

August 11, 2015

Barry A. Cozier, Chair
Commission on Statewide Attorney Discipline
25 Beaver Street
Eleventh Floor
New York, N.Y. 10004-2310

Dear Mr. Cozier:

Thank you for this opportunity to provide a summary of the remarks made to the Commission on Statewide Attorney Discipline by ABA Standing Committee on Professional Discipline Member Nancy Cohen and me. This submission also expands on some of those remarks. Copies of our short biographies are attached as Appendix A.

The work of the Commission is crucial to all those who are served by the state's disciplinary system, including New York lawyers, the public and consumers of legal services in the state. We appreciate the breadth and scope of the Commission's work. We hope this submission assists you and the other Commissioners in meeting your charge and formulating recommendations to improve the system. As was true in June, other than instances where we describe ABA policy, the comments that follow should not be attributed to the American Bar Association or its Standing Committee on Professional Discipline (Discipline Committee). These comments are based on our collective experience and expertise in the area of lawyer discipline and professional responsibility law, and our work with the Discipline Committee.

As we described in June, the Discipline Committee has, since 1980, provided one-of-a-kind lawyer consultation services at the invitation of the jurisdictions' highest courts. In addition to spending at least four days on-site, a full discipline system consultation involves the study and evaluation of all relevant system information, including but not limited to: all rules, regulations and policies relating to the operation of the system; budgets and financial reports; staffing information; detailed caseload processing information and data; technology resources; information relating to system volunteers and their training; disciplinary investigation files; reports and recommendations of system adjudicators; and court opinions. It is an intensive process, resulting in the issuance of a detailed report with recommendations. The Committee has conducted 62 of these consultations. Ms. Rosen has participated in 27 of them and served as the reporter for most. Ms. Cohen has also participated in consultations. As Ms. Cohen advised in June, she represented lawyers in Colorado at the time of the Discipline Committee's consultation in that state, and observed the positive changes to that system that resulted from the Colorado Supreme Court's implementation of the Discipline Committee's recommendations. A description of the Discipline Committee's consultation program is attached as Appendix B.

The materials forming the basis for the observations and suggestions in this submission (as they were in June) are far more limited. We reviewed the rules relating to the four Judicial Departments, relevant portions of the Judiciary Act, and Professor Gillers' article entitled "Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public." We also looked at descriptive information about the New York system that we located online.

We appreciate that politics and local practices vary from one part of New York State to another. While we were not privy to as much of that information as we would have been in the context of a full disciplinary consultation, we felt it important to note this. No negative connotation should be attributed to our recognition of this fact. Such differences exist in every jurisdiction and these are issues with which the Commission will have to grapple. Finally, as we did in June, we think it important to recognize that New York is and has been a leader in a number of areas relating to the admission and regulation of lawyers, both domestic and foreign.

I. Summary Observations
A. The Departmental Structure and Procedural Rules

When it comes to lawyer discipline, New York’s Departmental approach is not consistent with national practice or the system structure recommended in the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). The national norm, and structure commended by the MRLDE, is one state-wide disciplinary agency comprised of professionals who are trained, and a resourced disciplinary counsel’s office with one chief disciplinary counsel responsible for investigating and prosecuting complaints against lawyers, along with a separate adjudicative arm. The MRLDE structure for hearings is a trier of fact for formal disciplinary charges consisting of hearing panels of two lawyers and one nonlawyer. Several jurisdictions, such as Colorado and Arizona, use presiding disciplinary judges in combination with volunteers or, in the case of California, a separate disciplinary court. Any intermediate appeals of the report and recommendation of the trier of fact are also typically conducted by volunteers with public participation. The highest court of appellate jurisdiction has the authority to impose most discipline, including suspension and disbarment, but may delegate the authority to impose some lower level sanctions to other disciplinary adjudicators.¹ Those who adjudicate should not perform, or supervise those who perform, the investigative and prosecutorial functions. Likewise, those who perform the investigative and prosecutorial functions should not perform adjudicative functions and should not advise or supervise those who exercise adjudicative responsibilities.

In our experience, the optimal structure for a disciplinary system, as recommended by the MRLDE and which exists in almost all jurisdictions, consists of this unitary agency where the investigative and prosecutorial functions are directed by a Chief Disciplinary Counsel and the adjudicative and administrative functions are performed by volunteer lawyers and nonlawyers. In a majority of states the adjudicative and administrative bodies for the agency are comprised of two thirds lawyers and one-third nonlawyers.² This structure works and has done so for decades. We have seen that it provides certainty, fairness and clarity; everyone knows what to expect and the roles are clear. The playing field is level for the public and for all lawyers.

The First, Third and Fourth Departments each has a Chief Counsel. The Second Department has three Chief Counsel. The roles and responsibilities of the Chief Counsel and their staff vary

¹ We note that under the Judiciary Law any lawyer and petitioner can appeal an Appellate Division ruling to the Court of Appeals, but otherwise the Appellate Division opinions are final.

² The use of a presiding disciplinary judge also has merit.

from one Department to another, as does the extent of volunteer Committee member involvement with and oversight of the Counsel. This means there are not only four different operational approaches to investigating and prosecuting disciplinary complaints in New York, but also up to six different managerial approaches, including approaches to caseload management and to the exercise of prosecutorial discretion, to the extent the authority to have such discretion is authorized by a Department's rules.

Each Department has its own disciplinary rules and procedures. Unfortunately, inconsistencies exist among them. That each Judicial Department has its own and sometimes varying rules and procedures does not, in our view, optimally serve the public, consumers of legal services, New York lawyers, and lawyers from other states and countries who may have occasion to practice in New York. Under the current system, complaints against lawyers are subject to disparate treatment and standards depending on which Department is handling the complaint; lawyers who are the subject of disciplinary complaints and formal disciplinary proceedings are similarly subject to differing treatment, standards, and inconsistencies in the imposition of discipline. Further, lawyers are mobile. They practice in different areas of the state. Misconduct is not necessarily limited to the Department where the lawyer has her office. As a matter of fairness and due process, complainants and lawyers from one area of New York should not be treated differently than their fellow complainants and lawyers elsewhere in the state. In our experience, varying procedures and practices negatively impact the public's perception of the system as fair and effective, and create confusion and lack of uniformity in disciplinary sanctions.

On the face of the four sets of Departmental Rules, these are examples of inconsistencies we observed (this is not an exhaustive list and a document summarizing them in more detail is attached as Appendix C):

- Law firm discipline exists in only the First Department;
- The definitions of what constitutes professional misconduct are not the same across Departments;
- There are varying levels of review required for the approval of the dismissal of complaints after initial screening and investigation, and the responsibilities of the Chief Counsel and staff in this process also vary;³
- The First Department does not have rules and procedures relating to the diversion of matters to alternatives to discipline programs. The Second, Third and Fourth Departments have diversion rules, but the procedures are not uniform from one Department to another, and we understand that implementation is also inconsistent across the state;
- The process for determining probable cause to file formal charges differs across Departments;
- The manner in which the admissibility of evidence is determined varies and not all Departmental Rules address this issue;

³ The First Department has a multi-layered and, in our view somewhat redundant screening process that is not described clearly in the Rules. It is described in an online brochure explaining the process. See, <http://www.courts.state.ny.us/courts/AD1/Committees&Programs/DDC/Complaint%20Brochure.pdf>.

- The standard of proof in Section 90 of the Judiciary Law for matters resulting in discipline for lawyers who willfully misappropriate or misapply money is “ a preponderance of the legally admissible evidence,” while the Departmental rules lack clarity about the applicable standard of proof in all proceedings on formal disciplinary charges, and the rules in the Third Department reference the standard of clear and convincing evidence with regard to the imposition of admonitions;
- Procedures for hearings on formal charges, the identity of the trier of fact, and procedures for the review of decisions of the trier of fact vary from Department to Department (for example, the rules in the Fourth Department provide that the Chief Counsel can appeal certain Committee decisions, while the rules in other Departments do not);
- Reciprocal discipline rules and procedures are not the same in each Department;
- There is not Departmental consistency regarding the types of lower level sanctions and non-disciplinary actions that Committees can issue; and
- The rules relating to duties of disbarred and suspended lawyers differ, in that the First and Second Departments have provisions regarding the appointment of a lawyer to protect client interests, while the Third Department has no such provision.

B. Transparency and Confidentiality

The public, clients, and lawyers should easily be able to locate each Department’s rules and procedures, as well as disciplinary opinions, and information about the role and responsibilities of each Committee and disciplinary counsel (the Chief Counsel and staff). We found that locating the disciplinary rules and procedures and available information about the operation of the system is not as simple and straightforward as it should be. Outside of the rules, information about the roles and responsibilities of the Committees and Chief Counsel is not readily available. The Departmental Disciplinary Committees do not have stand-alone websites. There does not appear to exist online for lawyers, judges, consumers of legal services, and the public a document highlighting the differences in each Department’s rules and procedures. We imagine that New York lawyers in particular would find such a document helpful. In conjunction with the strict confidentiality requirements applicable to disciplinary proceedings, these matters contribute to the opaqueness surrounding the system and associated criticism of it.

The high level of confidentiality in New York disciplinary proceedings is inconsistent with national practice and ABA policy as set forth in the MRLDE. In New York, hearings on formal charges are not open to the public. Pleadings in formal disciplinary proceedings are not available for public review absent a court order upon good cause shown. In the vast majority of jurisdictions, disciplinary proceedings and associated pleadings not subject to protective orders are public after the finding of probable cause and service of formal charges on a lawyer. A research chart from the Center for Professional Responsibility describing the time at which disciplinary proceedings become public in U.S. jurisdictions is attached as Appendix D.

C. Timeliness

We understand that there are concerns about delays in the disciplinary process in all Departments. As noted above, we did not have the caseload processing data and information

regarding the technologies used to facilitate the prompt investigation and prosecution of complaints that we normally would possess when the Discipline Committee provides a consultation. However, we believe that procedural and structural redundancies that we observed in the rules, coupled with the heavy reliance on practicing lawyer volunteers, and not on professional and trained disciplinary counsel, likely play a significant role in adding time to the resolution of complaints, to the prosecution of matters, and to delay at the adjudicative levels of the system. The First Department's multi-layered screening process, as described in the brochure referenced in footnote 3, is a good example. That document notes that the initial screening of a complaint generally takes four to six weeks. The purpose of initial screening is to determine if the complaint falls under the Committee's jurisdiction. In our experience, four to six weeks to conduct the initial screening is too long.

Other than provisions relating to Resignations with Charges Pending, the Departments' rules do not appear to provide for discipline on consent. Discipline on consent is akin to plea bargaining. It allows the parties to formal disciplinary proceedings to negotiate an agreed disposition that could be short of resignation or disbarment for approval by the trier of fact. It allows the agency and the respondent lawyer to avoid time-consuming and expensive prosecutions. Discipline on consent, when used appropriately, is a useful tool to enhance the efficiency with which matters proceed.

D. Diversion

Nationwide, the majority of complaints made against lawyers allege instances of lesser misconduct. While technically violations of the rules of professional conduct, single instances of minor neglect or minor incompetence are seldom treated as such. These cases rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction. These complaints are almost always dismissed by the disciplinary agency. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with disciplinary systems. While these matters should be removed from the disciplinary system, they should not be simply dismissed. Such grievances should be handled administratively via a diversion program.

As noted above, the First Department lacks rules and procedures for the diversion of matters involving lesser misconduct. The other Departments have diversion rules and procedures, but they apply only in instances where alcohol and substance abuse are involved. We were advised that the manner in which diversion is implemented is not consistent from Department to Department.

E. Sanctions

Clients, the public, and lawyers have a right to expect that lawyers will be disciplined appropriately and consistently across the state for like misconduct. This is a fairness issue, and one that also reflects on the accountability of the disciplinary system. We believe that the concerns raised about the lack of consistency in the imposition of disciplinary sanctions in Professor Stephen Gillers' article are serious and merit consideration by this Commission. In our

experience, the lack of consistency in the imposition of disciplinary sanctions is not unusual, but the unique Departmental structure of New York's system, the lack of regular communication between Departments, and the lack of uniform rules and procedures in the state generally, including specifically the absence of standards for imposing lawyer sanctions, contribute to the problem.

II. Recommendations for the Commission Consideration

We appreciate that implementing some of the recommendations made below may be very difficult because in New York, unlike most jurisdictions, the legislature has involvement in the promulgation of rules relating to the disciplinary process and the Presiding Judges maintain authority for the Departments under the current rules. In addition, from our consultation and professional experience, we understand the role of politics, at a state and local level as well as within the bar, in any effort to reform any system or to adopt change. That these factors exist does not, in our view, mean that difficult and perhaps unpopular recommendations should not be made. Our hope is that the following suggestions, as difficult as some of them may be to implement, are helpful to the Commission.

A. The Departmental Structure and Procedural Rules

Perhaps the most important changes that we can recommend relate to the entire set of rules and procedures for lawyer discipline in the State of New York, and then to the structure of the system as set forth in the Departmental Rules. As noted above, there currently exist distinct rules and procedures for each of the four Judicial Departments. These procedures and standards for handling complaints against lawyers are sometimes inconsistent with each other, and in some instances appear to be inconsistent with Section 90 of the Judiciary Act.

As we highlighted above, that each Judicial Department has its own and sometimes varying rules and procedures does not well serve the public, consumers of legal services, New York lawyers, and lawyers from other states and countries. We strongly believe that there should be one statewide set of rules and procedures relating to the investigation, diversion, prosecution, and adjudication of disciplinary complaints. The roles and duties of the Chief Counsel and other professional staff, the Committee members, and adjudicators should be the same in every Department. The procedures for hearings on formal charges, the identity of the trier of fact, and procedures for the review of decisions of the trier of fact, for example, should be uniform across the state. As discussed in more detail below, the rules should incorporate the ABA Standards for Imposing Lawyer Sanctions or, at a minimum, direct that the Sanctions Standards be followed. If law firm discipline is to be available, it should be so statewide, not just in the First Department. In addition, there should be one statewide complaint form used to initiate investigations against lawyers.

Simply put, lawyers should be treated the same by the system no matter where their office is located or where the alleged misconduct occurs. Complainants and the public should also not be subject to disparate treatment and standards depending on which Department is handling a

matter. Based on what we have learned about the New York system, we believe this change could be made even in the context of the current Departmental structure.

We next strongly recommend that New York move to a statewide disciplinary system that consists of a unitary agency with separate investigative/prosecutorial and adjudicative functions within that agency. As noted above, this recommendation is consistent with national practice and with the MRLDE. This would include judicial appointment of one full-time professional Chief Disciplinary Counsel for the state; professional and full-time Deputy Chief Counsel and staff can handle operations at any branch offices. This is not an uncommon arrangement for large states. For example, in California, there are offices in Los Angeles and San Francisco, but only one chief disciplinary counsel. The same is true in Illinois, where the Attorney Registration and Disciplinary Commission's main office is in Chicago, and there is a branch office in Springfield. Florida is another example.

We further recommend that the one Chief Disciplinary Counsel and his/her Deputy Chief Disciplinary Counsel and other staff lawyers be provided with increased autonomy and prosecutorial discretion, as is seen nationally.⁴ They should be provided with necessary training on an ongoing basis, and appropriate technology with which to facilitate the effective and efficient performance of their duties and caseload management. Based on the information we have, the current high level of involvement by New York system volunteers, coupled with redundancies in procedures, contributes not only to delay but to inconsistent results. There should be a prompt and centralized screening of complaints for summary dismissal. Disciplinary Counsel's office should conduct a thorough and complete investigation of complaints that survive the summary dismissal. Disciplinary Counsel should be able to dismiss complaints after full investigation without the need for example, of approval by a majority of a full Committee, as happens in the Second Department, via the multilayered process in the First Department; or after consultation with a Committee Chair as in the Fourth Department.

The dedicated volunteers do and would continue to serve a crucial function in the system. We believe that, in addition to adjudicative functions that they already perform, another optimal use of their expertise and experience would be to determine whether to uphold Disciplinary Counsel's recommendation that formal charges be filed against a lawyer.⁵ The probable cause determination should be based upon Disciplinary Counsel's complete investigative report and copies of all relevant documents and information, including information provided by the respondent lawyer and exculpatory evidence for consideration. We do not recommend probable cause hearings or otherwise calling witnesses at this stage. In our experience this causes additional and unnecessary delay.

With regard to the structure, we suggest that the Commission consider recommending that there be created one statewide probable cause-finding body. This statewide body would elect its Chair and Vice-Chair, who would be responsible for appointing three-member panels to consider

⁴ See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4. If the current system where there are six Chief Counsel is retained, we urge enhanced communication among the Chief Counsel.

⁵ Obviously, the volunteers making the probable cause determination in a matter would not also serve as adjudicators of that case.

Disciplinary Counsel's recommendations to file formal charges. The three-member panels should not be comprised of individuals all from the same Judicial Department. Each panel should have two lawyer members and one nonlawyer member. Some states and ABA policy refer to them as Inquiry Panels.⁶ Rule 3 of the MRLDE also suggests that the Chair of a Hearing Committee can serve this function (in New York, depending on who the designated trier of fact is, that could be a Committee member or Referee).

We believe that creation of a statewide probable cause-finding entity with adequately trained members sitting in panels comprised of individuals from multiple locations in the state will help alleviate not only what we understand is sometimes the reality of geographic inconsistencies with regard to the handling of cases, but also the perception that such inconsistencies occur. It will increase the fairness of the process. As with professional disciplinary counsel, the volunteer lawyers and nonlawyers serving on this probable cause-finding entity, and all other volunteers in the system should receive regular training.

B. Transparency and Confidentiality

We believe that much can and should be done to enhance transparency of the system and to ease public access to information about it. We urge a continued leveraging of technology to accomplish this. In this regard it is noteworthy that, in early 2015, the New York court system added to its online database of registered lawyers any public disciplinary information associated with those lawyers. See, <http://iapps.courts.state.ny.us/attorney/AttorneySearch>. People should be able to find this information easily.

Currently, limited information about the system is available at various locations on the New York Court system's website. We suggest the development of a more easily locatable, searchable, consumer friendly, stand-alone, and robust website for the disciplinary system.⁷ This website should make available information about the system in languages other than English. In other jurisdictions (e.g, California, Colorado, Illinois, and the District of Columbia) information about the system is available in other languages. Here, we were not able to locate information about the system provided in other languages and we could not locate complaint forms in other languages.

We suggest that this website should be "hosted" by the Chief Counsel's office for the unitary agency recommended above. It should highlight the functions of each component of the system, as well as their limitations. The New York State Bar Association and local bar associations within the state should link to this new website as the central location for learning about the system and for obtaining a complaint form.

⁶ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 31

⁷ If the Departmental structure is retained, there should still be one website for the system that easily allows the public and lawyers to navigate to the information they need.

The new website should include an easily downloadable complaint form.⁸ The website should also centralize links to the Rules of Professional Conduct, the uniform disciplinary procedural rules recommended above, rules and forms for the Lawyers' Fund for Client Protection, and other New York legal resources and publications. The website should have a searchable library of the Court of Appeal's disciplinary opinions and those of the Appellate Divisions, Grievance Committees and Referees. The inclusion of rosters of system volunteers should continue, but be centralized on this website. Consideration should be given to including e-news alerts, summaries of recent cases of interest and import, and information about available continuing legal education programs relating to the system and ethics and professional responsibility generally.

We were able to locate on the various webpages, annual reports for the First, Third and Fourth Departments. We could not locate annual reports for the Second Judicial Department. We recommend that one statewide annual report of lawyer discipline be created, published, and made available online. This comprehensive annual report should detail the operations and activities of the discipline system as a whole, and if the Departmental structure is maintained, for each Department. Such a comprehensive annual report provides an easy method by which to compare how the process is working in each Department. Providing this type of information about the lawyer discipline process to the public and the bar ensures accountability, allows the public and the bar to evaluate the performance of the discipline system, and promotes increased public confidence in the system and the judiciary. The annual report also offers an opportunity for the agency and the court to detail the accomplishments of its agents, identify improvements in the system, and explain any new initiatives.

The Chief Counsel should be responsible for compiling the statistical information for inclusion in the annual report. The annual report should contain information explaining how the discipline process works, describe the functions and duties of the agency, offer comprehensive statistical information about the disciplinary caseload (e.g., the nature and number of complaints received and resolved and the number of cases that resulted in the imposition of disciplinary sanctions), outline the system's budget and highlight how entities of the system are meeting their goals of serving the public and the profession. The report should include a description of speaking events, CLE presentations, and articles published by Chief Counsel and staff, as well as system volunteers.

In New York, disciplinary proceedings are not open to the public until a recommendation for a public sanction is forwarded to the court and upheld. At that point the written decision and record of the proceedings are available to the public for inspection. The public cannot attend hearings on formal charges or view the pleadings in those matters until after the proceedings are completed and a public sanction imposed. This is contrary to practice in the majority of states and the MRLDE. We urge that the rules be changed to make proceedings public after finding of probable cause and service of formal charges. The following expands upon the discussion we had with the Commission in June.

⁸ Currently complaint forms can be downloaded. As noted above, only one version of a complaint form should be used in New York even if the Departmental structure is retained.

In our experience, lawyers most often express concern about the dangers of lawyers being subject to a public airing of frivolous or unfounded allegations, and cite factors unique to their state as justification for keeping disciplinary proceedings closed to the public until a sanction is imposed. Lawyers are rightly concerned about their reputations as reputation is a lawyer's stock in trade. However, the Court must be concerned about its reputation in regulating the profession in the public interest. The public rightfully expects that judicial proceedings in this country will be public and that it and the media will be free to attend and comment upon those proceedings. As noted in the 1992 Report of the ABA Commission on Evaluation of Disciplinary Enforcement (the McKay Commission), "[S]ecret records and secret proceedings create public suspicion regardless of how fair the system actually is."⁹

Recommendation Seven of the McKay Commission Report, which urges that disciplinary proceedings be made public upon the filing and service of formal charges, notes that the evidence contradicts those who fear unjust damage to lawyers' reputations.¹⁰ For example, in 1989, the Illinois Supreme Court's Blue Ribbon Committee to Study the Functions and Operation of the Attorney Registration and Disciplinary Commission issued a report recommending that the Court amend Supreme Court Rule 766 to provide that disciplinary proceedings in the state become public after the filing and service of formal charges. Over the objections of the organized bar, which cited the risk of damage to the reputation of the charged lawyers, including those vindicated publicly of wrongdoing, the Court adopted this change. The fears of the bar have not been realized.

The Supreme Court of New Jersey, in 1994, amended its rules of lawyer disciplinary procedure to make disciplinary matters public at the formal complaint stage. In doing so, the Court adopted the recommendation of the 1993 Report of the New Jersey Ethics Commission. In a July 14, 1994 Report describing its actions to open the system, the Court stated that the values served by doing so far outweighed the risk that an ethical lawyer, unfairly accused, might suffer from damaging publicity. New Jersey lawyers vehemently opposed this change. A May 2002 article in the New Jersey Law Journal memorializing Raymond R. Trombadore, chair of the McKay Commission, noted that those fears did not materialize.¹¹

As set forth in the Commentary to Rule 16 of the ABA Model Rules for Lawyer Disciplinary Enforcement:

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

⁹ *McKay Report* at 38.

¹⁰ *Supra* note 2 at 33.

¹¹ Attached to this submission as Appendix E is a copy of that article and an article from New Hampshire about the opening of its disciplinary system.

We understand that, because of the state of the law in New York and the need of legislative involvement, implementing such a recommendation, should the Commission decide to make it, would be challenging. We hope that any impediments to implementation do not deter the Commission from recommending the opening of the New York lawyer disciplinary system if the Commission agrees with our suggestion. Changing the status quo in New York in this regard would align it with more than 40 other jurisdictions where disciplinary proceedings become public at this stage or earlier.

C. Timeliness

Delay in the handling of cases fosters public and lawyer distrust and lack of confidence in the lawyer disciplinary system. We think that a statewide system with uniform procedures and practices, elimination of unnecessary duplication and review, and use of disciplinary counsel who are well trained and resourced with necessary technology and staff will help eliminate some delay.

As another way to reduce delay, we recommend that there be adoption of a stand-alone rule providing for Discipline on Consent. The parties should be able to negotiate a stipulated disposition short of Resignation with Charges Pending. Discipline on consent is an extremely effective tool in achieving prompt resolutions of discipline cases. In those states that have it and use it appropriately, many matters are resolved by stipulated discipline. Discipline on consent, implemented expeditiously, benefits both the public and the parties. The public is promptly protected from an unethical lawyer and the respondent avoids a time-consuming, costly, and public trial.¹² Also, disciplinary officials are not required to expend valuable time and resources on formal prosecutions and can devote their energies to contested matters.

D. Diversion

As noted above, three of the four Departments have rules providing for the diversion of matters to alternatives to discipline programs. In those Departments, diversion is limited to matters where the lawyer has an alcohol or substance abuse problem, and implementation of diversion is not consistent from Department to Department. We recommend that diversion be available throughout the state and that it apply to a broader spectrum of cases.

Diversion of a matter from the disciplinary system is appropriate to address limited instances of lesser misconduct where the lawyer's behavior is remediable and there is little danger of recidivism if a lawyer successfully completes the program. In our experience, an effective disciplinary and disability system should include diversion/alternatives to discipline programs that are not just limited to instances involving alcohol and substance abuse. That would be consistent with national practice and ABA policy.¹³ Reasons to divert a matter from the disciplinary system that do not relate to substance abuse include, but are not limited to, minor neglect, certain mental health issues, concerns about law office management, bookkeeping issues

¹² See, ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 21.

¹³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.11G.

that did not result in misappropriation but that demonstrate the need for enhanced trust accounting, and conduct that demonstrates a need for client relations education. Well-designed and consistently implemented diversion programs benefit both lawyers and clients. They allow disciplinary counsel to expend resources on more serious cases that need the attention. As Ms. Cohen stated in June, states such as Colorado that have instituted diversion programs find the recidivism rate to be low, and have successfully addressed issues before they got worse.

Participation in a diversion program should not be used as an alternative to discipline in cases of serious misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program should only be considered in cases where, assuming all the allegations against the lawyer are true, the presumptive sanctions would be less than disbarment, suspension or probation. The existence of one or more aggravating factors should not necessarily preclude participation in the program. For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

The existence of prior disciplinary offenses should also not necessarily make a lawyer ineligible for referral to the alternatives to discipline program. Consideration should be given to whether the lawyer's prior offenses are of the same or similar nature, whether the lawyer has previously been placed in the alternatives to discipline program for similar conduct, and whether it is reasonably foreseeable that the lawyer's participation in program will be successful. Both mitigating and aggravating factors should be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible lawyer for the program.

E. Sanctions

Professor Gillers' article, cited above, offered insight into the manner in which disciplinary sanctions are imposed in New York and associated concerns about inconsistency. As we noted above, clients, the public, and lawyers have a right to expect that lawyers will be disciplined appropriately and consistently across the state for like misconduct. This is a fairness issue, and one that also reflects on the accountability of the disciplinary system. We believe that restructuring the system as recommended above will help improve consistency in the imposition of disciplinary sanctions.

We also urge the Commission to recommend that New York adopt the ABA Standards for Imposing Lawyer Sanctions (Sanctions Standards), as one means by which to enhance consistency in the imposition of discipline in the state. The Sanctions Standards provide a straightforward methodology for ensuring consistency in the recommendation and imposition of lawyer disciplinary sanctions. That framework requires consideration of the rule violated, the lawyer's mental state, the extent of the injury, and aggravating and mitigating circumstances.¹⁴ The Sanctions Standards are designed to promote thorough consideration of all factors relevant to imposing a sanction in an individual case. They attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant

¹⁴ ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 3.0.

aggravating and mitigating circumstances are considered at the appropriate time. Additionally, consistent use of the Sanctions Standards helps to resolve inconsistencies in sanction recommendations for similar misconduct.

Many courts and disciplinary agencies utilize the Sanctions Standards. Greater consistency provides an increased level of fairness and predictability in the system. It puts lawyers on notice both as to what conduct will not be tolerated and what sanctions for misconduct will consistently result for various types of misconduct. Additionally, the Sanctions Standards help to create uniformity of sanctions between states, thus enhancing efforts to impose fair and efficient reciprocal discipline. Disciplinary authorities nationwide render more consistent and predictable decisions when they employ common language and uniform methods of analysis.

Regular and continued training of those responsible for the adjudication of formal charges also helps to ensure greater consistency in the imposition of sanctions. Effective training would help ensure proper application of the Sanctions Standards.¹⁵ Such training assists adjudicators to better understand the relationship between lawyer misconduct and alcohol and substance abuse, mental health issues, gambling, and issues specific to aging lawyers. All of these issues are being raised with increasing frequency in lawyer disciplinary cases.

The system's adjudicators should be encouraged to join the National Council of Lawyer Disciplinary Boards, Inc. (NCLDB) and attend its meetings. The NCLDB is comprised of individuals representing disciplinary boards throughout the United States. It provides a national forum for the exchange of information and ideas to assist volunteers and staff in improving the processes and address responsibilities, procedures, problems, and administration relating to formal proceedings before disciplinary boards. The NCLDB website can be accessed at www.ncldb.org.

F. Other Suggestions

Other areas where, based on the information available, we believe changes could help increase the fairness, effectiveness and efficiency of the system include:

- The standard of proof in disciplinary proceedings should be the same statewide and the rules should make this clear. It appears that the statewide standard, as applied, is a preponderance of evidence. As noted in Appendix C, the Departmental rules lack clarity about the applicable standard of proof in all proceedings on formal disciplinary charges, and the rules in the Third Department reference the standard of clear and convincing evidence with regard to the imposition of admonitions; and
- We suggest that the Commission consider recommending adoption of a rule providing complainants with absolute immunity for communications with the disciplinary system. Providing complainants with immunity encourages those who may have some doubt

¹⁵ Similarly, those responsible for prosecuting allegations of misconduct should be trained in the application of the Sanctions Standards. In addition, disciplinary counsel should be encouraged to attend the meetings of the National Organization of Bar Counsel, a professional association of disciplinary counsel.

about a lawyer's conduct to submit the matter to the proper authority without fear of reprisal. Since investigations should be confidential until a determination has been made that probable cause exists and formal charges have been served, conferring immunity on complainants results in little or no damage to lawyers. In addition the rules should provide for absolute immunity for Chief Counsel, staff, and volunteers in the system for actions taken in the performance of their official duties. Immunity protects the independent judgment of the agency and avoids diverting the attention of its personnel as well as its resources toward resisting collateral attack and harassment.

III. Conclusion

We appreciate the opportunity to summarize and supplement our June 2015 presentation to the Commission. We hope that the Commission finds this submission useful. We are available to answer any questions. Please contact Ellyn Rosen at ellyn.rosen@americanbar.org if you require additional information.

Sincerely,

Nancy Cohen, Partner
MiletichCohen PC
Denver, Colorado

Ellyn S. Rosen, Deputy Director
ABA Center for Professional Responsibility
Chicago, Illinois

APPENDIX A

Nancy L. Cohen
MILETICHOHEN PC
1660 Wynkoop, Suite 1160
Denver, Colorado 80202
Direct: 303-515-6660
Facsimile: 303-515-6655
ncohen@mcpclaw.com

Professional Experience

2012 – Present MiletichCohen PC

Shareholder

- Represents law firms and lawyers in defense of legal malpractice and third party claims, disciplinary matters, and fee issues.
- Represents other professionals on licensure issues and grievances.
- Provides risk management and ethics advice to professionals, including in-house counsel.
- Represents law applicants concerning licensure issues.
- Involved in complex commercial litigation and employment.
- Martindale-Hubbell AV® Preeminent Rated.

2010 – 2012 Wheeler Trigg O’Donnell LLP

Of Counsel (2010-August 2012)

1999 – 2010 Colorado Supreme Court Office of Attorney Regulation Counsel

Chief Deputy Regulation Counsel (2002–2010)

Deputy Regulation Counsel (1999–2002)

1992 – 1999 Waldbaum, Corn, Koff, Berger & Cohen, P.C.

Shareholder (1993–1999)

Of Counsel (1992–1993)

1982 – 1992 Plaut/Lipstein/Cohen

Shareholder (1988–1992)

Associate (1982–1987)

Teaching Positions

2006 – 2013 National Institute for Trial Advocacy

Instructor

1993 – 1994 University of Denver College of Law

Adjunct Instructor – Lawyering Process

Professional Recognition

2015 Recognized as one of the Top 100 Colorado Super Lawyers

2014 – 2015 Recognized as one of the Top 50 Women Colorado Super Lawyers

2013 – Present Recognized as a Colorado Super Lawyer – Professional Liability: Defense

2008 – Present Fellow, American Bar Association Foundation
1991 – 2001 Fellow, Colorado Bar Foundation
1993 First recipient of the Alumni Professionalism Award from the University of Denver Sturm College of Law

Professional & Public Service

2014 – Present Member, American Law Institute
2015 – 2016 President Elect, Denver Bar Association
2013 – Present Member, Colorado Bar Association Board of Governors
2013 – 2020 Member, Colorado Supreme Court Advisory Committee
2012 – Present Member, Colorado Bar Association, Lawyers Professional Liability Committee
2009 – 2015 Member, American Bar Association (Center for Professional Responsibility Standing Committee on Client Protection, 2009-2012; Standing Committee on Professional Discipline, 2012-2015)
2008 – 2011 Trustee, Denver Bar Association
Chairperson, Mentoring Program (2008-2010)
2007 – Present Chairman of the Board, Family Star Montessori (2009-Present)
Member of the Board (2007-2009)
2006 – 2007 President, National Organization of Bar Counsel
2003 – 2018 Colorado Supreme Court Standing Committee on Professional Rules of Conduct
1996 – 2001 Committee on Conduct for the United States District Court of Colorado
1984 – 2007 Colorado Bar Association Ethics Committee (Chairperson from 1990-1991)

Articles

Professional Liability Insurance - What to Consider When Purchasing Insurance, 41 No. 7 Colorado Lawyer, pp. 107-109 (July 2012).
New Rule on Retaining Client Files - How to Avoid Potential Pitfalls, 41 No. 6 Colorado Lawyer, pp. 69-71 (June 2012).
Cohen, Nancy L. “Why Should Lawyers Think About Conflicts of Interest at the Beginning or Representation and Determine Who the Lawyer Represents?” Real Estate Symposium. July 11, 2014.

CLE & Papers

Cohen, Nancy L. “How to Stay Out of Trouble: Practical Tips for Avoiding Legal Malpractice Claims and Grievances” Colorado Women’s Bar Association 38th Annual Convention. May 16, 2015.
Cohen, Nancy L. “Oil and Gas Law Advanced Topics – Ethics: Confidentiality and Conflicts of Interest, Landman “Unauthorized” Law Practice, and Multijurisdictional Practice Issues.” March 12, 2015
Cohen, Nancy L. “A Perspective on Practice Pitfalls.” Preventing Legal Malpractice 2015. February 6, 2015.

ELLYN S. ROSEN, Deputy Director of the American Bar Association Center for Professional Responsibility also serves as Regulation Counsel for the Association. She advises the ABA Standing Committee on Professional Discipline, whose mission is to assist the judiciary and the bar in the development, coordination, and strengthening of disciplinary enforcement throughout the United States, including the assessment of the regulatory ramifications of global legal practice developments. Ms. Rosen was Counsel to the ABA Commission on Ethics 20/20 (2009-2013), which reviewed and recommended changes to the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in response to the challenges that globalization and advances in technology present to clients, lawyers, law firms, and the public. She advises the ABA Task Force on International Trade in Legal Services, which monitors the free trade agreement negotiations affecting legal services and provides input to the Office of the United States Trade Representative. She liaises with the Conference of Chief Justices, National Organization of Bar Counsel, National Council of Lawyer Disciplinary Boards, and the Association of Professional Responsibility Lawyers. She speaks frequently at international, state and local bar programs regarding ethics and the regulation of the legal profession.

Prior to joining the Center in 1996, Ms. Rosen was a senior litigation counsel with the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois. She currently serves on the Executive Committee and Board of Governors of the Chicago Council of Lawyers, and was a member of the International Bar Association's Professional Ethics Committee (2009-2010). She co-chaired the Chicago Bar Association's Young Lawyers Section Professional Responsibility Committee (1997-1999), and served as an investigator and interviewer for the Illinois Alliance of Bar Associations for Judicial Evaluations (2000-2013). The Alliance evaluates and rates candidates seeking judgeships in Illinois via appointment or election. Ms. Rosen is also a Fellow of the American Bar Foundation. In 1989, Ms. Rosen received her J.D. with honors from the Indiana University School of Law in Bloomington, Indiana.

APPENDIX B

ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
LAWYER DISCIPLINE SYSTEM CONSULTATION PROGRAM

The ABA Standing Committee on Professional Discipline was established in 1973 to assist the judiciary and the bar in the development, coordination and strengthening of disciplinary enforcement throughout the United States. The Standing Committee has drafted model rules, policies and texts pertaining to all aspects of disciplinary enforcement, including the ABA *Model Rules for Lawyer Disciplinary Enforcement* (MRLDE), which were adopted by the House of Delegates at its August 1989 Annual Meeting. The MRLDE are recommendations formulated by the Discipline Committee for use by jurisdictions in drafting, updating and researching lawyer disciplinary rules and procedures.

At its February 1992 Midyear Meeting, the ABA House of Delegates adopted the Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Report), published as *Lawyer Regulation for a New Century*. Key recommendations of the McKay Report endorsed client protection mechanisms, dispute resolution, professionalism considerations, lawyer competence, lawyer impairment and alternatives to discipline. Accordingly, the Discipline Committee revised the MRLDE to reflect the McKay Report's recommendations.

Since 1980, the Discipline Committee has conducted 62 consultations, including several states that have requested revisits by the Standing Committee. At the request of a state's highest court, a team consisting of one or more Committee members, an experienced disciplinary counsel from another jurisdiction, and lawyers from the ABA Center for Professional Responsibility examines the lawyer discipline system. The team visits the jurisdiction and conducts interviews with disciplinary staff, discipline system adjudicators, bar officials, complainants, respondents, respondents' counsel, members of the judiciary and others who have had contact with or a role in the state's disciplinary system. Interviewees are afforded confidentiality with regard to the information that they provide to the team. At the conclusion of the on-site portion of the consultation, the team meets with the highest court to discuss preliminary findings and to answer questions. The team also reviews relevant court rules, reports and statistics and examines sample disciplinary files within the jurisdiction.

The team then prepares a comprehensive report with recommendations, which is reviewed and approved by the full Discipline Committee. The report is designed to assist those responsible for the administration of the disciplinary process to improve their system by providing constructive suggestions and recommendations based upon the team's investigation, its collective knowledge and experience, factors unique to the jurisdiction requesting the consultation, and the application of the MRLDE and McKay Report recommendations. The Committee generally issues its report approximately four months after the on-site portion of the consultation.

The report is filed on a confidential basis with the state's highest court. However, the court may decide whether to make the report available to other interested parties and the public. The Committee refers any questions regarding the Report to the Court and its designated spokesperson.

Please do not hesitate to contact Center Deputy Director and Regulation Counsel Ellyn S. Rosen at 312/988-5311 if you have any questions about the Committee's consultation program.

APPENDIX C

**SUMMARY EXAMPLES DIFFERENCES AND
APPARENT INCONSISTENCIES ON THE FACE OF
NEW YORK DISCIPLINARY PROCEDURAL RULES
FOR COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE**

Departmental Rules:

First Department 22 NYCRR 603 & 605:

<http://www.courts.state.ny.us/courts/AD1/Committees&Programs/DDC/index.shtml>

Second Department 22 CRR-NY 691.1- 691.25:

[https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ice3dde60bbec11dd8529f5ff2182bffa&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ice3dde60bbec11dd8529f5ff2182bffa&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))

Diversion: [N.Y.S. SECOND DEPT. R. 691.4\(m\)](#)

Third Department 22 NYCRR 806: <http://www.courts.state.ny.us/ad3/cops/COPSRules.html>

Diversion: [22 NYCRR 806.4\(g\)](#)

Fourth Department 22 NYCRR 1022.17-.28:

[https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Id32f95d0bbec11dd8529f5ff2182bffa&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Id32f95d0bbec11dd8529f5ff2182bffa&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))

Diversion: [22 NYCRR §1022.20\(d\)\(2\) & \(d\)\(3\)\(a\)-\(c\)](#)

N.Y. Jud. Law §90: <http://codes.lp.findlaw.com/nycode/JUD/4/90>

- ***Law Firm Discipline***

- Only First Department provides for law firm discipline. It is unclear how this rule applies to firms with offices Department in addition to the First Department.

- ***Definition of Misconduct***

- Understanding that all the Rules defining misconduct reference Section 90 of the Judiciary Act, such Rules for the First, Second, and Third Departments are similar, but not identical; the Fourth Department's Rules differ more significantly.
- Only the First and Second Department's Rules include the language "professionally and personally" to describe the type of conduct covered by the Rule. However, "both" precedes this phrase in the First Department's Rule, while "either" precedes it in the Rule for the Second Department.
- The First Department's Rule includes the language "special rules concerning court decorum"; the Rules for the other Departments do not.
- The Rules of the First, Second, and Third Departments all include the phrase "shall be guilty of professional misconduct"; the Fourth Department's Rule does not.

- The Fourth Department’s Rule specifies “rules or announced standard” of the Appellate Division; the First, Second, and Third Department Rules refer to “court” or “this court”.
- ***Process for Dismissal after Initial Screening***
 - Only the First Department seems to address this process in a web posting and briefly in the Rules, but not in any detail. See, <http://www.courts.state.ny.us/courts/AD1/Committees&Programs/DDC/Complaint%20Brochure.pdf>.
- ***Who Approves the Dismissal of Complaints***
 - In the First Department the Rule specifies that a lawyer member of the Grievance Committee, designated by First Department Committee chairperson, reviews Chief Counsel’s dismissal recommendations and approves or modifies that recommendation to dismiss a complaint. The Rule in the Second Department requires a majority vote of the full Grievance Committee. In the Third Department, the Committee on Professional Standards makes the determination to dismiss. In the Fourth Department, the Chief Counsel or a designated staff attorney, in consultation with the appropriate Attorney Grievance Committee Chairperson may dismiss the complaint.
- ***Diversion***
 - The Second, Third, and Fourth Departments have diversion for matters involving alcohol and substance abuse. The First Department does not have a diversion Rule. That diversion is available at any stage of the disciplinary proceedings is consistent across the three Departments that have it. While not an inconsistency in the Rules, we were advised that diversion is not implemented consistently across Departments.
 - Who may recommend diversion is not the same in each Department. In the Second Department diversion may be permitted by order of the court upon application of the respondent lawyer, the Grievance Committee, or upon the court’s own motion. In the Third Department the court may divert a matter to a monitoring program upon the recommendation of the Committee on Professional Standards or if the respondent lawyer raises alcohol or substance abuse as a mitigating factor during an investigation or proceeding. In the Fourth Department diversion can occur upon the recommendation of the Chief Counsel or designated staff lawyer.
- ***Who Approves of the Filing of Formal Charges***
 - In the First Department two members of the Policy Committee approve the filing of formal charges. In the Second, Third and Fourth Departments the Committee makes that determination.
 - Only the Second and Fourth Departments appear to have a probable cause standard in the Rules.

- The Second Department appears to permit a probable cause hearing before a subcommittee of the Committee. No other Departments' Rules seem to provide for such a hearing, but the Fourth Department allows the attorney to appear before Committee and be heard in response to charges prior to the Committee making a probable cause determination.
 - There exist different "majority" voting requirements for approval of filing of formal charges: the Second Department Rule requires a majority vote of the full Committee; the Fourth Department requires a vote of majority of the Committee members present; the Rules of the First and Third Departments do not specify.
- ***Application of Rules of Evidence at Hearings on Formal Charges***
- None of the Departmental Rules state that N.Y. Rules of Evidence apply to hearings on formal charges. Section 90 of the Judiciary law does refer to "legally admissible evidence" in reference to the standard of proof for cases involving misappropriation or mishandling of client funds. The First Department's Rules refer to evidence that is relevant, competent, and not privileged as being admissible.
 - In the First Department a referee rules on the admissibility of evidence at hearing. In the Second Department, the Committee or a Subcommittee of the Committee decides all questions of evidence. The Rules for the Third and Fourth Departments do not address how admissibility of evidence is determined.
- ***Standard of Proof***
- The Rules in the First, Second and Fourth Departments do not mention standard of proof. The Third Department's Rules refers to a clear and convincing standard with regard to admonitions. Section 90 of the Judiciary Law refers to the standard of proof as a preponderance of the evidence when an attorney is found to have willfully misappropriated or misapplied money or property in the practice of law.
- ***Procedures For Formal Hearing***
- In the First and Fourth Departments the Chief Counsel institutes formal proceedings. In the Second and Third Departments the Committee does so.
 - The Fourth Department is unique in that the Chief Counsel can appeal the determination not to file formal charges.
 - In addition to requirements set forth in Section 90 of the Judiciary Law with regard to service upon respondent, the First Department does not specify a procedure. In the Second and Third Departments, service is either in-person or by certified mail. The Third Department specifies that if service is made by mail and lawyer fails to respond within time specified, personal service is required. In the Fourth Department notice shall be served in the matter set forth in the Judiciary Law.
 - With regard to the time I which a respondent must file an answer to formal charges, the Rules in the First Department require such filing to occur within 20

days after service of notice of charges. The Rules in the Second and Third Departments contain no time requirement for filing an answer. In the Fourth Department, the respondent must file an answer within 20 days from service of petition.

- Hearings are recorded in the First and Second Departments. In the Third Department a stenographic transcript of minutes of the hearing is produced.
- The identity of the trier of fact differs from Department to Department. In the First Department, a Referee appointed by the court hears the case. In the Second Department the Committee or a subcommittee of the Committee does so. In the Third Department, the court refers any issues of fact to be heard and reported on by a judge or referee; if no factual issues exist, the court may hear any matters in mitigation or otherwise. In the Fourth Department the court may refer the matter to be heard by a justice of the Supreme Court or a referee designated by Appellate Court when issue of fact is raised; when no issue of fact is raised, the Appellate Division hears the case.
- The Rules for the First Department provide that the hearing on formal charges must commence within 60 days after service of notice of charges. The Rules for the Second and Third Departments do not provide any timing requirements. In the Fourth Department, unless otherwise directed, the hearing shall be completed within 60 days following date of entry of the order of reference.
- It appears that only the First Department requires pre-hearing stipulations.

- ***Appeal Following Hearing***

- Appeal procedures vary widely by Department. However, pursuant to N.Y. Jud. Law §90(8) respondents or petitioners have the right to appeal all final Appellate Division orders to the Court of Appeals.
 - In the First Department, a hearing panel reviews all referee reports and recommendations. In the Second, Third and Fourth Departments, review procedures depend on the recommended sanction, in particular with regard to lower level sanctions such as admonition and letters of caution. In formal disciplinary proceedings the Appellate Division reviews.

- ***Reciprocal discipline***

- In the First and Third Departments, if the respondent does not raise an enumerated defense, reciprocal discipline results. In the Second Department, there appears to be an internal inconsistency in paragraph (b) and (c) of reciprocal discipline Rule §691.3. Paragraph (b) requires respondent to raise a defense and demand a hearing to stop the default imposition of reciprocal discipline, but paragraph (c) implies that the court may conduct a full review of the underlying record even absent such defense being raised. The Rule in the Fourth Department sets forth a procedure that does not include the automatic entry of an order of reciprocal discipline absent any defense being raised by the respondent.
- The lawyer is required to advise the court of discipline imposed by another jurisdiction only in the First and Third Departments. The Rule does not include a time limit for making that self-report in the First Department, but in the Third

Department the lawyer must make such report within 30 days of the entry of the disciplinary order in the originating jurisdiction. The lawyer's failure to advise the court of discipline in the originating jurisdiction can constitute professional misconduct in the Third Department.

- The types of defenses that could result in the refusal of the court to impose reciprocal discipline are the same in Second, Third and Fourth Departments: deprivation of due process, insufficient proof that the lawyer committed the misconduct, or that the imposition of discipline would be unjust. The Rule in the First Department does not include the defense that imposition of discipline would be unjust. Instead, it states that "misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this jurisdiction." In the Fourth Department, the lawyer may also raise mitigating factors.

- ***Differences in Types of Lower Level Sanctions and Non-Disciplinary Actions***

- First Department: Admonition (discipline)
- Second Department: Reprimand (discipline), Admonition (discipline), and Letter of Caution (not discipline)
- Third Department: Admonition (discipline), Letter of Caution (unclear whether discipline or not), and Letter of Education (not discipline)
- Fourth Department: Letter of Admonition (discipline) and Letter of Caution (not discipline)

APPENDIX D
(see separate attachment
accompanying submission)

APPENDIX E

Continents and Calendar 10

Feature Program -

ial Evidence 11

Supreme Court Advisory Committee

Rules: Public Hearing Notice.. 12

Stephen C. Brown; and Sullivan, James G. Feleen.

| April 25 -May 1.

Time For A New Look At Lawyer Discipline

by Jack P. Crisp, Jr.
NHBA President-Elect

NHBA

ONE OF THE FREQUENT COMPLAINTS we hear from the public about our legal profession is the secret manner in which we conduct our disciplinary procedures. It is only natural the people of an open society mistrust any activity which is conducted in secret. This is especially true when the reasons for the secrecy are perceived to be largely self-serving and are not easily articulated.

Recent surveys conducted by national legal professional organizations such as the American Bar Association and the Association of Trial Lawyers of America have clearly demonstrated the public's perception of lawyer ethics extends far beyond the more serious conduct addressed by our Rules of Professional Conduct. The public believes that lawyers who do not return their telephone calls, who fail to show genuine concern about the client's problems, who are arrogant or aloof in their attitude or who do not promptly and efficiently attend to the client's case are unethical. In fact, the majority of the public believes that one out of every three lawyers is unethical, dishonest or both.

Our own experience shows that the more successful lawyers routinely maintain good client relations. They are the regular beneficiaries of word of mouth referral which is still the most effective and least costly form of marketing.

Highly publicized disciplinary cases in which lawyers have been found to have stolen their client's money or become sexually involved with them during periods of severe emotional stress and turmoil add credibility to the public's distrust of lawyers. They cause the public to wonder if other incidents of lawyer misconduct are being

concealed by a secret and closed disciplinary system. Whether this attitude is logical or not in light of the actual disciplinary measures taken by disciplinary boards does not change the growing public distrust.

Bar leaders are frequently confronted by members of the public and the press with questions and obvious cynicism about our closed disciplinary system. They point to the extreme cases of attorney misconduct and the public's deeply felt distrust of lawyers as proof of widespread unethical conduct which our secret system fails to uncover or disclose. Just as the press distrusts and resists confidentiality in legal proceedings, they are also suspicious of confidential disciplinary activities. Fringe organizations whose mission is to attack the legal profession and the justice system use our closed disciplinary system as "proof" of our "elitism."

To complicate matters further, when word spreads that a lawyer may have committed some act of misconduct, our Professional Conduct Committee (PCC) is unable to confirm or deny the allegations. It cannot assure the public that probable lawyer misconduct is under investigation and responsible action will be taken. On the other hand, non-lawyers involved in disciplinary matters can spread false and misleading information which the PCC is powerless to prevent or correct under the current rules.

Currently our proceedings become public at the point of Supreme Court action. Many states have already opened their disciplinary systems to the public at earlier stages than we do. Approximately thirty-three states have more open systems than ours. Experience thus far indicates open systems have not produced regular press

DISCIPLINE

Continued on page 6

NHBA Bar News May 4, 1994
Vol. 4, #23

Address Correction Requested

AMERICAN BAR ASSOCIATION
DIVISION OF BAR SERVICES
750 NORTH LAKE SHORE
CHICAGO IL 60611

Discipline... from page 1

reports about disciplinary proceedings. Lawyers who are the victims of frivolous and unfounded complaints have generally not been the subject of frivolous and destructive articles.

I believe it is time our discipline system was open to the public at an earlier stage. I also believe we must develop and adopt a meaningful diversion system that will aid lawyers and members of the public when conflicts arise which do not reach to the level of disciplinary rule violations.

I believe mediation at a very early stage which is reasonably modest and relatively non-intrusive can resolve misunderstandings that all too often evolve unnecessarily into conduct complaints and malpractice lawsuits. The Bar Center, PCC, New Hampshire Judicial Council, Supreme Court and various court clerk's offices frequently receive telephone calls from clients who are frustrated either as a result of a simple misunderstanding or by an attorney

who has poorly communicated with his or her client. Often these frustrated clients get no response to their calls beyond a referral to the PCC. The attorney involved rarely knows of the complaining telephone call. A program which would bring together frustrated clients with their attorney for the purpose of fixing the problem so the attorney-client relationship can continue is in the best interest of all concerned. The NHBA Mediation Committee is a step in this direction.

Next year the New Hampshire Bar Association will create a task force to study the issue of opening our discipline system and establishing a diversion program. We will formulate proposals for implementation that will be presented to the Bar, the Supreme Court and the PCC. I know the PCC and the Supreme Court are concerned about these issues and are already considering what should be done. We look forward to working with the court and the PCC to achieve changes of which we can all be proud.



Association at the group's retiring. Ann Graf, center, accepted from attorney James Muirhead, Graf, Raulerson & Middleton Manchester Bar Association Doreen F. Connor, of Wiggins Graf, who died January 31, 1990, for his contributions of energy to community causes in Manchester area.

GSBA Plans Law Day Dinner

THE GREATER SALEM BAR ASSOCIATION is again sponsoring the annual Law Day banquet and celebration to be held at Castleton on Friday, May 6, 1994. The featured speaker will be Doris Kearns Goodwin, noted political commentator and author. She is a regular panelist on "5 on 5," a public affairs program that is broadcast each Sunday morning by WCVB-TV, Boston.

Kearns Goodwin has also appeared on "Nightline," the "Today" program,

"Good Morning America" and "Morning News." Some of her books include: *Lyndon Johnson & The Dream*; *The Fitzgeralds and The White House*; *Franklin and Eleanor Roosevelt: The American Homefront During World War II*.

Tickets to the dinner may be purchased by calling attorney James V. Broderick at 893-5776. The celebration at Castleton each year follows the participation of GSBA members in Law Day activities in each of the Salem public schools.

APPLIED ECONOMIC RESEARCH, INC.

- Expert Testimony
- Property Tax Abatement
- Real Estate Appraisals
- Business Valuations
- Economic Consulting
- Market Analysis



*Substance • Credibility
Integrity*

Statewide Since 1976

Russell W. Thibeault, President
109 Court Street
Laconia, New Hampshire 03246
(603) 524-1484

applied
economic
research **aer**

Judge Broderick Testimonial May 1

RETIRING MANCHESTER DISTRICT Special Justice James V. Broderick honored at a testimonial reception dinner on Monday, May 16, 1994, at 6:00 p.m. at St. Anselm Dining Center in Goffstown.

Tickets to attend this special event can be obtained by contacting Clifford J. Ross, 69 Middle Street, Manchester, NH, 03101, 624-XXXX.

News items regarding court bar associations are welcome and sent to: Editor, Bar News, 100 Street, Concord, NH, 03301.



Our Professional Discipline Process

IN THIS ISSUE you will find reprinted for your information the New Hampshire Supreme Court Professional Conduct Committee's 1993 Annual Report. I urge you to read it and carefully consider its implications.

First, this report clearly demonstrates that no profession, business or trade in New Hampshire is as scrupulous and diligent in the supervision and disciplining of its members as the legal profession. Each of us should take great pride in the effort New Hampshire lawyers and our Supreme Court make to maintain the high level of integrity and ethical standards within our profession. No reasonable person could read this report and conclude that lawyers and the Supreme Court do not take such matters extremely seriously in New Hampshire.

On the other hand, there remain a number of concerns which I am certain will trouble many Bar members. Too many complaints from the public remain unanswered or unresolved. These complaints do not allege ethical violations or dishonesty by lawyers in any form. Indeed, some may be completely frivolous or merely attempts to harass attorneys who were involved in a matter in which the complaining party was on the other side and is unhappy with the outcome. However, it is likely that a significant portion of the complaints involve a client who, in some other way, is unhappy or dissatisfied with their attorney. The fact that the Professional Conduct Committee alone received 2,106 telephone contacts in 1993 regarding information on the complaint process should cause all of us great concern. I believe we must respond to this problem in as many creative ways as we can develop. Each unhappy client contributes to the overall lack of confidence in our profession and the justice system we serve.

In many instances, the client's frustration might be resolved by better informing them of the process in which they are involved as they attempt to find a resolution to the conflict which has brought them to an attorney. In other instances, poor communication or a lack of prompt service may be the source of frustration. And in still other cases, misunderstandings or disputes regarding fees may be the origin of the client's unhappiness.

Recent surveys have shown the public believes lawyers are competent and intelligent. The fact is, most lawyers are capable of providing quality legal services to their clients. What is needed is better lawyer management and organization, more attentive client service, better communication with clients about their ongoing legal matters, a clearly written and carefully explained fee agreement and diligent attention to the client's legal matter so it can be resolved as expeditiously as possible. Recently, I have heard a number of judges expressing frustration with the degree of preparation and organization they observe amongst some members of our Association. This frustration

from the bench is something about which all lawyers should be concerned and carefully evaluate. The practice of law involves many pressures and frustrations, but proper organization and management, timely preparation and regular client communication can avoid a great many problems.

We are attempting to provide members of our Association with as many programs and services as possible to

aid them in the management of their practices, the development of good communication skills and knowledge, and the ability to provide quality legal services to their clients. We are also trying to get out the message, beyond out membership, that the vast majority of lawyers in New Hampshire are honest, hard-working and diligent men and women dedicated to their profession, concerned about their communities and working hard to serve their clients as best as they are able.

The Professional Conduct Committee has recommended to the Supreme Court that our discipline process be opened to the public at an earlier stage. Specifically, the Professional Conduct Committee has recommended proceedings be opened at the point where a determination of probable cause has been made and further proceedings will occur. This recommendation should help prevent frivolous complaints, or complaints by those whose sole motive is to harass a lawyer, from being used in some unrea-

sonable manner to hurt a lawyer's reputation and practice. Opening the process at an earlier stage would provide those accused of misconduct, whose case becomes public knowledge despite the rules of confidentiality, with an opportunity to defend themselves and put forth accurate information about the matter at issue. It would also enable the Professional Conduct Committee to respond to requests in a more informative manner than to simply indicate it has no comment because its proceedings are subject to confidentiality. Finally, it is likely to engender more public confidence in our discipline system.

The matter of professional discipline is never popular except with those who have a bias against our profession. It is always an unpleasant topic for lawyers to consider. However, it is necessary and important that each of us continue to place a high degree of importance on the issues of integrity and professional ethics. During the last year the Professional Conduct Committee has visited almost every county bar association in an attempt to better inform us as to how the committee functions. I urge the committee to continue this very important and helpful process. I also urge each lawyer in New Hampshire to demand the highest level of professional integrity, competence and quality client service from each and every member from our Association. Professional collegiality, traditionally a hallmark of the New Hampshire legal profession, requires respect and trust, as well as consideration and understanding.

PRESIDENT'S PERSPECTIVE

by Jack P. Crisp, Jr.



■ Abramson... from page 1

January to December, 1993 and recently chaired the Governor's Commission on Domestic Violence. While some news reports have focused on the fact that Abramson, a woman, is replacing a man, Judge William J. O'Neil, who resigned August 12th, she says her gender will not be a significant influence in court.

"It shouldn't be," said Abramson, "except that it increases the number of women on the bench. I feel strongly that I cannot point to one instance of discrimination that I have faced as a lawyer in New Hampshire or New York. That is not to say that other

women have not or do not face it. But, I do not approach the job with the attitude that as a woman I am encumbered in any way."

"The experience (chairing the Commission on Domestic Violence) influenced me as a human being. Domestic violence is tearing the fabric of our society apart. The fallout on children results in a repeating cycle of abuse. Boys grow up to be batterers. Girls grow up to be victims. The Commission has recognized the magnitude of the problem and we have accomplished quite a bit in the first year." Due to her judicial duties, Abramson will step down as chair of the Commission, but says she wants to remain involved.

Alcohol Analyses in Blood And Preserved Breath Samples

By Fredric Leipziger, Ph.D.

Expert Witness Qualified
In Over 40 New Hampshire Courts

Free Pick-Up On Blood Samples

ALCOHOL ANALYSIS LABORATORY

317 Elm Street • Milford, NH 03055 • (603) 673-2806

— Certified By The State Of New Hampshire —

Raymond Trombadore, Architect of N.J.'s Modern Legal Ethics System, Is Dead at 72

Activist drew wrath of Bar to create open lawyer-discipline process

By Jim Edwards <mailto:>

New Jersey Law Journal

Raymond Trombadore 1930 to 2002 Photo: Carmen Natale

Raymond Trombadore, a lawyer who devoted himself to raising the legal profession's standards of ethics and who revolutionized New Jersey's attorney-discipline system, died last Wednesday at the age of 72.

Few lawyers are likely to leave a more lasting legacy on the practice of law in the state. "He was one of the most respected ethics authorities in the United States," says state Supreme Court Justice James Zazzali.

Trombadore's influence reached its height between 1988 and 1995, when as chairman of the Disciplinary Review Board, he championed measures that opened to public view the previously confidential secret disciplinary structures for attorneys. In the process, he transformed a slow, backlogged system into a professional operation often held as a model for the rest of the country.

He also drew the rancor of the organized bar. His reforms were opposed tooth-and-nail by the State Bar Association, whose leadership felt that allegations against lawyers should remain confidential until proven.

"Ray advocated certain reforms to the ethics system and incurred the anger and the enmity of people, which was not only totally undeserved but it turned out he was absolutely right from the beginning," says former State Bar President Cynthia Jacob of Collier, Jacob & Mills in Somerset.

"I think at some substantial risk to himself, he carried the charge for reform," said his son, David Trombadore, who has taken over the family law firm, Raymond R. and David W. Trombadore in Somerville. He chanced "being ostracized by the rest of the board, of being opposed, a renegade, rocking the boat."

The battle began in 1993 when a Supreme Court ethics commission - following an American Bar Association commission on similar matters - recommended that the state's low-budget, self-regulated discipline system be replaced by a centralized process. Trombadore was chairman of the ABA body and sat on the state panel.

The proposals were greeted with near apoplexy by the Bar. "It's outrageous," said Joel Kobert, the State Bar president at the time. Kobert, a partner with Courter, Kobert, Laufer & Cohen in Hackettstown, also used a front-page editorial in the Bar's newspaper, *New Jersey Lawyer*, to blast the report days before it came out.

"Our concern . . . is that any changes in the system be a real improvement, not changes that merely centralize power, impose bureaucracies, further delay case resolution, drive up costs, and slander innocent people," he wrote.

In what was widely regarded as an act of retaliation for his ethics stance, the State Bar in 1992 refused to reappoint Trombadore as its delegate to the ABA.

Trombadore presented the ethics panel's recommendations to the state Supreme Court himself. "He made a compelling case," says former Supreme Court Justice Stewart Pollock, now of counsel to Riker, Danzig, Scherer, Hyland & Perretti in Morristown, who watched him argue that day. "When he believed in something, you knew it."

Trombadore got his way. The Supreme Court adopted the recommendations of the ethics commission, chaired by Appellate Division Judge Herman Michels, which called for public airing of a disciplinary matter once a district ethics panel made a finding of probable cause.

When lawyers and judges are accused of ethics violations, the information is published. No longer does the DRB hand down private reprimands. And only on rare occasions do the mainstream media pay attention to ethics charges before a lawyer is disciplined.

The State Bar's principal objection to open discipline - that unproved grievances would become front-page news - never materialized. "The sun is shining, the sky is blue, the leaves haven't fallen yet and doom has not materialized," Trombadore told the *Law Journal* in 1994.

When Trombadore's successor, Lee Hymmerling, a partner with Archer & Greiner in Haddonfield, stepped down as DRB chairman in 2001, he included in his remarks to the board a tribute to the "giant of the law" who had preceded and often disagreed with him: "There were doomsayers who claimed that ill would befall the profession were the process to be opened. It has not happened."

Trombadore's battles were never personal. For that, he earned the respect of those who opposed him. Kobert visited the Trombadore family home in Bound Brook last Thursday, the day Trombadore was buried in a private ceremony. He had been diagnosed with a brain tumor in October 2000. He underwent surgery and chemotherapy but ultimately succumbed to its effects, according to family and colleagues.

"Ray was one of the great, great pillars of the bar," Kobert said. "There's never been an attorney who has contributed as much, in my memory, to the bar. . . . We clashed, but I always had tremendous respect for him."

The admiration of colleagues, even among opponents, was a hallmark of his career. "I think Ray and I clashed the first time we met," recalls William McGuire of Tompkins, McGuire, Wachenfeld & Barry in Newark, another former Bar president. The debate was over a long-forgotten Bar election. "I know we had severe differences of opinion, but over the years I recognized Ray as a man of great intellect and enormous integrity . . . he will be sorely missed."

Although he will be remembered institutionally as an ethics reformer, those who knew him personally noted his legal mind. "Ray was extraordinarily bright intellectually," Kobert says.

David Trombadore recalls a complicated real estate case that had been vexing him for months. It took him about 20 minutes to explain the issues to his father, who mulled it over for a few seconds before suggesting a perfect solution.

"I think what was most impressive about him was, he knew the law, knew it without looking it up, kept everything in his brain without any effort at all," says Linda Klem, his secretary of 28 years. Klem notes that, toward the end of his career, he was often called on to give expert opinions on ethics. He wrote them in one draft, no revisions.

In an article written when he became State Bar Association president in 1986, the *Law Journal* described Trombadore's courtroom style as "aloof" at first glance, but those who knew him, knew better.

"I'm sure he struck many people as arrogant," says David Trombadore. "He wasn't afraid to lock horns. Maybe that's just old school. He wasn't afraid of a good fight." Outside the courtroom, "he was a very laid-back individual, very outwardly calm," says Klem.

In his private life, Trombadore was an opera fan and took regular trips to New York for concerts.

"He had wonderful tickets at the Metropolitan," said Jacob. "And knew it cold, like he knew the law." He was also a wine buff - although he gave that up for health reasons in the 1990s - and he collected antique maps, some of them hundreds of years old. His real priorities, however, were his children and grandchildren, according to Michael Cole of DeCotiis, FitzPatrick, Gluck & Cole in Teaneck. "He always had photographs of his grandchildren. Over the years, you felt you were watching his grandchildren grow through him."

Trombadore was born in Easton, Pa., on Jan. 5, 1930. He was raised in Manville and graduated from Bound Brook High School in 1947, and then Rutgers College in 1951. In 1954, he graduated from the University of Michigan Law School where he met his wife, Ann, whose name also was on the family firm's shingle. From 1960 to 1972 he served as assistant and first assistant prosecutor in Somerset County. He also led a prayer group at the county jail, which earned him the

nickname "preacher-prosecutor" among inmates.

He served on 11 state Supreme Court committees. In 2001, he was awarded the State Bar's Medal of Honor "for significant contributions to improving our justice system."

Date Received: May 13, 2002