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BEFORE THE NEW YORK STATE SENATE
STANDING COMMITTEE ON JUDICIARY

Public Hearing on the
Appellate Division First Department
Departmental Disciplinary Committee,
the Grievance Committees of the
Various Judicial Districts, and the
New York State Commission on Judicial Conduct

Hearing Room 6
Empire State Plaza
Albany, NY

June 8, 2009
10:35 a.m.

PRESIDING:

Senator John Sampson
Chair
Senate Standing Committee on Judiciary

PRESENT:

Senator John A. DeFrancisco (R)
Senator Bill Perkins

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1 Committee.

2 Welcome, gentlemen. Good morning.

3 MR. GOLD: Good morning. Thank you.

4 Mr. Chairman, distinguished members of
5 the committee, my name is Martin R. Gold. I
6 am a lawyer in New York City and a partner
7 in Sonnenschein, Nath & Rosenthal, a large
8 national law firm. I'm a volunteer member
9 of the Departmental Disciplinary Committee
10 for the First Judicial Department appointed
11 by the Appellate Division. I am also a
12 senior member of the policy committee of the
13 Disciplinary Committee.

14 The chairman of the committee, Mr. Roy
15 Reardon, very much wanted to be here today
16 and to attend this hearing and participate,
17 but another commitment made that impossible.
18 And he asked me to attend in his place, and
19 it's my pleasure to do so.

20 With me is our chief counsel, Alan
21 Friedberg. Together we will provide you
22 with a description of the operation of the
23 attorney disciplinary system in the First
24 Department and answer any questions you may

1 have concerning our operation.

2 The Departmental Disciplinary Committee
3 was established by the Appellate Division,
4 First Department, to assist in the court's
5 role in disciplining attorneys in the First
6 Department, which consists of New York and
7 Bronx Counties. Members of the committee
8 are all appointed by the Appellate Division.
9 They are all volunteers.

10 There are approximately 80,000
11 attorneys in the First Department. As I
12 have indicated, Mr. Reardon is chairman of
13 the committee. The committee also receives
14 hands-on guidance from the Policy Committee
15 appointed by the Appellate Division from the
16 members of the committee. The Policy
17 Committee oversees the general functioning
18 of the committee and the staff and also
19 provides direction on pending issues.

20 Now, the Appellate Division has adopted
21 public rules and procedures governing the
22 Departmental Disciplinary Committee and
23 rules governing the conduct of attorneys.
24 These rules are available to the public,

1 together with the rules of professional
2 conduct which govern attorney conduct, on
3 the Departmental Disciplinary Committee
4 website, which is part of the Appellate
5 Division website.

6 Also available on the website is
7 information about the committee, including
8 information concerning how a complaint can
9 be filed. Information about filing a
10 complaint is also available to members of
11 the public who call or visit the committee's
12 offices. Complaint forms are available in
13 English, Spanish, and Chinese.

14 It is important to note that the
15 purpose of attorney discipline is not to
16 mediate disputes between attorneys and
17 clients or to vindicate the rights of
18 complainants. Such matters can best be
19 handled by the court system. Generally fee
20 disputes, issues of legal strategy, and
21 single incidents of malpractice that might
22 be addressed in a civil matter do not
23 constitute misconduct. The Appellate
24 Division and the committee must devote its

1 limited resources to the limited remedial
2 options within its jurisdiction.

3 Pursuant to Section 90, Subdivision 10,
4 as Senator Sampson mentioned, of the
5 Judiciary Law, all materials concerning an
6 investigation or proceeding concerning an
7 attorney's conduct are sealed until the
8 Appellate Division issues a decision
9 sustaining charges of misconduct concerning
10 an attorney. When the Appellate Division
11 issues such a decision, the record of all of
12 the proceedings becomes public.

13 The Office of the Chief Counsel of the
14 Disciplinary Committee is staffed by 23
15 attorneys. The staff attorneys screen
16 complaints, investigate allegations of
17 misconduct, and prosecute cases at hearings.
18 As I have indicated, Mr. Alan Friedberg is
19 the chief counsel.

20 Here is the process by which a
21 complaint is handled. When a complaint is
22 received at the committee, it is immediately
23 assigned to a staff attorney to be screened.
24 Investigations may also be commenced by the

1 chief counsel on his own initiative, even in
2 the absence of a complaint from a third
3 party.

4 Since numerous attorneys have offices
5 in more than one location in the state, the
6 address that an attorney lists in
7 registering with the Office of Court
8 Administration determines which disciplinary
9 body exercises jurisdiction over that
10 attorney. Complaints against an attorney
11 who is registered at an address in another
12 judicial department are referred to the
13 appropriate disciplinary body. Accordingly,
14 each regional disciplinary agency is able to
15 keep a record of all complaints filed
16 against that attorney.

17 Complaints against judges are referred
18 to the Commission on Judicial Conduct; we
19 have no jurisdiction over them.

20 The staff attorney who screens the
21 complaint reviews the entire complaint,
22 including attachments, and may choose to
23 interview the complainant, obtain court
24 documents, or obtain documents or

1 information from the attorney who is the
2 subject of the complaint. If the staff
3 attorney believes the allegations are likely
4 to warrant formal charges, he or she refers
5 the matter to the chief counsel for
6 immediate assignment.

7 If the chief counsel concurs that the
8 allegations are likely to warrant formal
9 charges, the complaint is immediately
10 assigned to a staff attorney for
11 investigation, which may include obtaining a
12 written response from the respondent
13 attorney, scheduling testimony of the
14 respondent attorney or others, and obtaining
15 records, including court records and bank
16 records. All of them, we have subpoena
17 power to do that.

18 In cases where there's conclusive
19 evidence of serious misconduct or failure to
20 cooperate with the committee, the committee
21 is authorized to make an immediate motion to
22 seek an attorney's interim suspension during
23 the proceedings.

24 If the allegations appear less serious,

1 the screening attorney may determine to seek
2 the written response of the respondent
3 attorney. When that is obtained, it is sent
4 to the complainant, who is requested to
5 reply to the attorney's response. After
6 obtaining this information, the screening
7 staff attorney may recommend, in writing,
8 dismissal or assignment of the matter to a
9 staff attorney for further investigation.

10 Each recommendation is reviewed by the
11 chief counsel, who may determine to assign
12 the matter to a staff attorney for
13 investigation or recommend dismissal of the
14 complaint.

15 If the recommendation of the chief
16 counsel is to dismiss the complaint, the
17 chief counsel signs the recommendation
18 memorandum and the entire file, including
19 the memorandum, is sent to one of the 55
20 members of the Departmental Disciplinary
21 Committee who must approve the dismissal.

22 If the complainant seeks
23 reconsideration, the matter is sent to
24 another attorney committee member who must

1 also approve dismissal. And if there's
2 disagreement, we have procedures to deal
3 with that.

4 The committee members are appointed by
5 the Appellate Division and include
6 experienced practicing attorneys, former
7 prosecutors, and approximately one-third are
8 lay members.

9 CHAIRMAN SAMPSON: So this committee
10 that reviews it, they are appointed by
11 members of the disciplinary --

12 MR. GOLD: These are the members of
13 the committee, the disciplinary committee,
14 all of whom were appointed by the court.

15 CHAIRMAN SAMPSON: Okay.

16 MR. GOLD: The types of complaints
17 that are dismissed include those complaints
18 expressing general dissatisfaction with the
19 outcome of a case without an allegation of
20 specific misconduct by an attorney, a very
21 common kind of complaint. There's a losing
22 side in every litigation.

23 CHAIRMAN SAMPSON: We know that.
24 And, Mr. Gold, we're just trying to keep

1 everything within five minutes, because we
2 have quite a few --

3 MR. GOLD: Well, I'm going to the
4 heart of what you're asking about --

5 CHAIRMAN SAMPSON: Okay. If you can,
6 that would be great.

7 MR. GOLD: -- is how these things are
8 reviewed internally and what are our
9 procedures.

10 The committee has discretion to refer
11 action concerning possible misconduct by an
12 attorney until litigation in the court
13 system is concluded. The exercise of that
14 discretion is done on a case-by-case basis.

15 If the staff attorney determines that
16 the allegations do not constitute
17 misconduct, the screening attorney may
18 recommend that the complaint be rejected
19 without seeking a response from the
20 respondent attorney. In such a case the
21 screening attorney's written memorandum is
22 reviewed again by the chief counsel, who, if
23 he agrees with the recommendation, signs the
24 memorandum, and again the entire file is

1 sent to a committee member who must approve
2 the rejection.

3 Following an investigation, which may
4 include depositions, subpoenaed documents,
5 interviews, the attorney writes a memorandum
6 recommending action on the complaint. The
7 memorandum again must be approved by chief
8 counsel. If the recommendation is for
9 dismissal, the entire file again goes to a
10 committee member for approval. And again,
11 there's a procedure for reconsideration if
12 the complainant seeks such reconsideration.

13 If the recommendation is for a letter
14 of admonition or the filing of formal
15 charges, it must be approved by two separate
16 attorney members of the Policy Committee of
17 the committee, which is composed of nine
18 attorneys and three laypersons. The members
19 review a file; if two members approve an
20 admonition, a confidential admonition is
21 sent to the respondent attorney and the
22 complainant is notified.

23 An admonition, although private, is
24 considered discipline and may be used as

1 aggravation if further charges are filed
2 against the attorney. If two attorney
3 members of the Policy Committee, after
4 reviewing the file, approve charges, the
5 Appellate Division appoints a referee who
6 conducts a hearing, which is essentially a
7 trial. The rules of evidence apply.

8 The referee's recommendation is then
9 reviewed by a panel, usually of four members
10 of the Disciplinary Committee, who make a
11 recommendation to the Appellate Division as
12 to misconduct or possible action.

13 SENATOR PERKINS: Excuse me. Maybe
14 we can get to the balance of what you're
15 going to share with some questions that I
16 think are coming up.

17 MR. GOLD: Fine.

18 SENATOR PERKINS: For instance -- if
19 you don't mind, Mr. Chair -- I'm looking
20 sort of like for some statistical
21 information in terms of how many
22 complaints --

23 MR. GOLD: I'm coming to that, but
24 I'll --

1 SENATOR PERKINS: So I might as well
2 ask the question so you can get to it, and
3 that way we can try and have a conversation.

4 Because, you know, one of the wonderful
5 things, Mr. Chairman, is that this is such a
6 great turnout, there's a lot of folks here.
7 And it's going to take a lot of time, so --

8 MR. GOLD: Well, let me just jump to
9 the statistics that we have.

10 SENATOR PERKINS: Okay.

11 MR. GOLD: In 2008 the committee
12 received approximately 3300 complaints
13 concerning attorneys. Five hundred
14 twenty-five of these were dismissed without
15 seeking responses from the respondent
16 attorney because these complaints did not
17 describe conduct that violated the rules
18 which the committee enforces. An additional
19 367 complaints were referred to other
20 disciplinary agencies, such as when a
21 complaint is made against an attorney in a
22 different department.

23 And also included in that number are
24 complaints against nonattorneys, such as the

1 unauthorized practice of law. Those things
2 we refer to the district attorney's office.

3 Of the remaining cases, responses are
4 sought and other forms of investigation are
5 commenced.

6 In 2008, 21 attorneys were disbarred
7 after hearings, that's after full hearings.
8 Eight attorneys submitted disciplinary
9 resignations, 22 attorneys were suspended,
10 and two were publicly censured. In
11 addition, approximately 1900 complaints were
12 dismissed by the committee and 58 attorneys
13 received private admonitions.

14 Now, I can say -- these are the 2008
15 statistics -- I've been a member of the
16 committee for quite some time, and I would
17 say that this was a representative year.

18 CHAIRMAN SAMPSON: That's usually
19 the -- that's the norm, or are there more
20 complaints, less complaints?

21 MR. GOLD: I think this is typical.

22 CHAIRMAN SAMPSON: Typical?

23 MR. GOLD: Mm-hmm. A typical kind of
24 a year.

1 CHAIRMAN SAMPSON: And when you were
2 talking about the issue, if there is a
3 question where, say, the staff attorney is
4 uncertain whether this rises to the level of
5 an attorney being disciplined, does he then
6 go speak to the chief counsel?

7 MR. GOLD: Absolutely. Each staff
8 attorney -- now, let me turn this one over
9 to Alan Friedberg, because he handles the
10 staff.

11 MR. FRIEDBERG: If there's any
12 question that there might be misconduct, we
13 would proceed with it.

14 But we get many complaints that are
15 just somebody who might have lost a criminal
16 or civil case and just said "I lost, and I'm
17 blaming it on my lawyer." If there's no
18 grounds for misconduct, then those are
19 rejected without seeking a response.

20 But in most cases we do seek the
21 response of the attorney, and then that
22 response, which we call an answer, is sent
23 to the complainant for what we call a reply.
24 And then when that comes in, we make a

1 determination in every case.

2 And that's 3300 to 3500 complaints a
3 year, I review them. And for any dismissal,
4 a committee member must review it, an
5 attorney committee member. And if
6 reconsideration is sought, a second attorney
7 committee member must review it.

8 For anything that may go to charges or
9 an admonition, two attorney Policy Committee
10 members must review it and approve.

11 CHAIRMAN SAMPSON: And dealing with
12 the -- and usually there's one staff
13 attorney who works on these complaints? Or,
14 I mean --

15 MR. FRIEDBERG: Well, almost all the
16 attorneys screen cases except for several of
17 the supervisors. So it's just randomly
18 given out to the next attorney. Our intake
19 people just give it out --

20 CHAIRMAN SAMPSON: How many cases do
21 they normally handle?

22 MR. FRIEDBERG: Well, they normally
23 have about 50 cases for -- not for
24 screening, for investigation. And they

1 probably would screen 3300 complaints
2 divided by 21 or 20 attorneys who are
3 screening, 150 a year, three a week, I'm
4 assuming.

5 Most of our staff is very experienced.
6 Many are former prosecutors.

7 MR. GOLD: Senator, let me just add
8 one thing. In cases where there's internal
9 disagreement or, say, the chief counsel in
10 his own mind looks at a case and says "This
11 one is kind of close, I don't know what we
12 ought to do," he'll take it to the chairman,
13 to Mr. Reardon.

14 Sometimes when Mr. Reardon looks at a
15 case, he says, "Let's bring this to the
16 whole Policy Committee."

17 CHAIRMAN SAMPSON: I gotcha. So if
18 there's a question such as that, it then
19 goes to the entire Policy Committee?

20 MR. GOLD: It could, yes.

21 CHAIRMAN SAMPSON: How many members
22 of the Policy Committee?

23 MR. FRIEDBERG: There's 12. All
24 appointed by the Appellate Division.

1 CHAIRMAN SAMPSON: And out of those
2 12 members, suppose you have a split? You
3 know, six say it doesn't rise to that level,
4 and the other six say it rises to a certain
5 level. What do we do in those instances?

6 MR. FRIEDBERG: That's theoretical.
7 It never really happens.

8 CHAIRMAN SAMPSON: Never really
9 happens.

10 MR. FRIEDBERG: If six people thought
11 it was misconduct, I'd have to say, well,
12 potentially it could be misconduct, and I'd
13 proceed. But generally it's fairly obvious.

14 CHAIRMAN SAMPSON: And most of the
15 cases that you see are usually mishandling
16 escrow or --

17 MR. FRIEDBERG: Well, most of the
18 complaints we get are neglect from the
19 clients.

20 Most of the serious cases that result
21 in serious charges involve financial
22 matters, particularly escrow. Although
23 escrow is not the biggest type of complaint,
24 it's the biggest type of complaint that

1 perhaps results in serious penalty.

2 MR. GOLD: I should say that in the
3 First Department, because of the nature of
4 what goes on in the Island of Manhattan, we
5 get an awful lot of very major complaints
6 involving complicated financial issues.
7 Sometimes -- we don't get too many of them,
8 but we do get some of these cases which are
9 very complex and involved. Sometimes they
10 involve allegations of mishandling of funds
11 in connection with estates or trusts or
12 securities matters or things of that sort.

13 And we deal with all of those kinds of
14 matters, and we have members of the Policy
15 Committee who are skilled and experienced in
16 mostly all of these areas.

17 Now, by the way, at the present time
18 one of the issues that's facing us, which is
19 very important to us, is immigration cases.
20 We are very concerned that people who are
21 coming into the United States and are here
22 and are subject to the immigration
23 litigation system, too many of them are
24 being inadequately represented by counsel.

1 us -- you just mentioned two major sources,
2 I guess, of complaints. One has to do with
3 the escrow accounts and the other one sort
4 of neglect.

5 MR. GOLD: Yes.

6 SENATOR PERKINS: Now, what falls
7 into sort of the neglect category?

8 MR. GOLD: Well, a typical kind of
9 neglect case, someone will write a letter
10 and say, "I hired a lawyer, I paid him
11 X thousand dollars as a retainer, and then I
12 couldn't get him on the telephone and he
13 didn't do anything for me." That's a
14 serious matter. That X thousands of dollars
15 is important to the client. Lawyers are not
16 supposed to neglect matters for clients.

17 And generally what we do with those is,
18 depending upon whether or not the client has
19 been adversely affected already by what's
20 happened -- I mean, if the statute of
21 limitations has run or something like
22 that -- we treat those as serious matters.

23 In the absence of something serious
24 having already happened, and certainly if

1 this is a first offense against that lawyer,
2 it would normally result in a letter of
3 admonition. So even though neglect is the
4 largest single category of matters that we
5 have, it's not often the most serious in
6 terms of the discipline.

7 The mishandling of client funds, a
8 client escrow account or maybe estate funds
9 or something like that, is probably the most
10 serious and comes with the way the court
11 deals with that --

12 SENATOR PERKINS: Would you say most
13 of your cases are in that area of the escrow
14 accounts?

15 MR. GOLD: No.

16 MR. FRIEDBERG: Not most, but many.

17 SENATOR PERKINS: But many.

18 MR. GOLD: Yes.

19 SENATOR PERKINS: Most would be in
20 the neglect categories?

21 MR. GOLD: Right.

22 SENATOR PERKINS: Let me ask two
23 quick other questions, just for the sake of
24 discussion.

1 Are these processes open, do they have
2 any transparencies? Or are these behind
3 closed doors, totally confidential?

4 MR. GOLD: They're absolutely closed.
5 Because of Section 90, Subdivision 10 of the
6 Judiciary Law, everything is confidential,
7 sealed, not subject to -- it's not available
8 to anybody in the public at all.

9 SENATOR PERKINS: The good news or
10 the bad news is it's sealed; right?

11 MR. GOLD: That's right. Unless and
12 until the Appellate Division orders public
13 discipline against the lawyer. That would
14 be either a censure, suspension or
15 disbarment. Until one of those happens, the
16 whole file is closed.

17 So for example -- and by the way, I'm
18 glad you asked that, Senator, because that's
19 important in terms of what's before you. We
20 get these complaints from complainants who
21 think that they've been injured, and we deal
22 with them fairly.

23 A complainant has a limited role in
24 terms of our proceedings. He's not like a

1 plaintiff in a civil litigation who's able
2 to prosecute a case by himself. He's more
3 like a complainant in a criminal matter who
4 refers things to a district attorney and
5 then watches to see what the district
6 attorney is going to do.

7 And if we decide to dismiss a matter,
8 we'll advise the complainant, our procedure
9 is to advise the complainant that we've done
10 that. But we don't tell them why, or we
11 don't tell them what we've discovered in our
12 investigation. We don't disclose anything
13 in our file to the complaint because we're
14 not permitted to.

15 CHAIRMAN SAMPSON: I think that's
16 understandable. A lot of people need to
17 understand that you're not permitted to
18 provide that information unless the
19 Appellate Division, if they choose to
20 suspend or admonish an individual, at that
21 point in time.

22 I think that this is a misunderstanding
23 that some people have, and I'm glad we were
24 able to clear it up to a certain extent at

1 this point in time.

2 MR. GOLD: Now, by the way, the
3 Appellate Division, I should add, with
4 respect to that point, has the legal
5 authority under Subdivision 10 to open the
6 file at any point with respect to any
7 particular matter.

8 CHAIRMAN SAMPSON: I think Senator
9 DeFrancisco has a question.

10 SENATOR DeFRANCISCO: Just very
11 quickly to follow up on that. I think that
12 was a great analogy, because I've heard some
13 complaints about these things are not open
14 to the public. But you're not a plaintiff,
15 you are someone referring to an agency, just
16 like a DA doesn't have to prosecute every
17 case if they don't think the evidence is
18 there or that the testimony is not
19 supportable by other facts that they learn.
20 And I think that's a big confusion in the
21 general public.

22 But one other question. What happens
23 if there's a complaint by somebody against
24 an attorney that's found to be unfounded?

1 Will that attorney at least get notice that
2 somebody's complaining about something under
3 those circumstances? Because no doubt that
4 person is unhappy. And wouldn't the
5 attorney at some point, after it's
6 dismissed, be entitled to know what the
7 complaint was?

8 MR. GOLD: Well, it depends upon the
9 time within the matter and the stage of the
10 matter and also the nature of what's
11 occurred.

12 As I indicated before, if a complaint
13 is filed and on its very face it doesn't set
14 forth any disciplinary matter, then the
15 respondent may not even be notified of this.
16 The complaint is simply dismissed on its
17 face, administratively, internally at the
18 commission, and the attorney, as far as
19 we're concerned, doesn't need to know that
20 anybody complained about them because as far
21 as we're concerned, they didn't complain
22 about them. You know? They didn't complain
23 about them with anything even close to
24 something.

1 It doesn't have to get to a very high
2 level before we'll send it to the respondent
3 and ask him for a response. That happens in
4 a substantial majority of cases.

5 MR. FRIEDBERG: Once the attorney
6 learns about it, obviously at the end of the
7 case we will notify them as to what
8 happened.

9 CHAIRMAN SAMPSON: Mr. Gold and
10 Mr. Friedberg, I want to thank you very much
11 for taking the time.

12 And the reason I let it extend over the
13 five minutes is because I really wanted them
14 to explain the procedures and the process
15 with respect to dealing with these
16 complaints.

17 Thank you very much.

18 MR. FRIEDBERG: We stand ready to
19 cooperate with you and answer any questions
20 today or any other day.

21 MR. GOLD: And we plan to stay here
22 for the day and be available to you in case
23 you have anything further you'd like to ask
24 us about.

1 CHAIRMAN SAMPSON: Thank you very
2 much, gentlemen.

3 MR. FRIEDBERG: Thank you for your
4 time.

5 CHAIRMAN SAMPSON: The next witness
6 is Christine C. Anderson, who used to be a
7 former employee with the First Department
8 Disciplinary Committee.

9 (Applause.)

10 CHAIRMAN SAMPSON: I think we should
11 try to keep our -- no need for applause,
12 ladies and gentlemen. We're just trying to
13 keep an orderly process and just keep it
14 moving.

15 Ms. Anderson, thank you very much.
16 We're going to try to keep it under five
17 minutes. We allowed them to go over just to
18 explain the process, to lay the groundwork.
19 Okay?

20 MS. ANDERSON: So you can just do
21 five?

22 CHAIRMAN SAMPSON: No problem,
23 Ms. Anderson. Thank you very much. We just
24 want to get to the -- we have your