

New York Law Journal

Select 'Print' in your browser menu to print this document.

Copyright 2011. ALM Media Properties, LLC. All rights reserved. New York Law Journal Online

Page printed from: <http://www.nylj.com>

[Back to Article](#)

State Bar Set to Consider NYCLA's Proposal for Conduct Commission

Joel Stashenko

01-21-2011

The policy-setting body of the New York State Bar Association will be asked next week to endorse legislative proposals by the New York County Lawyers' Association to change the way misconduct investigations are handled by the Commission on Judicial Conduct.

After more than a year of lobbying by NYCLA, the state bar's House of Delegates will consider eight resolutions embodying various recommendations during the state bar's annual meeting next week at the New York Hilton.

Supporters of the original recommendations, which were released in 2009 ([NYLJ, Nov. 16, 2009](#)), say the initiative was prompted by widespread frustration on the part of many judges who believe that the commission is unfair. Its aim is to enhance judicial independence, they argue.

However, after reviewing NYCLA's report, the commission opposed many of the recommendations, saying they would make it more difficult to investigate alleged misconduct by judges.

"The test for changing the Commission system or procedures should not be what would please or solely benefit the judiciary but what would be consistent with the public interest in a fair but rigorous system of ethics enforcement," the commission said. "It appears in many instances that the NYCLA recommendations emphasize the judges' individual interests at the expense of the larger public values the Commission must serve" ([NYLJ, Feb. 20, 2010](#)).

Read NYCLA's original resolution and the Commission's initial response.

Since then, the commission and NYCLA have "reflected" on the recommendations, with both sides making an effort to address each other's concerns, commission administrator Robert Tembeckjian said in an interview today.

"I think that NYCLA has modified some of their proposals, which has taken some of the edge off the one-sidedness which the commission originally felt was represented by their report," Mr. Tembeckjian said. "On the areas in which we still disagree, such as raising the standard of proof and expanding the discovery rules for judges to that which does not exist in other disciplinary proceedings, the recommendations still seem to be somewhat skewed" toward judges.

NYCLA's president, James B. Kobak Jr. of Hughes Hubbard & Reed, is scheduled to address the

delegates. He is also a member of the House of Delegates.

"We think it should be passed and hope that it will be," Mr. Kobek said yesterday. "There are a couple of major portions of the report, like burden of proof and separation of [investigative and adjudicative] functions, over which I suspect there will be debate. We think we have support for lot of our recommendations, and some other questions deserve full debate."

The commission submitted a memorandum on the NYCLA recommendations, but Mr. Tembeckjian's request to present the commission's views in person was denied by state bar officials.

Read NYCLA's revised resolution and the Commission's latest response.

"It's not our custom," state bar president Stephen Younger said of Mr. Tembeckjian's request to speak. "Only the members of the House of Delegates get to speak."

One of the moving forces behind NYCLA's proposals, Klaus Eppler, acknowledged in an interview that some of the proposals remain controversial.

Mr. Eppler, of Proskauer Rose, was co-chair of the subcommittee that proposed what it characterized as "improvements" to the judicial disciplinary process. Manhattan Supreme Court Justice Marcy L. Kahn co-chaired the panel.

One of the recommendations to be considered by the delegates that is expected to generate debate would heighten the standard of proof for allegations against judges from the current "preponderance of the evidence" to a "clear and convincing evidence" standard.

In its submission to delegates, NYCLA argued that its suggested standard has long been recommended by the American Bar Association and is the standard in at least 37 states.

But the commission opposes the recommendation, pointing to the Court of Appeals' rationale in **Seiffert v. Commission on Judicial Conduct**, 65 NY2d 278 (1985), for the current standard.

The Court, in that case, argued that the right of a judge "to continue in office [is] more akin to a property, rather than a personal or liberty, interest" and is far outweighed by the public interest.

"After 32 years and 91 reviews of [conduct commission] decisions by the Court of Appeals and absent any showing that this [preponderance] standard is unfair or has led to unjust results, the standard articulated by the Court of Appeals should not change," the commission wrote to the delegates.

A number of NYCLA's suggestions relate to providing judges what the bar group calls "adequate notice and discovery rights" in the service of due process.

The conduct commission opposes a recommendation to notify judges as soon as an investigation is authorized. It argues that the current policy of notifying judges only when a response is required protects the integrity of the investigation; promotes the independence of judges by insulating them from unsubstantiated allegations and protects and encourages complainants to come forward.

However, the commission supports notifying judges of a complaint source except when there is "good cause" to keep that information confidential.

Also controversial is NYCLA's recommendation that different commission members be delegated to supervise the investigation and adjudication of a particular case.

The commission previously said that the proposal would be impractical on a body with only 11 members. However, it noted in its memo to the commission that while 42 state judicial-conduct panels have joint investigatory and adjudicatory functions, it could support a "two-tier" approach depending on how a constitutional amendment was fashioned in New York.

Both the commission and NYCLA back the institution of suspension-without-pay as an "intermediate" punishment stronger than public censure but short of removal, which also could generate discussion among delegates.

The commission opposes a NYCLA proposal that a statement should be included in the commission's policy manual that its staff is to treat judges with the "highest respect." It called the provision a "gratuitous and unsubstantiated criticism" of its professionalism.

NYCLA backs the purchase by the state Office of Court Administration of professional liability insurance coverage for judges so they can afford legal representation if they are accused of wrongdoing. The commission says it has "no philosophical objection" to the idea but cautions that such a policy should be "carefully crafted to avoid conflict with other public policy concerns."

The commission and NYCLA found common ground on proposals for the commission to generate a policy manual and the institution of a training program for referees who collect evidence and testimony in misconduct cases.

Mr. Eppler said NYCLA's recommendations stemmed from an all-day session it held on the judicial disciplinary process in 2007. During those closed-door discussions, Mr. Eppler said he was surprised at the level of frustration that judges expressed about the disciplinary process and how eager the judges were for changes in the system.

"We took this on, not as a brief for the judges, but as an aid in enhancing the independence of the judiciary," Mr. Eppler said this week. "My own view, and of the others who have worked on this, is that if the procedures were generally deemed to be fair and the judge has the opportunity to defend himself or herself with adequate due process, then I think a great deal of that effect [of frustration] on the part of the judiciary is going to be alleviated."

Most of the NYCLA recommendations will require legislative action, although the imprimatur of the delegates might carry some weight with the lawmakers.

A spokesman for the New York City Bar Association said it has been in discussions with NYCLA and the state bar about the report but has not yet formally endorsed the still-evolving proposals.

@|Joel Stashenko can be contacted at jstashenko@alm.com.