New York State Bar Association
One Elk Street, Albany, New York 12207

Committee on
Professional Discipline

Lawyer Discipline in New York

February 10, 1995

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Introduction

A decade has passed since this Committee completed its comprehensive study of the attorney disciplinary system in New York State. The study concluded with the submission of a report to NYSBA's House of Delegates in June 1985 that indicated significant regional disparities in the quality and degree of professional discipline, proposed adoption of certain procedural changes and recommended the creation of a "Statewide Disciplinary Coordinating Board" to achieve greater uniformity among the four departments of the Appellate Division.[1]

Our Committee is again preparing to go before NYSBA's House with the results of a new comprehensive study; and, once again, we are attempting to achieve greater uniformity. But the report which follows is markedly different from the one presented to the House in 1985. This report is the product of three years of

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[1] The proposed Statewide Disciplinary Coordinating Committee was never created and no action was taken on the other recommendations, including a proposal that uniform rules be adopted for all four departments of the Appellate Division.

Part of the difficulty in gaining widespread support for the recommendations contained in the 1985 report may be attributable to the Association's profound dissatisfaction with one of the report's key proposals: that New York State move to a system of public discipline. The debate in NYSBA's House came to focus on that proposal almost to the exclusion of everything else; and, although the balance of the report was approved, approval of the balance seemed like an afterthought. The overall reaction to the report remained generally negative, and little attention was paid to issues other than maintaining the confidentiality of disciplinary proceedings.

intensive study, utilizing a substantially different methodology and reflecting significantly different data. As will be seen, it is also different in both the substance and specificity of its findings and recommendations.

Before turning to those findings and recommendations, we offer a few words about the purpose of our study, the methods we employed, and the organization of this report. We then proceed to discuss the present system and certain proposals which have recently been made to change it.

Our Stated Purpose

The stated purpose of our study was to examine the operation of New York's system of lawyer discipline. We also wanted to know whether that system should be changed and, if so, how those changes could be accomplished.

At the outset, we acknowledged the self-evident proposition that no system is perfect; and that all systems, therefore, theoretically can be improved. However, it was not our intention to recommend changes where there appeared to be no truly significant need. Likewise, it was not our intention to criticize a system for falling short of some merely academic, or only theoretically attainable, goal.

Throughout, we perceived of our mission as far more practical than academic. We wanted to see whether our system of professional discipline could be made to function more efficiently without substantially increasing its cost of operation.

We also recognized that, if our work was to have any chance of being adopted, whatever we recommended had to be both fair and politically feasible. In terms of our mission, it was and is still important not to confuse a concern that recommendations be politically feasible with mere public relations.

Although public relations will perforce play some role in deciding what is feasible, our system of professional discipline should no more be an exercise in public relations than our system of justice itself. While the public's understanding and acceptance of the system is important (and whenever consistent with the interests of justice, we should seek to accommodate the public's reasonable concerns), we should not formulate our procedures to accommodate unreasonable fears and suspicions or to compromise the principle of fairness. Consistent with this view, where considerations of public relations were all that seemed to commend some change that would substantially compromise the principle of fairness, we perceived that the better course was one of educating the public to the reasons for our current modalities and we declined to urge that the change be made.

In the final analysis, this report is intended to focus on improving the dual function of the disciplinary system: to prevent unethical lawyers from causing harm; and to exonerate innocent lawyers from charges of misconduct. The quicker and more efficiently we can do that, the better the public will be served.

Our Methodology

From the beginning of our study, we have shunned the anecdotal approach used by others in commenting upon various systems of lawyer discipline. Any set of stories is, by its nature, highly selective; and, therefore, in any search for the truth, the value of such anecdotes should be substantially discounted as proving little more than the bias of its author.

We have sought to avoid being influenced by preconceptions in selecting a methodology that forces us to examine the actual operation of the system, rather than what we or others perceive it to be. The methodology which we selected was principally grounded in an exhaustive analysis of hundreds of closed files and reported cases, using a uniform search for data and a consistent method of reporting what was found. That analysis was then further elaborated by discussions with staff counsel, grievance committee members and lawyers who regularly represent respondents in disciplinary proceedings.

Much of our work consisted in an examination of 766 cases,

including 541 randomly selected closed files and 225 reported cases of misappropriation handled by the Lawyers' Fund for Client Protection. In this way, we hoped to understand how well the system operated in disposing of its most typical cases and whether or to what extent the system may have operated more effectively to prevent its most serious examples of abuse.

Random selection of the 541 closed files was conducted in the Fall of 1993 at the offices of the State's eight official agencies of professional discipline by an inspection team consisting of five committee members pursuant to orders which we obtained from each department of the Appellate Division.[2] Data sheets were prepared for each file, with the information being tabulated and analyzed for each department.[3]

The 225 cases involving claims made against the Lawyers' Fund for Client Protection were initially reviewed by law student researchers following carefully prepared guidelines. Viewing these cases as the most egregious examples of professional misconduct, we were especially interested in the disciplinary history of the lawyers whose clients had to be compensated by the Fund.

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[2] Copies of the orders obtained from the four departments of the Appellate Division are attached to this report as Appendix A-1 through A-4.

[3] A sample data sheet is attached as Appendix A-5.

One of our subcommittees also reviewed several proposals to reform lawyer discipline generally and New York's system in particular. Among the various proposals studied were the ABA's "Lawyer Regulation for a New Century" (1992), the 1991 report of its Commission on Evaluation of Disciplinary Enforcement (popularly known as the "McKay Commission"), and the ABA's Standards for Disciplinary Enforcement. Additionally, the subcommittee examined a number of proposals advanced by this Committee's 1985 report, as well as some suggestions to change New York's system of lawyer discipline made in the 1980's by then Court of Appeals Chief Judge Lawrence Cooke and Presiding Justice Francis T. Murphy of the First Department.

To the extent that we have thought it appropriate to probe attitudes, we have used surveys. Instead of listening to those few individuals whose interests are sufficiently great to attend a public hearing or submit a written presentation, we have sought the kind of representative response which can only be obtained from a widely distributed survey. Over 1200 lawyers responded to our survey of the Association's General Practice Section; and many of those responding provided written comments in addition to answering the specific questions posed.[4]

Because several of our members are regularly employed as

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[4] A sample of our survey questionnaire is attached as Appendix B-1.

disciplinary counsel (including four of the State's chief counsels), in order to avoid an appearance of conflicting interests or the semblance of parochialism, those members were screened from some of the work of our subcommittees. Although disciplinary counsel were screened from those aspects of the Committee's work that required commenting on their operations, our work has been greatly enhanced by comments and suggestions which they made over the past three years concerning various problems with which they have had to deal. Additionally, our subcommittees benefitted from the observations made by all of the State's chief disciplinary counsel at the Committee's May 1994 annual seminar on professional discipline.

Having carefully examined New York's system of lawyer discipline over the last three years, we believe that our understanding of that system -- its strengths and successes, as well as its shortcomings -- is sufficiently accurate and comprehensive to permit us to make certain recommendations about its future operation. In this spirit, and acknowledging the valuable contributions of those who have gone before us, we hope that the report which follows will provide a basis for constructive change.

Organization of Our Report

The balance of our report is divided into four parts. The first part describes the disciplinary system as it now exists in

New York. We then examine several proposals to change that system, including those recently advanced by the McKay Commission. Next, we present our own findings and recommendations, as well as our reasons for proposing what we now recommend. Finally, we discuss how those recommendations should be implemented and put forth a draft set of uniform rules for consideration by the courts.

The Present System of Lawyer Discipline in New York

To understand the current system of lawyer discipline in New York, it is necessary to recognize that each of the four departments of the Appellate Division maintains its own set of procedures. Although many of these procedures are published as rules of court, a number of matters are left to the highly individualized application of the various disciplinary staff counsel and the courts themselves have evolved certain procedures that are not always clearly expressed in the rules.

Still, regardless of the high degree of procedural diversity, there are certain basic similarities.[5]

Basic Similarities

In all four departments, for example, the Disciplinary Rules

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[5] A table comparing the various procedures used in the four departments is attached as Appendix C-1. A flow chart, illustrating the sequential operation of a departmental disciplinary office in the handling a complaint, is attached as Appendix C-2.

contained in the Code of Professional Responsibility (22 NYCRR §§ 1200, et seq.) provide the substantive standard of conduct which, when violated, will subject a lawyer to professional discipline. Similarly, in all four departments, complaints of misconduct are processed by court-appointed, state-financed, staff attorneys, working with a court-appointed committee of volunteers. All four departments, to varying degrees, relegate complaints of minor misconduct to other committees sponsored by local bar associations. Complaints, in all departments, must be in writing but need not be verified. Staff counsel in all departments also have an initial procedure to reject matters coming to their attention for "failure to state a complaint" (whereupon the putative complaint will be deemed an "inquiry").

In all departments, there are varying procedures for investigating complaints, which generally begin with staff counsel requiring a respondent attorney to answer the complaint in writing. After investigation, all departments have some procedure whereby complaints can be dismissed or files can be closed with some form of decision made in the name of the committee. All departments, except the First (which abolished so-called "letters of caution" in May 1994), have some form of confidential communication to a respondent attorney which does not constitute "professional discipline," whereby the respondent can be "instructed" or "educated" about the ethical implications of his or her conduct and/or "cautioned."

All departments also have some form of confidential sanction which constitutes professional discipline, but does not interfere with the respondent attorney's ability to practice law. In all departments, public discipline (whether in the form of public censure, suspension or disbarment) can only be imposed by order of the Appellate Division.

The vast majority of the matters coming to the attention of staff counsel, in all departments, are dismissed. A large proportion of these matters are dismissed as "FSC" ("failure to state a complaint" that is legally cognizable as professional misconduct even if true) by staff counsel acting alone, without the participation of any committee member.

Some Notable Differences

The disciplinary procedures employed vary widely among the four Departments. Understandably, some of the terminology used to describe those differing procedures will also vary. What is remarkable about New York, is that often the same procedures will be described differently by the various Departments of the Appellate Division and even functionally equivalent agencies of discipline will be known by different names.

For example, until May 1994 (when the First Department abolished them), all four Departments used "Letters of Caution." In the First, Second and Fourth Departments, such letters have

not been considered professional discipline. However, in the Third Department, where there are so-called "Letters of Education" as well as Letters of Caution, the former have been deemed the functional equivalent of Letters of Caution and the latter are considered a form of professional discipline. The Second Department has yet another kind of action which is non-disciplinary in nature; it is the so-called "Dismissal with Advisement," considered somewhat less significant than a Letter of Caution.

Even the names used to describe the official agencies of discipline vary from one department to another. In the First Department, we refer to the "Departmental Disciplinary Committee" as the principal agency of professional discipline; in the Third Department, its functional equivalent is known as the "Committee on Professional Standards"; in the Second and Fourth Departments, there are three district "Grievance Committees" which serve as the principal agencies of discipline in each of those two Departments.

The amount of committee consultation and review also varies widely among the Departments. For example, before formal proceedings may be instituted in the Second, Third and Fourth Departments, the full district committee must be consulted. In the Second Department, the court receives a so-called "confidential memorandum" from disciplinary counsel prior to the

commencement of formal proceedings and the court must approve the filing of a petition charging professional misconduct. However, in the First Department, only one member of the committee need be consulted and the staff is authorized to issue charges without further consultation of the committee or approval by the court.

The procedures on closing files reflect a similar degree of diversity in the amount of committee consultation and review. In the First Department, files are closed by staff counsel with the approval of one member of its committee; and that member, acting alone, can authorize the issuance of a letter of caution or an admonition. In the Second and Third Departments, the concurrence of a majority of the disciplinary committee is necessary to issue a Letter of Caution or an Admonition. In the Fourth Department, chief counsel and the committee chairperson decide on issuing Letters of Caution. Unlike the other three departments, in the Fourth Department, respondents are routinely given an opportunity to address the full district committee prior to the issuance of an admonition.

The multiplicity of disciplinary committees operating throughout the State results in each committee receiving a substantial number of inquiries and complaints that fall within the jurisdiction of other committees and which must then be referred out. Sometimes this is a consequence of the complainant having chosen the wrong forum; other times it is as a consequence

of judicial policy requiring official staff review of all complaints relating to attorney conduct. For example, in the Second and Fourth Departments, all grievances received by county bar association committees (with the sole exception of those received by the Monroe County Bar Association in the Fourth Department) are routinely referred to the professional staff of one of the official district committees. Even if the complaint appears to be nothing more than a fee dispute, by court rule in these Departments, a policy has been established to refer all inquiries to the district grievance committee's professional staff. Upon review, the district grievance committee, in turn, will refer a large portion of these matters to county bar association committees for further processing and investigation. Often a matter that was initially referred to the district committee will be referred back to the same county bar association.

In the First Department, there are so-called "complaint mediation panels" which hear matters that are referred by the departmental disciplinary committee. These panels are operated pursuant to court order by volunteer members of the Association of the Bar of the City of New York, the Bronx County Bar Association and the New York County Lawyers' Association. Other matters, more properly regarded as "fee disputes," are referred to the joint committee on fee disputes for New York and Bronx Counties, consisting of members appointed by the same three local

bar associations. Occasionally, matters that have been referred out to the mediation panels or the joint committee are referred back to the departmental disciplinary committee for further investigation.

In the Second Department, there are a number of local bar association committees (including the respective grievance committees of the Brooklyn, Queens, Richmond, Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland and Westchester Bar Associations), which process hundreds of complaints each year. The authority of these local committees to dispose of the matters which come before them varies within the Department. In the Second and Eleventh Judicial Districts, for example, matters relating to lawyers practicing in the Counties of Kings and Queens can be closed without reference back to the court-appointed district committee. In the Tenth Judicial District, however, the grievance committees of the Nassau and Suffolk County Bar Associations only investigate so-called "minor complaints" and must then report them to the district committee which makes the ultimate disposition.

In the Third Department, relatively few matters are processed by local bar associations. It is estimated that less than 10% of the total number of matters are handled by such associations.

Finally, in the Fourth Department, a substantial number of so-called "minor complaints" are processed by local bar associations. Unlike the other three departments, most of the matters coming to the departmental committee's attention will be processed locally.

Past Efforts at Reform

The recently completed work of the McKay Commission can best be understood in relation to its historical antecedents. How it seeks to change professional discipline is relatively easy to understand when its work is viewed in terms of what had been established ABA policy at the time its recommendations were presented to the ABA's House of Delegates in 1992.

Beginning in 1970, when former Supreme Court Justice Tom Clark chaired a commission to evaluate disciplinary enforcement, the American Bar Association has been examining systems of professional discipline and advocating certain reforms. Following the recommendations contained in the Clark Report, in 1979, the ABA adopted its Standards for Lawyer Discipline and Disability Proceedings. Because this formulation proved unsatisfactory and was not generally accepted by the states, in 1986, it was partially replaced by the ABA's Standards for Imposing Lawyer Sanctions. In 1989, the ABA replaced the balance of its initial formulation when it adopted the Model Rules of Disciplinary

Enforcement.[6] Finally, in 1993, the ABA amended these rules to reflect those portions of the McKay Commission's recommendations that it had adopted in the preceding year.

In essence, not much has changed. The McKay Commission's report did little more than explicate, and then propose to follow, the system first formulated by the ABA in 1979 -- with two significant exceptions.[7] The first exception, relating to a proposed elimination of the confidentiality which presently attends disciplinary complaints in all but one jurisdiction -- was rejected by the ABA's House.[8] The second exception,

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[6] The Model Rules of Disciplinary Enforcement ("MRDE") should not be confused with the Model Rules of Professional Conduct ("MRPC") adopted by the ABA in 1983. The MRPC attempt to define substantive standards of conduct for the profession, while the MRDE seeks to establish the procedural means to determine when those standards have been violated and, ultimately, the level of sanction which should be imposed.

[7] As a result of the McKay Commission's close adherence to the ABA's 1979 standards, virtually all of its major "recommendations" were previously examined by NYSBA's House and, indeed, most of those recommendations were long ago adopted in some form by the various departments of the Appellate Division.

However, two of the ABA's most important standards -- first made ABA policy in 1979 and later followed in the wake of the McKay Commission's report -- have been overwhelmingly rejected by NYSBA's House. The first of these is that there be a single, statewide disciplinary agency; the second is that disciplinary proceedings be opened to the public on a showing of "probable cause." The former proposition was rejected by NYSBA's House in 1985; and the latter proposition was twice rejected, most recently in 1992.

[8] The McKay Commission's report claimed that three jurisdictions (viz., Oregon, West Virginia and Florida) had rules which were consistent with its recommendation to make complaints public upon filing. However, on examination, it appeared that only Oregon had such a system. Both Florida and West Virginia, contrary to what the Commission recommended, maintain the confidentiality of

amalgamating a number of non-disciplinary services currently offered by many bar associations into a single statewide system with a so-called "central intake office," was adopted with little debate.

It is difficult to say whether the lack of debate in the ABA's House on this issue was the product of thoughtful consideration, public relations or just plain relief at having been able to slay the perceived dragon of what the McKay Commission styled a "fully open" system. The fact remains that, despite the absence of debate by the ABA's House, there are still significant differences of opinion on the advisability of a "central intake office" that would meld all ancillary services with the system of lawyer discipline. The issue, simply put, is whether the concept would better serve the public.

Two quotations seem to capture the fundamental difference of opinion. On one side, we hear the McKay Commission's report, speaking of the large number of disciplinary complaints that are dismissed, and urging that the system do more than simply close its file when there appears to be no basis for discipline:

> "These complaints are dismissed because they do not allege ethical violations. Yet in many of these cases, while the lawyer's conduct may not have been unethical, the complaint

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complaints until there has been a determination of their validity.

deserves attention and response." [9]

On the other side of this very polite debate, we hear such comments as:

> "Adopting a 'get-tough policy' ... not only overloads the system so that it cannot operate efficiently, but it makes dross the true meaning of professional responsibility." [10]

Few lawyers active in the organized bar doubt the wisdom of providing alternative means to resolve fee disputes and claims of malpractice. Nor is there any argument against the proposition

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[9] Report of the ABA Commission on Evaluation of Disciplinary Enforcement, February 2, 1992.

This comment has found considerable support among the leaders of the New York bar. Some, not only want to see ancillary services melded to the disciplinary system, but have urged so-called "proactive" enforcement policies:

> "While reform of New York's disciplinary systems is not a panacea for the many troubles besetting lawyers and the legal system, strong, effective and proactive enforcement of the Lawyer's Code is vital to restore the public's faith in the integrity of lawyers." Haliburton Fales, 2d, Memorandum to NYSBA Executive Committee, May 14, 1993.

[10] George E. Bushnell, then ABA President-Elect Nominee, as reported in the June 7, 1993, edition of the National Law Journal.

Mr. Bushnell went on to say:

> "Professional conduct violations that harm clients, the public or the judicial system should not be ignored. But [I question] the wisdom of disciplinary proceedings that: merely second-guess a lawyer's judgment; equate negligent malpractice with substantive violations of ethics codes; are based on the lawyer's lifestyle; involve subjective determinations but no probative evidence of violations; or involve no harm. Those disciplinary proceedings have absolutely no place in the life of our profession. * * * Their inclusion ... leads those who are most affected, the practicing lawyer, to correctly identify the system as an ass."

that lawyers should be able to receive such support services as substance abuse counseling. In New York State, for example, we already have established alternative procedures for the resolution of fee disputes in many counties[11]; complaint mediation is also available in some areas; and NYSBA maintains a full-time staff to deal with substance abuse, coordinating its efforts with those of local bar associations.

Rather, the concern is that combining the means to resolve such matters in a single system will lead to overuse of the disciplinary process; blur important distinctions between the various kinds of conduct; and, inevitably, prove to be an administrative burden on both the profession and the public, while diminishing the court's ability to deal with truly significant conduct.

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11 As is typical of New York State, the various departments of the Appellate Division have adopted dissimilar policies with respect to the handling of non-matrimonial fee disputes. In the Second Department, for example, it has long been the Appellate Division's policy to insist that all complaints and inquiries relating to a lawyer's conduct be referred to one of its three district grievance committees; if the matter is to be referred to another body, that decision must be made by the grievance committee staff. In the First Department, fee disputes may be filed directly with the Joint Committee on Fee Disputes and Conciliation operated jointly by the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association. There is no similar facility in the Third Department although, since 1991, its rules have required that fee disputes be referred "back to the county bar association for resolution." In the Fourth Department, the policy varies among its three district committees, with certain bar associations being accorded greater autonomy than others.

Inspection of Closed Files

Approximately 90% of all complaints are closed without any action being taken against the respondent attorney. In terms of sheer volume, most of the work of the disciplinary committees is represented by closed files to which the public has no access.

Thus, in order for our Committee to understand how the system operates in the vast majority of cases, it was essential for us to examine those files which had been closed without any form of public discipline being imposed. To do this it was necessary for us to obtain orders permitting the Committee to undertake the inspection.

After obtaining orders from each of the four Departments, we assembled an inspection team. The team consisted of five attorneys: David N. Brainin, Jay C. Carlisle, Jan Kevin Meyers, Suzanne G. Parker and Suzanne Warshavsky. To avoid any suspicion of regional bias or self-interest, none of the inspection team served as members of, or counsel to, the committees whose files were to be examined. At considerable personal sacrifice, each of the five attorneys agreed to put all other matters aside so that the team could complete its work as scheduled.

The team then met to establish procedures that would assure

strict compliance with the terms of the orders; the securing of meaningful data; randomness in the process of file selection; fairness and consistency in evaluating the files selected; and sufficient documentation of the procedures followed.

Once the inspection team had determined what it needed and the time required to obtain it, notice of the dates selected for the inspections was given to each of the chief counsels so that appropriate arrangements could be made. Over a period of three months, the inspection team visited all eight district offices of the Appellate Division's system: beginning with Buffalo, then Rochester, Syracuse, Albany, Syosset, White Plains, Brooklyn and Manhattan.

The files that were made available, and from which the team selected a predetermined number at random on the date of their inspection, included all files closed during the three year period ending December 31, 1992. To obtain a statistically valid sample, it was decided that the team would examine at least 5% of the files closed in each of the three years under review. To assure sufficient documentation and consistency in evaluation, a uniform data sheet was prepared for each file. Further efforts were made to make certain that each inspector did no more than his or her predetermined share of the work.

When the team's inspection was completed, it had prepared

data sheets on 541 closed files. Those data sheets were then analyzed and the statistics which they contained extrapolated for this portion of our report.[12]

Our statistics have been arranged in two parts. The first part is a summary of the on-site inspections conducted at each of the eight district offices, presented office-by-office. It indicates the date of the inspection, the number of files inspected, and the information developed in the course of that inspection. The second part consists of a set of eight tables which compare the statistics developed for each of the district offices to one another. Tables I and II provide a comparison of the "average time to respondent's answer" and "average time to file closure," with bar graphs illustrating these statistics. Tables III and IV present additional information relating to the subject matter of the complaints and the respondent attorneys' areas of practice. Illustrating Tables III and IV are two pie charts which present the same data in a form facilitating comparison. The four remaining tables contain the balance of the statistical information developed in the course of the inspections.

In completing their data sheets, the members of the

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[12] A statistical analysis of our Committee's file inspection is attached as Appendix A-6. The analysis first sets forth the data obtained from each of the Appellate Division's eight district offices and concludes with eight tables comparing the data obtained from each of those offices.

inspection team frequently wrote detailed comments about what they had found. These comments afforded perspectives on the system which did not readily lend themselves to the kind of numerical formulation employed in other portions of the data sheets. Despite their considerable value, because of the sheer volume of these comments, they have not been reproduced with this report. However, consistent with the purpose underlying the Committee's inspection of closed files, all of the data sheets, together with their accompanying comments, will be made available to the respective departments of the Appellate Division for whatever use the courts may deem appropriate.

Beyond the numbers, some observations and conclusions seem worth stating.

First, the system is working; and it generally works well most of the time. Overall, three-quarters of the files examined were found to be impeccable. This is an exceptionally high mark when one considers the completely random nature of the inspection and the intense scrutiny to which the files were subjected. Also, it should be remembered that these files were not prepared for our inspection. Nor, for the most part, were these files intended to be viewed by anyone other than staff counsel when they were originally prepared.

Second, in practice, the system is not as slow as folklore

would suggest. Statewide, seven weeks was the average time from the initial filing of a complaint until the respondent attorney answered it. Six months was the average time from the filing of a complaint until the file was closed. The time within which complaints are answered is critically important because, in many cases, it is only then that staff counsel can assess the relative importance of the matter. The significance of the amount of time required for closure reflects upon the need to create a more efficient and responsive system.

Third, the system also seems to be producing correct decisions. Overall, in only two percent of the cases examined did the inspection team find clear reason to disagree with the result. Even when we combine the percentages of disagreement and apparent inaccuracy, no department had more than a scant seven percent rate of error. These are remarkably low percentages of error, whether compared with the percentage of reversals in civil litigation or the frequency of vacatur in administrative proceedings. In fairness to the record of our inspection, however, it should be observed that the percentage of error in disciplinary matters may be somewhat higher than the percentages we recorded, because 23% of the files examined by the inspection team were either "unclear" or "incomplete."

Areas Warranting Improvement

There are obviously areas that could use some improvement.

The principal problem areas found by the inspection team relate to: (1) time in process; (2) lack of documentation; and (3) recidivism. Although solving a significant portion of these problems would obviously require a far greater allocation of resources to the system than currently exists, some aspects could be substantially improved by changes in procedure.

Time in Process

While considerably better than popular myth would have it, the time required to close a file is still too long. Since the closed files that we examined related to matters which did not result in formal proceedings; and, except for a very few cases, no discipline of any kind was imposed, the average time of six months to closure is not impressive.[13] Another way of looking

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[13] In this connection, it will be observed that the ABA Standing Committee on Professional Discipline is proposing to amend the comment to Rule 11 of the MRLDE. The proposal (first suggested by the National Organization of Bar Counsel) is equally unimpressive. If adopted, it would establish non-binding "guidelines" for various stages of proceedings as follows:

> "Evaluation, investigation, and the filing and service of formal charges or other disposition of routine matters generally should be completed within six months; complicated matters generally should be completed [i.e., ready to proceed to a hearing, if required] within twelve months. The period from the filing and service of formal charges to the filing of the report of the hearing committee generally should not exceed six months. The period for review by the board generally should not exceed six months. Thus, overall time periods generally should not exceed the following: eighteen months for routine matters that are reviewed by the board and twenty-four months for complicated matters that are reviewed by the board." Memo., ABA Center for Professional Responsibility, August 2, 1994

at this statistic is to say that, on the average, it took the system six months to exonerate a lawyer who had been falsely accused of misconduct.

Establishing temporal limitations for certain phases of the disciplinary process has been suggested by several authorities as a way to assure both expedition and consistency. For the moment, we want to consider what has recently been done in this regard to obtain some perspective on the amount of delay which other systems have accepted as tolerable.

In July 1994, for example, the Supreme Court of New Jersey reluctantly approved so-called "time standards" for its disciplinary system that are significantly faster than what our inspection team found has been our experience in New York. The New Jersey standards are divided between those which apply to "minor misconduct matters" and those which apply the more serious

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In July 1993, a similar, albeit not identical, set of guidelines had been prepared by a NOBC liaison committee consisting of five bar counsel, chaired by the director of the New Jersey Office of Attorney Ethics. It had suggested the following guidelines:

> Investigative Time: 6 months (standard cases);
> 12 months (complex cases)
> Hearings: 6 to 9 months in all cases
> Appellate Review: 6 months in all cases
> Overall Time Periods:
> 12 Months - standard cases without appeal
> 18 months - standard cases with appeal
> 18 months - complex cases without appeal
> 24 months - complex cases with appeal

"disciplinary matters."

Matters relating to minor misconduct are divided into four phases: (1) investigations, which are to be completed within three months of the "docketing of a written grievance"; (2) hearings, which are to be completed within three months "from the expiration of the time for filing an answer to the formal complaint"; (3) intermediate appellate review, which is to be completed within three months of "the docketing by the Disciplinary Review Board"; and (4) final discipline, whereby the standards provide, "all ... matters reviewed by the Supreme Court ... and Order ... imposing final discipline should be issued ... within six months from the date of docketing by the Office of the Clerk of the Court." [14]

More serious cases are likewise divided into the same four phases. However, each of the phases is to be completed within six months.[15]

The New Jersey Supreme Court's statement of approval is worthy of note:

> "[The Court] believes ... that many of the time periods provided are too long. Nevertheless, while it accepts the

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[14] Administrative Determinations Relating to the 1993 Report of the New Jersey Ethics Commission, Supreme Court of New Jersey, July 14, 1994, Recommendation No. 6, p. 28.

[15] Id., Recommendation No. 5, p. 26.

> recommendations at the present time, the Court urges District Ethics Committees ... to devise practices and procedures that will result in faster dispositions."[16]

Another method of decreasing the time needed to dispose of complaints would be to require more frequent meetings of the various committees and their members. The effect would be to accelerate the time between which decisions are made. Whether this is feasible may necessitate each committee examining its meeting schedule and assessing the appropriateness of retaining those members whose commitments are such as to preclude increasing their active participation in the work of the committee.

In the short term, it does not seem advisable to require more frequent committee meetings by court rule, thereby imposing a judicially created uniform standard on the several committees' volunteers in all departments. Given the diversity of geography and the evident differences in the logistical difficulties confronting those volunteers, caution is recommended; and, as now proposed, the uniform rules would make no explicit change in the frequency with which the committees presently meet.

Documentation

In most cases (75%), the files which the team inspected contained a clear history of the matter examined and the report

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[16] Id., p. 27.

or recommendation to the committee appeared to be both accurate and informative. As elsewhere noted, there were very few instances (2%) where the inspection team disagreed with staff counsel's recommendation to the committee; and, in many instances, the staff's recommendations were praised for their excellence. Nevertheless, a significant minority of the files reviewed (about 23%) were considered to be lacking sufficient information regarding the basis of the decision and were otherwise deemed inaccurate or incomplete.

There are several ways of addressing this problem. But, before an appropriate solution can be found, there must be some sense of proportion and priority, as well as a recognition that the proverbial cure may turn out to be worse than the disease. In other words, to some extent, solving the problem of documentation may create so much procedural red tape as to slow significantly the process of disposition. It is, therefore, necessary to strike an appropriate balance to avoid unreasonably burdening the staff while assuring a sufficient degree of documentation to afford meaningful oversight and review.

The most effective solution would seem to require developing a set of standard forms for file management and documentation. Such forms could eventually be incorporated in an appendix to the uniform rules and revised from time to time in consultation with staff counsel.

Recidivism

Roughly one-third (31%) of the files reviewed by the inspection team contained complaints about attorneys who had previously been the subject of some grievance or complaint.[17] In many instances, files referred to a history of prior complaints having been made against the respondent, but there was no indication of what the prior complaints had been about or how those complaints were resolved. The absence of a clear understanding of the respondent's history made it virtually impossible to determine whether or to what extent that history should be, or was in fact, deemed by the staff to bear on the investigation of the then current complaint.

In each department, the inspection team found that a substantial number of grievances were resolved without notifying

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[17] The inspection team found that there were certain kinds of complaints which occurred far more frequently than others; and, further, that there were particular areas of practice which seemed to be the subject of complaint far more frequently than other areas of practice.

The most frequent complaint received concerned allegations of malpractice or neglect, accounting for 45% of the complaints on a statewide basis. Fee disputes were a distant second, accounting for about 11% of the complaints. No other category of alleged misconduct accounted for a significant percentage.

Attorneys engaged in domestic relations matters were the subject of more complaints than those engaged in other areas of practice (23%); followed by attorneys engaged in real estate transactions (16%); then criminal defense work (13%); and, finally, personal injury or negligence practice (11%). No other area of practice accounted for 10% or more of the complaints.

the respondent attorney or undertaking any investigation. These files were closed because staff counsel found that the grievances did not allege facts which, if true, would constitute professional misconduct or because they did not involve persons who were subject to the jurisdiction of any disciplinary committee in New York State. Among these files, the inspection team found a number of instances in which it believed that some investigation might have been warranted.

Also, because no permanent record or compilation of these closed files is maintained, it is conceivable that an attorney could have been the subject of numerous grievances and yet that attorney, as well as the disciplinary authorities, would remain blissfully ignorant of those grievances. This practice may have the unintended consequence of reenforcing conduct which should be corrected: patterns of behavior which, if left uncorrected, may lead to more serious breaches of proper deportment and ultimately result in actual misconduct. It is suggested that there may be some instances where the respondent attorney should be advised of the existence of a grievance notwithstanding early closure of the file.

By virtue of the large number of files that are closed at this early stage (accounting for 60% of the files inspected in two of the eight offices and averaging 45% across the State) and to reduce the possibility that some files will be closed without

sufficient investigation, it was also suggested that consideration should be given to developing a procedure to require one or more committee members to review staff counsel's recommendation before closing a file.

Review of Lawyers' Fund Cases

Another subcommittee reviewed cases involving certain attorneys whose clients were compensated by the Lawyers' Fund for Client Security.[18] The primary purpose of this review was to see whether there were any early warning signs of the problems to come. Was there something in the disciplinary history of these attorneys which would signal the kind of dishonesty that led them to cause the losses which the Fund ultimately had to make good?

A total of 225 cases identified by the Lawyers' Fund for Client Protection were reviewed. Of that total, 41 cases revealed a prior disciplinary history on unrelated charges.

The number of cases in each department was as follows:

First Department: 62 cases, with 13 (or 22%) having a prior

[18] A list of the most recent cases reviewed (covering the years 1990-1993) is attached as Appendix D. The cases are grouped under the district or departmental committee which handled the last reported decision involving the respondent lawyer.

disciplinary history on unrelated charges.

Second Department: 118 cases, with 21 (or 18%) having a prior disciplinary history on unrelated charges.

Third Department: 18 cases, with eight (or 44%) having a prior disciplinary history on unrelated charges.

Fourth Department: 27 cases, with only one (or 4%) having a prior disciplinary history on unrelated charges.

The average number of cases with disciplinary histories for all the departments combined is 19%. Even allowing for the wide variation between the Third and Fourth Departments, this is a significant statistic.

Still, when evaluating these statistics, it is important to bear in mind that, where disbarment is based on either a felony conviction or resignation, it is unusual for the court to discuss the attorney's unrelated disciplinary history; therefore, the record of such cases often will not reveal past misconduct. In this connection, we note that the 225 cases examined include a high percentage of cases involving disbarments based on felony convictions or resignations. Indeed, of the total 225 cases examined, 114 (or 51%) were based on conviction of a felony or resignation. Of the 114 cases, 59 were based on resignations; of

these 59 cases, the court's decision in 53 (or 90%) did not mention any prior disciplinary history. Again, of the 114 cases, 55 were based on felony convictions. Of this last group of 55 cases, in 39 (or 71%) of the cases, the court did not mention any prior disciplinary history. Thus, of the total 114 cases, the court did not discuss (or appear to have reason to discuss) the respondent's prior disciplinary history in 92 (or 81%) of the cases.

Because 41% of the cases examined which do not contain any reference to a respondent's disciplinary history involved grounds for disbarment that would not ordinarily contain such references, the overall average of 19% should probably be increased substantially. Thus, to provide a more realistic assessment of the percentage of cases that involved attorneys with some significant disciplinary history, we would factor out those cases where the court's decision is inconclusive on the issue. This would leave 31% of the total examined (225 - 92 = 133 ▸ 41/133 = 31%) as reflecting some significant disciplinary history.

The statistics suggest a need for further study. As previously noted, our review of the Lawyers' Fund cases was limited to published decisions; and our inspection of closed files was circumscribed by a process of random selection. Another inspection, specifically targeted at the closed files of attorneys whose misconduct led to action by the Lawyers' Fund,

might prove useful in identifying early warning signs of serious trouble to come.

Survey of Lawyer Attitudes

One of our subcommittees developed a survey to collect information about the profession's attitude toward various aspects of New York's system of lawyer discipline. The questions were designed principally to probe several areas of concern: (1) the profession's general familiarity with the system; (2) its attitude about reporting misconduct; (3) its confidence in the several official agencies of professional discipline; and (4) its perception of the system as an effective means for the regulation of lawyer conduct.

In order to secure a representative sampling of New York lawyers in different geographic areas, kinds of practice and law firm structures, the survey was mailed to all 4,800 members of the Association's General Practice Section. A survey conducted in 1992 had established that the Section's composition closely resembled the general composition of the profession in New York State.

The rate of response to the survey was slightly better than 25%, with 1,208 attorneys responding. The completed surveys were then divided, based on postmark, into groups corresponding to the eight departmental disciplinary committees, with an additional group for questionnaires returned from out of State or which contained no postmark. Although the response rate differed among the various judicial districts, the number of responses from each district were more than ample to provide a fair representation of attitudes in that district.[19]

Summary of the Findings

The survey reveals that a majority of lawyers prefer to avoid <u>any</u> involvement with the disciplinary system -- whether as a complainant, witness or respondent -- and that a large percentage of lawyers are unfamiliar with the process.

A majority of the lawyers responding to the survey agree that the disciplinary system is an effective means of regulating the profession, but most believe that the process is too slow and that substantial improvements to the system are necessary.[20]

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[19] A comparison of the percentage of the survey sample obtained from each judicial district to the percentage of the General Practice Section's total membership in that district is submitted herewith as Appendix B-2.

[20] A detailed analysis of the substance of the responses received is submitted herewith as Appendix B-3. Also submitted herewith as Appendix B-4 is a selected sampling of the comments that we received.

Analysis of Specific Responses

The four principal areas of concern were addressed by both responses to a group of detailed questions and specific comments volunteered by those answering the questionnaire. To a considerable extent, the comments served to elucidate important issues which could not be fully addressed by the questions.

Familiarity with the Disciplinary Process

One comment that "the system is a mystery for most attorneys" is confirmed by the data collected. A significant number of respondents indicated an inability to answer some of the most rudimentary questions about the operation of the system and its component parts.

For many, the respondents' general unfamiliarity with the system was summed up by the comment, "Please note that the responses provided were largely of the 'no opinion variety' because given by an attorney who has never had any kind of experience with the disciplinary system (and, of course, hopes never to be in the uncomfortable position of having to bring a colleague up on charges or certainly being the subject of a disciplinary investigation)."

Reporting Misconduct

The data collected also indicates that New York lawyers are reluctant to complain about their colleagues. While this

conclusion is in no way remarkable (and fully consistent with the attitude of lawyers elsewhere), the reasons advanced for their reluctance to file disciplinary complaints is deserving of attention.

One of the principal reasons advanced for their reluctance to file a complaint is the fear of retaliation. A majority (54%) of the survey's respondents believed that a complaint about another lawyer is likely to result in some form of direct retaliation; only 11% of those responding strongly believed that retaliation is unlikely.

A large number of those responding to the survey were discouraged from reporting misconduct by the perception that the filing of a complaint would involve them in a very time-consuming process. This belief was held by almost two-thirds of those responding, with another 16% indicating that they were uncertain as to the amount of time that would be required.

Peer pressure is another factor militating against reporting misconduct. One lawyer's opinion that "no one likes a 'whistle-blower' or a "fink," was shared by half of those responding, who agreed that the filing of a complaint would be considered inappropriate by their colleagues; only 16% expressed a strong opposing view. A number of lawyers said that those involved should attempt to work out any problems informally or seek the

assistance of a judge, especially in smaller communities.

Conduct of Committee Members

In general, those responding to the survey expressed the view that the individuals who comprise our various disciplinary committees make an effort to fulfill their responsibilities fairly. A large majority of those sampled (72%) agreed that the committee members take their responsibilities seriously and are fair; only 8% held a contrary view; and, of that number, only 3% felt strongly (2% expressed no opinion).

A significant number of lawyers appear to believe that there is something of a prosecutorial bias among committee members, as only half of those responding to the survey expressed the view that committee members are more concerned with doing justice than punishing lawyers charged with misconduct. A contrary view was expressed by 19%, with 30% having no opinion.

Slightly less than half of those responding expressed the view that committee members were familiar with realities of modern practice; 26% disagreed; and 28% expressed no opinion.

Those expressing any view as to whether committee members are biased in favor of lawyers who practice in large firms, were evenly divided (29% believing that such bias exists; 33% holding a contrary view, with 17% in each category expressing some

uncertainty). Only 16% strongly believed that committee members do not entertain such bias.

There was a similar division of opinion regarding the committee members' willingness to impose significant sanctions.

The written comments which referred to this portion of the survey were overwhelmingly negative. A number of such comments complained about the staff's apparent lack of "experience" in private practice and/or knowledge of the areas they were called upon to investigate.

Responsiveness of the System

While a majority of those responding expressed the view that complaints of misconduct would be handled promptly, there is a definite perception that the process moves too slowly. Almost two-thirds of the sample believe that the process is time-consuming; 56% believe that it takes too long to exonerate innocent lawyers, while 41% think that the process takes too much time to punish misconduct.

Effectiveness of the System

Just slightly less than two-thirds of those responding agreed that New York's disciplinary system provides an effective means to regulate lawyer misconduct; 10% strongly disagreed and only 22% expressed the view that malpractice litigation might

provide a more effective means of regulating the profession.

However, a majority of those responding thought that the system needs to be substantially improved before it can enjoy the confidence of lawyers. The functional relevance of such an attitude lies in its adverse effect on the willingness of lawyers to become involved in the process as complainants or witnesses.

Relevance of Findings

The attitudes reflected by the survey are particularly revealing of a need to change the way the system is perceived by the profession. Because lawyers generally know what kind of conduct should be expected of counsel and are better situated to appraise the performance of their colleagues than those untrained in the standards of the profession, their willingness to report misconduct is essential to the disciplinary system. Whether or to what extent such reports are made is in large measure a reflection of the profession's attitude toward the system and their confidence in its capacity to deal promptly, effectively and fairly with such matters as are brought to its attention.

Statistical Correlation of Resources and Caseloads

Much has happened to the system of lawyer discipline in New York during the last 10 years. The number of lawyers disciplined has risen, as have the resources dedicated to the system and the State's lawyer population. Yet, the rise in the number disciplined varies significantly among the four departments of the Appellate Division; and, apparently, this variation bears little relationship to the amount of resources allocated to the departments or the growth in their respective lawyer population.

In the First Department, for example, the number disciplined has increased by 40% (viz., 162:226); in the Second Department, it is up by 49% (viz., 312:463); in the Third Department, it has jumped by 139% (viz., 81:193); and, in the Fourth Department, the increase is an astounding 400% (viz., 31:152).

If we attempt to analyze these increases in the number of lawyers disciplined as reflecting a general increase in lawyer population, we find little statistical correlation except in the First and Second Departments. In the First Department, the number disciplined is slightly ahead of its growth in lawyer population, while that number in the Second Department is just slightly behind its growth in lawyer population. There is, however, no significant relationship between the numbers disciplined in the Third and Fourth Departments and their

respective growth in lawyer population. Thus, we see that, while the lawyer population of the State has increased 41% over the last 10 years (from 69,830 to 98,142), the growth in each department is as follows:

Dep't	1984	1993	% Increase
1st	38,883	52,803	36
2nd	19,015	29,005	53
3rd	4,814	6,624	38
4th	7,118	9,710	37
Total:	69,830	98,142	

There is even less correlation between the number of lawyers disciplined and the amount of resources allocated among the various departments of the Appellate Division. Thus, analyzing the amount of resources allocated in dollars (unadjusted for inflation), we see the following:

Dep't	1984	1993	% Increase
1st	$1,129,970	$2,157,953	91
2nd	1,048,096	2,703,302	158
3rd	276,076	599,539	118
4th	517,238	1,029,337	99
Total:	$2,971,380	$6,490,131	

Adjusting these dollar amounts for inflation (at 140.3, using 1984 as the base year), only the First Department seems to bear a close relationship to the increase in the number of lawyers disciplined. In the Third Department, where resources have been increased by slightly more than half, the number of

lawyers disciplined has almost trebled; and, in the Fourth Department, where resources have been increased by only 42%, the number disciplined has increased fourfold.

Dep't	1984	1993	% Increase
1st	$1,585,348	$2,157,953	37
2nd	1,470,479	2,703,302	84
3rd	387,335	599,539	55
4th	725,685	1,029,337	42
Total:	$4,168,847	$6,490,131	

Attempting to analyze the increase in the number of lawyers disciplined in terms of the growth in disciplinary personnel does not offer significantly better correlations:

Dep't	1984	1993	% Increase
	Atty : Non-Atty	Atty : Non-Atty	
1st	12 : 20	20 : 23	67 : 15
2nd	14 : 10	21 : 21	50 :110
3rd	3 : 4	5 : 8	67 : 50
4th	4 : 10	7 : 12	75 : 20
Total:	33 : 44	53 : 64	

Comparisons between the number of complaints received during the relevant periods reflect even less correlation:

Dep't	1984	1993	% Increase
1st	3,011	2,782	(8)
2nd	2,303	4,049	76
3rd	662	1,467	122
4th	2,084	2,060	(2)
Total:	8,060	10,358	

Thus, we see that the number of complaints received in the First and Fourth Departments have actually decreased. Only the Third Department statistics bear a close relationship between the increase in the number of lawyers disciplined (up by 139%, from 81 to 193) and the number of complaints received (up by 122%, from 662 to 1,467).

Comparing the lawyer population to the number of complaints received in each department produces the following results:

Dep't	1984	1993	% Compl/Lawyer
	Pop/Comp	Pop/Comp	1984/1993
1st	38,883/3,011	52,803/2,782	7.74/ 5.34
2nd	19,015/2,303	29,005/4,049	12.11/13.76
3rd	4,814/ 662	6,624/1,467	13.75/22.15
4th	7,118/2,084	9,710/2,060	29.28/21.22

Comparing the number of lawyers disciplined to the lawyer population in each department produces the following results:

Dep't	1984	1993	% Disciplined
	Pop/Disc	Pop/Disc	1984/1993
1st	38,883/162	52,803/226	.42/ .43
2nd	19,015/312	29,005/463	1.64/1.60
3rd	4,814/81	6,624/193	1.68/2.91
4th	7,118/31	9,710/152	.44/1.57

Comparing the number of lawyers disciplined to the number of complaints in each department produces the following results:

Dep't	1984	1993	% Disciplined
	Disc/Comp	Disc/Comp	1984/1993
1st	162/3,011	226/2,782	.054/.081
2nd	312/2,303	463/4,049	.135/.114
3rd	81/ 662	193/1,467	.122/.132
4th	31/2,084	152/2,060	.015/.074

On the basis of the foregoing statistics, one can conclude that the increased discipline in the First and Second Departments has been roughly equivalent to the growth in their respective lawyer populations. But, in the Third and Fourth Departments, where the growth in the number of lawyers disciplined has been many times that of the growth in their respective lawyer populations, we must look to other factors.

In the Third Department, the factor which bears the closest relationship to its increase in discipline is the number of complaints received; and, indeed, that factor alone could logically account for the increase in discipline.

However, in the Fourth Department, its increase in discipline bears no relationship to the number of complaints received. The latter figure has actually decreased slightly. Although the amount of resources allocated to the Fourth Department has been enhanced, it is in proportion to the increases accorded the other three departments. So, in the final analysis, we are left to conclude that the reason for an increase

in the number of lawyers disciplined in the Fourth Department, is simply a stiffened resolve to deal more decisively with professional misconduct.

Comparing the number of complaints received with the dollar amounts allocated to each department is also interesting. First, we state those numbers unadjusted for inflation and then correct for inflation as indicated below.

Dep't	1984	1993	%$/Comp
	$(unadj)/Comp	$(unadj)/Comp	1984/1993
1st	1,129,970/3,011	2,157,953/2,782	91/(8)
2nd	1,048,096/2,303	2,703,302/4,049	158/76
3rd	276,076/ 662	599,539/1,467	118/122
4th	517,238/2,084	1,029,337/2,060	99/(.1)

Adjusting for inflation, the following results:

Dep't	1984	1993	%$/Comp
1st	1,585,348/3,011	2,157,953/2,782	37/(8)
2nd	1,470,479/2,303	2,703,302/4,049	84/76
3rd	387,335/ 662	599,539/1,467	55/122
4th	725,685/2,084	1,029,337/2,060	42/(.1)

From the foregoing figures, allowing for inflation, it appears that only the Second Department's allocation bears some relationship to the number of complaints which it receives. Allocations to the First Department have increased by 37%, while the number of complaints it processes has fallen by 8%. Allocations to the Fourth Department have increased by 42%, while the number of complaints it processes is down by a tenth of one

percent. In the Third Department, although the number of complaints it processes is up by 122%, its allocation has increased by only 55%.

As of 1993, the First Department, maintaining only one office in Manhattan, handled 27% of the State's 10,358 complaints and received 38% of the State's $6,490,131 disciplinary dollars; the Second Department, maintaining three offices located in Brooklyn, Syosset and White Plains, handled 39% of the complaints and received 36% of the disciplinary dollars; the Third Department, maintaining one office in Albany, handled 15% of the complaints and received 9% of the disciplinary dollars; and the Fourth Department, maintaining three offices located in Buffalo, Syracuse and Rochester, handled 19% of the State's complaints while receiving 17% of the system's disciplinary dollars.[21]

Lawyer population obviously cannot be regarded as the sole determinate of how disciplinary resources ought to be allocated. Other factors, most especially the way in which lawyers are organized (whether in large or small firms and the amount of

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[21] A graph comparing the relationship of the disciplinary funds allocated to each department with the number of complaints received by that department during the years 1984 and 1993 is attached as Appendix E. The percentages are set forth in relation to the statewide total funds and complaints for the indicated periods. It will be observed that, while the percentage of funds allocated to each department has not changed over the last ten years, the percentage of complaints handled by each department in 1993 differs significantly from the percentage of complaints which it handled in 1984.

internal control to which they are subject) as well as the nature of their practice and the extent to which that practice involves personal contact with their clients, seem to play a far more significant role in making demands on the disciplinary system. Government lawyers, for example, because of the nature of their "clientele," are rarely in a position to generate complaints of misconduct. So, too, lawyers employed by large institutions generally lack the client contact that underlies the kind of grievances that are handled by the disciplinary system.

Viewing the caseload data over a ten year period, the limited relevance of lawyer population in assessing the need for disciplinary resources becomes clear. By way of illustration, although the lawyer population of the Second Department is only three-fifths the size of the First Department, in 1993 the Second Department received a third more complaints. In terms of the comparative seriousness of those complaints, over the years through 1993, the Second Department originated more Lawyers' Fund cases (118) than all of the other three departments combined (107); and more than twice the number of such cases than the First Department (62).

It is unfortunate that the four departments have been compelled to play a kind of zero-sum game, in which a relatively meager amount is allotted to the disciplinary system and then divided among the departments by a formula that has not

been adjusted over the years to reflect periodic variations in their respective caseloads. One solution would be to give the Appellate Division access to the surplus generated by the biennial registration fee, a huge surplus that is presently controlled by the Attorney Licensing Fund and regularly diverted from the fee's intended purpose to the State's General Fund.[22]

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[22] Frederick Miller, Executive Director of the Lawyers' Fund for Client Protection, has recently estimated that of the $21.5 million generated by the registration fee last year, no more than $15.7 million from the Attorney Licensing Fund was used to finance "profession-related programs." The difference between the $21.5 million generated and the funds used on profession-related programs (including the Lawyers' Fund and the disciplinary system) is the "surplus" that is regularly diverted to the General Fund. As Mr. Miller has observed, in addition to the $21.5 million raised by the biennial registration fee, the State Board of Law Examiners (whose operations are fully financed by ALF) also generates approximately $3 million which sum is similarly turned over to the General Fund.

Proposed Uniform Rules for Professional Discipline

In September 1994, as part of this Committee's annual report, we issued a draft set of uniform rules which had been prepared by one of our subcommittees. As the annual report explained:

> "The draft * * * is by no means final and is very much a work in process. It is being circulated with our report this year in order to move us farther along the path toward that day when New York will have a uniform set of rules for lawyer discipline.
>
> * * *
>
> "What is proposed is not intended as an exercise in theory. Rather, the draft focuses on what is feasible; and, in an effort to create a realistic chance for its adoption, the draft provides for a uniform system that would change only those procedures which the subcommittee deemed most in need of modification, while occasioning relatively few dislocations in personnel and methods of operation.
>
> * * *
>
> "[T]he discussion draft is neither a wish list nor a menu of vaguely stated options. Instead, it is highly detailed and, if adopted, would provide specific procedures in virtually all areas of lawyer discipline.
>
> "Whether those procedures are appropriate, desirable or sufficient are issues which can only be resolved by inviting examination and discussion of the draft. At this point, we have an adequate basis for discussion; and, we can now proceed to address lawyer discipline in New York using a common language and a uniform set of rules. But, if our project is to realize its goal, those rules must be the product of informed consensus. It is in that spirit that we seek written comments from the readers of this report."

During the weeks that followed issuance of our annual report, we received numerous comments from other sections and committees of the NYSBA, local bar associations, public agencies, individual attorneys and disciplinary staff counsel. Those

comments were reviewed by the original drafting subcommittee, as well as our Committee as a whole. The draft was then amended in an effort to accommodate many of the concerns expressed by those commenting on the proposed rules. What is herewith presented to the House incorporates over a hundred suggested revisions.[23]

Overview of the Proposed Rules

The proposed rules as now amended are intended to accomplish four objectives: (1) to provide a clear statement of the procedures by which lawyers are disciplined; (2) to establish, statewide, a uniform system for such procedures; (3) to promote the fair, prompt and efficient disposition of complaints of professional misconduct; and (4) to allow, where the public interest requires, greater access to disciplinary proceedings.

If adopted, the rules should generally produce results more quickly, with far greater flexibility to deal fairly with a wide variety of circumstances, than any of the systems now employed by the four departments of the Appellate Division.

To achieve these ends, the proposed rules establish two different, although complementary, sets of procedures: one set of procedures is created for those cases which are not deemed

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[23] A revised set of draft uniform rules and commentary is attached as Appendix F. The draft indicates by redlining and strikeouts the material which has been added and deleted since publication of the preliminary draft with our annual report.

sufficiently serious to warrant formal proceedings by the court; and, another set of procedures where the committee believes that the misconduct is sufficiently serious to warrant public censure, suspension or disbarment. Incident to formal proceedings before the court, the proposed rules establish certain procedures by which the proceedings may be opened to the public prior to a final determination of misconduct.

If the committee seeks to open the proceedings where the alleged misconduct is not based on a so-called "serious crime" conviction, there must be either a determination of "probable cause" and "public interest," made after the respondent has been accorded a meaningful opportunity to be heard, or such grounds must be shown to exist as would support a so-called "interim suspension." If the proceedings are to remain closed, there is no need for a specific finding of probable cause and public interest, and formal charges can be instituted essentially as is now done in three of the four departments.

The petition process described in the rules relating to formal proceedings before the court [1500.10] is, as elsewhere, intended to assure that unproven charges of misconduct will not be made public without according the respondent a reasonable opportunity to be heard. Again, such procedures are only required where the alleged misconduct does not relate to a serious crime conviction or the traditional grounds for an interim suspension

do not exist. Moreover, to avoid foreseeable prejudice or the appearance of prejudgment, the application to open the proceeding is heard by a single justice of the Court who is thereafter disqualified from further proceedings on the complaint.

In the vast majority of cases, as at present, there will be no hearing. The case will either be dismissed [1500.7(a)(1)] or end with the issuance of a letter of caution [1500.7(a)(2)] or an admonition [1500.7(a)(3)].

Where there is reason to believe that more serious misconduct may be involved, the disciplinary committee has several alternative courses to pursue. It can hold an informal hearing to determine whether the charges have merit [1500.7(a)(4)]. In the alternative, it may forego all informal proceedings and instruct staff to petition the court immediately for the issuance of formal charges [1500.7 (a)(5)]; it may decide that staff should seek an interim suspension [1500.7(a)(5); 1500.13]; and, finally, it may instruct staff to seek an order expediting the hearing [1500.9(h)] and/or summarily deciding certain charges [1500.9(i)].

Thus, even where there is evidence of serious misconduct, judging by present statistics, few cases will require the formalities of a hearing. The issues may be resolved on motion [1500.9(i)]; the underlying facts of the case may have been

resolved in other fora [1500.14, 1500.15]; or the respondent may resign in the face of expedited procedures [1500.17].[24] In those relatively few cases that will require a hearing, the proposed rules serve to define clearly what is expected of each side and, if adopted, should ultimately serve to expedite the process of disposition.

The proposed rules take the best and most common features of the rules and practices which currently exist in the four departments of the Appellate Division and forge them into a uniform set of procedures. Lawyers familiar with the disciplinary process will find little that is strange in what is proposed. For the most part, the disciplinary committees will continue to be constituted as they are now, local bar associations may still process complaints of minor misconduct, the professional staffs will continue to investigate complaints in the same manner, and the committee will continue to decide such matters as are not deemed to be so serious as to require action by the court. Only

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[24] Formal hearings are required in approximately 5% of the matters processed by the disciplinary committees. For example, in 1993, the percentage of matters referred to the court in each of the four departments was respectively: 6% (167:3,264), 7% (318:5,078), 7% (105:1,702) and 6% (124:2,329). These matters included so-called "automatic disbarment" cases under Judiciary Law § 90(4)(b), resignations, assorted motions and interim suspensions for convictions of so-called "serious crimes" or for failures to cooperate with the disciplinary committee. When such non-testimonial matters are factored out of the total percentage of cases referred to the court, the remaining percentage in each department for the year 1993 was respectively: 4% (167-38[129]:3,264), 6% (318-58[260]:5,078), 5% (105-29[76]:1,702) and 5% (124-12[112]:2,329).

in the First Department would there be some significant reorganization of committee structures; but, even there, the essential components of their committee could continue to operate, except in cases of serious misconduct warranting greater expedition than their present use of hearing panels would seem to allow.[25]

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[25] The Chief Counsel of the Departmental Disciplinary Committee for the First Department (who is also a member of our Committee) has filed a "dissent" to the proposed rules. He makes several points which are deserving of comment.

1. **Hearing Panels**: It is claimed that we propose to eliminate "the First Department's long established system of 'hearing panels' solely for the sake of statewide 'uniformity'." As elsewhere demonstrated in considerable detail, it is not "solely" for the sake of uniformity that the Committee voted to adopt this position. Rather, we believe that the use of special referees provides many advantages (including the ability to sit from day to day) which weekly hearing panels cannot.

a. The dissent's reference to a certain letter of the New York State Association of Disciplinary Attorneys dated November 12, 1994, is also worthy of comment. As the dissent should have acknowledged, that letter was a product of the NYSADA's decision to present a united front in upholding the various interests of its members; and, at the meeting of our Committee where the proposed rules were adopted, that letter was understood to be nothing more than an effort at parochial unity. Indeed, the author of that letter (who is also a member of our Committee, as well as Chief Attorney for the Third Department and President of NYSADA), along with all other staff counsel on our Committee (voting solely as their consciences dictated), voted in Committee to reject the position now advanced by the dissent.

b. The dissent claims that our Committee "had only minimal First Department representation." The claim is inaccurate. Our Committee is comprised of 25 members, nine of whom are from the First Department. Indeed, four of the nine (including the Chair of our Committee) also have been personally affiliated with the First Department's Disciplinary Committee.

2. **Confidentiality**: Also deserving of comment is the dissent's claim that the Committee's proposal with respect to confidentiality is "less than straightforward." The accusation is remarkable in light of the fact that the dissenter nowhere expressly acknowledges

that he actually would like NYSBA to adopt the ABA's position -- a position twice rejected by our House of Delegates.

a. As elsewhere explained in detail, one of the greatest difficulties that we have had with the ABA's position is that -- if adopted without the protections now proposed -- it would mean that whenever it was decided to file formal charges, the disciplinary proceeding would become public. In the First Department -- again, without the protections now proposed -- that would mean no more than the Chief Counsel convincing just <u>one</u> member of its so-called "Policy Committee" that formal proceedings should be instituted.

b. The dissent claims that the proposed change is illusory "because under the current statute [§90(10)] the courts already have the power to permit divulgance [sic] of all or any part of the record 'for good cause shown'." Again, as elsewhere explained in greater detail, it is precisely because the courts have such power that the procedures now proposed can be adopted by court rule. However, what the dissent fails to acknowledge is that the current case law is exceedingly limited as to the circumstances under which "good cause" may be found; and, further, that the proposed rules, by carefully defining additional circumstances under which the courts may find "good cause," effectively expand the ambit of disclosure beyond that which currently exists.

3. <u>**So-called "Other Flaws"**</u>: Each of the so-called "other flaws" was examined and debated in Committee. After hearing the arguments now advanced by the dissent, on motion by the dissenter, only the dissenter himself supported his position.

a. **Full Committee Review:** The procedures for full committee review (proposed § 1500.7[a]) are neither cumbersome nor unworkable. They work in two of the four departments exactly as now proposed; and the Chief Counsel of the other non-conforming department (who is also a member of our Committee) assures us that his department can easily adapt to the change. The dissent is curiously inconsistent: on one hand, in opposing our approach to hearing panels, the dissent insists on the importance of non-lawyer participation; yet, on the other hand, by opposing full committee review, the dissent refuses to accept a system that would greatly enhance non-lawyer participation in the disposition of far more cases than his department's existing procedures allow.

b. **Hearing on the Issue of Probable Cause:** The dissent's reference to a "preliminary hearing" to determine "probable cause" at the committee level is apparently based on a misreading of the rules. To avoid any confusion as to when and under what circumstances a probable cause hearing need be held, proposed Section 1500.7(b) was amended by the Committee. It should now be clear that such hearings are only held when so ordered by the court

The processing of a complaint or "grievance" under the proposed rules, as under current practice, would begin with its receipt by staff counsel. The grievance must be in writing, but it need not be verified. Where the grievance, even if true, does not allege professional misconduct, the staff will designate it an "inquiry" and reject it as "failing to state a complaint." If the grievance does describe behavior which, if true, would constitute professional misconduct, it will be deemed a complaint and the respondent lawyer will be required to answer it. The answer, or a summary of it, will then be forwarded to the complainant for comment. If further investigation is deemed appropriate, the same will generally proceed as under current practice.

When the investigation has been completed, a report will be submitted to the full committee. At that point, the committee may dismiss the complaint or cause formal proceedings before the court to be instituted forthwith. Alternatively, the committee might issue a letter of caution or an admonition, thereby closing

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(on a showing of good cause therefor) incident to an application to open the proceedings to the public.

c. **Motions Pending Investigation**: The objection to proposed Section 1500.6 is similarly unfounded. Such motions are currently available. Every member of our Committee (including the dissenter) knows this. The idea of discouraging such motions by keeping their availability secret was simply offensive to our Committee; and, hence, the dissenter's motion to eliminate 1500.6 failed for want of a second. Indeed, one of the principal purposes of our proposed rules is to provide a clear statement of the procedures by which lawyers are disciplined.

the file without further proceedings. In some cases, where the committee believes that additional facts must be developed and there is no apparent need for prompt action by the court or the matter does not seem to involve misconduct so serious as to warrant public censure, suspension or disbarment, the committee may refer the matter to a "hearing panel" comprised of a few committee members; the panel would then normally hold a hearing and make a recommendation for final action by the full committee.

Some Controversial Aspects of the Proposed Rules

The proposed rules have drawn criticism from certain segments of the bar. Among the most controversial aspects of the rules are the following.

Opening Proceedings to the Public

Some critics have asserted that the proposed rules fly in the face of long-established positions of this Committee and our Association's House with respect to its support for Judiciary Law § 90(10) and maintaining the confidentiality of disciplinary proceedings.

In fact, as recently as 1985, this Committee advocated opening proceedings to the public under certain circumstances; and, over the years, it has repeatedly expressed support for the "balance" struck by Judiciary Law §90(10). Although the

Committee's prior recommendations were rejected by the Association's House of Delegates, it was done at a time when there was no definition of "probable cause" or "public interest" and no procedural structure for their determination.

What is now proposed builds upon the flexibility contained in the Judiciary Law, makes meaningful the term "probable cause" and assures that proceedings will not be open unless it is demonstrated to be in the "public interest." It does not require additional legislation precisely because it goes no further than the Judiciary Law allows.[26]

We believe that it is unacceptable to create a system in which a lawyer's reputation can be destroyed by staff counsel and only one member of a disciplinary committee who has authorized the issuance of formal charges. Yet, that is precisely the situation that would obtain in the First Department if

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[26] While proposed 1500.10(c) is intended to stay well within the parameters of appropriate judicial action as defined by our Court of Appeals (see, e.g., Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 303 N.Y.S.2d 633 [1969]; Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.2d 491 [1959]), it should be noted that the Legislature has not demonstrated much enthusiasm to amend Section 90(10) of the Judiciary Law to conform New York's practice to that first recommended by the American Bar Association in 1979. Indeed, since 1983, no less than nine bills have been introduced in the State Assembly which would effectively adopt the ABA's position. All but one of the bills had been introduced by then Assemblyman Jerome Nadler of Manhattan (e.g., A 5304, A 4993, A 5520, A 5553). None of these bills has ever been voted out of the Assembly's Judiciary Committee and none has ever had a companion bill in the State Senate. The most recent attempt to amend Section 90(10), the so-called "Singer Bill" (A 9988), died last year in committee.

proceedings were automatically opened upon the issuance of formal charges without adopting the additional protections now proposed. Although the other three departments require more committee participation in deciding whether to issue formal charges, there is still no assurance in any of the departments that a respondent attorney will be accorded an opportunity to be heard on the question of whether proceedings should be open to the public prior to a finding of misconduct.

To avoid such manifest unfairness, the proposed rules require a very much different procedure where formal charges have the potential of being made public. Even then, what is proposed would not create a significantly greater administrative burden in three of the four departments. As the comment to proposed section 1500.10(c) explains:

> "The current practice in three departments assumes that probable cause for the commencement of a disciplinary proceeding will be based upon the 'available facts.' The First Department has no articulated standard of probable cause, and allows formal charges to be filed with the concurrence of one attorney member of its so-called 'Policy Committee.' Thus, no department currently requires that a respondent be accorded an opportunity to be heard on the question of whether formal proceedings should be commenced; and, as long as there is no possibility that the commencement of formal proceedings will trigger public disclosure of the charges, the absence of an opportunity to be heard is acceptable.
>
> "However, where public disclosure of the charges before a finding of guilt is sought, fairness would seem to require far more of an opportunity to be heard than current procedures allow. Proposed section 1500.10(c) is intended to fill that need."

The comment to proposed section 1500.10(c) then explains the three "exceptions" when a respondent need not be accorded the full range of its procedural protections:

> "The proposed rule recognizes three exceptions from its requirement that the respondent be accorded an opportunity to be heard on the issue of opening the proceedings: (1) where there are grounds to seek an 'interim suspension'; (2) where the respondent has been convicted of a so-called 'serious crime'; and (3) where the proceedings might 'otherwise' be opened under existing case law.
>
> "The first exception means nothing more than, in practice, an interim suspension will be sought whenever grounds therefor exist. Once an interim suspension is granted, the fact of the respondent's suspension may be publicized and all proceedings thereafter will be open to the public. Under present practice, although the fact of the respondent's suspension may be publicized, the subsequent proceedings themselves are closed and its records remain sealed unless and until there has been a final determination of misconduct by the Court.
>
> "The second exception recognizes the obvious fact that once there have been criminal proceedings the respondent's reputation has been compromised to the extent that there is a public record of his or her crime. It differs from present practice in two respects. First, the criminal record may be far more limited in its scope than the subsequent disciplinary proceeding; and, therefore, in some cases opening the latter proceeding may have the effect of publicizing far more than the crime itself. Second, under present practice it has happened that the court (most notably in tax cases) will ultimately impose only a so-called 'private reprimand' or 'private censure' notwithstanding the respondent's conviction of a serious crime.
>
> "The third exception merely recognizes that, over the years, the courts have developed a case law doctrine of when they will find 'good cause' for opening the proceedings, and that the proposed rule is not intended to disturb either that doctrine or its subsequent development case by case."

Where a lawyer's reputation is at stake, unless there are

sufficient grounds to grant an interim suspension or the lawyer already stands convicted of a so-called "serious crime" or there is "good cause" to open the proceedings under existing case law, the lawyer should be accorded a full and fair opportunity to be heard before his or her reputation is put at risk. The court, for its part in upholding the interests of justice, should insist on nothing less than a case-by-case determination of the need for public access. In an effort to avoid further prejudice or the appearance of prejudgment, we have proposed that the determination of the application for public access be made by a single judge who will thereafter be disqualified from participation in further proceedings on the complaint.

Expediting the Process

Other critics have complained that the proposed rules would encourage delay by creating too many procedural hurdles.

Actually, the proposed rules seek to speed the disposition of serious cases in several ways. The three principal procedures used are interim suspensions, summary dispositions and expedited hearings.

To make implementation of these procedures more realistic than at present, the proposed rules also provide for the exclusive use of special referees in all hearings on formal charges and orders which would permit those hearings to be

conducted from day-to-day. See § 1500.9(h); see also § 1500.9(c).

In theory, the new provisions are intended to complement each other. For example, applications for interim suspensions (§ 1500.13) may be coupled with requests to expedite the hearing process and/or the summary disposition of certain issues. § 1500.9(h) and (i).

The grounds for interim suspensions are consistent with those required by the Court of Appeals and mirror those which now obtain in three of the four departments. The provision for summary dispositions is partly based on recent case law applying principles of collateral estoppel to the realm of professional discipline and is generally similar to a provision adopted by the First Department in May 1994. The proposed rule -- consistent with case law -- would give res judicata effect to certain determinations made in civil litigation in the same manner that all four departments have long treated criminal convictions. Since the burden of proof required in disciplinary proceedings is a "fair preponderance of the evidence," the more exacting burden required for a criminal conviction is not considered necessary to permit a summary disposition.

Review of Proposed Dispositions

Some critics have questioned the advisability of the preliminary review procedures contained in the subcommittee's

initial draft released last September as part of our annual report.[27] Those procedures have since been removed from the draft.

In general, the initial draft sought to encourage closer scrutiny of the recommendations made by staff counsel. This was intended to insure both efficient operation and enable the

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[27] As initially proposed, the rules contained the following provision:

1500.7 Review of Recommended Disposition of Complaint

(a) **Examination of File by Reviewing Member.** In the case of recommendations under section 1500.5 (g)(2), (3), (4) and (5) of this Part, the chief counsel shall make the file available for examination by the reviewing member designated under section 1500.5(h)(2) of this Part no less than five days prior to the next scheduled meeting of the full Committee. In the case of recommendations under section 1500.5(g)(5) of this Part, the chief counsel shall also make available to the reviewing member, the proposed charges, and a memorandum summarizing the evidence adduced in support of the charges.

(b) **Action by Reviewing Member.**

(1) **General Rule.** The reviewing member may approve or request a modification of the recommendation by the Office of Chief Counsel concerning the disposition of a complaint, which request may be accepted or rejected by the Office of Chief Counsel, subject to the requirements of subdivision (b)(3) of this section.

(2) **Modification.** If the reviewing member requests a modification of the recommendation by the Office of Chief Counsel, the reviewing member shall set forth such request in writing. Such request, if made, shall be noted on the file folder or jacket and stated as one of the following:

(i) dismissal of the complaint;
(ii) further investigation;
(iii) letter of caution;
(iv) admonition;
(v) informal hearing; or
(vi) reference to the Court for the institution of formal disciplinary proceedings.

(3) **Notice of Action by Reviewing Member.** The full Committee shall be informed of any request that has been made by the reviewing member and/or the agreement of the reviewing member with the recommendation made by the Office of Chief Counsel.

committee to make more informed decisions when it met as a whole. The principal means used to accomplish this was an expedited review of the files marked for committee disposition. See § 1500.5(h)(2). Among other advantages to this form of review was thought to be its potential to limit the inappropriate "triage" of matters deserving attention.[28]

The procedure to review proposed dispositions was essentially the same as that now employed in three of the four departments. In those departments, the only difference the rules as initially proposed would have made was in the need for a preliminary review of the proposed disposition by a so-called "reviewing member." This change was believed appropriate in light of the large number of matters routinely passed on by the full committee and their obvious inability to undertake collectively a thorough inspection of the relevant files.

Nevertheless, the proposal for a preliminary review drew significant criticism from virtually every segment of the bar to comment on the initial draft. Most of the criticism saw the

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[28] The former New York State Attorney General has described the "triage" of disciplinary cases as "shocking." In context, the term refers to the practice of closing or deferring matters which are perceived to impose an inordinate prosecutorial burden. The rationale for this practice, offered at a public hearing conducted in New York City by the Judiciary Committee of the New York State Assembly, is said to be the limited resources available to the disciplinary system. New York Law Journal, 9/24/93, p. 1.

proposal as imposing an unmanageable burden on volunteer committee members and inevitably slowing the process of disposing of cases.

Being sensitive to such criticism, the Committee has decided to eliminate the proposal from the current draft. All that now remains is the problem which it sought to address.

One suggested approach to address the perceived problem is to encourage the courts to undertake, sua sponte, a periodic review of their closed disciplinary files. This would provide some assurance of adequate review and documentation, without unduly burdening the volunteer committee members or delaying the process.

Procedural Uniformity

Another criticism of the proposed rules questions the need for statewide uniformity, suggesting that the differences among the various departments are a reflection of "geography" or local policies which should not be disturbed.

A principal objective of the new rules is to bring about uniformity in the kind of sanctions imposed for professional misconduct. To accomplish this end, in its most elemental aspect, the proposed rules develop a uniform nomenclature.

Obviously, because the terminology and concepts now employed are somewhat different, an accommodation will have to be made among the various departments to achieve uniformity. For the most part, the proposed changes would not require any significant shift in policy. The one possible exception concerns the proposal to reintroduce letters of caution in the First Department. Yet, when all relevant components of the proposed rules are understood in their relation to one another (particularly, the relationship between sections 1500.4[c] and 1500.8[a][2] and [c][2][iii]), it is assumed that the proposal to make such letters uniform throughout the State will be accepted.[29]

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[29] When the First Department eliminated letters of caution in May 1994, no policy reasons were publicly stated for its action. The drafters of the proposed rules understood that the letters were eliminated by the First Department because of certain due process concerns revolving about their use in subsequent proceedings. As the comment to 1500.4 explains (at pp. A-62):

"Subsequent consideration of letters of caution may create unique problems of due process in light of a respondent's limited ability to have them reviewed. Although the First Department eliminated letters of caution in May 1994, we propose to continue their use. However, because it appears that the First Department does not consider it feasible to review such letters, we have accommodated this concern by limiting the conditions under which such letters may be considered in later proceedings.

"Section 1500.4 thus recognizes that letters of caution (although technically not deemed a form of discipline) may be considered; however, because of the limited opportunity to review or comment upon the issuance of such letters, their use in subsequent proceedings is subject to significant limitations, as well as the respondent's right to place in the record matters which may not previously have been considered. The most significant of the limitations on the use of letters of caution is set forth in the third sentence of subdivision (c) ('The issuance of a letter of caution may be considered only to the extent of demonstrating that a respondent was on

Limiting the Use of Hearing Panels

It also been urged that the proposed rules should seek to accommodate certain unique structures and procedures. The most significant of these is the First Department's use of hearing panels.

In New York, the First Department is unique in its use of hearing panels to make findings of misconduct and recommendations concerning the level of sanction to be imposed. All other departments use special referees (and, indeed, most departments limit the special referees to findings of fact).

Without in any way denigrating the dedication of the volunteer members who serve on these panels, their use imposes significant limitations on the system. First, it is virtually impossible for the panels to meet from day to day; usually, they can meet no more frequently than once a week. Indeed, it was because of the staff's apparent inability to schedule hearings to run even from week to week that, two years ago, the size of the hearing panels was reduced from seven to four members (with only two of its members now constituting a quorum). Second, there is a high probability in protracted hearings that one or more panel

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notice that certain behavior would constitute professional misconduct, where such behavior is the subject of the subsequent proceeding')."

members will be absent on one or more hearing days. Third, the specter of lawyers trying lawyers is generally regarded as poor public relations.

Their current rationale (viz., that they offer an opportunity for non-lawyer participation and a trial by one's "peers") is flawed in several respects. First, there is no reason why a special referee (often a sitting or retired judge) cannot fully represent the public interest, providing prompt and fair dispositions. Second, under the proposed rules, there is proportionally greater participation by non-lawyer members than currently exists in the First Department, because all non-lawyer members would be permitted to participate in the initial decision of the full committee as to whether any discipline should be imposed and, if so, whether the respondent's conduct is of sufficient seriousness to warrant formal proceedings. Third, the oft-stated rationale for hearing panels in the First Department is jurisprudentially invalid and inconsistent with the current composition of the panels (viz., due process never required that lawyers be tried by other lawyers; and, if it did, the current non-lawyer component of the panels would be inconsistent with that principle). Finally, to achieve statewide uniformity, it would seem most felicitous for the one department that uses hearing panels to adapt its procedures to those of the other three which do not.

It should be understood that adoption of the proposed rules would not eliminate hearing panels altogether. They could still be used to make the findings required for committee action in cases which do not involve misconduct serious enough to warrant formal disciplinary proceedings.

Motions Pending Investigation

Some critics have argued that inclusion of a provision for motions pending an investigation will encourage dilatory tactics. Particular exception is taken to the inclusion of a provision for protective orders.

The proposed rules merely make explicit (as do the rules of the Third Department) that a respondent may apply to the court for protection from unreasonably burdensome demands and procedures. Although this right has always been available, counsel unfamiliar with disciplinary proceedings may require the guidance of an explicit provision.

Making express the availability of such remedies should also have the salutary effect of obviating their use to some extent as both disciplinary staff and the respondent come to recognize that, procedurally, they stand on a level field.

Because the proposed rules do not include an automatic stay on respondent's request for protection, even in those few cases

where an application must be made, the application itself should not delay proceedings or the ultimate disposition of the case.

Relationship of Staff Counsel to the Disciplinary Committee

A question has been raised concerning the apparent limitation on staff counsel undertaking certain actions without prior approval of the disciplinary committee or the court.

The proposed rules serve to define the relationship of staff counsel to their respective committees with far greater precision than at present. In this connection, the proposed rules generally reflect the court's intention that staff counsel act under the direction and by the authority of the various disciplinary committees. Where staff has been authorized to exercise discretion, the power to exercise that discretion is expressly vested in the person of the Chief Counsel.

For example, the authority to undertake an investigation, sua sponte, is continued. However, the proposed rules make it clear that the authority to do so resides in the court or the Office of Chief Counsel "pursuant to written direction issued by the Chief Counsel." See § 1500.5(a). While the initial draft required the Committee Chairperson to issue the direction, on reflection, it was thought that placing the responsibility on the Chief Counsel was a sufficient guarantee of appropriate action and individual responsibility for the action taken. Beyond the

Chief Counsel, the staff does not, and should not, have authority to act without such direction.

Reviewing the Proposed Rules and Comments

The foregoing precis is intended to highlight some of the more controversial aspects of the proposed rules. But, it is not intended as a substitute for a review of the rules themselves or to suggest that the reader will not find other aspects of the rules less significant.

As is true of any complex set of regulations, their purpose and intended operation may not be facially apparent. Further guidance is provided by the detailed comments that follow the blackletter; and the reader is encouraged to review this commentary as well as the rules that they are intended to explain.

To aid in that review, the reader will find appended to this report both a redlined version of the proposed rules ("Appendix F," indicating the amendments made by our Committee since publication of the discussion draft last September) and another version ("Appendix G") without redlining. For those who are interested in commenting on the draft, it may prove easier to use and refer to Appendix G.

Although our Committee is satisfied that the proposed rules provide a fair and workable set of uniform procedures, we recognize that it will ultimately be left to others to decide their fate. We also recognize that this is as it should be because, in regulating the conduct of lawyers, no rule should ever be adopted which does not reflect the informed consensus of the bar and our profession's commitment to the public.

EDITOR'S NOTE: The following dissent has been submitted by Hal R. Lieberman, Chief Counsel of the Departmental Disciplinary Committee for the First Department. For comments responsive to this dissent, see footnote 25, at page 56, in the first section of this report.

DISSENT

I respectfully "dissent" from the vote of the NYSBA Committee on Professional Discipline ("the Committee") to adopt certain uniform rules for attorney discipline throughout the state. I do so only in my capacity as a member of the above Committee, and the views expressed here do not necessarily reflect those of the Appellate Division, First Department nor those of its Departmental Disciplinary Committee.

The effort of the Committee to promote statewide, uniform procedural rules for attorneys against whom complaints have been lodged is laudable. But as the Committee has itself wisely stated in its introduction to the proposed rules, New York's disciplinary system has worked well enough over the past twenty years so that advocates of change "must be prepared to demonstrate -- why such change is necessary". That has not been done with respect to the major revisions that are now recommended.

Ironically, while it is the First Department (which has 50% of New York's lawyers) that is most affected, detrimentally in my view, by the proposed uniform rules, our Court and its distinguished Presiding Justice have been in the forefront of statewide reform for many years. Indeed, Presiding Justice Francis T. Murphy wrote a seminal article as far back as 1981 urging, inter alia, the establishment of a centralized, statewide disciplinary system. See: "Grievance Counsel for the Public", Francis T. Murphy, Jr., 26 N.Y. Law School Law Review 221 (1981)

While the proposed uniform rules contain a number of defects, by far the most significant shortcomings concern the abolition of the First Department's "hearing panel" system to adjudicate the merits of serious charges and the less than straightforward attempt to alter the "confidentiality" provision of Judiciary Law §90(10). Specifically:

(1) Abolition of "hearing panels" to adjudicate the merits

Eliminating the First Department's long established system of "hearing panels" solely for the sake of statewide "uniformity" is a very grave mistake. As the New York State Association of Disciplinary Attorneys indicated in a November 12, 1994 letter to the Chair of the Committee:

> In reading the recommendations (of the New York State Association of Disciplinary Attorneys) you will note that we have proposed two options for conducting disciplinary hearings. While this may on the surface appear to run counter

to the goal of uniformity, as practicing grievance counsel we believe recognition must be given to the practical and geographical differences between the four departments.

But even more than "practical and geographical differences between the four departments" is at stake. Our Court has adopted a procedure that has worked well (and has been improved upon) for fifteen years because of the high quality of the lawyers and lay persons whom the Court has appointed to sit as panel members, and because it is democratic. Hearing panels which are partly comprised of lay persons send a signal to the public that the disciplinary system is not dominated completely by lawyers interested in protecting their own. That is why the hearing panel system (as opposed to the "Special Referee" system extant in the other three departments) is the procedure used in most jurisdictions in this country and is the one recommended in Rule 3 of the ABA's Model Rules for Lawyer Disciplinary Enforcement (1989). Unless there is some substantial evidence that the First Department's disciplinary adjudications are decidedly slower, are unfair, or are flawed in some other way, then no good reason exists to adopt the proposed uniform rules as presently written. The Committee which has proposed this radical alteration had only minimal First Department representation. It should conduct an in depth study of disciplinary adjudications on a statewide basis before the elimination of "hearing panels" is adopted against the wishes of those who work with this system on a daily basis.

(2) Confidentiality

Section 1500.11(c) of the proposed rules purports to open up the disciplinary process after a finding of "probable cause". However, in reality the proposal is not a change at all or, if it is, then it violates the letter and spirit of Judiciary Law §90(10). This is so because under the current statute [§90(10)] the courts already have the power to permit the divulgance of all or any part of the record "for good cause shown". Thus, the proposed language of 1500.10(c) stating that a proceeding may be open to the public where a justice of the court "determines that the public interest would be served thereby" really adds nothing unless the rule is to be construed so as to undermine the obvious legislative intent of §90(10) to preserve confidentiality until charges are sustained by the justices of the appellate division having jurisdiction in the case. Any other interpretation of

§90(10) flies in the face of very longstanding policy and practice by the appellate divisions and will, in many cases, spawn substantial litigation before those courts just on this issue.

Significantly, the NYSBA is presently on record in opposition to a bill introduced in the Assembly (A.9988-A) which directly amends §90(10) so as in fact to open up the process after a finding of "probable cause". Any change in the fundamental policy underlying Judiciary Law §90(10) ought to be accomplished directly and forthrightly without resort to judicial "legislation" in the guise of a rules change.

(3) Other Flaws

The proposed rules contain a number of other substantial defects, including, inter alia:

- the required approval of routine dispositions by a majority vote of the full Grievance Committee (§1500.7(a)) (in the First Department this would entail a cumbersome and unnecessary review by the full Committee of literally thousands of dismissals or referrals for mediation each year);

- the provision, under certain circumstances, of a preliminary hearing to determine "probable cause" (§1500.7(b)) (the provision for a "preliminary hearing" currently exists only in the Second Department, and there is no evidence that the procedures for determining "probable cause" in the other three departments -- where no hearing is available -- are any less fair to attorneys subject to formal charges; moreover, such a rule has the potential to further delay an already slow process);

- proposed §1500.6 allows for the issuance of what amounts to a "protective order" during the investigative stage, restraining a Grievance Committee from seeking unspecified information, and also gives respondents the right to obtain an order from the Court dismissing a complaint prior to completion of the Grievance Committee's investigation (again, this is an unnecessary and unwarranted intrusion which will only encourage certain lawyers to seek delays and obstruct investigations; it will also embroil the appellate divisions in pre-trial litigation without any basis to suggest that heretofore New York's Grievance Committees have improperly harassed lawyers, made abusive discovery demands or filed charges that were unjustified).

As noted at the outset, while the effort to achieve statewide uniformity in grievance procedures is a worthwhile goal, the proposed rules now before the House of Delegates are so flawed as to disserve the Bar's and the public's legitimate demands for reform. They should be rejected.

Respectfully submitted,

Hal R. Lieberman

HRL/amo

A P P E N D I C E S

APPENDIX A:

INSPECTION OF CLOSED FILES

Appendix A-1
First Judicial Department Order, June 21, 1993

At a Term of the Appellate Division of the Supreme Court, held in and for the First Department, at the Courthouse thereof, in the County of New York, on the 21st day of ~~May~~ June 1993

P R E S E N T:

Hon. Francis T. Murphy, Presiding Justice
Hon. Joseph P. Sullivan
Hon. John Carro
Hon. E. Leo Milonas
Hon. Ernst H. Rosenberger
Hon. Betty Weinberg Ellerin
Hon. Richard W. Wallach
Hon. Theodore R. Kupferman
Hon. David Ross
Hon. Sidney H. Asch
Hon. Bentley Kassal
Hon. Israel Rubin
Hon. Eugene L. Nardelli, Justices

- X

In the Matter :

of the :

Application of the New York State Bar Association to inspect files of the Departmental Disciplinary Committee, First Judicial Department. :

- X

The Justices of the Appellate Division of the Supreme Court, First Judicial Department, pursuant to the authority vested in them and in accordance with the provisions of Section 90, subdivision 10 of the Judiciary Law, and upon request of the Chair of the Committee on Professional Discipline of the New York State Bar Association,

DO HEREBY, effective immediately, grant permission to the said Committee and its authorized representatives to inspect all files of the Departmental Disciplinary Committee for the First Department, pertaining to complaints against attorneys which have been dismissed, or otherwise disposed with the imposition of a letter of caution, an admonition, or a reprimand to the date of

this order, and it is further,

ORDERED, that the information obtained from the inspection of those files is to be used for statistical purposes only and is not and will not be for public dissemination, and is subject to the confidentiality provisions of Section 90 of the Judiciary Law.

Dated: New York, New York
~~May~~ JUNE 21, 1993

E N T E R

For The Court

Francis T. Murphy
Presiding Justice

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

In the Matter of the Application of the NEW YORK STATE BAR ASSOCIATION for an order pursuant to Judiciary Law §90(10) permitting inspection of files maintained by the Grievance Committees of the Appellate Division, Second Judicial Department.

Application by the Chair of the Committee on Professional Discipline of the New York State Bar Association, for an order pursuant to Judiciary Law §90(10) permitting the Committee and its authorized representatives to inspect all files of the Grievance Committees for the Second and Eleventh, Ninth and Tenth Judicial Districts pertaining to complaints against attorneys which have been dismissed, or otherwise disposed of with the imposition of a letter of caution, an admonition, or a reprimand, to the date of this order.

Upon the papers filed in support of the application, it is

ORDERED that the application is granted, and it is further

ORDERED that the information obtained from the inspection of those files is to be used for statistical purposes only and is not and will not be for public dissemination, and is subject to the confidentiality provisions of Judiciary Law §90.

Dated: Brooklyn, New York
July 12, 1993

E N T E R

For The Court

GUY JAMES MANGANO
Presiding Justice

Appendix A-3
Third Judicial Department Order, June 30, 1993

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 24th day of May, 1993.

PRESENT:

HON. LEONARD A. WEISS,
Presiding Justice,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. HOWARD A. LEVINE,
HON. THOMAS E. MERCURE,
HON. D. BRUCE CREW III,
HON. A. FRANKLIN MAHONEY,
HON. JOHN T. CASEY,
HON. NORMAN L. HARVEY,
Associate Justices.

In the Matter of the Request by the Committee on Professional Discipline of the New York State Bar Association for Disclosure of Certain Attorney Disciplinary Records pursuant to section 90 (10) of the Judiciary Law.

A study of the attorney disciplinary system in the State of New York having been undertaken by the New York State Bar Association, through its Committee on Professional Discipline, and it appearing that an examination of certain disciplinary files of the Committee on Professional Standards of the Third Judicial Department is necessary in furtherance of such study, and the New York State Bar Association, by its President John P. Bracken, Esq., having requested disclosure of such files by letter dated April 14, 1993,

NOW, on reading and filing the letter of John P. Bracken, Esq., President of the New York State Bar Association, dated April 14, 1993, it is hereby

ORDERED that pursuant to the provisions of section 90 (10) of the Judiciary Law, the Committee on Professional Discipline of the New York State Bar Association, by and through its authorized representatives, is granted permission to examine those files of the Committee on Professional Standards of the Third Judicial Department wherein the complaint was dismissed or rejected by the Committee or the matter was disposed of by the Committee's imposition of a letter of education, caution, or admonition on or before the date of this order, and it is further

ORDERED that the information obtained from the inspection of these files is to be used for statistical purposes only and that such information and files shall be kept confidential and shall be protected from public dissemination, and that such information and files are and will continue to be subject to the confidentiality provisions of section 90 (10) of the Judiciary Law, and it is further

ORDERED, that the confidentiality provision of the previous paragraph shall specifically apply to the New York State Bar Association, its Committee on Professional Discipline, and to all employees, representatives or agents thereof.

ENTER:

/s/ Leonard A. Weiss

Presiding Justice

DATED and ENTERED:

JUN 30 1993

APPELLATE DIVISION SUPREME COURT - THIRD DEPARTMENT
STATE OF NEW YORK

I, MICHAEL J. NOVACK, Clerk of the Appellate Division of the Supreme Court Third Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on JUN 30 1993 and that the same is a correct transcript thereof and of the whole said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Court on

87 JUN 30 1993

Michael J. Novack

Appendix A-4
Fourth Judicial Department Order, July 9, 1993

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

In the Matter of the Request by the Committee on Professional Discipline of the New York State Bar Association for Disclosure of Certain Attorney Disciplinary Records pursuant to Judiciary Law §90 (10).

A study of the attorney disciplinary system in the State of New York having been undertaken by the New York State Bar Association through its Committee on Professional Discipline and it appearing that an examination of certain disciplinary files of the Office of Grievance Committees for the Fourth Judicial Department is necessary in furtherance of such study,

and the New York State Bar Association, by its President John P. Bracken, Esq., having requested disclosure of such files by letter dated April 14, 1993,

Now, upon reading and filing the letter of John P. Bracken, Esq., President of the New York State Bar Association, dated April 14, 1993 and due deliberation having been had thereon,

It is hereby ORDERED, That, pursuant to the provisions of Judiciary Law §90 (10), the Committee on Professional Discipline of the New York State Bar Association, by and through its authorized representatives, is granted permission to examine those files of the Office of Grievance Committees for the Fourth Judicial Department wherein the complaint was dismissed or rejected by the Committee or the matter was disposed of by the Committee's imposition of a letter of caution or admonition on or before the date of this order, and,

It is further ORDERED, That the information obtained from the inspection of these files is to be used for statistical purposes only and that such information and files shall be kept confidential and shall be protected from public dissemination, and that such information and files are and will continue to be subject to the confidentiality provisions of Judiciary Law §90 (10), and,

It is further ORDERED, That the confidentiality provision of the previous paragraphs shall specifically apply to the New York State Bar Association, its Committee on Professional Discipline, and to all employees, representatives or agents thereof.

FOR THE COURT

By Dolores Denman

Dated:
Buffalo, New York

July 9, 1993

Appendix A-5
Sample NYSBA Inspection Data Sheet

Committee: _____ **File No.:** _____ **Insp:** _____ **Date:** _____

Complt Recd:	_____	Ans Fwd Comp:	_____
File Opened:	_____	Staff Rpt:	_____
Resp Notifd:	_____	Comm Action:	_____
Resp Ans:	_____	Closed:	_____

Nature of Complaint: Conversion [ ]; Malpractice/Neglect [ ]; Conflict [ ]; Confidentiality [ ]; Misrepresentation [ ]; Tax [ ] Advertising/Solicitation [ ]; Frivolous Lit [ ]; Contempt [ ]; Fee [ ]; Communication [ ]; Other _____

Engagement: Criminal [ ]; Dom Rel [ ]; Real Prop [ ]; Estate/Trust [ ]; Negligence [ ]; Comm'l Trans [ ]; L&T [ ]; Gen'l Lit [ ]; Other _____

Investigation:
Correspondence:
Complainant [ ]; Respondent [ ]; Others _____
Interview(s)/Deposition(s):
Complainant: _____/_____
Respondent: _____/_____
Witnesses: _____/_____;_____/_____
Inspection(s):
Office files _____;_____;_____
Court files _____:_____;_____
Bank records _____;_____;_____
Other _____

Report to Committee:
Form of Rept: Memorandum [ ]; Checklist [ ]; Oral only [ ]
Other _____
Prepared by: Staff Atty [ ]; Investigator [ ];
F/T Clerical [ ]; P/T Clerical [ ]; Temp Clerical [ ];
Interne [ ]; Atty Volunteer [ ]; Other _____
Reviewed by: Chief Counsel [ ]; Deputy [ ]; Staff Atty [ ]
Comm Chair [ ]; F/T Clerical [ ]; Other _____
Documented Recommendation: File Jacket [ ]; Dkt Sheet [ ];
Agenda Entry [ ]; Other _____

Quality of Report:
Accurate and Informative [ ]:
Relevant facts clearly stated [ ]; Documentation referenced [ ]; File history clear [ ]
Incomplete [ ]:
Significant information unreported [ ]; Recommendation unexplained [ ]; File history unclear [ ]
Inaccurate [ ]:
Facts misstated [ ]; Documentation misstated [ ];
Recommendation inconsistent with content of file [ ];
Significant factors improperly characterized [ ]

Recom: DM [ ]; DA [ ]; LE [ ]; LC [ ]; AD [ ]; RP [ ]; CT [ ]
Dispo: DM [ ]; DA [ ]; LE [ ]; LC [ ]; AD [ ]; RP [ ]; CT [ ]

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Departmental Disc. Comm. for the First Dept.*

Date of Inspection: *October 28, 1993/November 4, 1993*

Total Number of Files Reviewed: *155*

1. Time in Process

A.	Average Time to Respondent's Answer:	*8.6 weeks*
B.	Average Time to File Closure:	*18.3 weeks*

2. Nature of Complaint:

A.	Conversion	*2%*
B.	Malpractice/Neglect:	*38%*
C.	Conflicts:	*4%*
D.	Confidentiality:	*2%*
E.	Misrepresentation:	*8%*
F.	Improper Advertising:	*1%*
G.	Frivolous Litigation:	*2%*
H.	Fee Dispute:	*18%*
I.	Failure of Communication:	*4%*
J.	Other/Not Specified:	*22%*

3. Engagement

A.	Criminal:	*12%*
B.	Domestic Relations:	*13%*

C. Real Property: *14%*

D. Estates & Trusts: *8%*

E. Negligence: *20%*

F. Commercial Transactions: *8%*

G. Landlord/Tenant: *3%*

H. General Litigation: *7%*

I. Other/Not Specified: *15%*

4. Investigation

A. Percentage having correspondence with

1. Respondent: *57%*

2. Third Persons: *6%*

B. Percentage where complainant shown response*: *52%*

C. Percentage where respondent

1. Interviewed: *2%*

2. Deposed: *0%*

D. Percentage where third person

1. Interviewed: *2%*

2. Deposed: *0%*

E. Percentage showing document inspection: *8%*

F. Percentage showing no apparent investigation: *N/A*

---

* Percentage based on total number of files.

5. **Report to Committee**

A. Percentage where

1.	Memorandum prepared:	*62%*
2.	Checklist prepared:	*28%*
3.	Other written report prepared:	*0%*
4.	No written proposal prepared:	*10%*

B. Percentage where report prepared by

1.	Staff attorney:	*84%*
2.	Investigator:	*0%*
3.	F/T Clerical:	*7%*
4.	Attorney Volunteer:	*1%*
5.	Other/Not Specified:	*8%*

C. Percentage where report reviewed by

1.	Chief Counsel:	*70%*
2.	Deputy:	*4%*
3.	Staff Attorney:	*5%*
4.	Committee Chair:	*2%*
5.	Other/Not Specified:	*19%*

D. Percentage where recommendation documented: *47%*

6. **Quality of Report**

A. Percentage of file action found to be

1.	Accurate and Informative:	*79%*
2.	Unclear or Incomplete:	*14%*

3. Inaccurate or Inappropriate: 7%

B. Percentage where comm. disagreed with recommend.: 0%

C. Percentage where respondent had prior complaints: 26%

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Grievance Committee for the 2d & 11th Judicial Districts*

Date of Inspection: *October 18, 1993*

Total Files Reviewed: *64*

1. Time in Process

A.	Average Time to Respondent's Answer:	*8.9 weeks*
B.	Average Time to File Closure:	*35.2 weeks*

2. Nature of Complaint:

A.	Conversion	*5%*
B.	Malpractice/Neglect:	*33%*
C.	Conflicts:	*0%*
D.	Confidentiality:	*0%*
E.	Misrepresentation:	*2%*
F.	Improper Advertising:	*2%*
G.	Frivolous Litigation:	*5%*
H.	Fee Dispute:	*17%*
I.	Failure of Communication:	*5%*
J.	Other/Not Specified:	*32%*

3. Engagement

A.	Criminal:	*20%*
B.	Domestic Relations:	*22%*

C.	Real Property:	*24%*
D.	Estates & Trusts:	*0%*
E.	Negligence:	*17%*
F.	Commercial Transactions:	*2%*
G.	Landlord/Tenant:	*5%*
H.	General Litigation:	*10%*
I.	Other/Not Specified:	*0%*

4. Investigation

A.	Percentage having correspondence with		
	1.	Respondent:	*41%*
	2.	Third Persons:	*6%*
B.	Percentage where complainant shown response*:		*33%*
C.	Percentage where respondent		
	1.	Interviewed:	*3%*
	2.	Deposed:	*2%*
D.	Percentage where third person		
	1.	Interviewed:	*2%*
	2.	Deposed:	*0%*
E.	Percentage showing document inspection:		*5%*
F.	Percentage showing no apparent investigation**:		*34%*

---

* Percentage based on total number of files.

** A number of files are listed as having been transferred to a local bar association or as involving an attorney's failure to register.

5. **Report to Committee**

A. Percentage where

1. Memorandum prepared: *59%*
2. Checklist prepared: *16%*
3. Other written report prepared: *0%*
4. No written proposal prepared: *25%*

B. Percentage where report prepared by

1. Staff attorney: *81%*
2. Investigator: *0%*
3. F/T Clerical: *0%*
4. Attorney Volunteer: *4%*
5. Other/Not Specified: *15%*

C. Percentage where report reviewed by

1. Chief Counsel: *80%*
2. Deputy: *0%*
3. Staff Attorney: *0%*
4. Committee Chair: *4%*
5. Other/Not Specified: *16%*

D. Percentage where recommendation documented: *30%*

6. **Quality of Report**

A. Percentage of file action found to be

1. Accurate and Informative: *73%*

2. Unclear or Incomplete: *27%*

3. Inaccurate or Inappropriate: *0%*

B. Percentage where comm. disagreed with recommend.: *2%*

C. Percentage where respondent had prior complaints: *30%*

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Grievance Committee for the 9th Judicial District*

Date of Inspection: *October 14, 1993*

Total Files Reviewed: *49*

1. Time in Process

A.	Average Time to Respondent's Answer:	*4.1 weeks*
B.	Average Time to File Closure:	*29.0 weeks*

2. Nature of Complaint:

A.	Conversion	*2%*
B.	Malpractice/Neglect:	*56%*
C.	Conflicts:	*0%*
D.	Confidentiality:	*0%*
E.	Misrepresentation:	*5%*
F.	Improper Advertising:	*5%*
G.	Frivolous Litigation:	*2%*
H.	Fee Dispute:	*9%*
I.	Failure of Communication:	*2%*
J.	Other/Not Specified:	*19%*

3. Engagement

A.	Criminal:	*3%*
B.	Domestic Relations:	*18%*

C.	Real Property:	*15%*
D.	Estates & Trusts:	*15%*
E.	Negligence:	*18%*
F.	Commercial Transactions:	*6%*
G.	Landlord/Tenant:	*0%*
H.	General Litigation:	*15%*
I.	Other/Not Specified:	*9%*

4. Investigation

A.	Percentage having correspondence with	
	1. Respondent:	*45%*
	2. Third Persons:	*8%*
B.	Percentage where complainant shown response*:	*29%*
C.	Percentage where respondent	
	1. Interviewed:	*4%*
	2. Deposed:	*0%*
D.	Percentage where third person	
	1. Interviewed:	*0%*
	2. Deposed:	*0%*
E.	Percentage showing document inspection:	*22%*
F.	Percentage showing no apparent investigation:	*10%*

* Percentage based on total number of files.

5. **Report to Committee**

A. Percentage where

1.	Memorandum prepared:	*39%*
2.	Checklist prepared:	*47%*
3.	Other written report prepared:	*0%*
4.	No written proposal prepared:	*14%*

B. Percentage where report prepared by

1.	Staff attorney:	*64%*
2.	Investigator:	*2%*
3.	F/T Clerical:	*2%*
4.	Attorney Volunteer:	*0%*
5.	Other/Not Specified:	*31%*

C. Percentage where report reviewed by

1.	Chief Counsel:	*74%*
2.	Deputy:	*0%*
3.	Staff Attorney:	*0%*
4.	Committee Chair:	*0%*
5.	Other/Not Specified:	*26%*

D. Percentage where recommendation documented: *47%*

6. **Quality of Report**

A. Percentage of file action found to be

1.	Accurate and Informative:	*79%*
2.	Unclear or Incomplete:	*21%*

3. Inaccurate or Inappropriate: 0%

B. Percentage where comm. disagreed with recommend.: 4%

C. Percentage where respondent had prior complaints: 39%

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Grievance Comm. for 10th Judicial District*

Date of Inspection: *October 15 1993*

Total Files Reviewed: *63*

1. Time in Process

A.	Average Time to Respondent's Answer:	*6.9 weeks*
B.	Average Time to File Closure:	*19.4 weeks*

2. Nature of Complaint:

A.	Conversion	*10%*
B.	Malpractice/Neglect:	*30%*
C.	Conflicts:	*3%*
D.	Confidentiality:	*0%*
E.	Misrepresentation:	*5%*
F.	Improper Advertising:	*2%*
G.	Frivolous Litigation:	*3%*
H.	Fee Dispute:	*28%*
I.	Failure of Communication:	*3%*
J.	Other/Not Specified:	*16%*

3. **Engagement**

A.	Criminal:	*10%*
B.	Domestic Relations:	*27%*
C.	Real Property:	*15%*
D.	Estates & Trusts:	*5%*
E.	Negligence:	*10%*
F.	Commercial Transactions:	*7%*
G.	Landlord/Tenant:	*0%*
H.	General Litigation:	*2%*
I.	Other/Not Specified:	*24%*

4. **Investigation**

A.	Percentage having correspondence with		
	1.	Respondent:	*50%*
	2.	Third Persons:	*5%*
B.	Percentage where complainant shown response* :		*18%*
C.	Percentage where respondent		
	1.	Interviewed:	*7%*
	2.	Deposed:	*2%*
D.	Percentage where third person		
	1.	Interviewed:	*8%*
	2.	Deposed:	*0%*

* Percentage based on total number of files.

E. Percentage showing document inspection: *13%*

F. Percentage showing no apparent investigation: *21%*

5. Report to Committee

A. Percentage where

1. Memorandum prepared**: *57%*
2. Checklist prepared: *5%*
3. Other written report prepared: *0%*
4. No written proposal prepared: *40%*

B. Percentage where report prepared by

1. Staff attorney: *79%*
2. Investigator: *0%*
3. F/T Clerical: *0%*
4. Attorney Volunteer: *5%*
5. Other/Not Specified: *16%*

C. Percentage where report reviewed by

1. Chief Counsel: *32%*
2. Deputy: *0%*
3. Staff Attorney: *0%*
4. Committee Chair: *18%*
5. Other/Not Specified: *50%*

D. Percentage where recommendation documented: *10%*

** Some files contain both a memorandum and a checklist.

6. **Quality of Report**

A. Percentage of file action found to be

1. Accurate and Informative: *98%*

2. Unclear or Incomplete: *2%*

3. Inaccurate or Inappropriate: *0%*

B. Percentage where comm. disagreed with recommend.: *3%*

C. Percentage where respondent had prior complaints: *21%*

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Committee on Professional Standards (3d Dept.)*

Date of Inspection: *September 27 1993*

Total Files Reviewed: *60*

1. Time in Process

A.	Average Time to Respondent's Answer:	*8.0 weeks*
B.	Average Time to File Closure:	*24.0 weeks*

2. Nature of Complaint:

A.	Conversion	*0%*
B.	Malpractice/Neglect:	*50%*
C.	Conflicts:	*7%*
D.	Confidentiality:	*0%*
E.	Misrepresentation:	*5%*
F.	Improper Advertising:	*7%*
G.	Frivolous Litigation:	*2%*
H.	Fee Dispute:	*8%*
I.	Failure of Communication:	*5%*
J.	Other/Not Specified:	*16%*

3. Engagement

A.	Criminal:	*7%*
B.	Domestic Relations:	*27%*

C.	Real Property:		*17%*
D.	Estates & Trusts:		*8%*
E.	Negligence:		*8%*
F.	Commercial Transactions:		*4%*
G.	Landlord/Tenant:		*4%*
H.	General Litigation:		*10%*
I.	Other/Not Specified:		*15%*

4. Investigation

A.	Percentage having correspondence with		
	1.	Respondent:	*40%*
	2.	Third Persons:	*8%*
B.	Percentage where complainant shown response*:		*25%*
C.	Percentage where respondent		
	1.	Interviewed:	*2%*
	2.	Deposed:	*0%*
D.	Percentage where third person		
	1.	Interviewed:	*3%*
	2.	Deposed:	*0%*
E.	Percentage showing document inspection:		*5%*
F.	Percentage showing no apparent investigation:		*17%*

* Percentage based on total number of files.

5. **Report to Committee**

A. Percentage where

1. Memorandum prepared** : *57%*
2. Checklist prepared: *45%*
3. Other written report prepared: *2%*
4. No written proposal prepared: *13%*

B. Percentage where report prepared by

1. Staff attorney: *89%*
2. Investigator: *2%*
3. F/T Clerical: *0%*
4. Attorney Volunteer: *2%*
5. Other/Not Specified: *7%*

C. Percentage where report reviewed by

1. Chief Counsel: *32%*
2. Deputy: *0%*
3. Staff Attorney: *19%*
4. Committee Chair: *0%*
5. Other/Not Specified: *49%*

D. Percentage where recommendation documented: *62%*

6. **Quality of Report**

A. Percentage of file action found to be

1. Accurate and Informative: *77%*

** Some files contain both a memorandum and a checklist.

2. Unclear or Incomplete: 20%

3. Inaccurate or Inappropriate: 3%

B. Percentage where comm. disagreed with recommend.: 3%

C. Percentage where respondent had prior complaints: 33%

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Grievance Comm. for the 5th Judicial District*

Date of Inspection: *September 14, 1993*

Total Files Reviewed: *24*

1. Time in Process

A.	Average Time to Respondent's Answer:	*5.9 weeks*
B.	Average Time to File Closure:	*29.2 weeks*

2. Nature of Complaint:

A.	Conversion	*4%*
B.	Malpractice/Neglect:	*71%*
C.	Conflicts:	*0%*
D.	Confidentiality:	*4%*
E.	Misrepresentation:	*0%*
F.	Improper Advertising:	*0%*
G.	Frivolous Litigation:	*0%*
H.	Fee Dispute:	*4%*
I.	Failure of Communication:	*4%*
J.	Other/Not Specified:	*13%*

3. Engagement

A.	Criminal:	*17%*
B.	Domestic Relations:	*26%*

C. Real Property: *9%*

D. Estates & Trusts: *13%*

E. Negligence: *9%*

F. Commercial Transactions: *0%*

G. Landlord/Tenant: *0%*

H. General Litigation: *4%*

I. Other/Not Specified: *22%*

4. Investigation

A. Percentage having correspondence with

1. Respondent: *71%*

2. Third Persons: *8%*

B. Percentage where complainant shown response*: *71%*

C. Percentage where respondent

1. Interviewed: *8%*

2. Deposed: *4%*

D. Percentage where third person

1. Interviewed: *8%*

2. Deposed: *4%*

E. Percentage showing document inspection: *33%*

F. Percentage showing no apparent investigation: *13%*

---

* Percentage based on total number of files.

5. **Report to Committee**

A. Percentage where

1. Memorandum prepared: *38%*
2. Checklist prepared: *29%*
3. Other written report prepared: *29%*
4. No written proposal prepared: *4%*

B. Percentage where report prepared by

1. Staff attorney: *66%*
2. Investigator: *13%*
3. F/T Clerical: *0%*
4. Attorney Volunteer: *0%*
5. Other/Not Specified: *21%*

C. Percentage where report reviewed by

1. Chief Counsel: *21%*
2. Deputy: *0%*
3. Staff Attorney: *29%*
4. Committee Chair: *4%*
5. Other/Not Specified: *46%*

D. Percentage where recommendation documented: *58%*

6. **Quality of Report**

A. Percentage of file action found to be

1. Accurate and Informative: *79%*

2. Unclear or Incomplete: *21%*

3. Inaccurate or Inappropriate: *0%*

B. Percentage where comm. disagreed with recommend.: *0%*

C. Percentage where respondent had prior complaints: *50%*

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Grievance Comm. for 7th Judicial District*

Date of Inspection: *September 2, 1993*

Total Files Reviewed: *63*

1. Time in Process

A.	Average Time to Respondent's Answer:	*7.8 weeks*
B.	Average Time to File Closure:	*26.4 weeks*

2. Nature of Complaint:

A.	Conversion	*4%*
B.	Malpractice/Neglect:	*59%*
C.	Conflicts:	*9%*
D.	Confidentiality:	*0%*
E.	Misrepresentation:	*9%*
F.	Improper Advertising:	*4%*
G.	Frivolous Litigation:	*2%*
H.	Fee Dispute:	*0%*
I.	Failure of Communication:	*2%*
J.	Other/Not Specified:	*11%*

3. Engagement

A.	Criminal:	*25%*
B.	Domestic Relations:	*23%*

C. Real Property: *30%*

D. Estates & Trusts: *5%*

E. Negligence: *2.5%*

F. Commercial Transactions: *0%*

G. Landlord/Tenant: *0%*

H. General Litigation: *2.5%*

I. Other/Not Specified: *12%*

4. Investigation

A. Percentage having correspondence with

1. Respondent: *73%*

2. Third Persons: *15%*

B. Percentage where complainant shown response* : *50%*

C. Percentage where respondent

1. Interviewed: *12.5%*

2. Deposed: *0%*

D. Percentage where third person

1. Interviewed: *2%*

2. Deposed: *0%*

E. Percentage showing document inspection: *35%*

F. Percentage showing no apparent investigation: *17%*

---

* Percentage based on total number of files.

5. **Report to Committee**

A. Percentage where

1. Memorandum prepared: *52%*
2. Checklist prepared: *2%*
3. Other written report prepared: *19%*
4. No written proposal prepared: *27%*

B. Percentage where report prepared by

1. Staff attorney: *26%*
2. Investigator: *26%*
3. F/T Clerical: *0%*
4. Attorney Volunteer: *6%*
5. Other/Not Specified: *43%*

C. Percentage where report reviewed by

1. Chief Counsel: *11%*
2. Deputy: *0%*
3. Staff Attorney: *11%*
4. Committee Chair: *0%*
5. Other/Not Specified: *78%*

D. Percentage where recommendation documented: *35%*

6. **Quality of Report**

A. Percentage of file action found to be

1. Accurate and Informative: *62%*
2. Unclear or Incomplete: *36%*

3. Inaccurate or Inappropriate: 2%

B. Percentage where comm. disagreed with recommend.: 0%

C. Percentage where respondent had prior complaints: 8%

New York State Bar Association
Committee on Professional Discipline
Statistical Analysis of File Inspection

Committee: *Grievance Committee for the 8th Judicial District*

Date of Inspection: *September 1, 1993*

Total Files Reviewed: *63*

1. Time in Process

A.	Average Time to Respondent's Answer:	*7.5 weeks*
B.	Average Time to File Closure:	*26.6 weeks*

2. Nature of Complaint:

A.	Conversion	*6%*
B.	Malpractice/Neglect:	*24%*
C.	Conflicts:	*6%*
D.	Confidentiality:	*2%*
E.	Misrepresentation:	*5%*
F.	Improper Advertising:	*5%*
G.	Frivolous Litigation:	*0%*
H.	Fee Dispute:	*3%*
I.	Failure of Communication:	*3%*
J.	Other/Not Specified:	*44%*

3. Engagement

A.	Criminal:	*11%*
B.	Domestic Relations:	*25%*

C. Real Property: *7%*

D. Estates & Trusts: *9%*

E. Negligence: *5%*

F. Commercial Transactions: *5%*

G. Landlord/Tenant: *0%*

H. General Litigation: *11%*

I. Other/Not Specified: *27%*

4. Investigation

A. Percentage having correspondence with

1. Respondent: *66%*

2. Third Persons: *16%*

B. Percentage where complainant shown response*: *46%*

C. Percentage where respondent

1. Interviewed: *8%*

2. Deposed: *3%*

D. Percentage where third person

1. Interviewed: *6%*

2. Deposed: *0%*

E. Percentage showing document inspection: *13%*

F. Percentage showing no apparent investigation: *11%*

---

* Percentage based on total number of files.

5. **Report to Committee**

A. Percentage where

1. Memorandum prepared: *48%*
2. Checklist prepared: *2%*
3. Other written report prepared: *6%*
4. No written proposal prepared: *43%*

B. Percentage where report prepared by

1. Staff attorney: *51%*
2. Investigator: *42%*
3. F/T Clerical: *0%*
4. Attorney Volunteer: *0%*
5. Other/Not Specified: *7%*

C. Percentage where report reviewed by

1. Chief Counsel: *29%*
2. Deputy: *11%*
3. Staff Attorney: *43%*
4. Committee Chair: *6%*
5. Other/Not Specified: *11%*

D. Percentage where recommendation documented: *46%*

6. **Quality of Report**

A. Percentage of file action found to be

1. Accurate and Informative: *62%*
2. Unclear or Incomplete: *36%*

3. Inaccurate or Inappropriate: 2%

B. Percentage where comm. disagreed with recommend.: 2%

C. Percentage where respondent had prior complaints: 43%

Table I: Average Time to Respondent's Answer

Committee	Weeks
1st Dept.	8.6
2d & 11th	8.9
9th Dist.	4.1
10th Dist.	6.9
3d Dept.	8
5th Dist.	5.9
7th Dist.	7.8
8th Dist.	7.5
State Avg.	7.2125

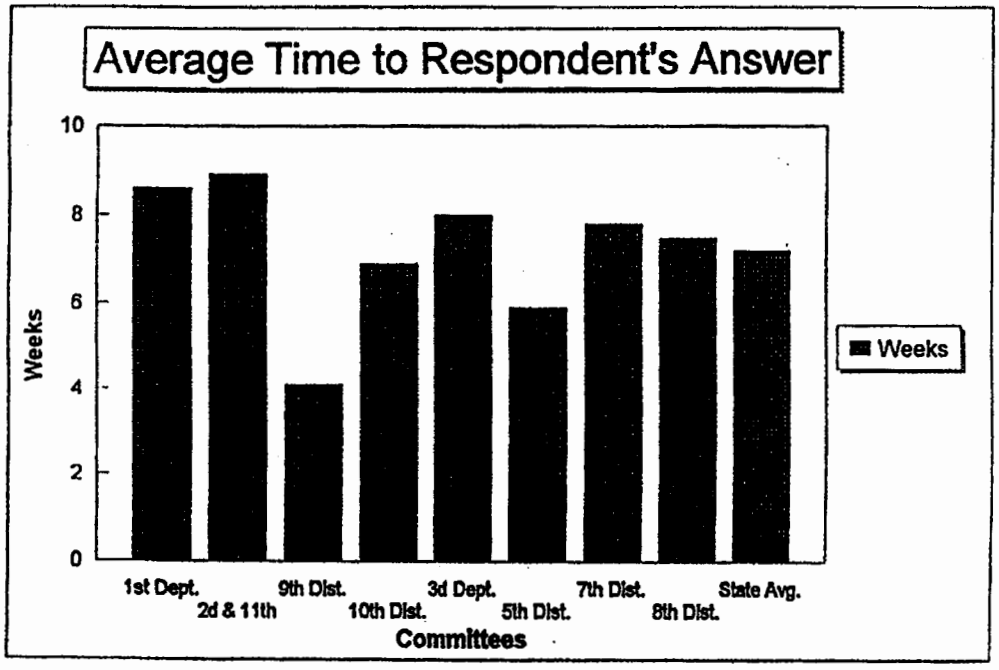


Table II: Average Time to File Closure

Committee	Weeks
1st Dept.	18.3
2d & 11th	35.2
9th Dist.	29
10th Dist.	19.4
3d Dept.	24
5th Dist.	29.2
7th Dist.	26.4
8th Dist.	26.6
State Avg.	26.0125

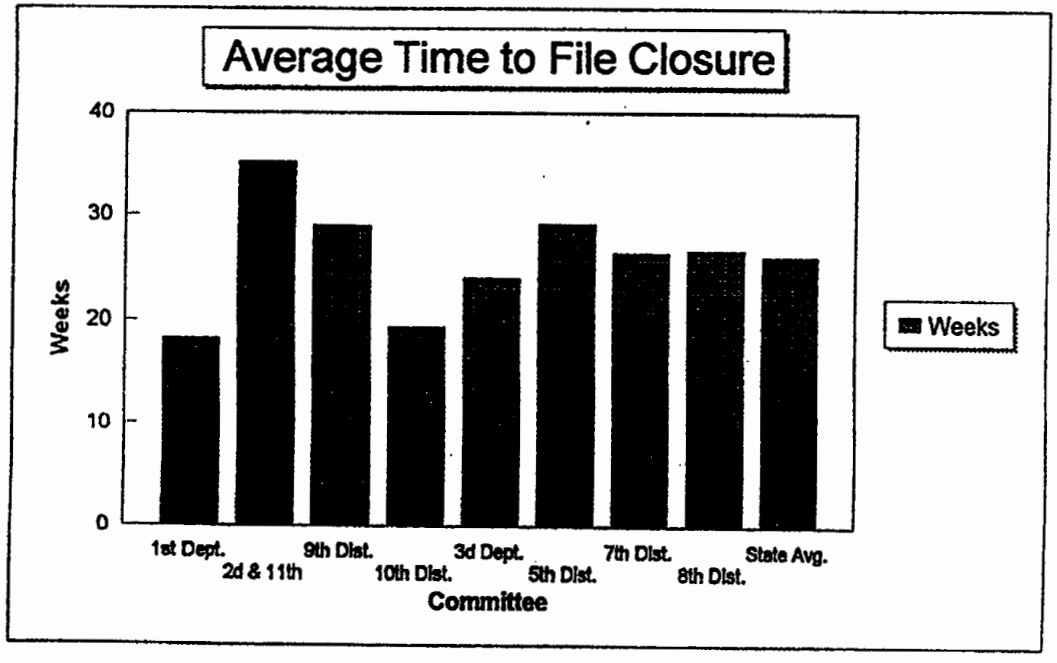


TABLE III: SUBJECT MATTER OF COMPLAINTS

	State Avg.	1st Dept.	2d & 11th	9th Dist.	10th Dist.	3d Dept.	5th Dist.	7th Dist.	8th Dist.
Conversion	4.125	2	5	2	10	0	4	4	6
Malpractice/Neglect	45.125	38	33	56	30	50	71	59	24
Conflicts	3.625	4	0	0	3	7	0	9	6
Confidentiality	1	2	0	0	0	0	4	0	2
Misrepresentation	4.875	8	2	5	5	5	0	9	5
Improper Advertising	3.25	1	2	5	2	7	0	4	5
Frivolous Litigation	2	2	5	2	3	2	0	2	0
Fee Dispute	10.875	18	17	9	28	8	4	0	3
Communication Failure	3.5	4	5	2	3	5	4	2	3
Other/Not Specified	21.625	22	32	19	16	16	13	11	44

* All figures represent the corresponding percentage of the files reviewed.

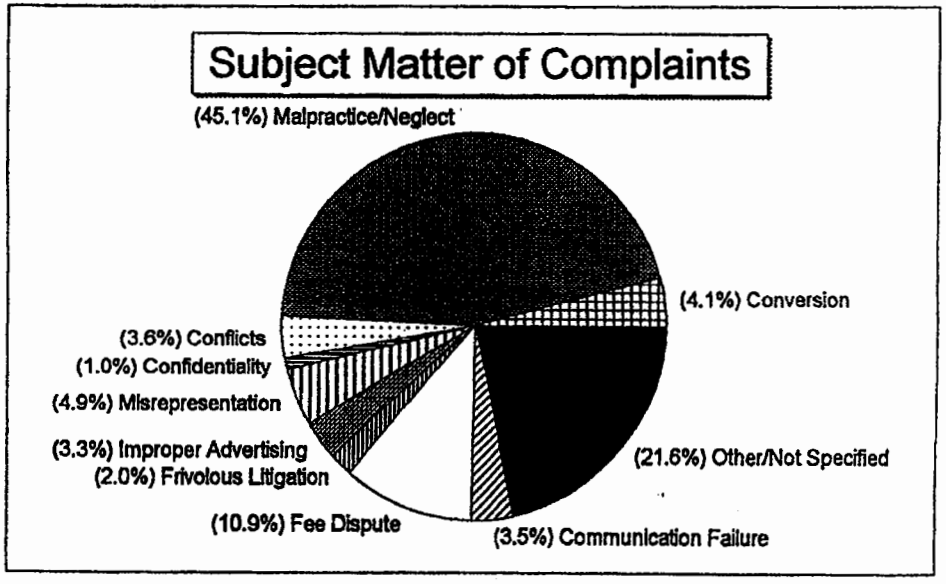


Table IV: **Attorney Area of Practice**

	1st Dept.	2d & 11th	9th Dist.	10th Dist.	3d Dept.	5th Dist.	7th Dist.	8th Dist.	State Avg.
Criminal	12	20	3	10	7	17	25	11	13.125
Domestic Relations	13	22	18	27	27	26	23	25	22.625
Real Property	14	24	15	15	17	9	30	7	16.375
Estates and Trusts	8	0	15	5	8	13	5	9	7.875
Negligence	20	17	18	10	8	9	2.5	5	11.1875
Commercial Trans.	8	2	6	7	4	0	0	5	4
Landlord/Tenant	3	5	0	0	4	0	0	0	1.5
General Litigation	7	10	15	2	10	4	2.5	11	7.6875
Other/Not Specified	15	0	9	24	15	22	12	27	15.5

* All figures represent the corresponding percentage of the files reviewed.

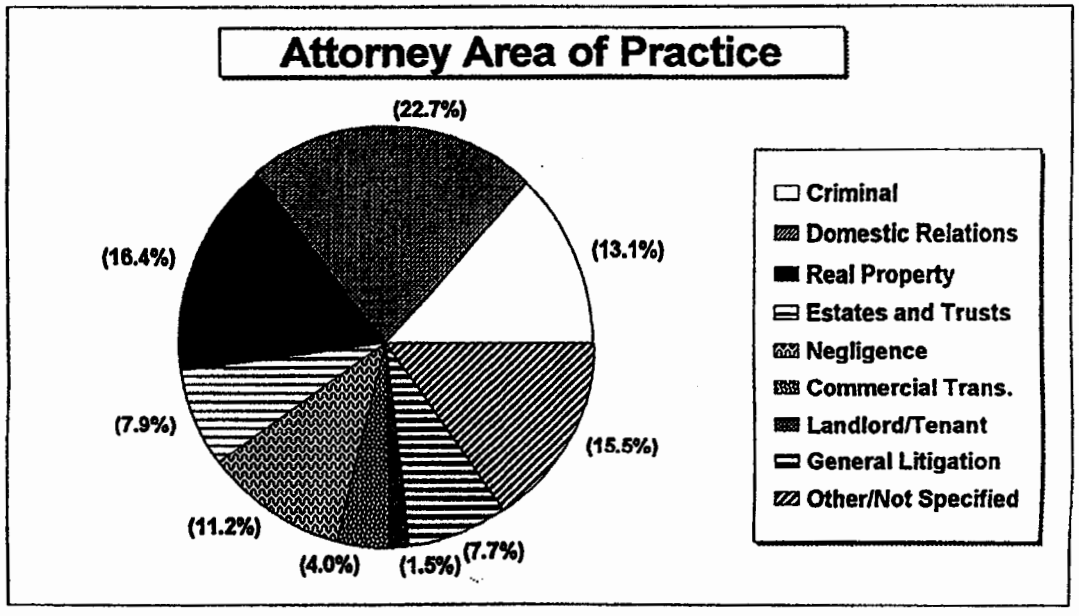


Table V: File Correspondence

	1st Dept.	2d & 11th	9th Dist.	10th Dist.	3d Dept.	5th Dist.	7th Dist.	8th Dist.	State Avg.
Corresp. w. Respondent	57	41	45	50	40	71	73	66	55.375
Corresp. w. 3rd Persons	6	6	8	5	8	8	15	16	9
Comp't Shown Response	52	33	29	18	25	71	50	46	40.5

All figures represent a percentage of the files reviewed. The percentages contained in "Complainant Shown Response" represent a percentage of all files, not only those in which a committee had correspondence with a respondent.

Table VI: Investigations

	1st Dept	2d & 11th	9th Dist.	10th Dist.	3d Dept.	5th Dist.	7th Dist.	8th Dist.	State Avg.
Resp. Interviewed	2	3	4	7	2	8	12.5	8	5.8125
Resp. Deposed	0	2	0	2	0	4	0	3	1.375
3d Party Interviewed	2	2	0	8	3	8	2	6	3.875
3d Party Deposed	0	0	0	0	0	4	0	0	0.5
Documents Inspected	8	5	22	13	5	33	35	13	16.75
No App. Investigation	N/A	34	10	21	17	13	17	11	15.375

Note: Many files in the 2d & 11th District inspection which have no apparent investigation are listed as having been transferred to a local bar grievance committee or as a "failure to register" matter.
All figures represent a percentage of the files reviewed.

Table VII: Report to Committee

	1st Dept.	2d & 11th	9th Dist.	10th Dist.	3d Dept.	5th Dist.	7th Dist.	8th Dist.	State Avg.
Memorandum Prepared:	62	59	39	57	57	38	52	48	51.5
Checklist Prepared:	28	16	47	5	45	29	2	2	21.75
No Written Report:	10	25	14	40	13	4	27	43	22
Other Written Material:	0	0	0	0	2	29	19	6	7
Report Prepared by:									
Staff Attorney	84	81	64	79	89	66	26	51	67.5
Investigator	0	0	2	0	2	13	26	42	10.625
Full Time Clerical	7	0	2	0	0	0	0	0	1.125
Attorney Volunteer	1	4	0	5	2	0	6	0	2.25
Other/Not Specified	8	15	31	16	7	21	43	9	18.75
Report Reviewed by:									
Chief Counsel	70	80	74	32	32	21	11	29	43.625
Deputy	4	0	0	0	0	0	0	11	1.875
Staff Attorney	5	0	0	0	19	29	11	43	13.375
Committee Chair	2	4	0	18	0	4	0	6	4.25
Other/Not Specified	19	16	26	50	49	46	78	11	36.875
Doc. Recommendation:	47	30	47	10	62	58	35	46	41.875

All figures represent a percentage of the files reviewed.

Table VIII: Quality of Report

	1st Dept.	2d & 11th	9th Dist.	10th Dist.	3d Dept.	5th Dist.	7th Dist.	8th Dist.	State Avg.
Quality of Report:									
Accurate/Informative	79	73	79	98	77	79	52	62	74.875
Unclear/Incomplete	14	27	21	2	20	21	42	36	22.875
Inaccurate/Inappropriate	7	0	0	0	3	0	6	2	2.25
Percentage Where Comm. Disagreed With Rec.	0	2	4	3	3	0	0	2	1.75
Percentage Resp. with Prior Complaints:	26	30	39	21	33	50	8	43	31.25

All figures represent a percentage of the files reviewed.

APPENDIX B:

SURVEY OF LAWYER ATTITUDES

Appendix B-1
Sample NYSBA Survey Questionnaire

ATTORNEY SURVEY

	AGREE STRONGLY	AGREE SOMEWHAT	DISAGREE SOMEWHAT	DISAGREE STRONGLY	NO OPINION
1. If I filed a complaint about another attorney, the complaint would:					
a) be handled promptly	[ ]	[ ]	[ ]	[ ]	[ ]
b) inevitably involve me in a very time consuming process	[ ]	[ ]	[ ]	[ ]	[ ]
c) likely result in some form of retaliation by the respondent attorney or his firm	[ ]	[ ]	[ ]	[ ]	[ ]
d) expose me to investigation by the disciplinary authorities ...	[ ]	[ ]	[ ]	[ ]	[ ]
e) be viewed as foul play or otherwise inappropriate by many of my colleagues	[ ]	[ ]	[ ]	[ ]	[ ]
2. The individual members of the disciplinary and grievance committees:					
a) take their responsibilities seriously and are fair.....	[ ]	[ ]	[ ]	[ ]	[ ]
b) are reluctant to impose significant sanctions	[ ]	[ ]	[ ]	[ ]	[ ]
c) are out of touch with the realities of modern practice	[ ]	[ ]	[ ]	[ ]	[ ]
d) are biased in favor of big firm lawyers	[ ]	[ ]	[ ]	[ ]	[ ]
e) are more concerned with convicting lawyers charged with misconduct than doing justice	[ ]	[ ]	[ ]	[ ]	[ ]
3. In general, the disciplinary system:					
a) provides an effective means of regulating the conduct of lawyers..	[ ]	[ ]	[ ]	[ ]	[ ]
b) provides a less effective means of regulating professional conduct than malpractice litigation and other forms of private action..	[ ]	[ ]	[ ]	[ ]	[ ]
c) takes too much time to punish a lawyer guilty of misconduct	[ ]	[ ]	[ ]	[ ]	[ ]
d) takes too much time to exonerate an innocent lawyer accused of misconduct	[ ]	[ ]	[ ]	[ ]	[ ]
e) needs to be substantially improved before it can enjoy the confidence of lawyers	[ ]	[ ]	[ ]	[ ]	[ ]

You may submit additional comments with respect to any of the foregoing questions on the reverse side of this sheet. Please indicate by number and letter the question or questions to which your comments are directed.

Appendix B-2

Percentage of Section Members by District

Grievance Committee	Percentage of total surveys received	Percentage of General Practice Membership in Area	Percentage of Section Membership Returning Surveys
1st Department	17%	22%	19%
2d & 11th Jud. Districts	8%	11%	19%
9th Judicial District	14%	12%	29%
10th Judicial District	14%	16%	21%
3rd Department	14%	11%	31%
5th Judicial District	8%	5%	42%
7th Judicial District	4%	5%	22%
8th Judicial District	5%	6%	21%
Out of state/no postmark	15%	12%	32%

New York State Bar Association
General Practice Section
Summer, 1994 Survey of Members
Concerning Attitudes Toward
New York's Disciplinary System

Question	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	No Opinion	Other/No Response
1. If I filed a complaint about another attorney, the complaint would:						
a. be handled promptly	19%	36%	18%	7%	14%	5%
b. inevitably involve me in a very time consuming process	22%	41%	16%	5%	9%	7%
c. likely result in some form of retaliation by the respondent attorney or his firm	19%	35%	17%	11%	10%	8%
d. expose me to investigation by the disciplinary authorities	6%	14%	23%	35%	14%	8%
e. be viewed as foul play or otherwise inappropriate by many of my colleagues	14%	33%	21%	16%	8%	8%
2. The individual members of the disciplinary and grievance committees:						
a. take their responsibilities seriously and are fair	39%	33%	5%	3%	16%	4%
b. are reluctant to impose significant sanctions	8%	28%	21%	20%	16%	7%

Question	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	No Opinion	Other/No Response
2. c. are out of touch with the realities of modern practice	8%	18%	25%	21%	21%	7%
d. are biased in favor of big firm lawyers	12%	17%	17%	16%	29%	7%
e. are more concerned with convicting lawyers charged with misconduct than doing justice	6%	13%	23%	28%	23%	7%
3. In general, the disciplinary system:						
a. provides an effective means of regulating the conduct of lawyers	21%	42%	19%	10%	5%	3%
b. provides a less effective means of regulating professional conduct than malpractice litigation	6%	16%	31%	28%	11%	8%
c. takes too much time to punish a lawyer guilty of misconduct	13%	28%	23%	13%	16%	7%
d. takes too much time to exonerate an innocent lawyer accused of misconduct	23%	33%	14%	7%	16%	7%
e. needs to be substantially improved before it can enjoy the confidence of lawyers	24%	30%	17%	9%	13%	7%

Appendix B-4
Selected Comments from Survey Responses

New York State Bar Association
General Practice Section
Summer, 1994 Survey of Members
Concerning Attitudes Toward
New York's Disciplinary System

Survey Comments

Question 1 (all):

(1) I have never filed a complaint against another attorney; in central New York we work our problems out with other attorneys. Sometimes the assistance of a judge is necessary. When real code violations arise or if criminal action is involved, more often than not, [the grievance committee staff is] already on the problem. I think you are describing a problem that arises in NYC.

Question 1(a):

(1) The initial response is fast, but the process takes too much time.

Question 1(b):

(1) The "time consuming" is necessary to get it right.

Question 1(c):

(1) Generally speaking, most individuals I know who have valid grievances against an attorney will not pursue such grievances primarily due to their fear of retaliation from such attorney once their identity is known.

(2) No one likes a "whistleblower" nor a "fink." We don't collectively have a Naval Academy honor code even though obliged to report violations. The retribution and ill-will can last a lifetime of a career and this is why lawyers don't complain of each other very much. There are other solutions, avenues and ways to handle the bad lawyer.

(3) I have never filed a complaint about another attorney. I have informed a Supreme Court Justice about misconduct by opposing counsel and my clients submitted a counterclaim based in part, on frivolous controversy.

The Court rejected all my work products having to do with this misconduct, including the counterclaim.

As a beginning attorney, I have been appalled by how some attorneys treat the opposing counsel. I am accused of "mudslinging" when I inform the Court of misconduct.

The following has occurred in just one case I have been handling: (1) Phone calls to my office by opposing counsel threatening to move against me with sanctions if I did not withdraw a motion to dismiss. (2) Opposing counsel did submit the motion as per NYCRR 131.1-1 and it was granted at $2,000! (3) Opposing counsel called me again the day I received the Court's decision and threatened me with a grievance if I reargued or began an appeal. I did both. The reargument was rejected by the Court. The appeal is pending. (4) Opposing counsel has also threatened me by accusing me of writing an affidavit that was entirely false for a non-party witness, and informed the court of this in opposing papers that I participated in this act of "libel."

I have not informed the Court of any more misconduct, as I fear stronger retaliation by opposing counsel. I believe that beginning a grievance would have the same results.

(4) I once filed a complaint against a well-placed and well-connected attorney who, in writing, threatened my witness that if he testified against his [the attorney's] client, the attorney would make sure my witness lost his job, as he happened to be friends with the client's boss.

I never heard from the grievance committee regarding my complaint in almost **10** years.

Question 1(e):

(1) I believe question 1(e) is significant to us in the rural counties in the Adirondacks.

Question 2 (all):

(1) The individual members appear to be led by Chief Counsel and [do] not exercise their independent judgment as experienced attorneys. They are wedded to the **system** of discipline; and too frequently fail to exercise the practical-reasonable approach, as they should and would - if the issue were one in their daily practice.

(2) It is also comprised of "local" attorneys who protect their "local" brethren.

(3) Based on my readings of the various decisions that appear daily in the NY Law Journal it seems that the committee is inconsistent. Certain

sanctions appear extremely harsh in light of the facts set forth and other appear too lenient. Oftentimes the same set of facts results in very different outcomes (e.g., censure vs. license revocation) with no reasonable explanation as to the discrepancies in sanctions, if any, imposed.

(4) All of the questions in part 2 are not appropriate, as my impression of the attorney grievance process is that much of it is kept confidential. Consequently, I don't understand how any of the participants in this survey can answer those questions without having had some personal involvement in the attorney grievance/disciplinary procedure.

From my review of cases which have been publicized, it appears that the crux of disciplinary action has been directed at commingling of funds. I'm certain that other forms of ethical violations exist, however, I'm not certain that any more regulation, either through the profession or otherwise, will correct ethical violations which will always occur in any profession.

(5) The bigger problem is with counsel to the committees. They are often attorneys with little or no practical experience and legal acumen in areas where the attorneys they investigate conduct their practices.

(6) [The committee] is political, lazy and incompetent. The worst attorneys sit in judgment of others who are busier, more talented, and much more successful. [The employees] are anti-Semitic, anti-negligence and matrimonial lawyers, and anti-Democrat.

(7) Many of the members of the disciplinary and grievance committees do not have experience in the private sector. Rather, they have come to the committees straight form law school or other public departments. The lack of practical experience often leads to charging attorneys with misconduct without proper or informed investigation prior to subjecting attorneys to the time-consuming and distressing process.

Question 2(a):

(1) I served 5 years on the grievance committee. It is a thankless job. The members and staff took their responsibilities very seriously although things moved slowly except in the case of extreme defalcation or misconduct. Most lawyers would want the system retained - i.e., discipline largely controlled by our peers. We had a good cross section of members who understood the pressures and problems facing most lawyers. In my experience the worst problems arose from alcoholism and drug abuse and programs of education and prevention.

(2) They take it seriously, but are not always fair.

(3) While I believe many members of the disciplinary committee take their responsibilities seriously, I do not believe all/many are fair.

Question 2(b):

(1) Reports indicate that the committees are reluctant to dismiss charges or otherwise exonerate attorneys. I believe this to be an attempt on the committees' part to head off the eventual accusations that they are protecting "fellow attorneys." Somehow this reverse bias must be removed from the system.

Question 2(c):

(1) A recent grievance meeting showed me (as defense counsel to the lawyer complained of) that a committee member lawyer didn't really know how day-to-day law practice is conducted. He kept harping on retainer agreements and time sheets in small, picayune, garden-variety office matters, as if the practitioner should spend more time doing an appropriate retainer agreement (which would **spook** the average client) and time sheets (also a client-spooker) - so I conclude sometimes committees are **not** in touch with real life.

(2) The attorneys who work on these disciplinary matters usually have not practiced law or have very little experience in practicing law. This handicaps their judgment - especially if an attorney being investigated has a specialized practice. Perhaps the salaries are low or the experience of disciplinary attorneys has little value in the practice of law, so that only inexperienced attorneys apply for the job.

Question 2(d):

(1) Complaint will result in motion practice on any matter with firm.

(2) I cannot recall a case (I am sure there are) that I have read, in years and years, where the individual who was punished was a member of a firm with more than one or two lawyers. A bit strange - to say the least.

(3) Questions 2(c) and 2(d) are absolutely correct; e.g., new matrimonial rules promulgated by Judge Kaye.

(4) A recent client told me he sued his prior attorney because he felt the fee was too high. The panel awarded the client a partial refund of the fee. The client gleefully explained how the bills were scrutinized line by line at the

hearing, and how the attorneys on the panel questioned the time spent on every letter and legal document which was prepared.

The attorney worked for a small firm. Some of the charges were high, but the panel overlooked the **hours** of free telephone advice to the client which were itemized but unbilled.

A small firm attorney will take longer to write a letter, etc., than his big-firm counterpart with his army of support staffers. But what big-firm attorney does **not** bill for phone advice and status updates?

As a small firm attorney, I try to provide a personal touch with my clients. In the end I charge much less to the client but I provide excellent service. However, a panel of attorneys should not compare **their** guesstimate of the proper cost of a service with the cost charged by a small firm attorney unless they are aware of the work we do - both billed and unbilled - for the client.

An aside - I told my adversary that the client was suing the former attorney. She works for a large firm. She said she's writing a "sympathy note" to the attorney. She knows that unlike her, he can't really write off this loss of fees. She saw, first hand, how grueling his work is.

(5) Too much "politics" is involved in the appointment of grievance committee personnel and the way they react to certain cases. This is why many lack confidence in the system.

(6) Complaints against attorneys from "big name" firms are not prosecuted with the same frequency as against other "smaller" attorneys.

(7) Re 2(c) and 2(d) - It appears that the investigators have no idea of what it is like to practice in a small firm, particularly in a rural area. The committee tends to give the benefit of the doubt to partners in large firms while an attorney in a small firm is dealt with harshly, particularly for items as ledger cards for escrow accounts or other technical violations when there is no showing of prejudice to the client.

Question 3 (all):

(1) An attorney is presumed guilty and from what I read and hear, is not treated fairly. The attorney should not have to prove his lack of guilt. The bar associations are afraid to face the Appellate Division and challenge any unfairness in the treatment of attorneys. Bar leaders tend to want to "get along" with appellate judges and, in the process, do little for their membership.

The present system is slow in discovering offending attorneys. The punishment is often too harsh and differs from department to department.

Question 3(a):

(1) As more and more attorneys practice in foreign courts or international tribunals, the disciplinary rules must clearly resolve conflict of law questions as to which state's or country's ethics rules govern.

(2) The process is extremely important.

(3) More money should be appropriated by the Legislature for disciplinary matters.

Question 3(b):

(1) Malpractice litigation, where coverage is in place and a deductible the risk, is only an **inconvenience** to a lawyer, but the grievance process which can suspend him and **take his ticket** is the ultimate deterrent.

(2) The root of many problems between client and attorney ... is reflective of the problems in our society. Many clients lack sufficient funds to pay an attorney for multiple cases involving family, employment, consumer credit and more. Many clients are entrenched in a declining situation, that they are unable to turn their lives around. An attorney is often "blamed" for not fixing it.

On the other hand, attorneys working with people on the down and out frequently suffer compassion fatigue and fail to impress on clients the complex nature of the problem and the attorney's inability to "fix it" for a few hundred dollars. ... [T]he problem is not is the discipline part but in our understanding of the client's needs and the limited nature of our assistance.

(3) Very few people will ever actually sue over most complaints.

Question 3(c):

(1) Drags on forever. Stop "Mirandizing" attorneys. If escrow account is short or "NSF" check issued why have interminable delay?

(2) My experience with local attorneys charged with offenses is that it takes much too long to conclude a case against them and in the meanwhile they continue actions which harm the profession. Some way must be found to process these matters more swiftly and more efficiently.

(3) When I was president of our local bar association, we had a situation where a local attorney was far "off the reservation" and actually stealing from

clients. He was in trouble, everyone in the bar association knew it, but he still had his office open bilking clients. We needed immediate action, but were told we'd have to wait until the Appellate Division was in session. He was able to continue bilking for several more months and was then disbarred. Can't these judges get together by conference phone when they're not in session to take care of pressing attorney discipline problems?

(4) The practice of keeping complaints on file when they are either dismissed by the grievance committee or unfounded by same is an egregious violation of rights. The concept of "where there's smoke, there's fire" has no place in the grievance system.

(5) In 22 years, I reported 2 lawyers guilty of serious misconduct and neither one was punished in any way to the best of my knowledge. Both were well-known, rich and aggressive lawyers, and I believe they intimidated the grievance committee.

Question 3(d):

(1) Too much time to rule on "disgruntled" clients and their stories. Speed the process. Have written complaints for all but medical reasons and allow for some manner of summary decision.

(2) As to 3(d), an innocent lawyer is generally forced to wait for too long a time until he/she is exonerated. There are many groundless claims made and before exoneration, a lawyer is forced to undergo unjustifiable anguish, even where the complaint is frivolous. There should be a faster way of doing this.

(3) There is no procedure for pre-emptively screening malicious grievances for the sole purpose of injuring another attorney. Regardless of the exoneration or complete innocence of an attorney, a false accusation creates a file and a record which cannot otherwise be erased. Perhaps some initial screening process prior to filing the grievance could be instituted.

(4) In connection with question 3(d) regarding the time it takes to exonerate an innocent lawyer, several years ago unsubstantiated allegations were made against my father involving an estate he was handling at the time. It was brought by certain members if the family. My father, an attorney in private practice over 50 years, felt it would be best to hire another attorney to represent him before the disciplinary committee. This was the first time that any accusations had been made against my father in all the years he had been practicing law. It took the grievance committee over nine months to dispose of the matter. My father was fully exonerated and the committee stated that

there was no basis for the charges against him. The system worked, but the matter, in my opinion, could have been disposed in a quicker manner.

(5) I am particularly concerned about the issue of exonerating lawyers who are innocent of charges in an expeditious fashion. Whenever an attorney is accused of any wrongdoing, regardless of the degree of seriousness, that individual must necessarily face a very time consuming investigation by the bar. It goes without saying that such a process places a heavy burden upon the attorney, both in terms of practice and private life. Given such a situation, the bar should be urged to make concerted efforts to assure that looking into the matter of a particular attorney's misconduct will be accomplished in as speedy a manner as is humanly possible. I do not believe that this is being done at the present time. This is probably because the various attorneys who are assigned to committees are simply too busy with their own practices to be concerned about inconveniencing a fellow attorney whose conduct is called into question.

(6) I have been in practice for six years. I have had no contact with the grievance committee in that time, nor has any friend or business acquaintance. ... However, if the grievance committee is run as the prosecutor's office, I am sure that Item 3(d) is very true. The innocence of a defendant is never publicized nearly so much as the accusation.

(7) Regrettably, this is probably because of the caseload - but I also believe that they may not realize the tension you're under until the decision comes down.

(8) The time it takes to be exonerated is unconscionable. Too often it's a fee mediation mechanism.

(9) In my experience the biggest defect in the system is the delay between complaint and action even in matters where the result is obvious.

Question 3e:

(1) As my answers indicate, I think the disciplinary process has serious problems. However, Question 3(e) misses the point. The disciplinary system must enjoy the confidence of the **public**; this is much more important than that it enjoy the confidence of lawyers. I suspect that currently it enjoys the confidence of neither the public nor lawyers.

The current system is much too closed. I would strongly favor opening up the disciplinary process, as states like Florida and Connecticut have done. This would in the long run increase public confidence and help expose the problems that do exist in the current system. It might even lead to greater funding of the system, which is desperately needed.

I also think the decentralization of the New York disciplinary system is ridiculous and unfair. Standards are enforced very differently in the different departments; this is wrong. There's a reason why all other states have centralized systems; New York should follow suit.

Let me add that I think the people who work on the disciplinary boards are hard-working and generally try to be fair. But they need a lot more funding to do the job. Frankly, the disciplinary system in New York is a joke. It is not a true deterrent to conduct, because lawyers don't see it as posing any real threat. And this is different from the situation in other states. I've also practiced in Florida, where the disciplinary system has some real teeth and where lawyers regard it as having real power.

We also need a lot more involvement from non-lawyers. They would add an important perspective. The current system is really set up as a closed club, with all the lawyers just talking to each other. This can never work.

(2) Lawyers' confidence in the grievance system is nowhere near as important as the certainty of inquiry and punishment for wrongdoing.

(3) I had a complaint filed against me by a truly crazy and dishonest client. I was also sued by that client. I won the suit (small claims court) and was found guiltless by the disciplinary committee - but to my grave, I will resent the fact that this complaint, which was patently baseless on its face, produced only a letter to the effect that the lawyer "does not seem" to have violated any code provisions. This was far too mild a response to this patent attempt to force a settlement in a civil suit.

(4) The disciplinary committee entertains any complaint, no matter how frivolous, taking time from lawyers who have to work hard enough in their time to earn a living. Attorneys really have no recourse against abusive clients who call every day and/or appear at an attorney's office and demand to see said attorney even without an appointment.

(5) It is a waste of time to file a complaint against a lawyer. Lawyers and clients have no faith in the existing system. Hearings are rarely held. The lawyer denies all. The committee does nothing.

(6) I honestly do not know how well the system works on an overall basis, but can only respond on the basis of my limited experience. However, whatever faults may exist in the present system are probably inherent in any social system of redress. I have no suggestions for a better system, nor have I heard of any.

(7) The system also needs substantial improvement before it will enjoy the confidence of the **public** - my sense is that the system as frequently administered is viewed cynically by **all** parties. If that is true, expectations have nowhere to go but up.

The process is twisted by unilateral interpretation of the "grievance" lawyer investigating. If he is "enthusiastic," there is imbalance. If he is experienced in the practice of law as a threshold qualification, there is likely to be more confidence in the process and more balance in the result. Thus, investigations are uneven and lack uniformity, and consequently results are unpredictable.

No specific question addressed:

(1) The grievance committee should give more attention to the administration of the law practices of suspended and disbarred attorneys.

(2) The lawyers on the [grievance] committee do take their obligation very seriously - but more professional help is necessary.

(3) From comments heard, the [staff] attorneys for the grievance committees "run" a great deal of what occurs - the committees meet infrequently and act on "presentations" of cases by their counsel, who may display various personal "agendas." Their attorneys may be "hatchet men" with excessive power. A committee member who practices in the area of practice relative to the complaint should review each complaint and "report" on it at committee meetings - not the professional (prosecutorial) attorneys for the committees whose reputations and livelihoods depend on "prosecutions," much like police and DA's. The committee attorneys are biased by their own positions/needs/outlooks.

(4) An unhappy or vengeful or emotionally disturbed client can literally cause a nightmare, and many clients know this or seem to know this. The system should not process certain cases and should process no case where the alleged victim does not first provide a sworn statement, punishable by perjury. Also, cases should be promptly dismissed where an attorney receives no reply from alleged victim after submission by attorney of a response to an unsworn or sworn complaint. I know of cases where attorneys have been blackmailed (because of the present system and how it is run) and forced to take certain action or inaction or waive rightful fees.

(5) Grievance committees are a farce, and you'd probably have to rob a rich widow of her last sou before any judge would impose more than a slap on the wrist. If you don't know this already, you're part of the problem.

(6) [I] do not know the difference between committees at Judicial District level and county level.

(7) [The system] works better than any other system I could think of. It's not perfect by any means, but it does work!

(8) Generally, the system works very well. It is only when the exception pops up the political pressure comes into play and the system comes under attack. You really have to be in the "pits" yourself to judge what is going on in the profession. I am proud of the job we do in policing our profession. If it works, don't fix it.

(9) I don't have very much experience in these matters, thus I don't have strong opinions about them. I do have a great deal of respect for the system, especially in light of the fact of efforts, such as this one, to improve the profession.

(10) Spend too much time harassing sole practicing lawyers on petty non-charges or obviously baseless charges while ignoring the more difficult to deal with, real problem lawyers.

(11) I do not believe that complaint should be publicized either before or after discipline - unless it results in disbarment. In a small rural upstate county like mine, the reputation of the lawyer and his practice would be severely damaged, if not destroyed. The bar should emphasize the food deeds and services that lawyers perform. 55,000+ attorneys should not be blasted because of the misdeeds of a very few attorneys. For example, I understand that the [matrimonial] court rules were the result of the misdeeds of six (6) New York City lawyers.

(12) I passed on a complaint against another attorney some time ago. The major thrust of the investigation seemed to be to try to get me to do it.

(13) I am a member of my local grievance committee and we attempt to respond to complaints within 30-60 days. I know from experience that the state committee takes longer, keeping the attorney in limbo. They should try to do a better job in responding more promptly. The vast majority of lawyers I deal with take complaints seriously and to heart.

(14) The problem is that the system puts the burden of proof on the accused (lawyer). It is the exact opposite of the constitutional system of justice enjoyed by everyone else. Lawyers especially need the same Bill of Rights every other citizen enjoys - especially the right not to be compelled to testify.

(15) Perception is now more important than reality. See *Newsday*, 5/11/94, p. 31.

(16) For whatever reason most cases of misconduct go unreported. Clients are not aware of a disciplinary option, nor do they always realize misconduct. Too bad the committee couldn't supervise the courts and see firsthand.

(17) There should be a unified system and uniform standards imposed which can not vary even within the same department.

The system is now penal in nature and a public censure stigmatizes the disciplined attorney.

We should be looking for ways to reach out to troubled attorneys before they get into trouble.

The system is now response oriented. Even sua sponte investigations generally result from some form of public announcement or complaint, i.e., newspaper articles re arrest of attorney.

We should demand a report of any attorney's criminal charge, even for offenses.

We should have some mechanism to deal with attorney behavior which evidences problems in the making before they become disciplinary.

(18) Don't tinker with something that is working - don't let the public activists run our profession. We police it very well, historically.

I served 17 years on the grievance committee, then represented many lawyers (and judges) who are helpless and really need counsel. Remember, some mistakes lawyers make are susceptible of correction.

(19) A case like Roger Scott's demeans the profession and the process. Multiple complaints and multiple "whitewashes."

(20) Go public at time of appellate referral for findings.

(21) Generally, the only time action is taken is if [the] attorney takes clients' money.

(22) I have the highest regard for our bar committee and [the principal attorney] of our district.

(23) The disciplinary system is appropriate for fee disputes, misappropriation of client funds and issues involving sex with clients. It is a waste of time as far as the "no returned telephone calls" and "the result isn't what I want" complaints. Plumbers, carpenters and auto mechanics can do just as much damage, but they can't have their time wasted because they didn't return a telephone call.

(24) I have been involved in the professional responsibility field nationally for almost twenty years. I have represented respondents and complainants and have even been a respondent once in a fee complaint. The discipline system in New York is in dire, dire need of overhaul, uniformity of procedure and practice, and adequate funding.

(25) I do not feel that I can comment on the system because I have had no contact with it and have not had clients, other attorneys or others comment on it one way or another. I am very interested in having a fair, responsive and effective system that will treat clients and attorneys justly, but I do not know if the present system does so or not. I hope this helps. I have practiced since 1975.

(26) Please note that the responses provided ... were largely of the "no opinion" variety because given by an attorney who has never had any kind of experience with the disciplinary system (and, of course, hopes never to be in the uncomfortable position of having to bring a colleague up on charges or certainly being the subject of a disciplinary investigation). However, I would believe that, as a matter of course, members of disciplinary and grievance committees do endeavor to provide the most effective, most efficacious and fairest resolutions of disputes presented to them for review, and thus take their work seriously. Regardless, however, human nature being what it is and attorneys being human beings in the last analysis, there is certainly at least the possibility of retaliation (and perhaps likelihood given the appropriate circumstances), as well as a certain amount of professional opprobrium to be expected from the wider circle of one's colleagues.

(27) Thanks for asking my opinion. I think, however, that you are substantially asking the wrong questions. The only complaint I ever filed against another attorney was dismissed because my client had contractual rights - it involved an assignment in escrow.

I have no knowledge or real concern about the individuals who serve on the grievance committee - but that should not be the point of your survey. The process should be opened and the rules should be formalized - there should be a way of controlling the conduct of lawyers - the disciplinary process is not set up to do that, but it is needed.

(28) Sometimes the committee forgets we are human beings who get angry and have "human" feelings and/or failings. I was told to improve my attitude when I was nasty to someone who had been shouting at me.

(29) The system is a mystery for most attorneys.

(30) There needs to be a more effective way to weed out the mere "sour grapes" complaints. As the premise of our legal system is justice through the adversarial means, it is too easy to cause problems for an attorney, [who is] simply doing his client service, by a complaint to the Board.

(31) On more than one occasion I witnessed purportedly "prominent," albeit flagrantly dishonest, [attorneys] manipulate the system. The manipulation manifested itself in endless delays and all too often the imposition of seemingly token sanctions given the gravity of the misconduct.

In one instance I was consulted about a situation where an individual lodged charges against a[n] attorney - charges lodged in or about 1981. Despite the individual's diligent pursuit of the issue, it was allowed to languish in limbo. When, years later, the individual requested the Appellate Division's intervention, over a year elapsed before the grievance committee reported that, despite the ongoing correspondence, the file had been closed/lost.

It was only a year or so later that the Bar was humiliated by the exposure of Jack Solerwitz. Unfortunately, the system's failure to act responsibly during the intervening five or six years permitted him to engage in a continuing pattern of misconduct which lost innocent clients millions of dollars.

I verily believe that, well intentioned as the members of the committee might be, the system, as it currently exists, is incapable of responding in a timely or meaningful fashion.

(32) We need more **mandatory** education so this system will not be necessary. We need the Bench to help lawyers. We need the ... Appellate Division to get out at meetings of bar associations, helping lawyers to be better lawyers so that they will not appear before them for disciplinary reasons. We need the Bench to appear at **mandatory** programs ..., to come off the bench and speak **out** and try to help a very serious problem plaguing our profession.

(33) As a sole practitioner, I have personally experienced the disciplinary process as a complainant. I testified when required. The attorney in question was eventually disbarred. It is the opinion of this lawyer that justice was done through the disbarment. The system, while not without shortcomings, was professional, timely and not overly time-consuming!

Remember, we are a **profession**. We must expect a little inconvenience from time to time in patrolling our ranks - when the rare attorney strays and does wrong and harm to the innocent.

(34) The grievance system is a FARCE! Lawyers do not police themselves at all. No wonder the bar has a negative reputation. No one here bothers to file a complaint because they know nothing will be done unless it's something so flagrant that the committee is embarrassed into it. The system is just a big joke to our local bar.

(35) The complaining lawyer should be informed of the **findings and results** of the investigation. ... The public is informed when people are accused of crimes. Why shouldn't the public be informed when lawyers are accused of misconduct?

(36) This questionnaire is so poorly thought out - questions are leading and do not, in my mind, address the real problem. The real problem is the number of attorneys who, without hesitation, take advantage of their clients. The disciplinary system appears too slow and not "user friendly." I am sure

that money is one of the problems. If the legal **profession** is to regain its rightful status, more policing needs to be done to protect the public. More attention needs to be made to the claims made in advertising. I'd be glad to work on a committee studying the issue.

(37) There should be a screening process at the local/county level to attempt to mediate minor allegations of attorney conduct.

(38) I believe the major obstacles are 1(c) and 1(e).

(39) The results of this report will be sanitized. Our profession, generally, is a disgrace. There is little reward for excellence or integrity, etc. [Neither t]he public, nor the law, is effectively served. The ... committees are rife with cronyism and ineptitude. They amount to a low-grade trade association.

(40) Committee ... does a fine job!

(41) Complaints are not screened well. Even most trivial complaints of unhappy clients or third parties require exhaustive attorney response.

Comments noting the responding attorney has no familiarity with the disciplinary system: 39

APPENDIX C:

COMPARISON OF APPELLATE DIVISION PROCEDURES

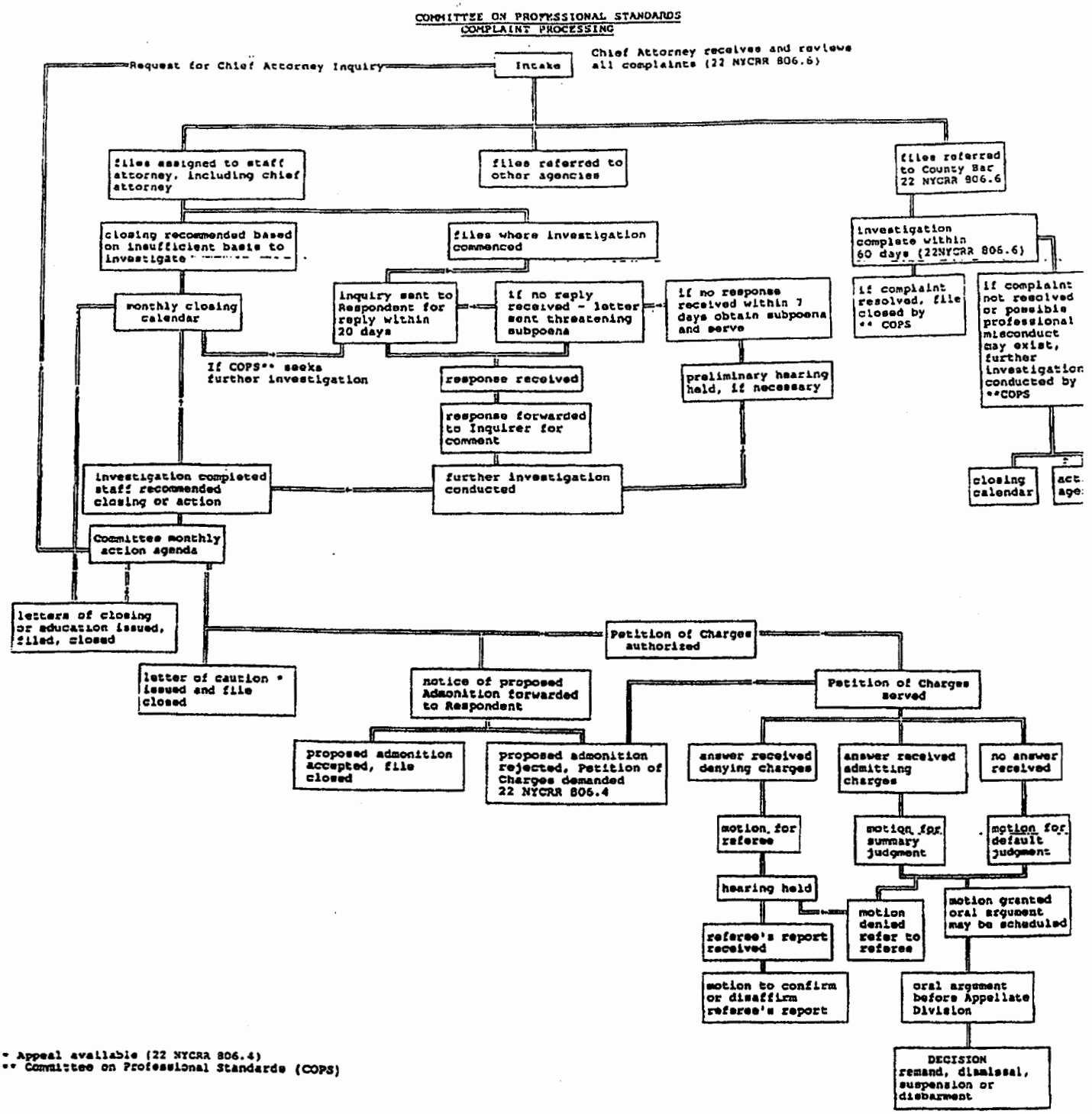
Appendix C-1
Table Comparing Procedures in Four Departments

	1st Dept.	2d Dept.	3d Dept.	4th Dept.
Number of DDC Members	43	20 x 3	21	21 x 3
Number of Nonlawyer Members	9	4 x 3	3	3 x 3
Number of Lawyer Members	34	16 x 3	18	18 x 3
Number of District Chairs	1	3	1	3
Number of Chief Counsels	1	3	1	1
Number of Staff Attorneys	18	18	4	6
Number of Support Personnel	23	21	8	12
Court-appointed DDC	yes	yes	yes	yes
Bar Comm. for Minor Matters	yes	yes	yes	yes
Court-appointed Bar Comm.	yes	no	no	no
Bar Comm. May Sanction	no	yes	no	yes*
All Matters Referred to DDC	no	yes	no	no
DDC Has Sua Sponte Authority	yes	yes	yes	yes
Staff Attorneys Hired by	court	court	court	court
Support Personnel Hired by	court	court	court	court
Complaint Mediation by Bar	yes	no	no	no
Use Volunteer Prosecutors	yes	no	no	no
Court Orders Formal Charges	no	yes	yes	yes
"FSC" on Authority of	chief	chief	chief	chief
Complaints Dismissed by	chief + 1	full comm	full comm	chief + 1
Investigative Hearings by	N/A	subcomm	staff atty	subcomm
Letters of Caution/Education	no	yes	yes	yes
L/C Used in Later Proceeding	N/A	no	yes	yes
Dismissal with Advisement	no	yes	no	no

* In limited circumstances.

Admonition	yes	yes	yes	yes
Reprimand	yes	yes	no	no
Letter of Caution requires:				
Chief Counsel	N/A	---	---	yes
DDC Chair		---	---	yes
Full Committee		yes	yes	---
Admonition requires:				
Chief Counsel	yes	---	---	---
DDC Chair	yes	---	---	---
Full Committee	---	yes	yes	yes
Reprimand requires:				
Chief Counsel	---	---	N/A	N/A
DDC Chair	---	---		
Hearing Panel	yes	---		
Full Committee	---	yes		
Formal Proceeding requires:				
Chief Counsel	yes	---	---	---
DDC Chair or Other Member	yes	---	---	---
Full Committee	---	yes	yes	yes
Hearing Panel	---	yes	---	---
Leave of Court	---	yes	yes	---
Appeal by Respondent				
To DDC Chair	yes	N/A	yes	N/A
To Other Panel Chair	no	no	N/A	yes
By Demanding Proceeding	yes	yes	yes	yes
Appeal by Complainant	yes	ad hoc	no	no
Complainant notified:				
complaint dismissed	yes	yes	yes	yes
specific sanction issued	yes	yes	no	yes
"appropriate action"	---	---	yes	---
Complainant Cautioned on Confidentiality	no	yes	yes	yes
Refer for Fee Conciliation	yes	yes	yes	yes
Authority to Require				
Substance Abuse Counsel	yes	yes	yes	yes
Other Remediation	yes	yes	yes	yes
Automatic Reinstatement on Suspension for 6 months or less	yes	no	no	no

Appendix C-2
Sample Flow Chart



* Appeal available (22 NYCRR 806.4)
** Committee on Professional Standards (COPS)

APPENDIX D:

CASES HANDLED BY LAWYERS' FUND FOR CLIENT PROTECTION

1ST DEP'T 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

Altomerianos, Nicholas 160 AD2d 96, 559 NYS2d 712	2 yr suspension commingling	NPDR
Bodner, Allen 160 AD2d 75, 559 NYS2d 6	indefinite suspension disabled	NPDR
Brown, Bradford 180 AD2d 150, 586 NYS2d 565	2 yr suspension commingling, dishonesty	NPDR
Catalfo, Vincent J. 181 AD2d 213, 586 NYS2d 256	disbarred theft of client funds, mail fraud, tax evasion	Matter of Catalfo (38 AD2d 205, 328 NYS2d 449), 2 yr suspension (as of 3/8/72) for forging client's name to a general release and settlement check and converting proceeds to his own use.
Eisenstat, Mitchell 180 AD2d 368, 586 NYS2d 741	indefinite suspension disabled	NPDR
Erlin, Jerome 157 AD2d 131, 554 NYS2d 916	disbarred noncompliance w/ suspension	Matter of Erlin (126 AD2d 83, 513 NYS2d 1), suspension for failure to cooperate w/ DDC in investigating complaint of neglect
Grubart, Harold 164 AD2d 144, 561 NYS2d 169	disbarred conversion of client funds, failure to pay judgment	Matter of Grubart (152 AD2d 185, 547 NYS2d 638), interim suspension on charges for which he was ultimately disbarred. Private Action: three letters of admonition (the dates and offenses are unreported)
gan, Charles 8 AD2d 28, 570 NYS2d 37	disbarred default in appearing before DDC, failed to return unearned fee, misrepresentation	NPDR
Katz, Reuben A. 165 AD2d 635, 569 NYS2d 21	disbarred convicted of grand larceny	NPDR
Kelly, Donald J. 157 AD2d 62, 554 NYS2d 531	disbarred conversion of client funds	NPDR

1st Dep't, 1990-93 (cont'd)

Kurtz, Irving 174 AD2d 207, 580 NYS2d 1	disbarred conversion of client funds	Matter of Kurtz (170 AD2d 1, 572 NYS2d 905), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.
McEnroe, James J. 174 AD2d 67, 577 NYS2d 828	3 yr suspension failed to return unearned fees, neglect (reinstated)	NPDR
Messina, Richard M. 180 AD2d 370, 585 NYS2d 342	disbarred conversion of clients' funds, failure to pay judgments	Matter of Messina (164 AD2d 160, 562 NYS2d 28), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.
Petty, Richard T. 171 AD2d 283, 575 NYS2d 667	disbarred failure to account for escrow funds, neglect, misrepresentation, failed to return unearned fees	Matter of Petty (156 AD2d 1, 553 NYS2d 758), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.
Polur, Sam 173 AD2d 96, 579 NYS2d 3	3 yr suspension violated disqualification order, neglect	NPDR
Romer, Stephen J. 179 AD2d 96, 582 NYS2d 648	disbarred convicted of grand larceny	Matter of Romer (169 AD2d 97, 572 NYS2d 3), interim suspension on charges related to some of the crimes for which he was ultimately disbarred. Otherwise, NPRD.
Rosenthal, Richard 160 AD2d 61, 559 NYS2d 526	disbarred conversion of clients' funds	NPDR
Savitsky, Richard D. 181 AD2d 199, 586 NYS2d 255	suspended indefinitely disabled	NPDR
Sylvan, Israel I. 166 AD2d 20, 568 NYS2d 934	disbarred conversion of estate funds	Matter of Sylvan (156 AD2d 56, 554 NYS2d 28), interim suspension on charges for which he was ultimately disbarred. Matter of Sylvan (104 AD2d 24, 481 NYS2d 81), censure for failure to segregate escrow funds (court noted "unblemished" 34-yr career).

2D & 11TH JUD'L DIS'TS (2D DEP'T) 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

Clark, Robert J. 180 AD2d 1, 586 NYS2d 217	disbarred convicted of grand larceny	NPDR
Daly, R. Scott 191 AD2d 127, 600 NYS2d 467	disbarred conversion of client funds, failure to cooperate	Matter of Daly (4/3/91, unreported), interim suspension on charges for which he was ultimately disbarred.
Elkin, Dennis 178 AD2d 83, 581 NYS2d 435	disbarred neglect, failure to cooperate, making false statements to Grievance Committee	Matter of Elkin (152 AD2d 213, 548 NYS2d 168), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.
Heron, Eric 154 AD2d 164, 552 NYS2d 48	disbarred convicted of grand larceny	Matter of Heron (134 AD2d 549, 522 NYS2d 448), interim suspension on charges related to some of crimes for which he was ultimately disbarred. Otherwise, NPDR.
Johnson, Robert 168 AD2d 7, 570 NYS2d 599	disbarred conversion of escrow funds, failure to cooperate	NPDR
Keith, Paul E. 77 AD2d 138, 583 NYS2d 153	resigned commingling client funds	NPDR
Kienosky, Rudolph	no record of any discipline	n/a
Lukas, Thomas 167 AD2d 83, 571 NYS2d 1014	resigned conversion of client funds	NPDR
Manning, Lloyd 71 AD2d 56, 74 NYS2d 293	resigned conversion of client funds	NPDR
Piastra, John 57 AD2d 95, 70 NYS2d 353	disbarred convicted of grand larceny	NPDR

2d & 11th Jud'l Dis'ts, 1990-93 (cont'd)

Reyes, Luis 52 AD2d 94, 50 NYS2d 757	resigned conversion of client funds	NPDR
Rivera, Jose A. 70 AD2d 178, 74 NYS2d 368	disbarred conversion of client funds	Matter of Rivera (unreported, 9/29/88) interim suspension on charges for which he was ultimately disbarred. Otherwise, NPRD.
Rosenbluth, Steven 183 AD2d 333, 591 NYS2d 336	disbarred convicted of grand larceny	Matter of Rosenbluth (unreported, 6/27/91) interim suspension on charges related to some of the crimes for which he was ultimately disbarred. Otherwise, NPDR.
Silvera, Oswald 153 AD2d 155, 551 NYS2d 792	resigned conversion of client funds	Matter of Silvera (unreported, 6/2/88) interim suspension on the charges pending when he resigned. Otherwise, NPDR.
Stern, Jeffrey 166 AD2d 4, 570 NYS2d 989	resigned conversion of client funds	NPDR

9TH JUD'L DIS'T (2D DEP'T) 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

Bradford, Raymond 153 AD2d 241, 550 NYS2d 60	disbarred commingling escrow funds, failure to cooperate	Matter of Bradford (unreported, 5/30/89), interim suspension for failure to cooperate in investigation of charges for which he was ultimately disbarred. Otherwise, NPDR.
Bruce, Kenneth 162 AD2d 79, 560 NYS2d 494	3 yr suspension conversion of escrow funds, failure to cooperate	Matter of Bruce (138 AD2d 553, 526 NYS2d 766), interim suspension on charges for which he was ultimately suspended for three years. Otherwise, NPRD.
Devorsetz, Bertram S. 171 AD2d 322, 576 NYS2d 521	resigned violated suspension order	Matter of Devorsetz (unreported, 9/5/89), interim suspension on conviction of "serious crime" (26 USC §§ 7206(1) and 7207).
Felton, Harvey 180 AD2d 109, 584 NYS 2d 581	disbarred conversion of client funds	Matter of Felton (unreported, 7/13/90), interim suspension on charges for which he was ultimately disbarred.
Hayden, John 168 AD2d 78, 571 NYS2d 1022	resigned violated suspension order, neglect	Matter of Hayden (151 AD2d 400, 546 NYS2d 155), suspended (10/16/89) for neglect. Matter of Hayden (82 AD2d 459, 442 NYS2d 98), censured for neglect.
Holden, William J. 165 AD2d 371, 567 NYS2d 867	resigned conversion of escrow funds	NPDR
Kuriakose, M. Thomas 1 AD2d 358, 576 NYS2d 293	disbarred violated suspension order, failure to cooperate, abetted unauthorized practice, neglect	Matter of Kuriakose (unreported, 9/25/89), interim suspension on some of the charges for which he was ultimately disbarred. Private Action: On 2/11/82, he received a letter of caution for his failure to cooperate with the Committee's investigation of of a prior complaint. On 2/2/88, he received two letters of admonition for failure to cooperate with the Committee.
Linn, Michael S. 183 AD2d 399, 592 NYS2d 597	disbarred convicted of grand larceny	NPRD

9th Jud'l Dis't, 1990-93 (cont'd)

McClure, Denis J. 168 AD2d 75, 571 NYS2d 1019	resigned violated suspension order failed to cooperate, refused to produce escrow records	Matter of McClure (unreported, 12/12/89), interim suspension on some of the charges pending when he resigned. Otherwise, NPDR.
O'Callaghan, Thomas 154 AD2d 147, 552 NYS2d 50	disbarred failed to cooperate, failed to accoount for escrow funds	Matter of O'Callaghan (unreported, 11/27/89), interim suspension on some of the charges for which he was ultimately disbarred. Otherwise, NPRD.
Selkin, Arthur 165 AD2d 221, 567 NYS2d 609	disbarred convicted of grand larceny	Matter of Selkin (unreported, 3/30/90), interim suspension on charges related to some of the crimes for which he was ultimately disbarred. Otherwise, NPDR.
Siegel, Matthew 182 AD2d 170, 586 NYS2d 822	disbarred commingling client funds, failed to return unearned fees	Matter of Siegel (unreported, 1/22/90), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.
Singer, Barry 154 AD2d 122, 552 NYS2d 144	resigned conversion of trust funds	NPDR
Sluys, Peter W. 171 AD2d 8, 573 NYS2d 629	disbarred convicted of grand larceny	NPDR
Tracy, Joseph 166 AD2d 17, 570 NYS2d 906	resigned conversion of escrow funds	NPDR
Villanova, Lillian R. 156 AD2d 118, 554 NYS2d 318	disbarred convicted of grand larceny	NPDR

10TH JUD'L DIS'T (2D DEP'T) 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

Bodner, Howard J. 188 AD2d 115, 596 NYS2d 695	disbarred convicted of grand larceny	Matter of Bodner (unreported, 5/18/92), suspension on consent pending pending determination of capacity to practice law. Otherwise, NPDR
Boxer, Jonathan N. 165 AD2d 71, 565 NYS2d 848	disbarred neglect of estate, failure to cooperate	NPDR
Clarke, James 183 AD2d 138, 589 NYS2d 803	disbarred convicted of grand larceny	NPDR
Domsky, Myron 160 AD2d 158, 560 NYS2d 46	disbarred violated suspension order	Matter of Domsky (118 AD2d 106, 503 NYS2d 986), 5 yr suspension for failing to return unearned fees, neglect and misrepresentation. Private Action: On 2/17/84 he received a letter of caution for his failure to cooperate with the Committee in connection with its investigation of a prior complaint.
Gill, Thomas E. 167 AD2d 93, 571 NYS2d 1012	resigned conversion of clients' funds	NPDR
Goerlich, Harold L. 170 AD2d 106, 573 NYS2d 303	disbarred convicted of grand larceny	Matter of Goerlich (unreported, 2/26/90), interim suspension on charges for which he was ultimately disbarred. Matter of Goerlich (82 AD2d 608, 442 NYS2d 546), censured for failure to cooperate with Grievance Committee.
Kavanaugh, Stephen C. 161 AD2d 89, 560 NYS2d 209	disbarred conversion of client funds	Matter of Kavanaugh (unreported, 3/15/89), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.

10th Jud'l Dis't, 1990-93 (cont'd)

Lamar, Robert 155 AD2d 123, 553 NYS2d 191	disbarred convicted of grand larceny	Matter of Lamar (unreported, 9/29/89), interim suspension on charges related to some of the crimes for which he was ultimately disbarred. Otherwise, NPDR.
Nesci, Pat Frank 164 AD2d 266, 563 NYS2d 663	resigned conversion of escrow funds	NPDR
Probert, Mark 183 AD2d 282, 590 NYS2d 747	disbarred failure to cooperate	Matter of Probert (unreported, 9/29/89), interim suspension for failure to cooperate with Grievance Committee. Otherwise, NPDR.
Rossbach, Phillip M. 180 AD2d 92, 584 NYS2d 123	1 yr suspension neglect, failure to cooperate	Massachusetts Proceeding (3/30/92), censured and placed on "disability inactive status" on condition that he refrain from substance abuse and that he be monitored therefor.
Sandberg, George 182 AD2d 182, 587 NYS2d 981	resigned conversion of escrow funds	NPDR
Sanna, Richard J. 154 AD2d 140, 152 NYS2d 52	disbarred convicted of grand larceny	NPDR
Silverman, Mark A. 142 AD2d 278, 536 NYS2d 980	resigned wrongfully withheld escrow funds, neglect, failure to cooperate	NPDR
Solerwitz, Jack B. 153 AD2d 335, 551 NYS2d 52	disbarred conversion of escrow funds	Matter of Solerwitz (unreported, 3/16/89), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.
Tifford, Alan S. 178 AD2d 76, 583 NYS2d 160	disbarred convicted of grand larceny	Matter of Tifford (127 AD2d 248, 514 NYS2d 745), 3 yr suspension (4/27/87) for causing client's signature to be forged, neglect and misrepresentation.
Weintraub, Myles 183 AD2d 331, 591 NYS2d 337	disbarred convicted of grand larceny	NPDR

3RD DEP'T 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

Conine Kevin A. 182 AD2d 913, 582 NYS2d 519	2 yr suspension conversion of client funds	Matter of Conine (165 AD2d 929, 561 NYS2d 497), 1 yr suspension for neglect, misrepresentation and failure to cooperate with Committee on Professional Standards. Private Action: He received letters of caution and admonition dates unknown, but prior to 165 AD2) for similar instances of neglect and failure to cooperate. Matter of Conine (167 AD2d 657, 564 NYS2d 202), successfully established "in mitigation" of his misconduct a causal connection of that misconduct with his "substance abuse problem."
Cooper, Stephen E. 168 AD2d 695, 563 NYS2d 690	resigned conversion of estate funds	NPDR
Dougherty, George E. 181 AD2d 939, 581 NYS2d 1022	resigned conversion of estate funds	Letter of Caution previously issued (date unknown) for charging excessive fees, failure to maintain adequate records, and failure to cooperate with Committee.
Wall, Robert H. 180 AD2d 863, 580 NYS2d 675	disbarred convicted of grand larceny	NPDR
Wojcik, Walter 179 AD2d 868, 578 NYS2d 675	1 yr suspension failed to identify client	Matter of Wojcik (165 AD2d 895, 560 NYS2d 710), censure for neglect and failure to cooperate (court noted "alcoholism" in mitigation).
Youmans, Louis 175 AD2d 399, 573 NYS2d 924	disbarred convicted (NJ) of conspiracy to commit theft, unlawful possession of weapon funds, violated order	Matter of Youmans (163 AD2d 793, 559 NYS2d 407), interim suspension on charges for which he was ultimately disbarred. Otherwise, NPDR.

5TH JUD'L DIS'T (4TH DEP'T) 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

Baker, David A. 158 AD2d 82, 557 NYS2d 823	disbarred conversion of client funds	NPDR
Baker, William F. 184 AD2d 9, 588 NYS2d 502	3 yr suspension grossly negligent accounting practices, failure to supervise secretary	NPDR

7TH JUD'L DIS'T (4TH DEP'T) 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

Erickson, Jonathan 161 AD2d 1210, 559 NYS2d 684	disbarred convicted of grand larceny	NPDR
LaLoggia, Charles NO DISCIPLINE REPORTED		
Maruk, Nancy 180 AD2d 239, 584 NYS2d 503	disbarred conversion of client funds	NPDR
Whitaker, Benjamin P. 167 AD2d 980, 563 NYS2d 714	resigned (charges unreported)	NPDR

8TH JUD'L DIS'T (4TH DEP'T) 1990-93 CASES IN WHICH COMPENSATION WAS AWARDED TO CLIENTS BY THE LAWYERS' FUND FOR CLIENT PROTECTION

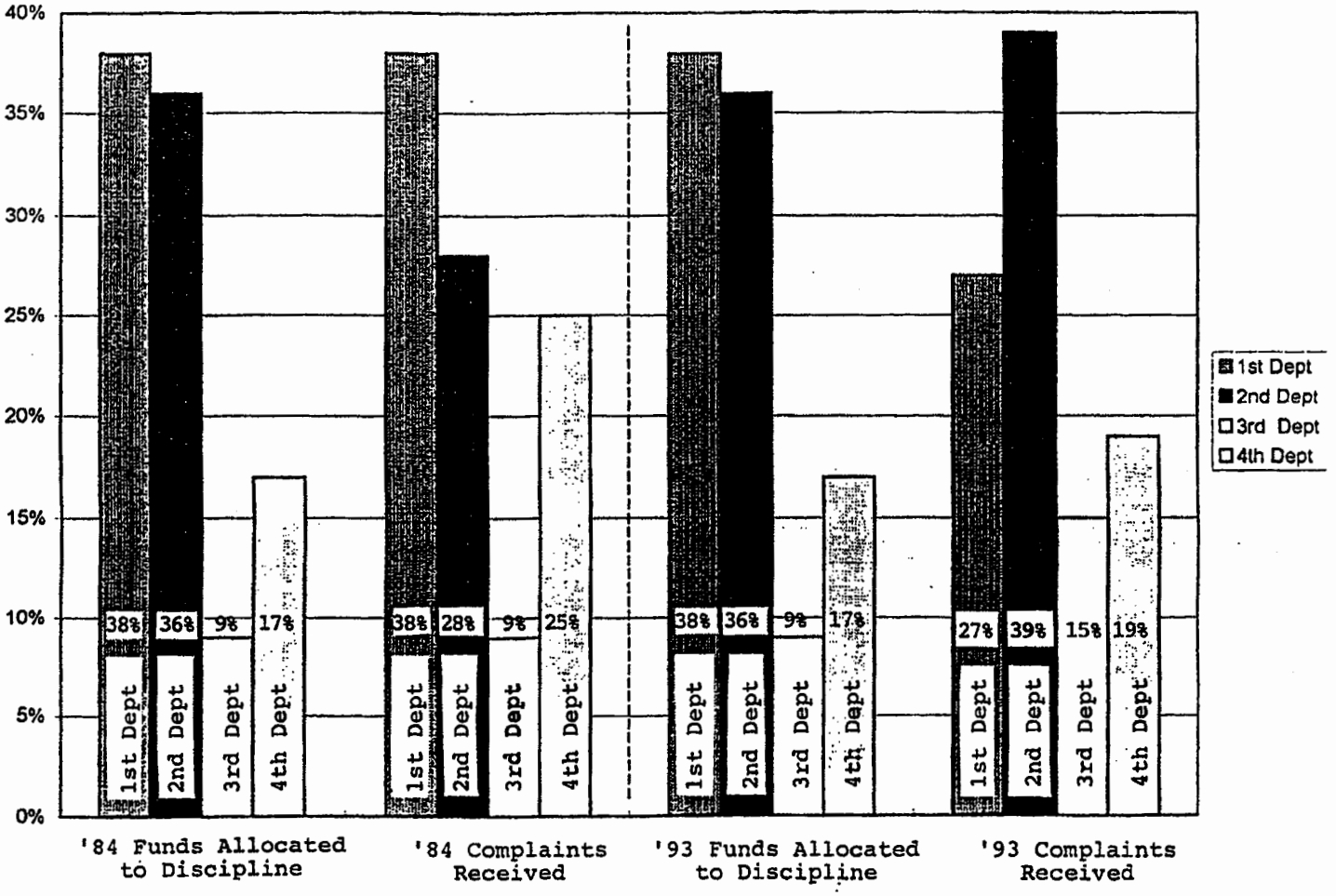
Cataldi, Richard H. 172 AD2d 1073, 571 NYS2d 391	resigned (charges unreported)	NPDR
Gaylord, Jack O. 155 AD2d 1, 555 NYS2d 646	indefinite suspension disabled by mental illness	NPDR
Johnson, Robert P. 168 AD2d 193, 572 NYS2d 223	3 yr suspension fraud, neglect	NPDR
Michalek, James 176 AD2d 1246, 578 NYS2d 429	disbarred convicted of securities fraud (Subsequently, in Matter of Michalek [180 AD2d 67, 582 NYS2d 892], he was fined and imprisoned for unlawful practice)	NPDR
Young, Floyd A. 168 AD2d 26, 572 NYS2d 224	disbarred conversion of client funds, forgery	NPDR

APPENDIX E:

COMPARISON OF DISCIPLINARY FUNDS ALLOCATED AND COMPLAINTS RECEIVED BY DEPARTMENT

COMPARISON OF ANNUAL PERCENTAGES OF DISCIPLINARY FUNDS ALLOCATED TO AND COMPLAINTS RECEIVED BY EACH DEPARTMENT

(Comparing 1984 and 1993)



The chart illustrates that while the percentage of disciplinary funds allocated to each department has remained constant (viz., 38%, 36%, 9% and 17%, respectively, for the First, Second, Third and Fourth Departments), the percentage of complaints handled by each department has varied significantly. Thus, for example, although the percentage of complaints handled by the Third Department in 1993 was 67% greater than the percentage of complaints which it handled in 1984 (increasing from 9% to 15%), it still received the same 9% of the State's disciplinary funds that was allocated to the Third Department in 1984.

APPENDIX F:

DRAFT (REDLINED) UNIFORM DISCIPLINARY RULES

22 NYCRR New Part 1500

UNIFORM RULES AND PROCEDURES FOR THE DEPARTMENTAL DISCIPLINARY COMMITTEES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

COMMENTS

UNIFORM RULES AND PROCEDURES FOR THE DEPARTMENTAL DISCIPLINARY COMMITTEES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

1500.1 Title, Citation, Application and Construction of Rules

(a) These Rules shall be known, and may be cited, as the "Uniform Rules and Procedures for the Departmental Disciplinary Committees of the Appellate Division of the Supreme Court of the State of New York" (each such committee hereinafter referred to as "the Committee").

(b) These Rules shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have law offices in the State of New York, as well as any attorney from another state, territory, district or foreign country admitted pro hac vice to participate in the trial or argument of a particular cause in any court in the State of New York, or who in any way participates in an action or proceeding therein, or any attorney who is admitted to practice by a court of another jurisdiction who regularly practices within the State of New York as counsel for governmental agencies or as house counsel to corporations or other entities, or otherwise, and to all legal consultants licensed to practice pursuant to the provisions of subdivision 6 of section 53 of the Judiciary Law. Each Department of the Appellate Division of the Supreme Court of the State of New York (hereinafter referred to as "the Court") shall exercise its respective disciplinary jurisdiction over the persons described in the immediately preceding sentence so as to minimize duplication of effort and conflict among the various departments and judicial districts.

(c) These Rules are promulgated for the purpose of assuring fair and uniform treatment of all persons involved in the disciplinary process. No action undertaken pursuant to these Rules will be held invalid by reason of any ~~nonprejudicial~~ mistake, omission, error, defect or irregularity that does not prejudice a substantial right; and any such mistake, omission, error, defect, or irregularity ~~or variance which does not affect substantial rights~~ shall be disregarded.

(d) Neither the conduct of proceedings nor the imposition of discipline pursuant to these Rules shall preclude the imposition of any further or additional sanctions prescribed or authorized by law, and nothing herein contained shall be construed to deny to any other court or agency such powers as are

necessary for that court or agency to maintain control over proceedings conducted before it, such as the power of contempt.

1500.2 Definitions

(a) Subject to additional definitions contained in subsequent provisions of these Rules which are applicable to specific sections, subsections or other provisions of these Rules, the following words and phrases, when used in these Rules, shall have the meanings given to them in this section unless the context clearly indicates otherwise:

(1) **Admonition**. Discipline administered without hearing, by letter issued at the direction of the Committee by the Committee Chairperson, in those cases in which misconduct in violation of a Disciplinary Rule is found by the Committee, but is determined to be of insufficient gravity to warrant prosecution of formal charges in the Court.

(2) **Answer**. A formal pleading filed by the Respondent in answer to a Notice of Charges.

(3) **Chief Counsel**. The chief counsel appointed by the Court or, in the absence of such chief counsel, the person designated deputy chief counsel and, in the absence of such deputy, an associate counsel designated to serve as acting chief counsel.

(4) **Code of Professional Responsibility**. The Code of Professional Responsibility adopted jointly by the Appellate Divisions of the Supreme Court, effective September 1, 1990, as thereafter amended, and with respect to conduct occurring prior to September 1, 1990, the Lawyer's Code of Professional Responsibilty theretofore adopted by the New York State Bar Association, as amended.

(5) **Committee**. The departmental disciplinary committee established pursuant to section 1500.~~22~~21 of this Part for such judicial department or districts as is provided therein. ~~When action is to be taken by the Committee under these Rules, except as expressly provided to the contrary in section 1500.22 of this Part, such action shall be deemed and understood to be that of the Committee when a quorum is present and a majority of those members present and voting has approved such action.~~

(6) **Committee Chairperson**. The Chairperson of the Committee appointed by the Court.

(7) **Complainant**. A person communicating a grievance to the Committee or to the Office of Chief Counsel, whether or not such grievance is set forth in a complaint or

alleges an act of misconduct.

(8) **Complaint**. A written statement of the nature described in section 1500.5(c) of this Part with respect to a grievance concerning an attorney communicated to the Committee or to the Office of Chief Counsel, alleging conduct which, if true, would constitute professional misconduct.

(9) **Confidential Clerk**. An official of the Court with whom all pleadings, papers, records and documents are to be filed when the same are directed to the Court and confidentiality is required by these Rules.

(10) **Court**. The Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction of the Judicial District which the Committee serves.

(11) **Disciplinary Rule**. Any provision of the rules of the Court governing the conduct of attorneys, as well as any Disciplinary Rule of the Code of Professional Responsibility, all as more particularly described in section 1500.3 of this Part.

(12) **Formal Charges**. The misconduct alleged to have been committed by a respondent as set forth in the pleading served by the Office of Chief Counsel in a formal disciplinary proceeding ~~pursuant to leave of the Court~~.

(13) **Formal Disciplinary Proceeding**. A proceeding instituted by ~~leave of~~ the filing of a petition with the Court and subject to sections 1500.~~10~~9 through 1500.~~13~~12 of this Part.

(14) **Grievance**. An accusation of impropriety which may or may not constitute misconduct.

(15) **Grievance Committee**. A committee established pursuant to section 1500.~~25~~24 of this Part, which committee is administered by one or more local bar associations and consists of volunteer attorney members who will investigate, hear and report to the Committee on complaints of minor misconduct referred to it by the Office of Chief Counsel.

(16) **Inquiry**. An accusation which, even if true, would not constitute misconduct.

(17) **Hearing Panel**. A group of Committee members appointed pursuant to section 1500.~~8~~7(b) of this Part to hear evidence with repect to a complaint and report their findings for action by the Committee.

(18) **Investigation**. Fact gathering with respect to alleged misconduct, whether preliminarily under the direction of the Office of Chief Counsel or, thereafter, by the Committee or a

duly constituted subcommittee thereof.

(19) **Investigator**. Any person designated by the Office of Chief Counsel or the Committee to assist it in the investigation of alleged misconduct.

(20) **Letter of Caution**. A letter issued at the direction of the Committee by the Committee Chairperson, pursuant to section 1500.~~9~~8 of this Part, when it is believed that the respondent acted in a manner which, while not constituting a clear violation of a Disciplinary Rule, involved behavior requiring comment.

(21) **Mediation Committee**. A committee established pursuant to section 1500.~~26~~25 of this Part, which committee is administered by one or more local bar associations and consists of volunteer attorney members who will attempt to mediate and resolve complaints referred to it by the Office of Chief Counsel, which complaints involve minor misconduct by attorneys with no significant disciplinary history.

(22) **Minor Misconduct**. Misconduct which does not include any element of interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, moral turpitude, or any other ~~intentional~~ conduct that raises a substantial question as to the respondent's honesty, trustworthiness or fitness as a attorney.

(23) **Notice of Charges**. A pleading served by the Office of Chief Counsel, pursuant to either section 1500.~~8~~7(b) or 1500.~~11~~10(a) of this Part, that is intended to provide the respondent with notice of the charges that will be heard at a hearing, whether incident to disciplinary proceedings before a panel of the Committee or formal disciplinary proceedings ~~ordered by the Court~~. Where the notice is given incident to the institution of formal proceedings pursuant to section 1500.10(a), the specific charges of misconduct will be set forth in the accompanying petition as and to the extent provided in section 1500.10(a).

(24) **Office of Chief Counsel**. The Office of Chief Counsel as provided in section 1500.~~23~~22 of this Part.

(25) **Parties**. The ~~Office of Chief Counsel~~ Committee and the respondent.

(26) **Petition ~~for Leave to Institute~~ Instituting Formal Disciplinary Proceedings**. A pleading served by the Office of Chief Counsel at the direction of the Committee instituting ~~requesting leave of the Court to commence~~ formal disciplinary

proceedings.

(27) **Probable Cause**. The ~~standard of proof necessary for the Court~~ degree of certainty which must obtain for the ~~Committee~~ to authorize the institution of a formal disciplinary proceeding and the standard of proof that must be found by a justice of the Court as one of the elements required for an order opening the proceedings to the public; ~~a finding of~~ probable cause ~~is intended to express the likelihood that~~ may be found when it is determined that the respondent is likely to have ~~has~~ committed the serious misconduct with which he or she is charged.

(28) **Reprimand**. Discipline, whether administered by the Committee ~~or the Court~~, after a hearing in those cases in which misconduct in violation of a Disciplinary Rule is found by the Committee ~~or the Court~~, but is determined to be of insufficient gravity to warrant ~~prosecution of formal charges in the Court~~ some form of public discipline.

(29) **Respondent**. A person subject to these Rules (as described more specifically in section 1500.1[b] of this Part) who is alleged to have been guilty of misconduct.

~~(30) **Reviewing Member**. The Committee member designated under section 1500.5(h)(2) of this Part to review the recommended disposition of a complaint.~~

~~(31)~~ (30) **Staff Counsel**. The attorneys (including the chief counsel) constituting the Office of Chief Counsel and, where appropriate, such other attorney or attorneys who may be appointed by the Court from time to time to serve therein.

~~(32)~~ (31) **Special Counsel**. An attorney (or attorneys) who is (or are) duly appointed by the Court to act as counsel in a particular investigation or proceeding where staff counsel is disqualified or otherwise disabled from undertaking or continuing such investigation or proceeding.

~~(33)~~ (32) **Special Referee**. An attorney (including a judge, justice, judicial hearing officer or other judicial official) who is duly appointed by the Court to preside at a formal disciplinary proceeding and to report thereon to the Court.

1500.3 Grounds for Discipline

Any person subject to these Rules who fails to conduct himself both professionally and personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law in this State and any attorney who violates any provision of the rules of the Court

governing the conduct of attorneys, or with respect to conduct on or after January 1, 1970, any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970, as amended, or with respect to conduct on or before December 31, 1969, any canon of the Canons of Professional Ethics, as adopted by such bar association and effective until December 31, 1969, or with respect to conduct on or after September 1, 1990, ~~as amended,~~ any disciplinary rule of the Code of Professional Responsibility, as jointly adopted by the Appellate Divisions of the Supreme Court, effective September 1, 1990, as amended, or any other rule or announced standard of the Court governing the conduct of attorneys, shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law and subject to discipline therefor. Discipline may also be imposed on attorneys pursuant to subdivision (4) of section 90 of the Judiciary Law for any of the criminal conduct specified therein, and on other persons subject to these Rules for the violation of any announced standards applicable to their conduct.

1500.4 Types of Discipline; Subsequent Consideration of Action Taken

(a) Misconduct under Section 90 of the Judiciary Law of the State of New York, the Disciplinary Rules or decisional law shall be grounds for any of the following:

(1) Disbarment -- by the Court.

(2) Suspension -- by the Court.

(3) Censure -- by the Court.

(4) Reprimand -- by the Committee after hearing, with or without referral to the Court for further action.

(5) Admonition -- by the Committee without hearing.

(b) The Committee Chairperson shall issue a letter of caution to a respondent pursuant to section 1500.~~8~~7(a)(2) of this Part when it is deemed to be appropriate by the Committee. The issuance of a letter of caution does not constitute discipline by the Committee.

(c) The fact that a person subject to these Rules has been issued an admonition, or a reprimand (with or without referral to the Court), or that a person subject to these Rules has been subjected to disciplinary action by the Court, may

(together with the basis thereof) be considered in determining whether to impose discipline only to the extent permitted by the rules of evidence of the State of New York (so as to prove such matters as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident), and the extent of discipline to be imposed, in the event other charges of misconduct are brought against such person subsequently. Charges which have been vacated or dismissed shall not be considered. The issuance of a letter of caution may be considered only to the extent of demonstrating that a respondent was on notice that certain behavior would constitute professional misconduct, where such behavior is the subject of the subsequent proceeding. In considering whether and to what extent discipline should be imposed, due consideration shall be given to the extent to which the issuance of an admonition or a reprimand then could be, or had been, reviewed, whether by the Committee or the Court; to the extent that the issuance of such sanctions was not previously subject to review, the respondent shall be accorded an opportunity to state his or her ability to seek review of the prior determination and to explain or otherwise comment upon the issuance of such sanction.

1500.5 Investigations, Discovery and Screening

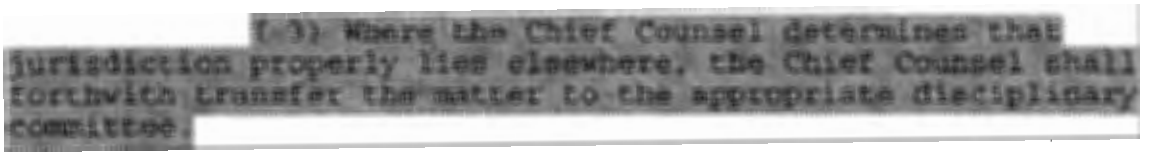
(a) **Initiation of Investigations**. The Office of Chief Counsel shall, except as otherwise provided by subdivision (b) of this section, undertake and complete an investigation of all matters involving alleged misconduct of attorneys within the jurisdiction of the Committee called to its attention by a complaint filed pursuant to subdivision (c) of this section, by the Court, or by the Committee pursuant to a written ~~direction issued by the Committee Chairperson~~ complaint signed by the Chief Counsel. The Office of Chief Counsel shall use such investigators as are deemed appropriate by the Chief Counsel.

(b) **Preliminary Screening of Grievances.**

(1) Any grievance received by the Office of Chief Counsel against a member of the Committee, or staff counsel or the Chief Counsel, involving alleged misconduct shall be transmitted forthwith to the Presiding Justice of the Court ~~Committee Chairperson~~, who shall transfer the matter to the Office of Chief Counsel of another Judicial Department for investigation and disposition in accordance with these Rules ~~assign it either to the Office of Chief Counsel (where the grievance does not relate to the conduct of of the Office of Chief Counsel or its staff), to a member of the Committee (where the grievance does not relate to a member of the Committee), or to special counsel (in such cases as are hereinafter provided in~~

~~this subdivision) who shall [1] conduct or direct an investigation, and [2] give a written recommendation as to the disposition of the grievance to the Committee Chairperson, who shall review the recommendation prior to placing the matter before the full Committee for action pursuant to these Rules. Any such grievance which relates to the Committee Chairperson shall, in the first instance, be transmitted to the Office of Chief Counsel which shall forthwith assign the same to a special counsel, who shall conduct an investigation and provide the Court with a written report for such action as the Court may deem appropriate~~.

(2) Except as provided in subdivision (1) of this section, all grievances coming to the attention of the Office of Chief Counsel or the Committee shall be promptly reviewed by the Office of Chief Counsel to determine whether a complaint of misconduct is stated or there is reason to believe that misconduct has occurred and that a complaint could be stated. Where there is no allegation of misconduct, the matter shall be closed by the Office of Chief Counsel and the complainant notified of such closure. Where the allegations are determined to involve minor misconduct, the Office of Chief Counsel may proceed as set forth in sections 1500.~~25~~24 or 1500.~~26~~25 of this Part.



(c) **Contents of Complaint.**

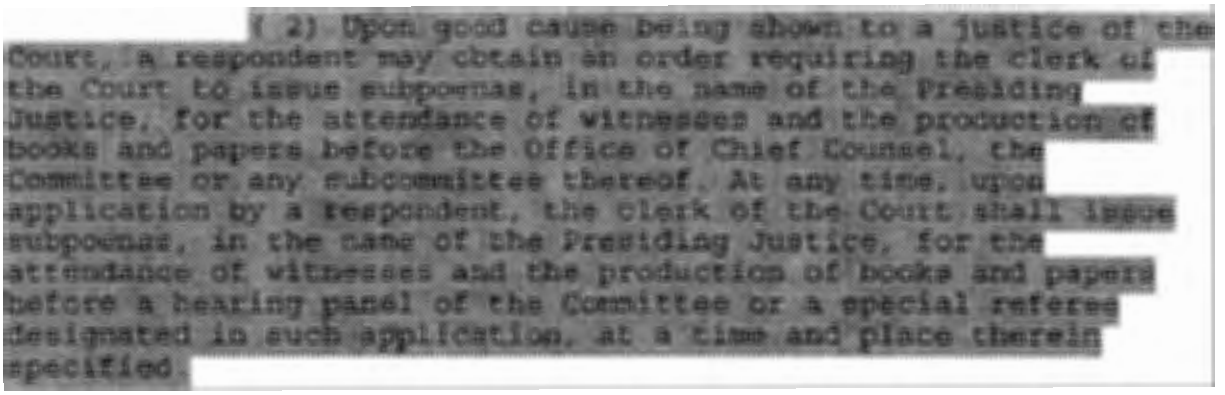
(1) **General Rule.** Each complaint relating to alleged misconduct of an attorney shall be in writing and subscribed by the complainant and shall contain a concise statement of the facts upon which the complaint is based. Verification of the complaint shall not be required. If necessary, the Office of Chief Counsel may assist the complainant in reducing a grievance to writing. The complaint shall be deemed filed when received by the Office of Chief Counsel.

(2) **Other Situations.** In the case of an allegation of misconduct originating in the Office of Chief Counsel, the Court or the Committee, the writing containing the allegation shall be treated as a complaint and so designated in the file.

(d) **Investigation and Discovery.** Subject to direction by the Committee, the staff of the Office of Chief Counsel shall make such investigation of each complaint as may be appropriate.

(1) Upon application by the Office of Chief Counsel, the Committee Chairperson, the chairperson of any duly

constituted subcommittee or hearing panel thereof~~, or a respondent~~, the clerk of the Court shall issue subpoenas, in the name of the Presiding Justice, for the attendance of witnesses and the production of books and papers before the Office of Chief Counsel, the Committee or any subcommittee or hearing panel thereof or special referee designated in such application, at a time and place therein specified. The Office of Chief Counsel, the Committee and any subcommittee or hearing panel thereof are empowered to take and cause to be transcribed the evidence of witnesses who may be sworn by any person authorized by law to administer oaths.


(2) Upon good cause being shown to a justice of the Court, a respondent may obtain an order requiring the clerk of the Court to issue subpoenas, in the name of the Presiding Justice, for the attendance of witnesses and the production of books and papers before the Office of Chief Counsel, the Committee or any subcommittee thereof. At any time, upon application by a respondent, the clerk of the Court shall issue subpoenas, in the name of the Presiding Justice, for the attendance of witnesses and the production of books and papers before a hearing panel of the Committee or a special referee designated in such application, at a time and place therein specified.

(e) **Notification of Respondent.**

(1) **General Rule.** No discipline or Letter of Caution shall be recommended by the Office of Chief Counsel until the respondent shall have been afforded a reasonable opportunity to state his or her position with respect to the allegations of the complaint.

(2) **Transmission of Notice.** Except where it appears that there is no basis for proceeding further or the matter must be referred to another disciplinary committee, the Office of Chief Counsel shall promptly prepare and forward to the respondent a request for a statement in response to the complaint, together with a copy of the complaint as filed, and advising the respondent of:

(i) the respondent's right to state his or her position with respect to the complaint; and

(ii) such aspects of the complaint as the Office of Chief Counsel may deem warrant a response.

(3) **Time Within Which to Reply.** Unless a shorter time is fixed by the Committee Chairperson and specified in the written notice transmitted pursuant to subdivision (2) of this section, or a longer time is permitted by the Office of Chief Counsel on good cause being shown, the respondent shall have 20

days from the date of such notice within which to file such a response ~~in~~ with the Office of Chief Counsel.

(f) **Notification of Complainant**. Except where it appears that there is no basis for proceeding further or the matter must be referred to another disciplinary committee, the Office of Chief Counsel shall promptly forward to the complainant an accurate summary or copy of the response to the complaint and a notice advising the complainant of his or her opportunity to comment thereon. Unless a shorter time is fixed by the Committee Chairperson and specified in the written notice provided to the complainant pursuant to the immediately preceding sentence, or a longer time is permitted by the Office of Chief Counsel on good cause being shown, the complainant shall have 20 days from the date of such notice within which to file his or her comments with the Office of Chief Counsel. Where it appears that there is no basis for proceeding further or the matter must be referred to another disciplinary committee, the complainant shall be so notified in writing by the Office of Chief Counsel.

(g) **Recommendation by Office of Chief Counsel**. Following completion of any investigation of a complaint (including consideration of any statement filed by the respondent pursuant to subdivision (e)(1) of this section and any comments thereon filed pursuant to subdivision (f) of this section), the Office of Chief Counsel shall prepare a written recommendation for one of the following dispositions:

(1) referral to another disciplinary committee in the State of New York ~~by reason of a lack of territorial jurisdiction~~;

(2) dismissal for any reason (with an indication of the reason therefor), and referral to another body if appropriate;

(3) referral to a subcommittee for a hearing pursuant to section 1500.7(a)(4) of this Part;

~~(3)~~ (4) letter of caution;

~~(4)~~ (5) admonition; or

~~(5)~~ (6) ~~application to the Court for~~ the institution of formal disciplinary proceedings.

~~(h) **Action Following Recommendation.**~~

~~(1) **No Jurisdiction.** If the Office of Chief Counsel determines that the Complaint should be referred under subdivision (g)(1) of this section, it shall notify the complainant and the respondent (if previously notified of the~~

~~complaint) of such disposition in writing and close the file on the matter. In cases under subdivision (g)(1) of this section, the Office of Chief Counsel shall bring the matter to the attention of the appropriate disciplinary committee having jurisdiction, and shall advise the complainant of such referral. Where there exists some other duly constituted body which may be able to provide a forum for the consideration of the grievance, the Office of Chief Counsel shall advise the complainant of the availability of such other body.~~

~~(2) **Other Cases**. Where recommendations are made pursuant to subdivisions (g)(2), (3), (4) and (5) of this section, the Committee Chairperson shall designate one or more attorney members of the Committee to review, pursuant to section 1500.7 of this Part, such recommendations prior to their submission to the full Committee.~~

1500.6 ~~Protective Orders~~ Motions Pending Investigation

(a) **Application.** The Office of Chief Counsel or a respondent ~~aggrieved by any investigation~~ may apply to the Court by affidavit, upon such notice to the respondent or the Office of Chief Counsel as a justice of the Court may direct, for ~~a protective~~ an order dismissing the complaint, transferring the venue of further proceedings, compelling discovery or denying, limiting, conditioning or regulating the use of any information being sought in relation to the complaint.

(b) **Stay Pending Determination.** For good cause shown, the Court may order that any or all proceedings on the complaint be stayed pending its determination of the application to dismiss, transfer, compel discovery or grant protection ~~for a protective order~~.

(c) **Service and Filing of Application.** A copy of the application shall be served on the respondent or the Office of Chief Counsel, as a justice of the Court may direct, and the original thereof together with five copies and proof of its service shall be filed with the confidential clerk of the Court.

~~**1500.7 Review of Recommended Disposition of Complaint**~~

~~(a) **Examination of File by Reviewing Member.** In the case of recommendations under section 1500.5 (g)(2), (3), (4) and (5) of this Part, the chief counsel shall make the file available for examination by the reviewing member designated under section 1500.5(h)(2) of this Part no less than five days prior to the~~

~~next scheduled meeting of the full Committee. In the case of recommendations under section 1500.5(g)(5) of this Part, the chief counsel shall also make available to the reviewing member, the proposed charges, and a memorandum summarizing the evidence adduced in support of the charges.~~

~~(b) **Action by Reviewing Member.**~~

~~(1) **General Rule.** The reviewing member may approve or request a modification of the recommendation by the Office of Chief Counsel concerning the disposition of a complaint, which request may be accepted or rejected by the Office of Chief Counsel, subject to the requirements of subdivision (b)(3) of this section.~~

~~(2) **Modification.** If the reviewing member requests a modification of the recommendation by the Office of Chief Counsel, the reviewing member shall set forth such request in writing. Such request, if made, shall be noted on the file folder or jacket and stated as one of the following:~~

~~(i) dismissal of the complaint;~~

~~(ii) further investigation;~~

~~(iii) letter of caution;~~

~~(iv) admonition;~~

~~(v) informal hearing; or~~

~~(vi) reference to the Court for the institution of formal disciplinary proceedings.~~

~~(3) **Notice of Action by Reviewing Member.** The full Committee shall be informed of any request that has been made by the reviewing member and/or the agreement of the reviewing member with the recommendation made by the Office of Chief Counsel.~~

1500.8~~7~~ Disposition Without Formal Disciplinary Proceedings

(a) Upon receipt or initiation of a specific complaint of professional misconduct, the Committee may, after investigation and upon a majority vote of the Committee:

(1) dismiss the complaint and so advise the complainant and the respondent;

(2) conclude the matter by issuing a Letter of Caution to the respondent and by appropriately advising the

complainant of such action;

(3) conclude the matter by privately admonishing the respondent, which admonition shall clearly indicate the improper conduct found and the disciplinary rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the respondent and hold a hearing on the matter as set forth in subdivision (b) of this section;

(5) forthwith ~~recommend to the Court the institution of~~ institute a formal disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action;

(6) refer the matter to another committee having jurisdiction.

(b) Except where the Committee determines to refer the matter to the Court forthwith as provided in paragraph (5) of subdivision (a) of this section, if, after investigation, the Committee shall deem a matter of sufficient importance to warrant a hearing, a written notice of charges predicated on its investigation, plainly stating the matter or matters charged, together with a notice of not less than 20 days, shall be served upon the respondent, either personally, by certified mail, or in such other manner as the Committee may direct. The respondent when so served shall file a written answer at the time and place designated in the notice and the Committee Chairperson shall designate a hearing panel consisting of no less than three members of the Committee to hear the case. The respondent may be represented and assisted by counsel thereat and in connection therewith. The hearing panel shall decide all questions relating to its procedures and the admissibility of evidence. Stenographic or electronically recorded minutes of the hearing shall be kept.

(1) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the Committee to prepare and serve an additional charge or charges on the respondent, but the hearing panel may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(2) The hearing panel shall make findings of fact and report those findings, together with their recommendations, to the Committee.

(c) Upon the completion of a hearing, the Committee shall promptly meet to consider the findings and report of the hearing panel, and either approve or reject those findings and report by sustaining, dismissing and/or modifying such of the charges as circumstances warrant. Subject to the quorum requirements specified in section 1500.~~22~~21 of this Part, any action taken by the Committee shall ~~be by majority vote of those present and voting shall~~ require an affirmative vote of the greater of (1) a majority of the members present at the meeting or (2) one-third of the full Committee.

(1) Where appropriate, the Committee may decide to issue a Letter of Caution either (i) with respect to such of the charges as have not been sustained when the Committee determines that the conduct of the respondent nevertheless requires comment or (ii) with respect to those charges which have been sustained, when there are mitigating circumstances.

(2) Except as provided in subdivision (c)(1) of this section, ~~As~~ as to any charges sustained, the Committee shall either, reprimand the respondent and/or, upon determining that ~~probable cause exists therefor~~ the misconduct of the respondent warrants the imposition of discipline by the Court, instruct the Office of Chief Counsel to ~~petition for the filing of~~ institute formal disciplinary proceedings against the respondent in the Court.

~~(3) In the event that a minority of the Committee disagrees with the determination of the majority, a minority report may be prepared and promptly filed with the Court, together with any majority report and the report of the hearing panel. Upon such filing, the Committee shall await the determination of the Court before otherwise disposing of the matter.~~

(d) Unless otherwise ordered by the Court, all proceedings conducted by the Committee shall be sealed and be deemed private and confidential.

1500.~~9~~8 Notice and Review of Disposition Without Formal Disciplinary Proceedings

(a) **Notification of Respondent.** Upon the determination of the appropriate disposition by the Committee as provided in section 1500.~~8~~7 of this Part, unless the disposition involves the institution of formal disciplinary proceedings, as appropriate to such determination:

(1) the Office of Chief Counsel by means of written notice shall notify the respondent of the dismissal of the complaint; or

(2) the Office of Chief Counsel shall transmit to the respondent a letter of caution (which shall bear the designation "Letter of Caution") signed by the Committee Chairperson; or

(3) the Office of Chief Counsel shall transmit to the respondent an admonition (which shall bear the designation "Admonition") signed by the Committee Chairperson; or

(4) the Office of Chief Counsel shall transmit to the respondent a reprimand (which shall bear the designation "Reprimand") signed by the Committee Chairperson.

(b) **Notification of Complainant.** Upon the disposition becoming final, a ~~A~~ copy of the notice described in subdivision (a) of this section or in the alternative a brief description of its substance, shall be forwarded to the complainant, together with a statement from the Office of Chief Counsel advising the complainant concerning the confidential nature of such disposition.

(c) **Review of Letters of Caution, Admonitions and Reprimands.**

(1) **General Rule.** A record shall be made and maintained by the Office of Chief Counsel (as more particularly provided in section 1500.~~29~~28 of this Part) of the basis for letters of caution, admonitions and reprimands.

(2) **Letter of Caution.** In the letter of caution, the respondent shall be advised of:

(i) the right to submit a written response under section 1500.~~9~~8(d) of this Part;

(ii) the fact that the issuance of the letter of caution does not constitute discipline by the Committee; and

(iii) the fact that, pursuant to section 1500.4 of this Part, the letter of caution may be brought to the attention of a hearing panel or the Court in any subsequent proceeding where there has been a determination of misconduct in considering whether to impose discipline, and the extent of discipline to be imposed, in connection with such subsequent misconduct.

(3) **Admonition.** In the admonition, the respondent shall be advised of:

(i) the right to seek reconsideration of the admonition under section 1500.~~9~~8(d) of this Part or to petition the Court for vacatur of the admonition under section 1500.~~9~~8(e)

of this Part; and

(ii) the fact that, pursuant to section 1500.4 of this Part, the admonition may be brought to the attention of a hearing panel or the Court in any subsequent proceeding where there has been a determination of misconduct in considering whether to impose discipline, and the extent of discipline to be imposed, in connection with such subsequent misconduct.

(4) **Reprimand.** In the reprimand, the respondent shall be advised of:

(i) the right to petition the Court for vacatur of the reprimand under section 1500.~~9~~8(e) of this Part; and

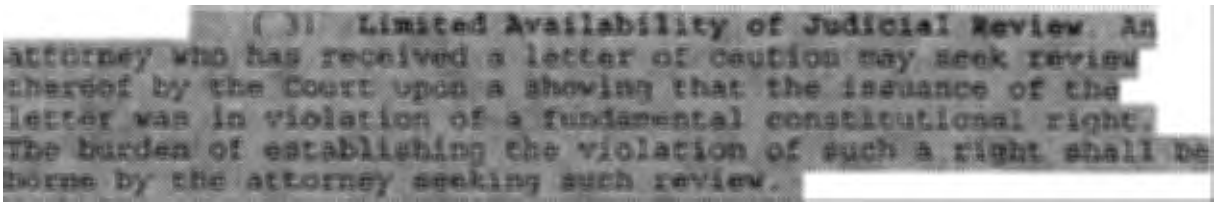
(ii) the fact that, pursuant to section 1500.4 of this Part, the reprimand may be brought to the attention of a hearing panel or the Court in any subsequent proceeding where there has been a determination of misconduct in considering whether to impose discipline, and the extent of discipline to be imposed, in connection with such misconduct.

(d) **Action Available to Respondent on Letter of Caution or Admonition.**

(1) **General Rule.** Subject to subdivision (d)(4) of this section, a ~~A~~ respondent shall not be entitled to seek review of a letter of caution issued after the matter has been heard by a hearing panel as provided in section 1500.~~8~~7 of this Part, but the respondent may submit a written response thereto within thirty days after its issuance, which response shall be maintained with the file relating to the complaint; or, in the alternative, where a letter of caution has been issued without the matter having been heard by a hearing panel under section 1500.~~8~~7 of this Part, respondent may submit a written application for reconsideration which shall be disposed of in accordance with subsection (2) of this subdivision.

(2) **Application for Reconsideration.** An application for reconsideration of a letter of caution issued without benefit of a hearing (as provided in section 1500.~~8~~7 of this Part) or an admonition shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which the letter of caution or admonition is forwarded to the respondent by the Office of Chief Counsel. The Office of Chief Counsel shall forthwith transmit the application and the file relating to the matter to a review panel consisting of three attorney members of the Committee designated to examine such matters by the Committee Chairperson ~~an attorney member of the Committee designated to examine the matter by the Committee Chairperson~~. Within 30 days after receipt of the application by the Office of Chief Counsel, the ~~member~~ panel so designated shall either confirm the letter of caution or admonition or otherwise

report to the Committee that the same should be reconsidered.



(e) **Action Available to Respondent on Reprimand or After Reconsideration of an Admonition.** Within 30 days after the issuance of a reprimand or affirmance of an admonition on reconsideration, the respondent may petition the Court to vacate the reprimand or admonition. Upon such petition, the Court may consider the entire record and may vacate the reprimand or admonition or impose such other discipline as the record may warrant.

1500.~~10~~9 Formal Disciplinary Proceedings; ~~Preliminary~~ General Provisions

(a) **Representation of Respondent.**

(1) **Appearance Pro Se.** When a respondent appears pro se in a ~~formal~~ disciplinary proceeding, the respondent shall file with the Office of Chief Counsel written notice of an address to which any notice or other written communication required to be served upon the respondent may be sent.

(2) **Representation of Respondent by Counsel.** When a respondent is represented by counsel in a formal disciplinary proceeding, such counsel shall file with the Office of Chief Counsel, a written notice of appearance, which shall state such counsel's name, address and telephone number, the name and address of the respondent on whose behalf counsel appears, and the caption of the subject proceeding. Any additional notice or other written communication required to be served on or furnished to a respondent may be sent to the counsel of record for such respondent at the stated address of the counsel in lieu of transmission to the respondent. In any proceeding where counsel has filed a notice of appearance pursuant to this subdivision, any notice or other written communication required to be served on or furnished to the respondent shall also be served upon or furnished to the respondent's counsel (or one of such counsel if the respondent is represented by more than one counsel) in the same manner as prescribed for the respondent, notwithstanding the fact that such communication may be furnished directly to the respondent.

(b) **Format of Pleadings and Documents.** Pleadings or other documents filed in formal disciplinary proceedings shall substantially comply with and conform to the requirements for comparable documents under the Civil Practice Law and Rules.

(c) **Avoidance of Delay.** All formal disciplinary proceedings under these Rules shall be as expeditious as possible. Only the Court or the special referee presiding may grant an extension of time in a formal disciplinary proceeding, and only upon good cause shown. Application for such an extension shall be made in advance and in writing where practicable.

(d) **Service by Office of Chief Counsel.** Except as expressly otherwise provided in subdivision (a)(1) of section 1500.~~11~~10 of this Part with respect to the institution of a formal disciplinary proceeding:

(1) Orders, notices and other documents originating with the Committee or the Office of Chief Counsel shall be served by the Office of Chief Counsel either personally or by mailing a copy thereof, to the person to be served, addressed to such person at such person's last known address. Whenever any such document is to be served by mail upon the respondent individually, it shall be mailed by both certified mail, return receipt requested, and by first class mail. In all other instances, service by mail may be effected by first class mail.

(2) Service by mail shall be complete upon mailing. When service is not accomplished by mail, personal service may be effected by anyone duly authorized by the Office of Chief Counsel in the manner provided in the laws of the State of New York relating to service of process in civil actions.

(e) **Service by Respondent.** Documents orginating with the respondent, whether represented by counsel or otherwise, shall be served as follows:

(1) By delivering a copy either personally or by mail to the Office of Chief Counsel. Where documents are delivered by mail:

(i) if the respondent is represented by counsel, such delivery may be effected by either first class mail or certified mail, return receipt requested;

(ii) if the respondent is not represented by counsel, such delivery shall be effected by certified mail, return receipt requested.

(2) Service by mail shall be complete upon mailing.

(f) **Number of Copies.** Except as expressly otherwise provided in subdivisions (a)(2) and (e)(1) of section 1500.~~11~~10 of this Part with respect to the institution of a formal disciplinary proceeding, the following number of copies of documents shall be served by each Party in a proceeding:

(1) Documents being served by the Office of Chief Counsel: one copy of each document to the respondent, and one copy to the special referee.

(2) Documents being served by the Respondent: two copies of each document to the Office of Chief Counsel, and one copy of each document to each other Respondent, if any; in each case, to be served personally or by mailing a copy thereof (as provided in subdivision [e] of this section) to the person to be served. The Office of Chief Counsel shall forthwith transmit one copy of any document so served to the special referee.

(3) Copies of exhibits to be offered during the hearing shall be provided as specified in subdivision (m) of section 1500.~~12~~11 of this Part.

(g) **Amendment and Supplementation of Pleadings.** No amendment or supplementation of any notice of charges or of any answer shall be made unless specified in the pre-hearing stipulation or otherwise granted by the special referee. Any objection to a proposed amendment shall be determined by the special referee upon conditions deemed appropriate.

(1) Whenever, in the course of any hearing under these Rules, evidence shall be presented upon which another charge or charges against the respondent might be made, it shall not be necessary to prepare or serve an additional notice of charges with respect thereto, but the special referee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if they had been made and served at the time of service of the notice of charges, and may render a decision upon all such charges as may be justified by the evidence in the case.

(2) Whenever, in the course of any hearing under these Rules, evidence shall be presented upon which another defense or defenses against a charge might be made, it shall not be necessary to prepare or serve another answer with respect thereto, but the special referee may, after reasonable notice to the Office of Chief Counsel and an opportunity to be heard with respect thereto, proceed to the consideration of such additional defense or defenses as if they had been made and served at the time of service of the answer, and may render a decision upon all such defenses as may be justified by the evidence in the case.

(h) **Expedited Hearing.** In any case where the Committee

Chairperson determines that the misconduct in question poses an immediate threat to the public by reason of the grounds alleged in subdivisions (a)(1) through (3) of section 1500.~~14~~13 of this Part, the Committee Chairperson may direct the chief counsel to request the Court, incident to a petition made pursuant to sections 1500.~~11~~10 or 1500.~~14~~13 of this Part, to appoint a special referee for the purpose of conducting a hearing on an expedited basis. Such request shall be on notice to the respondent as provided in section 1500.~~11~~10(a)(1) or 1500.~~14~~13(b), as the case may be. When appointed on such basis, the special referee shall, so far as is practicable, conduct the hearing from day to day until completed and, notwithstanding section 1500.~~13~~12(b)(3) of this Part, issue a written report thereon within 10 days after the conclusion of the hearing.

(i) **Summary Disposition.** In any case where the Committee Chairperson determines that the misconduct in question:

(1) has been adjudicated by a court of competent jurisdiction; or

(2) is established by:

(i) a default in responding to the process of the Committee;

(ii) a substantial admission of the respondent under oath; or

(iii) other uncontroverted evidence of the misconduct,

the Committee Chairperson may direct the chief counsel to request the Court, incident to a petition made pursuant to sections 1500.~~11~~10 or 1500.~~14~~13 of this Part, ~~to request the Court~~ to issue an order summarily disposing of the charges or so much thereof as may be appropriate to the circumstances. Such request shall be on notice to the respondent as provided in section 1500.~~11~~10(a)(1) or 1500.~~14~~13(b), as the case may be.

1500.~~11~~10 Formal Disciplinary Proceedings; Pleadings and Preliminary Procedures

(a) **Commencement of Formal Disciplinary Proceedings; Service of Notice of Charges and Petition.** The Office of Chief Counsel shall institute formal disciplinary proceedings, when so directed by the Committee, by serving on the respondent copies of a notice of ~~petition~~ charges and a verified petition ~~for leave to institute formal disciplinary proceedings, the petition annexing a notice of charges~~ which shall allege the misconduct.

(1) **Service and Filing of Process**. Service of the notice of charges and petition shall be made in accordance with subdivision 6 of section 90 of the Judiciary Law by delivering the same personally to the respondent within or outside the State or, when it is established to the satisfaction of the presiding justice of the Court that the respondent cannot with due diligence be served personally, the same may be served by mail, publication or otherwise as the presiding justice may direct, allowing the respondent an opportunity to be heard. Promptly after service of the notice and petition, the Office of Chief Counsel shall file with the confidential clerk of the Court the signed originals and five copies thereof together with proof of their service on the respondent.

(2) **Contents of Notice of Charges and Petition**. The notice of charges shall set forth the number of days within which the respondent may answer the petition; the locations whereat the answer is to be served and filed; and shall advise the respondent when application is being made to open the proceedings pursuant to section 1500.10(c) of this Part. The petition shall be verified and shall set forth the charges of misconduct against the respondent, the disciplinary rules alleged to have been violated, and, in appropriate cases, the factual basis upon which an application is being made for an order to open the proceeding to the public and/or the fact that the Office of Special Counsel will seek restitution or reimbursement pursuant to section 90.6-a(a) of the Judiciary Law, and costs pursuant to section 1500.12 of this Part.

~~(1) **Service and Filing of Process**. Service of the notice and petition shall be made either personally or by certified and first class mail. If service is made by mail and the respondent shall fail to answer or respond within the time specified by the notice, a copy of the notice and petition shall be served upon the respondent personally. If the respondent cannot be served personally, the Court may make such order as is appropriate to the circumstances. Promptly after service of the notice and petition, the Office of Chief Counsel shall file with the confidential clerk of the Court the signed originals and five copies thereof together with proof of their service on the respondent.~~

~~(2) **Answer to Petition**. Except as otherwise provided in sections 1500.14 or 1500.17 of this Part, the respondent shall be accorded 20 days to answer the petition. A copy of the answer, if any, shall be served on the Office of Chief Counsel, and the original thereof together with five copies and proof of its service shall be filed with the confidential clerk of the Court.~~

~~(b) **Order of the Court**. The Court shall make such order with respect to the petition as circumstances warrant, including~~

~~the appointment of a special referee to hear and report. Any compensation to be paid to such special referee shall be paid by the Court and neither the Committee nor the Office of Chief Counsel shall be permitted to discuss such compensation with the special referee.~~

(b) **Answer.**

(1) **General Rule**. Except as provided in sections 1500.11 or 1500.14 of this Part, unless the Court shall order otherwise, the respondent shall respond to the petition by serving An answer on the Office of Chief Counsel within 20 days after service of the notice of charges and petition. The original answer, together with five copies thereof and proof of its service on the Office of Chief Counsel, shall be filed with the confidential clerk of the Court.

(2) **Contents of Answer**. The answer shall be in writing and shall respond specifically (by admissions, denials or otherwise) to each allegation of the petition and shall assert all affirmative defenses.

(3) **Request to Be Heard in Mitigation**. The respondent may include in the answer matters in mitigation.

(4) **Effect of Failure to Answer**. In the event the Respondent fails either to serve and file an answer or respond specifically to any allegation or charge, such allegation or charge shall be deemed admitted.

(c) **Confidentiality of Proceeding**. All papers records and documents relating to the proceeding shall be sealed and deemed private and confidential unless and until charges of misconduct have been sustained by the Court; provided, however, upon a ~~showing~~ determination by a justice of the Court of probable cause to believe that the respondent has committed serious acts of misconduct with which the respondent has been charged, the justice ~~Court~~ may order that the proceeding be open to the public where ~~it~~ the justice determines that the public interest would be served thereby. ~~Any order which opens the proceeding to the public shall state in substance that a determination of probable cause is not equivalent to a finding of misconduct, and no such inference should be made or suggested.~~ Except in circumstances where a respondent is subject to interim suspension pursuant to section 1500.13 of this Part or has been convicted of a serious crime as described in section 1500.14 of this Part or as otherwise provided by section 90(10) of the Judiciary Law, any such determination to open the proceeding to the public shall be made pursuant to the following procedures:

(1) **Application by Committee**. The Committee may instruct the Office of Chief Counsel to apply to the Court for an

order to open the proceeding to the public;

(2) **Notice to Respondent**. The Office of Chief Counsel shall include in its notice of charges a statement that an application is being made for an order to open the proceeding to the public and shall set forth the factual basis of such application in its petition;

(3) **Opportunity to Be Heard**. The respondent shall be accorded no less than 20 days to answer the petition and respond to the application requesting an order that the proceeding be open to the public;

(i) Any papers or evidence proffered with respect to the application shall be filed with the confidential clerk of the Court and presented to the justice hearing the application;

(ii) for good cause shown, the justice may order a hearing at which testimony may be taken with respect to the application;

(4) **Content of Order**. Any order which opens the proceeding to the public shall state in substance that a determination of probable cause is not equivalent to a finding of misconduct, and no such inference should be made or suggested;

(5) **Disqualification of Justice Hearing Application from Further Proceedings on the Complaint**. The justice hearing the application to open the proceeding to the public, after making an order with respect to the application, shall be disqualified from any further involvement with the complaint and shall not thereafter participate in any decisions of the Court with respect thereto.

~~(d) **Notice of Charges**.~~

~~(1) **General Rule**. Unless the Court shall have ordered that the notice of charges be amended, the respondent need not be served with any copy other than that annexed to the notice and petition served pursuant to subdivision (a) of this section 1500.11. The order of the Court will direct that the respondent answer the notice of charges as annexed to the petition. However, if the Court shall have ordered that the notice of charges be amended, the Office of Chief Counsel shall serve a copy of an amended notice of charges on the respondent promptly after the Court shall have made an order as provided in subdivision (b) of this section 1500.11. The amended notice of charges shall conform in all respects to the order made by the Court, and the original thereof, together with proof of its service on the respondent, shall be filed with the confidential clerk of the Court.~~

~~(2) **Contents of Notice.** The notice of charges shall set forth the charges of misconduct against the respondent, the disciplinary rules alleged to have been violated, and, in appropriate cases, the fact that the Office of Special Counsel will seek restitution or reimbursement pursuant to section 90-6-a(a) of the Judiciary Law, and costs pursuant to section 1500.13 of this Part. The notice of charges shall also set forth the number of days within which the respondent may answer, the locations whereat the answer is to be served and filed, the date, time and place of the hearing, and shall advise the respondent that the respondent is entitled to be represented by counsel, to cross-examine witnesses, to present evidence and shall also indicate the special referee to which the matter has been assigned.~~

~~(e) **Answer.**~~

~~(1) **General Rule.** The respondent shall answer the notice of charges by serving an answer on the Office of Chief Counsel within 20 days after service of the notice of charges, and filing the original thereof with the special referee (together with proof of service thereof) unless different times are directed by the special referee and specified in the notice of charges.~~

~~(2) **Contents of Answer.** The answer shall be in writing and shall respond specifically (by admissions, denials or otherwise) to each allegation of the notice of charges and shall assert all affirmative defenses.~~

~~(3) **Request to Be Heard in Mitigation.** The respondent may include in the answer matters in mitigation.~~

~~(4) **Effect of Failure to Answer.** In the event the Respondent fails either to serve and file an answer or respond specifically to any allegation or charge, such allegation or charge shall be deemed admitted.~~

(d) **Order of the Court.** The Court shall make such order with respect to the petition as circumstances warrant, including the appointment of a special referee to hear and report, and the date, time and place of the initial hearing to be held before the special referee. Any compensation to be paid to such special referee shall be paid by the Court and neither the Committee nor the Office of Chief Counsel shall be permitted to discuss such compensation with the special referee.

(e) ~~(f)~~ **Pre-hearing Stipulation.** A form of pre-hearing stipulation ~~shall~~ may be served on the respondent by the Office of Chief Counsel at any time after the commencement of formal proceedings, together with the notice of charges. A recommended ~~The said~~ form ~~shall substantially reflect the order and content of the model~~ is set forth as Appendix A in section 1500.~~31~~30 of

this Part.

(f) ~~(g)~~ **No Other Pleadings.** Pleadings shall be limited to a Notice of Charges and any Answer thereto as amended or supplemented in accordance with these Rules.

(g) ~~(h)~~ **Assignment for Hearing.** Promptly after appointment by the Court, the special referee will establish the date, time and place of the hearing. The parties will be so advised and the same shall be confirmed by a writing served by the Office of Chief Counsel on the respondent no less than ten days prior to the hearing, unless a shorter period of notice is established by the special referee.

(h) ~~(i)~~ **Transmission of Pleadings.** The confidential clerk of the court shall transmit copies of the notice of charges, and of the answer thereto, if and when available, to the special referee.

(i) ~~(j)~~ **Subpoenas.** Both staff counsel and the respondent shall have the right to summon witnesses and require production of books and papers by issuance of subpoenas in accordance with the rules of the Court and to the full extent available in civil actions under the Civil Practice Law and Rules.

(j) ~~(k)~~ **Depositions.** When there is good cause to believe that the testimony of a potential witness will be unavailable at the time of hearing, testimony may be taken by deposition. Such deposition shall be initiated and conducted in the manner provided for the taking of depositions in the New York Civil Practice Law and Rules, and the use of such depositions at hearings shall be in accordance with the use of depositions at trials under the Civil Practice Law and Rules.

(k) ~~(l)~~ **Motions.** The special referee to which a matter has been assigned will entertain, from time to time, such motions as justice may require, in accordance with the principles set out in section 1500.1(c) of this Part.

1500.~~12~~11 Formal Disciplinary Proceedings: Conduct of Hearing

(a) **Conferences.** ~~In order to provide opportunity for the submission and consideration of facts or arguments, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited (including preparation of agreed stipulations of fact) staff counsel and respondent and/or respondent's counsel shall meet five business days after the answer is served (unless a different time be established by the special referee) to complete and sign a pre hearing stipulation in conformity with the model set forth in section 1500.31(a) of this Part. The signed stipulation shall~~

~~be forwarded to the special referee by the Office of Chief Counsel no later than five days prior to the hearing.~~ Staff counsel and respondent and/or respondent's counsel shall meet no later than five business days prior to the date of the initial hearing, unless a different date is set by the special referee, in order to provide an opportunity for the consideration of the means by which the conduct of the hearing may be facilitated and the disposition of the charges expedited. The conference shall include, but not be limited to, the consideration of agreed stipulations of fact and/or law, the marking of exhibits, and the exchange of witness lists. The special referee may make such orders with respect to the said conference as circumstances require.

(b) **Appearances**. The special referee shall cause to be entered upon the record all appearances, with a notation in whose behalf each appearance is made.

(c) **Order of Procedure**. In proceedings upon a notice of charges and petition, the Office of Chief Counsel shall ~~have the burden of proof, shall~~ initiate the presentation of evidence~~,~~ and may present rebuttal evidence. Opening statements, when permitted in the discretion of the special referee, shall be made first by staff counsel. Closing statements shall be made first by the respondent.

(d) **Burden of Proof.** ~~The burden of proof in all proceedings upon a notice of charges shall be a fair preponderance of the evidence.~~ The Office of Chief Counsel shall have the burden of proving the charges by a fair preponderance of the evidence. The respondent shall have the burden of proving by a fair preponderance of the evidence such matters as are raised by way of affirmative defense or in mitigation.

(e) **Presentation by the Parties**. Respondent and staff counsel shall have the right of presentation of evidence, cross-examination, objection, motion and argument. The special referee may examine all witnesses.

(f) **Limiting Number of Witnesses**. The special referee may limit the number of witnesses who may be heard upon any issue to eliminate unduly cumulative evidence.

(g) **Additional Evidence**. At the hearing, the special referee may, if deemed advisable, authorize any party to file specific documentary evidence as a part of the record within such time as shall be fixed by the special referee.

(h) **Oral Examination**. Witnesses shall be examined orally unless the testimony is taken by deposition as provided in section 1500.~~11~~10(k) of this Part, or the facts are stipulated in the manner provided in ~~section 1500.11(d)~~ subdivision (j) of

this ~~Part~~ section. Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.

(i) **Fees of Witnesses.** Witnesses subpoenaed by the Office of Chief Counsel or the respondent shall be paid, by the subpoenaing party, the same fees and mileage as are paid for like service in the Supreme Court.

(j) **Presentation and Effect of Stipulation.** The parties may stipulate as to any relevant matters of fact or the authenticity of any relevant documents. Such stipulations may be received in evidence at a hearing, and when so received shall be binding on such parties with respect to the matters therein stipulated.

(k) **Admissibility of Evidence.**

(1) **General Rule.** All evidence which is deemed by the special referee to be relevant, competent and not privileged, in accordance with the law of evidence of the State of New York as applied in civil proceedings, shall be admissible ~~in accordance with~~ subject to the principles set out in section 1500.1(c) of this Part.

(2) **Pleadings.** The notice of charges and the answer thereto shall, without further action, be considered as parts of the record.

(3) **Convictions.** A certificate of the conviction of a respondent for any crime shall be conclusive evidence of the respondent's guilt of that crime in any disciplinary proceeding instituted against the respondent and based on the conviction, and the respondent may not offer evidence inconsistent with the essential elements of the crime for which the respondent was convicted as determined by the statute defining the crime except such evidence as was not available either at the time of the conviction or in any proceeding challenging the conviction.

(l) **Reception and Ruling on Evidence.** When objections to the admission or exclusion of evidence are made, the grounds relied upon shall be stated concisely, if so requested by the special referee, and may be stated concisely if no such request is made. Formal exceptions are unnecessary. The special referee shall rule on the admissibility of all evidence.

(m) **Copies of Exhibits.** When exhibits of a documentary character are received in evidence, copies shall, unless impracticable, be furnished to the parties and to the special referee at the hearing.

(n) **Record of Proceeding.** Hearings shall be recorded by reporters authorized to take oaths, or by mechanical recording devices and a transcript of the hearing so recorded, if such transcription is made, shall be a part of the record and sole official transcript of the proceeding. Such transcript shall consist of a verbatim report of the hearing, an exhibit list and the reporter's certificate, and nothing shall be omitted from the record except as is directed by the special referee. After the closing of the record, there shall not be received in evidence or considered as part of the record any document submitted after the close of testimony, except as provided in subdivision (g) of this section or changes in the transcript, except as provided in subdivision (o) of this section.

(o) **Transcript Corrections.** Corrections in the official transcript may be made only to make it conform to what actually transpired at the hearing. No corrections or physical changes shall be made in or upon the official transcript of the hearing except as provided in this section. Transcript corrections agreed to by all parties may be incorporated into the record, if and when approved by the special referee, at any time during the hearing or after the close of the hearing, but in no event more than 10 days after the receipt of the transcript. Resolution of any dispute among the parties as to correction of the official transcript shall be resolved by the special referee, whose decision shall be final.

(p) **Copies of Transcripts.** A respondent desiring copies of an official transcript may obtain such copies at the respondent's own expense from the official reporter. ~~Any witness may obtain from the official reporter at the witness' own expense a copy of that portion of the transcript relating to the witness' own testimony, or any part thereof.~~ The Office of Chief Counsel shall ~~in either such case,~~ bear the expense of one such copy if and when directed by the special referee and shall furnish the same to the special referee as and when directed.

(q) Reopening of Record.

(1) Application. No application to reopen a proceeding shall be granted except upon the application of the respondent to the special referee, made prior to the filing of the special referee's report and recommendation, and only upon good cause shown. Such application shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, and shall be served on the parties and delivered to the special referee together with proof its of service.

(2) Responses. Within five days after the service of such application, any other party may serve an answer thereto (delivering the original thereof to the special referee together with proof of its service), and in default of such answer shall

be deemed to have waived any objection to the granting of such application.

1500.~~13~~12 **Formal Disciplinary Proceedings: Concluding Procedures**

(a) **Determinations.**

(1) **Determination of Charges.** After the hearing of concluding arguments and receipt of additional material, if any, the special referee shall determine whether any charges against the respondent are to be sustained.

(2) **No Charge Sustained.** If the special referee decides that none of the charges against the respondent should be sustained, the special referee may so advise the parties on the record, and the referee shall proceed to prepare and file with the confidential clerk of the Court a report recommending that the charges be dismissed and the matter closed.

(3) **Any Charge Sustained.** If the special referee decides that any charge against the respondent should be sustained, the special referee shall so advise the parties on the record, and shall thereupon ascertain from staff counsel, whether the respondent has previously received a letter of caution or has previously been subject to disciplinary action by the Court, the Committee, any grievance committee established or authorized by any other Appellate Division of the Supreme Court of the State of New York, or by any other court.

(4) **Sanctions.** Following the determination to be made in accordance with paragraph (3) of this subdivision, the special referee shall consider and deliberate which of the following disciplinary sanctions should be recommended:

(i) private reprimand;

(ii) censure, suspension or disbarment;

(iii) restitution or reimbursement pursuant to section 90 6-a of the Judiciary Law, if deemed appropriate;

(iv) costs be imposed on the respondent; and/or

(v) such other sanction as circumstances warrant.

Upon such deliberations having been had, the special referee shall prepare a report and recommendation for the Court as provided in section 1500.~~13~~12(b) of this Part.

(b) **Report and Recommendation of the Special Referee.**

(1) **All Cases.** In all cases there shall be a report and recommendation by the special referee which shall state the special referee's findings of fact and conclusions of law. In all cases it shall be in the discretion of the special referee to deliver the report and recommendation orally on the record at the close of the hearing.

(2) **Submissions of the Parties.** The special referee may require staff counsel ~~and/or the respondent~~ to submit briefs or proposed findings of fact and conclusions of law in accordance with such schedule as may be set by the special referee and shall offer the respondent a reasonable opportunity to respond to any such briefs and/or proposed findings. Copies of any submission to the special referee shall be simultaneously served on all of the parties at the time of its submission to the special referee.

(3) **Service and Filing of Report.** Unless good cause exists to proceed otherwise, the special referee shall issue a report and recommendation within 60 days after the conclusion of the hearing and submission of all post-hearing papers. The special referee shall file an original and five copies of the report and recommendation with the confidential clerk of the Court and serve copies thereof upon the parties.

(4) **Petitioning the Court for Final Action.** The Office of Chief Counsel and/or the respondent may petition the Court within 30 days after service of the special referee's report and recommendation to confirm or disaffirm the same, whether in whole or in part, and request the Court to enter an order for such other and further relief as may be appropriate under the circumstances including, but not limited to, reversal or modification of any finding in the report and/or a different sanction. Copies of such petition shall be served by the petitioner on the other party, with the original and five copies thereof being filed with the confidential clerk of the Court. The opposing party shall be accorded no less than 20 days to respond to the petition.

(5) **Notification of Complainant.** The Office of Chief Counsel by means of written notice shall advise the complainant of ~~any referral to the Court (which notice shall inform the Complainant of the requirement of confidentiality to whatever extent appropriate), and of~~ any final action by the Committee or the Court. Where such action does not consist of censure, suspension or disbarment, the complainant shall be advised of the requirement of confidentiality to whatever extent appropriate.

(c) **Entry of Order Concluding Formal Disciplinary Proceedings.** After due deliberation, the Court shall enter an order confirming or disaffirming the report and recommendation of

the special referee, whether in whole or in part, and providing for such other and further relief as may be appropriate under the circumstances including, but not limited to, reversal or modification of any finding in the report and/or a different sanction. The Court shall state its reasons for the order and the order shall provide for such of the following as may be deemed appropriate to the circumstances:

(1) Dismissal of the charges;

(2) Private reprimand;

(3) Public censure;

(4) Suspension from the practice of law for a stated period and until further order of the Court;

(5) Disbarment;

(6) Restitution or reimbursement pursuant to section 90 6-a of the Judiciary Law;

(7) Costs; and/or

(8) Such other sanction as circumstances warrant.

(d) **Service of Order.** A copy of the order made pursuant to section 1500(c) of this Part shall be served upon the respondent by the Office of Chief Counsel in such manner as the Court may direct.

1500.~~14~~13 Suspension Pending Consideration of Charges.

(a) **Grounds for Interim Suspension.** An attorney who is the subject of an investigation, or of charges by the Committee of professional misconduct, or who is the subject of a formal disciplinary proceeding pending in the Court against whom a petition has been filed pursuant to section 1500.~~11~~10 of this Part, or upon whom a notice has been served pursuant to section 1500.~~8~~7(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(1) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or the attorneys failure to submit a written answer to a complaint of professional misconduct within 10 days of receipt of a demand for

such an answer by the Committee, served either personally or by certified mail upon the attorney or the attorney's failure to comply with any of the lawful demands of the Court or the Committee made in connection with any investigation, hearing, or disciplinary proceeding; or

(2) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct; or

(3) other uncontroverted evidence of professional misconduct.

(b) **Application and Order.** The suspension shall be made by order of the Court upon the application of the Office of Chief Counsel acting at the direction of the Committee, after notice of such application has been given to the attorney pursuant to subdivision 6 of section 90 of the Judiciary Law. The Court shall briefly state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the Committee have been concluded, and until further order of the Court.

1500.~~15~~14 Attorneys Convicted of Serious Crimes; Record of Conviction as Conclusive Evidence.

(a) The clerk of any court within the judicial department in which an attorney admitted to practice in this State is convicted of a crime shall within five days of said conviction forward a certificate thereof to the clerk of ~~this Court~~ any court of this State before which disciplinary proceedings may be instituted against the convicted attorney and to the clerk of the Appellate Division of the Supreme Court in the judicial department in which said person was admitted to practice.

(b) Upon the filing with the Court of a certificate that an attorney has been convicted of a serious crime as hereinafter defined in a court of record of any State, territory or district, including this State, the Court shall:

(1) suspend the attorney from the practice of law until a final order is made pursuant to paragraph (g) of subdivision (4) of section 90 of the Judiciary Law, unless upon good cause shown, the Court determines when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interests of justice, to set aside such suspension; and

(2) ~~cause formal charges to be made and served~~

~~upon the respondent and shall~~ enter an order immediately referring the matter to a special referee appointed by the Court to conduct forthwith formal disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(c) The term "serious crime" shall include any felony, not resulting in an automatic disbarment under the provisions of subdivision (4) of section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, an attempt or a conspiracy or solicitation of another to commit a "serious crime" or a crime involving moral turpitude.

(d) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against the attorney based on that conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which the attorney was convicted as determined by the statute defining the crime; provided, however, that the attorney may offer such evidence as was not available either at the time of the conviction or in any proceeding challenging the conviction.

(e) Upon the filing with the court of a certificate that an attorney has been convicted of a crime not constituting a serious crime as hereinbefore defined in a court of record in any State, territory or district, including this State, the Court shall either refer the matter to the Committee for whatever action may be appropriate, or cause formal charges to be made and served upon the respondent and enter an order immediately referring the matter to a special referee appointed by the Court to conduct forthwith formal disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(f) The Committee or the Office of Chief Counsel, upon receiving information that any attorney to whom these Rules apply has been convicted of a crime in a court of record of any State, territory or district, shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate of the conviction to the Court. If the certificate has not been forwarded by the clerk, the Office of Chief Counsel shall obtain a certificate of the conviction and file the same with the Court.

1500.~~16~~15 **Discipline of Attorneys for Professional Misconduct in Foreign Jurisdiction.**

(a) **Application of Section.** Any attorney subject to these Rules, pursuant to section 1500.1 of this Part, who has been disciplined in a foreign jurisdiction, may be disciplined by the Court because of the conduct which gave rise to the discipline imposed in the foreign jurisdiction. For purposes of this Part, foreign jurisdiction means another state, territory or district.

(b) **Notice of Proceedings.** Upon receipt of a certified or exemplified copy of the order imposing such discipline in a foreign jurisdiction, and of the record of the proceedings upon which such order was based, the Court, directly or by the Committee acting through the Office of Chief Counsel, shall give written notice to such attorney pursuant to subdivision 6 of section 90 of the Judiciary Law, according him or her the opportunity, within 20 days of the giving of such notice, to file a verified statement setting forth evidentiary facts for any defense to discipline enumerated under subdivision (c) of this section, and a written demand for a hearing at which consideration shall be given to any and all such defenses. Such notice shall further advise the attorney that in default of such filing such discipline or such disciplinary action as may be appropriate will be imposed or taken. When a verified statement setting forth evidentiary facts for any defense to discipline and a demand for hearing have been duly filed, no discipline shall be imposed without affording the attorney an opportunity for hearing. The hearing shall ~~may~~ be conducted by a special referee ~~or by the Committee, as the Court directs~~. In the event the Committee or the attorney desires further action by the Court, a petition may be filed in the Court, together with the record of the proceedings before the special referee ~~or the Committee~~.

(c) **Permissible Defenses.** Only the following defenses may be raised:

(1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court ~~this court~~ could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the attorney's misconduct; or

(3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this jurisdiction.

(d) **Attorneys Required to File**. Any attorney subject to these Rules pursuant to section 1500.1 of this Part, who has been disciplined in a foreign jurisdiction shall promptly file with the Court a certified copy of the order imposing such discipline.

(e) **Filing by Committee**. Whenever the Committee or the Office of Chief Counsel learns that an attorney subject to these Rules pursuant to section 1500.1 of this Part has been disciplined in a foreign jurisdiction, it shall ascertain whether a certified or exemplified copy of the order imposing such discipline has been filed with the Court, and if it has not been filed, the Committee or the Office of Chief Counsel shall cause such order to be filed.

1500.~~17~~16 Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated.

(a) **Suspension Upon Judicial Determination of Incompetency or on Involuntary Commitment**. Where an attorney subject to this Part has been judicially declared incompetent or involuntarily committed to a mental hospital, the Court, upon proper proof of the fact (including a certified or exemplified copy of an order declaring the attorney to be incompetent or involuntarily committing the attorney to a mental hospital), shall enter an order suspending such attorney from the practice of the law, effective immediately and for an indefinite period and until the further order of the Court. A copy of such order shall be served upon such attorney, his committee, guardian or other legal representative, and/or the director of the mental hospital in such manner as the Court may direct.

(b) **Proceeding to Determine Alleged Incapacity and Suspension Upon Such Determination.**

(1) Whenever a committee appointed pursuant to section 1500.~~22~~21 of this Part shall petition the Court to determine whether an attorney is incapacitated from continuing to practice law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants or by reason of other mental disability, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including examination of the attorney by such qualified medical experts as the Court shall designate. If, upon due consideration of the matter, the Court is satisfied and concludes that, based upon a fair preponderance of the evidence, the attorney is incapacitated from continuing to practice law, it shall enter an order suspending the attorney on the ground of such disability for an indefinite period and until the further

order of the Court and any pending disciplinary proceedings against the attorney shall be held in abeyance.

(2) The Court shall provide for such notice to the respondent-attorney of proceedings in such matter as it deems proper and advisable and may appoint an attorney to represent the respondent, if the respondent-attorney is without adequate representation.

(c) **Procedure When Respondent Claims Disability During Course of Proceeding.**

(1) If, during the course of a disciplinary proceeding, the respondent contends that he or she is suffering from a disability by reason of mental infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent adequately to defend himself or herself, the Court thereupon shall enter an order suspending the respondent from continuing to practice law until a determination is made of the respondent's capacity to continue the practice of law in a proceeding instituted in accordance with the provisions of subdivision (b) of this section.

(2) If, in the course of a proceeding under this section or in a disciplinary proceeding, the Court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable, including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) **Appointment of Attorney to protect Client's and Suspended Attorney's Interest.**

(1) Whenever an attorney is suspended for incapacity or disability, the Court, upon such notice to the attorney as it may direct, may appoint another attorney or attorneys to inventory the files of the suspended attorney and to take such action as it deems proper and advisable to protect the interest of his or her clients and for the protection of the interest of the suspended attorney.

(2) Any attorney so appointed by the Court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates, except as is necessary to carry out the order of the Court which appointed the attorney to make such inventory.

(e) **Reinstatement Upon Termination of Disability.**

(1) Any attorney suspended under the provisions of this section shall be entitled to apply for reinstatement at such intervals as the Court may direct in the order of suspension or

any modification thereof. Such application shall be granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and he or she is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper for a determination as to whether the attorney's disability has been removed, including the direction of an examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such examination shall be paid by the attorney.

(2) Where an attorney has been suspended by an order in accordance with the provisions of subdivision (a) of this section and thereafter, in proceedings duly taken, has been judicially declared to be competent, the Court may dispense with further evidence that his or her disability has been removed and may direct his or her reinstatement upon such terms as it deems proper and advisable.

(f) **Burden of Proof**. In a proceeding seeking an order of suspension under this section, the burden of proof shall rest with the petitioner. In a proceeding seeking an order terminating a suspension under this section, the burden of proof shall rest with the suspended attorney.

(g) **Waiver of Doctor-Patient Privilege Upon Application for Reinstatement**. The filing of an application for reinstatement by an attorney suspended for disability shall be deemed to constitute a waiver of any doctor-patient privilege existing between the attorney and any psychiatrist, psychologist, physician or hospital who or which has examined or treated the attorney during the period of his disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital by whom or at which the attorney has been examined or treated since his or her suspension and the attorney shall furnish to the Court written consent to each to divulge such information and records as is requested by court-appointed medical experts or by the clerk of the Court.

(h) **Payment of Expenses of Proceedings**.

(1) The necessary costs and disbursements of an agency, committee or appointed attorney in conducting a proceeding under this section shall be paid in accordance with subdivision (6) of section 90 of the Judiciary law.

(2) The Court may fix the compensation to be paid to any attorney or medical expert appointed by the Court under this section. The compensation may be directed by the Court to be paid as an incident to the cost of the proceeding in which the charges are incurred and shall be paid in accordance with law.

1500.~~18~~17 Resignation by Attorney Under Disciplinary Investigation.

(a) **Tender of Resignation**. An attorney who is the subject of an investigation into allegations of misconduct, or who is the subject of a disciplinary proceeding pending in the Court, may tender a resignation by submitting to the Committee an affidavit stating that he or she intends to resign and that:

(1) his or her resignation is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; and he or she is fully aware of the implication of submitting his or her resignation;

(2) he or she is aware that there is pending an investigation into allegations that he or she has been guilty of misconduct, the nature of which shall be specifically set forth; and

(3) he or she acknowledges that if charges were predicated upon the misconduct under investigation, he or she could not successfully defend on the merits against such charges.

(b) **Recommendation to the Court**. On receipt by the Committee of an affidavit from an attorney who intends to resign, ~~the Committee Chairperson shall designate an attorney member of the Committee to review the affidavit and such other matters as the the member may deem appropriate to determine either (1) to recommend that the resignation be accepted and to recommend any terms and conditions of acceptance which may be appropriate to the circumstances, or (2) to recommend that the resignation not be accepted with the reasons therefor. The~~ the Committee shall promptly thereafter ~~consider the matter and~~ file the affidavit ~~its report~~ with the Court together with either (1) its recommendation that the resignation be accepted and whether acceptance should be conditioned upon restitution or reimbursement pursuant to section 90 6-a of the Judiciary Law or (2) its recommendation that the resignation not be accepted and its reasons therefor.

(c) **Entry of Order**. Upon the filing of the ~~report~~ recommendation of the Committee with the required affidavit, the Court may enter an order either disbarring the attorney~~, ordering that there be further proceedings, or accepting the resignation~~ and striking his or her name from the roll of attorneys on consent and upon such terms and conditions as it deems appropriate, or ordering that there be further proceedings. The Court may also order that the affidavit to which reference is made in subdivisions (a) and (b) of this section be deemed private and confidential under subdivision 10 of section 90 of the Judiciary Law.

(d) **Notification of Complainant.** The Office of Chief Counsel, by means of written notice, shall advise the complainant of any action taken by the Court with respect to the respondent's resignation.

1500.~~19~~18 Nonabatement of Disciplinary Proceedings

(a) **Refusal of Complainant or Respondent to Proceed, etc.** Neither unwillingness or neglect of the complainant to prosecute a charge, nor settlement, compromise or restitution, nor the failure of the respondent to cooperate, shall, in itself, justify abatement of an investigation or the deferral or termination of proceedings under these Rules.

(b) **Matters Involving Related Pending Civil Litigation or Criminal Matters.**

(1) **General Rule.** The processing of complaints involving material allegations which are substantially similar to the material allegations of pending criminal or civil litigation need not be deferred pending determination of such litigation.

(2) **Effect of Determination.** The acquittal of a respondent on criminal charges involving substantially similar material allegations shall not, in itself, justify termination of a disciplinary investigation predicated upon the same material allegations.

(c) **Restitution.** Restitution made by or on behalf of a respondent for property which has been converted by the respondent or payments made to reimburse or otherwise compensate persons injured by the respondent, shall not abate or otherwise bar the commencement or continuance of disciplinary proceedings.

1500.~~20~~19 Conduct of Disbarred, Suspended or Resigned Attorneys; Abandonment of Practice by Attorney

(a) **Compliance with Judiciary Law.** Disbarred, suspended or resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.

(b) **Compensation.** A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar.

A disbarred, suspended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client. Such applications shall be made at special term in the court wherein the action is pending or at special term in the Supreme Court in the county wherein the moving attorney maintains his or her office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been required to pay had no substitution of attorneys been required.

(c) **Notice to Clients Not Involved in Litigation.** A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigated or administrative matters or proceedings pending in any court or agency, of his or her disbarment, suspension or resignation and his or her consequent inability to act as an attorney after the effective date of his or her disbarment, suspension or resignation and shall advise said clients to seek legal advice elsewhere.

(d) **Notice to Clients Involved in Litigation.**

(1) A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, each of his or her clients involved in litigated matters or administrative proceedings, and the attorney or attorneys for each adverse party, as well as the court, in such matter or proceeding, of his or her disbarment, suspension or resignation and consequent inability to act as an attorney after the effective date of his or her disbarment, suspension or resignation. The notice to be given to the client shall inform the client of the advisablity of a prompt substitution of another attorney or attorneys in his or her place.

(2) In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension or resignation, it shall be the responsibility of the disbarred, suspended or resigned attorney to move pro se in the court in which the action is pending, or before the body in which an administrative proceeding is pending, for leave to withdraw from the action or proceeding.

(3) The notice given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred, suspended or resigned attorney. In

addition, notice shall be given in like manner to the Office of Court Administration of the State of New York in each case in which a retainer statement has been filed.

(e) **Conduct After Entry of Order.** The disbarred, suspended or resigned attorney, after entry of the disbarment or suspension order or after entry of the order accepting the resignation, shall not accept any new retainer or engage in any new case or legal matter of any nature as attorney for another. However, during the period between the entry date of the order and its effective date he or she may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(f) **Filing Proof of Compliance and Attorney's Address.** Within 10 days after the effective date of the disbarment or suspension order or the order accepting the resignation, the disbarred, suspended or resigned attorney shall file with the clerk of the Court an affidavit showing:

(1) that he or she has fully complied with the provisions of the order and with these Rules;

(2) that he or she has served a copy of such affidavit upon the petitioner or moving party; and

(3) the residence or other address of the disbarred, suspended or resigned attorney where communications may be directed to the said attorney.

(g) **Appointment of Attorney to protect Clients' Interests and Interests of Disbarred, Suspended or Resigned Attorney.** Whenever it shall be brought to the Court's attention that a disbarred, suspended or resigned attorney shall have failed or may fail to comply with the provisions of subdivisions (c), (d) or (f) of this section, the Court, upon such notice to such attorney as the Court may direct, may appoint an attorney or attorneys to inventory the files of the disbarred, suspended or resigned attorney and to take such action as seems indicated to protect the interests of his or her clients and for the protection of the interests of the disbarred, suspended or resigned attorney.

(h) **Disclosure of Information.** Any attorney so appointed by the Court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the Court appointing the attorney to make such inventory.

(i) **Fixation of Compensation.** The Court may fix the

compensation to be paid to any attorney appointed by it under this section. The compensation may be directed by the Court to be paid as an incident to the costs of the proceeding in which the charges are incurred and shall be charged in accordance with law.

(j) **Required Records**. A disbarred, suspended or resigned attorney shall keep and maintain records of the various steps taken by him or her under this section so that, upon any subsequent proceeding instituted by or against him or her, proof of compliance with this section and with the disbarment or suspension order or with the order accepting the resignation will be available.

(k) **Abandonment of Practice by Attorney**. When, in the opinion of the Court, an attorney has abandoned his or her practice, the Court, upon such notice to such attorney as it may direct, may appoint the Office of Chief Counsel or an individual attorney, to take custody and inventory the files of such attorney and to take such action as seems indicated to protect the interests of his or her clients.

1500.~~2120~~ Application for Reinstatement.

(a) **General**. Any attorney who has been ordered suspended for a period of six months or less pursuant to formal disciplinary proceedings shall be reinstated, subject to the procedures set forth in subdivisions (a)(1) and (2) hereof and if no objection is made by the Committee, 60 days after the end of the period of suspension by filing with the Court and serving upon the Office of Chief Counsel an affidavit stating that he or she has fully complied with the requirements of the suspension order, including the making of any restitution ordered by the Court and the payment of any fees and costs required by its order.

(1) Upon receipt of the affidavit, the Office of Chief Counsel shall mail a copy of it and a notice to each complainant in the disciplinary proceeding that led to the suspension advising the complainant that he or she has 20 days after the date of mailing of such affidavit and notice to raise an objection to, support or otherwise offer written comments on, the affidavit.

(2) Within 40 days after service of the affidavit on the Office of Chief Counsel, the Committee shall advise the Court if it objects to reinstatement of the attorney and shall file a report setting forth its objection. Upon the filing of such report, the Court may make an order appropriate to the circumstances or require that the attorney petition for

reinstatement in accordance with the procedures set forth in subdivisions (b) through (f) of this section.

(b) **Procedure on Petition.** Attorneys ~~Persons~~ who have been disbarred or who have been suspended for more than six months, or whose names have been stricken from the roll of attorneys on consent, may only apply for reinstatement by petitioning the Court.

(1) **Conditions Precedent to Entertaining Petition.** Unless the Court shall first order otherwise, a petition for reinstatement will not be accepted for filing unless the requisite fees therefor have been paid and where:

(i) The petitioning attorney has been disbarred after a hearing or has been stricken from the roll of attorneys pursuant to subdivision 4 of section 90 of the Judiciary Law or has resigned on consent, until the expiration of seven years after the effective date of the disbarment or removal; or

(ii) The petitioning attorney has been denied reinstatement, until the expiration of two years after the date of the Court's order denying restatement.

(2) **Petition to Be Verified and Submitted in the Form Prescribed.** A petition for reinstatement shall be verified and shall be submitted substantially conforming to the form and content of the model set forth as Appendix B in section 1500.~~31~~30 of this Part.

(3) **Service and Filing of Petition.** A petitioner shall serve a copy of the petition on the Office of Chief Counsel and the Lawyers' Fund for Client Protection.

(c) **Investigation.** The Committee or the Committee on Character and Fitness, as the Court may direct, shall inquire into the facts submitted in support of the petition and all other relevant facts.

(1) **Standard Investigation ~~Inquiry~~.** Upon reference to the Committee (or to the Committee on Character and Fitness, as the case may be) of a petition made by a person who has been disbarred or who has been suspended for more than six months, or whose name has been stricken from the roll of attorneys on consent, the Office of Chief Counsel (or the Committee on Character and Fitness) shall mail a ~~copy of the petition and a~~ notice to each complainant in the disciplinary proceeding that led to the suspension or disbarment advising the complainant that a petition has been filed whereby readmission is sought and that he or she has 60 days after the date of mailing such ~~affidavit and~~ notice to ~~raise an objection to, support or otherwise~~ offer

written comments on the petition for reinstatement. Specific inquiry shall be made by the Office of Chief Counsel (or the Committee on Character and Fitness) as to whether and to what extent restitution has been made to those persons who were injured by the applicant's misconduct.

(2) **Supplemental Investigation ~~Inquiry~~**. The Committee (or the Committee on Character and Fitness) may, in its discretion, require the petitioner to (i) submit additional sworn proof, (ii) submit to an examination under oath, (iii) produce records or other documents relevant to the application, (iv) provide proof of compliance with all disciplinary orders, and (v) submit to medical or psychiatric examination by qualified experts.

(d) **Committee Recommendation and Report**. After completing the investigation to which reference is made in subdivision (c) of this section, the Committee (or the Committee on Character and Fitness) shall decide whether to support or oppose the petition and shall thereupon direct the Office of Chief Counsel to prepare a report consistent with its decision. If the Committee (or the Committee on Character and Fitness) opposes reinstatement, the reasons for its opposition shall be set forth in the report and it may request that the Court either deny the petition or refer the petition to a special referee to hear and report to the Court on such matters as may be appropriate. A copy of the report shall be served on the petitioner and the original thereof shall be filed with the Court together with proof of its service.

(e) **Hearing on Petition**. If the Court orders that there be a hearing on the petition, the Court shall appoint a special referee to conduct the hearing and to report his or her findings to the Court. At the hearing, both the petitioner and the Office of Chief Counsel (or such other body as the Committee on Character and Fitness may designate) may present evidence relevant to the issues raised by the petition.

(f) **Conditions for Granting Petition**. A petition for reinstatement may be granted by the Court only after there has been compliance with the procedures set forth in this section and the petition has been reviewed by the Committee or the Committee on Character and Fitness or such other individual or body as the Court may deem appropriate and

(1) upon a showing by the petitioner:

~~(1)~~ (1) by clear and convincing evidence that the petitioner has fully complied with the provisions of the order disbarring or suspending him or her or striking his or her name from the roll of attorneys, and that the petitoner possesses the character and general fitness to practice law; and

~~(2)~~ (ii) that, subsequent to the entry of such order, the petitoner has taken, and attained a passing score on, the Multistate Professional Responsibility Examination described in section 520.8(a) of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law, the passing score thereon being that determined by the New York State Board of Law Examiners pursuant to section 520.8(c) of such rules.

~~(3)~~ (2) The Court in its discretion may direct as a condition of reinstatement that:

(i) the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner; and/or

(ii) the petitioner make full restitution to such persons as were injured by his or her misconduct.

~~(4)~~ (3) In reviewing a petition for reinstatement, the Court may:

(i) order that notice of the petition for reinstatement be published in one or more newspapers circulated within the territorial jurisdiction of the Court; and

(ii) consider the misconduct for which the petitioner was originally suspended or disbarred and any other relevant conduct or information which may come to its attention.

(g) **Stay of Petition Pending Condition**. In the event that the Court determines to grant a petition for reinstatement, it may nevertheless withhold final action on the petition for a period of not more than two years pending the satisfaction of one or more conditions, including the attainment by the petitoner of a passing score on the Multistate Professional Responsibility Examination described in section 520.8(a) of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law. Upon proof of successful completion of the said examination, the satisfaction of any other conditions imposed, and in the absence of further misconduct by the petitioner, the petition shall be granted.

1500.~~2221~~ Structure, Composition and Membership of the Departmental Disciplinary Committees

There shall be eight departmental disciplinary committees, structured and composed as follows:

(a) First Judicial Department. The Court shall appoint a departmental disciplinary committee for the First Judicial

Department. The departmental disciplinary committee shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the First Judicial Department at the time of their admission to practice by the Appellate Division. The departmental disciplinary committee shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) The departmental disciplinary committee shall consist of a ~~chairman~~ chairperson and ~~forty-two~~ forty-three members, nine of whom shall be non-attorneys.

(2) Appointments shall be made, after consultation with the departmental disciplinary committee, for a term of three years. A vacancy shall be filled for the remainder of the term. No person who has served two consecutive terms shall be eligible for reappointment until the passage of three years from the expiration of his or her second term. The chairperson shall be named by the Court upon recommendation of the Committee. The chairperson may appoint an executive committee consisting of at least six members of the Committee.

(3) The chairperson of the departmental disciplinary committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairperson of the departmental disciplinary committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may hold hearings as authorized by section 1500.~~8~~7 of this Part.

(4) The membership of the departmental disciplinary committee shall be a total of not more than 44 persons each of whom shall be appointed by the Court for a term of three years, except members who have been appointed to complete unexpired terms, in which case such members may be reappointed for three-year or shorter terms. At least two-thirds of the members of the Committee shall be members of the bar of the State of New York in good standing, each of whom shall reside or have an office in the City of New York, and up to one-third of such members shall be persons who are not members of the bar, each of whom shall reside or have a principal place of business in the City of New York. Appointments to the departmental disciplinary committee may be made from lists of nominees submitted by the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association, and by such other means which the Court deems in the public interest. A member of the bar who has served two consecutive terms shall not be eligible for reappointment until one year after the expiration

of the second term.

(b) **Second Judicial Department**: The Court shall appoint three departmental disciplinary committees for the Second Judicial Department. One of these committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Second and Eleventh Judicial Districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Ninth Judicial District at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Tenth Judicial District at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) Each departmental disciplinary committee shall consist of 19 members and a ~~chairman~~ chairperson, all of whom shall be appointed by this court and 16 of whom shall be attorneys. The ~~chairman~~ chairperson shall have the power to appoint an acting ~~chairman~~ chairperson from among the members of the departmental disciplinary committee. Appointments may be made from lists of prospective members submitted by the following county bar associations within the Second Judicial Department: Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County, New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association, Rockland County Bar Association, Inc., Suffolk County Bar Association and Westchester County Bar Association.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. Thereafter, yearly appointments of five persons shall be made to each such committee for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his or her second such term. The person appointed ~~chairman~~ chairperson shall serve as ~~chairman~~ chairperson for a term of two years and shall be eligible for reappointment as ~~chairman~~ chairperson for not more than one additional term of two years.

(3) The chairperson of each departmental disciplinary committee shall have the power to appoint its

members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairperson of the committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may hold hearings as authorized by section 1500.~~8~~7 of this Part.

(c) **Third Judicial Department**. The Court shall appoint a departmental disciplinary committee for the Third Judicial Department. The departmental disciplinary committee shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Third Judicial Department at the time of their admission to practice by the Appellate Division. The departmental disciplinary committee shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) The departmental disciplinary committee shall consist of a ~~chairman~~ chairperson and twenty members, three of whom shall be non-attorneys. Appointment of attorneys shall, as far as practicable, be made equally from practicing attorneys in each of the judicial districts of the Third Judicial Department.

(2) Appointments shall be made, after consultation with the departmental disciplinary committee, for a term of three years. A vacancy shall be filled for the remainder of the term. No person who has served two consecutive terms shall be eligible for reappointment until the passage of three years from the expiration of his or her second term. Seven members of the committee shall constitute a quorum and the concurrence of six members shall be necessary for any action taken. The chairperson shall be named by the Court upon recommendation of the Committee. The chairperson may appoint an executive committee consisting of at least one member of the Committee from each judicial district.

(3) The chairperson of the departmental disciplinary committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairperson of the departmental disciplinary committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may hold hearings as authorized by section 1500.~~8~~7 of this Part.

(d) **Fourth Judicial Department**: The Court shall appoint three departmental disciplinary committees for the Fourth Judicial Department. One of these committees shall be charged with the duty and power to investigate and prosecute matters

arising in or concerning attorneys practicing, or currently residing or having resided in the Fifth Judicial District at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Seventh Judicial District at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Eighth Judicial District at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) Each departmental disciplinary committee shall consist of 21 members and a chairperson, all of whom shall be appointed by the Court, reside in their respective district, and 18 of whom shall be attorneys. The chairperson shall have the power to appoint an acting chairperson from among the members of the departmental disciplinary committee. Appointments may be made from lists of prospective members submitted by bar associations within the Fourth Judicial Department.

(2) Six attorneys shall be appointed for a term of one year, six for a term of two years, and six for a term of three years. One non-attorney shall be appointed for a term of one year, one for a term of two years, and one for a term of three years. Thereafter appointments shall be made for a term of three years, and no person who has served two consecutive three-year terms shall be eligible for reappointment until the passage of three years from the expiration of the second term. A vacancy shall be filled for the remainder of the term.

(3) The chairperson of each departmental disciplinary committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairperson of the committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may hold hearings as authorized by section 1500.8[illegible] of this Part.

(e) **Meetings, Notice of Time and Place.** The Committee shall meet not less frequently than every other month, and such meetings shall be held upon notice given at the direction of the Committee Chairperson. The notice shall ordinarily be in writing and shall set forth the date and time of the meeting, which shall take place at such place as may be designated by the Committee Chairperson. In lieu of such written notice, meetings may be called on notice given to each member of the Committee not less

than 24 hours prior to the time fixed for the meeting, in person or by telephone. All notices shall be given to members of the Committee at the addresses furnished for such purposes by the members. The Committee Chairperson or his or her designee shall preside at all meetings of the Committee. Minutes of all meetings shall be kept and filed in the Office of Chief Counsel. To the extent possible, an agenda for each meeting of the Committee shall be prepared by or with the approval of the Committee Chairperson and shall be distributed to all members of the Committee prior to the meeting.

(f) **Quorum and Manner of Acting**. Except as otherwise expressly stated to the contrary in these Rules, a majority of the members of the Committee shall constitute a quorum for the transaction of business, and all action shall require an affirmative vote of the greater of (1) a majority of the members present at the meeting or (2) one-third of the full Committee.

(g) **Disqualification**. No person shall, while serving on the Committee, appear before the Committee or any of its constituent parts on behalf of any other person.

1500.~~23~~22 Appointment and Duties of Staff Counsel.

(a) **General**. There shall be an Office of Chief Counsel which shall consist of the chief counsel, deputy chief counsel and other staff counsel. The Court shall, in consultation with the Committee, appoint all such persons, together with such supporting staff as it deems advisable.

(b) **Supervision by Chief Counsel**. The Office of Chief Counsel shall be supervised by the chief counsel who shall, either personally or by other staff counsel, exercise the powers and perform the duties of the Office of Chief Counsel set forth in these Rules. The chief counsel may from time to time designate the deputy chief counsel or in the absence of such deputy chief counsel, an associate counsel, to serve as acting chief counsel in the chief counsel's absence.

(c) **Powers and Duties of the Office of Chief Counsel**. The Office of Chief Counsel shall:

(1) have the powers and duties set forth in this Part;

(2) subject to the limitations and requirements of section 1500.~~29~~28 of this Part, maintain ~~permanent~~ records of all matters processed by it, including the disposition thereof, and maintain dockets and assign such docket numbers as may be appropriate for the clear designation of each matter, which shall

include the calendar year in which the matter is originally docketed;

(3) represent the Committee in all proceedings before the Court;

(4) periodically report to the Committee Chairperson and the Court on the operation of the office, including, for each reporting period, the number of matters received and disposed, the number of matters under investigation, the number of matters referred to other agencies, the number of matters in hearings, and the number of hearing days required for each such matter.

(5) have such other duties as may be assigned to it from time to time by the Committee, the Committee Chairperson or the Court.

1500.~~24~~23 Appointment, Status and Duties of Special Counsel.

(a) **General**. From time to time, the Court may appoint an attorney to act as counsel in a particular investigation or proceeding where staff counsel is disqualified or otherwise disabled from undertaking or continuing such investigation or proceeding. Such special counsel may serve either without compensation on a pro bono voluntary basis or, when no such qualified attorney can readily be appointed, the Court may provide for reasonable compensation.

(b) **Recruitment**. From time to time, the Committee Chairperson or the Court may send notices to the principal bar associations located in the Judicial Department, describing the use of special counsel and soliciting the resumes of interested volunteers.

(c) **Conflicts**. Before accepting the assignment of a case, Special Counsel shall determine whether accepting the assignment would create a conflict under the Lawyer's Code of Professional Responsibility, and shall inform the Court of any conflict or potential conflict which arises in the course of handling the case.

(d) **Confidentiality**. Special Counsel shall be bound by the confidentiality rules contained in Judiciary Law Section 90(10) and all other applicable confidentiality provisions.

(e) **Reporting and Independence of Special Counsel**. From time to time, special counsel shall report on the assigned case to the Committee Chairperson, who shall assume direct responsibility for supervising the manner in which the case is

being processed by special counsel. In all respects, special counsel shall be independent of the Office of Chief Counsel.

(f) **Defense and Indemnification of Special Counsel**. All special counsel serving voluntarily, whether or not compensated, are expressly authorized to participate in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law and are thereby entitled to receive, and shall receive, the protections of that law.

(g) **Application of Rules to Special Counsel**. Apart from this section 1500.~~24~~23, references in these Rules to the Office of Chief Counsel shall mean and be understood to refer to special counsel where and to the extent that special counsel has assumed the duties of the Office of Chief Counsel in relation to an assigned case.

1500.~~25~~24 Appointment, Status and Duties of Local Bar Association Grievance Committees.

~~(1)~~ (a) **General**. The Court may~~, from time to time,~~ designate one or more bar associations located in its Judicial Department associations which shall appoint persons to serve as volunteer members of one or more grievance committees administered by ~~the principal~~ such bar associations ~~located in the Judicial Department~~. Such persons shall be attorneys of sound judgment and demonstrated ability and shall not then be serving as a member or staff counsel of a departmental disciplinary committee.

~~(2) **Recruitment**. From time to time, the Committee Chairperson shall send notices to the principal bar associations located in the Judicial Department, describing the grievance process and soliciting the resumes of interested volunteers. The Committee Chairperson may recommend qualified attorneys to the Court for such appointments. The Office of Chief Counsel shall forward these recommendations to the Court together with a proposed order requesting the appointment of the volunteers. The Court may also appoint by similar order such qualified attorneys as may be known to be willing to serve as volunteer members of a grievance committee on its own initiative.~~

~~(3)~~ (b) **Referrals**. The Office of Chief Counsel may refer complaints involving minor misconduct by attorneys with no significant disciplinary history to a bar association administered grievance committee. Such reference may be made only ~~upon the prior written concurrence of an attorney member of the Committee designated by the Committee Chairperson for such purpose~~ at the written direction of the Chief Counsel. Upon receipt of the referred complaint, the grievance committee shall investigate and report on the issues raised by the complaint. If

it appears that the matter should be further considered by the Committee because it then no longer appears to involve merely minor misconduct or the respondent fails to cooperate with the grievance committee, the complaint shall be referred back to the Office of Chief Counsel for investigation under these Rules. The grievance committee shall only consider such matters as may be referred to it pursuant to this section, and shall refer to the Office of Chief Counsel any grievance coming to its attention which has not been so referred.

(c) **Conflicts**. Before taking any action with respect to a matter, the members of the grievance committee shall determine whether undertaking any action with respect thereto would create a conflict under the Lawyer's Code of Professional Responsibility, and shall inform the administrator or chairperson of the grievance committee of any conflict or potential conflict which arises in the course of handling the matter.

~~(4)~~ (d) **Action on Complaint**. Upon completion of an investigation by the grievance committee of a complaint, a written report of its findings shall be prepared and forwarded to the Office of Chief Counsel ~~for consideration of the recommendations contained therein~~. The report shall then be reviewed by an attorney member of the departmental disciplinary committee designated for that purpose by the Committee Chairperson ~~who may accept or reject the recommendation on behalf of the Committee pursuant to the procedures set forth in section 1500.7(b) of this Part~~.

~~(5)~~ (e) **Grievance Committee Rules and Procedures**. The grievance committee shall prepare written rules and procedures governing its proceedings which are not inconsistent with the principles and procedures set forth in sections 1500.5 through 1500.~~9~~8 of this Part. Such grievance committee rules and procedures shall be filed with the Court which may accept or modify them.

~~(6)~~ (f) **Confidentiality**. Grievance committee members shall be bound by the confidentiality rules contained in section 90(10) of the Judiciary Law and all other applicable confidentiality provisions.

~~(7)~~ (g) **Supervision and Reporting**. ~~The Committee Chairperson shall designate one or more attorney members of the Committee to supervise the local grievance committee with the assistance of the Office of Chief Counsel. The Office of Chief Counsel shall report to the Committee at its regularly scheduled meetings concerning the disposition of matters assigned.~~
Upon resolution of a complaint referred to a grievance committee pursuant to this section, the grievance committee shall forward to the Office of Chief Counsel a brief letter or memorandum stating its determination.

1500.~~26~~25 Appointment, Status and Duties of Local Bar Association Mediation Committees.

~~(1)~~ (a) **General.** The Court may~~, from time to time,~~ designate one or more local bar associations which shall appoint persons to serve as volunteer complaint mediators. Such persons shall be attorneys of sound judgment and demonstrated ability ~~admitted to practice no less than ten years~~ and shall not then be serving as a member or staff counsel of a departmental disciplinary committee.

~~(2) **Recruitment.** From time to time, the Committee Chairperson shall send notices to the principal bar associations located in the Judicial Department, describing the mediation service and soliciting the resumes of interested volunteers. The Committee Chairperson may recommend qualified attorneys to the Court for such appointments. The Office of Chief Counsel shall forward these recommendations to the Court together with a proposed order requesting the appointment of the volunteers. The Court may also appoint by similar order such qualified attorneys as may be known to be willing to serve as volunteer mediators on its own initiative.~~

~~(3)~~ (b) **Referrals.** The Office of Chief Counsel may refer complaints involving minor misconduct by attorneys with no significant disciplinary history to a bar association administered mediation committee, where such complaints are deemed suitable for resolution through mediation. Such reference may be made only upon the prior written concurrence of an attorney member of the Committee designated by the Committee Chairperson for such purpose. Upon receipt of the referred complaint, the mediation committee administrator shall designate a mediator who shall attempt to mediate and resolve the matters raised by the complaint. If the mediator is unable to resolve the matter, or if it appears that the matter should be further considered by the Committee, the mediator shall refer the complaint back to the Office of Chief Counsel for investigation under these Rules. The mediation committee shall only consider such matters as may be referred to it pursuant to this section, and shall refer to the Office of Chief Counsel any grievance coming to its attention which has not been so referred.

~~(4)~~ (c) **Conflicts.** Before accepting the assignment of a matter, the mediator shall determine whether accepting the assignment would create a conflict under the Lawyer's Code of Professional Responsibility, and shall ~~agree to~~ inform the ~~Office of Chief Counsel~~ mediation committee administrator or chairperson of any conflict or potential conflict which arises in the course of handling the matter.

~~(5)~~ (d) **Confidentiality**. Mediators shall be bound by the confidentiality rules contained in section 90(10) of the Judiciary Law and all other applicable confidentiality provisions.

~~(6)~~ (e) **Supervision and Reporting**. ~~The Committee Chairperson shall designate one or more attorney members of the Committee to supervise the volunteer mediation program with the assistance of the Office of Chief Counsel. The Office of Chief Counsel shall report to the Committee at its regularly scheduled meetings concerning the disposition of matters assigned for mediation.~~ Upon resolution of a complaint referred to a mediation committee pursuant to this section, the mediation committee shall forward to the Office of Chief Counsel a brief letter or memorandum stating the result of the mediation.

1500.~~27~~26 Defense and Indemnification of Committee Members.

(a) **General**. Members of the departmental disciplinary committees, as well as members of the authorized grievance and mediation committees, are volunteers, and are expressly authorized to participate in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law and are thereby entitled to receive, and shall receive, the protections of that law.

(b) **Bar Associations**. Local bar associations administering grievance and mediation programs shall be deemed volunteers and, to the extent of their Court authorized participation in such programs, will be deemed to be participating in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law and are thereby entitled to receive, and shall receive, the protections of that law.

1500.~~28~~27 Communications with Other Disciplinary Agencies.

Nothing contained in these Rules shall be deemed to prohibit communications between the various disciplinary agencies identified in these Rules with respect to any complaint or proceeding relating to the conduct of an attorney.

1500.~~29~~28 Retention of Disciplinary Records.

The following records shall be retained to the extent and in the manner hereinbelow set forth:

(a) **Matters Where Discipline Has Been Imposed.** Where discipline has been imposed, case files containing the documentary record of a complaint filed against an attorney (including, but not limited to, any complaint, investigation report, attorney response, deposition or hearing transcript, special referee's report, petition to the Appellate Division, affidavit, motion, order and decision of the Court) shall be retained for fifty years after the date of the disposition of such matter by the Office of Chief Counsel and then destroyed.

(b) **Matters Which Have Been Rejected for Failure to State a Complaint, Etc.** Where a grievance has been rejected for failure to state a complaint, lack of jurisdiction or referred to another agency and the attorney about whom the grievance was made has not been accorded an opportunity to respond, all records relating to such grievance shall be retained for one year after the date of its disposition by the Office of Chief Counsel and then destroyed.

(c) **Matters Which Have Been Dismissed Without Imposition of Any Discipline or ~~Advisement~~ Comment.** Where a complaint has been dismissed without the imposition of any discipline or ~~advisement~~ comment, all records relating to such matter (including, but not limited to, any complaint, investigation report, attorney response, deposition or hearing transcript or other record of proceedings) shall be retained for five years after the date of its disposition by the Office of Chief Counsel and then destroyed.

(d) **Matters Which Have Been Closed With ~~Advisement~~ Comment.** Where a matter has been closed by the issuance of a letter of caution, admonition, reprimand or similar ~~advisement~~ comment, all records relating to such matter (including, but not limited to, any complaint, investigation report, attorney response, deposition or hearing transcript or other record of proceedings, and letter of caution or similar ~~advisement~~ comment) shall be retained for ~~ten~~ five years after the date of its disposition by the Office of Chief Counsel and then destroyed. A copy of the letter of caution, admonition, reprimand or similar comment shall be retained for ten years and then destroyed.

(e) **Indexes, Etc.** Any index or listing (including, but not limited to, any manual or machine-readable material that contains information relating to disciplinary matters, the identities of the complainant and/or respondent, the date opened and/or closed) shall be retained for fifty years after the date

of its entry by the Office of Chief Counsel and then destroyed or otherwise eliminated from such index or listing.

(f) **Statistical Reports**. Any statistical report filed with the Office of Court Administration (including, but not limited to, Form UCS-145) shall be retained by the Office of Chief Counsel for one year after the date of its filing with the Office of Court Administration.

1500.~~30~~29 Regulations and Procedures for Random Review and Audit and Biennial Affirmation of Compliance

(a) **Availability of Bookkeeping Records; Random Review and Audit**. The financial records required by DR 9-102 of the Code of Professional Responsibility shall be available at the principal New York State office of the attorneys subject hereto, for inspection, copying and determination of compliance with DR 9-102, to a duly authorized representative of the Court pursuant to the issuance, on a randomly selected basis, of a notice or subpoena by the Court or the appropriate departmental disciplinary committee.

(b) **Confidentiality**. All matters, records and proceedings relating to compliance with DR 9-102, including the selection of an attorney for review hereunder, shall be kept confidential in accordance with applicable law, as and to the extent required of matters relating to professional discipline.

(c) Prior to the issuance of any notice or subpoena in connection with the random review and audit program established by this section, the appropriate departmental disciplinary committee shall propose regulations and procedures for the proper administration of the program. The Court shall approve such of the regulations and procedures of the departmental disciplinary committee as it may deem appropriate, and only such regulations and procedures as have been approved by the Court shall become effective.

(d) Any attorney subject to the Court's jurisdiction shall execute that portion of the biennial registration statement provided by the Office of Court Administration affirming that the attorney has read and is in compliance with DR 9-102 of the Code of Professional Responsibility. The affirmation shall be available at all times to the departmental disciplinary committees. No affirmation of compliance shall be required from a full-time judge or justice of the unified court system of the State of New York or of a court of any other state, or of a federal court.

1500.~~31~~30 APPENDIX OF FORMS

(a) **Appendix A: Form of Pre-Hearing Stipulation**

[VENUE AND CAPTION]

(1) amendments;

(2) claims or defenses abandoned;

(3) undisputed facts:

(i) facts not in dispute as to Staff's Counsel's case;

(ii) facts not in dispute as to the Respondent's case;

(4) facts in dispute:

(i) the Staff Counsel's contentions;

(ii) the Respondent's contentions;

(5) documents to be offered in evidence during the hearing:

[All documents (including schedules, summaries, charts and diagrams] to be offered [other than those to be used for impeachment or rebuttal) are to be listed in the stipulation with a description of each sufficient for identification. The documents are to be premarked by counsel, and, to the extent practicable, such markings are to be in the sequence of which the documents will be offered. If illegible or handwritten documents are to be offered, counsel shall include a typed version of the document.

Objections as to authenticity must be made in this stipulation or else they shall be deemed waived. Counsel are directed to exchange copies of their exhibits within two business days prior to the scheduled hearing.

Counsel offering an exhibit shall provide copies for the special referee and opposing counsel at that time. Witnesses to be called in rebuttal or for impeachment purposes need not be identified in this stipulation.]

(i) staff counsel will offer the following numbered exhibits;

(ii) the respondent will offer the following lettered exhibits;

(6) witnesses to be called:

[Witness identification should include the witness' name and address, as wellas a brief statement of the overall scope of the witness' testimony. For example, if specific witnesses are to be called to substantiate particular claims or defenses on portions thereof, that should be noted. In addition, any witness being called as a character witness should be so designated.]

(i) by staff counsel;

(ii) by the respondent;

(7) statement of legal contentions and authorities; [Only a brief statement of each contention is required, together with the principal authority relied upon; string cites are not necessary.]

(8) estimated length of hearing.

(b) **Appendix B: Form of Petition for Reinstatement**

(Applicant's Last Name)_____
(Date)_____

[VENUE AND CAPTION]

TO: THE APPELLATE DIVISION OF THE SUPREME COURT,
_____ JUDICIAL DEPARTMENT.

STATE OF NEW YORK)
)
COUNTY OF)

I, _____, hereby apply, pursuant to Judiciary Law, Section 90, and the Rules of this Court, for reinstatement as an attorney and counselor-at-law licensed to practice in all the courts of the State of New York. In support of my application I submit this petition, the form of which has been prescribed by this Court. Inapplicable provisions have been stricken and initialed by me.

1. My full name is _____. I have also been known by the following names _____. (If change of name was made by court order, including marriage, a certified copy of that order

is attached.)

2. I was born on (date) at (city-state-country).

3. I reside at _____ (If you reside in more than one place, state all places in which you reside.)
My home telephone number is _____.
My office telephone number is _____.

4. On _____ I was admitted as an attorney and counselor-at-law by the Appellate Division of the Supreme Court of the State of New York, _____ Judicial Department.

5. By order of this Court, dated _____, I was disciplined to the following extent: _____. A certified copy of this Court's order is attached; this Court's opinion was published in the _____ volume, page _____, of the official reports (2d series) for the Appellate Divisions. My use of the term "discipline" hereafter refers to the action of this Court by the order here referred to.

6. Since the effective date of my discipline, I have resided at the following addresses _____.

7. The discipline imposed upon me was predicated upon, or arose out of, my misappropriation or misuse of the real or personal property of others. Attached to this application is a full listing of each property, its dollar value, the name of the true owner, and the extent to which I have yet to make full restitution. Where I still owe a party under this section, I have also attached a copy of a restitution agreement, signed by that owner and myself setting forth the terms of my repayment obligations.

8. On the date of my discipline, the following matters, which were not the basis of that order, were pending against me before the Departmental Disciplinary Committee (or its predecessor, then known as _____): _____.

9. On the effective date of discipline, I was also admitted to practice in the following courts/jurisdictions: _____ _____.

10. Based upon this Court's discipline of me, I also have been disciplined in the following way(s): _____.

11. In addition, dating back to my original admission to the bar up until the present, I have also been disciplined for other actions or activities, in the following ways: _____, _____ _____.

12. Prior to my discipline, my law practice involved

the following areas of law: _____.

13. Since the effective date of my discipline, I have engaged in the practice of law in other jurisdiction(s), on the date(s) and in the manner specified: _____.

14. Since the effective date of my discipline, I have been engaged in the following legal-type or law-related activities: _____.

15. Since the effective date of my discipline I have had the following employment or been engaged in the following business (set forth names, dates, addresses) _____.

16. I am attaching copies of all federal, state and local tax returns filed by me for the past two years.

17. At the time of my discipline, I took the following affirmative steps to notify my clients of my inability to continue representing them: _____.

18. As required by the Rules of this Court, I filed an affidavit of compliance on (date).

-or-

I did not file an affidavit of compliance, as required by this Court's rules, because _____.

19. Since the date of my discipline, I have maintained the following bank accounts and brokerage accounts _____.

20. There presently exist the following unpaid judgments against me or a partnership, corporation or other business entity

of which I am an employee or in which I have an ownership interest _____.

21. Since my discipline, I or a partnership, corporation or other business entity in which I have an ownership interest, have/has been involved in the following lawsuits, to the extent indicated _____.

22. I, or a partnership, corporation or other business entity in which I have an ownership interest, petitioned to be adjudicated a bankrupt on (date) to (court).

23. (a) Since my discipline, I applied for the following licenses(s) which required proof of good character: _____.

(b) These applications resulted in the following action(s): _____.

24. Since my admission to the bar, I have had the following licenses suspended or revoked for the stated reason(s), unrelated to this Court's order of discipline: _____.

25. Since my discipline, on the date(s) specified I have been arrested, charged with, indicted, convicted, tried, and/or have pleaded guilty to the following violation(s), misdemeanor(s) and/or felony(ies): _____.

26. Since my discipline, I have been the subject of the following governmental investigation(s) on the specified date(s), which resulted in the charge or complaint indicated being brought against me: _____.

27. Other than the passage of time and the absence of additional misconduct, the following facts establish that I possess the requisite character and general fitness to be reinstated as an attorney in New York: _____.

28. I have made the following efforts to maintain or renew my general fitness to practice law, including continuing legal education and otherwise, during the period following my disbarment, removal, or suspension: _____.

29. I was treated for alcoholism and/or drug abuse on the date(s) and under the circumstances here set forth: _____.

30. The following fact(s), not heretofore disclosed to this Court, are relevant to this application and might tend by some degree to induce the Court to look less favorably upon this application: _____.

I UNDERSTAND THAT THE DEPARTMENTAL DISCIPLINARY COMMITTEE, THE COMMITTEE ON CHARACTER AND FITNESS, OR OTHER ATTORNEY AUTHORIZED BY THE COURT, MAY TAKE ADDITIONAL INVESTIGATIVE STEPS DEEMED APPROPRIATE IN ACTING UPON THIS APPLICATION FOR REINSTATEMENT. I WILL FULLY COOPERATE WITH ANY REQUEST FOR INFORMATION AND MAKE MYSELF AVAILABLE FOR SWORN INTERVIEWS OR HEARINGS, AS REQUIRED.

_____ (Signature of Applicant)

Sworn to before me this ____ day of _____, 19__.

STATE OF NEW YORK)
)
COUNTY OF)

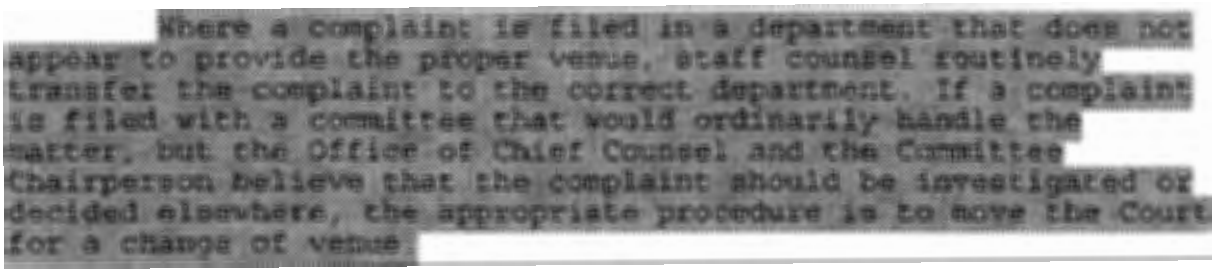
I, _____ being duly sworn, say: I am the petitioner in the within action; I have read the foregoing petition and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

Sworn to before me this ____ day of _____, 19__.

COMMENTS

1500.1 (Title, Citation, Application and Construction of Rules): Subdivisions (b) and (c) are modelled on similar provisions found in the Rules of the First Department.

Breadth of Application. Subdivision (b) is intended to express the breadth of the Rules' application. In practice, as a matter of proper venue rather than subject matter jurisdiction, the various departmental disciplinary committees ~~may~~ will limit the exercise of their respective juridiction to the district or department in which the principal office of the repondent lawyer is maintained. If no such office is maintained, the appropriate venue is deemed the department in which the respondent lawyer last practiced or, if none can be ascertained, the department in which the lawyer was admitted.


Where a complaint is filed in a department that does not appear to provide the proper venue, staff counsel routinely transfer the complaint to the correct department. If a complaint is filed with a committee that would ordinarily handle the matter, but the Office of Chief Counsel and the Committee Chairperson believe that the complaint should be investigated or decided elsewhere, the appropriate procedure is to move the Court for a change of venue.

Nonprejudicial Error. Subdivision (c) is intended to underscore the purpose of the Rules as expressing a logical and fair method of proceeding, while recognizing the immateriality of nonprejudicial error in failing to follow the Rules in all particulars.

Availability of Other Sanctions and Remedies. Subdivision (d) is modelled on a similar provision in the Rules of the Second Department. It is intended to express the non-exclusive nature of sanctions and remedies imposed in disciplinary proceedings.

1500.2 (Definitions):

Private Action and Sanctions. Definitions 1 ("Admonition"), 20 ("Letter of Caution") and 28 ("Reprimand") are intended to make uniform various forms of private (as distinguished from public) action. Under the Rules, there are only three forms of private action, two of which (the admonition and the reprimand) are deemed to be professional discipline. Such devices as "letters of education" have been eliminated.

Letters of Caution were eliminated from the rules of the

First Department in May 1994. Although they continue to exist in all other departments, the Third Department views Letters of Caution as constituting professional discipline, while the Second and Fourth Departments do not.

Definition 20 makes explicit that a letter of caution does not constitute discipline and is to be issued only when, on the basis of the record before the Committee, it is unclear whether a disciplinary rule has been violated. Such letters may be issued only by the Committee Chairperson, and not by a local bar association grievance committee. Although letters of caution are not considered a form of discipline, they may be used in subsequent proceedings to determine the appropriate level of sanction which should be imposed, provided due consideration is given to the respondent's inability to obtain review of such letters, as well as according respondent an opportunity to place in the record any facts which respondent deems appropriate to a correct understanding of the letter and the circumstances attendant upon its issuance.

Committees. Definitions 5 ("Committee"), 15 ("Grievance Committee") and 21 ("Mediation Committee") are intended to regularize and make uniform the present confusing assortment of terms used to describe three essentially different kinds of committees. Definition 5 refers to the departmental disciplinary committee of which there are eight (one in the First Department; three in the Second Department; one in the Third Department; and three in the Fourth Department). These are the principal (and most broadly empowered) public agencies of discipline, wholly independent of bar associations in their administration. Definitions 15 and 21, on the other hand, refer to committees which are generally administered by private bar associations.

Forms of Complaint. Definitions 8 ("Complaint"), 12 ("Formal Charges"), 14 ("Grievance) and 16 ("Inquiry") are intended to make uniform and logically consistent the nomenclature used to describe the various forms of communication by which the departmental disciplinary agencies are informed of an attorney's conduct. All such communications when they are first brought to the committee's attention are deemed "inquiries" (that is, a communication about the conduct of an attorney which does not necessarily state a "complaint"). By recognizing and making uniform the custom in some departments to avoid calling such communications "complaints," we avoid the anomaly of dismissing a "complaint" for "failure to state a complaint."

The generic term for an initial commmunication with the agency (prior to any analysis or review of its content) is "grievance." Hence, a "grievance" which alleges misconduct cognizable by the agency is a "complaint," while a grievance which fails to allege such misconduct is dismissed and will thereafter be deemed merely an "inquiry."

When, after investigation, the allegations of a complaint are deemed sufficiently serious, the Committee may ~~request~~ direct staff counsel to ~~petition the Court for permission to~~ institute a formal disciplinary proceeding. That proceeding will seek to adjudicate "formal charges" of misconduct.

Degrees of Misconduct. Definition 22 ("Minor Misconduct") effectively serves to delineate that degree of misconduct which may properly be referred to local bar association grievance or mediation committees. More serious misconduct must be handled by the departmental disciplinary committee. Because the practical consequence of describing misconduct as "minor" is to allow it to be referred to a bar association committee, the definition is phrased in negative terms to focus on the kinds of significant misconduct which it is not intended to encompass. This produces a definition that fully delineates the kinds of misconduct which must remain with the departmental disciplinary committee.

In practice, minor misconduct should be understood to describe the relatively limited kind of behavior that should be referred to grievance or mediation committees. This would include isolated cases of simple neglect which do not cause signifcant loss, failure to respond to appropriate client inquiries, and similar lapses in conduct required by the Code.

Often, in practice, the cause of the grievance and the underlying lapse in cases of minor misconduct is seen to be a failure of communication or an inadequate understanding of the client's needs. Such matters are at times more appropriately handled in the context of mediation than professional discipline.

~~**Leave of Court Required on**~~ **Showing of Probable Cause**. Definitions 26 ("Petition ~~for Leave to Institute~~ Instituting Formal Disciplinary Proceeding") and 27 ("Probable Cause") respectively serve to describe the pleading mechanism and the burden of persuasion required to institute a formal disciplinary proceeding. ~~The requirement of leave to institute such proceedings would be new only in the First Department; the other three departments have used this procedure for more than 20 years.~~

Integral to the petitioning process is the ability to request the Court for various forms of interim relief, including interim suspensions, expedited hearings and a variety of summary dispositions. Of course, such interim relief is to be made available only where warranted by the circumstances -- including proof of serious misconduct posing an imminent threat to the public. Understandably, the proof necessary for such relief is of a much higher degree of certainty than the mere probability required to institute any formal proceeding.

Committee Recommendations. ~~Definitions 17 ("Hearing~~

~~Panel") and 30 ("Reviewing Member") represent an amalgam of procedures now used in all four Departments.~~

The hearing panel contemplated by the proposed Rules is essentially similar to that currently employed in the Second, Third and Fourth Departments -- differing substantially from that used in the First Department in two important respects: (1) it would not undertake protracted hearings in cases of serious misconduct; and (2) it would report to the full Committee (rather than directly the Court). ~~Court authorized formal~~ Formal disciplinary proceedings before special referees (of the kind prescribed by proposed sections 1500.9 through 1500.12), rather than hearing panels, would be the principal means of adjudicating serious misconduct.

~~The reviewing member procedure contemplated by the proposed Rules is similar to (albeit somewhat different from) that now used in the First Department. The notion is to have one or more lawyer members of the Committee review staff counsel's recommendations before the Committee's regular meeting, when large numbers of such recommendations are presented for approval to the full Committee with little time for reflection or an examination of the relevant files.~~

Court Appointees. Definitions ~~32~~31 ("Special Counsel") and 3332 ("Special Referee") serve to describe persons respectively appointed by the Court to prosecute complaints of misconduct and preside at formal disciplinary proceedings. Usually, the appointment of special counsel will be sought by the Office of Chief Counsel shortly after it has been determined that a complaint of misconduct has been alleged and that there exists some disqualifying conflict which precludes the Office of Chief Counsel from proceeding with investigation of that complaint.

1500.3 (Grounds for Discipline):

Former Standards Applicable to Past Misconduct. Section 1500.3 is modelled on a similar provision found in the Rules of the Second Department and is intended to carry forward disciplinary standards as they existed prior to September 1, 1990, for alleged instances of misconduct committed prior to that date.

Code Is Not Exclusive Standard for Discipline. Section 1500.3 serves to remind the Bar that the Disciplinary Rules contained in the Code of Professional Responsibility do not provide the only standards by which attorneys may be disciplined. Rather, the section recognizes the inherent power of the Court under Judiciary Law § 90(2) to create "other rule[s] or announced

standard[s] ... governing the conduct of attorneys." For the sake of clarity and inclusiveness, unlike the Second Department rule, section 1500.3 also contains a reference to the so-called "automatic disbarment/suspension" rules of Judiciary Law § 90(4).

1500.4 (Types of Discipline; Subsequent Consideration of Disciplinary Action):

Section 1500.4 is intended, consistent with the new definitions set forth in the proposed rules, to make uniform various forms of discipline.

Private Discipline. Under the rules, there are only two kinds of private discipline: the admonition and the reprimand. These forms of discipline can be imposed by the Committee without any action by the Court. When issued without referral to the Court, these two forms of discipline are usually considered identical in substantive degree. They differ procedurally in three respects. First, a reprimand is the form of discipline employed after a hearing, while an admonition is issued without a hearing. Second, a reprimand may be issued either orally on the record at the conclusion of a hearing or written in letter form; an admonition is always issued in the form of a letter. Third, and most significantly, a reprimand may be part of a process leading to more serious discipline being imposed by the Court.

The proposed rules eliminate two kinds of dispositions currently in use and restore a form of disposition recently eliminated by one of the departments. Specifically, the Rules would eliminate dispositions known in the Second Department as "Dismissals with Advisement" and in the Third Department as "Letters of Education," while restoring Letters of Caution to the First Department.

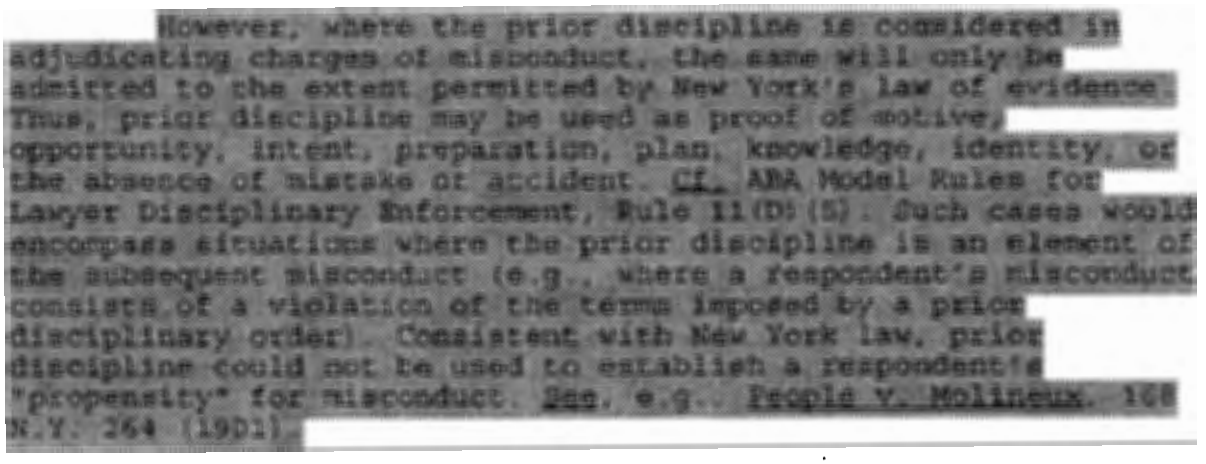
Except in the Third Department, Letters of Caution were never considered a form of discipline. Letters of Education in the Third Department were, and are still today, considered the functional equivalent of Letters of Caution in the other departments. Dismissals with Advisement, which exist only in the Second and Fourth Departments, are viewed as being even less significant than Letters of Caution.

To achieve uniformity, it is necessary for the rules to add one of the other of these forms of comment to the other departments' procedures or to eliminate them entirely. The proposed rules reflect a decision to eliminate them because the Letter of Caution can be made to serve the same function as Letters of Education and Dismissals with Advisement.

Letters of Caution could be restored because the proposed rules should now satisfy the due process concerns which apparently caused the First Department to eliminate such letters in May 1994. Thus, the Rules greatly restrict the use of such letters in subsequent proceedings and a more appropriate method for their review has been created.

Public Discipline. Public discipline (i.e., censure, suspension and disbarment) is continued under the Rules as the exclusive province of the Court. Such discipline can only be imposed by formal disciplinary proceedings, whether instituted on the basis of the Committee's recommendation after informal proceedings or as the consequence of a summary proceeding or an application for interim relief.

Consideration of Respondent's Disciplinary History. Section 1500.4 also addresses the extent to which a respondent's disciplinary history may be considered in subsequent disciplinary proceedings. The Section makes explicit that previously imposed discipline may be considered both in deciding whether discipline should be imposed and in assessing the degree of sanction that may be imposed.


However, where the prior discipline is considered in adjudicating charges of misconduct, the same will only be admitted to the extent permitted by New York's law of evidence. Thus, prior discipline may be used as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident. Cf., ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11(D)(5). Such cases would encompass situations where the prior discipline is an element of the subsequent misconduct (e.g., where a respondent's misconduct consists of a violation of the terms imposed by a prior disciplinary order). Consistent with New York law, prior discipline could not be used to establish a respondent's "propensity" for misconduct. See, e.g., People v. Molineux, 168 N.Y. 264 (1901).

This proposal would mark a significant change in some departments which limit consideration of a respondent's disciplinary history to deciding the degree of sanction to be imposed or do not currently permit consideration of a respondent's disciplinary history in deciding whether there has been misconduct in relation to a subsequent complaint. It would also change existing practice in some departments to the extent of permitting consideration of letters of caution.

Subsequent consideration of letters of caution may create unique problems of due process in light of a respondent's limited ability to have them reviewed. Although the First Department eliminated letters of caution in May 1994, we propose to continue their use. However, because it appears that the First Department

does not consider it feasible to review such letters, we have accommodated this concern by limiting the conditions under which such letters may be considered in later proceedings.

Section 1500.4 thus recognizes that letters of caution (although technically not deemed a form of discipline) may be considered; however, because of the limited opportunity to review or comment upon the issuance of such letters, their use in subsequent proceedings is subject to significant limitations, as well as the repondent's right to place in the record matters which may not previously have been considered. The most significant of the limitations on the use of letters of caution is set forth in the third sentence of subdivision (c) ("The issuance of a letter of caution may be considered only to the extent of demonstrating that a respondent was on notice that certain behavior would constitute professional misconduct, where such behavior is the subject of the subsequent proceeding").

Also, for reasons of due process and because of the lack of uniformity among the various departments (and even within some of the departments, at different times), in considering a respondent's disciplinary history, subdivision (c) requires that "due consideration ... be given to the extent to which the issuance of an admonition or a reprimand then could be, or had been, reviewed, whether by the Committee or the Court." Where there was no review, subdivision (c) allows the respondent "an opportunity to state his or her ability to seek review of the prior determination and to explain or otherwise comment upon the issuance of such sanction."

1500.5 (Investigations, Discovery and Screening):

Section 1500.5 is an adaptation of a similar provision found in the Rules of the First Department to procedures generally modelled on those of the other three departments.

More Involvement of Complainant and Committee. The principal changes would require: (1) more involvement of the complainant in those matters where investigation is deemed warranted; (2) more consistent documentation and review of recommended dispositions; and (3) Committee action on all informal dispositions other than those relating to grievances dismissed for lack of jurisdiction or failure to state a complaint.

Screening and Fee Disputes. Where a matter is determined to relate solely to the reasonableness of an attorney's fee, and it is not apparent on the face of the grievance that the fee is excessive, the file should be closed. The matter should not be referred for to a mediation committee of the kind established by

section 1500.~~24~~23 of these Rules. Rather, where local bar associations have established fee mediation committees or the rules of court require that certain kinds of fee disputes be arbitrated, the parties should be so advised and encouraged to seek the help of such other agencies to resolve their dispute.

1500.6 (~~Protective Orders~~ Motions Pending Investigation):

Availability of ~~Protection~~ Motions Made Explicit. Section 1500.6 is intended to make explicit the availability of motions pending investigations. The reference to protective orders is adapted from a similar provision found in the Rules of the Third Department. Although all departments accord similar rights to respondent attorneys, ~~the availability of protective orders is now only made explicit in~~ only the Third Department rules make their availability explicit, and, even there, only to the extent of recognizing the respondent's right to seek a protective order.

Motions in Conformity with Civil Practice. The service of motions will ordinarily conform to analogous provisions of the Civil Practice Law and Rules, except that any filing to be made with the Court will be through its confidential clerk.

No Automatic Stay of Proceedings. Although section 1500.6 recognizes the possibility of obtaining a stay of all proceedings, the stay is not automatic and should not be issued without a substantial showing of irreparable injury.

~~**1500.7 (Review of Recommended Disposition of Complaint):**~~

~~Section 1500.7 has no analogue in any of the departments. It derives from observations made by our Committee's inspection team in the course of examining 480 closed disciplinary files.~~

~~**Prior Review of Recommendation Staff Recommendation.**~~ ~~Although the First Department uses the term "reviewing member," the individual so designated (unlike the one here proposed) has final authority in certain cases. The rules of the other three departments (unlike those of the First Department) generally provide for decisions to be made by the full committee without any prior review and without any real opportunity for anyone other than staff counsel to examine the files.~~

~~What is now proposed is the designation of one or more attorney members who will review the actual files in light of staff counsel's recommendations prior to any action being taken~~

~~by the full committee.~~

~~**Notice of Decision by Reviewing Member.** The decision of the reviewing member contemplated by section 1500.7 is not binding on staff counsel, and the staff is authorized to proceed to make its original recommendation to the departmental disciplinary committee when it meets as a whole. However, section 1500.7 does require that the committee be informed of the decision of the reviewing member prior to the taking of any action on the recommendation of staff counsel.~~

1500.8~~7~~ (Disposition Without Formal Disciplinary Proceedings):

Section 1500.8~~7~~ is an adaptation of procedures currently used in the Second, Third and Fourth Departments.

Informal Discipline Requires Concurrence of Committee. What is proposed by section 1500.8~~7~~ differs from the procedures now used in the First Department in that: (1) staff counsel would no longer be able to impose professional discipline with the concurrence of only one member of the committee; (2) the full committee would be consulted when it is proposed to hold hearings; (3) the hearing panel would report its recommendations to the full committee; and (4) professional discipline could be imposed only with the concurrence of a majority of the committee.

The "majority" of the disciplinary committee required to act is a simple majority of those in attendance constituting a quorum~~, but no less than one-third of the full Committee~~.

Hearings Would Not Usually Be Required. The hearings addressed by this section are "informal" in the sense that they are held without leave of the Court or the issuance of formal charges. Experience has shown that, in most cases, hearings will not be necessary. Usually, they are employed where there is a potential for referring the matter to the Court with a request for the institution of a "formal disciplinary proceeding."

1500.9~~8~~ (Notice and Review of Disposition Without Formal Disciplinary Proceedings):

Section 1500.9~~8~~ is an amalgam of the notice and review procedures now used to some extent in all four departments.

Notice to Complainant. The proposed procedures would generally recognize the right of a complainant to be informed concerning the disposition of his or her complaint. They would also establish clear and certain methods for a respondent to obtain review of letters of caution, admonitions and reprimands.

Review of Informal Dispositions. Because letters of caution are not deemed professional discipline, the ability of a respondent to obtain review is understandably more limited than in the case of admonitions and reprimands. Where a letter has been issued without a hearing, the repondent may ask for reconsideration; but, where a letter is issued after a hearing, the respondent is only allowed to submit a written response to the letter for the file.

Although respondents are allowed to petition the Court for review of admonitions and reprimands, the procedure is not without substantial risk to those who would do so frivolously. The Court, on review of the record, may impose any "other discipline" that it deems warranted.

1500.~~10~~9 (Formal Disciplinary Proceedings; ~~Preliminary~~ General Provisions):

Sections 1500.~~10~~11 through 1500.~~13~~12 describe the procedures applicable to formal disciplinary proceedings. Such proceedings are generally reserved for the most serious charges of misconduct and can result in public censure, suspension or disbarment.

Expedited Hearings. A novel provision found in Section 1500.~~10~~9 would permit an application to the Court for hearings to be held on an expedited basis where a determination is made that "the misconduct in question poses an immediate threat to the public." In theory, such an application might be coupled with a request for an interim suspension under section 1500.~~14~~13.

Summary Dispositions. Another provision found in Section 1500.~~10~~9 which may seem novel to three of the departments would allow an application to be made for summary disposition of certain charges of misconduct. The provision is partly based on recent case law applying principles of collateral estoppel to the realm of professional discipline and is generally similar to a provision adopted by the First Department in May 1994. The proposed rule -- consistent with case law -- would give res judicata effect to certain determinations made in civil litigation in the same manner that all four departments have long treated criminal convictions. Since the burden of proof required in disciplinary proceedings is a "fair preponderance of the evidence," the more exacting burden required for a criminal conviction is not considered necessary to permit a summary disposition.

1500.~~11~~10 (Formal Disciplinary Proceedings; Pleadings and Preliminary Procedures):

Commencement of Proceedings. For the most part, section 1500.~~11~~10 is an adaptation of procedures currently used in the Second, Third and Fourth Departments. It differs from the procedures now used in the First Department in that: (1) staff counsel would no longer be able to issue formal charges and commence formal disciplinary proceedings with the concurrence of only one member of the committee; (2) the full committee would be consulted when it is proposed to bring formal charges; (3) leave of Court would be required to commence such proceedings; and (4) a special referee (rather than a volunteer panel) would preside at the hearing.

Confidentiality of Proceedings. Section 1500.~~11~~10, if adopted, would permit public hearings in most cases where formal disciplinary proceedings are held. In theory, the philosophical trigger for opening the proceedings to the public would be a determination made by a single justice of the Court, on a case by case basis, that the public interest would be served by such action. Factors militating against an open proceeding might include the interest of the respondent's clients in maintaining confidentiality or the improbability that others would be harmed by the respondent during the pendency of the proceedings.

Adoption of this proposal would not require an act of the Legislature. Rather, the proposal builds on the discretion presently vested in the Court by Judiciary Law § 90(10):

> "[U]pon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all of any part of such [confidential] papers, records and documents. * * * In furtherance of the purpose of this subdivision said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary."

Because the Judiciary Law vests discretion in "the Court," there is some question as to whether the single justice who decides that there is sufficient basis in the evidence to warrant opening the proceedings has the authority when acting alone to make such an order. The drafters of the proposed section 1500.10 believe that a fair reading of the statute permits such a construction. If it were otherwise, alternatively, the collective "Court" could make an order based on the findings of the single justice.

Notice to Respondent and Opportunity to Be Heard. Current practice in most departments assumes that probable cause for the commencement of a disciplinary proceeding will be based upon the

"available facts." Only the Fourth Department requires that a respondent be given "a clear opportunity to be heard" before formal proceedings are commenced. In the First Department, there is no articulated standard of probable cause, and formal charges can be filed with the concurrence of only one member of its so-called "Policy Committee." As long as there is no possibility that the commencement of formal proceedings will trigger public disclosure of the charges, the absence of an opportunity to be heard in three of the four departments is acceptable.

However, where public disclosure of the charges is sought, fairness would seem to require far more of an opportunity to be heard than current procedures in most departments presently allow and, further, that those procedures be articulated clearly. Proposed section 1500.10(c) is intended to fill that need.

The proposed rule recognizes three exceptions from its requirement that the respondent be accorded an opportunity to be heard on the issue of opening the proceedings: (1) where there are grounds to seek an "interim suspension"; (2) where the respondent has been convicted of a so-called "serious crime"; and (3) where the proceedings might "otherwise" be opened under existing case law.

The first exception means nothing more than, in practice, an interim suspension will be sought whenever grounds therefor exist. Once an interim suspension is granted, the fact of the respondent's suspension may be publicized and all proceedings thereafter will be open to the public. Under present practice, although the fact of the respondent's suspension may be publicized, the subsequent proceedings themselves are closed and its records remain sealed unless and until there has been a final determination of misconduct by the Court.

The second exception recognizes the obvious fact that once there have been criminal proceedings the respondent's reputation has been compromised to the extent that there is a public record of his or her crime. It differs from present practice in two respects. First, the criminal record may be far more limited in its scope than the subsequent disciplinary proceeding; and, therefore, in some cases opening the latter proceeding may have the effect of publicizing far more than the crime itself. Second, under present practice it has happened that the court (most notably in tax cases) will ultimately impose only a so-called "private reprimand" or "private censure" notwithstanding the respondent's conviction of a serious crime.

The third exception merely recognizes that, over the years, the courts have developed a case law doctrine of when they will find "good cause" for opening the proceedings, and that the proposed rule is not intended to disturb either that doctrine or its subsequent development case by case.

Compensation of Special Referee. The Rules assume that (contrary to present practice) the compensation of these individuals will be provided from the Court's budget, rather than the Office of Chief Counsel. Whether viewed in terms of appearances or actual conflicting interests, the present practice must be changed. It is simply unacceptable to have one of two contending advocates responsibile for the compensation of the person designated to hear the matter.

Moreover, where circumstances warrant expedited handling, the Committee and the Office of Chief Counsel must be able to recommend the appointment of a special referee who can sit from day to day without fear of its impact on the Office's budget. When the Court selects a sitting judge as the special referee, no additional compensation is required: the judge will handle the matter in the normal course of his or her duties. However, usually, when a sitting judge is appointed as a special referee, the press of his or her other judicial duties precludes having day to day hearings. For this reason, when an expedited hearing is needed, ordinarily a retired judge or judicial hearing officer is appointed; but, such appointments require additional compensation.

At present, the budget for the Office of Chief Counsel includes such funds; and the Office processes all requests for payment by the special referee. The solution is to move that budget item from the Office of Chief Counsel to the Court, and then have the Court process all requests for payment.

1500.~~12~~11 (Formal Disciplinary Proceedings; Conduct of Hearing):

Section 1500.~~12~~11 generally follows the procedures set forth in the Rules of the First Department, modified to comport with the exclusive use of special referees as hearing officers.

Procedural Guidelines. The various procedures established by this section, including its reference to New York's law of evidence, should be viewed merely as guidelines to enhance speed and substantive fairness. They are neither absolute nor jurisdictional, and should be applied with reason. Where procedural errors are committed, the same shall be deemed of no consequence unless they materially prejudice the rights of the parties.

Burden of Proof. New York State is among a minority of jurisdictions that use the civil litigation "fair preponderance" standard. The proposed rule continues this standard, notwithstanding some suggestion that New York should move to the

more widely used standand of "clear and convincing evidence." One advantage of maintaining the current standard is the ability to give collateral effect to findings made against a respondent in related civil litigation.

1500.~~13~~12 (Formal Disciplinary Proceedings; Concluding Procedures):

Section 1500.~~13~~12 generally follows the procedures which exist in the Second, Third and Fourth Departments.

Report and Recommendation. One significant difference between the recommended procedures and current practice is the proposed ability of the special referee to recommend a specific sanction. For many years, the hearing panels in the First Department have recommended sanctions which the Court is at liberty to accept or ignore. In most cases, the Court has accepted the panels' recommendations. Current practice in the other departments generally limits a referee's report to specific findings. Although it may be argued that a more consistent level of sanction can be maintained by the Court (because it will have the benefit of many more proceedings than any one referee), the proposed rule does not limit the Court's ability to do it; rather, the new procedure would only serve to provide the Court with more information and an informed perspective on an issue which is still left for the Court to decide.

Notification of Complainant. The proposed procedure would advise the complainant of ~~a referral to~~ any "final" action taken by the Committee or the Court. Where the Committee does not refer the matter to the Court for further proceedings, unless the respondent has indicated an intention to seek review of the Committee's determination, the Committee's action would be deemed final for purposes of the rule. ~~and caution the complainant about the requirements of confidentiality to the extent appropriate to the circumstances of the case.~~ The rule is intended to address ~~express~~ the ~~minimum amount of~~ information that should be provided to the complainant about the disposition of the complaint; it should not be understood to limit the ability of staff counsel to communicate other ~~additional~~ information to the complainant where appropriate or necessary for the prosecution of the respondent. In all cases involving a non-public disposition, the complainant should be cautioned about the continuing expectation of confidentiality.

Awarding Costs. Among the various remedies and sanctions that the Court may impose under subsection (c) is an award of costs. Although the proposed rule does not specifically address the amount of costs to be awarded, it is anticipated that the

Court would establish a fixed charge in the range of $300 to be awarded to the prevailing party in most cases. How the Court determines whether there should be an award of costs in any given case may require the Court to assess the number and gravity of the charges made against the number and gravity of the charges sustained.

1500.~~14~~13 (Suspension Pending Consideration of Charges):

Section 1500.~~14~~13 is derived from the rules of the Second, Third and Fourth Departments. It is intended to be applied in a manner consistent with the standards announced by the Court of Appeals in Matter of Russakoff, 79 N.Y.2d 520 (1992).

Grounds for Interim Suspension. The stated grounds for an interim suspension include "uncontroverted evidence" of serious misconduct. That term does not require the functional equivalent of an admission or default in responding. Rather, the term is meant to describe the respondent's inability to come forward with evidence that is legally suffient to controvert, or raise a triable issue, with respect to the charges.

Application and Order. The order should specify whether or to what extent further proceedings against the respondent will be deemed confidential. Usually, both the Court's decision to grant an interim suspension, as well as all disciplinary proceedings thereafter, will not be deemed confidential.

1500.~~15~~14 (Attorneys Convicted of Serious Crimes; Record of Conviction as Conclusive Evidence):

Section 1500.~~15~~14 is generally consistent with the policies adopted by all four departments.

Special Referee to Preside at Hearing. The proposal differs procedurally from current practice in the First Department to the extent that the proposed Rules abandon the First Department's unique hearing panel structure; instead, if hearings are to be held, they would be assigned to a special referee. The proposal differs textually from the rules of the Fourth Department in making explicit procedures which are not currently set forth in detail.

Interim Suspensions for Serious Crimes. Section 1500.~~15~~14 incorporates the operative language of Judiciary Law § 90(4)(f) and explicitly provides for the interim suspension of attorneys convicted of serious crimes, unless that suspension is stayed by the Court "upon good cause shown." Consistent with the Judiciary Law, that stay may be obtained on application of the respondent or on the Court's own motion.

1500.~~16~~15 (Discipline of Attorneys for Professional Misconduct in Foreign Jurisdiction).

Section 1500.~~16~~15 is adapted from a similar provision in the Rules of the First Department. It is intended to avoid duplication of effort in retrying facts already determined by proceedings in a foreign juridisdiction. However, it does not determine the level of sanction which the Court will impose.

Limited Defenses to Foreign Discipline. Subdivision (c) limits the kind of defenses that can be raised essentially to lack of notice, a clear failure of proof and behavior which would not be considered misconduct in New York. No other matters bearing upon the findings made in the foreign jurisdiction can be raised.

Court Has Option to Direct Hearing. In theory, while the Court has unlimited authority, it is expected that where the nature of the misconduct is such that it would not ordinarily be considered for formal disciplinary proceedings, the Court will direct that any hearings be held before the Committee. Where the misconduct appears to have been serious, the Court is more likely to direct that the hearing be held before a special referee.

1500.~~17~~16 (Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated):

Section 1500.~~17~~16 is derived from a similar provision found in the rules of the Second Department. The section addresses the three procedural contexts in which the mental incompetency of an attorney may brought to the Court's attention: (1) a judicial declaration of incompetency or an involuntary commitment to a mental hospital; (2) an accusation of a respondent's incompetency made by the Committee; and (3) a claim of incompetency by a respondent in the course of proceedings.

Judicial Declaration of Incompetency. Subdivision (a) recognizes the power of the Court to enter an order, on proof of

a judicial determination of an attorney's incompetency, to enter an order immediately suspending the attorney from the practice for an indefinite period and until the further order of the Court.

Petition by Committee for a Declaration of Incompetency. Subdivision (b) authorizes the Committee to petition the Court to determine whether an attorney is incompetent. The provision does not require a pendant allegation of misconduct.

Claim of Disability by Respondent. Subdivision (c) recognizes an "addition to drugs or intoxicants" as a cause of disability in addition to "mental infirmity or illness." The claim (or admission) by a respondent is sufficient to authorize the Court to suspend the respondent "until a determination is made of the respondent's capacity to continue the practice of law."

1500.~~18~~17 (Resignation by Attorney Under Disciplinary Investigation):

Admission of Inability to Defend Is Required. Section 1500.~~18~~17 is an adaptation of provisions currently found in the rules of the First, Second and Third Departments. It proposes no significant change from current practice where an attorney seeks to resign while under investigation. The respondent attorney is not required to admit the misconduct with which he or she is charged, but only that he or she could not defend against such charges.

Committee Recommendation to Court. The request for permission to resign would be reviewed by an attorney member of the departmental disciplinary committee who would prepare a recommendation for the committee to forward to the Court. The proposed procedure assumes that, consistent with current practice, staff counsel would have a significant role in the preparation of the committee's recommendation.

1500.~~19~~18 (Nonabatement of Disciplinary Proceedings):

Section 1500.~~19~~18 combines provisions relating to pending litigation from the First Department with concepts of restitution in the Second and Fourth Departments.

Discretion to Proceed. The basic policy is that disciplinary committees should be able to proceed notwithstanding

the existence of related litigation, the fact of restitution or a complainant's unwillingness to cooperate. Whether or to what extent such factors may influence the decision to proceed with the investigation or prosecution of a particular matter is left to the sound discretion of the departmental committee and its staff.

Protection of the Public Is Paramount. In many cases which do not pose a significant risk of harm to the public, it may be prudent to await the outcome of pending litigation. This is certainly the case where the complaint relates to activities that are the subject of pending civil litigation and significant issues of fact remain to be resolved. Throughout, the question of whether to proceed will be seen as a matter of recognizing the paramount interest in protecting the public from misconduct and the need to allocate limited resources in that effort.

1500.~~20~~19 (Conduct of Disbarred, Suspended or Resigned Attorneys; Abandonment of Practice by Attorney):

Section 1500.~~20~~19 is adapted from similar provisions found in the rules of the Second and Third Departments, and is generally consistent with the practice in all four departments.

Emphasis on Client Protection. Section 1500.~~20~~19 carries forward present practice in seeking to protect clients of the atorney who has been disbarred or suspended. It also makes uniformly explicit the requirement that a court pass on the appropriateness of any fees received by the attorney after the effective date of disbarment or suspension.

Affirmative Action Required. A disbarred or suspended attorney is required to take action to notify his or her clients and others of the disbarment or suspension.

1500.~~21~~20 (Application for Reinstatement):

Section 1500.~~21~~20 is essentially new, albeit derived from a variety procedures currently in use.

Suspensions of Less Than Six Months. The concept of automatic reinstatement where an attorney has been suspended for a period of less than six months is borrowed from the First Department. Where an attorney has been suspended for a period of six months or less, no application for reinstatement need be made

because the order of suspension issued by the Court will provide for a date of reinstatement. In all other cases of suspension or disbarment, an application for reinstatement must be made.

Inquiry About Restitution. The notion of requiring specific inquiry as to whether restitution has been made simply makes explicit current practice.

Court Has Option on Reference. Providing the Court with an option of referring the matter to the Committee on Character and Fitness or a special referee to hear and report represents an adaptation of procedures currently employed in the Second Department.

1500.~~22~~21 (Structure, Composition and Membership of the Departmental Disciplinary Committees):

Committee Composition Unchanged. Section 1500.~~22~~21 permits each of the eight disciplinary committees to retain their present composition, but makes uniform the terminology used to describe their function and relation to the courts. At present, only the Second and the Fourth Departments use the term "Grievance Committee"; the First Department is the "Departmental Disciplinary Committee," and the Third Department refers to its corresponding body as the "Committee on Professional Standards." Complicating the nomenclature even further, many local bar associations also maintain their own grievance committees to investigate minor misconduct.

The proposed rules refer to each of the eight official agencies as a "departmental disciplinary committee" to emphasize that its authority is derived from a certain department of the Appellate Division. In the Second and Fourth Departments, where there are three such committees, the official designation would add a reference to the specific districts within their jurisdiction (e.g., "Departmental Disciplinary Committee for the Second and Eleventh Judicial Districts").

Some Functions Reassigned. Although the rules essentially permit the principle of local option and experience to determine the composition of the disciplinary committees, the rules will perforce have the effect of reassigning some of their traditional functions to newly proposed subcommittees, as well as individual committee members and committees of the whole. For example, in the First Department, the traditional roles of its Policy Committee and hearing panels have been reassigned to different persons or bodies within the committee.

Voting Requirements and Vacancies. The voting

requirements for committee action have been slightly ameliorated to avoid undue delay in the disposition of cases because of an occasionally low attendance at meetings of the full committee.

It is an understandable irony that many of those lawyers most qualified to serve on such committees are also their busiest members and, therefore, will be obliged on occasion to miss some meetings.

Although the proposed rules do not make explicit provision for habitual absenteeism, it is expected that when the committee's chairperson informs the Court a continued absence of a particular member, the Court will promptly declare a vacancy and appoint a replacement.

1500.~~2322~~22 (Appointment and Duties of Staff Counsel):

Section 1500.~~2322~~22 is an amalgam of various provisions adapted from the rules of all four departments.

Independence of Staff Counsel. The proposed rules are generally intended to reinforce the independence of staff counsel, while acknowledging their role as advocates and eliminating those instances where that role may compromise the integrity of the adjudicatory responsibilities of the committee.

Office of Chief Counsel. All administrative responsibilities for the supervision of staff devolve on the chief counsel. Correlative to these responsibilities is the duty to report appropriately on the operation of the office. To that end, subdivision (c)(4) contains a non-exhaustive list of subjects about which the chairperson and the Court should be periodically informed.

1500.~~2423~~23 (Appointment, Status and Duties of Special Counsel):

Section 1500.~~2423~~23 provides for the appointment of special counsel when the Office of Chief Counsel is precluded from undertaking a matter because of some disqualifying conflict.

Independence of Special Counsel. Contrary to present practice, when special counsel is appointed, under the proposed Rules, he or she would be independent of the Office of Chief Counsel. Of course, where consent of the respondent can be obtained, it would normally be preferable to move the entire case to another office, rather than require appointment of special counsel.

Eliminated from the Rules is the notion of appointing

as special counsel volunteer lawyers simply to relieve the case load of the Office of Chief Counsel. Such notions are essentially throwbacks to a time when the private bar processed grievances under a broad grant of authority from the courts and there were no professional staff lawyers. What began as a temporary expedient to relieve an extraordinary backlog in one of the Departments, has become a permanent (and ever-expanding) part of its process. The proposed Rules are intended to reverse the trend and to reassure the public of consistent prosecutorial standards, independent of private concerns or the appearance of compromising influences.

Change of Venue on Consent as Alternative. Of course, where consent of the respondent can be obtained, it would normally be preferable to move the entire case to another office, rather than require appointment of special counsel. When the Office of Chief Counsel learns of a disqualifying conflict, it should request the committee chairperson to designate a committee member to explore with the respondent his or her willingness to consent to a different venue.

1500.~~2524~~24 (Appointment, Status and Duties of Local Bar Association Grievance Committees):

Section 1500.~~2524~~24 is generally modelled on the system of local bar association grievance commitees which exists in the Second, Third and Fourth Departments. But, there are some significant differences proposed.

~~**Court Appointment of Grievance Committees Required.** Contrary to current practice, all local grievance committee members would be appointed by the Court. This is intended to ameliorate an element of public suspicion about the work of private bar associations and to emphasize the public nature of the service required.~~

All Misconduct to Be Screened. Consistent with the practice which today obtains in the Second Department, the proposed procedures require that any grievance coming to the attention of a local bar association committee will be forwarded for screening to the Office of Chief Counsel. The work of the grievance committee will thus be limited to such matters as are referred to it by the Office of Chief Counsel.

Only Minor Misconduct to Be Referred. Section 1500.~~2524~~24 is to be read in conjunction with the definition of "minor misconduct" set forth in section 1500.2(a)(22), mindful that repeated instances of such misconduct cannot be referred.

~~**Concurrence of Designated Committee Member Required.** Section 1500.25 also marks a significant departure from present practice in requiring the concurrence of a committee member. The added requirement makes it less likely that matters will be referred simply to lighten staff's caseload.~~

1500.~~26~~25 (Appointment, Status and Duties of Local Bar Association Mediation Committees):

Section 1500.~~26~~25 is generally modelled on a mediation program used in the First Department.

Supervision of Mediation Program. ~~Unlike the mediation program in the First Department, supervisory authority is removed from the Office of Chief Counsel. Instead, that authority is vested in certain designated members of the departmental disciplinary committee.~~ Upon resolution of a complaint referred to a mediation committee, the mediation committee is required to forward to the Office of Chief Counsel a brief letter or memorandum stating the result of the mediation. Ordinarily, the decision to close a file would be made by the mediation committee; and that decision would not be reviewed unless the complainant requested the Office of Chief Counsel to do so.

Repeated Misconduct. Section 1500.~~26~~25, like section 1500.~~25~~24, limits the kinds of matters that may be referred in two ways. The complaint itself must be deemed to allege only "minor misconduct"; and the respondent can have "no significant disciplinary history." The second criterion is intended to retain repeat offenders in the departmental disciplinary committee.

While the proposed rules do not fix a specific number of instances of prior misconduct which will require such retention, a respondent attorney who has previously been referred to a mediation committee, should more likely be referred to a grievance committee for the investigation of a subsequent complaint; and an attorney who has previously been referred to a grievance committee should more likely be retained by the departmental disciplinary committee.

1500.~~27~~26 (Defense and Indemnification of Committee Members):

Section 1500.~~27~~26 is modelled on a similar provision found in the rules of the Third Department. It serves to incorporate by reference the protections afforded by Public Officers Law § 17.

Protection Extended to All Volunteers. Section 1500.~~27~~26 serves to clarify the present uncertain status of volunteers

working on disciplinary matters in connection with bar association administered grievance and mediation programs.

Related Bar Association Activities Also Covered. Consistent with court appointment of their members, the section now makes clear that both those persons and the associations themselves (to the extent of their grievance and mediation activities) are entitled to be defended and indemnified.

1500.~~28~~27 (Communications with Other Disciplinary Agencies):

Section 1500.~~28~~27 is new. It derives from an often expressed need on the part of disciplinary counsel to know a respondent's disciplinary history in the investigatory stage of a complaint.

Need to Identify and Track Repeat Offenders. The proposed rule is intended to facilitate the identification and tracking of repeat offenders. At times, the geographical limits which each committee has placed on its jurisdiction permits some attorneys to avoid early detection of their disciplinary history. It is intended that the proposed rule will operate to secure this information shortly after files are opened for investigation.

Limited Access to Information. Because of the need to maintain confidentiality, the section contemplates that the information about pending complaints will not be released to any disciplinary agencies other than those New York State agencies referenced in the proposed rules.

1500.~~29~~28 (Retention of Disciplinary Records):

Section 1500.~~29~~28 is an adaptation of a uniform rule on record retention adopted by the Office of Court Administration.

Office of Chief Counsel to Maintain Custody of Records. The rule requires that various disciplinary records be "retained" by the Office of Chief Counsel for certain periods. Retention, in this context, should be understood to mean custody and control, as distinguished from actual possession.

Uniformity in Record Retention. Consistent with the policy adopted by the Office of Court Administration, in addition to requiring that various records be retained, it also requires that certain records be destroyed after stated periods of time.

APPENDIX G:

DRAFT (WITHOUT REDLINING) UNIFORM DISCIPLINARY RULES

22 NYCRR New Part 1500

UNIFORM RULES AND PROCEDURES FOR THE DEPARTMENTAL DISCIPLINARY COMMITTEES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

COMMENTS

UNIFORM RULES AND PROCEDURES FOR THE DEPARTMENTAL DISCIPLINARY COMMITTEES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

1500.1 Title, Citation, Application and Construction of Rules

(a) These Rules shall be known, and may be cited, as the "Uniform Rules and Procedures for the Departmental Disciplinary Committees of the Appellate Division of the Supreme Court of the State of New York" (each such committee hereinafter referred to as "the Committee").

(b) These Rules shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have law offices in the State of New York, as well as any attorney from another state, territory, district or foreign country admitted pro hac vice to participate in the trial or argument of a particular cause in any court in the State of New York, or who in any way participates in an action or proceeding therein, or any attorney who is admitted to practice by a court of another jurisdiction who regularly practices within the State of New York as counsel for governmental agencies or as house counsel to corporations or other entities, or otherwise, and to all legal consultants licensed to practice pursuant to the provisions of subdivision 6 of section 53 of the Judiciary Law. Each Department of the Appellate Division of the Supreme Court of the State of New York (hereinafter referred to as "the Court") shall exercise its respective disciplinary jurisdiction over the persons described in the immediately preceding sentence so as to minimize duplication of effort and conflict among the various departments and judicial districts.

(c) These Rules are promulgated for the purpose of assuring fair and uniform treatment of all persons involved in the disciplinary process. No action undertaken pursuant to these Rules will be held invalid by reason of any mistake, omission, error, defect or irregularity that does not prejudice a substantial right; and any such mistake, omission, error, defect, or irregularity shall be disregarded.

(d) Neither the conduct of proceedings nor the imposition of discipline pursuant to these Rules shall preclude the imposition of any further or additional sanctions prescribed or authorized by law, and nothing herein contained shall be construed to deny to any other court or agency such powers as are necessary for that court or agency to maintain control over

proceedings conducted before it, such as the power of contempt.

1500.2 Definitions

(a) Subject to additional definitions contained in subsequent provisions of these Rules which are applicable to specific sections, subsections or other provisions of these Rules, the following words and phrases, when used in these Rules, shall have the meanings given to them in this section unless the context clearly indicates otherwise:

(1) **Admonition.** Discipline administered without hearing, by letter issued at the direction of the Committee by the Committee Chairperson, in those cases in which misconduct in violation of a Disciplinary Rule is found by the Committee, but is determined to be of insufficient gravity to warrant prosecution of formal charges in the Court.

(2) **Answer.** A formal pleading filed by the Respondent in answer to a Notice of Charges.

(3) **Chief Counsel.** The chief counsel appointed by the Court or, in the absence of such chief counsel, the person designated deputy chief counsel and, in the absence of such deputy, an associate counsel designated to serve as acting chief counsel.

(4) **Code of Professional Responsibility.** The Code of Professional Responsibility adopted jointly by the Appellate Divisions of the Supreme Court, effective September 1, 1990, as thereafter amended, and with respect to conduct occurring prior to September 1, 1990, the Lawyer's Code of Professional Responsibilty theretofore adopted by the New York State Bar Association, as amended.

(5) **Committee.** The departmental disciplinary committee established pursuant to section 1500.21 of this Part for such judicial department or districts as is provided therein.

(6) **Committee Chairperson.** The Chairperson of the Committee appointed by the Court.

(7) **Complainant.** A person communicating a grievance to the Committee or to the Office of Chief Counsel, whether or not such grievance is set forth in a complaint or alleges an act of misconduct.

(8) **Complaint.** A written statement of the nature described in section 1500.5(c) of this Part with respect to a grievance concerning an attorney communicated to the Committee or to the Office of Chief Counsel, alleging conduct which, if true,

would constitute professional misconduct.

(9) **Confidential Clerk.** An official of the Court with whom all pleadings, papers, records and documents are to be filed when the same are directed to the Court and confidentiality is required by these Rules.

(10) **Court.** The Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction of the Judicial District which the Committee serves.

(11) **Disciplinary Rule.** Any provision of the rules of the Court governing the conduct of attorneys, as well as any Disciplinary Rule of the Code of Professional Responsibility, all as more particularly described in section 1500.3 of this Part.

(12) **Formal Charges.** The misconduct alleged to have been committed by a respondent as set forth in the pleading served by the Office of Chief Counsel in a formal disciplinary proceeding.

(13) **Formal Disciplinary Proceeding.** A proceeding instituted by the filing of a petition with the Court and subject to sections 1500.9 through 1500.12 of this Part.

(14) **Grievance.** An accusation of impropriety which may or may not constitute misconduct.

(15) **Grievance Committee.** A committee established pursuant to section 1500.24 of this Part, which committee is administered by one or more local bar associations and consists of volunteer attorney members who will investigate, hear and report to the Committee on complaints of minor misconduct referred to it by the Office of Chief Counsel.

(16) **Inquiry.** An accusation which, even if true, would not constitute misconduct.

(17) **Hearing Panel.** A group of Committee members appointed pursuant to section 1500.7(b) of this Part to hear evidence with repect to a complaint and report their findings for action by the Committee.

(18) **Investigation.** Fact gathering with respect to alleged misconduct, whether preliminarily under the direction of the Office of Chief Counsel or, thereafter, by the Committee or a duly constituted subcommittee thereof.

(19) **Investigator.** Any person designated by the Office of Chief Counsel or the Committee to assist it in the investigation of alleged misconduct.

(20) **Letter of Caution.** A letter issued at the direction of the Committee by the Committee Chairperson, pursuant to section 1500.8 of this Part, when it is believed that the respondent acted in a manner which, while not constituting a clear violation of a Disciplinary Rule, involved behavior requiring comment.

(21) **Mediation Committee.** A committee established pursuant to section 1500.25 of this Part, which committee is administered by one or more local bar associations and consists of volunteer attorney members who will attempt to mediate and resolve complaints referred to it by the Office of Chief Counsel, which complaints involve minor misconduct by attorneys with no significant disciplinary history.

(22) **Minor Misconduct.** Misconduct which does not include any element of interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, moral turpitude, or any other conduct that raises a substantial question as to the respondent's honesty, trustworthiness or fitness as a attorney.

(23) **Notice of Charges.** A pleading served by the Office of Chief Counsel, pursuant to either section 1500.7(b) or 1500.10(a) of this Part, that is intended to provide the respondent with notice of the charges that will be heard at a hearing, whether incident to disciplinary proceedings before a panel of the Committee or formal disciplinary proceedings. Where the notice is given incident to the institution of formal proceedings pursuant to section 1500.10(a), the specific charges of misconduct will be set forth in the accompanying petition as and to the extent provided in section 1500.10(a).

(24) **Office of Chief Counsel.** The Office of Chief Counsel as provided in section 1500.22 of this Part.

(25) **Parties.** The Committee and the respondent.

(26) **Petition Instituting Formal Disciplinary Proceedings.** A pleading served by the Office of Chief Counsel at the direction of the Committee instituting formal disciplinary proceedings.

(27) **Probable Cause.** The degree of certainty which must obtain for the Committee to authorize the institution of a formal disciplinary proceeding and the standard of proof that must be found by a justice of the Court as one of the elements required for an order opening the proceedings to the public; probable cause may be found when it is determined that the respondent is likely to have committed the serious misconduct

with which he or she is charged.

(28) **Reprimand**. Discipline, whether administered by the Committee or the Court, after a hearing in those cases in which misconduct in violation of a Disciplinary Rule is found by the Committee or the Court, but is determined to be of insufficient gravity to warrant some form of public discipline.

(29) **Respondent**. A person subject to these Rules (as described more specifically in section 1500.1[b] of this Part) who is alleged to have been guilty of misconduct.

(30) **Staff Counsel**. The attorneys (including the chief counsel) constituting the Office of Chief Counsel and, where appropriate, such other attorney or attorneys who may be appointed by the Court from time to time to serve therein.

(31) **Special Counsel**. An attorney (or attorneys) who is (or are) duly appointed by the Court to act as counsel in a particular investigation or proceeding where staff counsel is disqualified or otherwise disabled from undertaking or continuing such investigation or proceeding.

(32) **Special Referee**. An attorney (including a judge, justice, judicial hearing officer or other judicial official) who is duly appointed by the Court to preside at a formal disciplinary proceeding and to report thereon to the Court.

1500.3 Grounds for Discipline

Any person subject to these Rules who fails to conduct himself both professionally and personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law in this State and any attorney who violates any provision of the rules of the Court governing the conduct of attorneys, or with respect to conduct on or after January 1, 1970, any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970, as amended, or with respect to conduct on or before December 31, 1969, any canon of the Canons of Professional Ethics, as adopted by such bar association and effective until December 31, 1969, or with respect to conduct on or after September 1, 1990, any disciplinary rule of the Code of Professional Responsibility, as jointly adopted by the Appellate Divisions of the Supreme Court, effective September 1, 1990, as amended, or any other rule or announced standard of the Court governing the conduct of attorneys, shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law and subject to discipline therefor. Discipline

may also be imposed on attorneys pursuant to subdivision (4) of section 90 of the Judiciary Law for any of the criminal conduct specified therein, and on other persons subject to these Rules for the violation of any announced standards applicable to their conduct.

1500.4 Types of Discipline; Subsequent Consideration of Action Taken

(a) Misconduct under Section 90 of the Judiciary Law of the State of New York, the Disciplinary Rules or decisional law shall be grounds for any of the following:

(1) Disbarment -- by the Court.

(2) Suspension -- by the Court.

(3) Censure -- by the Court.

(4) Reprimand -- by the Committee after hearing, with or without referral to the Court for further action.

(5) Admonition -- by the Committee without hearing.

(b) The Committee Chairperson shall issue a letter of caution to a respondent pursuant to section 1500.7(a)(2) of this Part when it is deemed to be appropriate by the Committee. The issuance of a letter of caution does not constitute discipline by the Committee.

(c) The fact that a person subject to these Rules has been issued an admonition, or a reprimand (with or without referral to the Court), or that a person subject to these Rules has been subjected to disciplinary action by the Court, may (together with the basis thereof) be considered in determining whether to impose discipline only to the extent permitted by the rules of evidence of the State of New York (so as to prove such matters as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident), and the extent of discipline to be imposed, in the event other charges of misconduct are brought against such person subsequently. Charges which have been vacated or dismissed shall not be considered. The issuance of a letter of caution may be considered only to the extent of demonstrating that a respondent was on notice that certain behavior would constitute professional misconduct, where such behavior is the subject of the subsequent proceeding. In considering whether and to what extent discipline should be imposed, due consideration shall be given to the extent to which the issuance of an admonition or a reprimand then could be, or

had been, reviewed, whether by the Committee or the Court; to the extent that the issuance of such sanctions was not previously subject to review, the respondent shall be accorded an opportunity to state his or her ability to seek review of the prior determination and to explain or otherwise comment upon the issuance of such sanction.

1500.5 Investigations, Discovery and Screening

(a) **Initiation of Investigations.** The Office of Chief Counsel shall, except as otherwise provided by subdivision (b) of this section, undertake and complete an investigation of all matters involving alleged misconduct of attorneys within the jurisdiction of the Committee called to its attention by a complaint filed pursuant to subdivision (c) of this section, by the Court, or by the Committee pursuant to a written complaint signed by the Chief Counsel. The Office of Chief Counsel shall use such Investigators as are deemed appropriate by the Chief Counsel.

(b) **Preliminary Screening of Grievances.**

(1) Any grievance received by the Office of Chief Counsel against a member of the Committee, or staff counsel or the Chief Counsel, involving alleged misconduct shall be transmitted forthwith to the Presiding Justice of the Court, who shall transfer the matter to the Office of Chief Counsel of another Judicial Department for investigation and disposition in accordance with these Rules.

(2) Except as provided in subdivision (1) of this section, all grievances coming to the attention of the Office of Chief Counsel or the Committee shall be promptly reviewed by the Office of Chief Counsel to determine whether a complaint of misconduct is stated or there is reason to believe that misconduct has occurred and that a complaint could be stated. Where there is no allegation of misconduct, the matter shall be closed by the Office of Chief Counsel and the complainant notified of such closure. Where the allegations are determined to involve minor misconduct, the Office of Chief Counsel may proceed as set forth in sections 1500.24 or 1500.25 of this Part.

(3) Where the Chief Counsel determines that jurisdiction properly lies elsewhere, the Chief Counsel shall forthwith transfer the matter to the appropriate disciplinary committee.

(c) **Contents of Complaint.**

(1) **General Rule.** Each complaint relating to alleged misconduct of an attorney shall be in writing and subscribed by the complainant and shall contain a concise statement of the facts upon which the complaint is based. Verification of the complaint shall not be required. If necessary, the Office of Chief Counsel may assist the complainant in reducing a grievance to writing. The complaint shall be deemed filed when received by the Office of Chief Counsel.

(2) **Other Situations.** In the case of an allegation of misconduct originating in the Office of Chief Counsel, the Court or the Committee, the writing containing the allegation shall be treated as a complaint and so designated in the file.

(d) **Investigation and Discovery.** Subject to direction by the Committee, the staff of the Office of Chief Counsel shall make such investigation of each complaint as may be appropriate.

(1) Upon application by the Office of Chief Counsel, the Committee Chairperson, the chairperson of any duly constituted subcommittee or hearing panel thereof, the clerk of the Court shall issue subpoenas, in the name of the Presiding Justice, for the attendance of witnesses and the production of books and papers before the Office of Chief Counsel, the Committee or any subcommittee or hearing panel thereof or special referee designated in such application, at a time and place therein specified. The Office of Chief Counsel, the Committee and any subcommittee or hearing panel thereof are empowered to take and cause to be transcribed the evidence of witnesses who may be sworn by any person authorized by law to administer oaths.

(2) Upon good cause being shown to a justice of the Court, a respondent may obtain an order requiring the clerk of the Court to issue subpoenas, in the name of the Presiding Justice, for the attendance of witnesses and the production of books and papers before the Office of Chief Counsel, the Committee or any subcommittee thereof. At any time, upon application by a respondent, the clerk of the Court shall issue subpoenas, in the name of the Presiding Justice, for the attendance of witnesses and the production of books and papers before a hearing panel of the Committee or a special referee designated in such application, at a time and place therein specified.

(e) **Notification of Respondent.**

(1) **General Rule.** No discipline or Letter of Caution shall be recommended by the Office of Chief Counsel until the respondent shall have been afforded a reasonable opportunity to state his or her position with respect to the allegations of the complaint.

(2) **Transmission of Notice.** Except where it appears that there is no basis for proceeding further or the matter must be referred to another disciplinary committee, the Office of Chief Counsel shall promptly prepare and forward to the respondent a request for a statement in response to the complaint, together with a copy of the complaint as filed, and advising the respondent of:

(i) the respondent's right to state his or her position with respect to the complaint; and

(ii) such aspects of the complaint as the Office of Chief Counsel may deem warrant a response.

(3) **Time Within Which to Reply.** Unless a shorter time is fixed by the Committee Chairperson and specified in the written notice transmitted pursuant to subdivision (2) of this section, or a longer time is permitted by the Office of Chief Counsel on good cause being shown, the respondent shall have 20 days from the date of such notice within which to file such a response with the Office of Chief Counsel.

(f) **Notification of Complainant.** Except where it appears that there is no basis for proceeding further or the matter must be referred to another disciplinary committee, the Office of Chief Counsel shall promptly forward to the complainant an accurate summary or copy of the response to the complaint and a notice advising the complainant of his or her opportunity to comment thereon. Unless a shorter time is fixed by the Committee Chairperson and specified in the written notice provided to the complainant pursuant to the immediately preceding sentence, or a longer time is permitted by the Office of Chief Counsel on good cause being shown, the complainant shall have 20 days from the date of such notice within which to file his or her comments with the Office of Chief Counsel. Where it appears that there is no basis for proceeding further or the matter must be referred to another disciplinary committee, the complainant shall be so notified in writing by the Office of Chief Counsel.

(g) **Recommendation by Office of Chief Counsel.** Following completion of any investigation of a complaint (including consideration of any statement filed by the respondent pursuant to subdivision (e)(1) of this section and any comments thereon filed pursuant to subdivision (f) of this section), the Office of Chief Counsel shall prepare a written recommendation for one of the following dispositions:

(1) referral to another disciplinary committee in the State of New York;

(2) dismissal for any reason (with an indication of the reason therefor), and referral to another body if

appropriate;

(3) referral to a subcommittee for a hearing pursuant to section 1500.7(a)(4) of this Part;

(4) letter of caution;

(5) admonition; or

(6) the institution of formal disciplinary proceedings.

1500.6 Motions Pending Investigation

(a) **Application.** The Office of Chief Counsel or a respondent may apply to the Court by affidavit, upon such notice to the respondent or the Office of Chief Counsel as a justice of the Court may direct, for an order dismissing the complaint, transferring the venue of further proceedings, compelling discovery or denying, limiting, conditioning or regulating the use of any information being sought in relation to the complaint.

(b) **Stay Pending Determination.** For good cause shown, the Court may order that any or all proceedings on the complaint be stayed pending its determination of the application to dismiss, transfer, compel discovery or grant protection.

(c) **Service and Filing of Application.** A copy of the application shall be served on the respondent or the Office of Chief Counsel, as a justice of the Court may direct, and the original thereof together with five copies and proof of its service shall be filed with the confidential clerk of the Court.

1500.7 Disposition Without Formal Disciplinary Proceedings

(a) Upon receipt or initiation of a specific complaint of professional misconduct, the Committee may, after investigation and upon a majority vote of the Committee:

(1) dismiss the complaint and so advise the complainant and the respondent;

(2) conclude the matter by issuing a Letter of Caution to the respondent and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the respondent, which admonition shall clearly indicate the improper conduct found and the disciplinary rule which has been

violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the respondent and hold a hearing on the matter as set forth in subdivision (b) of this section;

(5) forthwith institute a formal disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action;

(6) refer the matter to another committee having jurisdiction.

(b) Except where the Committee determines to refer the matter to the Court forthwith as provided in paragraph (5) of subdivision (a) of this section, if, after investigation, the Committee shall deem a matter of sufficient importance to warrant a hearing, a written notice of charges predicated on its investigation, plainly stating the matter or matters charged, together with a notice of not less than 20 days, shall be served upon the respondent, either personally, by certified mail, or in such other manner as the Committee may direct. The respondent when so served shall file a written answer at the time and place designated in the notice and the Committee Chairperson shall designate a hearing panel consisting of no less than three members of the Committee to hear the case. The respondent may be represented and assisted by counsel thereat and in connection therewith. The hearing panel shall decide all questions relating to its procedures and the admissibility of evidence. Stenographic or electronically recorded minutes of the hearing shall be kept.

(1) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the Committee to prepare and serve an additional charge or charges on the respondent, but the hearing panel may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(2) The hearing panel shall make findings of fact and report those findings, together with their recommendations, to the Committee.

(c) Upon the completion of a hearing, the Committee shall promptly meet to consider the findings and report of the hearing panel, and either approve or reject those findings and report by sustaining, dismissing and/or modifying such of the charges as circumstances warrant. Subject to the quorum

requirements specified in section 1500.21 of this Part, any action taken by the Committee shall require an affirmative vote of the greater of (1) a majority of the members present at the meeting or (2) one-third of the full Committee.

(1) Where appropriate, the Committee may decide to issue a Letter of Caution either (i) with respect to such of the charges as have not been sustained when the Committee determines that the conduct of the respondent nevertheless requires comment or (ii) with respect to those charges which have been sustained, when there are mitigating circumstances.

(2) Except as provided in subdivision (c)(1) of this section, as to any charges sustained, the Committee shall either, reprimand the respondent and/or, upon determining that the misconduct of the respondent warrants the imposition of discipline by the Court, instruct the Office of Chief Counsel to institute formal disciplinary proceedings against the respondent in the Court.

(d) Unless otherwise ordered by the Court, all proceedings conducted by the Committee shall be sealed and be deemed private and confidential.

1500.8 Notice and Review of Disposition Without Formal Disciplinary Proceedings

(a) **Notification of Respondent.** Upon the determination of the appropriate disposition by the Committee as provided in section 1500.7 of this Part, unless the disposition involves the institution of formal disciplinary proceedings, as appropriate to such determination:

(1) the Office of Chief Counsel by means of written notice shall notify the respondent of the dismissal of the complaint; or

(2) the Office of Chief Counsel shall transmit to the respondent a letter of caution (which shall bear the designation "Letter of Caution") signed by the Committee Chairperson; or

(3) the Office of Chief Counsel shall transmit to the respondent an admonition (which shall bear the designation "Admonition") signed by the Committee Chairperson; or

(4) the Office of Chief Counsel shall transmit to the respondent a reprimand (which shall bear the designation "Reprimand") signed by the Committee Chairperson.

(b) **Notification of Complainant.** Upon the disposition

becoming final, a copy of the notice described in subdivision (a) of this section or in the alternative a brief description of its substance, shall be forwarded to the complainant, together with a statement from the Office of Chief Counsel advising the complainant concerning the confidential nature of such disposition.

(c) **Review of Letters of Caution, Admonitions and Reprimands.**

(1) **General Rule.** A record shall be made and maintained by the Office of Chief Counsel (as more particularly provided in section 1500.28 of this Part) of the basis for letters of caution, admonitions and reprimands.

(2) **Letter of Caution.** In the letter of caution, the respondent shall be advised of:

(i) the right to submit a written response under section 1500.8(d) of this Part;

(ii) the fact that the issuance of the letter of caution does not constitute discipline by the Committee; and

(iii) the fact that, pursuant to section 1500.4 of this Part, the letter of caution may be brought to the attention of a hearing panel or the Court in any subsequent proceeding where there has been a determination of misconduct in considering whether to impose discipline, and the extent of discipline to be imposed, in connection with such subsequent misconduct.

(3) **Admonition.** In the admonition, the respondent shall be advised of:

(i) the right to seek reconsideration of the admonition under section 1500.8(d) of this Part or to petition the Court for vacatur of the admonition under section 1500.8(e) of this Part; and

(ii) the fact that, pursuant to section 1500.4 of this Part, the admonition may be brought to the attention of a hearing panel or the Court in any subsequent proceeding where there has been a determination of misconduct in considering whether to impose discipline, and the extent of discipline to be imposed, in connection with such subsequent misconduct.

(4) **Reprimand.** In the reprimand, the respondent shall be advised of:

(i) the right to petition the Court for vacatur of the reprimand under section 1500.8(e) of this Part; and

(ii) the fact that, pursuant to section 1500.4 of this Part, the reprimand may be brought to the attention of a hearing panel or the Court in any subsequent proceeding where there has been a determination of misconduct in considering whether to impose discipline, and the extent of discipline to be imposed, in connection with such misconduct.

(d) **Action Available to Respondent on Letter of Caution or Admonition.**

(1) **General Rule.** Subject to subdivision (d)(4) of this section, a respondent shall not be entitled to seek review of a letter of caution issued after the matter has been heard by a hearing panel as provided in section 1500.7 of this Part, but the respondent may submit a written response thereto within thirty days after its issuance, which response shall be maintained with the file relating to the complaint; or, in the alternative, where a letter of caution has been issued without the matter having been heard by a hearing panel under section 1500.7 of this Part, respondent may submit a written application for reconsideration which shall be disposed of in accordance with subsection (2) of this subdivision.

(2) **Application for Reconsideration.** An application for reconsideration of a letter of caution issued without benefit of a hearing (as provided in section 1500.7 of this Part) or an admonition shall be in writing and shall be filed in the Office of Chief Counsel within 30 days after the date on which the letter of caution or admonition is forwarded to the respondent by the Office of Chief Counsel. The Office of Chief Counsel shall forthwith transmit the application and the file relating to the matter to a review panel consisting of three attorney members of the Committee designated to examine such matters by the Committee Chairperson. Within 30 days after receipt of the application by the Office of Chief Counsel, the panel so designated shall either confirm the letter of caution or admonition or otherwise report to the Committee that the same should be reconsidered.

(3) **Limited Availability of Judicial Review.** An attorney who has received a letter of caution may seek review thereof by the Court upon a showing that the issuance of the letter was in violation of a fundamental constitutional right. The burden of establishing the violation of such a right shall be borne by the attorney seeking such review.

(e) **Action Available to Respondent on Reprimand or After Reconsideration of an Admonition.** Within 30 days after the issuance of a reprimand or affirmance of an admonition on reconsideration, the respondent may petition the Court to vacate the reprimand or admonition. Upon such petition, the Court may

consider the entire record and may vacate the reprimand or admonition or impose such other discipline as the record may warrant.

1500.9 Formal Disciplinary Proceedings; General Provisions

(a) **Representation of Respondent.**

(1) **Appearance Pro Se.** When a respondent appears pro se in a disciplinary proceeding, the respondent shall file with the Office of Chief Counsel written notice of an address to which any notice or other written communication required to be served upon the respondent may be sent.

(2) **Representation of Respondent by Counsel.** When a respondent is represented by counsel in a formal disciplinary proceeding, such counsel shall file with the Office of Chief Counsel, a written notice of appearance, which shall state such counsel's name, address and telephone number, the name and address of the respondent on whose behalf counsel appears, and the caption of the subject proceeding. Any additional notice or other written communication required to be served on or furnished to a respondent may be sent to the counsel of record for such respondent at the stated address of the counsel in lieu of transmission to the respondent. In any proceeding where counsel has filed a notice of appearance pursuant to this subdivision, any notice or other written communication required to be served on or furnished to the respondent shall also be served upon or furnished to the respondent's counsel (or one of such counsel if the respondent is represented by more than one counsel) in the same manner as prescribed for the respondent, notwithstanding the fact that such communication may be furnished directly to the respondent.

(b) **Format of Pleadings and Documents.** Pleadings or other documents filed in formal disciplinary proceedings shall substantially comply with and conform to the requirements for comparable documents under the Civil Practice Law and Rules.

(c) **Avoidance of Delay.** All formal disciplinary proceedings under these Rules shall be as expeditious as possible. Only the Court or the special referee presiding may grant an extension of time in a formal disciplinary proceeding, and only upon good cause shown. Application for such an extension shall be made in advance and in writing where practicable.

(d) **Service by Office of Chief Counsel.** Except as expressly otherwise provided in subdivision (a)(1) of section

1500.10 of this Part with respect to the institution of a formal disciplinary proceeding:

(1) Orders, notices and other documents originating with the Committee or the Office of Chief Counsel shall be served by the Office of Chief Counsel either personally or by mailing a copy thereof, to the person to be served, addressed to such person at such person's last known address. Whenever any such document is to be served by mail upon the respondent individually, it shall be mailed by both certified mail, return receipt requested, and by first class mail. In all other instances, service by mail may be effected by first class mail.

(2) Service by mail shall be complete upon mailing. When service is not accomplished by mail, personal service may be effected by anyone duly authorized by the Office of Chief Counsel in the manner provided in the laws of the State of New York relating to service of process in civil actions.

(e) **Service by Respondent.** Documents orginating with the respondent, whether represented by counsel or otherwise, shall be served as follows:

(1) By delivering a copy either personally or by mail to the Office of Chief Counsel. Where documents are delivered by mail:

(i) if the respondent is represented by counsel, such delivery may be effected by either first class mail or certified mail, return receipt requested;

(ii) if the respondent is not represented by counsel, such delivery shall be effected by certified mail, return receipt requested.

(2) Service by mail shall be complete upon mailing.

(f) **Number of Copies.** Except as expressly otherwise provided in subdivisions (a)(2) and (e)(1) of section 1500.10 of this Part with respect to the institution of a formal disciplinary proceeding, the following number of copies of documents shall be served by each Party in a proceeding:

(1) Documents being served by the Office of Chief Counsel: one copy of each document to the respondent, and one copy to the special referee.

(2) Documents being served by the Respondent: two copies of each document to the Office of Chief Counsel, and one copy of each document to each other Respondent, if any; in each case, to be served personally or by mailing a copy thereof (as provided in subdivision [e] of this section) to the person to be

served. The Office of Chief Counsel shall forthwith transmit one copy of any document so served to the special referee.

(3) Copies of exhibits to be offered during the hearing shall be provided as specified in subdivision (m) of section 1500.11 of this Part.

(g) **Amendment and Supplementation of Pleadings.** No amendment or supplementation of any notice of charges or of any answer shall be made unless specified in the pre-hearing stipulation or otherwise granted by the special referee. Any objection to a proposed amendment shall be determined by the special referee upon conditions deemed appropriate.

(1) Whenever, in the course of any hearing under these Rules, evidence shall be presented upon which another charge or charges against the respondent might be made, it shall not be necessary to prepare or serve an additional notice of charges with respect thereto, but the special referee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if they had been made and served at the time of service of the notice of charges, and may render a decision upon all such charges as may be justified by the evidence in the case.

(2) Whenever, in the course of any hearing under these Rules, evidence shall be presented upon which another defense or defenses against a charge might be made, it shall not be necessary to prepare or serve another answer with respect thereto, but the special referee may, after reasonable notice to the Office of Chief Counsel and an opportunity to be heard with respect thereto, proceed to the consideration of such additional defense or defenses as if they had been made and served at the time of service of the answer, and may render a decision upon all such defenses as may be justified by the evidence in the case.

(h) **Expedited Hearing.** In any case where the Committee Chairperson determines that the misconduct in question poses an immediate threat to the public by reason of the grounds alleged in subdivisions (a)(1) through (3) of section 1500.13 of this Part, the Committee Chairperson may direct the chief counsel to request the Court, incident to a petition made pursuant to sections 1500.10 or 1500.13 of this Part, to appoint a special referee for the purpose of conducting a hearing on an expedited basis. Such request shall be on notice to the respondent as provided in section 1500.10(a)(1) or 1500.13(b), as the case may be. When appointed on such basis, the special referee shall, so far as is practicable, conduct the hearing from day to day until completed and, notwithstanding section 1500.12(b)(3) of this Part, issue a written report thereon within 10 days after the conclusion of the hearing.

(i) **Summary Disposition.** In any case where the Committee Chairperson determines that the misconduct in question:

(1) has been adjudicated by a court of competent jurisdiction; or

(2) is established by:

(i) a default in responding to the process of the Committee;

(ii) a substantial admission of the respondent under oath; or

(iii) other uncontroverted evidence of the misconduct,

the Committee Chairperson may direct the chief counsel to request the Court, incident to a petition made pursuant to sections 1500.10 or 1500.13 of this Part, to issue an order summarily disposing of the charges or so much thereof as may be appropriate to the circumstances. Such request shall be on notice to the respondent as provided in section 1500.10(a)(1) or 1500.13(b), as the case may be.

1500.10 Formal Disciplinary Proceedings; Pleadings and Preliminary Procedures

(a) **Commencement of Formal Disciplinary Proceedings; Service of Notice of Charges and Petition.** The Office of Chief Counsel shall institute formal disciplinary proceedings, when so directed by the Committee, by serving on the respondent copies of a notice of charges and a verified petition which shall allege the misconduct.

(1) **Service and Filing of Process.** Service of the notice of charges and petition shall be made in accordance with subdivision 6 of section 90 of the Judiciary Law by delivering the same personally to the respondent within or outside the State or, when it is established to the satisfaction of the presiding justice of the Court that the respondent cannot with due diligence be served personally, the same may be served by mail, publication or otherwise as the presiding justice may direct, allowing the respondent an opportunity to be heard. Promptly after service of the notice and petition, the Office of Chief Counsel shall file with the confidential clerk of the Court the signed originals and five copies thereof together with proof of their service on the respondent.

(2) **Contents of Notice of Charges and Petition.**

The notice of charges shall set forth the number of days within which the respondent may answer the petition; the locations whereat the answer is to be served and filed; and shall advise the respondent when application is being made to open the proceedings pursuant to section 1500.10(c) of this Part. The petition shall be verified and shall set forth the charges of misconduct against the respondent, the disciplinary rules alleged to have been violated, and, in appropriate cases, the factual basis upon which an application is being made for an order to open the proceeding to the public and/or the fact that the Office of Special Counsel will seek restitution or reimbursement pursuant to section 90 6-a(a) of the Judiciary Law, and costs pursuant to section 1500.12 of this Part.

(b) **Answer.**

(1) **General Rule.** Except as provided in sections 1500.13 or 1500.16 of this Part, unless the Court shall order otherwise, the respondent shall respond to the petition by serving an answer on the Office of Chief Counsel within 20 days after service of the notice of charges and petition. The original answer, together with five copies thereof and proof of its service on the Office of Chief Counsel, shall be filed with the confidential clerk of the Court.

(2) **Contents of Answer.** The answer shall be in writing and shall respond specifically (by admissions, denials or otherwise) to each allegation of the petition and shall assert all affirmative defenses.

(3) **Request to Be Heard in Mitigation.** The respondent may include in the answer matters in mitigation.

(4) **Effect of Failure to Answer.** In the event the Respondent fails either to serve and file an answer or respond specifically to any allegation or charge, such allegation or charge shall be deemed admitted.

(c) **Confidentiality of Proceeding.** All papers records and documents relating to the proceeding shall be sealed and deemed private and confidential unless and until charges of misconduct have been sustained by the Court; provided, however, upon a determination by a justice of the Court of probable cause to believe that the respondent has committed serious acts of misconduct with which the respondent has been charged, the justice may order that the proceeding be open to the public where the justice determines that the public interest would be served thereby. Except in circumstances where a respondent is subject to interim suspension pursuant to section 1500.13 of this Part or has been convicted of a serious crime as described in section 1500.14 of this Part or as otherwise provided by section 90(10) of the Judiciary Law, any such determination to open the

proceeding to the public shall be made pursuant to the following procedures:

(1) **Application by Committee.** The Committee may instruct the Office of Chief Counsel to apply to the Court for an order to open the proceeding to the public;

(2) **Notice to Respondent.** The Office of Chief Counsel shall include in its notice of charges a statement that an application is being made for an order to open the proceeding to the public and shall set forth the factual basis of such application in its petition;

(3) **Opportunity to Be Heard.** The respondent shall be accorded no less than 20 days to answer the petition and respond to the application requesting an order that the proceeding be open to the public;

(i) Any papers or evidence proffered with respect to the application shall be filed with the confidential clerk of the Court and presented to the justice hearing the application;

(ii) for good cause shown, the justice may order a hearing at which testimony may be taken with respect to the application;

(4) **Content of Order.** Any order which opens the proceeding to the public shall state in substance that a determination of probable cause is not equivalent to a finding of misconduct, and no such inference should be made or suggested;

(5) **Disqualification of Justice Hearing Application from Further Proceedings on the Complaint.** The justice hearing the application to open the proceeding to the public, after making an order with respect to the application, shall be disqualified from any further involvement with the complaint and shall not thereafter participate in any decisions of the Court with respect thereto.

(d) **Order of the Court.** The Court shall make such order with respect to the petition as circumstances warrant, including the appointment of a special referee to hear and report, and the date, time and place of the initial hearing to be held before the special referee. Any compensation to be paid to such special referee shall be paid by the Court and neither the Committee nor the Office of Chief Counsel shall be permitted to discuss such compensation with the special referee.

(e) **Pre-hearing Stipulation.** A form of pre-hearing stipulation may be served on the respondent by the Office of Chief Counsel at any time after the commencement of formal

proceedings, together with the notice of charges. A recommended form is set forth as Appendix A in section 1500.30 of this Part.

(f) **No Other Pleadings.** Pleadings shall be limited to a Notice of Charges and any Answer thereto as amended or supplemented in accordance with these Rules.

(g) **Assignment for Hearing.** Promptly after appointment by the Court, the special referee will establish the date, time and place of the hearing. The parties will be so advised and the same shall be confirmed by a writing served by the Office of Chief Counsel on the respondent no less than ten days prior to the hearing, unless a shorter period of notice is established by the special referee.

(h) **Transmission of Pleadings.** The confidential clerk of the court shall transmit copies of the notice of charges, and of the answer thereto, if and when available, to the special referee.

(i) **Subpoenas.** Both staff counsel and the respondent shall have the right to summon witnesses and require production of books and papers by issuance of subpoenas in accordance with the rules of the Court and to the full extent available in civil actions under the Civil Practice Law and Rules.

(j) **Depositions.** When there is good cause to believe that the testimony of a potential witness will be unavailable at the time of hearing, testimony may be taken by deposition. Such deposition shall be initiated and conducted in the manner provided for the taking of depositions in the New York Civil Practice Law and Rules, and the use of such depositions at hearings shall be in accordance with the use of depositions at trials under the Civil Practice Law and Rules.

(k) **Motions.** The special referee to which a matter has been assigned will entertain, from time to time, such motions as justice may require, in accordance with the principles set out in section 1500.1(c) of this Part.

1500.11 Formal Disciplinary Proceedings: Conduct of Hearing

(a) **Conferences.** Staff counsel and respondent and/or respondent's counsel shall meet no later than five business days prior to the date of the initial hearing, unless a different date is set by the special referee, in order to provide an opportunity for the consideration of the means by which the conduct of the hearing may be facilitated and the disposition of the charges expedited. The conference shall include, but not be limited to, the consideration of agreed stipulations of fact and/or law, the marking of exhibits, and the exchange of witness lists. The

special referee may make such orders with respect to the said conference as circumstances require.

(b) **Appearances.** The special referee shall cause to be entered upon the record all appearances, with a notation in whose behalf each appearance is made.

(c) **Order of Procedure.** In proceedings upon a notice of charges and petition, the Office of Chief Counsel shall initiate the presentation of evidence and may present rebuttal evidence. Opening statements, when permitted in the discretion of the special referee, shall be made first by staff counsel. Closing statements shall be made first by the respondent.

(d) **Burden of Proof.** The Office of Chief Counsel shall have the burden of proving the charges by a fair preponderance of the evidence. The respondent shall have the burden of proving by a fair preponderance of the evidence such matters as are raised by way of affirmative defense or in mitigation.

(e) **Presentation by the Parties.** Respondent and staff counsel shall have the right of presentation of evidence, cross-examination, objection, motion and argument. The special referee may examine all witnesses.

(f) **Limiting Number of Witnesses.** The special referee may limit the number of witnesses who may be heard upon any issue to eliminate unduly cumulative evidence.

(g) **Additional Evidence.** At the hearing, the special referee may, if deemed advisable, authorize any party to file specific documentary evidence as a part of the record within such time as shall be fixed by the special referee.

(h) **Oral Examination.** Witnesses shall be examined orally unless the testimony is taken by deposition as provided in section 1500.10(k) of this Part, or the facts are stipulated in the manner provided in subdivision (j) of this section. Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.

(i) **Fees of Witnesses.** Witnesses subpoenaed by the Office of Chief Counsel or the respondent shall be paid, by the subpoenaing party, the same fees and mileage as are paid for like service in the Supreme Court.

(j) **Presentation and Effect of Stipulation.** The parties may stipulate as to any relevant matters of fact or the authenticity of any relevant documents. Such stipulations may be received in evidence at a hearing, and when so received shall be binding on such parties with respect to the matters therein

stipulated.

(k) **Admissibility of Evidence.**

(1) **General Rule.** All evidence which is deemed by the special referee to be relevant, competent and not privileged, in accordance with the law of evidence of the State of New York as applied in civil proceedings, shall be admissible subject to the principles set out in section 1500.1(c) of this Part.

(2) **Pleadings.** The notice of charges and the answer thereto shall, without further action, be considered as parts of the record.

(3) **Convictions.** A certificate of the conviction of a respondent for any crime shall be conclusive evidence of the respondent's guilt of that crime in any disciplinary proceeding instituted against the respondent and based on the conviction, and the respondent may not offer evidence inconsistent with the essential elements of the crime for which the respondent was convicted as determined by the statute defining the crime except such evidence as was not available either at the time of the conviction or in any proceeding challenging the conviction.

(l) **Reception and Ruling on Evidence.** When objections to the admission or exclusion of evidence are made, the grounds relied upon shall be stated concisely, if so requested by the special referee, and may be stated concisely if no such request is made. Formal exceptions are unnecessary. The special referee shall rule on the admissibility of all evidence.

(m) **Copies of Exhibits.** When exhibits of a documentary character are received in evidence, copies shall, unless impracticable, be furnished to the parties and to the special referee at the hearing.

(n) **Record of Proceeding.** Hearings shall be recorded by reporters authorized to take oaths, or by mechanical recording devices and a transcript of the hearing so recorded, if such transcription is made, shall be a part of the record and sole official transcript of the proceeding. Such transcript shall consist of a verbatim report of the hearing, an exhibit list and the reporter's certificate, and nothing shall be omitted from the record except as is directed by the special referee. After the closing of the record, there shall not be received in evidence or considered as part of the record any document submitted after the close of testimony, except as provided in subdivision (g) of this section or changes in the transcript, except as provided in subdivision (o) of this section.

(o) **Transcript Corrections.** Corrections in the official transcript may be made only to make it conform to what actually

transpired at the hearing. No corrections or physical changes shall be made in or upon the official transcript of the hearing except as provided in this section. Transcript corrections agreed to by all parties may be incorporated into the record, if and when approved by the special referee, at any time during the hearing or after the close of the hearing, but in no event more than 10 days after the receipt of the transcript. Resolution of any dispute among the parties as to correction of the official transcript shall be resolved by the special referee, whose decision shall be final.

(p) **Copies of Transcripts.** A respondent desiring copies of an official transcript may obtain such copies at the respondent's own expense from the official reporter. The Office of Chief Counsel shall bear the expense of one such copy if and when directed by the special referee and shall furnish the same to the special referee as and when directed.

(q) Reopening of Record.

(1) Application. No application to reopen a proceeding shall be granted except upon the application of the respondent to the special referee, made prior to the filing of the special referee's report and recommendation, and only upon good cause shown. Such application shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, and shall be served on the parties and delivered to the special referee together with proof its of service.

(2) Responses. Within five days after the service of such application, any other party may serve an answer thereto (delivering the original thereof to the special referee together with proof of its service), and in default of such answer shall be deemed to have waived any objection to the granting of such application.

1500.12 Formal Disciplinary Proceedings: Concluding Procedures

(a) **Determinations.**

(1) **Determination of Charges.** After the hearing of concluding arguments and receipt of additional material, if any, the special referee shall determine whether any charges against the respondent are to be sustained.

(2) **No Charge Sustained.** If the special referee decides that none of the charges against the respondent should be sustained, the special referee may so advise the parties on the record, and the referee shall proceed to prepare and file with the confidential clerk of the Court a report recommending that the charges be dismissed and the matter closed.

(3) **Any Charge Sustained.** If the special referee decides that any charge against the respondent should be sustained, the special referee shall so advise the parties on the record, and shall thereupon ascertain from staff counsel, whether the respondent has previously received a letter of caution or has previously been subject to disciplinary action by the Court, the Committee, any grievance committee established or authorized by any other Appellate Division of the Supreme Court of the State of New York, or by any other court.

(4) **Sanctions.** Following the determination to be made in accordance with paragraph (3) of this subdivision, the special referee shall consider and deliberate which of the following disciplinary sanctions should be recommended:

(i) private reprimand;

(ii) censure, suspension or disbarment;

(iii) restitution or reimbursement pursuant to section 90 6-a of the Judiciary Law, if deemed appropriate;

(iv) costs be imposed on the respondent; and/or

(v) such other sanction as circumstances warrant.

Upon such deliberations having been had, the special referee shall prepare a report and recommendation for the Court as provided in section 1500.12(b) of this Part.

(b) **Report and Recommendation of the Special Referee.**

(1) **All Cases.** In all cases there shall be a report and recommendation by the special referee which shall state the special referee's findings of fact and conclusions of law. In all cases it shall be in the discretion of the special referee to deliver the report and recommendation orally on the record at the close of the hearing.

(2) **Submissions of the Parties.** The special referee may require staff counsel to submit briefs or proposed findings of fact and conclusions of law in accordance with such schedule as may be set by the special referee and shall offer the respondent a reasonable opportunity to respond to any such briefs and/or proposed findings. Copies of any submission to the special referee shall be simultaneously served on all of the parties at the time of its submission to the special referee.

(3) **Service and Filing of Report.** Unless good cause exists to proceed otherwise, the special referee shall issue a report and recommendation within 60 days after the

conclusion of the hearing and submission of all post-hearing papers. The special referee shall file an original and five copies of the report and recommendation with the confidential clerk of the Court and serve copies thereof upon the parties.

(4) **Petitioning the Court for Final Action.** The Office of Chief Counsel and/or the respondent may petition the Court within 30 days after service of the special referee's report and recommendation to confirm or disaffirm the same, whether in whole or in part, and request the Court to enter an order for such other and further relief as may be appropriate under the circumstances including, but not limited to, reversal or modification of any finding in the report and/or a different sanction. Copies of such petition shall be served by the petitioner on the other party, with the original and five copies thereof being filed with the confidential clerk of the Court. The opposing party shall be accorded no less than 20 days to respond to the petition.

(5) **Notification of Complainant.** The Office of Chief Counsel by means of written notice shall advise the complainant of any final action by the Committee or the Court. Where such action does not consist of censure, suspension or disbarment, the complainant shall be advised of the requirement of confidentiality to whatever extent appropriate.

(c) **Entry of Order Concluding Formal Disciplinary Proceedings.** After due deliberation, the Court shall enter an order confirming or disaffirming the report and recommendation of the special referee, whether in whole or in part, and providing for such other and further relief as may be appropriate under the circumstances including, but not limited to, reversal or modification of any finding in the report and/or a different sanction. The Court shall state its reasons for the order and the order shall provide for such of the following as may be deemed appropriate to the circumstances:

(1) Dismissal of the charges;

(2) Private reprimand;

(3) Public censure;

(4) Suspension from the practice of law for a stated period and until further order of the Court;

(5) Disbarment;

(6) Restitution or reimbursement pursuant to section 90 6-a of the Judiciary Law;

(7) Costs; and/or

(8) Such other sanction as circumstances warrant.

(d) **Service of Order.** A copy of the order made pursuant to section 1500(c) of this Part shall be served upon the respondent by the Office of Chief Counsel in such manner as the Court may direct.

1500.13 Suspension Pending Consideration of Charges.

(a) **Grounds for Interim Suspension.** An attorney who is the subject of an investigation, or of charges by the Committee of professional misconduct, or who is the subject of a formal disciplinary proceeding pending in the Court against whom a petition has been filed pursuant to section 1500.10 of this Part, or upon whom a notice has been served pursuant to section 1500.7(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(1) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or the attorneys failure to submit a written answer to a complaint of professional misconduct within 10 days of receipt of a demand for such an answer by the Committee, served either personally or by certified mail upon the attorney or the attorney's failure to comply with any of the lawful demands of the Court or the Committee made in connection with any investigation, hearing, or disciplinary proceeding; or

(2) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct; or

(3) other uncontroverted evidence of professional misconduct.

(b) **Application and Order.** The suspension shall be made by order of the Court upon the application of the Office of Chief Counsel acting at the direction of the Committee, after notice of such application has been given to the attorney pursuant to subdivision 6 of section 90 of the Judiciary Law. The Court shall briefly state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the Committee have been concluded, and until further order of the Court.

1500.14 Attorneys Convicted of Serious Crimes; Record of Conviction as Conclusive Evidence.

(a) The clerk of any court within the judicial department in which an attorney admitted to practice in this State is convicted of a crime shall within five days of said conviction forward a certificate thereof to the clerk of any court of this State before which disciplinary proceedings may be instituted against the convicted attorney and to the clerk of the Appellate Division of the Supreme Court in the judicial department in which said person was admitted to practice.

(b) Upon the filing with the Court of a certificate that an attorney has been convicted of a serious crime as hereinafter defined in a court of record of any State, territory or district, including this State, the Court shall:

(1) suspend the attorney from the practice of law until a final order is made pursuant to paragraph (g) of subdivision (4) of section 90 of the Judiciary Law, unless upon good cause shown, the Court determines when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interests of justice, to set aside such suspension; and

(2) enter an order immediately referring the matter to a special referee appointed by the Court to conduct forthwith formal disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(c) The term "serious crime" shall include any felony, not resulting in an automatic disbarment under the provisions of subdivision (4) of section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, criminal contempt of court, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, an attempt or a conspiracy or solicitation of another to commit a "serious crime" or a crime involving moral turpitude.

(d) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against the attorney based on that conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which the attorney was convicted as determined by the statute defining the crime; provided, however, that the attorney may offer such evidence as was not available either at the time of the

conviction or in any proceeding challenging the conviction.

(e) Upon the filing with the court of a certificate that an attorney has been convicted of a crime not constituting a serious crime as hereinbefore defined in a court of record in any State, territory or district, including this State, the Court shall either refer the matter to the Committee for whatever action may be appropriate, or cause formal charges to be made and served upon the respondent and enter an order immediately referring the matter to a special referee appointed by the Court to conduct forthwith formal disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(f) The Committee or the Office of Chief Counsel, upon receiving information that any attorney to whom these Rules apply has been convicted of a crime in a court of record of any State, territory or district, shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate of the conviction to the Court. If the certificate has not been forwarded by the clerk, the Office of Chief Counsel shall obtain a certificate of the conviction and file the same with the Court.

1500.15 Discipline of Attorneys for Professional Misconduct in Foreign Jurisdiction.

(a) **Application of Section.** Any attorney subject to these Rules, pursuant to section 1500.1 of this Part, who has been disciplined in a foreign jurisdiction, may be disciplined by the Court because of the conduct which gave rise to the discipline imposed in the foreign jurisdiction. For purposes of this Part, foreign jurisdiction means another state, territory or district.

(b) **Notice of Proceedings.** Upon receipt of a certified or exemplified copy of the order imposing such discipline in a foreign jurisdiction, and of the record of the proceedings upon which such order was based, the Court, directly or by the Committee acting through the Office of Chief Counsel, shall give written notice to such attorney pursuant to subdivision 6 of section 90 of the Judiciary Law, according him or her the opportunity, within 20 days of the giving of such notice, to file a verified statement setting forth evidentiary facts for any defense to discipline enumerated under subdivision (c) of this section, and a written demand for a hearing at which consideration shall be given to any and all such defenses. Such notice shall further advise the attorney that in default of such filing such discipline or such disciplinary action as may be appropriate will be imposed or taken. When a verified statement

setting forth evidentiary facts for any defense to discipline and a demand for hearing have been duly filed, no discipline shall be imposed without affording the attorney an opportunity for hearing. The hearing shall be conducted by a special referee. In the event the Committee or the attorney desires further action by the Court, a petition may be filed in the Court, together with the record of the proceedings before the special referee.

(c) **Permissible Defenses.** Only the following defenses may be raised:

(1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the attorney's misconduct; or

(3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this jurisdiction.

(d) **Attorneys Required to File.** Any attorney subject to these Rules pursuant to section 1500.1 of this Part, who has been disciplined in a foreign jurisdiction shall promptly file with the Court a certified copy of the order imposing such discipline.

(e) **Filing by Committee.** Whenever the Committee or the Office of Chief Counsel learns that an attorney subject to these Rules pursuant to section 1500.1 of this Part has been disciplined in a foreign jurisdiction, it shall ascertain whether a certified or exemplified copy of the order imposing such discipline has been filed with the Court, and if it has not been filed, the Committee or the Office of Chief Counsel shall cause such order to be filed.

1500.16 Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated.

(a) **Suspension Upon Judicial Determination of Incompetency or on Involuntary Commitment.** Where an attorney subject to this Part has been judicially declared incompetent or involuntarily committed to a mental hospital, the Court, upon proper proof of the fact (including a certified or exemplified copy of an order declaring the attorney to be incompetent or

involuntarily committing the attorney to a mental hospital), shall enter an order suspending such attorney from the practice of the law, effective immediately and for an indefinite period and until the further order of the Court. A copy of such order shall be served upon such attorney, his committee, guardian or other legal representative, and/or the director of the mental hospital in such manner as the Court may direct.

(b) **Proceeding to Determine Alleged Incapacity and Suspension Upon Such Determination.**

(1) Whenever a committee appointed pursuant to section 1500.21 of this Part shall petition the Court to determine whether an attorney is incapacitated from continuing to practice law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants or by reason of other mental disability, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including examination of the attorney by such qualified medical experts as the Court shall designate. If, upon due consideration of the matter, the Court is satisfied and concludes that, based upon a fair preponderance of the evidence, the attorney is incapacitated from continuing to practice law, it shall enter an order suspending the attorney on the ground of such disability for an indefinite period and until the further order of the Court and any pending disciplinary proceedings against the attorney shall be held in abeyance.

(2) The Court shall provide for such notice to the respondent-attorney of proceedings in such matter as it deems proper and advisable and may appoint an attorney to represent the respondent, if the respondent-attorney is without adequate representation.

(c) **Procedure When Respondent Claims Disability During Course of Proceeding.**

(1) If, during the course of a disciplinary proceeding, the respondent contends that he or she is suffering from a disability by reason of mental infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent adequately to defend himself or herself, the Court thereupon shall enter an order suspending the respondent from continuing to practice law until a determination is made of the respondent's capacity to continue the practice of law in a proceeding instituted in accordance with the provisions of subdivision (b) of this section.

(2) If, in the course of a proceeding under this section or in a disciplinary proceeding, the Court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and

advisable, including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) **Appointment of Attorney to protect Client's and Suspended Attorney's Interest.**

(1) Whenever an attorney is suspended for incapacity or disability, the Court, upon such notice to the attorney as it may direct, may appoint another attorney or attorneys to inventory the files of the suspended attorney and to take such action as it deems proper and advisable to protect the interest of his or her clients and for the protection of the interest of the suspended attorney.

(2) Any attorney so appointed by the Court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates, except as is necessary to carry out the order of the Court which appointed the attorney to make such inventory.

(e) **Reinstatement Upon Termination of Disability.**

(1) Any attorney suspended under the provisions of this section shall be entitled to apply for reinstatement at such intervals as the Court may direct in the order of suspension or any modification thereof. Such application shall be granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and he or she is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper for a determination as to whether the attorney's disability has been removed, including the direction of an examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such examination shall be paid by the attorney.

(2) Where an attorney has been suspended by an order in accordance with the provisions of subdivision (a) of this section and thereafter, in proceedings duly taken, has been judicially declared to be competent, the Court may dispense with further evidence that his or her disability has been removed and may direct his or her reinstatement upon such terms as it deems proper and advisable.

(f) **Burden of Proof.** In a proceeding seeking an order of suspension under this section, the burden of proof shall rest with the petitioner. In a proceeding seeking an order terminating a suspension under this section, the burden of proof shall rest with the suspended attorney.

(g) **Waiver of Doctor-Patient Privilege Upon Application for Reinstatement.** The filing of an application for

reinstatement by an attorney suspended for disability shall be deemed to constitute a waiver of any doctor-patient privilege existing between the attorney and any psychiatrist, psychologist, physician or hospital who or which has examined or treated the attorney during the period of his disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital by whom or at which the attorney has been examined or treated since his or her suspension and the attorney shall furnish to the Court written consent to each to divulge such information and records as is requested by court-appointed medical experts or by the clerk of the Court.

(h) **Payment of Expenses of Proceedings.**

(1) The necessary costs and disbursements of an agency, committee or appointed attorney in conducting a proceeding under this section shall be paid in accordance with subdivision (6) of section 90 of the Judiciary law.

(2) The Court may fix the compensation to be paid to any attorney or medical expert appointed by the Court under this section. The compensation may be directed by the Court to be paid as an incident to the cost of the proceeding in which the charges are incurred and shall be paid in accordance with law.

1500.17 Resignation by Attorney Under Disciplinary Investigation.

(a) **Tender of Resignation.** An attorney who is the subject of an investigation into allegations of misconduct, or who is the subject of a disciplinary proceeding pending in the Court, may tender a resignation by submitting to the Committee an affidavit stating that he or she intends to resign and that:

(1) his or her resignation is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; and he or she is fully aware of the implication of submitting his or her resignation;

(2) he or she is aware that there is pending an investigation into allegations that he or she has been guilty of misconduct, the nature of which shall be specifically set forth; and

(3) he or she acknowledges that if charges were predicated upon the misconduct under investigation, he or she could not successfully defend on the merits against such charges.

(b) **Recommendation to the Court.** On receipt by the Committee of an affidavit from an attorney who intends to resign, the Committee shall promptly thereafter file the affidavit

with the Court together with either (1) its recommendation that the resignation be accepted and whether acceptance should be conditioned upon restitution or reimbursement pursuant to section 90 6-a of the Judiciary Law or (2) its recommendation that the resignation not be accepted and its reasons therefor.

(c) **Entry of Order.** Upon the filing of the recommendation of the Committee with the required affidavit, the Court may enter an order either disbarring the attorney and striking his or her name from the roll of attorneys on consent and upon such terms and conditions as it deems appropriate, or ordering that there be further proceedings. The Court may also order that the affidavit to which reference is made in subdivisions (a) and (b) of this section be deemed private and confidential under subdivision 10 of section 90 of the Judiciary Law.

(d) **Notification of Complainant.** The Office of Chief Counsel, by means of written notice, shall advise the complainant of any action taken by the Court with respect to the respondent's resignation.

1500.18 Nonabatement of Disciplinary Proceedings

(a) **Refusal of Complainant or Respondent to Proceed, etc.** Neither unwillingness or neglect of the complainant to prosecute a charge, nor settlement, compromise or restitution, nor the failure of the respondent to cooperate, shall, in itself, justify abatement of an investigation or the deferral or termination of proceedings under these Rules.

(b) **Matters Involving Related Pending Civil Litigation or Criminal Matters.**

(1) **General Rule.** The processing of complaints involving material allegations which are substantially similar to the material allegations of pending criminal or civil litigation need not be deferred pending determination of such litigation.

(2) **Effect of Determination.** The acquittal of a respondent on criminal charges involving substantially similar material allegations shall not, in itself, justify termination of a disciplinary investigation predicated upon the same material allegations.

(c) **Restitution.** Restitution made by or on behalf of a respondent for property which has been converted by the respondent or payments made to reimburse or otherwise compensate persons injured by the respondent, shall not abate or otherwise bar the commencement or continuance of disciplinary proceedings.

1500.19 Conduct of Disbarred, Suspended or Resigned Attorneys; Abandonment of Practice by Attorney

(a) **Compliance with Judiciary Law.** Disbarred, suspended or resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.

(b) **Compensation.** A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar. A disbarred, suspended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client. Such applications shall be made at special term in the court wherein the action is pending or at special term in the Supreme Court in the county wherein the moving attorney maintains his or her office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been required to pay had no substitution of attorneys been required.

(c) **Notice to Clients Not Involved in Litigation.** A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigated or administrative matters or proceedings pending in any court or agency, of his or her disbarment, suspension or resignation and his or her consequent inability to act as an attorney after the effective date of his or her disbarment, suspension or resignation and shall advise said clients to seek legal advice elsewhere.

(d) **Notice to Clients Involved in Litigation.**

(1) A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, each of his or her clients involved in litigated matters or administrative proceedings, and the attorney or attorneys for each adverse party, as well as the court, in such matter or proceeding, of his or her disbarment, suspension or resignation and consequent inability to act as an attorney after the effective date of his or her disbarment, suspension or

resignation. The notice to be given to the client shall inform the client of the advisablity of a prompt substitution of another attorney or attorneys in his or her place.

(2) In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension or resignation, it shall be the responsibility of the disbarred, suspended or resigned attorney to move pro se in the court in which the action is pending, or before the body in which an administrative proceeding is pending, for leave to withdraw from the action or proceeding.

(3) The notice given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred, suspended or resigned attorney. In addition, notice shall be given in like manner to the Office of Court Administration of the State of New York in each case in which a retainer statement has been filed.

(e) **Conduct After Entry of Order.** The disbarred, suspended or resigned attorney, after entry of the disbarment or suspension order or after entry of the order accepting the resignation, shall not accept any new retainer or engage in any new case or legal matter of any nature as attorney for another. However, during the period between the entry date of the order and its effective date he or she may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(f) **Filing Proof of Compliance and Attorney's Address.** Within 10 days after the effective date of the disbarment or suspension order or the order accepting the resignation, the disbarred, suspended or resigned attorney shall file with the clerk of the Court an affidavit showing:

(1) that he or she has fully complied with the provisions of the order and with these Rules;

(2) that he or she has served a copy of such affidavit upon the petitioner or moving party; and

(3) the residence or other address of the disbarred, suspended or resigned attorney where communications may be directed to the said attorney.

(g) **Appointment of Attorney to protect Clients' Interests and Interests of Disbarred, Suspended or Resigned Attorney.** Whenever it shall be brought to the Court's attention that a disbarred, suspended or resigned attorney shall have failed or may fail to comply with the provisions of subdivisions (c), (d) or (f) of this section, the Court, upon such notice to

such attorney as the Court may direct, may appoint an attorney or attorneys to inventory the files of the disbarred, suspended or resigned attorney and to take such action as seems indicated to protect the interests of his or her clients and for the protection of the interests of the disbarred, suspended or resigned attorney.

(h) **Disclosure of Information.** Any attorney so appointed by the Court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the Court appointing the attorney to make such inventory.

(i) **Fixation of Compensation.** The Court may fix the compensation to be paid to any attorney appointed by it under this section. The compensation may be directed by the Court to be paid as an incident to the costs of the proceeding in which the charges are incurred and shall be charged in accordance with law.

(j) **Required Records.** A disbarred, suspended or resigned attorney shall keep and maintain records of the various steps taken by him or her under this section so that, upon any subsequent proceeding instituted by or against him or her, proof of compliance with this section and with the disbarment or suspension order or with the order accepting the resignation will be available.

(k) **Abandonment of Practice by Attorney.** When, in the opinion of the Court, an attorney has abandoned his or her practice, the Court, upon such notice to such attorney as it may direct, may appoint the Office of Chief Counsel or an individual attorney, to take custody and inventory the files of such attorney and to take such action as seems indicated to protect the interests of his or her clients.

1500.20 Application for Reinstatement.

(a) **General.** Any attorney who has been ordered suspended for a period of six months or less pursuant to formal disciplinary proceedings shall be reinstated, subject to the procedures set forth in subdivisions (a)(1) and (2) hereof and if no objection is made by the Committee, 60 days after the end of the period of suspension by filing with the Court and serving upon the Office of Chief Counsel an affidavit stating that he or she has fully complied with the requirements of the suspension order, including the making of any restitution ordered by the Court and the payment of any fees and costs required by its order.

(1) Upon receipt of the affidavit, the Office of Chief Counsel shall mail a copy of it and a notice to each complainant in the disciplinary proceeding that led to the suspension advising the complainant that he or she has 20 days after the date of mailing of such affidavit and notice to raise an objection to, support or otherwise offer written comments on, the affidavit.

(2) Within 40 days after service of the affidavit on the Office of Chief Counsel, the Committee shall advise the Court if it objects to reinstatement of the attorney and shall file a report setting forth its objection. Upon the filing of such report, the Court may make an order appropriate to the circumstances or require that the attorney petition for reinstatement in accordance with the procedures set forth in subdivisions (b) through (f) of this section.

(b) **Procedure on Petition.** Attorneys who have been disbarred or who have been suspended for more than six months, or whose names have been stricken from the roll of attorneys on consent, may only apply for reinstatement by petitioning the Court.

(1) **Conditions Precedent to Entertaining Petition.** Unless the Court shall first order otherwise, a petition for reinstatement will not be accepted for filing unless the requisite fees therefor have been paid and where:

(i) The petitioning attorney has been disbarred after a hearing or has been stricken from the roll of attorneys pursuant to subdivision 4 of section 90 of the Judiciary Law or has resigned on consent, until the expiration of seven years after the effective date of the disbarment or removal; or

(ii) The petitioning attorney has been denied reinstatement, until the expiration of two years after the date of the Court's order denying restatement.

(2) **Petition to Be Verified and Submitted in the Form Prescribed.** A petition for reinstatement shall be verified and shall be submitted substantially conforming to the form and content of the model set forth as Appendix B in section 1500.30 of this Part.

(3) **Service and Filing of Petition.** A petitioner shall serve a copy of the petition on the Office of Chief Counsel and the Lawyers' Fund for Client Protection.

(c) **Investigation.** The Committee or the Committee on Character and Fitness, as the Court may direct, shall inquire into the facts submitted in support of the petition and all other

relevant facts.

(1) **Standard Investigation.** Upon reference to the Committee (or to the Committee on Character and Fitness, as the case may be) of a petition made by a person who has been disbarred or who has been suspended for more than six months, or whose name has been stricken from the roll of attorneys on consent, the Office of Chief Counsel (or the Committee on Character and Fitness) shall mail a notice to each complainant in the disciplinary proceeding that led to the suspension or disbarment advising the complainant that a petition has been filed whereby readmission is sought and that he or she has 60 days after the date of mailing such notice to offer written comments on the petition for reinstatement. Specific inquiry shall be made by the Office of Chief Counsel (or the Committee on Character and Fitness) as to whether and to what extent restitution has been made to those persons who were injured by the applicant's misconduct.

(2) **Supplemental Investigation.** The Committee (or the Committee on Character and Fitness) may, in its discretion, require the petitioner to (i) submit additional sworn proof, (ii) submit to an examination under oath, (iii) produce records or other documents relevant to the application, (iv) provide proof of compliance with all disciplinary orders, and (v) submit to medical or psychiatric examination by qualified experts.

(d) **Committee Recommendation and Report.** After completing the investigation to which reference is made in subdivision (c) of this section, the Committee (or the Committee on Character and Fitness) shall decide whether to support or oppose the petition and shall thereupon direct the Office of Chief Counsel to prepare a report consistent with its decision. If the Committee (or the Committee on Character and Fitness) opposes reinstatement, the reasons for its opposition shall be set forth in the report and it may request that the Court either deny the petition or refer the petition to a special referee to hear and report to the Court on such matters as may be appropriate. A copy of the report shall be served on the petitioner and the original thereof shall be filed with the Court together with proof of its service.

(e) **Hearing on Petition.** If the Court orders that there be a hearing on the petition, the Court shall appoint a special referee to conduct the hearing and to report his or her findings to the Court. At the hearing, both the petitioner and the Office of Chief Counsel (or such other body as the Committee on Character and Fitness may designate) may present evidence relevant to the issues raised by the petition.

(f) **Conditions for Granting Petition.** A petition for reinstatement may be granted by the Court only after there has been compliance with the procedures set forth in this section and

the petition has been reviewed by the Committee or the Committee on Character and Fitness or such other individual or body as the Court may deem appropriate and

(1) upon a showing by the petitioner:

(i) by clear and convincing evidence that the petitioner has fully complied with the provisions of the order disbarring or suspending him or her or striking his or her name from the roll of attorneys, and that the petitoner possesses the character and general fitness to practice law; and

(ii) that, subsequent to the entry of such order, the petitoner has taken, and attained a passing score on, the Multistate Professional Responsibility Examination described in section 520.8(a) of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law, the passing score thereon being that determined by the New York State Board of Law Examiners pursuant to section 520.8(c) of such rules.

(2) The Court in its discretion may direct as a condition of reinstatement that:

(i) the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner; and/or

(ii) the petitioner make full restitution to such persons as were injured by his or her misconduct.

(3) In reviewing a petition for reinstatement, the Court may:

(i) order that notice of the petition for reinstatement be published in one or more newspapers circulated within the territorial jurisdiction of the Court; and

(ii) consider the misconduct for which the petitioner was originally suspended or disbarred and any other relevant conduct or information which may come to its attention.

(g) **Stay of Petition Pending Condition.** In the event that the Court determines to grant a petition for reinstatement, it may nevertheless withhold final action on the petition for a period of not more than two years pending the satisfaction of one or more conditions, including the attainment by the petitoner of a passing score on the Multistate Professional Responsibility Examination described in section 520.8(a) of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law. Upon proof of successful completion of the said examination, the satisfaction of any other conditions imposed, and in the absence of further misconduct by the petitioner, the

petition shall be granted.

1500.21 Structure, Composition and Membership of the Departmental Disciplinary Committees

There shall be eight departmental disciplinary committees, structured and composed as follows:

(a) First Judicial Department. The Court shall appoint a departmental disciplinary committee for the First Judicial Department. The departmental disciplinary committee shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the First Judicial Department at the time of their admission to practice by the Appellate Division. The departmental disciplinary committee shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) The departmental disciplinary committee shall consist of a chairperson and forty-three members, nine of whom shall be non-attorneys.

(2) Appointments shall be made, after consultation with the departmental disciplinary committee, for a term of three years. A vacancy shall be filled for the remainder of the term. No person who has served two consecutive terms shall be eligible for reappointment until the passage of three years from the expiration of his or her second term. The chairperson shall be named by the Court upon recommendation of the Committee. The chairperson may appoint an executive committee consisting of at least six members of the Committee.

(3) The chairperson of the departmental disciplinary committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairperson of the departmental disciplinary committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may hold hearings as authorized by section 1500.7 of this Part.

(4) The membership of the departmental disciplinary committee shall be a total of not more than 44 persons each of whom shall be appointed by the Court for a term of three years, except members who have been appointed to complete unexpired terms, in which case such members may be reappointed for three-year or shorter terms. At least two-thirds of the members of the

Committee shall be members of the bar of the State of New York in good standing, each of whom shall reside or have an office in the City of New York, and up to one-third of such members shall be persons who are not members of the bar, each of whom shall reside or have a principal place of business in the City of New York. Appointments to the departmental disciplinary committee may be made from lists of nominees submitted by the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association, and by such other means which the Court deems in the public interest. A member of the bar who has served two consecutive terms shall not be eligible for reappointment until one year after the expiration of the second term.

(b) **Second Judicial Department:** The Court shall appoint three departmental disciplinary committees for the Second Judicial Department. One of these committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Second and Eleventh Judicial Districts at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Ninth Judicial District at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Tenth Judicial District at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) Each departmental disciplinary committee shall consist of 19 members and a chairperson, all of whom shall be appointed by this court and 16 of whom shall be attorneys. The chairperson shall have the power to appoint an acting chairperson from among the members of the departmental disciplinary committee. Appointments may be made from lists of prospective members submitted by the following county bar associations within the Second Judicial Department: Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County, New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association, Rockland County Bar Association, Inc., Suffolk County Bar Association and Westchester County Bar Association.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons

for a term of four years. Thereafter, yearly appointments of five persons shall be made to each such committee for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his or her second such term. The person appointed chairperson shall serve as chairperson for a term of two years and shall be eligible for reappointment as chairperson for not more than one additional term of two years.

(3) The chairperson of each departmental disciplinary committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairperson of the committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may hold hearings as authorized by section 1500.7 of this Part.

(c) Third Judicial Department. The Court shall appoint a departmental disciplinary committee for the Third Judicial Department. The departmental disciplinary committee shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Third Judicial Department at the time of their admission to practice by the Appellate Division. The departmental disciplinary committee shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) The departmental disciplinary committee shall consist of a chairperson and twenty members, three of whom shall be non-attorneys. Appointment of attorneys shall, as far as practicable, be made equally from practicing attorneys in each of the judicial districts of the Third Judicial Department.

(2) Appointments shall be made, after consultation with the departmental disciplinary committee, for a term of three years. A vacancy shall be filled for the remainder of the term. No person who has served two consecutive terms shall be eligible for reappointment until the passage of three years from the expiration of his or her second term. Seven members of the committee shall constitute a quorum and the concurrence of six members shall be necessary for any action taken. The chairperson shall be named by the Court upon recommendation of the Committee. The chairperson may appoint an executive committee consisting of at least one member of the Committee from each judicial district.

(3) The chairperson of the departmental disciplinary committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At

least two members of a subcommittee shall be attorneys. The chairperson of the departmental disciplinary committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may hold hearings as authorized by section 1500.7 of this Part.

(d) **Fourth Judicial Department:** The Court shall appoint three departmental disciplinary committees for the Fourth Judicial Department. One of these committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Fifth Judicial District at the time of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Seventh Judicial District at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the Eighth Judicial District at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom these Rules apply pursuant to section 1500.1(b) of this Part.

(1) Each departmental disciplinary committee shall consist of 21 members and a chairperson, all of whom shall be appointed by the Court, reside in their respective district, and 18 of whom shall be attorneys. The chairperson shall have the power to appoint an acting chairperson from among the members of the departmental disciplinary committee. Appointments may be made from lists of prospective members submitted by bar associations within the Fourth Judicial Department.

(2) Six attorneys shall be appointed for a term of one year, six for a term of two years, and six for a term of three years. One non-attorney shall be appointed for a term of one year, one for a term of two years, and one for a term of three years. Thereafter appointments shall be made for a term of three years, and no person who has served two consecutive three-year terms shall be eligible for reappointment until the passage of three years from the expiration of the second term. A vacancy shall be filled for the remainder of the term.

(3) The chairperson of each departmental disciplinary committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairperson of the committee shall designate a member of the subcommittee to act as its chairperson. Such subcommittees may

hold hearings as authorized by section 1500.7 of this Part.

(e) **Meetings, Notice of Time and Place.** The Committee shall meet not less frequently than every other month, and such meetings shall be held upon notice given at the direction of the Committee Chairperson. The notice shall ordinarily be in writing and shall set forth the date and time of the meeting, which shall take place at such place as may be designated by the Committee Chairperson. In lieu of such written notice, meetings may be called on notice given to each member of the Committee not less than 24 hours prior to the time fixed for the meeting, in person or by telephone. All notices shall be given to members of the Committee at the addresses furnished for such purposes by the members. The Committee Chairperson or his or her designee shall preside at all meetings of the Committee. Minutes of all meetings shall be kept and filed in the Office of Chief Counsel. To the extent possible, an agenda for each meeting of the Committee shall be prepared by or with the approval of the Committee Chairperson and shall be distributed to all members of the Committee prior to the meeting.

(f) **Quorum and Manner of Acting.** Except as otherwise expressly stated to the contrary in these Rules, a majority of the members of the Committee shall constitute a quorum for the transaction of business, and all action shall require an affirmative vote of the greater of (1) a majority of the members present at the meeting or (2) one-third of the full Committee.

(g) **Disqualification.** No person shall, while serving on the Committee, appear before the Committee or any of its constituent parts on behalf of any other person.

1500.22 Appointment and Duties of Staff Counsel.

(a) **General.** There shall be an Office of Chief Counsel which shall consist of the chief counsel, deputy chief counsel and other staff counsel. The Court shall, in consultation with the Committee, appoint all such persons, together with such supporting staff as it deems advisable.

(b) **Supervision by Chief Counsel.** The Office of Chief Counsel shall be supervised by the chief counsel who shall, either personally or by other staff counsel, exercise the powers and perform the duties of the Office of Chief Counsel set forth in these Rules. The chief counsel may from time to time designate the deputy chief counsel or in the absence of such deputy chief counsel, an associate counsel, to serve as acting chief counsel in the chief counsel's absence.

(c) **Powers and Duties of the Office of Chief Counsel.**

The Office of Chief Counsel shall:

(1) have the powers and duties set forth in this Part;

(2) subject to the limitations and requirements of section 1500.28 of this Part, maintain records of all matters processed by it, including the disposition thereof, and maintain dockets and assign such docket numbers as may be appropriate for the clear designation of each matter, which shall include the calendar year in which the matter is originally docketed;

(3) represent the Committee in all proceedings before the Court;

(4) periodically report to the Committee Chairperson and the Court on the operation of the office, including, for each reporting period, the number of matters received and disposed, the number of matters under investigation, the number of matters referred to other agencies, the number of matters in hearings, and the number of hearing days required for each such matter.

(5) have such other duties as may be assigned to it from time to time by the Committee, the Committee Chairperson or the Court.

1500.23 Appointment, Status and Duties of Special Counsel.

(a) **General.** From time to time, the Court may appoint an attorney to act as counsel in a particular investigation or proceeding where staff counsel is disqualified or otherwise disabled from undertaking or continuing such investigation or proceeding. Such special counsel may serve either without compensation on a pro bono voluntary basis or, when no such qualified attorney can readily be appointed, the Court may provide for reasonable compensation.

(b) **Recruitment.** From time to time, the Committee Chairperson or the Court may send notices to the principal bar associations located in the Judicial Department, describing the use of special counsel and soliciting the resumes of interested volunteers.

(c) **Conflicts.** Before accepting the assignment of a case, Special Counsel shall determine whether accepting the assignment would create a conflict under the Lawyer's Code of Professional Responsibility, and shall inform the Court of any conflict or potential conflict which arises in the course of handling the case.

(d) **Confidentiality.** Special Counsel shall be bound by the confidentiality rules contained in Judiciary Law Section 90(10) and all other applicable confidentiality provisions.

(e) **Reporting and Independence of Special Counsel.** From time to time, special counsel shall report on the assigned case to the Committee Chairperson, who shall assume direct responsibility for supervising the manner in which the case is being processed by special counsel. In all respects, special counsel shall be independent of the Office of Chief Counsel.

(f) **Defense and Indemnification of Special Counsel.** All special counsel serving voluntarily, whether or not compensated, are expressly authorized to participate in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law and are thereby entitled to receive, and shall receive, the protections of that law.

(g) **Application of Rules to Special Counsel.** Apart from this section 1500.23, references in these Rules to the Office of Chief Counsel shall mean and be understood to refer to special counsel where and to the extent that special counsel has assumed the duties of the Office of Chief Counsel in relation to an assigned case.

1500.24 Appointment, Status and Duties of Local Bar Association Grievance Committees.

(a) **General.** The Court may designate one or more bar associations located in its Judicial Department associations which shall appoint persons to serve as volunteer members of one or more grievance committees administered by such bar associations. Such persons shall be attorneys of sound judgment and demonstrated ability and shall not then be serving as a member or staff counsel of a departmental disciplinary committee.

(b) **Referrals.** The Office of Chief Counsel may refer complaints involving minor misconduct by attorneys with no significant disciplinary history to a bar association administered grievance committee. Such reference may be made only at the written direction of the Chief Counsel. Upon receipt of the referred complaint, the grievance committee shall investigate and report on the issues raised by the complaint. If it appears that the matter should be further considered by the Committee because it then no longer appears to involve merely minor misconduct or the respondent fails to cooperate with the grievance committee, the complaint shall be referred back to the Office of Chief Counsel for investigation under these Rules. The grievance committee shall only consider such matters as may be referred to it pursuant to this section, and shall refer to the

Office of Chief Counsel any grievance coming to its attention which has not been so referred.

(c) **Conflicts.** Before taking any action with respect to a matter, the members of the grievance committee shall determine whether undertaking any action with respect thereto would create a conflict under the Lawyer's Code of Professional Responsibility, and shall inform the administrator or chairperson of the grievance committee of any conflict or potential conflict which arises in the course of handling the matter.

(d) **Action on Complaint.** Upon completion of an investigation by the grievance committee of a complaint, a written report of its findings shall be prepared and forwarded to the Office of Chief Counsel. The report shall then be reviewed by an attorney member of the departmental disciplinary committee designated for that purpose by the Committee Chairperson.

(e) **Grievance Committee Rules and Procedures.** The grievance committee shall prepare written rules and procedures governing its proceedings which are not inconsistent with the principles and procedures set forth in sections 1500.5 through 1500.8 of this Part. Such grievance committee rules and procedures shall be filed with the Court which may accept or modify them.

(f) **Confidentiality.** Grievance committee members shall be bound by the confidentiality rules contained in section 90(10) of the Judiciary Law and all other applicable confidentiality provisions.

(g) **Supervision and Reporting.** Upon resolution of a complaint referred to a grievance committee pursuant to this section, the grievance committee shall forward to the Office of Chief Counsel a brief letter or memorandum stating its determination.

1500.25 Appointment, Status and Duties of Local Bar Association Mediation Committees.

(a) **General.** The Court may designate one or more local bar associations which shall appoint persons to serve as volunteer complaint mediators. Such persons shall be attorneys of sound judgment and demonstrated ability and shall not then be serving as a member or staff counsel of a departmental disciplinary committee.

(b) **Referrals.** The Office of Chief Counsel may refer complaints involving minor misconduct by attorneys with no significant disciplinary history to a bar association administered mediation committee, where such complaints are deemed suitable for resolution through mediation. Such reference

may be made only upon the prior written concurrence of an attorney member of the Committee designated by the Committee Chairperson for such purpose. Upon receipt of the referred complaint, the mediation committee administrator shall designate a mediator who shall attempt to mediate and resolve the matters raised by the complaint. If the mediator is unable to resolve the matter, or if it appears that the matter should be further considered by the Committee, the mediator shall refer the complaint back to the Office of Chief Counsel for investigation under these Rules. The mediation committee shall only consider such matters as may be referred to it pursuant to this section, and shall refer to the Office of Chief Counsel any grievance coming to its attention which has not been so referred.

(c) **Conflicts.** Before accepting the assignment of a matter, the mediator shall determine whether accepting the assignment would create a conflict under the Lawyer's Code of Professional Responsibility, and shall inform the mediation committee administrator or chairperson of any conflict or potential conflict which arises in the course of handling the matter.

(d) **Confidentiality.** Mediators shall be bound by the confidentiality rules contained in section 90(10) of the Judiciary Law and all other applicable confidentiality provisions.

(e) **Supervision and Reporting.** Upon resolution of a complaint referred to a mediation committee pursuant to this section, the mediation committee shall forward to the Office of Chief Counsel a brief letter or memorandum stating the result of the mediation.

1500.26 Defense and Indemnification of Committee Members.

(a) **General.** Members of the departmental disciplinary committees, as well as members of the authorized grievance and mediation committees, are volunteers, and are expressly authorized to participate in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law and are thereby entitled to receive, and shall receive, the protections of that law.

(b) **Bar Associations.** Local bar associations administering grievance and mediation programs shall be deemed volunteers and, to the extent of their Court authorized participation in such programs, will be deemed to be participating in a State-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law and are thereby entitled to receive, and shall receive, the protections of that law.

1500.27 Communications with Other Disciplinary Agencies.

Nothing contained in these Rules shall be deemed to prohibit communications between the various disciplinary agencies identified in these Rules with respect to any complaint or proceeding relating to the conduct of an attorney.

1500.28 Retention of Disciplinary Records.

The following records shall be retained to the extent and in the manner hereinbelow set forth:

(a) **Matters Where Discipline Has Been Imposed.** Where discipline has been imposed, case files containing the documentary record of a complaint filed against an attorney (including, but not limited to, any complaint, investigation report, attorney response, deposition or hearing transcript, special referee's report, petition to the Appellate Division, affidavit, motion, order and decision of the Court) shall be retained for fifty years after the date of the disposition of such matter by the Office of Chief Counsel and then destroyed.

(b) **Matters Which Have Been Rejected for Failure to State a Complaint, Etc.** Where a grievance has been rejected for failure to state a complaint, lack of jurisdiction or referred to another agency and the attorney about whom the grievance was made has not been accorded an opportunity to respond, all records relating to such grievance shall be retained for one year after the date of its disposition by the Office of Chief Counsel and then destroyed.

(c) **Matters Which Have Been Dismissed Without Imposition of Any Discipline or Comment.** Where a complaint has been dismissed without the imposition of any discipline or comment, all records relating to such matter (including, but not limited to, any complaint, investigation report, attorney response, deposition or hearing transcript or other record of proceedings) shall be retained for five years after the date of its disposition by the Office of Chief Counsel and then destroyed.

(d) **Matters Which Have Been Closed With Comment.** Where a matter has been closed by the issuance of a letter of caution, admonition, reprimand or similar comment, all records relating to such matter (including, but not limited to, any complaint, investigation report, attorney response, deposition or hearing transcript or other record of proceedings, and letter of caution

or similar comment) shall be retained for five years after the date of its disposition by the Office of Chief Counsel and then destroyed. A copy of the letter of caution, admonition, reprimand or similar comment shall be retained for ten years and then destroyed.

(e) **Indexes, Etc.** Any index or listing (including, but not limited to, any manual or machine-readable material that contains information relating to disciplinary matters, the identities of the complainant and/or respondent, the date opened and/or closed) shall be retained for fifty years after the date of its entry by the Office of Chief Counsel and then destroyed or otherwise eliminated from such index or listing.

(f) **Statistical Reports.** Any statistical report filed with the Office of Court Administration (including, but not limited to, Form UCS-145) shall be retained by the Office of Chief Counsel for one year after the date of its filing with the Office of Court Administration.

1500.29 Regulations and Procedures for Random Review and Audit and Biennial Affirmation of Compliance

(a) **Availability of Bookkeeping Records; Random Review and Audit.** The financial records required by DR 9-102 of the Code of Professional Responsibility shall be available at the principal New York State office of the attorneys subject hereto, for inspection, copying and determination of compliance with DR 9-102, to a duly authorized representative of the Court pursuant to the issuance, on a randomly selected basis, of a notice or subpoena by the Court or the appropriate departmental disciplinary committee.

(b) **Confidentiality.** All matters, records and proceedings relating to compliance with DR 9-102, including the selection of an attorney for review hereunder, shall be kept confidential in accordance with applicable law, as and to the extent required of matters relating to professional discipline.

(c) Prior to the issuance of any notice or subpoena in connection with the random review and audit program established by this section, the appropriate departmental disciplinary committee shall propose regulations and procedures for the proper administration of the program. The Court shall approve such of the regulations and procedures of the departmental disciplinary committee as it may deem appropriate, and only such regulations and procedures as have been approved by the Court shall become effective.

(d) Any attorney subject to the Court's jurisdiction

shall execute that portion of the biennial registration statement provided by the Office of Court Administration affirming that the attorney has read and is in compliance with DR 9-102 of the Code of Professional Responsibility. The affirmation shall be available at all times to the departmental disciplinary committees. No affirmation of compliance shall be required from a full-time judge or justice of the unified court system of the State of New York or of a court of any other state, or of a federal court.

1500.30 APPENDIX OF FORMS

(a) **Appendix A: Form of Pre-Hearing Stipulation**

[VENUE AND CAPTION]

(1) amendments;

(2) claims or defenses abandoned;

(3) undisputed facts:

(i) facts not in dispute as to Staff's Counsel's case;

(ii) facts not in dispute as to the Respondent's case;

(4) facts in dispute:

(i) the Staff Counsel's contentions;

(ii) the Respondent's contentions;

(5) documents to be offered in evidence during the hearing:

[All documents (including schedules, summaries, charts and diagrams] to be offered [other than those to be used for impeachment or rebuttal) are to be listed in the stipulation with a description of each sufficient for identification. The documents are to be premarked by counsel, and, to the extent practicable, such markings are to be in the sequence of which the documents will be offered. If illegible or handwritten documents are to be offered, counsel shall include a typed version of the document.

Objections as to authenticity must be made in this stipulation or else they shall be deemed waived. Counsel are directed to exchange copies of their exhibits within two business days prior to the scheduled hearing.

Counsel offering an exhibit shall provide copies for the special referee and opposing counsel at that time. Witnesses to be called in rebuttal or for impeachment purposes need not be identified in this stipulation.]

(i) staff counsel will offer the following numbered exhibits;

(ii) the respondent will offer the following lettered exhibits;

(6) witnesses to be called:

[Witness identification should include the witness' name and address, as wellas a brief statement of the overall scope of the witness' testimony. For example, if specific witnesses are to be called to substantiate particular claims or defenses on portions thereof, that should be noted. In addition, any witness being called as a character witness should be so designated.]

(i) by staff counsel;

(ii) by the respondent;

(7) statement of legal contentions and authorities;
[Only a brief statement of each contention is required, together with the principal authority relied upon; string cites are not necessary.]

(8) estimated length of hearing.

(b) **Appendix B: Form of Petition for Reinstatement**

(Applicant's Last Name)_____
(Date)_____

[VENUE AND CAPTION]

TO: THE APPELLATE DIVISION OF THE SUPREME COURT,
_____ JUDICIAL DEPARTMENT.

STATE OF NEW YORK)
)

COUNTY OF)

I, _____, hereby apply, pursuant to Judiciary Law, Section 90, and the Rules of this Court, for reinstatement as an attorney and counselor-at-law licensed to practice in all the courts of the State of New York. In support of my application I submit this petition, the form of which has been prescribed by this Court. Inapplicable provisions have been stricken and initialed by me.

1. My full name is _____. I have also been known by the following names _____. (If change of name was made by court order, including marriage, a certified copy of that order is attached.)

2. I was born on (date) at (city-state-country).

3. I reside at _____ (If you reside in more than one place, state all places in which you reside.)
My home telephone number is _____.
My office telephone number is _____.

4. On _____ I was admitted as an attorney and counselor-at-law by the Appellate Division of the Supreme Court of the State of New York, _____ Judicial Department.

5. By order of this Court, dated _____, I was disciplined to the following extent: _____. A certified copy of this Court's order is attached; this Court's opinion was published in the _____ volume, page _____, of the official reports (2d series) for the Appellate Divisions. My use of the term "discipline" hereafter refers to the action of this Court by the order here referred to.

6. Since the effective date of my discipline, I have resided at the following addresses _____.

7. The discipline imposed upon me was predicated upon, or arose out of, my misappropriation or misuse of the real or personal property of others. Attached to this application is a full listing of each property, its dollar value, the name of the true owner, and the extent to which I have yet to make full restitution. Where I still owe a party under this section, I have also attached a copy of a restitution agreement, signed by that owner and myself setting forth the terms of my repayment obligations.

8. On the date of my discipline, the following matters, which were not the basis of that order, were pending against me before the Departmental Disciplinary Committee (or its predecessor, then known as _____): _____.

9. On the effective date of discipline, I was also admitted to practice in the following courts/jurisdictions: _____ _____.

10. Based upon this Court's discipline of me, I also have been disciplined in the following way(s): _____.

11. In addition, dating back to my original admission to the bar up until the present, I have also been disciplined for other actions or activities, in the following ways: _____, _____ _____.

12. Prior to my discipline, my law practice involved the following areas of law: _____.

13. Since the effective date of my discipline, I have engaged in the practice of law in other jurisdiction(s), on the date(s) and in the manner specified: _____.

14. Since the effective date of my discipline, I have been engaged in the following legal-type or law-related activities: _____.

15. Since the effective date of my discipline I have had the following employment or been engaged in the following business (set forth names, dates, addresses) _____.

16. I am attaching copies of all federal, state and local tax returns filed by me for the past two years.

17. At the time of my discipline, I took the following affirmative steps to notify my clients of my inability to continue representing them: _____.

18. As required by the Rules of this Court, I filed an affidavit of compliance on (date).

-or-

I did not file an affidavit of compliance, as required by this Court's rules, because _____.

19. Since the date of my discipline, I have maintained the following bank accounts and brokerage accounts _____ __.

20. There presently exist the following unpaid judgments against me or a partnership, corporation or other business entity

of which I am an employee or in which I have an ownership interest _____.

21. Since my discipline, I or a partnership, corporation or other business entity in which I have an ownership interest, have/has been involved in the following lawsuits, to the extent indicated _____.

22. I, or a partnership, corporation or other business entity in which I have an ownership interest, petitioned to be adjudicated a bankrupt on _(date)_ to _(court)_.

23. (a) Since my discipline, I applied for the following licenses(s) which required proof of good character: _____.

(b) These applications resulted in the following action(s): _____.

24. Since my admission to the bar, I have had the following licenses suspended or revoked for the stated reason(s), unrelated to this Court's order of discipline: _____.

25. Since my discipline, on the date(s) specified I have been arrested, charged with, indicted, convicted, tried, and/or have pleaded guilty to the following violation(s), misdemeanor(s) and/or felony(ies): _____.

26. Since my discipline, I have been the subject of the following governmental investigation(s) on the specified date(s), which resulted in the charge or complaint indicated being brought against me: _____.

27. Other than the passage of time and the absence of additional misconduct, the following facts establish that I possess the requisite character and general fitness to be reinstated as an attorney in New York: _____.

28. I have made the following efforts to maintain or renew my general fitness to practice law, including continuing legal education and otherwise, during the period following my disbarment, removal, or suspension: _____.

29. I was treated for alcoholism and/or drug abuse on the date(s) and under the circumstances here set forth: _____.

30. The following fact(s), not heretofore disclosed to this Court, are relevant to this application and might tend by some degree to induce the Court to look less favorably upon this application: _____.

I UNDERSTAND THAT THE DEPARTMENTAL DISCIPLINARY COMMITTEE, THE COMMITTEE ON CHARACTER AND FITNESS, OR OTHER ATTORNEY AUTHORIZED BY THE COURT, MAY TAKE ADDITIONAL INVESTIGATIVE STEPS DEEMED APPROPRIATE IN ACTING UPON THIS

APPLICATION FOR REINSTATEMENT. I WILL FULLY COOPERATE WITH ANY REQUEST FOR INFORMATION AND MAKE MYSELF AVAILABLE FOR SWORN INTERVIEWS OR HEARINGS, AS REQUIRED.

_____ (Signature of Applicant)

Sworn to before me this ____ day of _____, 19__.

STATE OF NEW YORK)
)
COUNTY OF)

I, _____ being duly sworn, say: I am the petitioner in the within action; I have read the foregoing petition and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

Sworn to before me this ____ day of _____, 19__.

COMMENTS

1500.1 (Title, Citation, Application and Construction of Rules): Subdivisions (b) and (c) are modelled on similar provisions found in the Rules of the First Department.

Breadth of Application. Subdivision (b) is intended to express the breadth of the Rules' application. In practice, as a matter of proper venue rather than subject matter jurisdiction, the various departmental disciplinary committees will limit the exercise of their respective juridiction to the district or department in which the principal office of the repondent lawyer is maintained. If no such office is maintained, the appropriate venue is deemed the department in which the respondent lawyer last practiced or, if none can be ascertained, the department in which the lawyer was admitted.

Where a complaint is filed in a department that does not appear to provide the proper venue, staff counsel routinely transfer the complaint to the correct department. If a complaint is filed with a committee that would ordinarily handle the matter, but the Office of Chief Counsel and the Committee Chairperson believe that the complaint should be investigated or decided elsewhere, the appropriate procedure is to move the Court for a change of venue.

Nonprejudicial Error. Subdivision (c) is intended to underscore the purpose of the Rules as expressing a logical and fair method of proceeding, while recognizing the immateriality of nonprejudicial error in failing to follow the Rules in all particulars.

Availability of Other Sanctions and Remedies. Subdivision (d) is modelled on a similar provision in the Rules of the Second Department. It is intended to express the non-exclusive nature of sanctions and remedies imposed in disciplinary proceedings.

1500.2 (Definitions):

Private Action and Sanctions. Definitions 1 ("Admonition"), 20 ("Letter of Caution") and 28 ("Reprimand") are intended to make uniform various forms of private (as distinguished from public) action. Under the Rules, there are only three forms of private action, two of which (the admonition and the reprimand) are deemed to be professional discipline. Such devices as "letters of education" have been eliminated.

Letters of Caution were eliminated from the rules of the

First Department in May 1994. Although they continue to exist in all other departments, the Third Department views Letters of Caution as constituting professional discipline, while the Second and Fourth Departments do not.

Definition 20 makes explicit that a letter of caution does not constitute discipline and is to be issued only when, on the basis of the record before the Committee, it is unclear whether a disciplinary rule has been violated. Such letters may be issued only by the Committee Chairperson, and not by a local bar association grievance committee. Although letters of caution are not considered a form of discipline, they may be used in subsequent proceedings to determine the appropriate level of sanction which should be imposed, provided due consideration is given to the respondent's inability to obtain review of such letters, as well as according respondent an opportunity to place in the record any facts which respondent deems appropriate to a correct understanding of the letter and the circumstances attendant upon its issuance.

Committees. Definitions 5 ("Committee"), 15 ("Grievance Committee") and 21 ("Mediation Committee") are intended to regularize and make uniform the present confusing assortment of terms used to describe three essentially different kinds of committees. Definition 5 refers to the departmental disciplinary committee of which there are eight (one in the First Department; three in the Second Department; one in the Third Department; and three in the Fourth Department). These are the principal (and most broadly empowered) public agencies of discipline, wholly independent of bar associations in their administration. Definitions 15 and 21, on the other hand, refer to committees which are generally administered by private bar associations.

Forms of Complaint. Definitions 8 ("Complaint"), 12 ("Formal Charges"), 14 ("Grievance) and 16 ("Inquiry") are intended to make uniform and logically consistent the nomenclature used to describe the various forms of communication by which the departmental disciplinary agencies are informed of an attorney's conduct. All such communications when they are first brought to the committee's attention are deemed "inquiries" (that is, a communication about the conduct of an attorney which does not necessarily state a "complaint"). By recognizing and making uniform the custom in some departments to avoid calling such communications "complaints," we avoid the anomaly of dismissing a "complaint" for "failure to state a complaint."

The generic term for an initial communication with the agency (prior to any analysis or review of its content) is "grievance." Hence, a "grievance" which alleges misconduct cognizable by the agency is a "complaint," while a grievance which fails to allege such misconduct is dismissed and will thereafter be deemed merely an "inquiry."

When, after investigation, the allegations of a complaint are deemed sufficiently serious, the Committee may direct staff counsel to institute a formal disciplinary proceeding. That proceeding will seek to adjudicate "formal charges" of misconduct.

Degrees of Misconduct. Definition 22 ("Minor Misconduct") effectively serves to delineate that degree of misconduct which may properly be referred to local bar association grievance or mediation committees. More serious misconduct must be handled by the departmental disciplinary committee. Because the practical consequence of describing misconduct as "minor" is to allow it to be referred to a bar association committee, the definition is phrased in negative terms to focus on the kinds of significant misconduct which it is not intended to encompass. This produces a definition that fully delineates the kinds of misconduct which must remain with the departmental disciplinary committee.

In practice, minor misconduct should be understood to describe the relatively limited kind of behavior that should be referred to grievance or mediation committees. This would include isolated cases of simple neglect which do not cause signifcant loss, failure to respond to appropriate client inquiries, and similar lapses in conduct required by the Code.

Often, in practice, the cause of the grievance and the underlying lapse in cases of minor misconduct is seen to be a failure of communication or an inadequate understanding of the client's needs. Such matters are at times more appropriately handled in the context of mediation than professional discipline.

Showing of Probable Cause. Definitions 26 ("Petition Instituting Formal Disciplinary Proceeding") and 27 ("Probable Cause") respectively serve to describe the pleading mechanism and the burden of persuasion required to institute a formal disciplinary proceeding.

Integral to the petitioning process is the ability to request the Court for various forms of interim relief, including interim suspensions, expedited hearings and a variety of summary dispositions. Of course, such interim relief is to be made available only where warranted by the circumstances -- including proof of serious misconduct posing an imminent threat to the public. Understandably, the proof necessary for such relief is of a much higher degree of certainty than the mere probability required to institute any formal proceeding.

Committee Recommendations. The hearing panel contemplated by the proposed Rules is essentially similar to that currently employed in the Second, Third and Fourth Departments -- differing substantially from that used in the First Department in two important respects: (1) it would not undertake protracted

hearings in cases of serious misconduct; and (2) it would report to the full Committee (rather than directly the Court). Formal disciplinary proceedings before special referees (of the kind prescribed by proposed sections 1500.9 through 1500.12), rather than hearing panels, would be the principal means of adjudicating serious misconduct.

Court Appointees. Definitions 31 ("Special Counsel") and 32 ("Special Referee") serve to describe persons respectively appointed by the Court to prosecute complaints of misconduct and preside at formal disciplinary proceedings. Usually, the appointment of special counsel will be sought by the Office of Chief Counsel shortly after it has been determined that a complaint of misconduct has been alleged and that there exists some disqualifying conflict which precludes the Office of Chief Counsel from proceeding with investigation of that complaint.

1500.3 (Grounds for Discipline):

Former Standards Applicable to Past Misconduct. Section 1500.3 is modelled on a similar provision found in the Rules of the Second Department and is intended to carry forward disciplinary standards as they existed prior to September 1, 1990, for alleged instances of misconduct committed prior to that date.

Code Is Not Exclusive Standard for Discipline. Section 1500.3 serves to remind the Bar that the Disciplinary Rules contained in the Code of Professional Responsibility do not provide the only standards by which attorneys may be disciplined. Rather, the section recognizes the inherent power of the Court under Judiciary Law § 90(2) to create "other rule[s] or announced standard[s] ... governing the conduct of attorneys." For the sake of clarity and inclusiveness, unlike the Second Department rule, section 1500.3 also contains a reference to the so-called "automatic disbarment/suspension" rules of Judiciary Law § 90(4).

1500.4 (Types of Discipline; Subsequent Consideration of Disciplinary Action):

Section 1500.4 is intended, consistent with the new definitions set forth in the proposed rules, to make uniform various forms of discipline.

Private Discipline. Under the rules, there are only two kinds of private discipline: the admonition and the reprimand.

These forms of discipline can be imposed by the Committee without any action by the Court. When issued without referral to the Court, these two forms of discipline are usually considered identical in substantive degree. They differ procedurally in three respects. First, a reprimand is the form of discipline employed after a hearing, while an admonition is issued without a hearing. Second, a reprimand may be issued either orally on the record at the conclusion of a hearing or written in letter form; an admonition is always issued in the form of a letter. Third, and most significantly, a reprimand may be part of a process leading to more serious discipline being imposed by the Court.

The proposed rules eliminate two kinds of dispositions currently in use and restore a form of disposition recently eliminated by one of the departments. Specifically, the Rules would eliminate dispositions known in the Second Department as "Dismissals with Advisement" and in the Third Department as "Letters of Education," while restoring Letters of Caution to the First Department.

Except in the Third Department, Letters of Caution were never considered a form of discipline. Letters of Education in the Third Department were, and are still today, considered the functional equivalent of Letters of Caution in the other departments. Dismissals with Advisement, which exist only in the Second and Fourth Departments, are viewed as being even less significant than Letters of Caution.

To achieve uniformity, it is necessary for the rules to add one or the other of these forms of comment to the other departments' procedures or to eliminate them entirely. The proposed rules reflect a decision to eliminate them because the Letter of Caution can be made to serve the same function as Letters of Education and Dismissals with Advisement.

Letters of Caution could be restored because the proposed rules should now satisfy the due process concerns which apparently caused the First Department to eliminate such letters in May 1994. Thus, the Rules greatly restrict the use of such letters in subsequent proceedings and a more appropriate method for their review has been created.

Public Discipline. Public discipline (i.e., censure, suspension and disbarment) is continued under the Rules as the exclusive province of the Court. Such discipline can only be imposed by formal disciplinary proceedings, whether instituted on the basis of the Committee's recommendation after informal proceedings or as the consequence of a summary proceeding or an application for interim relief.

Consideration of Respondent's Disciplinary History. Section 1500.4 also addresses the extent to which a respondent's

disciplinary history may be considered in subsequent disciplinary proceedings. The Section makes explicit that previously imposed discipline may be considered both in deciding whether discipline should be imposed and in assessing the degree of sanction that may be imposed.

However, where the prior discipline is considered in adjudicating charges of misconduct, the same will only be admitted to the extent permitted by New York's law of evidence. Thus, prior discipline may be used as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident. Cf. ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11(D)(5). Such cases would encompass situations where the prior discipline is an element of the subsequent misconduct (e.g., where a respondent's misconduct consists of a violation of the terms imposed by a prior disciplinary order). Consistent with New York law, prior discipline could not be used to establish a respondent's "propensity" for misconduct. See, e.g., People v. Molineux, 168 N.Y. 264 (1901).

This proposal would mark a significant change in some departments which limit consideration of a respondent's disciplinary history to deciding the degree of sanction to be imposed or do not currently permit consideration of a respondent's disciplinary history in deciding whether there has been misconduct in relation to a subsequent complaint. It would also change existing practice in some departments to the extent of permitting consideration of letters of caution.

Subsequent consideration of letters of caution may create unique problems of due process in light of a respondent's limited ability to have them reviewed. Although the First Department eliminated letters of caution in May 1994, we propose to continue their use. However, because it appears that the First Department does not consider it feasible to review such letters, we have accommodated this concern by limiting the conditions under which such letters may be considered in later proceedings.

Section 1500.4 thus recognizes that letters of caution (although technically not deemed a form of discipline) may be considered; however, because of the limited opportunity to review or comment upon the issuance of such letters, their use in subsequent proceedings is subject to significant limitations, as well as the repondent's right to place in the record matters which may not previously have been considered. The most significant of the limitations on the use of letters of caution is set forth in the third sentence of subdivision (c) ("The issuance of a letter of caution may be considered only to the extent of demonstrating that a respondent was on notice that certain behavior would constitute professional misconduct, where such behavior is the subject of the subsequent proceeding").

Also, for reasons of due process and because of the lack of uniformity among the various departments (and even within some of the departments, at different times), in considering a respondent's disciplinary history, subdivision (c) requires that "due consideration ... be given to the extent to which the issuance of an admonition or a reprimand then could be, or had been, reviewed, whether by the Committee or the Court." Where there was no review, subdivision (c) allows the respondent "an opportunity to state his or her ability to seek review of the prior determination and to explain or otherwise comment upon the issuance of such sanction."

1500.5 (Investigations, Discovery and Screening):

Section 1500.5 is an adaptation of a similar provision found in the Rules of the First Department to procedures generally modelled on those of the other three departments.

More Involvement of Complainant and Committee. The principal changes would require: (1) more involvement of the complainant in those matters where investigation is deemed warranted; (2) more consistent documentation and review of recommended dispositions; and (3) Committee action on all informal dispositions other than those relating to grievances dismissed for lack of jurisdiction or failure to state a complaint.

Screening and Fee Disputes. Where a matter is determined to relate solely to the reasonableness of an attorney's fee, and it is not apparent on the face of the grievance that the fee is excessive, the file should be closed. The matter should not be referred for to a mediation committee of the kind established by section 1500.23 of these Rules. Rather, where local bar associations have established fee mediation committees or the rules of court require that certain kinds of fee disputes be arbitrated, the parties should be so advised and encouraged to seek the help of such other agencies to resolve their dispute.

1500.6 (Motions Pending Investigation):

Availability of Motions Made Explicit. Section 1500.6 is intended to make explicit the availability of motions pending investigations. The reference to protective orders is adapted from a similar provision found in the Rules of the Third Department. Although all departments accord similar rights to respondent attorneys, only the Third Department rules make their availability explicit; and, even there, only to the extent of

recognizing the respondent's right to seek a protective order.

Motions in Conformity with Civil Practice. The service of motions will ordinarily conform to analogous provisions of the Civil Practice Law and Rules, except that any filing to be made with the Court will be through its confidential clerk.

No Automatic Stay of Proceedings. Although section 1500.6 recognizes the possibility of obtaining a stay of all proceedings, the stay is not automatic and should not be issued without a substantial showing of irreparable injury.

1500.7 (Disposition Without Formal Disciplinary Proceedings):

Section 1500.7 is an adaptation of procedures currently used in the Second, Third and Fourth Departments.

Informal Discipline Requires Concurrence of Committee. What is proposed by section 1500.7 differs from the procedures now used in the First Department in that: (1) staff counsel would no longer be able to impose professional discipline with the concurrence of only one member of the committee; (2) the full committee would be consulted when it is proposed to hold hearings; (3) the hearing panel would report its recommendations to the full committee; and (4) professional discipline could be imposed only with the concurrence of a majority of the committee.

The "majority" of the disciplinary committee required to act is a simple majority of those in attendance constituting a quorum, but no less than one-third of the full Committee.

Hearings Would Not Usually Be Required. The hearings addressed by this section are "informal" in the sense that they are held without leave of the Court or the issuance of formal charges. Experience has shown that, in most cases, hearings will not be necessary. Usually, they are employed where there is a potential for referring the matter to the Court with a request for the institution of a "formal disciplinary proceeding."

1500.8 (Notice and Review of Disposition Without Formal Disciplinary Proceedings):

Section 1500.8 is an amalgam of the notice and review procedures now used to some extent in all four departments.

Notice to Complainant. The proposed procedures would generally recognize the right of a complainant to be informed concerning the disposition of his or her complaint. They would also establish clear and certain methods for a respondent to obtain review of letters of caution, admonitions and reprimands.

Review of Informal Dispositions. Because letters of caution are not deemed professional discipline, the ability of a respondent to obtain review is understandably more limited than in the case of admonitions and reprimands. Where a letter has been issued without a hearing, the repondent may ask for reconsideration; but, where a letter is issued after a hearing, the respondent is only allowed to submit a written response to the letter for the file.

Although respondents are allowed to petition the Court for review of admonitions and reprimands, the procedure is not without substantial risk to those who would do so frivolously. The Court, on review of the record, may impose any "other discipline" that it deems warranted.

1500.9 (Formal Disciplinary Proceedings; General Provisions):

Sections 1500.11 through 1500.12 describe the procedures applicable to formal disciplinary proceedings. Such proceedings are generally reserved for the most serious charges of misconduct and can result in public censure, suspension or disbarment.

Expedited Hearings. A novel provision found in Section 1500.9 would permit an application to the Court for hearings to be held on an expedited basis where a determination is made that "the misconduct in question poses an immediate threat to the public." In theory, such an application might be coupled with a request for an interim suspension under section 1500.13.

Summary Dispositions. Another provision found in Section 1500.9 which may seem novel to three of the departments would allow an application to be made for summary disposition of certain charges of misconduct. The provision is partly based on recent case law applying principles of collateral estoppel to the realm of professional discipline and is generally similar to a provision adopted by the First Department in May 1994. The proposed rule -- consistent with case law -- would give res judicata effect to certain determinations made in civil litigation in the same manner that all four departments have long treated criminal convictions. Since the burden of proof required in disciplinary proceedings is a "fair preponderance of the evidence," the more exacting burden required for a criminal conviction is not considered necessary to permit a summary disposition.

1500.10 (Formal Disciplinary Proceedings; Pleadings and Preliminary Procedures):

Commencement of Proceedings. For the most part, section 1500.10 is an adaptation of procedures currently used in the

Second, Third and Fourth Departments. It differs from the procedures now used in the First Department in that: (1) staff counsel would no longer be able to issue formal charges and commence formal disciplinary proceedings with the concurrence of only one member of the committee; (2) the full committee would be consulted when it is proposed to bring formal charges; (3) leave of Court would be required to commence such proceedings; and (4) a special referee (rather than a volunteer panel) would preside at the hearing.

Confidentiality of Proceedings. Section 1500.10, if adopted, would permit public hearings in most cases where formal disciplinary proceedings are held. In theory, the philosophical trigger for opening the proceedings to the public would be a determination made by a single justice of the Court, on a case by case basis, that the public interest would be served by such action. Factors militating against an open proceeding might include the interest of the respondent's clients in maintaining confidentiality or the improbability that others would be harmed by the respondent during the pendency of the proceedings.

Adoption of this proposal would not require an act of the Legislature. Rather, the proposal builds on the discretion presently vested in the Court by Judiciary Law § 90(10):

> "[U]pon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all of any part of such [confidential] papers, records and documents. * * * In furtherance of the purpose of this subdivision said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary."

Because the Judiciary Law vests discretion in "the Court," there is some question as to whether the single justice who decides that there is sufficient basis in the evidence to warrant opening the proceedings has the authority when acting alone to make such an order. The drafters of the proposed section 1500.10 believe that a fair reading of the statute permits such a construction. If it were otherwise, alternatively, the collective "Court" could make an order based on the findings of the single justice.

Notice to Respondent and Opportunity to Be Heard. Current practice in most departments assumes that probable cause for the commencement of a disciplinary proceeding will be based upon the "available facts." Only the Fourth Department requires that a respondent be given "a clear opportunity to be heard" before formal proceedings are commenced. In the First Department, there is no articulated standard of probable cause, and formal charges can be filed with the concurrence of one member of its so-called

"Policy Committee." As long as there is no possiblility that the commencement of formal proceedings will trigger public disclosure of the charges, the absence of an opportunity to be heard in three of the four departments is acceptable.

However, where public disclosure of the charges is sought, fairness would seem to require far more of an opportunity to be heard than current procedures in most departments presently allow and, further, that those procedures be articulated clearly. Proposed section 1500.10(c) is intended to fill that need.

The proposed rule recognizes three exceptions from its requirement that the respondent be accorded an opportunity to be heard on the issue of opening the proceedings: (1) where there are grounds to seek an "interim suspension"; (2) where the respondent has been convicted of a so-called "serious crime"; and (3) where the proceedings might "otherwise" be opened under existing case law.

The first exception means nothing more than, in practice, an interim suspension will be sought whenever grounds therefor exist. Once an interim suspension is granted, the fact of the respondent's suspension may be publicized and all proceedings thereafter will be open to the public. Under present practice, although the fact of the respondent's suspension may be publicized, the subsequent proceedings themselves are closed and its records remain sealed unless and until there has been a final determination of misconduct by the Court.

The second exception recognizes the obvious fact that once there have been criminal proceedings the respondent's reputation has been compromised to the extent that there is a public record of his or her crime. It differs from present practice in two respects. First, the criminal record may be far more limited in its scope than the subsequent disciplinary proceeding; and, therefore, in some cases opening the latter proceeding may have the effect of publicizing far more than the crime itself. Second, under present practice it has happened that the court (most notably in tax cases) will ultimately impose only a so-called "private reprimand" or "private censure" notwithstanding the respondent's conviction of a serious crime.

The third exception merely recognizes that, over the years, the courts have developed a case law doctrine of when they will find "good cause" for opening the proceedings, and that the proposed rule is not intended to disturb either that doctrine or its subsequent development case by case.

Compensation of Special Referee. The Rules assume that (contrary to present practice) the compensation of these individuals will be provided from the Court's budget, rather than the Office of Chief Counsel. Whether viewed in terms of

appearances or actual conflicting interests, the present practice must be changed. It is simply unacceptable to have one of two contending advocates responsibile for the compensation of the person designated to hear the matter.

Moreover, where circumstances warrant expedited handling, the Committee and the Office of Chief Counsel must be able to recommend the appointment of a special referee who can sit from day to day without fear of its impact on the Office's budget. When the Court selects a sitting judge as the special referee, no additional compensation is required: the judge will handle the matter in the normal course of his or her duties. However, usually, when a sitting judge is appointed as a special referee, the press of his or her other judicial duties precludes having day to day hearings. For this reason, when an expedited hearing is needed, ordinarily a retired judge or judicial hearing officer is appointed; but, such appointments require additional compensation.

At present, the budget for the Office of Chief Counsel includes such funds; and the Office processes all requests for payment by the special referee. The solution is to move that budget item from the Office of Chief Counsel to the Court, and then have the Court process all requests for payment.

1500.11 (Formal Disciplinary Proceedings; Conduct of Hearing):

Section 1500.11 generally follows the procedures set forth in the Rules of the First Department, modified to comport with the exclusive use of special referees as hearing officers.

Procedural Guidelines. The various procedures established by this section, including its reference to New York's law of evidence, should be viewed merely as guidelines to enhance speed and substantive fairness. They are neither absolute nor jurisdictional, and should be applied with reason. Where procedural errors are committed, the same shall be deemed of no consequence unless they materially prejudice the rights of the parties.

Burden of Proof. New York State is among a minority of jurisdictions that use the civil litigation "fair preponderance" standard. The proposed rule continues this standard, notwithstanding some suggestion that New York should move to the more widely used standand of "clear and convincing evidence." One advantage of maintaining the current standard is the ability to give collateral effect to findings made against a respondent in related civil litigation.

1500.12 (Formal Disciplinary Proceedings; Concluding Procedures):

Section 1500.12 generally follows the procedures which exist in the Second, Third and Fourth Departments.

Report and Recommendation. One significant difference between the recommended procedures and current practice is the proposed ability of the special referee to recommend a specific sanction. For many years, the hearing panels in the First Department have recommended sanctions which the Court is at liberty to accept or ignore. In most cases, the Court has accepted the panels' recommendations. Current practice in the other departments generally limits a referee's report to specific findings. Although it may be argued that a more consistent level of sanction can be maintained by the Court (because it will have the benefit of many more proceedings than any one referee), the proposed rule does not limit the Court's ability to do it; rather, the new procedure would only serve to provide the Court with more information and an informed perspective on an issue which is still left for the Court to decide.

Notification of Complainant. The proposed procedure would advise the complainant of any "final" action taken by the Committee or the Court. Where the Committee does not refer the matter to the Court for further proceedings, unless the respondent has indicated an intention to seek review of the Committee's determination, the Committee's action would be deemed final for purposes of the rule. The rule is intended to address the information that should be provided to the complainant about the disposition of the complaint; it should not be understood to limit the ability of staff counsel to communicate other information to the complainant where appropriate or necessary for the prosecution of the respondent. In all cases involving a non-public disposition, the complainant should be cautioned about the continuing expectation of confidentiality.

Awarding Costs. Among the various remedies and sanctions that the Court may impose under subsection (c) is an award of costs. Although the proposed rule does not specifically address the amount of costs to be awarded, it is anticipated that the Court would establish a fixed charge in the range of $300 to be awarded to the prevailing party in most cases. How the Court determines whether there should be an award of costs in any given case may require the Court to assess the number and gravity of the charges made against the number and gravity of the charges sustained.

1500.13 (Suspension Pending Consideration of Charges):

Section 1500.13 is derived from the rules of the Second,

Third and Fourth Departments. It is intended to be applied in a manner consistent with the standards announced by the Court of Appeals in Matter of Russakoff, 79 N.Y.2d 520 (1992).

Grounds for Interim Suspension. The stated grounds for an interim suspension include "uncontroverted evidence" of serious misconduct. That term does not require the functional equivalent of an admission or default in responding. Rather, the term is meant to describe the respondent's inability to come forward with evidence that is legally suffient to controvert, or raise a triable issue, with respect to the charges.

Application and Order. The order should specify whether or to what extent further proceedings against the respondent will be deemed confidential. Usually, both the Court's decision to grant an interim suspension, as well as all disciplinary proceedings thereafter, will not be deemed confidential.

1500.14 (Attorneys Convicted of Serious Crimes; Record of Conviction as Conclusive Evidence):

Section 1500.14 is generally consistent with the policies adopted by all four departments.

Special Referee to Preside at Hearing. The proposal differs procedurally from current practice in the First Department to the extent that the proposed Rules abandon the First Department's unique hearing panel structure; instead, if hearings are to be held, they would be assigned to a special referee. The proposal differs textually from the rules of the Fourth Department in making explicit procedures which are not currently set forth in detail.

Interim Suspensions for Serious Crimes. Section 1500.14 incorporates the operative language of Judiciary Law § 90(4)(f) and explicitly provides for the interim suspension of attorneys convicted of serious crimes, unless that suspension is stayed by the Court "upon good cause shown." Consistent with the Judiciary Law, that stay may be obtained on application of the respondent or on the Court's own motion.

1500.15 (Discipline of Attorneys for Professional Misconduct in Foreign Jurisdiction).

Section 1500.15 is adapted from a similar provision in the Rules of the First Department. It is intended to avoid duplication of effort in retrying facts already determined by proceedings in a foreign juridisdiction. However, it does not

determine the level of sanction which the Court will impose.

Limited Defenses to Foreign Discipline. Subdivision (c) limits the kind of defenses that can be raised essentially to lack of notice, a clear failure of proof and behavior which would not be considered misconduct in New York. No other matters bearing upon the findings made in the foreign jurisdiction can be raised.

Court Has Option to Direct Hearing. In theory, while the Court has unlimited authority, it is expected that where the nature of the misconduct is such that it would not ordinarily be considered for formal disciplinary proceedings, the Court will direct that any hearings be held before the Committee. Where the misconduct appears to have been serious, the Court is more likely to direct that the hearing be held before a special referee.

1500.16 (Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated):

Section 1500.16 is derived from a similar provision found in the rules of the Second Department. The section addresses the three procedural contexts in which the mental incompetency of an attorney may brought to the Court's attention: (1) a judicial declaration of incompetency or an involuntary commitment to a mental hospital; (2) an accusation of a respondent's incompetency made by the Committee; and (3) a claim of incompetency by a respondent in the course of proceedings.

Judicial Declaration of Incompetency. Subdivision (a) recognizes the power of the Court to enter an order, on proof of a judicial determination of an attorney's incompetency, to enter an order immediately suspending the attorney from the practice for an indefinite period and until the further order of the Court.

Petition by Committee for a Declaration of Incompetency. Subdivision (b) authorizes the Committee to petition the Court to determine whether an attorney is incompetent. The provision does not require a pendant allegation of misconduct.

Claim of Disability by Respondent. Subdivision (c) recognizes an "addition to drugs or intoxicants" as a cause of disability in addition to "mental infirmity or illness." The claim (or admission) by a respondent is sufficient to authorize the Court to suspend the respondent "until a determination is made of the respondent's capacity to continue the practice of law."

1500.17 (Resignation by Attorney Under Disciplinary Investigation):

Admission of Inability to Defend Is Required. Section 1500.17 is an adaptation of provisions currently found in the rules of the First, Second and Third Departments. It proposes no significant change from current practice where an attorney seeks to resign while under investigation. The respondent attorney is not required to admit the misconduct with which he or she is charged, but only that he or she could not defend against such charges.

Committee Recommendation to Court. The request for permission to resign would be reviewed by an attorney member of the departmental disciplinary committee who would prepare a recommendation for the committee to forward to the Court. The proposed procedure assumes that, consistent with current practice, staff counsel would have a significant role in the preparation of the committee's recommendation.

1500.18 (Nonabatement of Disciplinary Proceedings):

Section 1500.18 combines provisions relating to pending litigation from the First Department with concepts of restitution in the Second and Fourth Departments.

Discretion to Proceed. The basic policy is that disciplinary committees should be able to proceed notwithstanding the existence of related litigation, the fact of restitution or a complainant's unwillingness to cooperate. Whether or to what extent such factors may influence the decision to proceed with the investigation or prosecution of a particular matter is left to the sound discretion of the departmental committee and its staff.

Protection of the Public Is Paramount. In many cases which do not pose a significant risk of harm to the public, it may be prudent to await the outcome of pending litigation. This is certainly the case where the complaint relates to activities that are the subject of pending civil litigation and significant issues of fact remain to be resolved. Throughout, the question of whether to proceed will be seen as a matter of recognizing the paramount interest in protecting the public from misconduct and the need to allocate limited resources in that effort.

1500.19 (Conduct of Disbarred, Suspended or Resigned Attorneys; Abandonment of Practice by Attorney):

Section 1500.19 is adapted from similar provisions found in the rules of the Second and Third Departments, and is generally consistent with the practice in all four departments.

Emphasis on Client Protection. Section 1500.19 carries forward present practice in seeking to protect clients of the atorney who has been disbarred or suspended. It also makes uniformly explicit the requirement that a court pass on the appropriateness of any fees received by the attorney after the effective date of disbarment or suspension.

Affirmative Action Required. A disbarred or suspended attorney is required to take action to notify his or her clients and others of the disbarment or suspension.

1500.20 (Application for Reinstatement):

Section 1500.20 is essentially new, albeit derived from a variety procedures currently in use.

Suspensions of Less Than Six Months. The concept of automatic reinstatement where an attorney has been suspended for a period of less than six months is borrowed from the First Department. Where an attorney has been suspended for a period of six months or less, no application for reinstatement need be made because the order of suspension issued by the Court will provide for a date of reinstatement. In all other cases of suspension or disbarment, an application for reinstatement must be made.

Inquiry About Restitution. The notion of requiring specific inquiry as to whether restitution has been made simply makes explicit current practice.

Court Has Option on Reference. Providing the Court with an option of referring the matter to the Committee on Character and Fitness or a special referee to hear and report represents an adaptation of procedures currently employed in the Second Department.

1500.21 (Structure, Composition and Membership of the Departmental Disciplinary Committees):

Committee Composition Unchanged. Section 1500.21 permits each of the eight disciplinary committees to retain their present

composition, but makes uniform the terminology used to describe their function and relation to the courts. At present, only the Second and the Fourth Departments use the term "Grievance Committee"; the First Department is the "Departmental Disciplinary Committee," and the Third Department refers to its corresponding body as the "Committee on Professional Standards." Complicating the nomenclature even further, many local bar associations also maintain their own grievance committees to investigate minor misconduct.

The proposed rules refer to each of the eight official agencies as a "departmental disciplinary committee" to emphasize that its authority is derived from a certain department of the Appellate Division. In the Second and Fourth Departments, where there are three such committees, the official designation would add a reference to the specific districts within their jurisdiction (e.g., "Departmental Disciplinary Committee for the Second and Eleventh Judicial Districts").

Some Functions Reassigned. Although the rules essentially permit the principle of local option and experience to determine the composition of the disciplinary committees, the rules will perforce have the effect of reassigning some of their traditional functions to newly proposed subcommittees, as well as individual committee members and committees of the whole. For example, in the First Department, the traditional roles of its Policy Committee and hearing panels have been reassigned to different persons or bodies within the committee.

Voting Requirements and Vacancies. The voting requirements for committee action have been slightly ameliorated to avoid undue delay in the disposition of cases because of an occasionally low attendance at meetings of the full committee.

It is an understandable irony that many of those lawyers most qualified to serve on such committees are also their busiest members and, therefore, will be obliged on occasion to miss some meetings.

Although the proposed rules do not make explicit provision for habitual absenteeism, it is expected that when the committee's chairperson informs the Court a continued absence of a particular member, the Court will promptly declare a vacancy and appoint a replacement.

1500.22 (Appointment and Duties of Staff Counsel):

Section 1500.22 is an amalgam of various provisions adapted from the rules of all four departments.

Independence of Staff Counsel. The proposed rules are

generally intended to reinforce the independence of staff counsel, while acknowledging their role as advocates and eliminating those instances where that role may compromise the integrity of the adjudicatory responsibilities of the committee.

Office of Chief Counsel. All administrative responsibilities for the supervision of staff devolve on the chief counsel. Correlative to these responsibilities is the duty to report appropriately on the operation of the office. To that end, subdivision (c)(4) contains a non-exhaustive list of subjects about which the chairperson and the Court should be periodically informed.

1500.23 (Appointment, Status and Duties of Special Counsel):

Section 1500.23 provides for the appointment of special counsel when the Office of Chief Counsel is precluded from undertaking a matter because of some disqualifying conflict.

Independence of Special Counsel. Contrary to present practice, when special counsel is appointed, under the proposed Rules, he or she would be independent of the Office of Chief Counsel. Of course, where consent of the respondent can be obtained, it would normally be preferable to move the entire case to another office, rather than require appointment of special counsel.

Eliminated from the Rules is the notion of appointing as special counsel volunteer lawyers simply to relieve the case load of the Office of Chief Counsel. Such notions are essentially throwbacks to a time when the private bar processed grievances under a broad grant of authority from the courts and there were no professional staff lawyers. What began as a temporary expedient to relieve an extraordinary backlog in one of the Departments, has become a permanent (and ever-expanding) part of its process. The proposed Rules are intended to reverse the trend and to reassure the public of consistent prosecutorial standards, independent of private concerns or the appearance of compromising influences.

Change of Venue on Consent as Alternative. Of course, where consent of the respondent can be obtained, it would normally be preferable to move the entire case to another office, rather than require appointment of special counsel. When the Office of Chief Counsel learns of a disqualifying conflict, it should request the committee chairperson to designate a committee member to explore with the respondent his or her willingness to consent to a different venue.

1500.24 (Appointment, Status and Duties of Local Bar Association Grievance Committees):

Section 1500.24 is generally modelled on the system of local bar association grievance commitees which exists in the Second, Third and Fourth Departments. But, there are some significant differences proposed.

All Misconduct to Be Screened. Consistent with the practice which today obtains in the Second Department, the proposed procedures require that any grievance coming to the attention of a local bar association committee will be forwarded for screening to the Office of Chief Counsel. The work of the grievance committee will thus be limited to such matters as are referred to it by the Office of Chief Counsel.

Only Minor Misconduct to Be Referred. Section 1500.24 is to be read in conjunction with the definition of "minor misconduct" set forth in section 1500.2(a)(22), mindful that repeated instances of such misconduct cannot be referred.

1500.25 (Appointment, Status and Duties of Local Bar Association Mediation Committees):

Section 1500.25 is generally modelled on a mediation program used in the First Department.

Supervision of Mediation Program. Upon resolution of a complaint referred to a mediation committee, the mediation committee is required to forward to the Office of Chief Counsel a brief letter or memorandum stating the result of the mediation. Ordinarily, the decision to close a file would be made by the mediation committee; and that decision would not be reviewed unless the complainant requested the Office of Chief Counsel to do so.

Repeated Misconduct. Section 1500.25, like section 1500.24, limits the kinds of matters that may be referred in two ways. The complaint itself must be deemed to allege only "minor misconduct"; and the respondent can have "no significant disciplinary history." The second criterion is intended to retain repeat offenders in the departmental disciplinary committee.

While the proposed rules do not fix a specific number of instances of prior misconduct which will require such retention, a respondent attorney who has previously been referred to a mediation committee, should more likely be referred to a grievance committee for the investigation of a subsequent complaint; and an attorney who has previously been referred to a grievance committee should more likely be retained by the departmental disciplinary committee.

1500.26 (Defense and Indemnification of Committee Members):

Section 1500.26 is modelled on a similar provision found in the rules of the Third Department. It serves to incorporate by reference the protections afforded by Public Officers Law § 17.

Protection Extended to All Volunteers. Section 1500.26 serves to clarify the present uncertain status of volunteers working on disciplinary matters in connection with bar association administered grievance and mediation programs.

Related Bar Association Activities Also Covered. Consistent with court appointment of their members, the section now makes clear that both those persons and the associations themselves (to the extent of their grievance and mediation activities) are entitled to be defended and indemnified.

1500.27 (Communications with Other Disciplinary Agencies):

Section 1500.27 is new. It derives from an often expressed need on the part of disciplinary counsel to know a respondent's disciplinary history in the investigatory stage of a complaint.

Need to Identify and Track Repeat Offenders. The proposed rule is intended to facilitate the identification and tracking of repeat offenders. At times, the geographical limits which each committee has placed on its jurisdiction permits some attorneys to avoid early detection of their disciplinary history. It is intended that the proposed rule will operate to secure this information shortly after files are opened for investigation.

Limited Access to Information. Because of the need to maintain confidentiality, the section contemplates that the information about pending complaints will not be released to any disciplinary agencies other than those New York State agencies referenced in the proposed rules.

1500.28 (Retention of Disciplinary Records):

Section 1500.28 is an adaptation of a uniform rule on record retention adopted by the Office of Court Administration.

Office of Chief Counsel to Maintain Custody of Records. The rule requires that various disciplinary records be "retained" by the Office of Chief Counsel for certain periods. Retention, in

this context, should be understood to mean custody and control, as distinguished from actual possession.

Uniformity in Record Retention. Consistent with the policy adopted by the Office of Court Administration, in addition to requiring that various records be retained, it also requires that certain records be destroyed after stated periods of time.

1500.29 (Regulations and Procedures for Random Review and Audit and Biennial Affirmation of Compliance):

Section 1500.29 is adapted from the rules of the First and Second Departments.

Random Audit of Attorney Trust Accounts. There are sharp differences of opinion concerning the efficacy of random audits. Since September 1990, DR 9-102(H) of the Code of Professional Responsibilty has contained a provision that lays the predicate for a program of random audits.

Local Option. To date, only the First and Second Departments have adopted court rules which specifically address such audits. But, even in those two departments, the rules require the formulation and court approval of additional procedures before any such program can be implemented.

Section 1500.29 follows this last concept by recommending a uniform rule which would yet permit the various departments to exercise a local option in deciding whether or to what extent such programs should be implemented.

1500.30 (Appendix of Forms):

Section 1500.30 is an appendix of forms. It is intended to locate in one portion of the proposed rules those forms that are presently contained in the rules of some departments and, further, to facilitate the subsequent development of a more complete set of forms for use in connection with disciplinary proceedings.

Pre-hearing Stipulation. Appendix A is an adaptation of a form contained in the Rules of the First Department. It has been recast in language suited to statewide use.

Petition for Reinstatement. Appendix B is an adaptation of a similar form presently used in all four departments.