinary proceedings, leading to suspension or disbarment, are in each instance formal plenary court proceedings.

But in contrast, in the First Department, there is a committee of 36 members divided into "hearing panels" of five members each and the record of the hearing before the hearing panel may be the sole basis upon which a public censure, suspension or disbarment may later be ordered by the Appellate Division. Additionally, in the First Department the chief counsel, with the concurrence of merely the chair and a single reviewing member, can not only dismiss or issue a letter of caution but can also issue an admonition or order a formal hearing. Thus the First Department differs widely in (1) that

substantial sanctions may be issued by relatively small subcommittees rather than the more representative committee of the whole, (2) that greater authority resides in the chief counsel and chair, and that (3) greater significance is given to the hearing which may be the only and last opportunity of the respondent to be heard.

At the very least, the procedures uniformly require that when a complaint is received the staff must first ask whether, if all that is alleged be true, the conduct would have been improper. If not, it is an inquiry and is not to be recorded as a complaint filed against that attorney nor should the attorney be required to reply to it. However, if the complaint would, no matter how incredible its assertion, constitute misconduct, it is a complaint for which a file must be opened and an answer obtained from the attorney, following which investigation must be conducted which may or may not include a hearing. When the investigation is complete, the staff, with or without participation by the chair, the full committee or a subcommittee, or all three, must then decide whether to dismiss, to issue a confidential committee sanction or to send it on to the Appellate Division for a formal disciplinary proceeding which has the potential of the more severe sanctions because only the Appellate Division has the power to impose public sanctions of censure, suspension or disbarment.

Jurisdiction

All departments assert jurisdiction over attorneys who commit misconduct within their department, reside, or maintain an

office in the department, and, except for the Third Department, if the attorney was admitted in that department. The latter, probably inadvertent, omission, might affect an attempt to discipline an attorney for misconduct in a foreign jurisdiction if he does not reside or maintain an office in the state and was admitted by the Third Department. As to possible conflicts between the departments, it has been agreed to cede jurisdiction to the committee within whose territory the attorney maintains his or her main office. What follows is a somewhat more detailed comparison of the procedural and structural differences between the systems of professional discipline in the four departments.

DISTRIBUTION OF AUTHORITY BETWEEN CHIEF COUNSEL, CHAIR AND COMMITTEE

The most significant difference between the departments is in the relationship of the chief counsel to the committee and to the chair, and the distribution of authority amongst them. In the Second and Third Departments all decisions from dismissal of a complaint to the recommendation for a formal disciplinary proceeding, including the question of whether or not there shall be a hearing before a subcommittee, are determined by the committee; the staff and chief counsel merely investigate and recommend. However, in the First and Fourth Departments the chief counsel and the committee chair are given authority to make certain decisions such as dismissal or lesser sanctions with no committee participation. As a result, a chief counsel with a dynamic personality or one working with an overburdened or inadequately motivated committee chair, may easily become a more

dominant figure. Nevertheless, in the Second, Third and Fourth Departments the committee plays the dominant role, whereas that is not so in the First Department.

In the First Department, except for review by a "reviewing member" of the committee, the chief counsel has the authority to dismiss a complaint, before or after investigation, and the chair may issue an admonition or letter of caution without submitting the matter to the committee; the reviewing member is selected either by the chief counsel or the chair, and the chair may reject the modification or recommendation of the reviewing member. The chief counsel in the First Department also has the authority to order that a hearing be conducted, which is a plenary adversary proceeding, the record of which may be the sole basis for discipline imposed by the Appellate Division in a subsequent disciplinary proceeding. Thus the hearing takes on much greater significance than in other committees; it is the trial.

In the Fourth Department, the chief counsel starts off as a more imposing figure by virtue of being the chief counsel of all three committees of the department while each chair is chair of only one of the district committees. The chief counsel can dismiss a complaint "after consultation with the committee chairman" and may issue a letter of caution upon the recommendation of a staff attorney after the staff attorney has consulted with the committee chair and obtained consent. Although a letter of admonition can be issued only by the full committee it must first have the approval of the chief counsel. However, unlike the First Department, the chief counsel cannot

send a matter to a hearing panel without the approval of the committee chair although, unlike the Second Department, full committee consideration is not required. In the Third Department there are no adversary hearings; chief counsel may require respondent "to be examined under oath", usually with a committee member present.

Hearings

There is also great variation in the matter of hearings. In the Second and Fourth Departments the hearings are preliminary to action by the full Committee. They serve both an investigative and adjudicative purpose, developing evidence and providing an evaluation in the form of a recommendation to the full committee. In addition, in the Second Department and, apparently, in the Fourth Department, the full committee may not recommend to the Appellate Division the commencement of a formal disciplinary proceeding without first affording the respondent a hearing before a subcommittee, unless the "public interest" justifies proceeding directly to the disciplinary proceeding (two of the three committees in the Second Department interpret nearly all cases headed for a disciplinary proceeding as being "in the public interest" so that a subcommittee hearing is bypassed).

However, in the First Department there is no testimony under oath or subcommittee hearing prior to the hearing before the "hearing panel" which is, in most cases, the final hearing, while in the Third Department there are no hearings at all, only testimony under oath at the instance of the chief counsel, in the nature of a deposition. Whether or not subcommittee hearings are

conducted is a matter of some importance. Permitting staff to conduct such hearings without responsible supervision can result in harrassment and a waste of committee members' time. Investigation which can be conducted by other means should be done so. An attorney asked to testify under oath is placed under great risk and would in most instances be well-advised to retain counsel. Thus staff should not be permitted to use the subcommittee hearing as the easy substitute for proper investigation. The great majority of these matters can and should be resolved without the cost, trauma and delay of a hearing. On the other hand, in the First Department, where there is no preliminary hearing, there is no choice but to put a matter before a "hearing panel" if investigation would not be otherwise complete, or if it were felt necessary to hear competing versions in order to make some evaluation of credibility, yet such hearings, having the potential of the most dire of results, invite the full panoply of counsel motions, objections to "protect the record", etc. Whether this results in more, and in more protracted, hearings is a matter which must be evaluated.

Committee Sanctions

All 8 committees can issue letters of caution and letters of admonition, the latter being the more serious (however the Third Department's authorization to issue a letter of caution does not appear in the published rules although authorized by the court). In the Second Department there is also a "dismissal with a caution", being in the nature of advice to the respondent. In the First Department there is also a "reprimand", intended to be

more serious than an "admonition", and which may be issued only by a "hearing panel".

Notification of Disposition to Complainants

The First, Second and Fourth Departments advise complainants of the sanctions, if any, which have been issued. However in the Third Department, when a caution or admonition has been issued the complainant is advised only that "appropriate action has been taken".

APPEALS BY RESPONDENT

Here also, the variations are wide and of substance. In the First Department there is no appeal from a letter of caution or admonition but in the first instance the respondent can place in the file a written response and in the latter may demand a formal proceeding before a hearing panel (which may be accepted by the Court as the basis for final disciplinary action). In the Second Department the respondent may appeal any disposition by demanding a subcommittee hearing, or, if one has already been held, by demanding a formal disciplinary proceeding. In the Third Department where there are no subcommittee hearings, the only method of appeal provided the respondent attorney is to demand a formal disciplinary proceeding before the court. In the Fourth Department the respondent may appeal, in writing to the committee, from a letter of caution received from the chief counsel and may appeal to the chair of the three committees from an admonition issued by the committee.

PARTICIPATION OF LOCAL BAR ASSOCIATION GRIEVANCE COMMITTEES

The Second, Third and Fourth Departments all delegate jurisdiction of "minor" complaints to the grievance committees of local bar associations with varying degrees of control or supervision over their exercise of that jurisdiction. In the First Department the option of referring minor matters to local bar associations is not exercised. As a consequence all complaints, no matter how minor, receive the same formal treatment. However, there appears to be a significant variation between the percentage of total complaints retained by local bar associations, reflecting perhaps a substantial difference in how, in practice, "minor" complaints are defined. The definition must necessarily be imprecise and some flexibility does permit a transfer of excessive caseload, thus working as a safety valve when professional staff is overloaded.

However, we are advised that in the Second Department where there are three disciplinary agencies, the percentage of matters deemed minor and retained by or referred to local grievance committees runs from 40% to 50%, that in the Third Department where there is one disciplinary agency it is a very small percentage, and that in the Fourth Department it is very substantial. Our annual report has received the statistics of the local bar association grievance committees from the Second Department but we have received no separate report for the activity of local bar associations in the Third and Fourth Departments. In the Third Department and in the Tenth Judicial District of the Second Department, the local committees only investigate and report to the departmental committee which then

issues the sanctions, if any.

TENURE OF COMMITTEE MEMBERS

In the First, Second and Third Departments, committee members serve for staggered three or four year terms. This enables committee members to acquire the necessary experience and familiarity with the Code of Professional Responsibility, with its enforcement, with the gradations of the various sanctions as applied to varying degrees of misconduct and also to become familiar with the staff, their procedures, personalities and philosophy. By staggering the terms and limiting the number of terms of service, the committee is assured the services of experienced members who are available to show new members the way and yet enough turnover to prevent fossilization.

But in the Fourth Department the members serve only one year terms; without assurance of longer tenure there is less incentive to commit oneself as completely as the position requires. Indeed, under the best of circumstances, there are always several disciplinary cases which take a year or more to process. Even if the practice is, more often than not, to reappoint committee members, the lack of certainty, the possibility of wholesale turnover and the lack of a fixed standard for turnover (e.g., there will be four new members each year if a 12-member committee sits for no more than two three-year terms, staggered in groups of four) could contribute to a reduced stability in the committee and a reduction in its authority over the staff.

An anomaly in the Third Department is that its members are appointed upon the recommendation of the committee rather than

upon the recommendation of the local bar association. This presents a potential for self-perpetuation and while, in practice, the court does also receive recommendations from the bar associations, the failure to so specify may further the denigration and eventually the disappearance of the role of the local bar associations.

MISCELLANEOUS MATTERS

With regard to the effect given a conviction of a crime, the resignation of an attorney while charges of misconduct are pending, the manner in which incompetent or incapacitated attorneys are treated, the rules of the four departments are nearly identical. The First, Second and Fourth Departments have nearly identical rules regarding the effect of restitution of converted funds and recognition of discipline by a foreign jurisdiction; however the Third Department has no rule regarding either. The rules of the four departments regarding the conduct of disbarred or suspended attorneys are also for all practical purposes identical.

There is also some variation in the rules for the conduct of attorneys. While the four departments have rules establishing the same maximum fee in cases of contingent retainers, the Third Department is the only one which does not require the filing of statements of retainer. Similarly, the Third Department is the only department without a rule prohibiting the combining of claims for purposes of settlement and is the only department with no rule requiring the preservation of certain records for a specified period of time, although the First and Second

Departments require that records be preserved for 7 years while the Fourth Department is satisfied with a 5 year period of preservation. The First and Second Departments do specify certain records which must be maintained by attorneys, of special importance with regard to escrow accounts, but the Third and Fourth Departments are silent in that regard. Finally, while the First, Second and Fourth Departments specify that the restitution of converted funds shall not be a bar to prosecution of the attorney for professional misconduct, the Third Department is again silent.

Finally, there may be some variation between the departments in the standard of proof they profess to require - either a "fair preponderance" or the slightly more strict "clear and convincing" requirement.

	1st Dept.	2nd Dept.	3rd Dept.	4th Dept.
Apply code of professional responsibility	X	X	X	X
State funded	X	X	X	X
Full time professional staff	X	X	X	X
Complaint need not be verified	X	X	X	X
Sua sponte power	X	X	X	X
Number of committee members	36	20 (x3)	21	21 (x3)
Number of attorney members	24	16	18	18
Number of lay members	12	4	3	3
Committee appointed by court with bar association participation	X	X	X	X
Local bar may handle minor cases	X	X	X	X
Local bar may determine sanctions on minor matters	N/A	X	NO	X
Staff Hired by:				
general counsel				
committee				
court	X	X	X	X
Matters deemed "inquiry" on authority of:				
chief counsel	X	X	X	X
chair				
full committee				
subcommittee or other				
Complaints dismissed by:				
full committee		X	X	
chief counsel				
chief counsel with approval of chair or other	X			X
Hearings prior to final hearing conducted by:				
subcommittee		X		X
counsel			X	
no provision	X			

	1st Dept.	2nd Dept.	3rd Dept.	4th Dept.
Committee action authorized:				
admonition	X	X	X	X
reprimand	X	NO	NO	NO
letters of caution or education	X	X	X	X
dismissal with a caution	NO	X	NO	NO
disciplinary proceeding	X		X	X
recommendation to court for disciplinary proceeding		X		
"Admonition" requires:				
chief counsel	X			
chair	X			
full committee		X	X	X
hearing				
"Letter of caution" requires:				
chief counsel	X			X
chair	X			X
full committee		X	X	
hearing				
"Reprimand" requires:				
chief counsel	X	N/A	N/A	N/A
chair				
full committee				
hearing	X			
Disciplinary proceeding requires:				
chief counsel	X			
chair				
full committee		X	X	X
hearing	X	X		X
Appeal by respondent:				
to other chair's	N/A		N/A	X
by demanding subcommittee hearing or disciplinary proceeding	X	X	X	X
Appeal by complainant	NO	INFORMAL	NO	NO
Complainant is notified that complaint was:				
dismissed	X	X	X	X
that a specific sanction was issued	X	X		X
that "appropriate action was taken"			X	

	1st Dept.	2nd Dept.	3rd Dept.	4th Dept.
Provision for temporary suspension of attorney in serious case or failure to cooperate	NO	NO	X	NO
Authorization to respond if asked whether proceeding against attorney publicly identified as convicted of crime	NO	X	NO	NO
Rules governing: attorneys disciplined in foreign jurisdiction	X	X	NO	X
Attorneys convicted of crimes	X	X	X	X
Effect of restitution of converted monies	X	X	NO	X
Conduct of disbarred or suspended attorneys	X	X	X	X
Resignation of attorney under charges	X	X	X	X
Suspension of incompetent or disabled attorney	X	X	X	X
Practice abandoned by attorney	NO	X	NO	NO
Maximum contingent fees	X	X	X	X
Filing statements of retainer	X	X	NO	X
Required records	X	X	NO	NO
Preservation of records	7 yrs	7 yrs	0	5 yrs
Combining claims for settlement	X	X	NO	X

APPENDIX 3

Report of the Subcommittee to Review Unpublished Opinions

INTRODUCTION

In 1979, the American Bar Association adopted a set of principles for lawyer disciplinary and disability proceedings. These ABA Standards later served as the basis for the formulation of 112 specific criteria to be utilized in judging the fairness and effectiveness of any particular state's system for attorney discipline. The ABA had created a disciplinary "model", an analytical structure to measure real-life, in-place, disciplinary practices and procedures throughout the entire country. Deviation from the model would be judged as demonstrating the existence of an inefficient or unfair disciplinary practice or procedure and the ABA's specific "evaluation team" could then propose changes in a state's current disciplinary structure. Every state's structure could then be tailored to comply with the ABA model of what it deemed necessary and essential.

In 1980, and again in 1981, the ABA was invited to evaluate New York State's system for the disciplining of attorneys. In essence, the ABA was to be permitted to compare the state's system, with the ABA's theoretical standards and its 112 specific criteria. Logically, it must have been assumed that the invitation given to an ABA evaluation team was based on a fundamental premise, i.e., the comparison of the actual with the ideal would necessarily entail a thorough and painstaking investigation of the existing Discipline System and that any recommendations as to substantial changes would be based on

problems identified in this investigation. Unfortunately, the ABA evaluation team chose not to make the necessary prior investigation or compile empirical data to support its eventual recommendations. Instead, the entire ABA evaluation of the New York State disciplinary system was designed to ascertain how the system compared with the ABA theoretical standards. Its activities consisted of the following:

> (1) a superficial review of court rules and other public documents and informal conversations with anonymous sources;
>
> (2) compilation of the responses received from professional staffs within the Discipline System to a 59 question "self-evaluation" questionnaire which had been mailed by the ABA to the four Departments (all 59 questions were based on specific sections of the ABA's own Standards, with the questions themselves being answered "yes" or "no");
>
> (3) a six day on site evaluation in the State in March of 1982 by a six person evaluation team with the team itself being divided into two groups of three with one group visiting two of the four judicial Departments, apparently for a total of a portion of three days, and the second group apparently functioning in like manner;
>
> (4) a step by step comparison of the ABA Standards to real-world information provided to the evaluation team and the compilation of a Report containing 44 recommended changes in the New York State Discipline System, all being based entirely on specific provisions of the ABA Standards.

In February of 1983, the Brooklyn Bar Association issued its analysis of the ABA Report, the "Garvar Report". In March of 1983, the Association of the Bar of the City of New York issued its analysis of the ABA Report, the "Gallantz Report". In May of 1983, the New York County Lawyer's Association issued its

analysis of the ABA Report, the "Pugh Report". Previously, on March 2nd, 1982, Assembly Bill No. 10512 had been introduced and referred to committee. On March 1st, 1983, Assembly Bill No. 4663 was introduced. Both legislative proposals are virtual restatements verbatim of the ABA Report and Standards.

On October 28th, 1983, the Committee on Professional Discipline of the New York State Bar Association met and adopted a resolution calling for a "comprehensive study of the standards and procedures for lawyer discipline" in New York. On December 1, 1983, the Committee met again and decided that an examination of confidential disciplinary files throughout the state would be necessary in order to determine how the present Discipline System is actually working, in order to make realistic recommendations for changes or improvements. A statewide investigation had never previously been done in the State. The focus of the proposed examination would be those disciplinary files which involved matters which had been disposed of prior to the commencement of formal hearings. These "unpublished dispositions" comprised more than 85% of all matters processed annually by the Discipline System.

The Committee created a Subcommittee on Unpublished Opinions to attempt the broad and time consuming statewide evaluation to secure hard empirical data from actual case files. On January 4, 1983 the Committee adopted a concrete proposal for such a statewide evaluation.

TERMS EMPLOYED

1. ABA: American Bar Association.

2. ABA Report: Evaluation Of the Lawyer Disciplinary Systems of the State of New York; Final Report. December, 1982, ABA Standing Committee on Professional Discipline.

3. ABA Standards: Standards for Lawyer Discipline and Disability Proceedings, Approved Draft, February, 1979, as amended through August 3, 1983; Joint Committee on Professional Discipline of the Appellate Judge's Conference and the Standing Committee on Professional Discipline of the ABA.

4. NYSBA: New York State Bar Association.

5. Committee: NYSBA Committee on Professional Discipline.

6. Subcommittee: Subcommittee on Unpublished Opinions of the New York State Bar Association Committee on Professional Discipline.

7. Discipline in New York: The State of Discipline in New York State, Annual Report for the Year 1982, NYSBA Committee on Professional Discipline.

8. Clark Report: Problems and Recommendations in Disciplinary Enforcement, Final Draft, June, 1970, ABA Special Committee on Evaluation of Disciplinary Enforcement.

9. Christ Report: Disciplinary Enforcement Against Attorneys in New York State; An Evaluation and Recommendation, Report to the Administrative Board of the Judicial Conference of the State of New York by the New York State Committee on Disciplinary Enforcement, June, 1972.

10. Silverman Report: Report on the Grievance System, The Ad Hoc Committee on Grievance Procedures, The Association of the Bar of the City of New York, 1976.

11. Garvar Report: Report of Grievance Committee of Brooklyn Bar Association on ABA Recommendations of January 4, 1983, Robert H. Garvar, Chair, February 9, 1983.

12. Gallantz Report: A Statewide System of Professional Discipline, Association of the Bar of the City of New York, George G. Gallantz, Chair, March 17, 1983.

13. Pugh Report: Report of Committee on Professional Ethics,

of New York County Lawyers' Association on Lawyer Disciplinary Systems of the State of New York, Roger V. Pugh, Jr., Chair, May 13, 1983.

14. Misconduct: As employed in New York State, this term encompasses:

(a) violation of any disciplinary rule of the Code of Professional Responsibility (22 NYCRR 603.2, 691.2, 806.2, 1022.17);

(b) violation of any of the special rules governing court decorum (22 NYCRR 603.2, 691.2);

(c) violation of any announced standard of professional conduct or court rule (22 NYCRR 603.2, 806.2, 691.2, 1022.17);

(d) violation of any provision of Article 15 of the Judiciary Law (Jud. Law Secs. 90(2), 476, 479, 480, 481, 483, 488, 491, 492, and 493).

15. Complaint: For purposes of this report, the term is defined as an allegation of impropriety made against an attorney, which if true, is "sufficient to establish a charge of misconduct", 22 NYCRR 806.4.

16. Unpublished Dispositions: As utilized in New York State, these will encompass the following:

(a) FSC: failure to state a complaint; a matter which involves an attorney but does not, under any view of the alleged facts, support a possible finding of misconduct;

(b) D&W: dismissed or withdrawn; a matter which has been preliminarily treated as a complaint, but is subsequently either withdrawn by the complainant or dismissed after investigation as not involving misconduct;

(c) Ref: referral, a matter which is transferred to another grievance committee or disciplinary body, or to some other agency for appropriate action;

(d) PSC: private sanctions, for purposes of this report, a matter which has been treated as a complaint and terminates in one of the following dispositions (none of which is revealed publicly)

(i) Letter of Education;

(ii) Letter of Caution;

(iii) Dismissal with Caution;

(iv) Private Admonition;

(v) Letter of Admonition;

(vi) Reprimand.

In reality, neither (i), (ii), nor (iii) is treated as discipline as such, within the New York State structure of attorney discipline.

17. "Discipline System" : The New York State System for the professional discipline of attorneys who practice within the State and have had allegations of professional impropriety lodged against them with one of the following disciplinary bodies:

(a) county bar association;

(b) district grievance committee;

(c) Committee on Professional Standards (Third Judicial Department);

(d) Departmental Disciplinary Committee (First Judicial Department).

18. Districts : unless a specific judicial district is named, this term will refer, for purposes of this report, to all judicial districts in the state.

19. Department: unless a specific judicial department is named, this term will refer to all four judicial departments in this state.

Methodology

This Subcommittee adopted two, interrelated goals: (1) the furnishing of an accurate picture of weaknesses in the present Discipline System in the crucial stage from initial grievance to formal hearing; and (2) the establishment of a solid empirical basis for revisions in the disciplinary framework. A real understanding of the present Discipline System is necessary in order to make valid recommendations for correcting current errors and creating a better system. A purely theoretical model cannot possibly represent the best disciplinary structure for every state. Economic, geographic, and social diversity require that the ideal be tailored to the real to ensure efficiency and fundamental fairness. The Subcommittee's report is an attempt to delineate clearly those areas in the Discipline System which require modification and improvement. Its field evaluations were performed without any preconceived model or set of standards in mind.

To accomplish its task, the Subcommittee took the following steps:

1. A detailed and exhaustive examination was made of every statute, court rule, or special court order pertaining to attorney misconduct and discipline;

2. The Lawyer's Code of Professional Responsibility was thoroughly reviewed and all disciplinary rules were collected in a single document for easy reference;

3. The 1982 Report, the State of Discipline in New York State, was carefully examined and charts were prepared demonstrating significant statistical differences between the Departments in the area of Unpublished Dispositions;

4. All available background reports were read and compared: The ABA Report, the Clark Report, the Christ Report, the Gallantz Report, and the Pugh Report;

5. Court orders were secured from all four Departments permitting Subcommittee members full access to any and all confidential case files (these files, of necessity included all the various kinds of unpublished dispositions, since any cases resulting in public censure, suspension, or disbarment, would be available as public records as provided by Judiciary Law §90)

6. Professional Staff in the Departments were directly contacted and requested to set aside a representative number of case files, preferably in strict numerical sequence;

7. One thousand checklists were prepared and printed to ensure uniformity of evaluation with each checklist containing specific definitions of the terms to be utilized: "misconduct", "complaint", "letter of education", "letter of caution", "letter of admonition";

8. Over five hundred case files, letters of complaint, and inquiries were reviewed by Subcommittee members in the Departments during some 22 days in March and April of 1984 at the following locations:

a. Syracuse, New York - Office of the Grievance Committee, Fifth Judicial District;

b. Buffalo, New York - Office of the Grievance Committee, Eighth Judicial District;

c. Albany, New York - Office of the Committee on Professional Standards, Third Department;

d. White Plains, New York - Office of the Grievance Committee, Ninth Judicial District;

e. New York, New York - Office of the Departmental Disciplinary Committee, First Department;

(Case files, letters of complaints and inquiries were reviewed for every District in New York State, and for every Department; professional staff acommodated Subcommittee members by transporting documents to central locations in the case of the 2nd and 4th Departments where the distances between offices precluded the

evaluators from visiting each grievance Committee site);

9. A Spokesperson for professional staff in each Department was interviewed and questioned at length, and in many cases, additional telephone interviews were conducted with Chief and Principal Attorneys over a period of many weeks;

10. The written results of all Subcommittee evaluations were personally reviewed by the chair and all significant notes were transferred to individual index cards to facilitate comparisons on Departmental and District bases;

11. Informal results of the Subcommittee's findings were transmitted to:

a. All members of the full Committee;

b. The Subcommittee on Practices and Procedures; and

c. All Chief and Principal Attorneys within the Discipline System;

12. A 32 page proposal based on the Subcommittee's efforts was compiled by the Chair and submitted for comment: to all other Subcommittee members, to the Chair of the full Committee, and to the Chair of the Subcommittee on Practice and Procedures;

13. At a Subcommittee meeting on November 4, 1984, the eventual framework of this report was adopted by all members in attendance, with the Chair undertaking to prepare the final report on the basis of comments, observations, and written submissions provided by other Subcommittee members in conjunction with the wealth of data secured from on-site evaluations.

Subcommittee Evaluation

As a result of its statewide evaluation of the Discipline System, the Subcommittee has concluded that certain practices and policies presently exist which warrant serious attention and concern. This report will attempt: (1) to point out the areas of concern; (2) to provide specific examples to illustrate the nature of the particular problems involved; and (3) to

demonstrate how the full Committee's proposed changes in the disciplinary structure will remedy the unsatisfactory practice or procedure.

Identification, illustration, resolution: these three steps will be attempted for each area of concern raised by the Subcommittee's examination of over 500 unpublished dispositions. (illustration by means of specific examples is subject to the strict rules of confidentiality under Judiciary Law Section 90. Thus, specific examples, without identification by Department, District, or case number, are contained in Appendix A. All names or identifying elements are deleted in each example).

The Subcommittee believes that the basic solution to all the problem areas which have been identified by our on-site evaluations lies in the adoption in toto of the following four proposals:

1. Adoption of a Statewide Disciplinary Coordinating Board (hereafter, "the Board");

2. Adoption of a Uniform Practices and Procedures Manual (hereafter, "the Manual") to be utilized in every office and by all professional staff within the Discipline System;

3. Establishment of the Office of Counsel to the Statewide Disciplinary Coordinating Board (hereafter, "Counsel"); and

4. Establishment of the position of Chair of the Statewide Disciplinary Coordinating Board (hereafter "the Chair").

The Subcommittee does not believe that a large staff will be necessary for the office of Counsel. However, a minumum of one fulltime attorney and a secretary are envisioned.

In addition, the Subcommittee believes that while the position of Chair will be a part-time one, it must not be merely symbolic or perfunctory. It must entail a considerable expenditure of time, involve major responsibility, and be an office of high respect and prestige. To this end, the Chair might well be required to attend at least two meetings of each Departmental Disciplinary Committee per year, and to submit regular written reports.

In addition, payment of a per diem rate comparable to that of an Appellate Division Justice would not merely enhance the position as one of major importance in the State, but would also give a clear signal of the expectation that services are expected to be rendered.

It should be evident that our Subcommittee's most basic conclusion is that the system does not require radical re-structuring but only that there must be more vigorous supervision and that the Appellate Division, which has the utlimate authority for the day to day functioning of the system, has available a continuous knowledge of the manner in which complaints are processed by these Committees.

TEN MAJOR AREAS OF CONCERN: EXISTING DISCIPLINE SYSTEM

1. FAILURE TO STATE A COMPLAINT:

In theory any allegation of attorney impropriety which fits the definition of misconduct must be treated as a complaint by professional staff and processed in accordance with the particular Department's rules. In reality, a great number of matters are dismissed on their face by professional staff where clearly a problem exists and calls for action. Three types of matters can be identified which fall under this area of concern.

a. A grievance clearly alleges attorney misconduct but the matter is treated as FSC because the reviewing member of the professional staff lacks sufficient knowledge of what is, and what is not, lawyer misconduct;

b. A grievance is so poorly written, or so lacking in factual allegations that no misconduct is actually alleged but clearly some problem does exist and further inquiry by professional staff might well reveal a serious case of in propriety; and

c. A grievance is lodged against an attorney who has been disbarred, is still apparently practicing law, and the complainant is told that the Discipline System has no authority over disbarred attorneys (apparently no referral being made to the local District Attorney).

Illustrations[1]: Cases 1, 2, 3, 4, 5, 6, 14, 16, 21, 35, 51, and 52.

Solution: Initial and continuing training by Counsel to the

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[1] A list and brief description of cases illustrating our concerns with the present system begin on p. 96, below.

Board, and exchange of expertise across Department lines will ensure greater competence in professional staff. A statewide Manual would provide clear and uniform guidance to professional staff and require further inquiry when a letter of complaint is illegible or unintelligable. In addition, under the Discipline System proposed by the Committee, every dismissal, even a FSC, would require the approval of a panel. When these matters are presented to a panel of attorneys, all with considerable experience in different fields of law, there is a greater likelihood that instances of potential misconduct will be recognized and that proper investigations will then be required. Our experience has shown this to be the case. Comparison of files from Committees where dispositions are made by counsel, sometimes with the Chair's approval, with those of Committees where dispositions must have the approval of the full Committee have corroborated that conclusion.

The Board itself will have to further address the issue of the securing of cooperation from local district attorneys in prosecuting the disbarred lawyer and endeavoring to compel restitution to complainants; also the professional staff shall enforce, in all appropriate cases, violations of disbarment orders.

2. THE FEE DISPUTE

By court rule in all four Departments, any violation of a disciplinary rule contained in the Code of Professional

Responsibility constitutes attorney misconduct (22 NYCRR 603.2, 691.2, 806.2, 1022.17). Disciplinary Rule (hereafter "DR") 2-106 (A) states "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee" and DR 2-106(B) lists the specific factors to be considered in determining when a fee is "clearly excessive". While courts have always supervised attorneys' fees under specific statutes, the concept has arisen throughout the State that the fee dispute is beyond the jurisdiction of the Discipline System. Thus, cases judged to be fee disputes are almost universally referred to local bar associations by professional staff. While the new ABA Proposed Model Rules would apparently totally eliminate any restrictions on legal fees, at this time in this state, an allegation of an illegal or clearly excessive (unconscionable) fee is an allegation of professional misconduct and should be treated as such. Particularly damaging to the credibility of the Discipline System is the advice sometimes given to an individual complaining about an unconscionable fee or retainer agreement, i.e., that the complainant should secure counsel to assist in recovering funds from his ex-attorney. In such cases, the complainant often complains of having no money and, thus, cannot afford another lawyer. While the discipline system should not permit itself to be used as a tool to beat down a fee which though expensive is not "clearly excessive", neither should such concern preclude sanctions where the "clearly excessive" standard has been exceeded.

In addition to the illegal or excessive fee dispute issue, the subcommittee has observed a tendency to employ the term "fee dispute" to avoid acting on many grievances which clearly allege misconduct. If reference is made to the particular attorney's fee by a complainant, even where several other serious allegations of professional impropriety have been alleged the professional staff is often too willing to treat the complainant's problems entirely as a fee dispute and either dismiss the complaint or refer it to a local bar association. This practice was noted some eight years ago in the "Silverman Report" and is still prevalent. Where a complaint suggests misconduct independent of the real or apparent fee dispute, the potential misconduct must be investigated by the Disciplinary Committee, regardless of the manner of disposition of the fee dispute.

Illustrations: Cases 38, 42, 43, 46, 47, 48, 49, 50, 53, 55 and 64.

Solution: By means of continued training and periodic inspections by Counsel to the Board, as well as the adoption of statewide policies by the Board itself, professional staff can be made aware of the proper role of the Discipline System in the areas of: (1) the "illegal or clearly excessive fee"; and (2) the need to process every allegation of professional misconduct, even if an accompanying minor fee dispute cannot be dealt with.

3. INADEQUATE CASE FILES

An examination of disciplinary case files throughout the state reveals:

a. Some case files are maintained excellently, with detailed notes and documentation in chronological order. (When that has been so, the results have been correspondingly superior).

b. Some case files are almost wholly incomprehensible, notes are illegible, documents are missing, no closing sheets or explanation for the particular disposition are provided; and

c. No uniformity exists from Department to Department, or in some cases, from District to District within the same Department as to:

i. numbering of files;

ii. use of standardized case opening sheets, case closing sheets, or attorney activity sheets;

iii. organization of case files contents on a uniform basis so that any attorney will be able to take over another attorney's files if necessary; and

iv. requirements for entering or logging all activity relevant to the particular case: what was done, what was the substance of a crucial telephone conversation, who made the particular entry in the file, what testimony a particular respondent gave to professional staff.

Illustrations: Cases 8, 9, 10, 34, 62 and 63.

Solution: The proposed statewide Manual, implemented and monitored by the Counsel to the Board, should provide the necessary consistency, uniformity, and efficiency needed in case file management.

4. INADEQUATE INVESTIGATIONS

Once a grievance has been accepted as a complaint, professional staff in each Department is required to conduct some form of investigation to determine the validity or non-validity of the allegation of professional impropriety. Here, as elsewhere in the Discipline System, lack of uniformity is evident. The kind of investigation, its thoroughness, the use of testimony, the requirement for documentation, the degree of credibility awarded the complainant and the respondent attorney, vary throughout the Discipline System. Common elements exist, however, in nearly all areas of the State:

a. The attorney respondent's explanation of what

happened is judged to be more credible than the allegation of misconduct leveled by the complainant;

b. Relevant documentation - whether in the form of cancelled checks, bank statements, letters, medical reports, contacts or expert testimony - is seldom required of the attorney respondent unless the case involves conversion of escrow or trust funds; and

c. Attorneys' records are usually accepted at face value, despite the fact that these documents on their face were obviously prepared for purpose of defense of disciplinary charges. An attorney should not be considered inherently more credible than a complainant, especially in the cases where the attorney respondent has been the subject of a number of prior complaints. Investigation should not be discouraged merely because of the attorney's uncorroborated denial of the charges. The professional staff, as far as is reasonably possible, must remain neutral, treating the complaint as a dispute between two equals and relying as much as possible on documentation to corroborate either party's allegations or explanations.

Illustrations: Cases 11, 12, 13, 15, 17, 18, 20, and 56.

Solution: Statewide training, a uniform Manual with minimum standards for investigation, and periodic monitoring by the Board Chair and Counsel to ensure that such standards are upheld.

5. LOCAL BAR PARTICIPATION

The ABA Report argues for the virtual elimination of the participation of local bar associations in the Discipline System. Professional staff throughout the state have expressed a strong desire for continuing local bar participation in the area of fee disputes and minor grievance resolution. The effectiveness of local bars varies throughout the state. Some of

the largest local bars have prepared and completed excellent investigative reports on disciplinary matters. Small bar associations acting informally, seem capable of resolving minor disputes efficiently and fairly. However, case files reveal that central control, over local bar reports, at the district or departmental basis is essential. Initial complaints of minor matters can reasonably be referred to most all local bars but prompt investigations at the local level, and periodic complete reports to Staff and each Committee are necessary. Too often, no control over matters being processed by local bars is evident in case files. In addition training in the areas of: (1) fee matters; and (2) professional discipline is needed at the local bar level.

Illustrations: Cases 22 and 23

Solution: Changes proposed by the Committee would alleviate most of the current deficiencies in local bar participation in the Discipline System. Mandatory filing of all complaints with professional staff, supervision of local bar case files by professional staff and Counsel to the Board, and a statewide Manual would allow maximum use of the local bar but also ensure uniformity and consistency of dispositions.

6. LACK OF COOPERATION

One of the most disheartening issues raised in the

Subcommittee's field investigation, is in the apparent willingness of elements of the Discipline System, on every level, to permit certain respondents repeatedly, and even continuously, to refuse to cooperate with professional staff or even full Committees in their efforts to uphold the honor of the profession. In file after file, certain respondents pay little heed to requests for records or documentation. Some respondents ignore requests for explanations sought by professional staff, ignore deadlines for personal appearances, ignore warnings of severe sanctions. Months pass, the complainant wonders whatever happened concerning a serious allegation of impropriety. The Discipline System as a whole is brought into public disrepute if individual respondents are permitted: (1) seemingly interminable adjournments; or (2) apparent immunity from compliance with reasonable requests for information and documentation.

Illustrations: Cases 7, 24, 26, 27, 33, 67 and 68.

Solution: The full Committee has spent considerable time considering and re-considering the need for strict compliance, on a statewide basis, with fixed time periods for respondent attorney to answer inquiries and requests from professional staff. The Committee's proposals reflect adequately that deep concern. The proposed Manual will allow for additional, more specific details in this area. The Board should ennunciate a positive policy of strong, statewide, uniform sanctions for the non-cooperative respondent.

7. WITHDRAWAL OF COMPLAINTS

Policies differ within the Departments as to the effect the withdrawal of a grievance will have on a professional staff's continued investigation of the alleged professional impropriety. The seriousness of the alleged impropriety, existence of other similar allegations against the respondent, as well as the real ability to proceed without the complainant's full cooperation, are all factors considered. However, the Subcommittee strongly believes that the practice of a cash settlement with the client by a respondent is not to be condoned as, in itself, permitting the termination of a disciplinary investigation. The inherent dangers of permitting this practice of cash settlement are obvious. Wealth of a respondent cannot determine professional integrity nor protect the public from an unscrupulous attorney who could well cover one settlement by borrowing the funds of other clients. Unfortunately, this cash settlement practice has been permitted in several areas of the state.

Illustrations: Cases 30, 31, and 32

Solution: The Committee does not condone the practice of withdrawal of a complaint, as such, to terminate an investigation of claimed misconduct.

8. INADEQUATE CLOSURE LETTERS

The Subcommittee found that in many cases closure letters were inadequate. Closure letters are of two kinds: (1) those sent to the original complainant; and (2) those sent to the respondent when a letter of caution or admonition was issued. Argument has waged for several years as to precisely what a complainant should be told, depending upon the disposition of the complaint: (1) FSC: (2) D or W; (3) Private Sanction. Changes have been made in the Departments towards fuller disclosure to the complainant. At a minimum, uniformity to a rather high degree, should exist statewide. In addition, while form letters are an inevitable necessity in most cases, individual complainants with special problems deserve letters tailored to assist them. For example, an indigent complainant could be advised in all cases where a civil claim might exist, of the availability of specific local bar referral programs or Legal Aid Offices.

Closure letters sent by a Committee to particular respondents in the forms of letters of caution or admonition tended to be particularly form-like with little specific information as to: (1) the precise nature of the impropriety committed; (2) the real severity of the impropriety; or (3) the possibility of much severer sanctions in the event of future professional impropriety and any strong language condemning the respondent's breach of trust to his client, the public, or the

profession as a whole.

Illustrations: Cases 45, 57, 58, and 61

Solution: Continuing training, transmittal of information as to Board policy to every Committee, utilization of an adequate Manual, and continuing inspection and comment on actual case files by the Counsel to the Board, should resolve these problems. Professional staff must be reminded that the function of a letter of admonition is not to spare the respondent's feelings but to discourage repetition of similar unprofessional conduct.

9. PENDING CIVIL/CRIMINAL ACTIONS

There exists no statewide policy as to whether disciplinary investigation or action should, or must, be deferred pending judicial action involving the same parties and related issues. However, some individual members of the professional staffs seem willing to unhesitatingly defer any action on the basis that a civil action is pending, especially an attorney's suit for legal fees against a complainant. Individual Departments have taken the stand that the existence of a civil or criminal action between the parties does not, of itself, defer a disciplinary inquiry.

Illustrations: Cases 28 and 29

Solution: Each complaint of professional impropriety must be judged on its own. Outside factors, civil or criminal proceedings are, of course, elements to be carefully considered. Under the Committee's proposal, a panel, not a single individual, will make the decision based on statewide policy subject to Board revision.

10. DISPARATE SANCTIONS

Since the ABA Evaluation Team did not examine closed, confidential case files, it did not comment on any statewide disparity in Private Sanctions. Such disparity does exist but the reasons for it are not clear. However, much of the disparity is explainable by the fact that: professional staff, grievance committees, departmental disciplinary panels, and local bar grievance committees and volunteers, all have different legal, professional, social, economic, and cultural backgrounds. There exists no model Fourth Department private attorney as opposed to a model First Department private attorney. The Committee and Subcommittee are themselves composed of disparate types of legal practitioners, often with vehemently opposed views of what is the fairest and best system of professional discipline for this state. The allegations of impropriety lodged against attorneys are diverse, sometimes incredible, sometimes too credible and such as to bring disgrace to the respondent and many others whom

have been touched by reprehensible conduct. The dishonest, the unscrupulous and the criminal are not permitted to go unpunished by the present Discipline System. However, the Subcommittee believes improvements are needed. The System needs to be more uniform, more efficient, and disparities in dispositions need to be eliminated to the maximum extent possible and desirable.

Illustrations: Cases 36, 39, 40, 41, 44, 45, 57, 58, 59, 65, 66, 69 and 70.

Solution: In 1972, The Christ Committee oberserved that:

> The Commmittee extended its investigation into the area of punishment imposed in an attempt to determine whether standard of uniformity were needed and could be formulated, at least, for the more common types of misconduct. It discovered that a suprising degree of uniformity now exists in the four judicial departments although little or no conscious attempt has been made to achieve it. The Committee also found that the diverse nature and degree of the offenses involved, the personal and professional histories of the attorneys, their cooperation with or hostility to the disciplinary process, restitution or the lack of it, and many other variants made it virtually impossible to formulate a 'penal code' approach to punishment in grievance matters. (Christ Report, p. xiii).

Some disparity of sanctions is inevitable, but uniform procedures which will ensure that the four departments receive a more uniform input from their respective Committees will encourage uniformity of sanctions. We view the disciplinary Committees in the four departments as if they were four independent vessels each containing liquid but at different levels. It is our hope that if all of the Committees in the four departments are connected directly to each other through the State Board, the level of sanctions in the four departments will tend to reach the same level.

SUMMARY OF UNPUBLISHED CASES ILLUSTRATING WEAKNESSES

IN PRESENT DISCIPLINARY SYSTEM

The brief summaries of actual case files which are presented here serve to focus attention on the areas of concern outlined by the Subcommittee. These summaries do not exhaust all the documentation secured by Subcommittee members from their careful review and analysis of disciplinary files.

The following abbreviations are used:

C - A complainant

R - An attorney against whom an allegation of impropriety has been lodged, a respondent

Ltr of Ed - A letter of Education

Ltr of C - A letter of Caution;

Ltr of A shall refer to both: (a) a letter of Admonition mailed to a respondent; and (b) a letter of Admonition, or oral Admonition delivered by a Grievance Committee.

Comm. - shall refer to any and all of the following:

1. Grievance Committee;
2. Departmental Disciplinary Committee;
3. Committee on Professional Standards.

PS - Professional staff employed within the discipline system.

CASES

1. Ltr of A - R had a 50% contingency fee agreement with C on a property damage claim; R received $136,300 under that contingency agreement plus $17,400 allegedly paid for an appeal by another

attorney; R received an overpayment in excess of $2000 from the opposing party and R then sent a letter to C that if nothing were heard from the opposing party as to this erroneous payment, R and C could divide the money on a 50/50 basis; matter was initially referred to a local bar association as a pure fee dispute; prior discipline against R: two Ltrs. of A and a 6 month suspension.

2. FSC - matter dismissed as a fee dispute, beyond the jurisdiction of the Comm.. C alleges that R was paid some $1630 in advance for criminal representation but that R never appeared in court, the trial judge had to provide a public defender for C and C had to repay the county $100 for his services.

3. D&W - C alleges fee-gouging, unconscionable retainer agreement; $5000 initial retainer agreement contains a clause allowing R to withdraw at any time if R believes withdrawal is "necessary or desirable" R, after complaint has been received by professional staff, sends a letter threatening civil action against C for "legally defamatory and libelous statements". C eventually withdraws complaint.

4. FSC - C alleges that R was paid $2000 to secure a divorce for C but instead never appeared for C, allowed C's wife to get a default divorce against him, and never notified C of the divorce. Only after a new attorney was hired did C learn of R's actions. R then offered to return $1400 of his fee. Entire matter treated as a pure fee dispute and referred to the local

bar.

5. FSC (inquiry) - C alleges that R has been mishandling an estate which has been in litigation since 1977. PS sends letter to C that R has been spoken to and his records reviewed and no misconduct has occurred (no copies of any documents or records in the file). Memo to file states that R wishes to withdraw because he has not been paid.

6. FSC - C alleges that R has refused to enter C's completed divorce decree unless all fees and costs are paid. Treated as no allegation of misconduct. (see Kennedy vs. Macaluso, 86 AD2d 775 (4th Dept., 1982) affd. 56 NY 2d 630 (1982)).

7. Ltr of Ed - R has prior record of having been admonished for: (1) neglect of an estate; and (2) failure to communicate with client. C alleges R is neglecting another estate. Ltr of Ed sent to R on 11/9/83, telling him to institute proceedings to settle estate within 60 days and advise Committee of action. As of March, 1984, no response was in R's file.

8. D&W - C alleges R committed negligence, and neglected her case. Apparently R appeared at the Committee offices and sufficiently explained his actions. However, the case file merely contains two pages of wholly illegible notes as to the explanation.

9. D&W - C alleges that R neglected his divorce and acted improperly. No copy of C's complaint apparently mailed to R. Seven pages of wholly incomprehensible notes in the file, apparently case was closed solely on the basis of a phone conversation between R and PS. No records of what was discussed in that conversation except in closing letter to C.

10. D&W - Memo in case file by PS states that there existed "substantial evidence" that R had induced his client to refrain from suit on a promissory note in order to allow his wife to buy the property and re-sell it at a profit to R's client. There are three pages of illegible notes in the file along with the final entry that the matter was dismissed upon recommendation of PS. No explanation is given.

11. FSC - C alleges: R grossly mishandled and overcharged an estate. R had prior Ltr. of Ed and Ltr of A. Local bar "investigates", receives 8 page explanation from R. No unethical conduct.

12. FSC - C alleges: (1) R failed to notify C that his case was lost until 8 months after the trial; as a result; (2) time to appeal had passed. C's bank account was seized and he was forced into bankruptcy. R's explanation contained in a letter which contains no hard data, facts or dates, yet PS closes case solely on R's response to C's allegations.

13. Ltr. of C - C is an attorney, files complaint against R:(1) R has refused over a period of 2 years to respond to 6 letters from C regarding R's handling of an estate; (2) some $7000 of that estate was not held in trust for some, if not all of the period between 1977 through 1981. R admits some money not held in trust, postpones repeatedly his appearance before the Committee, eventually appears with statement from doctor who had treated him for 30 years stating R's hypertension "could" have affected his ability to perform his professional duties; medical evidence is flimsy, at best.

14. Inquiry (substantially equivalent to FSC) - C alleges that R had kept some $476.00 of C's money in addition to the agreed upon fee of $500; matter treated purely as a fee dispute.

15. D&W - C alleges that R misappropriated $500 which was to have been used for hiring a private investigator; almost 3 months elapse between complaint and R's answer; R submits copy of bill showing $500 expended for private investigator (no copy of cancelled check or proof of when $500 actually paid was submitted).

16. FSC - referred by PS to local bar as fee dispute. C alleges he retained R in 1979 for divorce representation at a total fee of $500. C alleges after the divorce R missrepresented nature of note, got C to sign agreement to pay $2500 for divorce; actual divorce bill, $4194.38. R submits billing sheets: (1) no

contemporaneous time records; (2) no periodic bills ever submitted to C; (3) time sheets apparently all written at the same time, list 5 and 10 minute periods expended over many months but no explanation of what services were rendered for each entry. Local bar holds for R, apparently finding his bill fair and reasonable.

17. FSC - C alleges excessive fee. Prior discipline of R: Ltr. of Ed and Ltr of C. R here provided absolutely no records of dates and times he worked on C's case, fee still upheld.

18. FSC - C had an auto accident in 1975, retained R. Supposedly some $930 of the settlement went to attorney X for arbitration. C, seeks the money back. Phone conversation between PS and R. R states that attorney X lost arbitration, used the $930.00 to pay for C's medical and hospital bills. PS receives letter from attorney X that R was holding $870.50 in escrow and was prepared to pay $641.50 to C or the hospital. Attorney X sends letter and check for $641.50 to C as coming from amount held in escrow by R. PS seeks copies of attorney X's escrow accounts, no response. Further request made, attorney X finally responds and alleges he never held any money of C's in an escrow account. R was holding the $641.50 pending notification by Attorney X as to arbitration. Memo in file - C received $641.50, everything settled. (Two obvious questions: (1) how could R's explanation to PS possibly be reconciled with Attorney X's explanation? and (2) did R, in fact, hold $641.50 in a trust or escrow account?

19. FSC - treated purely as a fee dispute, local bar handles matter. R's fee found to be reasonable, despite no itemized bill whatsoever. C's allegations of neglect and inordinate delay are not addressed.

20. FSC - matter handled by local bar. C alleges that R represented her in a divorce action in which a divorce was granted as of June 1979. As of December 1981, C alleges she has not received a single dollar in divorce settlement despite R's receiving $1100 in legal fees. R alleges that in April of 1981 judgement for support and latter income execution entered on C's behalf; no documents, records supplied, nothing further done by PS or bar association.

21. FSC - treated as fee dispute by local bar, closure approved by PS of Committee. C alleges she entered into an oral retainer with R for criminal representation, $5000 paid in advance, criminal case dismissed prior to trial. C alleges oral retainer requires that R return $2500 of fee, R refuses to submit matter to fee dispute tribunal, refuses to provide itemized bill to local bar of C. Local bar then conducts hearing and decides $5000 was a fair and reasonable fee. C continues to complain: was there a retainer contract between her and R or was there not? Nothing else done.

22. D&W - C alleges R (1) was paid $1500 and did absolutely nothing in a custody case; and (2) advised both C's to come to New York for custody case although 1st Degree Kidnapping warrants were outstanding against both of them. Matter referred by PS to local bar as a pure fee dispute; following dates are relevant:

1. 2/9/82 referral by PS to local bar;
2. 4/22/82 letter from PS to local bar for status report on its investigation
3. 5/26/82 identical letter to local bar for status;
4. 6/25/82 identical letter;
5. 7/22/82 identical letter;
6. 8/23/82 identical letter;
7. 9/21/82 identical letter;
8. 10/21/82 identical letter;
9. 10/25/82 identical letter;
10. 11/22/82 identical letter;
11. 12/22/82 identical letter;
12. 12/23/82 handwritten report from local bar states C's claim is without foundation;
13. 3/1/83 memo from PS to Comm. - matter has been resolved (no evidence C ever saw R's letter to local bar or the letter of R's employer).

23. D&W - C. alleges R owes rebate to him of $246.67 or rent; referred to local bar on 1/15/82; following dates are relevant:

1. 3/24/82 - PS writes local bar, please return file to Committee office;
2. Same request made by letter on: 4/22/82; 5/26/82; 7/22/82; 8/23/82; 9/21/82; 10/22/82 10/25/82; 11/22/82; 12/22/82;

3. 1/24/83 - PS receives file originally referred to local bar on 1/15/82.

24. FSC (inquiry)-Matter filed with local bar. C alleges (1) misrepresentation; (2) excessive fees; (3) no notice of appeal filed; and (4) inadequate representation. Copy of complaint filed with PS. Status reports requested of local bar by PS on 7/32/82, 9/7/82, 9/29/82, 11/22/82. Final report by local bar but no evidence attorney investigating complaint ever spoke to C. Matter treated as an inquiry.

25. Ltr. of Ed - prior discipline of R: (1) private censure and (2) Ltr. of A - both for failure to cooperate. C alleges R failed to prepare income tax returns for C's mother. R fails to cooperate, order to show cause for contempt prepared and made returnable; Ltr. of Ed to R based on: (1) his failure to cooperate and (2) his promise to discontinue private practice (no evidence in file that R's performance of (2) was either supervised or actually completed).

26. FSC - PS requests orally on 1/14/82, and by confirming letter on 1/14/82, that R perform his duties to his client; PS sends similar letter to R on: 1/25/82; 2/1/82; 3/10/82; 3/26/82; 4/21/82; 5/27/82. R responds to two of the letters but nothing actually done; in letter on 5/27/82 PS threatens "to open a formal complaint" against R; on 6/10/82, R performs his obligations to his formal client.

27. D&W - C alleges R settled her auto accident case for $24,500 in December 1980, alleges entire amount was placed in R's personal account and around $590 still owed to C; the following sequence of events then occurs:

1. 1/12/82 - Ltr. from PS to R - please respond in 14 days - no response;

2. 2/2/82 - similar Ltr to R - no response;

3. 2/17/82 - R calls PS, says $500 has been given to C, C is now happy;

4. 2/17/82 - Ltr to R from PS, please contact this office;

5. 2/18/82 - C calls, still wants an accounting for entire insurance settlement;

6. 3/2/82 - PS, Ltr to R, respond within 7 days. R responds with xerox copies of all personal checks made to C - 24 separate checks, starting on 1/15/81 to 10/15/81 (R admits case settled in December 1980); check dated 10/15/81 for $1200 came out of R and his wife's personal bank account;

7. 3/11/82 - PS sends C copy of R's latest response for comment;

8. 4/9/82 - C writes, she wishes to withdraw complaint;

9. 3/15/82 - PS to R -please forward:
   a. copy of bank statement showing deposit of settlement check;
   b. a monthly record of that deposit from 12/80 to 12/81;
   c. explain why proceeds of settlement not turned over to C in December, 1980;

10. No response from R, no response from R to follow-up letter from PS; 4/21/82 another letter sent by PS;

11. Memo in file: 2 sentences, no copies of any of the documents requested on 3/15/82; does not appear to be any commingling of client funds.

(Questions unanswered: (1) 24 separate checks for a lump sum settlement; (2) 10/15/81 personal check on R and wife's account; and (3) R's continued unwillingness to cooperate).

28. FSC - referred to local bar by PS as a fee dispute on 4/27/83 (complaint received by PS on 3/24/83 alleging clearly excessive fees); on 4/29/83 local bar writes to R, please respond within 10 days; on 5/2/83 R writes that he commenced a suit for his legal fees on 4/21/83; Ltr to R by local bar, since matter in litigation, no action can be taken, file will be closed.

29. Inquiry (essentially same as FSC) - local bar, fee dispute, sequence of events:

1. Ltr. of C to R; bill is excessive, 12/19/81;

2. Ltr. of C to R - I will pay part of bill or submit it to local bar arbitration; 1/8/82;

3. C to local bar; submit matter to arbitration, 1/28/82;

4. R letter to local bar; I am suing client in small claims court for fee, hearing due on 2/24/82, alleges matter pending when R first received complaint from local bar;

5. small claims verdict, 2/3 of R's bill awarded to him. (issue: no investigation apparently. Was small claims civil proceeding commenced after C's 1/8/82 letter to R in which submission to local bar arbitration suggested?)

30. Ltr of C - C alleges R failed for over 1 year to draw up Family Court order requiring husband to pay medical expenses. R admits his neglect, C reports to PS by phone that on 11/11/80 R offered her a bribe to drop charges, $200 specified (no evidence of further investigation of this issue); Ltrs. of C directs attorney R will receive no fee, attempt to get back support, and pay for medical expenses incurred by C by reason of R's neglect

to file support order.

31. Ltr. of C - R fails to pursue personal injury case, cause of action lost; on July 8th, 1982 R makes written agreement to pay C $6,000 for release of liability; terms: $2000 up front, remainder to be paid by January 1st, 1983. Same date, R had appeared in person before grievance committee, advised at that time matter would be re-opened unless $6000 paid in full by 12/31/82; copies of checks in case file shows R breached payment schedule, matter never reopened. Checks:

1. $1500 - 3/1/83;
2. $350 - 3/15/83
3. $350 - 3/21/83
4. $650 - 5/3/83

32. D&W - C alleges in letter of Feb. 16, 1981, that she had her divorce hearing on 5/3/78 and paid her attorney in full but husband's attorney has neglected to file divorce decree; R's husband's attorney, responds to PS, divorce papers forwarded to hearing judge. 2/19/82 date of response; memo in file dated 2/5/82, C called hearing judge, he was refusing to sign papers as over 1 year default limit, yet on 3/5/82 judge signs papers. Recommendation for dismissal made to Comm. by PS.

33. D&W - C alleges R has neglected an estate. Apparently R has had chronic problems with: (1) prior clients and (2) cooperation with PS. By Ltr of 5/28/82 to C, PS states that R "has fully

responded to this office with reference to your January 1982 complaint letter. No written response of any kind in file. In ltr. of 4/15/82, four separate matters, including C's addressed to R. No evidence of full response although note in file, on 3/30/82 R promised to fix any problems.

34. D&W - C alleges R sold C's property for $16,000 and converted the entire sum; sometime in 1978 a member of PS questions C under oath, disbelieved C's allegations; no record or transcript of testimony, 4 pages of unintelligible notes, no response in file from R, except for request that no closure letters be sent to C; PS agrees to this request.

35. Ltr. of C - R failed to settle an estate for 10 years, no conversion involved; eventually, after complaint, distributes money with interest. R gives "fee dispute" as reason for failing to distribute estate.

36. Ltr. of C - 2 different C's: R allowed statute of limitations to run on both clients; eventually R sued for malpractice, two separate judgements secured against R: one for $12,000, the other for $9,000; R has virtually no money, no insurance, 70 years old.

37. Ltr. of C - prior discipline for similar conduct, June 1976 Ltr. of A. C alleges R paid $500 retainer for divorce in October 1979, allegedly nothing of substance done. October of 1980, C

gets new attorney; C requests R return entire $500 retainer plus interest; R offers to return $250 (apparently this issue not resolved).

38. FSC - C processed by local bar. April of 1977, motor vehicle accident occurred. C retained R as attorney, apparently case neglected and in 1981 C employed new attorney. C alleges that R, while visibly intoxicated, came to her house and begged her for another chance. R admits "personal problems" to president of local bar, closure letter merely that C got as much of a settlement eventually as they could reasonably have received.

39. Ltr. of Ed - prior discipline of R: (1) Ltr. of Ed, (2) censure, and (3) suspension. C alleges neglect of an appeal, but R argues no financial loss suffered by C.

40. Ltr. of C - R represented new client against C, former client, in matters which were substantially related. R directed to withdraw from representation of new client; notes of PS state that R used confidences gained from C to C's disadvantage in the pending litigation.

41. Ltr. of A - prior discipline of R, Ltr. of A. on 8/31/83 for failure to file a bankruptcy petition; C alleges here that a claim was totally lost because of R's failure to file a notice of claim. (second Ltr. of A in 2 months).

42. Inquiry (essentially FSC) - C paid $300 to R for name change, apparently nothing done. R alleges petition for name change was dismissed by court without notification on 9/20/82; R states C is coming back into his office to discuss matter, nothing further done.

43. FSC is an attorney, alleges R represented other side in a divorce action, R withdrew, let matter proceed as a default. C prepared all final papers and forwarded them as a courtesy to R who refused to forward them to the hearing judge as R's client had refused to pay his entire bill. PS spoke to R who agreed to mail divorce papers to hearing judge, apparently did so.

44. Ltr. of C - C prison inmate. On 5/13/80 PS receives his complaint alleging (1) inadequate representation; (2) neglect of C's case; and (3) lack of contact with C. On 5/10/80 letter from PS to R, please appear at our offices on 5/29/80 and: (1) bring your entire case file; (2) bring all relevant bank statements and cancelled checks; and (3) a stenographer will take your testimony. You may bring an attorney as counsel. Memo of 11/5/80 from one of PS to another of PS, 6 typed pages, lists prior complaints against R, further investigation required, main charge against R: that he received $4000 to handle C's appeal, appeal neglected, no notice of appeal filed with Court of Appeals; status report in file 12/3/80 by PS: presently 9 matters under investigation over the next five years, following facts

revealed:

1. C 69 years old sentenced to 15 years to life;

2. C had been given permission in forma pauperis to appeal to Appellate Division. (thus no transcript costs involved);

3. C gave R $4000 for appeal, C's life savings;

4. C completely lost any possibility of review by Court of Appeals by R's failure to file application for leave to appeal;

5. C could read and speak English with great difficulty, Spanish his native tongue;

6. R submitted, did not argue C's appeal, brief on appeal was 5 pages long, 4 cases cited; and

7. R never notified C of adverse Appellate Division decision.

On 5/18/82 - C notified that R has agreed to assist you in securing parole.

45. Ltr. of C - C alleges grossly excessive legal fees, improper retention of personal jewelry of value in excess of any reasonable legal fees. R retained for custody case, Family Court which would hear case, over 200 miles from R's office; R charged $7,440 for his travel time back and forth to court at rate $125/hr. despite fact allegedly $2500 paid to custody "expert" to actually try case. C paid R all the money she had, apparently trial "expert" never appeared in Family Court, no custody decision ever reached by trial court, C got visitation. R kept 2 pieces of C's jewelry for alleged fees still due him (total bill some $18,000.00); 2 pieces of jewelry: (1) 1 piece, diamond bracelet set with 80 small cut diamonds; (2) gold watch (valued at $1200 by R's appraiser, $6500 by Committee's appraiser). Ltr.

of Caution to R: (1) no breach of professional responsibility; (2) be more cautious in explaining fees to your client; and (3) "travel expenses were somewhat high" (Apparently at meeting of Committee - R agreed to return jewelry; PS had recommended formal disciplinary proceedings.)

46. FSC - matter dismissed on its face on the basis that a purely civil matter was involved although C alleges funds were not placed in an escrow account.

47. FSC - matter dismissed on its face because the "attorney" involved had already been disbarred and Comm. alleged that it possessed no jurisdiction over disbarred attorneys.

48. FSC - substantial sum paid to "attorney" X to secure "Green Card"; C advised by PS that nothing further would be done since "attorney" X had been disbarred.

49. FSC - C alleges attorney X counseled his client to disobey court orders, no action taken by PS, matter dismissed on its face.

50. FSC - matter dismissed on its face despite the fact that R had threatened criminal prosecution after the initial receipt of a summons and complaint by his client.

51. FSC - matter treated purely as a fee dispute, despite the fact that attorney X had apparently allowed his client's claim to become barred by the statute of limitations.

52. FSC - C alleges total neglect of his case by his attorney and that, despite being paid, the same attorney has refused to deliver C's file; matter treated solely as a fee dispute.

53. Inquiry (same as FSC) - jail inmate alleges that his attorney has seen him only once in prison in 8 months, representation totally inadequate, matter dismissed on its face.

54. FSC - C alleges attorney received $650 for representation in divorce action, apparently R defaulted in answering, despite an extension; C wanted $500 back, matter treated as a fee dispute solely, local bar ruled in C's favor, $500 returned.

55. FSC - C alleges R wrongfully, without notice, placed restraining orders against his bank accounts; matter dismissed on its face, no inquiry, no investigation of any type.

56. D&W - C alleges R and his doctor brother: (a) lump claims together for purposes of law suits (other doctors assigned their claims to R's brother); and (b) split amount of money received and collected on those medical bills. No investigation apparently conducted; matter dismissed on C's letter and R's written submissions.

57. D&W - C alleges that R blackmailed her into hiring him for $10,000 legal fee to secure cabaret license (basis of alleged blackmail - allegations that C's income tax returns would show improprieties, witness Z gives oral testimony corroborating C's story), C eventually withdraws complaint for payment to her of $5,000 by R, nothing further in file.

58. Ltr. of A - Attorney sanctioned for totally fabricating a letter and submitting false evidence to the Comm. to justify his improper release of escrow accounts.

59. Ltr. of A - C alleges $1,000 retainer paid but R has totally neglected the matter, 21 prior complaints against R since 1975, 20 dismissed, 1 Ltr of C, eventually R gives C back $750.

60. Ltr. of C (Ltr. of A) - C is parent of a child who suffered a personal injury in 1972, for 10 years firm X has put off C with excuses, eventually, because of PS, the following explanations are provided:

1. attorney Y - case was handled by a "prior attorney in the office" from 1972 through 1976, name of that attorney not given;

2. attorney Z - apparently a senior partner in firm. X eventually explains "apparently" one of several attorneys

(all unnamed) "did not process this case"

61. Ltr of C - C alleged that two unsatisfied judgements pending against R for legal malpractice. Two times PS sent letters to R, neither letter was answered. There were 6 prior complaints against R. Ltr. of C. stated:

1. Comm. noted R's cooperation;

2. Comm. noted R's service to the bar and the community;

3. Comm. "wishes you well in all your endeavors".

62. FSC - Attorney arranged a settlement without authorization of his client and against the specific written instructions of his client. No written answer was filed by the R who chose instead to appear before the committee. The nature of his position is not disclosed in the file.

63. FSC - Complaint that C cannot reach R in order to arrange for executor to open safe deposit box for 10 months. Complaint sent to R January 7, 1982, and February 22, 1982; as of March 16, 1982 R had neither answered nor appeared. Subpoena duces tecum issued. April 15, 1982 PS notes there were now 4 files open against R. May 28, 1982 PS writes C that everything is alright, R has explained everything, but no written answer in the file.

Apparently one of the other files is a serious matter involving an $11,000 escrow account, but file in question contains no further information.

64. FSC - C and H bought land from F, F taking back a mortgage. Thereafter H and C sought a division of the land and H hired R. R failed to have mortgage, held by F, modified appropriately. R was also the attorney for F. During those proceedings for division of the title, F asked for time for R to examine the papers of the parties. Ultimately the C was billed by R for the work. C questioned the bill, whereupon R added $10.00 to the bill for his advice as to whether it was proper. A copy of R's answer was sent to the C. There was no discussion in the file as to the conflict of interest.

65. Ltr of C - August 1979 C states that R was retained with a fee of $300 to contest the reduction of child support and that during the proceeding the court requested briefs in October of 1978 but that as of August 1979 no briefs had been filed and no support had been paid since December of 1978. R said he had filed a brief but a letter from the court confirmed that no brief had been filed even though he had been warned 4 times. Although the complaint was sent to R in August 1979, no answer was served although the file indicates that R came in on February 1980 to testify, but there were no notes as to what he said. Counsel for the grievance committee arranged for another attorney to represent C, drafted an affidavit for the H to sign and drafted a

notice discharging R in March 1980. In may of 1980 the new attorneys had not yet received the file and in that same month a letter from the court clerk confirmed that the brief still had not yet been filed. The case was closed even though no answer was received. In addition to this case, R had previously received a letter of admonition for similar conduct.

66. Ltr of C - Complaint that R missed the applicable statute of limitations. As a result, claim was apparently lost. No recommendation made to the committee. No answer sent to C. The letters to R for C state that the committee is satisfied that R is judgement proof and that no transfer in fraud of creditors has taken place.

67. Ltr of C - C alleges that due to R's neglect a default judgment was taken against the client which cost him $2000 and which his new attorney was unable to reopen. His new attorney was of the opinion that if he had gone to trial he would have lost the case anyway.

The default was taken even though the attorney for the plaintiff had sent a letter to R warning him he would take the default if he did not appear.

At one point, after sending five letters to R seeking information concerning the complaint, PS wrote "it would appear that you have failed to fully cooperate". That was one of eight

letters requesting cooperation from R. The complaint was withdrawn and the closing letter stated that there was "no breach of the Code of Professional Responsibility but be more cautious in representing clients. Thank you for your cooperation."

68. FSC - C alleges he had spent one year trying to get R to work on his case and he was now being sued for medical expenses in a support proceeding. The local bar association could not get an answer from R. R after one year agreed to appear at the office, then requested an adjournment of the appearance, and then did not show. R took three years getting an order signed for client. R later offered C $200 to withdraw the complaint. R eventually admitted that he had no excuse for the delay in obtaining the order in the support proceeding, waived a fee, and agreed to advance money to C until such time as the husband paid the money due under the order.

In the closing letter staff counsel concludes with "Thank you for your cooperation".

69. FSC - Prisoner complains that R agreed to return fee of $2500 if sentenced to more than 5 to 10 years. The sentence was 6 to 12 years, fee was not refunded. C asserts R assured him he had a strong defense, but it was only the day before trial that R asked the defendant whether he had any evidence, defendant said he had none. No notice of appeal was filed. County bar chair had reported no success in talking to R. Yet the file contains

the report "I feel that grievance is terminated and she agrees".

Earlier complaint in 1980, involved failure to appear at a trial resulting in a default. R returned the file and retainer which he was unable to handle "because of his workload". The committee advised him that it was a violation of the code to neglect a matter or to withdraw without protecting the client and yet the closing letter stated "insufficient evidence of misconduct".

70. D & W - Complaint that R was paid $2500 to handle a bad check case and failed to do so. R did not answer three separate letters from the committee. Complaint was withdrawn and file closed.

OUTLINE OF PROCEDURAL STEPS NOW BEING USED IN NEW YORK IN THE PROCESSING OF CHARGES OF ATTORNEY IMPROPRIETY IN NEW YORK FROM INITIAL CONTACT TO THE FORMAL HEARING.

I INITIAL CONTACT

The individual communicates a charge of attorney impropriety to a member of the professional staff within the disciplinary structure. Communication is by: (1) written complaint; (2) telephone call; (3) personal appearance (walk-in). The particular method of communication is important:

> (1) First Department: a complaint is defined as a written statement containing an allegation of attorney misconduct and only in the case of such written statements must an investigation be conducted (Rules 1.3,2.1);
>
> (2) Second Department: an investigation of professional misconduct may be commenced upon receipt of a "specific complaint" in writing (22NYCRR 691.4 (c));
>
> (3) Third Department, an investigation of misconduct is triggered by a specific complaint in writing signed by the complainant (22NYCRR 806.4(a)).

Under 22NYCRR 1022.19(d), the Fourth Department requires professional staff to "investigate and report" on all matters involving alleged misconduct. The ABA Standards and Assembly Bill 10512 do not require that allegations of professional impropriety be received in any particular form. (Standard 8.4,Bill 11.4) (Under Rule 2.2 in the First Department, the Office of Chief Counsel "will assist the Complainant in reducing the Grievance to writing"; apparently the other three judicial

departments merely provide the complainant with a form to be completed and submitted as a written complaint.)

II THE WRITTEN COMPLAINT/INQUIRY

Once the allegation of professional impropriety has been reduced to writing, a determination is made whether or not misconduct is being alleged. This determination involves two closely related issues: (1) the specific definition of misconduct to be employed; and (2) the standard or test to be applied to the factual allegations in the written statement submitted by the complainant. If misconduct is not determined to have been alleged by the complainant, the matter is treated as an inquiry, not requiring any further action. If allegations of actual misconduct are found, an investigation must be commenced and a written recommendation must be submitted by professional staff as the to proposed disposition of the complaint received.

A. MISCONDUCT:

APPLIES TO ALL FOUR JUDICIAL DEPARTMENTS

1. violation of any disciplinary rule of the Code of Professional Responsibility as adopted by the New York State Bar Association and amended through April 29, 1978; (22 NYCRR 603.2; 691.2; 1022.17)

APPLIES TO THE FIRST AND SECOND DEPARTMENTS

2. violation of any of the special rules concerning court decorum: (22NYCRR 603.2; 691.2)

APPLIES TO ALL FOUR DEPARTMENTS

3. violation of any announced standard of the particular Appellate Division governing the conduct of attorneys; (22 NYCRR 806.2; 1022.17; phrased as any provision of the rules of this court governing the conduct of attorneys in 22NYCRR 603.2; 691.2)

4. violation of the Judiciary Law,

Article 15:

(a)Jud. Law §90 (2), "malpractice, fraud, deceit, crime, or misdemeanor, or any conduct prejudicial to the administration to the administration of justice",

APPLIES TO ALL FOUR DEPARTMENTS

(b) Jud. Law §476; §§479; 481; §483; §488; §§491; and 493, which deal primarily with the issues of champerty and maintenance and those matters related to the "ambulance chasing" inquiry of the 1920's and 1930's, with most of these prohibitions being restated in specific Appellate Division rules, (22 NYCRR 603.17; 603;18; 691.15; 1022.13) or contain matters which are covered by the disciplinary rules of the Code of Professional Responsibility;

(c) Jud. Law 487 - Misconduct by attorneys, primarily a penal statute with provision for treble damages, it prohibits the use of fraud or deceit, willful delay of a client's case, and unauthorized receipt of funds.

Special Rules have been adopted by the First, Second, and Fourth Departments which are of particular importance in the area of the attorney's right to withdraw from representation after an appearance has been entered on the client's behalf. These rules are 22 NYCRR 604.1; 700.4; 10022.11, and should be read in conjunction with CPLR 321 (b)(1) and (2), as amended, effective January 1, 1981:

APPLIES TO THE FIRST AND SECOND DEPARTMENTS

1. "Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without: (i) justifiable cause, (ii) reasonable notice to the client, and (iii) permission of court." 22NYCRR 604.1(d)(6); 700.4(f);

2. "Counsel assigned to or retained for the

APPLIES TO THE FOURTH DEPARTMENT

defendant in a criminal action or proceeding shall represent the defendant until the matter has been terminated in the trial court." 22NYCRR 1022.11(a);

3. An Attorney of record may withdraw without his client's consent only upon court order after notice, (CPLR 321 (b)(1) and (2)). Good and sufficient cause would be required under DR 2-110 of the Code of Professional Responsibility.)

B. STANDARD UTILIZED FOR DETERMINATION OF WHETHER WRITTEN ALLEGATIONS CONSTITUTE A COMPLAINT REQUIRING INVESTIGATION OR AN INQUIRY:

1. Even though a written allegation of impropriety has been received by the professional staff of the disciplinary system, no investigation is required unless actual misconduct is alleged, as that term is defined by the rules of the Appellate Division, with the factual allegations being scrutinized as follows:

(a) the written charge of impropriety "alleges facts, which if true, would constitute misconduct", (ABA Standards 8.4, 8.5);

(b) Assembly Bill 10512 employs the same test as contained in the ABA Standards, Assembly Bill sections 11.4, 11.5);

(c) First Department merely states that the charge of impropriety must relate to "alleged misconduct" and "shall contain a concise statement of the facts upon which the complaint is based", (Rule 2.2);

(d) Second and Fourth Departments, no specific standard promulated;

(e) Third Department: written charge of impropriety must contain "allegations, which, if true, are sufficient to establish a charge of misconduct" (22NYCRR 806.4 (b)).

2. If the written allegations of impropriety are not sufficient to constitute a complaint, the professional staff may determine to take no

further action. The obligation to recontact the complainant is nowhere spelled out, nor is there apparently any requirement to notify the individual who submits the written allegations that no further action will be taken:

(a) First Department: while the Chief Counsel must assist the complainant in reducing the grievance to writing, nowhere is the Chief Counsel required to notify the complainant that the matter is being dismissed for Failure to State Complaint (See Rule 2.2(a));

(b) Second Department: notification must be provided to complainants of action taken by the particular grievance committee. Since a dismissal as FSC is made by the staff and not the committee, apparently no notice is required for such a disposition (22NYCRR 691.4(c));

(c) Third Department: the Chief Attorney is required to "answer and take appropriate action respecting all inquiries concerning an attorney's conduct", but the precise nature of that duty is not clear, (22 NYCRR 806.3(e)).

III THE INVESTIGATION

Professional staff has largely uncontrolled discretion as to the type of investigation which will be conducted after the initial determination that the written allegations against an attorney must be treated as a complaint:

A. First Department:

1. Chief Counsel shall make such an investigation "as may be appropriate" (Rule 2.3);

2. Apparently, if after some investigation, Chief Counsel is going to recommend dismissal, the Respondent attorney need not be contacted for an explanation of the conduct in question. Rule 2.4(a) specifies that if discipline or a Letter of Caution is to be recommended, the Chief Counsel must send a written notice to the Respondent attorney informing respondent: (a) of the nature of the grievance and

the facts alleged to support it, and (b) of respondent's right to state a position concerning the matters alleged.

B. Second Department:

The rules merely specify that an investigation must be undertaken and that after a "preliminary" investigation, the complaint may be dismissed, (22 NYCRR 691.4(e));

C. Third Department:

1. a copy of the complaint must be forwarded to the Respondent attorney with a statement of the alleged misconduct; and

2. a request for a written statement must be made to the Respondent with the advisory that a copy of any such statement may be furnished to the Complainant (22NYCRR 806.4(b));

D. Fourth Department:

Permits the use of any or all of the methods described below:

1. request to the Respondent to furnish an explanation of conduct;

2. send a copy of the attorney's response to the Complainant for comments; and

3. require further explanations from the Respondent as to conduct (22 NYCRR 1022.19(e));

E. All Departments:

1. subpoenas may be issued requiring the testimony of any person;

2. subpoenas may be issued requiring the production of any books, papers, or documents, (22 NYCRR 603.5,691.5,806.4(e),1022.19(e));

F. Third and Fourth Deptartments:

Specifically provide that upon written notice, the attorney Respondent may be directed to appear and testify concerning conduct.

IV DISMISSAL AFTER INVESTIGATION

In none of the rules of the four departments of the Appellate Division is there a clear standard or test to be employed to determine whether a complaint should be dismissed after an investigation:

A. First Department: After an investigation, the Chief Counsel may recommend "dismissal for any reason (with an indication of the reason therefor)" and need only secure the consent of one member of the Departmental Disciplinary Committee who has been designated as a Reviewing Member ("RM") by the Chair of the Committee, or, upon written delegation by the Chair, has been designated by the Chief Counsel as an RM, and even if the particular RM disagrees, the Chair may be sought out by counsel and "the Committee Chairperson shall direct such disposition as may be appropriate" (Rule 2.5(2),2.6(b), 2.9,2.10,2.11);

1.No appeal lies from dismissal, and

2.Both the Complainant and the Respondent are notified of this disposition, (Rule 2.11(1), 2.14);

B. Second Department: No standard whatsoever is provided, after a "preliminary investigation", upon a majority vote of the particular grievance committee. The Committee may "dismiss the complaint and so advise the complainant and attorney" (22NYCRR 691.4(e));

C. Third Department: No standard for dismissal after an investigation "If after investigation, the committee determines that no further action is warranted". The complaint is dismissed and the Complainant and attorney

notified in writing (22 NYCRR 806.4 (c));

D. Fourth Department: No standard for dismissal provided; if upon investigation, the chief attorney or staff attorney "after consultation with the Committee chairman, determines that the complaint is unwarranted", the complaint shall be dismissed by "appropriate letter to the complainant and the attorney" (22NYCRR 1022.19(e) (2)(i));

E. As in the First Department, so too in the other three Departments there is no right of appeal of a dismissal;

F. The ABA Standards provide that after an investigation there shall be "dismissal if there is not probable cause to believe misconduct has occurred"(Standard 8.10),while Assembly Bill 10512 utilizes precisely the same standard (11.10);

G. ABA Standards, and Assembly Bill 10512, which is modeled on those standards, provide:

1. that counsel's recommendation for dismissal be reviewed by the chair of a hearing panel who can approve, disapprove, or modify that recommendation or direct further investigation;

2. if the panel chair modifies, disapproves, or directs further inquiry, counsel can appeal that decision to the chair of another hearing panel whose decision will be final within the agency; however, the Complainant is afforded rights of appeal beyond the hearing panel level (Standards 8.11,8.12,8.15,8.16,Assembly Bill 11.11, 11.12,11.15,11.16).

V PRIVATE SANCTIONS AFTER INVESTIGATION: RECOMMENDATION OF COUNSEL

A. First Department: Sanction imposed upon recommendation of counsel with the consent of an RM. If counsel and RM disagree, Committee Chair directs "such disposition as may be appropriate"(except reprimand which is administered by a hearing panel chair after a hearing in those cases in which misconduct in violation of a Disciplinary Rule is found, 22 NYCRR 603.9 (a), Rule 1.3,in general, Rule 2.5,2.9,2.10);

1. Letter of Caution: issued in cases in which an attorney "acted in a manner, which while not constituting clear professional misconduct, involved behavior requiring comment"; not a form of discipline (22 NYCRR 603.9(c), Rule 1.3);

2. Admonition: imposed "where misconduct in violation of a Disciplinary Rule is found, but is determined to be of insufficient gravity to warrant prosecution of formal charges",it is "discipline imposed without a hearing" (22 NYCRR 603.9,Rule 1.3);

3. Notice of the letter of caution or admonition is sent to the Complainant as well as the attorney (Rule 2.11,2.14).

B. Second Department:

1.Letter of Caution: no standard set forth, apparently not discipline, notice given to the Complainant as well as the attorney(22 NYCRR 691.4(e));

2.Private admonition: no precise standard, must "clearly indicate the improper conduct found and the disciplinary rule, canon, or special rule which has been violated". Notice given to Complainant as well as the attorney (22 NYCRR 691.4(e)),

3. Both the above sanctions are determined by majority vote of the particular grievance committee (22 NYCRR 691.4(e)).

C. Third Department: action by the whole committee (or apparently by an executive committee of five members, Procedural Rules XXI and XXII) if it "determines that a complaint warrants action".

1.Letter of Admonition or Formal Admonition: if the alleged acts of misconduct have been established by clear and convincing evidence but the misconduct is "not serious enough to warrant prosecution of a disciplinary proceeding, the Committee, in its discretion, may admonish the attorney either orally or in writing or both". Complainant as well as Respondent are notified (22 NYCRR 806.4(c)). In addition, under Procedural Rules, section XXVI, Formal Admonition by Committee, in cases where a letter of admonition is authorized, the Respondent may be directed to appear before the full or Executive Committee for "oral admonition and hand delivery of a letter of admonition";

2. Letters of Education and Caution: referred to in the ABA Report and in the Procedural Rules for the Committee on Professional Standards, but no test or standards for their issuance are given.

D. Fourth Department:

1.Letter of Caution: apparently discipline, issued after an investigation. Staff attorney drafts such a letter with the consent of the Chair of the particular grievance committee, and then recommends it to the Chief Attorney, who issues such a letter if "such action is

indicated"; Complainant is then notified (22 NYCRR 1022.19(2)(ii));

2. Letter of Admonition: if staff attorney believes that such a letter should be issued, a proposed letter is drafted, and recommended to the Chief Attorney; the Respondent is given a clear opportunity to respond. Letter must state: (a) the evidence upon which the charge of improper conduct is based; and (b) the applicable authority. If the Chief Attorney approves the recommendation goes to the committee which if it approves then issues the letter and notifies the Complainant (22NYCRR 1022.19(2)(iii)).

E. Assembly Bill 10512 allows for issuance of an admonition "if there is probable cause to believe misconduct has occurred but the misconduct is minor and isolated" (Bill 11.10(b)).

VI OTHER JURISDICTIONS

New York is not unique in its conferring of almost unlimited discretion on its disciplinary staff and committees to determine, with few standards or guidelines, what matters should be investigated or what matters dismissed, as well as what, if any, sanctions should be imposed for misconduct:

A. Louisiana ,Articles of Incorporation, State Bar Association, Article XV, section (3)(b): after the receipt of the Respondent's reply to a complaint and any other evidence "the Committee may in its discretion order that a formal investigative hearing be held";

B. Kansas, Disciplinary Rules of the Supreme Court of Kansas, Rule 209: the Disciplinary Administrator may dismiss any complaint which "appears, on its face, to be frivolous, or without merit";

C. Idaho, Rules for Review of Professional Conduct, Idaho State Bar, Rule 155.2.3: Bar Counsel possesses the power "to disregard or dismiss a matter as unfounded, frivolous or beyond the purview of these Rules"; and

D. Maryland, Rules of Procedure, Rule BV6(a)(2): "If in the opinion of the Bar Counsel the complaint is without merit or the attorney has engaged in conduct which does not warrant discipline, he may dismiss the complaint" subject to the

approval of the Chair or Vice Chair of the Inquiry Committee.

APPENDIX 4

Report of the Subcommittee to Review Published Opinions

1. CONVERSION

MATTER OF:	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	MITIGATION	# OF CONVERSIONS	TOTAL AMOUNTS	TIME SPAN	INTENT	REASONS/ MOTIVE	RESTITUTION	HOW COMPLAINT RECEIVED	SANCTION
1. Field (Irving E.), 79 A.D. 2d 198 (1981)	10/22/41	None indicated	Neglect; misrepresentation	None indicated	6	1)$10,000 2)$20,000 3)$1,000 4)$20,000 5)$30,000 6)$338	10/75-8/78	Yes	None indicated	Partial	Client	Disbarment
2. Genzer (Joel I.), 80 A.D.2d 114 (1981)	3/22/65	None indicated	Failure to cooperate with Disciplinary Committee	None indicated	3	1)$15,000 2)$2,400 3)$2,500	5/74-6/78	Yes	None indicated	Patrial	Client	Disbarment
3. Resnick (David), 84 A.D. 2d 293 (1982)	12/4/39	None	Commingling	Married for 41 years with children and grandchildren; military, community and civic service	1	$41,579.68	11/77-1/78	Yes	Not indicated	Full	Client	Resignation
4. Rawlins (Earl A.), 85 A.D.2d 1 (1982)	6/22/60	None	Commingling; neglect	None indicated	2	1)$200 2)$740	8/72 & 9/77	Not clear (as respondent's records were disorderly)	Not indicated	Full	Client	3-year suspension
5. Nadel (Arthur G.), 85 A.D.2d 8 (1982)	12/12/58	None indicated	None indicated	None indicated	1	$50,000	8/78-10/78	Yes	To aid client allegedly indebted to loan sharks	Full	Client	Disbarment
6. Bickerstaff (William T.), 85 A.D.2d 199 (1982)	10/10/72	None indicated	None	Unemployed; wife pregnant; war orphan	Not indicated	$22,000	1/74-8/79	Yes	Dissatisfaction with employer (law firm)	None indicated	Law Firm	Resignation

MATTER OF:	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	MITIGATION	# OF CONVERSIONS	TOTAL AMOUNTS	TIME SPAN	INTENT	REASONS/ MOTIVE	RESTITUTION	HOW COMPLAINT RECEIVED	SANCTION
7. Grean (Ronald P.), 86 A.D.2d 107 (1982)	10/27/72	None indicated	None	None indicated	1	$33,000	7/80	Yes	None indicated	None	Client	Disbarment
8. Miller (Stephen A.), 86 A.D.2d 344 (1982)	6/68	None	Neglect and failure to return unearned fees	Compulsive gambler; wife and 2 children	1	$8,000	Not indicated	Yes	Repay debts incurred through gambling	Full	Client	Disbarment
9. Solomon (Frederick B.) 87 A.D.2d 137 (1982)	10/13/76	None	None	Religous charitable, & military service; client gave consent to actions.	1	$8,600	4/80-6/80	Yes	To allow client to pay loan sharks, obtain an apartment and pay respondent's legal fees	Yes	Client	2-year suspension
10. Lewin (Allen M.), 87 A.D.2d 143 (1982)	6/19/57	None	Neglect; splitting fees with a non-lawyer; misrepresentation	Divorced; autistic child; psychiatric history.	4	1)$2,500 2)$2,500 3)$2,800 4)$6,513	7/75-early 1980	Yes	None indicated	Partial	Client	Resignation
11. Einhorn (Joseph J.), 88 A.D.2d 95 (1982)	6/17/31	None	None	76 yrs. old; informed co-escrowee of his actions; legitimately owed money by client.	3 (on same escrow account)	$30,000	10/80-not indicated	Yes	To satisfy unpaid legal fees owed by client.	Partial (interest on $30,000 not returned)	Client	Censured

MATTER OF:	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	MITIGATION	# OF CONVERSIONS	TOTAL AMOUNTS	TIME SPAN	INTENT	REASONS/ MOTIVE	RESTITUTION	HOW COMPLAINT RECEIVED	SANCTION
12. Salinger (Ronald D.), 88 A.D.2d 133 (1982)	3/6/74	None	None	Gambling problem; wife ill; cases not mishandled	Not indicated	In excess of $8,800	1/80-11/80	Yes	Financial pressures	Full	Client	Disbarment
13. Krat (Harvey), 89 A.D.2d 254 (1982)	12/22/69	None indicated	None	None indicated	1	$10,000-$20,000	Not indicated	Yes	None indicated	None indicated	Client	Resignation
14. Hampares (A. James), 89 A.D.2d 428 (1982)	3/23/59	None indicated	None	None indicated	1	$36,000	11/79-6/81	Yes	Not aware of provisions of escrow agreement.	Full	Client	Disbarment
15. Shapiro* (Barry R.), 90 A.D.2d 22 (1982), 93 A.D.2d 102 (1983)	10/8/71	None indicated	Practicing under a trade name; splitting fees with laymen; conviction for extortion.	Divorced; deaths in family during period in question; under psychiatric care.	Not indicated	Not indicated	Not indicated	Yes	Not indicated	None	Sua sponte prosecution by DDC** following Florida proceedings.	Suspended and subsequently disbarred
16. Warfman (Mortimer) 91 A.D.2d 356 (1982)	3/28/51	None	None	None indicated	2	1)$2,350 2)$1,900	Not indicated	Yes	Not indicated	Full	Client	Disbarment

* Reciprocal discipline (events and conviction occurred in Florida).
**Departmental Discipline Committee.

II. NEGLECT RESULTING IN A LOSS OF THE STATUTE OF LIMITATIONS

MATTER OF:	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	MITIGATION	# OF CASES INVOLVED	# WHERE STATUTE OF LIMITATIONS LOST	TOTAL AMOUNTS	REASONS/ MOTIVE	RESTITUTION	HOW COMPLAINT RECEIVED	SANCTION
1. Fanning (Edward J.), 83 A.D.2d 377 (1981)	10/60	Admonished by the Grievance Committee in 1973 and 1975 for neglect, failure to communicate with a client and failure to follow the directions of the Surrogate's Court	Misrepresentation	None indicated	1	1	Amount of claim unknown (however, malpractice award for $75,230)	None indicated	None	Client	3-year suspension
2. Corbett (James J.), 87 A.D.2d 140 (1982)	12/30/53	None indicated	Failure to cooperate with the Grievance Committee	Attending Alcoholics Anonymous and recovering; wife and 5 children; no misappropriation of funds; made restitution to clients.	6	2	1) Settled for $7,500 2)Settled for $2,000	Incapacity due to alcoholism	Full	Clients	Censure (& supervisor appt'd for 18 months)
3. Javitz (Marvin R.) 88 A.D.2d 303 (1982)	12/17/58	Admonished on 2 earlier occasions for neglect and misrepresentation.	Conflict of interest; misrepresentation	None indicated	3	1	Not indicated	Not indicated	None indicated	Client	3-year suspension

III. FRAUDULENT FILING OF TAX RETURNS

MATTER OF:	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	MITIGATION	NATURE OF FRAUD	TOTAL AMOUNTS	YEARS INVOLVED	INTENT	REASONS/ MOTIVE	HOW COMPLAINT RECEIVED	SANCTION
1. Feldshuh (Sydney), 84 A.D.2d 284 (1982)	2/34	None	None	Active in community and religious affairs	Backdated 1970 charitable contribution to 1969 in order to receive tax benefits.	Not indicated	1969	Pleaded guilty	Not indicated	Sua sponte prosecution by DDC* following conviction.	3-year suspension
2. Schrager (Ian), 86 A.D.2d 229 (1982)	2/4/72	None	None	Informant for federal authorities; time in prison; did not plan fraud; no prior record; repentant	Failure to declare $2.5 million in corporate revenues on Federal and State tax returns, a portion of which was kept by respondent.	Approx. $400,000 to $500,000	1978	Pleaded guilty	Not indicated	Sua sponte prosecution by DDC* following Federal conviction	Disbarment
3. Sorkin (Charles), 80 A.D.2d 31 (1981)	10/19/60	None	None	Religious and community service; married with 2 children; failing health; no personal gain.	Overstated deductions on the returns of a business that employed him as an accountant.	Not indicated	1973 & 1974	Yes	Responded to pressure by employer (& co-defendant) out of fear of losing his job.	Sua sponte prosecution by the DDC* following Federal conviction.	6-months suspension

*Departmental Disciplinary Committee

IV. FAILURE TO FILE TAX RETURN

MATTER OF:	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	MITIGATION	YEARS NOT FILED	TOTAL AMOUNTS	INTENT	REASONS/ MOTIVE	HOW COMPLAINT RECEIVED	SANCTION
1. Fahy (Francis X.), 87 A.D.2d 340 (1982)	12/8/41	None	None	Serious medical problems involving his eyesight; forfeited his pension as a result of his Federal conviction; voluntarily suspended himself from practice.	1972, 1973, 1974 & 1975	Not indicated	Pleaded guilty	Not indicated	Sua sponte prosecution by DDC* following Federal conviction	Censured
2. Groban (Robert S.), 84 A.D.2d 521 (1981)	11/10/47	None indicated	None indicated	None indicated	1962, 1963 & 1964	Gross income of $489,000 over 3-year period	Not indicated	None	Client	Interim suspension pending further Order of the Court (Respondent subsequently died).

*Departmental Disciplinary Committee

SECOND DEPARTMENT

Since there were many more published discipline cases in 1981 and 1982 in the second department than in the first department, we reviewed every other "conversion" case, every other case of neglect which resulted in the expiration of the statute of limitations and every tax conviction. In this way, we reviewed a neutrally selected representative sample which included as many cases as were reviewed in the first department.

I. Conversion

1. David N. Addison, 87 A.D. 2d 1012, admitted Feb. [illegible], 1976, resignation accepted June 4, 1981
   Conversion Escrow account overdrawn on 30 occasions from Sept., 1979 to Jan., 1981, amounts not stated, reasons and intent not stated, apparently noone lost money
   Other misconduct Four neglects (two blew Statim), two forged releases to ins. cos., practiced law before admitted, forged client's name to check, failure to cooperate.
   Background No prior record indicated. In mitigation. supporting 5 nieces and nephews and own son, therapy 2 years.

2. Arnold Gelman, 82 A.D. 2d 842, admitted Dec. 18, 1957, resignation accepted June 15, 1981.
   Conversion Eleven thefts in 1977 and 1978. Amounts: 6,500; 4,800; 7,200; 9,350; 5,400; 7,000; 10,050; 2,000; 8,300; 6,150; 5,000, reasons and intent not stated, restitution unknown.
   Other misconduct Four neglects (three blew statute), failure to keep escrow records, representing conflicting interests, arranging unlawful payments in adoptions, failure to cooperate, false testimony before Grievance Comm.
   Background No prior record indicated, no mitigation stated. Held in contempt in 1982 for accepting retainer 3 weeks after resignation.

3. Almerindo E. Manieri, 80 A.D. 2d 365, admitted March 29, 1961, disbarred May 18, 1981
   Conversion Nine thefts in 1979 and 1980. Amounts: 4,750 repaid 4 mos. later; 7,000 repaid; 6,400 repaid 5 mos. later; 4,880 repaid 7 mos. later; 2,000 apparently never repaid; 4,500 repaid 6 mos. later; 8,275 repaid 3 weeks later; 4,350 unknown if repaid; 500 unknown if repaid. Reasons and intent not stated. Respondent appeared pro se and presented no evidence and did not testify.
   Other misconduct Failure to produce escrow records and cooperate with Bar Assoc. and Grievance Comm, failure to communicate with clients, 4 bounced checks, neglect.
   Background Prior L of C and 1977 L of A for failure to cooperate.

4. C. John Prince, 81 A.D. 2d 61, admitted April 27, 1938, disbarred June 1, 1981.
   Conversion Deposited 8,000 in 1975 and issued client check for 7,725. Client sued for 8,000. When judgment entered for client, money not there. March, 1978 repaid client 7,725. Reasons and intent not stated.
   Other misconduct Commingling (1 account for personal and escrow funds), failure to cooperate (produce bank records), complex fraud on client buying house and reselling it to client at inflated price. After referee's report filed, but before court acted, respondent convicted 2 counts fraudulent disposition mtgd. prop. (Class A misds.)
   Background No prior record indicated, no mitigation stated.

5. Stanford Allan Chaison, 80 A.D. 2d 3[illegible], admitted [illegible], 1963, disbarred (default) April 27, 1981. Resignation not accepted by court and respondent did not appear at hearing.
Conversion Took 2,500 downpayment in escrow, stalled the sellers, after 3 mos. bounced 2 checks to sellers for 2,500, then repaid. Reasons and intent not stated.
Other misconduct Commingling, false testimony before Grievance Comm.
Background No prior record indicated, no mitigation stated.

6. Leroy F. Dreyfuss, 84 A.D. 2d 824, admitted March 4, 1946, resignation accepted Nov. 30, 1981 (prior to initiation of formal disciplinary proceedings in AD)
Conversion Took 138,000 from escrow account in estate matter. Reasons and intent not stated. Client Security Fund paid client 5,000. Indicted for the theft.
Other misconduct Failure to cooperate with Grievance Comm.
Background In 1978 disciplined by Conn. State Bar for conversion. In 1981 indefinitely suspended by Conn. State Bar for improper sexual advances to a client.

7. Richard Kaplan, 81 A.D. 2d 599, admitted March 18, 1964, disbarred (default) April 9, 1981. Respondent served by mail & public.
Conversion Took 8,000 in June, 1977, repaid 6,500 13 mos. later. Took 13,362 in May, 1977, no repayment indicated. Reasons and intent not stated.
Other misconduct Commingling personal and escrow funds in one account, failure to register with OCA, failure to cooperate with Grievance Comm., 3 neglects, contempt of AD subpoena failure to purge contempt or pay fine imposed.
Background No prior record indicated, no mitigation stated.

8. Miles L. Markowitz, 80 A.D. 2d 422, admitted Dec. 18, 1968, suspended for 3 years on May 6, 1981, effective June 29, 1981.
Conversion October, 1977 check for 6,500 payable to himself and others. He forged one payee's name, deposited check and withdrew whole amount. 4 mos. later repaid 5,970 (unclear if he was entitled to the balance). Reasons and intent not stated, but see background, infra.
Other misconduct Lied to Grievance Comm. in saying funds intact, commingling thousands in personal and escrow funds in 3 accts.
Background No prior record indicated. Mitigation: His second divorce required him to move, law firm broke up so opened new bank accts, closed old. Litigation with first wife over visitation. Conversion stemmed from building he and law ptnrs bought from X which was damaged by fire. Suit on fire ins. policy was brought by him, law ptnrs. and X who held P.M.. He forged X's name, so business context.

9. William J. St.John, 81 A.D. 2d 250, admitted Mar. 28, 1951, disbarred June 22, 1981. Resignation not accepted.
Conversion Took 20,000 from an estate. No reason, intent or repayment indicated.
Other misconduct Commingling, failure to maintain escrow records, practicing law while suspended (took retainer in estate matter while suspended), got client to sign blank papers, then filled in consent to allowance of atty's fees.
Background No mitigation stated. Suspended 1974 1 year, 43 A.D. 2d 7

10. Stanley D. Scharf, 81 A.D. 2d 331, admitted April 4, 1962, suspended for two years on June 29, 1981 effective Aug. 31, 1981.
Conversion Eight thefts in 1977 and 1978. Amounts: 3,500 repaid; 14,200 repaid over 6 mos.; 2,250 repaid in 6 mos.; 9,000 repaid in 8 mos.; 1,600 repaid in 2 mos.; 7,500 repaid in 9 mos.; 3,522 repaid in 2 mos.; 1,300 repaid in 4 years. Intent - yes. Reasons not stated.
Other misconduct none
Background No prior misconduct indicated. Severe family and physical problems set forth in detail in the record. Initial complaint was from an associate covering for respondent while he was away who received call from client, looked at records and uncovered theft. Everyone repaid most before thefts discovered. Many clients did not want to testify against him.

11. Harold Stubenhaus, 81 A.D. 2d 140, admitted Jan. 21, 1942, name struck from the rolls June 15, 1981 on conviction of Class D felony, Grand Larceny 2d degree
Conversion 68 count indictment for theft of funds from estate account. 19 counts grand larceny 2d degree, 14 counts grand larceny 3d degree, 35 counts crim. poss. forged instrument.
Other misconduct None
Background 1975 private censure, 1976 public censure, both by AD. Respondent sentenced to 4 years on grand larceny plea.

12. Anthony Alfano, 86 A.D. 2d 307 admitted March 26, 1951, disbarred May 10, 1982.
Conversion (Characterized by court as a failure to account) Resp. owned a bakery with his clients and when it was sold, he did not pay them their share. Settled 3 years later when he paid them 2,000. Reasons and intent not stated.
Other misconduct Neglect, misrepresentation and deceit with clients, gross conflict of interest, failure to cooperate with Grievance Comm. (many business dealings with clients)
Background Suspended in 1965 for conflicts of interests, readmitted in 1968, 24 A.D. 2d 723. In mitigation one char. w.

13. Harry Dubin, 87 A.D. 2d 262, admitted April 17, 1940, June 14, 1982 ordered suspended for 1 year, Oct. 29, 1982 sanction reduced to censure.
Conversion (Characterized by court as a failure to account). Withdrew 16,450 from estate account over time. He claimed he was entitled to 15,000 fee and used 2,400 to pay off heir's debts, but all checks payable to him or to cash. Never sought court approval for fee. Acctg. to heirs did not list "fee". Referee found he lied. Referee suggested he file for fee in Surrogate's Court. He returned 4,900 to estate as "excess fee". Intent and reasons not stated.
Other misconduct Failure to file estate tax returns (He paid penalty which was assessed).
Background No prior record indicated. Character testimony.

14. Raymond T. Greene, 87 A.D. 2d [illegible], admitted March 17, [illegible], disbarred June 21, 1982 (reciprocal discipline - Florida)
Conversion Took $8,214 in 1967, repaid in 1969. On Feb. 20, 1971 he was granted leave to resign from the Fla. bar after a hearing.
Other misconduct None
Background NY apparently did not learn of Fla.'s action until many years later. Resp. defaulted in NY proceeding.

15. Robert J. Connolly, 85 A.D. 2d 484, admitted Dec. 15, 1954, name struck from the rolls March 29, 1982 on conviction of Class E felony, Grand Larceny 3d degree.
Conversion Confidential report lists numerous conversions, but indictment is not in file. Client Security Fund paid two clients. Resp. sentenced to one to three years in prison.
Other misconduct Unknown.
Background None stated.

16. Arthur Martin Goldberg, 90 A.D. 2d 489, admitted Oct. 21, 1953, resignation accepted Oct. 5, 1982.
Conversion Three thefts. Rec'd 7,100 June, 1979 as a referee in foreclosure. Despite court order, has not paid over the money. Converted 10,000 from referee's acc't - repaid year later. Jan., 1978 rec'd 8,500 escrow, Sept., 1978 check bounced - repaid 2 weeks later. Reasons and intent not stated.
Other misconduct Two neglects, failure to cooperate.
Background No prior record indicated, no mitigation stated.

17. Daniel A. Steifman, 86 A.D. 2d 277, admitted June 19, 1980, disbarred May 3, 1982.
Conversion Resp. held 27,000 in escrow to pay off seller's creditors and remit balance. Produced checks for 13,349 in payments. Gave client two checks for 15,000 which bounced. Several mos. later (3 years after escrow) resp.'s father repaid money. Client testified resp. told him he had used money to buy into law firm partnership!
Other misconduct Failure to maintain proper escrow records so checks bounced, failure to cooperate with Grievance Comm.
Background No prior record indicated, no mitigation stated.

II. Neglect Which Results in Expiration of Statute of Limitations

1. Oscar J. Greene, 62 A.D. 2d 286, admitted June 21, 1939, suspended on July 27, 1981 for one year beginning Sept. 1, 1981
Neglect Retained in 1969 in p.i. case, misrepresented to client that action had been filed when it was not. Client hired new att'y who sued resp. Settled for 10,000 at 100 per month, payments current.
Other misconduct Failure to file retainer statement, failure to cooperate with Grievance Comm, failure to register with OCA.
Background 1977 letter of admonition for neglect and failure to cooperate, 1978 letter of admonition for misleading opposing counsel, 1979 private censure by AD for neglect, failure to cooperate and failure to file retainer statement.

2. Gerald Leibowitz, 82 A.D. 2d 646, admitted June 21, 1961, publicly censured Sept. 22, 1981
Neglect Retained in July, 1974 in p.i. case and did nothing. In 1978 client asked ins. co. and was told file closed. Resp. paid client 3,500.
Other misconduct Failure to cooperate with Grievance Comm.
Background 1975 letter of admonition for neglect (at least three of which caused expiration of statute of limitations) and failure to cooperate.

3. William C Hunter, 87 A.D. 2d 90, admitted April 4, 1956, suspended on June 1, 1982 for one year effective July 1, 1982.
Neglect Retained in 1973 in a p.i. case and did nothing before statute expired in 1976, misleading client as to status of case.
Other misconduct Neglect of three estate matters, failure to cooperate with Grievance Comm.
Background 1975 letter of admonition for failure to cooperate, 1977 letter of caution for neglect. In mitigation, psychiatric testimony, character testimony.

III. Tax Evasion

1. Charles R. Colin, 82 A.D. 2d 449, admitted June 23, 1948, publically censured August 24, 1981.
Fraud Failed to report as income $2,000 in forwarding fees paid to him by another att'y. for 1972. Also failed to report 30,000 from same att'y in 1973. 1972 evaded 2,500 in taxes. Pled guilty to 1972 count in EDNY, 2 yrs. probation, 10,000 fine. Reasons-has heart attack in Feb. 1972, two kids in school, no capital, concerned for family.
Other misconduct None.
Background No prior record indicated. When lawyer who paid him was audited, he overpaid his taxes to "make up" for the underreporting, but before all was repaid he was audited. Served in WW II, lots of character testimony.

2. Paul A. Gritz, 87 A.D. 2d 1013, admitted July 1, 1963, resignation accepted June 26, 1981.
Fraud Failed to report 132,000 in income for 1975. Evaded 66,000 in taxes for that year. Pled guilty 5 years probation, 10,000 fine. Indictment also charged 1973 failed to report 21,000 income, evaded 10,000 in taxes and 1974 failed to report 71,000 income, evaded 36,000 in taxes. Reason not stated.
Other misconduct suborned perjury, unlawful gratuities, paid 300,000 to people for soliciting legal business
Background No prior record indicated, no mitigation stated.

3. Theodore Rosenberg, 80 A.D. 2d 217, admitted June 25, 1952, disbarred April 26, 1982 (April 26, 1978 his name was struck from the rolls pursuant to the Chu decision. Dec. 17, 1979 he was reinstated and the DP authorized)
Fraud Failed to report 23,000 in income for 1971 and evaded 9,000 in taxes. Failed to report 30,000 in income for 1972 and evaded 16,000 in taxes. Failed to report 20,000 in income for 1973 and evaded 8,000 in taxes. Convicted after trial and sentenced to one year and a day, two years probation. Reasons not stated.
Other misconduct Took 37,500 in cash to fix a proceeding in Kings County. Indicted by Nadjari and acquitted. Paid to manipulate the court calendar, steal file from DA and get no jail or dismissal. Referee found "bribe" was really theft under false pretenses.
Background No prior record indicated. Character evidence.

IV Failure To File

1. Raymond E. Claybrook, 82 A.D. 2d 447, admitted June 16, 1977, publicly censured August 10, 1981.
   Failure to file for 1970 and 1971. Money owed on taxes (amounts not given) ultimately paid out of refunds for later years. Referee felt failure to file was based more on gross neglect than willfulness. Five years probation, 10,000 fine
   Other misconduct None
   Background Court's opinion says previously unblemished record, but file indicates 1979 letter of admonition.

2. Harvey S. Gilbert, 85 A.D. 2d 19, admitted June 18, 1956, suspended Feb. 16, 1982, nunc pro tunc May 16, 1981.
   Failure to file for 1974, 1975 and 1976. Income was 1974-42,506; 1975-26,507; 1976-32,106. Sentenced to 60 days, 3 years probation, 5,000 fine and financial counselling. Pled guilty to 1974 count.
   Other misconduct None
   Background Suspended July 18, 1969 for one year, effective Aug. 19, 1968, reinstated Sept. 29, 1969. 30 A.D. 2d 369, 33 A.D. 2d 516 for forging client's endorsement on check. In mitigation. character testimony.

3. Howard McGratty, 89 A.D. 2d 246, admitted June 25, 1952, publicly censured Oct. 25, 1982
   Failure to file for 1974, 1975 and 1976. Amounts of income and taxes due not stated. Pled guilty to 1975 count, 5 years probation, 10,000 fine. Most of taxes owed had been repaid.
   Other misconduct None
   Background Resp. became alcoholic in late 1960s and his personal finances became a shambles. In 1976 he "beat" alcohol. Had prior letter of admonition for neglect. In mitigation presented character testimony. 1981 developed cancer of the larynx.

FOURTH DEPARTMENT

CONVERSION

ATTORNEY	DIST.	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	INSTANCES & AMOUNTS	MITIGATING CIRCUMSTANCES	RESTITUTION	SANCTION
GERALD L. DORSEY 82 AD2d 641 (1981)	7th	-	None Indicated	Neglected duties as Executor; failed to file & pay estate tax returns ($18,654.64 int. & penalties); notarized forged signatures	Several $21,050.	None Indicated	Full Restitution Made	Order of Disbarment
RICHARD W. MARRIOTT	5th	9/71	None Indicated	Temporarily removed records County Clerk's Office; permitted fictitious confession of judgment to be filed against himself	Trust account hopelessly and inexplicably out of balance	Did not act with malicious intent	None Indicated	Order of Censure
JOHN DAVID BAKER 85 AD2d 492 (1982)	7th	3/9/60	Suspension 2 years 9/26/80	Filed suit knowing same would serve merely to harass or maliciously injure another; advanced a claim unwarranted under existing law	Mishandling funds of 2 clients, residents of nursing home; failed to render appropriate account; comingled & converted client funds	None Indicated	None Indicated	Order of Disbarment

NEGLECT

ATTORNEY	DIST.	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	DESCRIPTION OF NEGLECT	MITIGATING CIRCUMSTANCES	RESTITUTION	SANCTION
DENNIS J. LIVADAS 80 AD2d 21 (1981)	7th	5/22/46	Censured 12/13/73	Failed to deliver file to client; failed to expedite court proceedings consistent with clients interests	2 estates neglected (a) failed to file estate tax return; failed to deposit estimated tax; failed to pay real property taxes. (b) failed to file estate tax returns	None Indicated	None Indicated	Order of Suspension 2 years
ERNEST F. FERULLO 85 AD2d 99 (1982)	7th	1971	None Indicated	Lied to client concerning status pending matters	Failure to perform services at request of client including failure to move to reargue or appeal custody order, and prepare Bankruptcy petition	Outstanding academic record; record as practicing attorney; extensive pro bona service; case was highly emotional custody matter; excessive demands on time; new office, youth & inexperience	Malpractice Action $17,844 compensatory; $100,000 punitive	Order of Suspension 6 months
CHARLES P. KNAPP 89 AD2d 419 (1982)	7th	7/9/52	None Indicated	Misled client that matter still pending and in process of being settled	Failed to appear & represent client at a medical malpractice hearing; failed to have case timely restored to calendar	None Indicated	Understanding with client & monetary settlement	Order of Censure

NEGLECT

ATTORNEY	DIST.	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	DESCRIPTION OF NEGLECT	MITIGATING CIRCUMSTANCES	RESTITUTION	SANCTION
RONALD W. PLEWNIAK 91 AD2d 285 (1983)	8th	7/11/56	None Indicated	Borrowed money from clients or relatives of clients and gave post-dated checks in repayment which were dishonored for insufficient funds	Neglecting clients' business in several matters	Series of financial reverses; serious drinking problem	Making an effort to repay loans	Order of Censure

FAILURE TO FILE
INCOME TAX RETURNS

ATTORNEY	DIST.	DATE ADMITTED	PRIOR RECORD	OTHER CHARGES	TAX CASE FACTS	TAX CASE DISPOSITION	MITIGATING CIRCUMSTANCES	SANCTIONS
SANFORD L. CHURCH 80 AD2d 477 (1981)	8th	11/14/56	None Indicated	None Indicated	Income tax return for year 1977	Plea of guilty	None Indicated	Order of Suspension 6 months
GEORGE P. DOYLE 89 AD2d 10 (1982)	8th	12/6/65	None Indicated	None Indicated	Two counts	Plea of nolo contendere	None Indicated	Order of Suspension 6 months