KRAUSMAN COMMITTEE REPORT

PUBLIC COMMENTS

TABLE OF CONTENTS

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44 STREET
NEW YORK, NEW YORK 10036-6689

COMMITTEE ON ALCOHOLISM AND SUBSTANCE ABUSE

WILLIAM HAMMOND
CHAIR
555 FIFTH AVENUE
NEW YORK, NY 10017
t. 212-984-7845
f. 212-972-9150
e. whammond@wbcsk.com

AVROM ROBIN
VICE-CHAIR
245 FIFTH AVENUE
SUITE 1900
NEW YORK, NY 10016
t. 212-683-8000
f. 212-683-9422
e. avrom@mindspring.com

IAN W. MacLEAN
SECRETARY
42 WEST 44TH STREET
NEW YORK, NY 10036
t. 917-374-6888
f. 914-771-8567
e. ianwmaclean@nysbar.com

November 4, 2004

Presiding Justice A. Gail Prudenti
Supreme Court of the State of New York
Appellate Division, Second Judicial Department
45 Monroe Place
Brooklyn, NY 11201

Re: Krausman Report on Attorney Admission and Discipline

Dear Justice Prudenti:

While our overall assessment of the Krausman Report is favorable and we look forward to working with you on your orientation program with respect to the resources available in the legal community to deal with alcohol and other substance abuse problems, we take exception to the recommendation of the Subcommittee on Reinstatement to disapprove the adoption of the "Bellacosa Rule," which authorizes the deferral of a disciplinary investigation or proceeding to enable an attorney to enter a monitoring program if he or she claims a disability due to alcohol or substance abuse.

The Subcommittee's decision is apparently based on its concern that with court-sponsored monitoring, the court would be perceived as holding out as competent to practice law an attorney who self-discloses that his or her misconduct was the direct result of alcohol or substance abuse problems, when there is some doubt as to that attorney's competence.

We believe your concern is misplaced based on our experience in monitoring. To date, we have monitored fourteen attorneys on behalf of the Departmental Disciplinary Committee of the Appellate Division, First Department. With respect to these attorneys, eight have successfully completed the monitoring program, four of whom continued to practice while being monitored and four of whom were reinstated following suspension. Five others are currently being monitored while continuing to practice. The conditions of the monitoring agreement include:

assignment of a trained monitor; regular attendance at 12 Step meetings or another abstinence based program; total abstinence from alcohol and drugs; random drug testing; regular contact with treatment programs and/or treating professionals; on a case-by-case basis, other recommendations that will monitor the attorney's good faith efforts toward recovery. While there can be no guarantee that an attorney in recovery will not relapse, it has been our experience that attorneys who have been accepted into the First Department monitoring program have a greater likelihood of continued sobriety than the recovery population in general. An attorney who has not already admitted that he is an alcoholic and demonstrated that he is committed to a program of abstinence will not be recommended for monitoring.

Our position is that alcoholism, substance abuse, addictive behavior, and psychological problems are treatable illnesses rather than moral issues. Our experience has shown that the only stigma attached to these illnesses is an individual's failure to seek help. The public is better served by encouraging these attorneys to seek treatment rather than continuing to practice while denying they have a problem. We believe it is the responsibility of the recovering legal community to help our colleagues who may not recognize their need for assistance.

We urge you to reconsider your objection to adopting a monitoring program.

Sincerely yours,

/s/

William E. Hammond

cc: Alan Rothstein, Esq.

BRYAN CAVE

Austin V. Campriello
Voice:212-541-2065
Fax: 212-541-1365
avcampriello@bryancave.com

October 27, 2004

Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104-3300
Tel (212) 541-2000
Fax (212) 541-4630
www.bryancave.com

Chicago
Hong Kong
Irvine
Jefferson City
Kansas City
Kuwait
Los Angeles
New York
Phoenix
Riyadh
Shanghai
St. Louis
United Arab Emirates (Dubai)
Washington, DC

And Bryan Cave,
A Multinational Partnership,
London

James E. Pelzer, Esq.
Clerk of the Appellate Division
Second Department
45 Monroe Place
Brooklyn, New York 11201

Re: Krausman Commission Report

Dear Mr. Pelzer:

I am a member of the Committee on Character and Fitness for the Second Judicial Department, Ninth Judicial District. I am writing with respect to two recommendations in the Krausman Commission Report.

First, I simply note that reasonable minds may differ on the efficacy of a term limit. There is a benefit in periodically injecting new blood into Committees. On the other hand, there is also a benefit in continuity and experience, particularly where readmission hearings are involved.

I do, however, object to the recommendation with respect to mandatory training in conducting interviews of applicants. Needless to say, whenever one objects to "continuing education" one is subject to attack on the grounds that he or she is purporting to "know it all" or is a troglodyte or both. But this recommendation is silly. If members of the Committee need to be trained in conducting interviews, they should not be members of the Committee in the first place. Moreover, I consider service on the Committee as a service to the profession. I am more than happy to commit my time to interviewing and evaluating prospective applicants and conducting hearings for suspended or disbarred individuals who are seeking readmission. However, I do not think I would be willing to devote time to attend a formal program on how to conduct a hearing or an interview.

I hope you find these comments helpful.

Very truly yours,

Austin V. Campriello

AVC:cfo

cc: Fred A. Bodoff, Esq.

PRBO/P005683/1192493

WINSTON & STRAWN LLP

35 WEST WACKER DRIVE
CHICAGO, ILLINOIS 60601-9703

43 RUE DU RHONE
1204 GENEVA, SWITZERLAND

CITY POINT
1 ROPEMAKER STREET
LONDON, EC2Y 9HT

200 PARK AVENUE
NEW YORK, NEW YORK 10166-4193

(212) 294-6700

FACSIMILE (212) 294-4700

www.winston.com

333 SOUTH GRAND AVENU
LOS ANGELES, CALIFORNIA 900

21 AVENUE VICTOR HUGO
75116 PARIS, FRANCE

101 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94

1400 L STREET, N.W.
WASHINGTON, D.C. 20005-3

ANTHONY J. D'AURIA
(212) 294-6707
adauria@winston.com

November 8, 2004

James Pelzer, Esq.
Clerk of the Appellate Division
Second Department
45 Monroe Place
Brooklyn, NY 11201

Dear Mr. Pelzer:

At a meeting of the Committee on Character and Fitness for the Second, Tenth and Eleventh Judicial Districts, held on November 5, 2004, which I chaired, the Committee unanimously approved a resolution expressing its disagreement with two recommendations in the Krausman Commission Report.

With respect to the recommendation to institute a two-term limit on Committee members, it was the Committee's view that the present system, which permits extensions after two four-year terms, should be retained due to the benefits in continuity and experience which are fostered by such an approach.

With respect to the recommendation concerning mandatory training in conducting interviews of applicants, the Committee adopted the views in opposition to the recommendations which were expressed by Mr. Bodoff, Executive Secretary of the Committee, and are contained in the Krausman Commission report.

Very truly yours,

Anthony J. D'Auria
Chairman

AJD:rg

04

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT

MEMORANDUM

DATE: 07/13/04

TO: James Edward Pelzer, Clerk of the Court

FROM: Robert Guido, Chief Counsel (tel. no. 631-231-3775 ext 202) RG

SUBJECT: Krausman Commission - Draft Report

I offer these brief observations (numbers in parentheses are references to the page in the draft report) :

1. The "Bellacosa Rule" authorizing diversion to a monitoring program (18,28)

This concept is widely supported by members of the Lawyers Assistance Trust and numerous Lawyer Assistance Programs throughout the state. It is a procedure now functioning in the Fourth Department alone. The rule leaves the Court with absolute discretion based upon the individual circumstances of each case. I vigorously urge the Court to closely examine and approve this innovative proposal.

2. Recommendations as to Sanctions and Plea Bargaining (11, 23)

I urge the Court to carefully consider the negative impact of any change in the process that draws Staff Counsel into the realm of advocating sanctions. From my perspective with the system since 1981, the Disciplinary Committees and its Staff Offices have worked diligently to achieve and foster a favorable, albeit imperfect, level of perception among the Bar and the Public: that regardless of the outcome, favorable or unfavorable, that the system has treated them fairly. Among the practicing Bar especially, it is absolutely vital that they have confidence that the Staff Counsel who administer the system, and who do the investigations and prosecutions, have no "agenda", and are fair and impartial in resolving facts and presenting evidence. As the system currently operates, one aspect that serves significantly to foster this confidence is the understanding that Staff Counsel never take a position on sanctions. Lawyers know we are charged with the responsibility of fact-finding and reporting to the Committee, and the prosecution of formal charges before the Court if necessary, but that our role ends there and the imposition of sanctions is a matter solely within province of the Justices. The initiation of both plea bargaining and having the Special Referee's make a sanctions recommendation will necessarily draw staff

counsel into the sanctions realm: plea bargaining expressly involves Staff Counsel in directly "negotiating" sanctions with the Respondent and/or his counsel; a Special Referee who intends to make a recommendation as to sanction may either invite both sides to argue the point or otherwise submit memoranda outlining discipline imposed in similar cases. I fear that once Staff Counsel crosses the line into advocating sanctions, it will dramatically change whatever perception of fairness we have attained with the Bar. Rather than viewed as fulfilling our mandate as fair and impartial fact-finders and prosecutors, we will become distrusted adversaries, charged with a responsibility to advocate measures specifically affecting their license, livelihood and lives.

Finally, if the concept of plea bargaining is approved, I observe an absence in the draft report of any specifics as to how it will operate procedurally, particularly regarding the stage at which the opportunity to plea bargain is triggered; i.e. during the investigation, before or after the Court authorizes charges to be brought, or after formal charges are served, etc.?

RPG:tbm

HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

November 4, 2004

James Edward Pelzer
Clerk of the Court
Appellate Division, Second Judicial Department
45 Monroe Place
Brooklyn, NY 11201

Dear Mr. Pelzer:

Enclosed please find a copy of our comments to the Second Department regarding the Krausman Report on the Department's Grievance Committees. For the Court's convenience, we have also faxed a copy of our comments. If you have any questions, please do not hesitate to call me at (202) 887-8255. Thank you for your attention to this matter.

Sincerely,

Suzanne Mishkin
Associate Counsel

1612 K STREET NW ■ SUITE 510 ■ WASHINGTON, D.C. 20006
(202) 887-8255 ■ (202) 887-9699 FAX ■ www.halt.org

HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

COMMENTS TO THE SECOND JUDICIAL DEPARTMENT OF NEW YORK FROM HALT – *AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM* RE: PROCEDURES OF THE GRIEVANCE COMMITTEES RECOMMENDED BY THE KRAUSMAN REPORT

The Report and Recommendations of the Committee to Review the Procedures of the Committees on the Grievance Committees of the Second Judicial Department, chaired by the Honorable Gabriel M. Krausman, was released on October 5, 2004. Pursuant to a request by the Second Department, HALT – *An Organization of Americans for Legal Reform* hereby submits comments regarding the Krausman Committee's proposed changes to the department's disciplinary rules.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our well-known Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve systems in place to weed out unethical lawyers and provide recourse to victimized legal consumers.

Most recently, HALT provided input to officials in Pennsylvania, New Jersey, New Hampshire, the District of Columbia, Arizona as they considered reforms for their respective systems of attorney discipline. As a result of our efforts and the dedication of disciplinary staff, we have seen a rise in nonlawyer participation on hearing panels, the abolition of disciplinary "gag rules" and increased satisfaction from client populations in those jurisdictions.

We congratulate the Second Judicial Department for appointing a committee to review its system of attorney discipline. We are pleased that the Krausman Committee has, in many cases, proposed thoughtful solutions to repair some of the problems plaguing the disciplinary body.

Specifically, we strongly support the Committee's recommendation to increase the number of competent Special Referees. Faster turn-around on written reports after the conclusion of a disciplinary hearing is also a welcome improvement. Providing referees with a copy of court rules would certainly assist them in meting out appropriate discipline.

We also congratulate the Committee for refusing to support a statute of limitations for filing a complaint against an unethical attorney because it can take years to discover a lawyer's misconduct. In addition, we believe that consolidation of informational pamphlets of the Second Department's three grievance committees is a good step toward alleviating a great

1612 K STREET NW ■ SUITE 510 ■ WASHINGTON, D.C. 20006
(202) 887-8255 ■ (202) 887-9699 FAX ■ www.halt.org

deal of confusion related to New York's bifurcated system. And finally, we support the Krausman Committee's proposal to allow complainants to be heard on a disciplined attorney's application for reinstatement.

We believe, however, that two of the Krausman Committee's proposals represent potential setbacks for the Department. First, we disagree with the Committee's opposition to the imposition of disciplinary costs on culpable attorneys because we believe that added funds would help shore up the Second Department's resources. In addition, we would like the Second Department to clarify the Krausman Committee's recommendation to reduce the minimum duration of suspension from one year to a mere six months. The Department should amend the proposal to indicate that the shorter suspension will be used to replace lesser forms of discipline, such as public censure, and the one-year suspension will continue to be used to sanction attorneys who have committed more serious violations.

Finally, HALT also urges the Second Department to take this opportunity to conduct a more far-reaching examination of the region's disciplinary system. In particular, we advise the Department to increase nonlawyer participation on hearing panels and bring the disciplinary system out into the open. Together with the Krausman Committee's recommendations, these proposals can help restore lost public trust in the system that oversees attorney conduct in southeastern New York.

I. HALT Supports Krausman Committee Recommendations that Offer Meaningful Protections to Legal Consumers.

The Krausman Committee issued a number of proposals that stand to create a more responsive, fair and prompt system for meting out lawyer discipline in the Second Judicial Department. By adopting these recommendations, the Second Department will bring itself more in line with its counterparts throughout New York and across the country.

Several of the Committee's proposals speak directly to the issue of fairness in the system. For example, one of the Committee's proposals states, "Do not adopt a rule effectively imposing a statute of limitations for making a complaint against an attorney." The Committee correctly concluded that such a statute of limitations would serve only to shield lawyers and prevent victimized clients from seeking recourse.

New York's Second Judicial Department's complicated attorney discipline structure confounds many consumers, and unfortunately, the Second Department hosts no Web site to explain the unique structure of its disciplinary system. With the substantial time it takes the average consumer to simply figure out the system, a statute of limitations would prevent many consumers from filing a complaint before the statute ran out. By adopting a proposal that bars a statute of limitations on attorney discipline complaints, the Committee has displayed a commitment to protecting legal consumers and creating an evenhanded discipline process.

The Committee also approved a proposal that directs that "all interested parties, including the complainants and other victims of a suspended or disbarred attorney's misconduct, receive notice of an application for reinstatement." Such a rule, which is already in place in New York's Fourth Judicial Department, would create an opportunity for the complainant to provide input in the reinstatement process. This aspect of the discipline process, currently shrouded in secrecy, urgently demands a measure of sunshine and transparency, which this proposal would provide.

The Committee's proposals that address the need for prompt handling of complaints against attorneys stand to reduce the considerable delays that currently plague the system. According to the American Bar Association's 2002 Survey on Lawyer Disciplinary Systems, it can take New York's Second Judicial Department as long as one year to file formal charges against an attorney, following the receipt of a complaint. The same study found that other states, such as Nevada, typically take as few as 60 days to file charges. The slow pace of discipline in New York's Second Judicial Department not only delays justice for victimized clients; while complaints languish, unethical attorney continue to take on new clients.

With its proposal that would "require Special Referees to complete and submit their reports to the court within 60 days after the conclusion of a disciplinary hearing," the Committee promises to provide a measure of relief for the problem of delay. By implementing deadlines such as this for processing complaints, disciplinary officials have an incentive to promptly respond to grievances. New York's Second Judicial Department should adopt and adhere to this deadline, while also adopting similar time standards for all stages of complaint resolution.

The Committee's proposal to "undertake a recruitment initiative, not limited to retired members of the judiciary, to increase the number of eligible and competent Special Referees," would increase the pace of the Second Judicial Department's discipline system. As presented in the Committee's report, "The subcommittee concluded that the disciplinary hearing process could be expedited by increasing the current pool of eligible Special Referees ... Expediting the process would have the concomitant effect of bolstering confidence in the system."

In addition to reducing delays in the system, this proposal also raises a critical point when it directs that recruitment efforts should not be solely aimed at retired members of the judiciary. The lack of public—or nonlawyer—participation on lawyer discipline hearing panels creates a system of self-regulation, which undermines public confidence and allows accused attorneys to answer only to their peers from the bench and bar. As the Second Judicial Department seeks to enlarge its supply of Special Referees, it should ensure that at least a majority of Special Referees on any hearing panel are nonlawyers.

Furthermore, all Special Referees should undergo extensive background checks and meet a rigorous set of ethical criteria. Those charged with the weighty responsibility of ridding the legal profession of its unscrupulous members must be impartial and well-qualified

for the task. By approving a proposal that would "provide a Special Referee with a copy of the court's rules when assigned to hear a disciplinary proceeding," the Committee showed a commitment to ensuring that Special Referees are competent and well-informed.

Finally, we support the Committee's proposal to "consolidate informational pamphlets of the three Grievance Committees into one uniform pamphlet," which would be an excellent step toward making the Second Judicial Department's discipline system more user-friendly and responsive to the general public. As it stands, the Second Judicial Department's system is overly-complex and a uniform pamphlet marks a first step toward eliminating consumer confusion. To build on this, the Second Judicial Department should also work to develop an easily-navigable Web site for legal consumers wishing to file a complaint against an attorney. Ultimately, New York should consider streamlining its entire attorney discipline system, to bring itself in line with every other state in the nation.

This set of proposals represents pro-legal consumer reform of the Second Judicial Department's lawyer discipline system. The Committee should be commended for its dedication to addressing features ranging from promptness and responsiveness to fairness and openness. These proposals, if adopted, will address the problems plaguing the region's discipline system.

II. HALT Urges the Second Department to Require Culpable Lawyers to Pay Disciplinary Costs and Clarify the Krausman Committee's Recommendation to Reduce the Minimum Length of Suspensions.

In a press release announcing the Krausman Committee's recommendations to the Second Department's disciplinary body, Justice A. Gail Prudenti of the Supreme Court, stated, "[W]e must act in ways that foster the public's trust and confidence in the legal system . . . ." ["Appellate Division, Second Judicial Department, Makes Report on Attorney Admission and Discipline Available to Public," October 5, 2004] Unfortunately, one of the Krausman Committee's recommendations fails to satisfy this important mission.

The Committee opposes the imposition of disciplinary costs on culpable attorneys. We strongly disagree with the Committee's position because we believe that the additional funds would bring urgently needed capital to the Second Department. As you may know, California recently passed legislation to require respondent attorneys to help fund disciplinary costs because legislators recognized the need for added resources in the state's badly underfunded discipline system. Under the new California law, attorneys who are the subject of a complaint are not automatically required to pay any fee; but if they are later found to have violated the state's professional conduct rules, they must pay disciplinary costs. We believe the Second Department would greatly benefit from adopting a similar rule.

According to the ABA's most recent statistics, grievance committees within the Department do not currently have adequate resources to investigate every complaint filed.

Some committees, including those in the Ninth District, are investigating less than one out of every three complaints. With added funds, the Second Department would be able to hire more staff to review more complaints, respond more efficiently to consumers, and fulfill some of the Krausman Committee's important proposals.

In addition, we believe that the Second Department should clarify one of the Krausman Report recommendations. The Committee proposes reducing the minimum duration of a suspension from one year to just six months. While we agree that some instances of misconduct only merit a six-month suspension, we urge the Department to clarify that the six-month suspension should be used sparingly and only under circumstances in which a public censure would have been applied under the previous rules. Year-long suspensions should continue to be applied in cases in which an attorney has been in flagrant violation of the Rules of Professional Conduct. A clarification the Committee's recommendation is necessary so that the shortened suspension option is not overused.

We urge the Second Department to require culpable attorneys to pay disciplinary costs associated with the proceedings that their misconduct produced, and we hope that the Department will take a closer look at a recommendation to reduce the length of minimum suspensions from one year to six months. These two items addressed in the Krausman Report warrant a reanalysis by the Department.

III. The Second Department Should Take this Opportunity to Conduct a More Comprehensive Overhaul of its System of Attorney Discipline.

At this time, a unique opportunity arises for the Second Department to go beyond the Krausman Report to ensure that all of the characteristics of the region's discipline system fulfill the Department's mission to protect the local client population. HALT's 2002 Lawyer Discipline Report Card – a comprehensive analysis of attorney discipline systems in all 50 states and the District of Columbia – reveals systemic problems that demand attention.

HALT's report card followed three decades of calls for reform. The 1992 American Bar Association McKay Commission declared the system "too slow, too secret, too soft, and too self-regulated." This study followed an earlier 1970 blue ribbon panel led by Supreme Court Justice Tom Clark that found the lawyer discipline system was in a "scandalous situation." After 30 years with only marginal improvement, it is time for discipline systems—including the Second Department's—to change.

Under HALT's Report Card, New York's disciplinary body, taken as a whole, fell within the worst 10 systems in the nation. The Second Department's results brought down New York's average to a shameful grade of D. In particular, HALT criticized the Second Department for failing to require more participation by nonlawyers on grievance subcommittees and for prohibiting the public, including complainants, from attending disciplinary hearings.

HALT hopes that the Second Department will use the Krausman Committee as a springboard to repair some of these critical problems facing the region's discipline system. As a starting point, HALT offers the following suggestions: (a) increased public participation in the disciplinary process and (b) expanded openness in disciplinary hearings.

We believe that these improvements would greatly strengthen the Second Department's discipline system and begin to restore lost public confidence in its ability to enforce lawyer accountability.

The Second Department should increase lay participation in the disciplinary decision-making process. Under the Department's current law, "each grievance committee shall consist of 19 members and a chairman, all of whom shall be appointed by this court and 16 of whom shall be attorneys . . . . Each grievance 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." See NY CLS Sup. Ct § 691.4.

Because only three out of 19 members of each grievance committee are nonlawyers, there are not enough nonlawyer members to ensure that every subcommittee is comprised of at least one lay person. The Second Department should increase the number of lay persons serving on grievance committees so that at least one nonlawyer can serve on every subcommittee that hears a complaint. This would bring the Department in line with nearly every other jurisdiction in the country, which require that at least one-third of every panel consist of lay persons.

A system in which attorneys preside as judge and jury over their colleagues is perceived as lenient and biased by the general public. The claim that nonlawyers are unqualified or insufficiently informed about the legal profession is wholly unfounded. Jurors with no special expertise regularly decide sophisticated questions and are trusted with far more weighty decisions, such as capital murder cases. We urge the Second Department to revise its disciplinary rules to ensure that at least one lay person serves on every grievance subcommittee.

In addition, in an era that places a premium on principles of sunshine and transparency, the Second Department's disciplinary system must come out into the open. Current New York law bars members of the public from attending disciplinary hearings. See NY CLS Sup. Ct § 691.4(j) ("all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential"). Unlike the vast majority of states, even the individual who files a complaint against an attorney is forbidden to attend the proceeding in which his complaint is heard. At best, this creates the appearance of impropriety, and in many cases, this prevents the grievance committees from learning the full set of facts. A victim would

never be prohibited from sitting in on a trial in the criminal justice system; there is no reason to exclude complainants from disciplinary hearings.

In addition, the general public should have a right to attend hearings held by the Second Department. In an age where principles of sunshine and transparency guide government proceedings, the Department's current rule is perceived as regressive. It also gives the public the notion that the disciplinary system has something to hide—hardly a perception that the Department hopes to propagate in light of its mission to protect legal consumers. We urge the Department to permit members of the public—and particularly, complainants—to attend disciplinary hearings.

By replacing a system designed to shield unethical attorneys with a more impartial set of procedures capable of meting out appropriate discipline, the Second Department could provide an appropriate balance of due process and consumer protection.

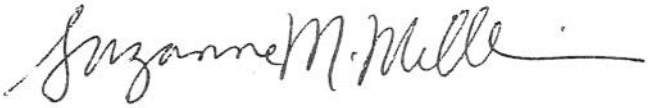
Conclusion

HALT strongly supports most of the Krausman Committee's recommendations. We do trust, however, that the Second Department will give further consideration to a proposal to require culpable attorneys to pay disciplinary costs for proceedings that their misconduct produced. We also hope that the Department will clarify the Committee's recommendation to reduce minimum suspensions from one year to six months. In addition, we urge the Department will take this opportunity to conduct a more comprehensive overhaul of the region's system of attorney discipline. The Department should allow more nonlawyers to participate in the disciplinary decision-making process and eliminate the secrecy pervading the system.

Because all who practice law have a shared responsibility in creating a discipline system that investigates promptly, deliberates openly and fairly, and weeds out unethical or incompetent attorneys, HALT encourages the Second Department to embrace these reforms. By addressing the shortcomings of the current system, we believe the Second Department can create a discipline system that engenders consumer trust and respect, rather than alienation and resentment.

Respectfully Submitted,

HALT – An Organization of Americans for Legal Reform



By: Suzanne M. Mishkin
Associate Counsel

New York Law Journal – Friday, Nov. 12, 2004

Report Misses Two Crucial Discipline Issues

As the Law Journal recently reported ("Report Recommends Changes in Attorney Discipline Process," Oct. 12, 2004, page 1), clients in downstate New York may have something to cheer about. A committee chaired by Appellate Division Justice Gabriel Krausman is in the midst of overhauling the Second Department's attorney discipline body — a system previously marked by a bewilderingly complicated structure and endless delay.

The 2002 Lawyer Discipline Report Card from HALT, an organization of Americans for legal reform, gave New York's disciplinary body, as a whole, a disgraceful 'D' and named it one of the 10 worst systems in the nation. Thankfully, the Krausman Report's recommendations address some of our concerns. Proposals include expediting the disciplinary process, consolidating the three districts' informational brochures and improving the caliber of disciplinary decision-makers.

Unfortunately, the report fails to address two of the Second Department's most critical deficiencies: an unusually low number of non-lawyers on hearing committees and its rule prohibiting the public, including complainants, from attending disciplinary hearings. In comments recently filed with the Department, HALT urged these important improvements.

In addition to errors of omission, two proposals in the Krausman Report stand to undermine the committee's efforts to restore the public's trust and confidence in the legal system. The committee opposes the imposition of disciplinary costs on culpable attorneys. HALT strongly disagrees with the committee's position because we believe that the additional funds would bring urgently needed capital to the Second Department. HALT also urges the Department to take a closer look at a recommendation to reduce the length of minimum suspensions from one year to six months. While we agree that some instances of misconduct only merit a six-month suspension, we urge the Department to clarify that the six-month suspension should be used sparingly and only under circumstances in which a public censure would have been applied under the previous rules.

All who practice law have a shared interest in creating a discipline system that is worthy of the public's trust and confidence. Do New York consumers deserve any less?

Suzanne Mishkin
Amy Dieterich
Washington, D.C.

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

COUNSELORS AT LAW
1505 KELLUM PLACE
P.O. BOX 803
MINEOLA, NEW YORK 11501-0803
516-741-6565
212-227-5511
FACSIMILE: 516-741-6706
E-MAIL: meyersuozzi@msek.com

ONE COMMERCE PLAZA
SUITE 1102
ALBANY, NEW YORK 12260
518-465-5551
FACSIMILE: 518-465-2033

1300 CONNECTICUT AVENUE, N.W.
SUITE 600
WASHINGTON, D.C. 20036
202-955-6340
FACSIMILE: 202-223-0358

1350 BROADWAY
SUITE 501
NEW YORK, NEW YORK 10018
212-239-4999
FACSIMILE: 212-239-1311

425 BROADHOLLOW ROAD, SUITE 405
P.O. BOX 9064
MELVILLE, NEW YORK 11747-9064
631-249-6565
FACSIMILE: 631-777-6901

A. THOMAS LEVIN
MEMBER OF THE FIRM
ADMITTED NEW YORK, FLORIDA, US VIRGIN ISLANDS
IMMEDIATE PAST PRESIDENT,
NEW YORK STATE BAR ASSOCIATION
DIRECT E-MAIL: atlevin@msek.com
DIRECT PHONE: 516-592-5704

November 1, 2004

Hon. A. Gail Prudenti
Presiding Justice
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11207

Re: Committee to Review the Procedures of the Committee of Character and Fitness and the Grievance Committees of the Appellate Division, Second Department.

Dear Justice Prudenti:

I have read the above report with great interest, and am constrained to offer one personal comment with respect to a proposal not contained in the report.

At page 14, the Committee states in a conclusory fashion that it considered whether costs of the disciplinary process should be imposed upon attorneys who are found to have engaged in improper behavior, and concluded that the process of computing and imposing such costs, and enforcing them, would strain the limited resources of the court "with little tangible benefit". I respectfully disagree, and urge further consideration of this idea.

At present, the costs of the disciplinary process are borne either by the general public or the overwhelming number of attorneys who do not commit misconduct. I suggest that it would be more appropriate to impose these costs upon attorneys who are found guilty of misconduct. This is already done in a number of states (including Florida, where I also am admitted to practice), and those states do not appear to have difficulty in computing the amount of costs. Furthermore, imposing costs has been found in those states to be effective from the point of view of punishment, from a fiscal point of view, and from the public information point of view.

It should not be difficult to establish a formula for the cost of disciplinary proceeding, which would enable calculation of the amount of cost to be imposed. If such costs were imposed as a condition of any disciplinary action, together with a rule requiring payment of the costs within a reasonable amount of time, the costs would be collected quickly and efficiently from all attorneys who receive reprimands, censures, and suspension. This would be particularly so if payment of the costs were a condition of ending the suspension. In the case of attorneys who are disbarred, the question whether to pursue a judgment for costs should be made on a case by case basis, so

that it can be fiscally effective, but in any event payment of the costs should be a condition in the event of any future reinstatement.

I am confident that it would be beneficial for the public to know that when an attorney is disciplined, the attorney not only receives appropriate punishment, but is also fined the amount of expense which is incurred to mete out that punishment.

Such a system would be effective, without adding any significant expense to the process, and would result in collections which would more than offset the small cost of administering the imposition of costs. Furthermore, the message which it would send would be welcome to members of the public, and to all those attorneys who do not commit misconduct, who are presently contributing to the cost of the disciplinary system. It is difficult to believe that there would not be a beneficial effect if the public were to know that attorneys found to have committed misconduct were being required to pay for the costs incurred by the public in imposing discipline.

I urge the adoption of a rule to impose such costs.

Sincerely yours,

A. THOMAS LEVIN

476531.1

JEFFREY LEVITT
ATTORNEY AT LAW
330 BROADWAY SUITE 2
AMITYVILLE, NEW YORK 11701-2740
631-789-3900
FAX: 631-789-3988

MEMBER OF NEW YORK AND FLORIDA BAR

SERVICE OF LEGAL DOCUMENTS
BY FAX IS NOT AUTHORIZED

October 22, 2004

Honorable A. Gail Prudenti
Presiding Justice of the Appellate Division
Chambers
210 Centre Drive
Riverhead, NY 11743

Re: Report on Grievance Procedures

Dear Judge Prudenti:

I did not know that the grievance inquiry was limited as indicated in its report and wrote to Justice Krausman, a copy of my letter to him being attached.

I think there is a lot more to do with regard to Grievance and the business of punishment is something that I contacted the Tenth Committee about that more than twenty years ago. There was a time when a minimum suspension was five years.

I think other attorneys thought that the Krausman committee was going beyond these issues of suspensions or the Justice would not have received a public letter from the Suffolk County Bar praising the committee.

Respectfully,

Jeffrey Levitt

JL:cb
Enclosure

February 13, 2004

CONFIDENTIAL
Hon. Garbrielle Krausman
Associate Justice
Appellate Division-Second Department
45 Monroe Place
Brooklyn, New York 11201

Re: Committee to Study Discipline

Dear Justice Krausman,

I would like to comment on the workings of Joint Grievance Committee for the 10th Judicial District, and would not have done so except for the publication of a letter to you from the Suffolk County Bar Association dated September 18, 2003. Comments from the Bar from persons who regularly practice before the committee are probably worthless, because no one who makes a living practicing before that committee is going to tell you the truth because of fear of consequences.

With 36 years of practice, I have spent many years criticizing the committee, often about excessive punishments, sometimes to its face, where I have to interact with them based on assisting persons who have claims against attorneys (I do plaintiffs legal malpractice) as well as assisting persons without charge in helping them to write their complaint letters so that they are not a stream of consciousness. I have also discussed grievance committee problems with lawyers who have minor complaints lodged against them and complain about the treatment. To some extent, my comments are biased, as I have also felt their hot breath on minor matters, and have come to the conclusion that other than for the most extreme cases of obvious conversion of funds or extreme misconduct, the committee serves no useful purpose other than as a "ticket writing" function to show that it is carefully reviewing the

cases.

Part of the problem is that the committee, which has no rules of procedure, can make demands on attorneys which may appear to be irrelevant, but no one can question the committee as to the scope and purpose of inquiry. Without rules, there are no rights. If one wants to object or raise issues, there is no access to committee members and no right to ask to speak before the committee or one of it subcommittees.

For example, a client might make a complaint upon which a letter of caution would be the typical resolution, but there are times that the committee will then expand its inquiry into matters far beyond the initial complaint. As stated in the Clinton impeachment, if you send enough FBI agents out against a particular person, for a long enough period of time, something can be found. The committee may spend an inordinate amount of time on the attorney's record-keeping, such as whether you still have copies of deposit tickets in your escrow account even where the escrow numbers are not in dispute and there is no claim of conversion. (always a sure way to find a breach of rules)

They sometimes seem to want a "conviction" of something and may escalate the matter when it is not something that would otherwise deserve attention. Thus, there are more "convictions" of even minor issues once the committee is contacted, while serious problems not involving escrows are intentionally overlooked. I was once invited to make a complaint about an issue the committee wanted to investigate and on which I had knowledge (the attorney running a referral agency), and after making the complaint the committee found a $500 discrepancy in this young man's escrow account and disbarred him. I am still sickened over that and while the committee feels that it has open ended review of everything in an attorney's life once a complaint has been lodged, I wonder if that should be the case. Without rules, the committee makes its own rules.

While the technical violations may abound, and which never reach the Appellate Division, I have been unable to locate any published public discipline of an attorney in the 10th Judicial District for conduct occurring during a litigation. Considering the number of attorneys, the number of cases, and the number of complaints that must be filed, the court should wonder why this occurs, but it occurs because I believe that the committee, through an oral history which probably dates

back to the 1930s, believes that it was under a mandate from the Appellate Division not to pursue attorneys for conduct during a litigation.

I have made complaints myself against attorneys, rarely, but it happens, as I think that certain things, such as knowingly presenting a forged document, or deeds for fraudulent conveyances, or obtaining a matrimonial judgment on default when the attorney knows that the spouse is in a mental hospital, warrants some investigation. But not with this committee and certainly not if the attorney were also being sued for fraud. Their method of avoidance, in the event of litigation which does not involve negligence but intentional, malicious or fraudulent conduct, is that they don't want their investigation used in the litigation. Of course, it would not be used as that would be an offense for which the offender could be disciplined. Interestingly, California requires that the disciplinary committee review every litigation against an attorney which takes away the onus on having to file a complaint where non- negligence matters are involved.

In a recent matter which resolved itself, I was aware of a complaint that an attorney held a $35,000 real estate escrow and when he was discharged before the closing, would not turn the escrow over to new counsel (with the consent of the buyer) because he claimed a lien on the escrow for his fee of $25,000 in other matters. There is no lien on an escrow, especially for more than the claim. The committee responded that it had no jurisdiction in the matter and the client should sue for his money.

The committee has also recently indicated that the issue of the competence of any attorney is no longer the subject of discipline. I know that a buyer of a home complained that the attorney omitted the mortgage contingency clause in the contract, causing the loss of the deposit when there was application for a mortgage. What is left? Escrow conversions and little else of major categories, and "ticket writing."

The Appellate Division, itself, is not immune from this issue. I filed a complaint against an attorney which was refused (he was subsequently disbarred anyway) for writing to a court and falsely claiming, while the judge was deciding our non-jury case, that I had said that the judge was fixing the case. I claimed that went beyond "zealous advocacy" and something, even some letter, be sent to the attorney. The committee found that there was no breach of the Code of Professional

Responsibility and I even wrote to the then Presiding Justice (many years ago) saying that the Appellate Division should review this and I received back a letter that the determination was appropriate. Perhaps, that gave the attorney incentive to go on to other things which lead to his disbarment; and that was only one of my three complaints against the same attorney in the same case.

If you read the record and brief in Biggers v. Farmingdale United Method Church, 168 AD2d 476 (2nd Dept. 1990) (No. 290E), you will find the conduct of the defendant's attorney shocking, but not to the court.

An attorney who should have been disciplined got his second free pass in Rubenfeld v. Gambino, 289 AD2d 319 (2nd Dept. 2001) (2001-00827). In another case, the court overruled its own well-known precedent (without so stating) to dismiss an action before service of an answer where there were specific allegations of presenting forged documents and perjurious testimony.

Where the court suspended an attorney for two years for defrauding his client in a real estate deal and the court did not direct the re-payment to the client and the statute of limitations for suit had expired, I was contacted by the client to seek review from the Grievance Committee. I suggested that the committee make application back to the court to modify the suspension to provide that without repayment there would be no right to re-apply for admission, or seek some direction to the attorney to repay. I was told to mind my own business, to make no such application to the court (I did what I was told) and that the committee is not a collection agency.

The same courts would have crucified another attorney for not responding to client phone calls or promptly resolving their retained matters, so that the discipline side of the court never matches the litigation side of the court where attorneys are involved. If the court will not treat seriously attorney issues in litigated matters, neither will the Grievance Committee.

I believe there needs to be a set of procedural rules for the protection of attorneys. I also believe that the concept of immunity granted to attorneys for their conduct in litigation, concerning the issue of their responsibility to the client as well as their responsibility to the Code of Professional Responsibility, needs examination and a different approach.

There is no attorney willing to "take on" the committee or report honestly for fear of having to cross paths with them in the future. As I view my usefulness in these matters as coming to an end, I thought I might as well make the comments, for whatever they are worth.

Respectfully,

Jeffrey Levitt

THE BAR ASSOCIATION OF NASSAU COUNTY

15th & West Streets • Mineola, New York 11501-4868 • (516) 747-4070 • Fax (516) 747-4147
e-mail: info@nassaubar.org • www.nassaubar.org

November 29, 2004

James Edward Pelzer
Clerk of the Court
Appellate Division , Second Department
45 Monroe Place, Brooklyn, New York 11201

re: The Krausman Committee Report

Dear Mr. Pelzer:

I write in my capacity as President of the Nassau County Bar Association to forward to you this Association's response to the report issued by Justice Krausman's Committee. As I advised in my letter of November 1, 2004, our Board could not meet before the official close of the comment period. We hope, not only that our comments will be considered, but that the Appellate Division finds the comments useful.

Thank you for your attention.

Sincerely, and with best regards,

Susan T. Kluewer

Report to the Nassau County Bar Association
Board of Directors from the NCBA Task Force
Appointed To Study and Report
On The Report And Recommendations
Of the 'Krausman' Committee
(The Committee to Review the Procedures of
The Committees on Character and Fitness and
The Grievance Committees
of the Appellate Division, Second Department)

Adopted, as Amended, by NCBA, November 9, 2004[1]

The Second Department has established a committee, chaired by the Hon. Gabriel M. Krausman and which we refer to as the 'Krausman' Committee, to review the procedures of Second Department's Committees on Character and Fitness and the procedures of its Grievance Committees. The Krausman Committee released its report on October 5, 2004. It reveals that the Krausman Committee was divided into three subcommittees: a subcommittee on admissions, a subcommittee on discipline, and a subcommittee on reinstatement. The Krausman Committee as a whole, by its report, analyzed each subcommittee's report, and approved, disapproved or took no position with respect to the subcommittee recommendations. Those recommendations total 50, and are separately numbered in the part of the Krausman Committee's report titled "Conclusions of the Committee of the Whole."

NCBA President Susan Kluewer appointed this Task Force, chaired by Gilbert L. Balanoff, Esq. and comprised of Marc C. Gann, Esq., Jack E. Hollenberg, Esq., Robert O'Brien, Esq., and Helen Phillips (Task Force Secretary), to review the Krausman Committee's recommendations and conclusions. It is our task to recommend to the

---

[1] Except where noted, the NCBA Board of Directors adopted as its own the recommendations of the NCBA Task Force.

NCBA Board of Directors what positions, if any, NCBA should take about the Krausman Committee conclusions. The Task Force has reviewed the Krausman Committee's report, and it met on October 13 and 19, 2004, to fully discuss its contents. We worked expeditiously so we could submit our own recommendations, at least to the NCBA Board, within the 30-day comment period contemplated by the Second Department. The Task Force recommends that NCBA take the following positions about the Krausman Committee conclusions. The numbering below corresponds to the numbering of the conclusions of the Krausman Committee set forth on pages 21 through 28 of its report.

Recommendations of the Krausman Subcommittee on Admissions

Speeding the Admissions Process

1. Retain the personal applicant interview by a member of the Committee on Character and Fitness. *Approved by the Krausman Committee of the Whole.*

NCBA Task Force Recommendation: Agree

Committee on Character and Fitness Issues

2. Impose term limits on the service of members of the Committees on Character and Fitness. *Approved by the Krausman Committee of the Whole, with one dissent.*

NCBA Task Force Recommendation: Agree with the Krausman Committee of the Whole

3. Improve the selection of members of the Committees on Character and Fitness and institute a training program for such members on how to conduct the applicant interview. *Approved by the Krausman Committee of the Whole, with one dissent.*

NCBA Task Force Recommendation: Agree with the Krausman Committee of the Whole. The Task Force is also of the view that additional members should be appointed to the Committees on Character and Fitness in order to expedite the admissions process. Each of the Task Force members had a long wait for admission, even when early admission was approved.

4. Require that a dissent from the recommendation of a Committee on Character and Fitness to approve a candidate be accompanied by a statement of the reasons therefor. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

5. When the court denies an application for admission to the bar referred to it by the Committees on Character and Fitness, provide the rejected applicant with the specific reason or reasons for that denial. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Criminal Background Checks

6. Recommend to the statewide Committee on Bar Admissions that criminal background checks be conducted for all applicants for admission to the bar. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Orientation Program for Applicants

7. Adopt an orientation program for applicants for admission to the bar modeled on the program currently conducted by the Appellate Division, First Department. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree, but the Task Force recommends that the program be presented throughout the Second Department rather than, as the subcommittee recommends, only in Brooklyn.

Issues Referred to the Court without Recommendation

8. Should the practice of referring to the court the applications of candidates that did not receive the unanimous approval of a Committee on Character and Fitness be continued?

NCBA Task Force Recommendation: Agree with the referral to the Court

9. Should the progress of applications for admission and reinstatement before the Committee on Character and Fitness for the Second, Tenth, and Eleventh Judicial Districts be expedited by increasing the number of its meetings and/or introducing voting by mail?

NCBA Task Force Recommendation: The Task Force suggests that the Committees on Character and Fitness consider holding "teleconference" meetings in order to expedite the process. The Task Force also suggests that, if Justices are available, additional induction ceremonies be scheduled in order to expedite the inductions.

Recommendations of the Krausman Subcommittee on Discipline

Suspension from Practice

10. Adopt a policy permitting the use of a suspension from practice for a period shorter than one year but not less than six months as a sanction for professional misconduct. *Approved by the Krausman Committee of the Whole.*

NCBA Task Force Recommendation: Agree

11. In the case of a suspension from practice for one year or less, expedite and simplify the reinstatement process and make it virtually automatic upon the filing of a completed application, by:

a. Not requiring that an attorney suspended for less than one year take and pass the MPRE;

b. Requiring that an attorney suspended for one year either take and pass the MPRE or take six credits of CLE in the field of attorney ethics;

c. Eliminating Committee on Character and Fitness review of the applicant; and;

d. Directing that the Grievance Committees and the Lawyers' Fund for Client Protection make especially prompt responses to reinstatement applications where the term of the suspension is one year or less.

Approved in part and disapproved in part by the Krausman Committee of the Whole

The Krausman Committee of the Whole agreed that the reinstatement of attorneys suspended for one year or less should be virtually automatic and that passage of the MPRE was not necessary in all such cases. However, it did not agree that complete elimination of the role of the Committee on Character and Fitness from the reinstatement process was desirable and recommended that the court require an interview by one member of the Committee on Character and Fitness on a reinstatement application following a suspension of one year or less.

NCBA Task Force Recommendation: The Task Force split on whether a personal interview is necessary in those cases where the suspension from practice is of short duration. The Task Force is unanimous in recommending that, if the interview is required, it be conducted within the period of the suspension so as to expedite reinstatement rather than work to extend the suspension period beyond that imposed by the Court. The Task Force is of the view that the readmission procedures should not, by delay, impose an additional penalty.

12. Retain the requirement that an attorney suspended for one year or less:

a. Serve and file a timely affidavit of compliance pursuant to 22 NYCRR 691.10(f); and

b. Serve and file a completed application for reinstatement leading to a court order of reinstatement.

Approved by the Krausman Committee of the Whole

NCBA Task Force Recommendation: Agree

Combining Sanctions

13. Utilize a combination of sanctions for certain minor violations (such as failure to register with the Office of Court Administration and certain minor tax offenses), by, e.g., combining censure with a requirement that the attorney take a stated number of hours of CLE, provide community service, or undertake pro bono representation. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Recommendation as to Appropriate Sanction

14. Require a Special Referee who hears a disciplinary proceeding to make a recommendation to the court as to an appropriate sanction. *No position; referred to the court.* The Committee of the Whole was divided on this point. Some members opposed this recommendation while others felt that the matter of recommending sanctions to the court warrants greater input and that in addition to the Special Referee, grievance counsel,

and the respondent attorney also should be heard on the issue of an appropriate sanction.

NCBA Position Adopted November 9, 2004: In disagreement with the recommendation of the NCBA Task Force, the NCBA Board of Directors is of the view that the Special Referee should be authorized to make a recommendation about the sanction to be imposed in a case he or she hears. Disciplinary proceedings are unusual in that the body imposing a punishment does not see or immediately hear from the person subject to punishment. Only the Special Referee is in a position to directly assess the credibility and demeanor of the attorney accused of misconduct. While the determination about the sanction is the exclusive province of Court, input from the Special Referee should be welcomed.

Plea Bargaining and Discipline on Consent

15. Authorize counsel to a Grievance Committee to engage in plea bargaining for discipline on consent, with the agreement to be subject to approval by the Grievance Committee itself and thereafter by the court. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Interim Suspensions

16. Do not require a minimum number of attempts by the Grievance Committee to

secure the cooperation of an uncooperative attorney who is the subject of a complaint before it may move for that attorney's interim suspension from practice under 22 NYCRR 691.4(*l*)(1)(i). *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

17. Require the existence of independent evidence to corroborate any admission under oath made by a cooperative attorney who is the subject of a complaint before the Grievance Committee may move for the attorney's interim suspension from practice under 22 NYCRR 691.4(*l*)(1)(ii). *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

18. Accord the respondent attorney credit for time spent under an interim suspension against any period of suspension imposed by the court at the conclusion of a disciplinary proceeding. *Agreed in part by the Krausman Committee of the Whole*

With regard to credit for interim suspensions, rather than recommending that there *must* be credit given, the Committee of the Whole recommended that the current policy against such credit merely be dropped resulting in the court having the flexibility – rather than the obligation – to provide for such a credit.

NCBA Task Force Recommendation: Agree with the Krausman Committee of the Whole. See # 44, *infra.*

19. Impose an affirmative duty on District Attorneys in the Second Judicial Department to notify the appropriate Grievance Committee of convictions, arrests, and indictments of attorneys and, if possible, of ongoing investigations, to enable the court to determine whether an interim suspension of the attorney is warranted under Judiciary Law § 90(4)(f). *Approved in part and disapproved in part by the Krausman Committee of the Whole.* The Committee of the Whole agreed with the recommendation of the subcommittee only insofar as it pertained to convictions, arrests, and indictments, but it disapproved of requiring District Attorneys to notify the Grievance Committee of ongoing investigations.

NCBA Position Adopted November 9, 2004: In slight disagreement with the NCBA Task Force, the NCBA Board of Directors is in complete agreement with the Krausman Committee of the Whole.

Special Referees

20. Undertake a recruitment initiative, not limited to retired members of the judiciary, to increase the number of eligible and competent Special Referees. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

21. Require Special Referees to complete and submit their reports to the court within

60 days after the conclusion of a disciplinary hearing or the submission of post-hearing memoranda by all parties. *Approved by the Krausman Committee of the Whole.*

NCBA Task Force Recommendation: Agree

22. Provide a Special Referee with a copy of court's rules when assigned to hear a disciplinary proceeding. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Disciplinary Hearings

23. Provide members of the Grievance Committee with a copy of the respondent attorney's answer to any complaint on which the staff recommends the issuance of a letter of caution or admonition, or the authorization to seek leave to commence a formal disciplinary proceeding, and impose a reasonable page limit on that answer. *No position; referred to the court.* Conflicting views on this point were voiced at the meeting of the Committee of the Whole and a consensus was not reached on the issue. Some members felt that providing a copy of the respondent attorney's answer was not practical and if his or her answer is to be provided to the Grievance Committee, complainants should be afforded the opportunity to present their views directly rather than rely upon staff counsel to that committee. Others felt it was a simple matter of fairness to allow the respondent's views to be presented at that stage of the process. Some

who were opposed to providing the Grievance Committee members with the respondent's answer pointed out that he or she would always have the opportunity to present a defense at a full and fair hearing (*see, e.g.*, 22 NYCRR 691.6[a]; Judiciary Law § 90[6]).

NCBA Task Force Recommendation: The Task Force is split on this issue. A Task Force member recommended that, before the institution of a "formal disciplinary proceeding" is voted upon by the Grievance Committee members, they should be provided with all of the documentation rather than rely upon the committee staff reports summaries.

Discovery

24. Adopt a rule codifying the substance of § 605.17 of the rules of the Appellate Division, First Department, regarding subpoenas, depositions, and motions (22NYCRR 605.17). *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

25. Require advance notice to grievance counsel if the respondent attorney wishes to offer psychological or medical evidence in mitigation at the hearing and require the execution of any applicable waiver. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

26. Allow respondent attorneys and grievance counsel access to medical reports prepared by court-appointed medical experts pursuant to 22 NYCRR 691.13. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Statute of Limitations

27. Do not adopt a rule effectively imposing a statute of limitations for the making of a complaint against an attorney. *Approved by the Krausman Committee of the Whole*

NCBA Position Adopted November 9, 2004: While the NCBA Task Force split on this issue, the NCBA Board of Directors is of the view that, without such a limit, attorneys are subjected to addressing stale claims, and, if more than seven years have elapsed, may be without the documentation necessary to properly respond to the complaint. In the Board's view, the absence of a statute of limitations is simply unfair.

Costs

28. Do not impose the costs of a disciplinary proceeding on a respondent attorney. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Deceased or Incapacitated Attorneys

29. Amend DR 9-102(g) of the Code of Professional Responsibility (22 NYCRR 1200.46[g]) to require the designation of a successor signatory on an attorney trust account. *Approved by the Krausman Committee of the Whole.*

NCBA Position Adopted November 9, 2004: Both the NCBA Task Force and NCBA Board of Directors disagree with the Krausman Committee of the Whole and are opposed to a requirement that a successor attorney be designated. The NCBA Board is of the view that this complex matter needs more study before any further recommendations or suggestions are made.

30. Do not require grievance counsel to provide legal counsel to persons seeking advice concerning the affairs of deceased or incapacitated attorneys. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Practice Limitations on Former Grievance Counsel and Committee Members

31. Bar former staff counsel and former Grievance Committee members from representing a respondent attorney on any matter which was pending during the period of the former staff member's or committee member's term of service. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Registration and CLE Requirements for Suspended Attorneys

32. Require suspended attorneys to continue to fulfill all biennial registration requirements, including the payment of the required fee, and to take the requisite amount of CLE during the period of suspension. *Approved by the Krausman Committee of the Whole*. The Committee of the Whole endorsed this recommendation but believed that these requirements, as currently in effect, are not clearly understood by suspended attorneys. Accordingly, the Committee of the Whole further recommended that the requirements of fulfilling the biennial registration, paying the registration fee, and taking required courses should be included in orders of suspension as well as set forth on the attorney registration form.

NCBA Task Force Recommendation: Agree, except as noted at #45, *infra*.

Additional Recommendations

33. Consolidate informational pamphlets of the three Grievance Committees into one uniform pamphlet. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

34. Improve the accuracy of the data in the attorney registration database maintained

by the Office of Court Administration before the names of delinquent attorneysare sent to the Grievance Committees for disciplinary action. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

35. Notify respondent attorneys by telephone or electronic transmission of court decisions regarding disciplinary proceedings against them before those decisions appear in the New York Law Journal. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Recommendations of the Krausman Subcommittee on Reinstatement

Conduct and Employment of Suspended or Disbarred Attorneys

36. Adopt a rule authorizing the court to issue an advisory opinion as to whether proposed employment by a suspended or disbarred attorney would constitute the practice of law. *Referred to the Court without Recommendation*. This was an area where the subcommittee on reinstatement and the Krausman Committee of the Whole had differing and opposite views that made it impractical to make a unified recommendation to the court. The Committee, therefore, decided that it should be brought to the attention

of the court without any specific recommendation, but that the court should consider the following:

a. Whether a procedure should be adopted for applying for an advance ruling on the propriety of proposed employment of disbarred and suspended attorneys;

b. Whether criteria should be set forth for such employment;

c. Whether a definition of the term "practicing law" should be drafted; and,

d. Whether higher standards should be applied to suspended attorneys, who are still members or the bar, as opposed to disbarred attorneys, who are not.

NCBA Position Adopted November 9, 2004: In disagreement with the NCBA Task Force, the NCBA Board of Directors is of the view that the Court should not engage in the practice of giving advisory opinions.

Reinstatement Applications in General

37. Adopt the model rule on the reinstatement of attorneys proposed by the Committee on Professional Discipline of the New York State Bar Association.

Disapproved by the Krausman Committee of the Whole

NCBA Task Force Recommendation: The Task Force makes no recommendation as it has not had available to it the proposed model rule at issue.

38. Incorporate the reinstatement questionnaire, petition, or application into § 691.11 of the court's rules (22 NYCRR 691.11). *Approved in part and disapproved in part by the Krausman Committee of the Whole.* The Committee of the Whole adopted this recommendation to the extent that the court's rules should refer to the questionnaire, petition, or application and direct applicants for reinstatement to the court's website for a copy thereof.

NCBA Task Force Recommendation: The Task Force disagrees with the recommendation insofar as it permits the attorney applicant access to the reinstatement documents only via website. The Task Force recommends that the applicant also be permitted to obtain copies by mail or e-mail, or by appearing in person at the office of the clerk of the Appellate Division.

39. Adopt a rule requiring that all interested parties, including the complainants and other victims of a suspended or disbarred attorney's misconduct, receive notice of an application for reinstatement. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Disagree. The Task Force is of the view that notice to "interested parties" of an application for reinstatement will in fact be a second review of the initial complaint rather than a determination of the applicant's current fitness to practice law and may lead to additional penalty for the underlying misconduct.

40. Expedite reinstatement applications by authorizing the Committees on Character and Fitness to confer and vote by telephone conference call, by directing those committees to meet more frequently, and by requiring that the Committees on Character and Fitness be served with a copy of the reinstatement application before or contemporaneously with its filing with the court. *Approved by the Krausman Committee of the Whole*

Task Force Recommendation: Agree

41. Recite the papers read on an application for reinstatement in the order that determines that application. *Approved by the Krausman Committee of the Whole*

Task Force Recommendation: Agree

42. Advise the applicant of any information in the court's possession that played a significant role in deciding the application for reinstatement, with appropriate redactions. *Disapproved by the Krausman Committee of the Whole*

Task Force Recommendation: Disagree with the Krausman Committee of the Whole. The Task Force strongly recommends, as an issue of fundamental fairness, that an applicant denied readmission be advised of the basis of that denial.

Reinstatement after Suspension

43. Adopt a procedure for the automatic reinstatement of attorneys suspended from practice for one year or less. *Approved by Krausman the Committee of the Whole*

NCBA Task Force Recommendation: Agree

44. Credit the period of any interim suspension against the period of suspension imposed as discipline unless the court orders otherwise in a particular case. The court might also consider whether credit for a period of interim suspension should be given on an application for reinstatement after disbarment. *Approved by the Krausman Committee of the Whole.*

NCBA Task Force Recommendation: Agree

45. Excuse suspended attorneys from the duty to pay the biennial registration fee during the period of suspension and require that attorneys suspended for more than two years successfully complete 24 credits of CLE. *Disapproved by the Krausman Committee of the Whole*. Instead, the Committee of the Whole endorsed the recommendation of the Attorney Discipline Subcommittee that suspended attorneys be required to fulfill all registration and CLE requirements during the period of suspension.

NCBA Task Force Recommendation: The Task Force agrees with the recommendation requiring the 24 CLE credits to be completed as a condition of reinstatement, but is of the

view that no registration fee should be required while the attorney is under suspension

46. Adopt the "Bellacosa Rule" authorizing the deferral of a disciplinary investigation or proceeding to enable the attorney to enter a monitoring program if he or she claims a disability due to alcohol or substance abuse. *Disapproved by the Krausman Committee of the Whole.*

NCBA Task Force Recommendation: Disagree with the Krausman Committee of the Whole. The Task Force recommends that the "Bellacosa Rule" be implemented. The rule authorizes, but does not require, deferral of disciplinary investigations and proceedings, thus giving the Court the discretion to allow for remediation of an underlying drug or alcohol problem and rehabilitation of the attorney while still allowing for the possibility of discipline, if warranted.

47. Amend § 691.11 of the court's rules (22 NYCRR 691.11) to specify that there be a minimum interval of one year between the denial of an application for reinstatement of a disbarred attorney and the next application. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Reinstatement after Disbarment

48. Require disbarred attorneys, as a condition of reinstatement, to submit proof of their successful completion of at least 24 credits of CLE. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

49. Amend § 691.11 of the court's rules (22 NYCRR 691.11) to provide that the recommendation of a Committee on Character and Fitness made on an order referring an application for reinstatement to it for consideration shall be given substantial consideration but shall not be binding on the court in ultimately determining the application. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

Reinstatement after Voluntary Resignation

50. Adopt a rule regarding the reinstatement of voluntary resignees requiring them to explain the circumstances of their resignation, the reason for applying for reinstatement, and whether they have been the subject of disciplinary proceedings elsewhere during the period of resignation, to successfully complete at least 24 credits of CLE if they have been removed from the roll of attorneys for more than two years, and to pay a modest fee. All biennial registration fees that would have been paid during the period of removal

from the roll of attorneys would be waived. *Approved by the Krausman Committee of the Whole*

NCBA Task Force Recommendation: Agree

The Task Force submits this report for your review and consideration. The Task Force is available to you for any questions which may be raised by this report or in considering the Second Department's report as a whole.

Respectfully Submitted,

GILBERT L. BALANOFF (Chair)
MARC C. GANN, Esq.
JACK E. HOLLENBERG, Esq.
ROBERT O'BRIEN, Esq.
HELEN PHILLIPS, Secretary

NYSBA

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

COMMITTEE ON LAWYER ALCOHOLISM AND DRUG ABUSE

CHARLES W. BEINHAUER
Chair
Pfalzgraf Beinhauer & Menzies
455 Cayuga
Suite-600
Buffalo, NY 14225
716/204-1055
FAX 716/204-1080
chuckbeinhauer@pbmlawyers.com

VIA FACSIMILE AND FIRST CLASS MAIL

November 3, 2004

Presiding Justice A. Gail Prudenti
Supreme Court, Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, NY 11201

RE: Response to Krausman Report – Diversion to Monitoring

Dear Judge Prudenti:

As Chairman of the New York State Bar Association Committee on Lawyer Alcoholism and Drug Abuse ("CLADA") I would like to offer my comments with respect to the Diversion to Monitoring Rules in the "Report and Recommendations of the Committee to Review the Procedures of the Committees on Character and Fitness and the Grievance Committees of the Appellate Division, Second Judicial Department," chaired by Hon. Gabriel M. Krausman.

The New York State Bar Association Committee on Lawyer Alcoholism and Drug Abuse has been involved in Attorney monitoring since the inception of the NYSBA Lawyers Assistance Program in 1990. During that time our committee members through the Lawyers Assistance

Programs in Albany and New York City have monitored over 100 lawyers, most of whom have been able to retain their licenses and successfully return to the practice of law while also abstaining from alcohol and addictive substances. Clients have been well served by the recovery of their lawyers.

One of the Commission's concerns was the drain on manpower that would result from a Diversion to Monitoring Program. In 2002, the Fourth Judicial Department adopted Diversion to Monitoring Rules and last year implemented its Diversion to Monitoring Program. We participated with the Fourth Department in a monitor training session and are pleased to report that 33 lawyers attended the training session and are available to serve as volunteer monitors in diversion cases. The lawyers are from all areas of the Fourth Department. Accordingly, we feel very comfortable that we will have sufficient monitors to meet the monitoring needs as they arise.

Most recently, the Third Judicial Department also adopted a Diversion to Monitoring Rule. We hope to work closely with the Third Department in implementing its Diversion Rule.

If the Second Department were to adopt a Diversion to Monitoring Rule, I can assure you that there is a group of attorneys in recovery who would willingly serve as monitors to assist the Grievance Committee. They would, of course, have to undergo a similar training program to the one utilized by the Fourth Department. CLADA would be happy to develop and present a program for the Second Department.

A second area that was discussed in the comments was a concern that there would be too many attorneys seeking refuge through a Diversion to Monitoring Program. Our experience is that attorneys are <u>not</u> quick to try to capitalize on a Diversion to Monitoring option. In order for Attorneys to qualify for the Diversion Program, they must show not only that they are suffering from an Alcohol/Drug addiction problem, but also that the disease was the cause for the complained of conduct. These facts must be established independently by a professional licensed to diagnose and detect alcoholism and/or drug addiction.

We believe that a Diversion to Monitoring Program properly employed can be a very successful tool in addressing issues created by the disease of alcoholism and/or drug addiction which impacts the life of the individual attorney as well as the profession as a whole. Generally, we have had a very favorable experience with monitoring and would strongly urge the Second Judicial Department to reconsider the Krausman recommendation relative to the Diversion of Monitoring Rules.

Please feel free to contact me should you have any questions.

Very truly yours,

Charles W. Beinhauer

CWB/kem

cc: Hon. Justice Eugene Pigott, Presiding Justice, Appellate Division Fourth Department

Ray Lopez, Director, New York State Bar Association Lawyers Assistance Program

Patricia Bucklin, Executive Director, New York State Bar Association

Kenneth Standard, President, New York State Bar Association

Barbara Smith, Executive Director, Lawyers Assistance Trust

NYSBA

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

COMMITTEE ON PROFESSIONAL DISCIPLINE

GERARD M. LARUSSO
Chair
19 Westland Avenue
Rochester, NY 14618
585/737-0086
FAX 585/442-5085

November 9, 2004

Hon. James E. Pelzer
Clerk of the Court
New York Supreme Court
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Dear Mr. Pelzer:

On behalf of the New York State Bar Association's Committee on Professional Discipline, I am pleased to enclose the committee's recommendations regarding the report of the Second Department Committee to Review the Procedures of the Committees on Character and Fitness and the Grievance Committees. It should be noted that this report represents solely the views of the committee, and should not be considered the official position of the Association.

Please do not hesitate to contact me if I can provide additional information or be of further assistance.

Very truly yours,

Gerard M. LaRusso

Gerard M. LaRusso

NYSBA

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

COMMITTEE ON PROFESSIONAL DISCIPLINE

GERARD M. LARUSSO
Chair
19 Westland Avenue
Rochester, NY 14618
585/737-0086
FAX 585/442-5085

November, 2004

RECOMMENDATIONS OF NYSBA COMMITTEE ON PROFESSIONAL DISCIPLINE REGARDING THE REPORT AND RECOMMENDATIONS OF THE SECOND DEPARTMENT COMMITTEE TO REVIEW THE PROCEDURES OF THE COMMITTEES ON CHARACTER AND FITNESS AND THE GRIEVANCE COMMITTEES*

The NYSBA Committee on Professional Discipline appointed a subcommittee to review the Report and Recommendations of the Second Department Committee to Review the Procedures of the Committees on Character and Fitness and the Grievance Committees, which was chaired by the Honorable Gabriel M. Krausman.

The Krausman Committee's charge was to review the procedures of the admissions and grievance committees in the Second Department "to determine whether changes are necessary to ensure that dispositions are as fair, expeditious, and internally consistent as possible." The Committee also reviewed the court's own rules and internal procedures governing admissions, discipline and reinstatement.

The NYSBA Committee on Professional Discipline applauds the Krausman Committee for its hard work and sincere effort to improve the admissions and grievance procedures in the Second Department and commends the Committee for its recommendations, which will certainly contribute to the greater fairness of the admissions and attorney discipline systems. As outlined below, we support many of the recommendations in the Krausman Committee Report and suggest some additional changes for the Court's consideration.

The Admissions Process

We wholeheartedly support the retention of the personal interview of every bar applicant as that can be a valuable part of the admissions review process. Obviously, with a single interview system, there exists the potential for unfairness in that interviewers can have markedly different standards and, in addition, some applications raise issues which trouble one interviewer and are viewed sympathetically by another Committee member.

The Committees in other Departments use additional mechanisms -- multiple individual interviews (4th Department) or group interviews (1st Department) -- to achieve a more consistent Committee-wide

* The Committee on Professional Discipline is solely responsible for the contents of this report. Unless and until adopted by the Executive Committee or House of Delegates of the New York State Bar Association, no part of the report should be considered the official position of the Association.

approach to individual applicants. The benefit of such devices is to avoid unnecessary sub-committee hearings (and the attendant delays) for applicants whose admission to the bar is likely to be recommended by the Committee.

With respect to the membership of the Committees on Character and Fitness and their training, we support the recommendation that there be a training program and suggest that lawyers who regularly represent bar applicants before the Committees be invited to participate in such a program. We support "term limits" for Committee members, for it is important that the admissions panels be diverse and open to new membership. Continuity is important to the work of the Committees, as are fresh ideas and new perspectives. Term limits for Committee members have worked well in the grievance process and they would help promote public confidence in the fairness of the admissions process.

To address a greater openness in the admissions process we propose that: the Committees and their interviewers and subcommittees should advise applicants of the defects in their applications, the problems with their presentations and the Committees' recommendations, formal and informal. (A frequent practice to avoid issuing a report is to make no recommendation or to have a less than unanimous referral to the Court. Applicants are then not advised of the Committees' concerns, or are advised only in general terms.) We see no drawbacks to sharing the Committees' full reports and candid views with applicants and we see considerable advantages to all involved if the process becomes more open.

The views and opinions of Committee members are generally sound and fair. They are especially so when made known to applicants, fully and completely. The present practice of not sharing internal Committee reports (from interviewers, subcommittees and the whole Committee) does not further the shared goal of admitting applicants who have demonstrated the necessary character and fitness to be admitted. The practice fosters the impression that the admissions process is unfair and biased and does a disservice to the bar as a result. We support the greater openness in the admissions process, fully confident that the decisions and reasoning of the Committees will withstand any challenges brought as a result of such greater openness.

The recommendation that the Court include more specific reasons for denying an application in its order is fair, however, it is probably even more useful for applicants to be advised of those reasons by the Committees at an earlier stage of the application process. Applicants who are aware of their issues and determined to address the legitimate concerns of the Committees frequently follow sensible advice, often withdraw or table their applications, and demonstrate their responsiveness to the Committees' and the Court's expressed concerns.

The Disciplinary Process

We wholeheartedly support the Krausman Committee Report's recommendation that respondent attorneys be given "credit" for time served during an interim suspension, a practice that once was routine in the Second Department, as it is elsewhere in New York.

We also commend the Committee for recommending that the Court impose shorter suspensions, i.e., less than one year, in appropriate cases. While the Committee states that suspensions less than 6 months are

"unduly onerous," in fact, 30, 60 and 90-day suspensions are regularly imposed in many other jurisdictions and could be done easily in New York, particularly if done on consent of the respondent attorney, who would undertake to comply fully and agree to close his or her practice for the prescribed period.

The consequence of the present practice of imposing suspensions of a year or longer is that respondents in the Second Department are often suspended for longer periods than attorneys found guilty of similar misconduct in other judicial departments. While statewide uniformity is probably unachievable, it is highly desirable that New York lawyers face the same range of sanctions, regardless of where they practice law.

In the same vein, we respectfully request that the Court consider imposing, in appropriate cases, "suspended" suspensions, as is now done in the Third and Fourth Departments. The mechanics of supervising lawyers on such conditional suspensions should not be such an impediment that such sanctions are not available to respondent attorneys whose situations warrant such options. In the Third and Fourth Departments (and in jurisdictions throughout the nation), attorneys may be required to report on their escrow accounts and recordkeeping, have monitors report periodically to the Court or grievance committee, or comply with other conditions imposed by the Court. In many cases, the respondent bears the cost of paying for the arrangement, as well as proposing conditions and monitoring sufficient to satisfy the concerns of the Court and Committee.

We also respectfully recommend that the Court adopt a diversion program, similar to the programs now in place in the Third and Fourth Department. Lawyers in the Second Department, who face problems stemming from alcohol or drug dependence and depression to the same degree that lawyers upstate do, are treated more harshly than lawyers in the Third and Fourth Departments.

The Second Department has long supported lawyer assistance programs for lawyers struggling with chemical dependencies and similar problems. Such issues underlie a significant percentage of disciplinary proceedings and the diversion of lawyers into treatment accomplishes two things: the greater protection of the public and the more effective rehabilitation (thereby assuring the future ethical conduct) of the impaired lawyer. Diversion programs recognize that impaired lawyers are not ethically impaired.

Mentoring programs have been used very effectively in many jurisdictions to assist lawyers who have entered private practice without adequate training or experience in running a private practice, to train young lawyers in handling caseload responsibilities and obligations to clients, and to help lawyers with specific issues. Mentoring programs can be a useful (and less expensive) alternative to disciplinary proceedings and are invariably paid for by the lawyer, not the Court.

Mentoring and monitoring programs need not require any additional public resources or funding, but rather are likely to reduce the caseloads of the grievance committees by diverting lawyers with treatable problems or in need of professional guidance to the appropriate resources. Professional misconduct complaints will be reduced, as they have been those jurisdictions which have adopted such alternatives.

Procedural changes which we support include "plea bargaining" or the imposition of discipline on consent, without the time and expense that hearings frequently entail. In many cases, it is clear what the sanction should be, i.e., a censure or a one-year suspension, because it is consistent with the Court's precedents for similar misconduct. In many cases, both the grievance committee and the respondent agree on the sanction and, in most cases, the proposed sanction is likely to be approved by the court. Most jurisdictions around the country permit "plea bargaining" or consent dispositions in disciplinary cases. New York would benefit enormously if it were adopted here.

The Special Referees should be drawn from a diverse pool of candidates and more individuals should be added to the list used by the Court. The frequent appointment of certain individuals as Special Referees has undermined the reputation of the disciplinary system for impartiality and fairness. We support the Committee's recommendation that Special Referees be instructed to make a recommendation on sanction. We would go further and recommend that staff counsel also make sanction recommendations. Indeed, staff counsel have the greatest experience in this area and are most likely to be consistent and fair in their recommendations.

Finally, we recommend that the CPLR be applied to disciplinary proceedings, as is the case in many other jurisdictions. At a minimum, respondents should be entitled to a copy of their deposition testimony and should, pursuant to the CPLR, be provided with a copy in a timely fashion and given 30 days to sign the transcript and submit corrections. The present practice in the three committees is not uniform. One committee does not permit respondents to have the transcript unless it is offered in evidence at a hearing. Another committee permits respondents to purchase the transcript from the court reporter. The CPLR should be followed in the Second Department, as was the prior practice.

The "revolving door" conflict issue raised by former counsel and Committee members representing respondents is, we respectfully suggest, adequately addressed by DR 9-101 (b) which provides that a "lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. . . . " Other lawyers in the firm, however, may undertake the representation of the private client if certain conditions are met, as specified in the rule.

Reinstatement Proceedings

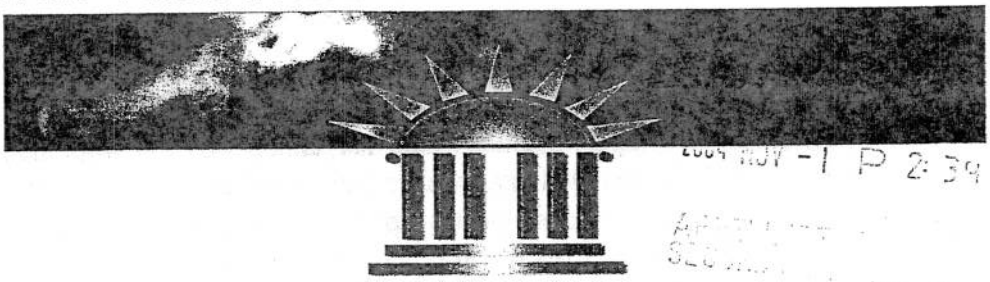
We wholeheartedly support the recommendation that suspended and disbarred attorneys and their employers be permitted to seek guidance and a ruling from the Court on the propriety of a law firm's proposed employment of a suspended or disbarred attorney in a non-legal capacity. This would end the practice of forbidding such "former" lawyers from undertaking permitted activities, such as managing clerk, within the context of a law firm and subject to the supervision of licensed members of the Bar.

We recommend that any committee report concerning the reinstatement of a suspended or disbarred attorney be provided to the attorney seeking reinstatement, as a normal part of what should be a fair and open process. If there are errors in the report, they can then be corrected or addressed. If there is unsound or unfair reasoning, the applicant can make appropriate arguments why it should not be followed. Disclosure will not undermine the ability of the Court to insure that only meritorious applications for reinstatement are granted.

54 State Street, Suite 802
Albany, NY 12207

Phone: 518.285.4545
Fax: 518.432.8885
www.nylat.org

NEW YORK STATE LAWYER ASSISTANCE TRUST



2004 NOV -1 P 2:39

October 29, 2004

Presiding Justice A. Gail Prudenti
Supreme Court, Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, New York 11201

Dear Justice Prudenti:

On behalf of the New York State Lawyer Assistance Trust (LAT), please accept these comments on the recently released "Report and Recommendations of the Committee to Review the Procedures of the Committees on Character and Fitness and the Grievance Committees of the Appellate Division, Second Judicial Department," chaired by Hon. Gabriel M. Krausman.

The Mission of the Committee was to analyze the procedures employed by the Second Department for the admission, discipline and reinstatement of attorneys, to update them and ensure that "dispositions are as expeditious, fair, and internally consistent as possible."

The Recommendation on Diversion to Monitoring Rules

Of primary importance, the LAT urges you to reject the recommendation of the Committee of the Whole to disapprove the adoption of the diversion-to-monitoring rule change. As you will recall, that proposal was first recommended by the Bellacosa Commission. Our reasons for this position, and our support for other recommendations, follow.

On page 18 of the Report, the text states that

> "[t]he so-called **"Bellacosa Rule"** which is similar to a rule recently adopted by the Appellate Division, Fourth Department (*see* 22 NYCRR 1022.20[d][3]), **was considered by the [reinstatement] subcommittee and recommended for adoption.** (Emphasis added) It would allow a disciplinary proceeding or investigation to be deferred, in certain instances, to allow the respondent attorney to enroll in a monitoring program if he or she claims disability due to alcohol or substance abuse. Upon successful completion of the program, the court could dismiss the proceeding or investigation."

On page 28, the Report indicates that the Committee of the Whole disapproved the recommendation (#47), but provided no explanation.

Background: Programs in Place in New York

✓ Adoption of Diversion Rules would bring the Second Department's procedure into harmony with the two upstate Departments.

As you know, in January 2003, the Appellate Division of the Fourth Department adopted amendments to their rules governing the disciplinary process, in those circumstances where the alleged misconduct would not result in disbarment as a sanction, to permit diversion of attorneys with alcohol or substance abuse problems to a court-approved monitoring program, and successful completion of the program may result in dismissal of the charges.

Similarly, last month, the Appellate Division of the Third Department adopted amendments that permit diversion to a monitoring program, considering the severity of the misconduct, whether it was related to an attorney's alcohol or substance abuse; and whether diversion is in the best interests of the public, the legal profession and the attorney. Upon the attorney's successful completion of the monitoring program, the Court may discontinue the matter. [Copies of the two sets of rules accompany this letter, for your information.]

Since 1999, the New York City Lawyer Assistance Program Attorney Sobriety and Recovery Monitoring Program has monitored 18 attorneys who demonstrated a causal relationship between an alcohol, substance abuse or mental health problem and their misconduct. Six monitored attorneys have resumed the practice of law after successfully completing a period of monitoring; 11 are pending completion of their monitoring period and one attorney who failed to meet the terms of the monitoring agreement was referred back to the Disciplinary Committee. Participation in the monitoring program is by order of the Appellate Division's Departmental Disciplinary Committee and generally lasts 1-5 years. The attorney to be monitored must be willing to enter into an agreement with the Monitoring Program and meet all of the requirements of the monitoring contract. Progress reports are submitted to the Disciplinary Committee on a monthly basis. The monitored attorney must demonstrate an ongoing commitment to recovery in order to complete the monitoring program.

Additionally, since 1990, the Lawyer Assistance Program established by the New York State Bar Association has monitored 70 lawyers referred by the Appellate Divisions or disciplinary committees. The Director, Ray Lopez, reports that about 70% of those successfully completed their monitoring program and returned to the practice of law. Those who were unable to successfully complete their program were reported to the disciplinary committee and were dealt with accordingly.

ABA Model Rules for Lawyer Disciplinary Enforcement

✓ Adoption of Diversion Rules would also bring the Second Department's procedure into harmony with the Model Rules for Lawyer Disciplinary Enforcement established by the American Bar Association's Standing Committee on Professional Discipline and would continue a well documented trend across the country.

Model Rule #11(g), the "Alternatives To Discipline Program", has as one of the options, referral of attorneys involved with lesser misconduct to lawyer assistance programs authorized by the court. Upon successful completion of the monitoring program, the disciplinary complaint is dismissed. Numerous states around the country have adopted diversion to monitoring programs in their jurisdiction, including, for example, Florida, California, Illinois, Arizona, Texas and Washington. According to Ellyn Rosen, Staff Counsel for the ABA Center for Professional Responsibility, the trend is toward more states adopting diversion programs.

✓ The value of getting lawyers to treatment and support networks should not be underestimated. The following example shows why.

Oregon Study: In April 2002, the Oregon Attorney Assistance Program studied the cases of 55 recovering lawyers who were in private practice for five years before and five years after their sobriety dates. As reported in their April 2002 Newsletter *INSIGHT*

> [d]uring the five years before sobriety, the 55 lawyers had 83 malpractice claims filed against them, whereas the number dropped dramatically – to 21 claims – in the five years after sobriety. This represents a 30 per cent annual malpractice claim rate before sobriety and an 8 per cent rate after sobriety. The same lawyers had 76 discipline complaints during the five years before sobriety and 20 discipline complaints during the five years after sobriety. This represents a 28 per cent annual discipline complaint rate before sobriety and a 7 per cent discipline complaint rate afterwards.
>
> These statistics show that malpractice and discipline complaint rates for lawyers before recovery are nearly four times greater than those in recovery. . . Lawyers in recovery also have lower malpractice and discipline complaint rates than the general population of lawyers. In Oregon, the current annual malpractice claim rate for lawyers in private practice is 13.5 per cent, compared to the 8 percent for lawyers in recovery. The current annual discipline complaint rate for Oregon lawyers is 9 percent, compared to 7 percent for lawyers in recovery.
>
> . . . In addition to saving lives and careers, recovery saves malpractice and discipline dollars.

✓ Other states are moving to an even more innovative approach.

Washington Project: The State of Washington Bar Association administers both its lawyer discipline department and its Lawyer Assistance Program. Since January 2004, the two departments entered an experimental approach to discipline diversion. In their new pilot, all lawyers guilty of less serious misconduct are being considered for diversion, regardless of whether a mental or emotional issue has been raised. They are evaluated by the Lawyer Assistance Program, which, if warranted, recommends the terms of diversion and monitors the lawyer's progress in diversion. The Disciplinary Counsel initially determine whether a lawyer meets the legal standard for diversion eligibility, drafts diversion contracts and decides, in consultation with LAP, whether to sanction a lawyer who breaches the diversion contract. In this way LAP and Discipline work hand in hand to "reclaim" lawyers. [Excerpt from "The Washington Experiment" by Joy McLean, Director of Lawyer Discipline, Washington State Bar Association October, 2004]

Conclusion

The Board of the Lawyer Assistance Trust therefore strongly recommends that the Justices of the Second Department reject that portion of the Krausman Committee Report which recommends disapproval of diversion rules.

The underlying purpose of the recommended procedure is to protect the public by getting the attorneys the help they need to be healthy, which, in turn, would make them better able to deliver quality legal services. The program itself need not be "court-sponsored" or "administered by the Grievance Committees", but, as in the Third and Fourth Departments diversion may be made to "a monitoring program sponsored by a lawyers' assistance program approved by the Appellate Division." As a practical matter, for most upstate lawyers, this means a referral to the State Bar Association's Lawyer Assistance Program. (In the metropolitan New York area, referrals would be made to the New York City Lawyer Assistance Program.) In any event, the model rule reserves total discretion with the Court to grant the relief requested.

Ironically, failing to adopt a diversion policy creates a disincentive for lawyers who may have practice problems arising from their alcohol or substance abuse, or mental health issues, to seek treatment for

those problems. As the potential for harm to their clients increases in seriousness, the likelihood of the lawyers receiving treatment or support for their health conditions decreases. It is a vicious circle.

Recommendations of the Subcommittee on Discipline

Alternatives to Suspension

The Subcommittee on Discipline rejected "court-sponsored mentoring" expressing concern "that the court would be perceived as holding out as competent to practice law an attorney who suffers from clinical depression or who is a substance abuser, when, in fact, there is some doubt as to that attorney's competence. The consensus is that mentoring is a very valuable tool which should be encouraged through bar associations but which should not be court-sponsored or administered by the Grievance Committees." [Report, Page 10]

The Lawyer Assistance Trust confesses puzzlement as to the intent of this paragraph. It may be that by "mentoring", the Report intends to describe a sort of "practice monitor" in contrast with the "sobriety monitor" described in the Diversion Model Rules. Whatever the intent, the Trust rejects the underlying all-or-nothing approach, which seems to say that an attorney suffering from clinical depression or who may be a substance abuser is incapable of delivering competent legal services. Since no related recommendation was posed or defeated by the Krausman Committee, the Trust will not comment further, but will let stand its recommendation on the Diversion to Monitoring Rules.

Interim Suspensions – Notification by District Attorney

Recommendation (19) The Committee of the Whole approved creating an affirmative obligation on the part of District Attorneys within the Second Department to notify respective Grievance Committees of convictions, arrests, and indictments of attorneys, provided that such notification does not compromise the District Attorney's investigation.

The **Trust supports** this recommendation for those instances when the underlying activity arises from impairment induced by alcohol or substance abuse and the attorney is then diverted to a monitoring program overseen by a court-approved Lawyer Assistance Program.

Recommendations of the Subcommittee on Admission

Committee on Character and Fitness Issues

Recommendation (3) Improve the selection of members of the Committees on Character and Fitness and institute a training program for such members on how to conduct the applicant interview.

The **Trust supports** the subcommittee recommendation that a training program be established for the benefit of the committee members, particularly if that training includes a component on recognizing alcohol and substance abuse issues.

Orientation Program for Applicants

Recommendation (7) Adopt an orientation program for admission to the bar modeled on the program currently conducted by the Appellate Division, First Department.

The **Trust wholeheartedly supports** the recommendation that the court institute an orientation program for applicants, which would cover a code of civility for lawyers; the pro bono obligation; common disciplinary issues; available resources to deal with alcohol and substance abuse problems; and the significance of the oath taken on admission. The similar "Bridge the Gap" program in

the First Department has proved to be a very useful tool, which has resulted in numerous inquiries from new admittees to the New York City Lawyer Assistance Program. The report raises issues concerning the location and frequency of such an orientation program, and the Trust wishes to convey its willingness to serve as a "clearinghouse" of sorts to coordinate the appearance of speakers with respect to the topic of alcohol and substance abuse.

* * *

Thank you for considering these comments. If you or your staff wishes to discuss any of the positions described in this letter, please do not hesitate to contact me. I thank you in advance for your serious consideration of our position.

Respectfully submitted,

James C. Moore

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held in the City of Albany, New York, commencing on the 7th day of September, 2004.

PRESENT:

HON. ANTHONY V. CARDONA,

Presiding Justice

HON. THOMAS E. MERCURE,
HON. D. BRUCE CREW, III,
HON. KAREN K. PETERS,
HON. EDWARD O. SPAIN,
HON. ANTHONY J. CARPINELLO,
HON. CARL J. MUGGLIN,
HON. ROBERT S. ROSE,
HON. JOHN A. LAHTINEN,
HON. ANTHONY T. KANE,

Associate Justices.

In the Matter of the Amendment of the Rules Governing the Conduct of Attorneys of the Supreme Court, Appellate Division, Third Judicial Department.

ORDER

Pursuant to the authority conferred upon this Court by law, it is

ORDERED that, effective immediately, section 806.4 of the Rules of the Supreme Court, Appellate Division, Third Judicial Department (22 NYCRR 806.4) is hereby amended by adding thereto a new subdivision (g) to read as follows:

(g) Diversion program. (1) During the course of an investigation or disciplinary proceeding, when the attorney raises alcohol or other substance abuse or dependency as a mitigating factor, or upon recommendation of the committee, the Court may, upon

application of the attorney or committee, stay the investigation or disciplinary proceeding and direct the attorney to complete a monitoring program sponsored by a lawyers' assistance program approved by the Court. In determining whether to divert an attorney to a monitoring program, the Court shall consider (i) whether the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency; (ii) whether the alleged misconduct is related to such alcohol or other substance abuse or dependency; (iii) the seriousness of the alleged misconduct; and (iv) whether diversion is in the best interests of the public, the legal profession, and the attorney.

(2) Upon submission of written proof of successful completion of the monitoring program, the Court may direct discontinuance or resumption of the investigation or disciplinary proceeding, or take other appropriate action.

(3) In the event the attorney is not accepted into or fails to successfully complete the monitoring program as ordered by the Court, or the attorney commits additional misconduct after diversion is directed pursuant to this subdivision, the Court may, upon notice to the attorney affording him or her an opportunity to be heard, rescind the order diverting the attorney to the monitoring program and reinstate the investigation or disciplinary proceeding, or take other appropriate action.

(4) Any costs associated with the attorney's participation in a monitoring program pursuant to this subdivision shall be the responsibility of the attorney.

DATED AND ENTERED:
September 20, 2004

Anthony V. Cardona

Hon. Anthony V. Cardona
Presiding Justice

§ 1022.17 Professional Misconduct Defined

A violation of any rule of the Disciplinary Rules of the Code of Professional Responsibility as set forth in 22 NYCRR part 1200, or any other rule or announced standard of the Appellate Division governing the conduct of attorneys, shall constitute professional misconduct within the meaning of Judiciary Law §90 (2).

§ 1022.18 Effect of Restitution on Disciplinary Proceedings

The restitution by an attorney of client funds converted or misapplied by the attorney shall not bar the commencement or continuation of grievance or disciplinary proceedings.

§ 1022.19 Fourth Judicial Department Grievance Plan

(a) Attorney Grievance Committee Structure.

(1) There shall be an attorney grievance committee for each judicial district in the Fourth Judicial Department. The committees shall be composed of members recommended by the presidents of the local bar associations in each district, and there shall be at least one member from each county in a judicial district.

(2) The Appellate Division shall appoint the members of the committees, including a chairperson. An appointment shall be for a term of three years.

A member who has completed two consecutive three-year terms shall not be eligible for reappointment until three years after the expiration of the second term and vacancies on the committee shall be filled for the remainder of the unexpired term. Each committee shall be composed of 21 members, including three nonlawyers. All members of a committee shall reside in the respective judicial district. Twelve members of a committee shall constitute a quorum.

Members of the committees are volunteers and are expressly authorized to participate in a State-sponsored volunteer program, pursuant to Public Officers Law §17 (1).

(3) A member of a current or former committee member's law firm shall not be prohibited from representing a respondent in a disciplinary proceeding, or during an investigation conducted pursuant to these rules, provided that such representation is in accordance with 22 NYCRR part 1200.45.

(b) Duties of Attorney Grievance Committee.

The attorney grievance committee shall:

(1) consider and investigate all matters presented or referred to it by complaint or otherwise, which involve allegations of misconduct by an attorney practicing in the respective district;

(2) supervise staff attorneys in the performance of their duties before the committee;

(3) appoint sub-committees to assist in investigations when necessary and appropriate;

(4) refer cases directly to the Appellate Division when the public interest requires prompt action or when the matter involves an attorney who has been convicted of a felony or a crime involving conduct that adversely reflects upon the attorney's honesty, trustworthiness or fitness as an attorney; and

(5) maintain and provide to the Appellate Division statistical reports summarizing the processing and disposition of all matters before the committee.

(c) Staff Structure.

(1) There shall be a legal staff, which shall include a chief attorney and such staff attorney positions as may be provided for in the State budget. Staff attorneys shall be recommended by the committee chairpersons and appointed by the Appellate Division. Staff attorneys shall reside within the Fourth Department. The chief attorney may hire investigative and clerical staff as provided for in the State budget.

(d) Duties and authority of legal staff.

(1) Investigation of complaints.

Investigation of all complaints shall be initiated by the chief attorney and conducted by the staff attorneys. Staff attorneys are authorized to:

(i) request from the subject of a complaint that a written response be filed within 14 days; a copy of the response may be provided to the complainant;

(ii) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint;

(iii) direct the subject of the complaint to appear before the chief attorney or a staff attorney for a formal interview or examination under oath;

(iv) when it appears that the examination of any person is necessary for a proper determination of the validity of a complaint or that the production of relevant books and papers is necessary, the chief attorney may apply to the Clerk of the Appellate Division for a judicial subpoena to compel the attendance of the person as a witness or the production of relevant books and papers; the application for the subpoena shall be supported by sufficient facts to demonstrate the relevancy of the testimony and of any books and papers specified; subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable before the chief attorney or staff attorney at a time and place specified therein; and

(v) when it appears that a complaint involves a minor matter, such as a personality conflict between attorney and client, a fee dispute or a delay that resulted in no harm to the client, the staff attorney may refer the complaint, upon notice to the attorney and the complainant, to an appropriate committee of the local bar association.

(2) Authorized dispositions of matters not warranting institution of formal disciplinary proceedings.

After investigation of a complaint and consultation with the appropriate committee chairperson, the chief attorney or designated staff attorney may:

(i) dismiss a complaint as unfounded by letter to the complainant and subject attorney; or,

(ii) refer a complaint to a mediation or monitoring program, pursuant to 22 NYCRR 1220.2; or,

(iii) **w hen it appears that the factors set forth in 22 NYCRR 1022.20 (d) (3) (a) are present, make a written recommendation to the Appellate Division, on notice to the attorney who is the subject of the complaint or investigation, that the matter under investigation be stayed and that the attorney be diverted to a monitoring program approved by the Appellate Division; or**

(iv) when it appears that the subject attorney has engaged in inappropriate behavior that does not constitute professional misconduct, issue a Letter of Caution to the attorney, with written notification to the complainant that such action has been taken; or

(v) recommend to the appropriate committee that a Letter of Admonition be issued to the subject attorney. A report summarizing the matter along with the recommendation shall be provided to the attorney. The attorney shall be afforded the right to appear before the committee and be heard. A Letter of Admonition shall be issued upon the approval of a majority of the committee members present. The Letter of Admonition shall state the nature of the inappropriate conduct and the basis for the determination. The issuance of a Letter of Admonition shall constitute the imposition of formal discipline. The complainant shall receive written notification that such action has been taken.

In the event that a majority of the committee members decline to approve the issuance of a Letter of Admonition, the matter may be disposed of in any manner set forth in 22 NYCRR 1022.19 (d) (2) (i), (ii) or (iv).

(3) Appeals.

(i) Appeal from Letter of Caution. An attorney may appeal to the committee from a Letter of Caution by filing a letter stating objections to the Letter of Caution. The letter appeal shall be directed to the chairperson of the appropriate district committee, and shall be served on the chief attorney. The letter appeal shall be filed within 30 days of the date on the Letter of Caution. The chief attorney may file a reply within 10 days of service of the letter appeal. Oral argument of the appeal is not permitted.

(ii) Appeal from Letter of Admonition. An attorney may appeal to the three district committee chairpersons from a Letter of Admonition by filing a letter stating objections to the Letter of Admonition. The letter appeal shall be filed within 30 days of the date on the Letter of Admonition, and shall be served on the chief attorney. The chief attorney may file a reply within 10 days of service of the letter appeal. Appearances on such appeals shall be within the discretion of the committee chairpersons.

(iii) Appeal by chief attorney. The chief attorney may appeal to the three committee chairpersons from a committee determination declining to approve the issuance of a Letter of Admonition by filing a letter stating objections to the determination. The letter appeal shall be filed within 30 days of the date of the adverse determination, and shall be served on the subject attorney. The attorney may file a reply within 10 days of service of the letter appeal. Appearances on such appeals shall be within the discretion of the committee chairpersons.

On appeals taken pursuant to 22 NYCRR 1022.19 (d) (3), the chairperson or chairpersons shall review all issues raised by the complaint or complaints and the entire record that was before the chief attorney or the committee.

(e) Duties of county and local bar associations. A county or local bar association may review, investigate and determine complaints against attorneys involving allegations of minor delay that resulted in no harm to the client, fee disputes, personality conflicts between attorney and client, and other minor matters.

(i) The bar association shall provide to the chief attorney, within 20 days of receipt of a complaint, a report, in a form prescribed by the chief attorney, a copy of the complaint and any other relevant correspondence.

(ii) When a bar association retains jurisdiction over a complaint after notifying the chief attorney as required by 22 NYCRR 1022.19 (e) (i), the association shall complete its investigation and forward the file along with a status report in a form prescribed by the chief attorney, to the chief attorney within 60 days of the date of receipt of the complaint. When the bar association has not reached a determination resolving the complaint within the 60-day period, the district committee shall assume jurisdiction of the matter. The association may make a written request to the chief attorney for an extension of the 60-day period.

(iii) A complaint received by a bar association that involves a matter other than a minor delay, fee dispute or personality conflict shall be forwarded to the chief attorney as soon as possible and in no event more than 20 days after receipt.

(iv) Each bar association shall file quarterly reports on attorney grievance matters in a form prescribed by the chief attorney. The report shall be filed within 15 days of the end of each quarter.

§ 1022.20 Formal disciplinary proceedings.

(a) Authorization for commencement of proceedings.

The chief attorney may recommend to the committee that disciplinary proceedings be commenced when there is probable cause to believe that an attorney has committed professional misconduct or when an attorney has been convicted of a crime involving conduct that adversely reflects upon the attorney's honesty, trustworthiness or fitness as an attorney. The chief attorney shall present the matter to the committee along with a written recommendation, which shall be provided to the attorney who is the subject of the proceeding. The attorney shall have the right to appear before the committee and to be heard in response to the charges. When a majority of the committee members present vote to approve the filing of charges, the chief attorney shall institute formal proceedings against the attorney.

(b) Appeal by chief attorney.

The chief attorney may appeal to the three district chairpersons from a committee determination declining to approve the filing of formal charges by filing a letter stating objections to the determination. The letter appeal shall be filed within 30 days of the date of the adverse determination, and shall be served on the subject attorney. The attorney may file a reply within 10 days of service of the letter appeal. On appeals taken pursuant to 22 NYCRR 1022.20 (b), the chairpersons shall review all issues raised by the complaint or complaints and the entire record that was before the committee.

(c) Procedure for filing charges.

(1) To commence a proceeding in the Appellate Division, the chief attorney shall file the original notice of petition and petition and [12] **five** copies thereof with proof of service of one copy on the respondent attorney. Unless otherwise directed by the Appellate Division, the proceeding shall be made returnable at [3] **2** p.m. on the second Tuesday of the next scheduled Court term. The notice of petition and petition shall be served in the manner set forth in Judiciary Law §90 (6), and with sufficient notice to all parties, as set forth in the CPLR, and shall be filed at least 20 days prior to the commencement of the Court term when it is returnable.

(2) An attorney subject to formal disciplinary charges shall personally appear before the Appellate Division on the return date of the matter and thereafter on any adjourned date, except as provided in 22 NYCRR 1022.20 (c) (1).

(3) Answer. An attorney subject to formal disciplinary charges shall file in the Appellate Division the original answer and 12 copies thereof with proof of service of one copy on the chief attorney or staff counsel within 20 days from the date of service of the petition.

(d) Disposition by the Appellate Division.

(1) When a respondent, in the answer, denies a material allegation of the petition, thereby raising an issue of fact, the Appellate Division may dispense with respondent's appearance and refer the matter to a justice of the Supreme Court or a referee designated by the Appellate Division to hear and report

without recommendation. Unless otherwise directed by the Appellate Division, the referee shall give the matter a preference, shall schedule the hearing on consecutive dates, to the extent possible, and shall complete the hearing within 60 days following the date of the entry of the order of reference. The parties shall make final submissions, including proposed findings of fact, if any, within 15 days following the date on which the stenographic transcript of the minutes of the hearing is completed, and the referee's report shall be completed within 30 days thereafter.

(2) When no issue of fact is raised, or after completion of the hearing and report on such issue, the Appellate Division shall fix a time at which the respondent may be heard in mitigation or otherwise, unless the respondent waives in writing the privilege to be heard.

(3) (a) **When an attorney who is the subject of a disciplinary investigation or proceeding raises in defense of the charges or as a mitigating factor alcohol or substance abuse, or, upon the recommendation of chief counsel or a designated staff attorney pursuant to 22 NYCRR 1022.19 (d) (2) (iii), the Appellate Division may stay the matter under investigation or the determination of the charges and direct that the attorney complete a monitoring program sponsored by a lawyers' assistance program approved by the Appellate Division upon a finding that:**

(i) **the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency;**

(ii) **the alleged misconduct is not such that disbarment from the practice of law would be an appropriate sanction; and**

(iii) **diverting the attorney to a monitoring program is in the public interest.**

(b) **Upon submission of written proof of successful completion of the monitoring program, the Appellate Division may dismiss the disciplinary charges. In the event of an attorney's failure to successfully complete a Court ordered monitoring program, or, the commission of additional misconduct by the attorney during the pendency of the proceeding, the Appellate Division may, upon notice to the attorney and**

after affording the attorney an opportunity to be heard, rescind the order diverting the attorney to the monitoring program and reinstate the disciplinary charges or investigation.

(c) Any costs associated with the attorney's participation in a monitoring program pursuant to this section shall be the responsibility of the attorney.

(e) Suspension pending disposition.

An attorney who is the subject of an investigation or proceeding may be suspended during the pendency of the investigation or proceeding on motion of the chief attorney, on notice to the attorney, upon a finding by the Appellate Division that the attorney has committed misconduct immediately threatening the public interest. Such a finding may be based upon the attorney's default in responding to a petition, or notice to appear for questioning or subpoena; an admission under oath to the commission of professional misconduct; or other uncontroverted evidence of misconduct.

§ 1022.21 Attorneys convicted of a crime

(a) Attorneys convicted of a felony.

The Appellate Division shall, upon receipt of proof that an attorney has been convicted of a felony, as that term is defined in Judiciary Law § 90 (4) (e), enter an order striking the attorney's name from the roll of attorneys.

(b) Attorneys convicted of a serious crime.

(1) The Appellate Division shall, upon receipt of proof that an attorney has been convicted of a serious crime, as that term is defined in Judiciary Law § 90 (4) (d), enter an order suspending the attorney pending the entry of a final order of disposition.

The Appellate Division may, upon the application of the attorney and for good cause shown, as provided in Judiciary Law § 90 (4) (f), vacate the suspension.

(2) The Appellate Division shall, upon entry of the judgment of conviction, direct the attorney to show cause why a final order of discipline should not be

entered. When an attorney requests a hearing, the Appellate Division shall refer the matter to a referee for a hearing, report and recommendation.

(c) Referral to Grievance Committee.

When it is determined by the Appellate Division that the crime of which the attorney has been convicted is not a serious crime, pursuant to Judiciary Law § 90 (4) (d), the Appellate Division may refer the matter to a district grievance committee for investigation and appropriate disciplinary action.

(d) Effect of reversal of conviction or pardon.

When an attorney has been suspended or disbarred based upon a conviction of a serious crime or felony and the conviction is subsequently reversed on appeal, or, the attorney is pardoned by the President of the United States or a governor of any state, the Appellate Division may vacate or modify the order of suspension or disbarment, as provided in Judiciary Law § 90 (5).

§ 1022.22 Imposition of discipline for misconduct committed in other jurisdiction.

When the Appellate Division receives notice that an attorney admitted to practice by the Fourth Department has been disciplined by another state, territory or district, it shall direct the attorney to appear and show cause why similar discipline should not be imposed for the underlying misconduct. The attorney may file, within 20 days of service of the order to show cause, an affidavit stating any defense to the imposition of discipline and raising any mitigating factors. After the attorney has been heard, or, after the appearance has been waived, and upon review of the attorney's affidavit, the order entered by the foreign jurisdiction and the record of the proceeding in that jurisdiction, the Appellate Division may discipline the attorney for the misconduct committed in the foreign jurisdiction unless it finds that the procedure in the foreign jurisdiction deprived the attorney of due process of law, that there was insufficient proof that the attorney committed the misconduct, or, that the imposition of discipline would be unjust.

§ 1022.23 Incompetency or Incapacity of Attorney

(a) When the Appellate Division is presented with proof that an attorney has been judicially declared incompetent or has been committed to a mental facility, it shall enter an order immediately suspending the attorney from the practice of law. The chief attorney shall serve a copy of the order upon the attorney, a committee appointed on behalf of the attorney or upon the director of the appropriate facility, as directed by the Appellate Division.

(b) At any time during the pendency of a disciplinary proceeding or an investigation conducted pursuant to these rules, the chief attorney, or the attorney who is the subject of the proceeding or investigation, may apply to the Appellate Division for a determination that the attorney is incapacitated from practicing law by reason of mental illness or infirmity, addiction to alcohol or illegal substances or any other condition that renders the attorney incapacitated from practicing law. The application shall be by notice of motion and shall be served with sufficient notice to all parties, as set forth in the CPLR. An affidavit shall be filed in support of the application, setting forth facts demonstrating that the attorney is incapacitated. The Appellate Division may appoint a medical expert to examine the attorney and render a report and may assign counsel to represent the attorney. When the Appellate Division finds that an attorney is incapacitated from practicing law, the Appellate Division shall enter an order immediately suspending the attorney from the practice of law and may stay the pending proceeding or investigation.

§ 1022.24 Appointment of attorney to protect clients of suspended, disbarred, incapacitated, or deceased attorney

(a) Suspension, Disbarment, Incapacitation or Death

When an attorney is suspended, disbarred, incapacitated from practicing law pursuant to 22 NYCRR 1022.23, has abandoned the practice of law, or is deceased or is otherwise unable to adequately protect the interests of clients, the Appellate Division may appoint one or more attorneys to take possession of the attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the clients' interests.

(b) Report to Court

An attorney appointed pursuant to 22 NYCRR 1022.24 shall file, within 30 days of the order of appointment or any other time period set by the Appellate Division, a status report, which shall include the name and address of each client and the disposition of each client's file.

(c) Compensation

The Appellate Division may fix the compensation of any attorney appointed pursuant to 1022.24 (a), and may direct that compensation shall be a cost of the underlying disciplinary or incapacitation proceeding.

§ 1022.25 Responsibilities of Retired Attorneys

(a) An attorney shall, at least sixty days prior to retirement from the practice of law, notify by certified mail, return receipt requested, each client and the attorney for each adverse party in any pending matter involving the client, that the attorney is retiring and shall advise each client to secure another attorney. The attorney shall also, with respect to each matter in which a retainer statement has been filed pursuant to 22 NYCRR 1022.2 notify the Office of Court Administration that the attorney is retiring.

(b) In the event that a retired attorney fails to comply with subdivision (a), the Appellate Division may appoint an attorney to take possession of the retired attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the clients' interest.

§ 1022.26 Resignation from practice of law

(a) Resignation of attorney during pendency of disciplinary proceeding or investigation.

The Appellate Division shall enter an order striking from the roll of attorneys the name of an attorney who is the subject of a disciplinary proceeding or an investigation conducted pursuant to these rules upon receipt of an affidavit or affirmation in the form included in Appendix A, with proof of service on the chief attorney, which sets forth the nature of the charges or the allegations under investigation and shows that:

(1) the resignation is voluntarily rendered without duress and with full awareness of the consequences;

(2) the resignor admits the charges or allegations of misconduct;

(3) the resignor has no defense to the charges or allegations of misconduct; and

(4) when the charges or allegations include the wilful misappropriation or misapplication of clients' funds or property, the resignor consents to the entry of an order of restitution.

(b) Resignation of attorney for non-disciplinary reasons.

An attorney may resign from the practice of law for non-disciplinary reasons by submitting to the Appellate Division an affidavit or affirmation in the form included in Appendix A, showing:

(1) the jurisdiction or jurisdictions where the attorney is admitted, along with the respective dates of admission;

(2) the attorney's current address and, when applicable, date that the attorney left the State of New York;

(3) that the attorney is in good standing in each jurisdiction where admitted and that the attorney is not currently the subject of a disciplinary proceeding or complaint;

(4) the specific reason for the resignation; and

(5) when the resignation is submitted by an attorney residing out-of-state who does not want to submit attorney registration fees, that the attorney does not intend to return to the State of New York to resume the practice of law.

When the Appellate Division determines that an attorney is eligible to resign for non-disciplinary reasons, it shall enter an order removing from the roll of attorneys the attorney's name and stating the non-disciplinary nature of the resignation.

§ 1022.27 Conduct of disbarred, suspended or resigned attorneys

(a) Prohibition against practicing law.

Attorneys disbarred, suspended or resigned from practice shall comply with Judiciary Law §§ 478, 479, 484 and 486.

(b) Notification of clients.

When an attorney is disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, the attorney shall promptly notify, by registered or certified mail, each client, the attorney for each party in a pending matter and, for each action where a retainer statement has been filed pursuant to 22 NYCRR 1022.2, the Office of Court Administration. The notice shall state that the attorney is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action or to the Office of Court Administration in connection with an action where a retainer statement has been filed shall include the name and address of the disbarred, suspended or resigned attorney's client.

(c) Duty to withdraw from pending action or proceeding.

When a client in a pending action or proceeding fails to obtain new counsel, the disbarred, suspended or resigned attorney shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.

(d) Affidavit of compliance.

A disbarred, suspended or resigned attorney shall file with the Appellate Division, no later than 30 days after the date of the order of disbarment, suspension or removal from the roll of attorneys, an affidavit showing a current mailing address for the attorney and that the attorney has complied with the order and these Rules. The affidavit shall be served on the chief attorney and proof of service shall be filed with the Appellate Division.

(e) Compensation

A disbarred, suspended or resigned attorney may not share in any fee for legal services rendered by another attorney during the period of disbarment, suspension or removal from the roll of attorneys but may be compensated on a quantum meruit basis for services rendered prior to the effective date of the disbarment, suspension or removal from the roll of attorneys. The amount and manner of compensation shall be determined, on motion of the disbarred, suspended or resigned attorney, by the court or

agency where the action is pending, or, if the action has not been commenced, at a special term of the Supreme Court in the county where the moving attorney maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.

(f) Required records

A disbarred, suspended or resigned attorney shall keep and maintain records of the attorney's compliance with 22 NYCRR 1022.27 and with the order of disbarment, suspension or removal from the roll of attorneys.

§ 1022.28 Reinstatement

The Appellate Division may enter an order reinstating an attorney who has been disbarred, suspended or removed from the roll of attorneys for non-disciplinary reasons, when it appears to the satisfaction of the Appellate Division that the attorney has established by clear and convincing evidence that: the attorney has complied with the order of disbarment, suspension or the order removing the attorney from the roll; the attorney has complied with the Rules of the Court; the attorney has the requisite character and fitness to practice law; and it would be in the public interest to reinstate the attorney to the practice of law.

(a) Disbarred Attorneys.

(1) Time of Application

An attorney disbarred by order of the Appellate Division for misconduct, or stricken from the roll of attorneys pursuant to Judiciary Law § 90 (4) or 22 NYCRR 1022.26 (a), may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment or the order striking the attorney from the roll of attorneys.

The Appellate Division may deny the application with leave to renew upon submission of proof of successful completion of the New York State Bar Examination described in 22 NYCRR 520.8.

(2) Procedure.

An application for reinstatement shall be made by motion, which shall be served with sufficient notice to all parties as set forth in the CPLR. The motion shall be returnable at [3] 2 p.m. on the date scheduled by the Appellate Division for disciplinary matters, or as otherwise directed by the Appellate Division. The disbarred attorney shall personally appear before the Appellate Division on the return date of the application, unless otherwise directed by the Appellate Division. The motion and all supporting papers, as set forth in 22 NYCRR 1022.28 (3), shall be filed in the Appellate Division no later than the Friday preceding the return date.

(3) Necessary papers.

An applicant for reinstatement shall file an original and 12 copies of the application. Papers on an application for reinstatement following disbarment shall include: a notice of motion; a copy of the order of disbarment or the order striking the attorney from the roll of attorneys; a copy of the Per Curiam Opinion of the Appellate Division, if any; a completed questionnaire in the form included in Appendix A; proof of successful completion of the Multistate Professional Responsibility Examination described in 22 NYCRR 520.9; and proof of service of one copy of the application on the chief attorney.

(4) Responding papers.

Papers in response to an application for reinstatement must be in the form of an affidavit or affirmation and shall be filed, along with 12 copies thereof and proof of service of one copy on the disbarred attorney, no later than the Friday preceding the return date of the application.

(b) Attorneys suspended for misconduct.

(1) Time of application.

A suspended attorney may apply for reinstatement after the expiration of the period of suspension and as provided in the order of suspension.

When an attorney has been suspended for a period of more than one year, the Appellate Division may deny the application with leave to renew upon submission of proof of successful completion of the New York State Bar Examination described in 22 NYCRR 520.8.

(2) Procedure.

An attorney suspended for misconduct by order of the Appellate Division may apply for reinstatement by making a motion, as provided in 22 NYCRR 1022.28 (a) (2). When an attorney has been suspended for a period of more than six months, the attorney shall personally appear before the Appellate Division on the return date of the application, unless otherwise directed by the Appellate Division. An attorney suspended for a period of six months or less shall not be required to appear before the Appellate Division, unless otherwise directed by the Appellate Division.

(3) Necessary papers.

An applicant for reinstatement shall file an original and 12 copies of the application. When an attorney has been suspended for a period of more than six months, papers on an application for reinstatement following suspension shall include: a notice of motion; a copy of the order of suspension; a copy of the Per Curiam Opinion of the Appellate Division, if any; a completed questionnaire in the form included in Appendix A; proof of successful completion of the Multistate Professional Responsibility Examination described in 22 NYCRR 520.9; and proof of service of one copy of the application on the chief attorney.

When an attorney has been suspended for a period of six months or less, papers on an application for reinstatement following suspension shall include: an affidavit of the suspended attorney demonstrating compliance with the order of suspension and with 22 NYCRR 1022.27; a copy of the order of suspension; a copy of the Per Curiam Opinion of the Appellate Division, if any; and proof of service of one copy of the application on the chief attorney.

The Appellate Division may direct an attorney to file a completed questionnaire in the form included in Appendix A.

(4) Responding papers.

Responding papers may be filed as provided in 22 NYCRR 1022.28 (a) (4).

(c) Attorneys suspended pursuant to 22 NYCRR 1022.23.

(1) Time of application.

An attorney suspended pursuant to 22 NYCRR 1022.23 (a) may apply for reinstatement at such time as the attorney is declared competent.

An attorney suspended pursuant to Rule 1022.23 (b) may apply for reinstatement as provided in the order of suspension or at such time as the attorney is no longer incapacitated from practicing law.

(2) Procedure.

An attorney suspended pursuant to 22 NYCRR 1022.23 (a) or (b) may apply for reinstatement by making a motion as provided in 22 NYCRR 1022.28 (a) (2). The attorney shall personally appear before the Appellate Division on the return date of the application, unless otherwise directed by the Appellate Division.

The Appellate Division may appoint a medical expert to examine the suspended attorney or may require the suspended attorney to be examined at the attorney's expense. The Appellate Division may require the suspended attorney to submit records of medical or psychiatric care made during the period of disability.

(3) Necessary papers.

An applicant for reinstatement shall file an original and 12 copies of the application. Papers on an application for reinstatement following suspension pursuant to 22 NYCRR 1022.23 shall include a notice of motion; a copy of the order of suspension; a copy of the Per Curiam Opinion of the Appellate Division, if any; proof, in evidentiary form, of a declaration of competency or of the attorney's capacity to practice law; proof of service of one copy of the application on the chief attorney; and, when the suspension was for a period of one year or more, a completed questionnaire in the form included in Appendix A; proof of successful completion of the Multistate Professional Responsibility Examination described in 22 NYCRR 520.9; and proof of service of one copy of the application on the chief attorney.

(4) Responding papers.

Responding papers may be filed, as provided in 22 NYCRR 1022.28 (a) (4).

(d) Attorneys removed from roll of attorneys after voluntary

resignation.

(1) Time of Application.

Attorneys removed from the roll of attorneys after voluntarily resigning from practice pursuant to 22 NYCRR 1022.26 (b) may apply for reinstatement to practice at any time upon a showing of changed circumstances.

When the attorney has been removed from the roll of attorneys for a period of one year or more, the Appellate Division may require that the attorney submit proof of successful completion of the Multistate Professional Responsibility Examination described in 22 NYCRR 520.9 or may direct that the application be denied with leave to renew upon submission of proof of successful completion of the New York State Bar Examination described in 22 NYCRR 520.8.

(2) Procedure.

An attorney removed from the roll of attorneys pursuant to 22 NYCRR 1022.26 (b) may apply for reinstatement to practice by submitting to the Appellate Division an affidavit along with supporting documentation showing:

(i) the jurisdiction or jurisdictions where the attorney is admitted and that the attorney is in good standing in each jurisdiction where admitted and is not the subject of a pending disciplinary proceeding or complaint;

(ii) the attorney's current address and, when applicable, date that the attorney left the State of New York;

(iii) facts demonstrating a change of circumstances subsequent to entry of the order accepting the attorney's voluntary resignation; and

(iv) payment of attorney registration fees outstanding at the time of the voluntary resignation and that accrued during the period between the entry of the order removing the attorney from the roll of attorneys and the filing of the application for reinstatement.

When the attorney has been removed from the roll of attorneys for a period of one year or more, the attorney shall personally appear before the Appellate Division at [3] 2 p.m. on the next date scheduled for disciplinary proceedings following the filing of the application, unless otherwise directed

by the Appellate Division. Attorneys removed from the roll of attorneys for a period of less than one year prior to the application for reinstatement shall not be required to appear before the Appellate Division, unless otherwise directed by the Appellate Division.

Twelve copies of the application shall be filed, along with proof of service of one copy of the application on the chief attorney, in the Appellate Division no later than the Friday preceding the next scheduled disciplinary date.

(3) Necessary papers.

Unless otherwise directed by the Appellate Division pursuant to 22 NYCRR 1022.28 (d) (2), papers on an application for reinstatement following the entry of an order of voluntary resignation shall include the affidavit described in 22 NYCRR 1022.28 (d) (2); a copy of the order removing the attorney from the roll of attorneys; the Per Curiam Opinion of the Appellate Division, if any; and proof of service of one copy of the application on the chief attorney.

The Appellate Division may direct an attorney to file a completed questionnaire in the form included in Appendix A.

(4) Responding papers

Responding papers may be filed as provided in 22 NYCRR 1022.28 (a) (4).