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NEW YORK STATE BAR ASSOCIATION

Committee on Standards of Attorney Conduct ("COSAC")

Comments on

Proposed Uniform Attorney Disciplinary Rules of the Appellate Division

December 7, 2015 Draft – For Consideration by NYSBA Executive Committee

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Disciplinary Rules of the Appellate Division

I. Introduction

This report reviews the Proposed Uniform Attorney Disciplinary Rules of the Appellate Division (the "Proposed Rules") issued by the New York State Unified Court System's Office of Court Administration ("OCA"), on behalf of the Administrative Board of the Courts, on November 4, 2015.[1] The Proposed Rules would be a sea change in attorney disciplinary procedures and warrant careful, detailed study of their potential impact. The review by the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"), however, was substantially limited by the tight time frame afforded for public comment. Because of this tight time frame, the short period in which the Proposed Rules were drafted, and the potential adverse impact of the Proposed Rules, the Administrative Board should proceed with great caution, and should consider delaying the implementation of the Proposed Rules to allow a more appropriate period of review. Particularly at a time when two out of the five members of the Administrative Board (including a Presiding Justice and the Chief Judge) will be turning over from 2015 to 2016, it might well be prudent to pause and allow more time for input on these difficult issues.

By way of background, OCA established the Committee on Statewide Attorney Discipline ("COSAD") on March 30, 2015, and COSAD's report and recommendations (the "COSAD Report") were posted for public comment only six months later, on September 24, 2015. COSAD did not recommend the adoption of uniform statewide rules. To the contrary, COSAD recommended the "harmonization" and "synchronization" of the rules of the four individual Departments of the Appellate Division on what COSAD believed were key points. COSAD Report, at 43-44. In fact, the COSAD Report specifically stated:

> While the Subcommittee does not find a need to create a new statewide disciplinary system, it finds a pressing need for rejuvenation, coordination and uniformity in both procedure and sanction. Unfortunately, this Committee does not have the luxury of time to unilaterally determine, *in toto*, which

[1] This report reflects a consensus view. Some members of COSAC disagree with certain recommendations in this report.

> procedures and practices of the various Appellate Division Departments should be adopted statewide. . . .

Id. at 41-42. The September 24, 2015 memorandum of OCA Counsel requested public comment on the COSAD Report no later than November 9, 2015.

Portions of the Proposed Rules clearly advance the goals of efficiency, fairness, and uniformity. Although like COSAD, COSAC has had insufficient time to comment on all of them, some are worth singling out for praise. We applaud, for example, the creation of a "plea bargaining" system where charges may be disposed of by negotiation. We also believe that in the adjudicatory stage, the discovery to be provided as a matter of right, and the ability of the referee and the Court to grant additional discovery in the exercise of their discretion, will allow a more level playing field in the resolution of formal disciplinary charges. In short, we share the goals outlined by COSAD; we simply fear that the time frame imposed on everyone in this process might have the perverse effect of frustrating those goals in certain instances. COSAC has done its best to develop constructive comments on the Proposed Rules during the short time allowed for public comment.

The November 4, 2015 proposal, which was released by OCA before the close of the stated public comment period on the COSAD Report, rejected COSAD's recommendation that the individual Appellate Division rules remain intact save for changes to "harmonize" and "synchronize" key points. Although COSAC sees merit in creating statewide uniformity in attorney disciplinary rules, which would eliminate the wide variation of procedures that tend to favor attorneys already familiar with the process – and thereby reduce the disparity in punishment from Department to Department [2] – the time constraints involved preclude surveying every Department's grievance committee procedures in detail and fully assessing the ramifications of the Proposed Rules.

This is unfortunate. Such an assessment would have been important, because the proposal as a whole will substantially change the current disciplinary rules and procedures of each Department. The First Department is an excellent example. If the Proposed Rules are adopted, the grievance committee would be required to authorize all formal discipline, whereas the First Department now requires only two members of the Policy Committee and the Chair to authorize disciplinary charges. If one important goal is to

[2] See Stephen Gillers. *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, y, 17 N.Y.U. J. Legis. & Public Policy 485 (2014).

increase efficiency – the average time a case is open, statewide, is 856 days[3] – the proposed procedures could easily have the opposite effect, at least in the First Department.

Additionally, the members of the Departmental Disciplinary Committee ("DDC") in the First Department currently participate as Hearing Panels in the adjudication stage of the disciplinary process. The Proposed Rules would do away with any role for the members of the new grievance committee in adjudicating matters of formal discipline, or recommending formal discipline, to the Appellate Division. The COSAD report, fearing delay in disciplinary proceedings, suggested only that the First Department itself might wish to "re-evaluat[e] its two-tier hearing process which utilizes both hearing officers and hearing panels."[4] The Proposed Rules would take that decision away from the First Department. COSAC itself takes no position on COSAD's proposal or the OCA position under the Proposed Rules, but mentions it as an example of a significant change in this short time frame.

Notwithstanding the truncated time frame and the potential of great disruption to the existing disciplinary system, COSAC has undertaken an intensive review of the Proposed Rules in an effort to assist OCA in making the language as clear as possible and avoiding unintended consequences. To that end, COSAC has identified a number of issues in the text of the Proposed Rules that need attention, from minor wording suggestions to more substantive comments.

II. Comments on Proposed Rules

A. Section I – Application; Appointment of Committees

1. *Section 1 (Application)*

OCA Proposed Language: "These rules shall apply to (a) all attorneys who are admitted to practice, reside in, commit professional misconduct in or who have offices in the State of New York; (b) all in-house counsel, attorneys admitted pro hac vice, and licensed legal consultants who reside in, have an office in or commit professional misconduct in the State of New York; and (c) the law firms or other entities that have as a member, retain, or otherwise employ any person covered by these rules."

[3] COSAD Report, at 51.

[4] COSAD Report, at 60.

Issue: The proposed "application" provision is both too broad and too narrow. First, read literally, this language would apply the rules to *clients* of New York lawyers – because they may be "entities that . . . retain" those covered by these rules. If left unchanged, the rules would literally cover business corporations and other collective entities that are not law firms.

Second, applying the rules to lawyers who do not practice in New York to any extent, but merely live in New York State, goes too far.

Third, in its application to lawyers and certain others "who commit professional misconduct in" New York, it also may be too narrow in a number of ways. The provision seems designed to address situations such as that of an attorney not admitted here but who practices *pro hac vice* in a New York court – which dovetails with Rule 8.5(b)(1). But it also seems appropriate for the rules to address situations in which an attorney is practicing in New York wholly without authorization – *e.g.*, practicing in a New York court without admission *pro hac vice*, or more generally engaging in unauthorized practice in New York although admitted elsewhere. New York would seemingly have a strong interest in the application of its disciplinary rules to such situations, even though (i) under Rule 8.5(b), the rule to be applied may be that of another state, and (ii) as in the case of the lawyer admitted *pro hac vice*, some sanctions (such as censure and referral to the other state) may be available, and others (such as disbarment or suspension) may not.

Fourth, the reference to "commit[ting] professional misconduct" also seems too narrow in that it makes jurisdiction depend on the merits. That is, the rules should apply whenever there is an *issue* of New York professional misconduct that needs to be addressed, whether or not such misconduct actually occurred.

Finally, the proposed provision is arguably too limited in its reference to lawyers who commit professional misconduct "in" the State of New York. A lawyer not admitted in New York may be physically located in another state when engaging in conduct that would violate the New York Rules of Professional Conduct. For example, if New York adopts temporary practice rules similar to the proposed Part 523 currently pending, a Pennsylvania lawyer not admitted in New York could commit professional conduct "in" New York while physically practicing outside New York, by serving a New York client in a New York transaction pursuant to Part 523. Similarly, a non-New York lawyer who is co-counsel to a New York lawyer in a transaction involving a New York company or lender could commit professional conduct "in" New York without ever setting foot in New York. The proposed rules should be written broadly enough to capture these and similar situations.

Suggested Revision: "These rules shall apply to (a) all attorneys who are admitted to practice~~, reside in, commit professional misconduct in or who have offices~~ in the State of New York; (b) all in-house counsel registered in the State of New York; (c) all~~, attorneys admitted pro hac vice, and licensed~~ legal consultants licensed in the State of New York; (d) all attorneys who ~~reside in,~~ have an office in, practice in, or seek to practice in the State of New York, including those admitted pro hac vice or who otherwise engage in conduct subject to the New York Rules of Professional Conduct~~ or commit professional misconduct in the State of New York~~; and (e) the law firms ~~or other entities~~ that have as a member, retain, or otherwise employ any person covered by these rules."

2. *Section 2(a) (Definitions)*

OCA Proposed Language: "Professional Misconduct Defined. A violation of any of the Rules of Professional Conduct as set forth in 22 NYCRR Part 1200, including the violation of any rule or announced standard governing the personal or professional conduct of attorneys, shall constitute professional misconduct within the meaning of Judiciary Law § 90(2)."

Issue: The term "announced standard" is not defined and has no recognized or customary meaning. More importantly, the only source of discipline for attorneys in New York should be the black letter text of the New York Rules of Professional Conduct. Other rules or standards should be actionable only if they otherwise fit within a Rule of Professional Conduct, such as, for example, Rule 8.4(d) ("conduct that is prejudicial to the administration of justice") and Rule 8.4(h) ("any other conduct that adversely reflects on the lawyer's fitness as a lawyer"). Disciplinary authorities are, of course, free to interpret the Rules by looking to the Comments, case law, ethics opinions, commentary, and other sources, but standards outside the Rules of Professional Conduct, whether announced or not, should not by themselves become additional sources of professional discipline.

3. *Section 2(b) (Definitions)*

Issue: Section 2(b) includes definitions of some terms, but not others, relating to various forms of discipline. For example, "Admonition" and "Letter of Advisement" are defined, but "censure," "suspension," and "discipline" are not, nor is "chief attorney." For completeness and clarity, they should be defined.

Suggested Revision: The following four definitions should be added to section 2(b), and the affected subparagraphs should be renumbered accordingly:

(2) Censure: censure pursuant to Judiciary Law § 90(2).
(3) Chief attorney: one or more attorneys designated as such by a Committee, and having the powers and duties conferred by these rules.
(8) Discipline: includes private discipline (admonition) and public discipline (censure, suspension and disbarment).
(12) Suspension: the imposition of suspension from practice pursuant to Judiciary Law § 90(2).

4. *Section 6(a) (Conflicts; Disqualifications from Representation*

OCA Proposed Language: [Certain persons are prohibited from representing] "a respondent in a matter investigated or prosecuted before that Committee."

Issue: This language is inconsistent with the definition of "respondent" in § 2(b)(8), which refers to "an investigation or a proceeding before the Committee."

Suggested Revision: [Certain persons are prohibited from representing] "a respondent in an investigation or a proceeding ~~matter investigated or prosecuted~~ before that Committee."

(c) certain persons prohibited from representing "a respondent in an investigation or a proceeding before ~~matter investigated or prosecuted by~~ that Committee" for a certain period.

5. *Section 6 (Conflicts; Disqualifications from Representation)*

OCA Proposed Language:

"(a) No (1) current member of a Committee, (2) partner, associate or member of a law firm associated with such member of the Committee, (3) current member of the Committee's professional staff, or (4) immediate family member of a current Committee member or Committee staff member, may represent a respondent in a matter investigated or prosecuted before that Committee.

(b) No referee appointed to hear and report on the issues raised in a proceeding under these rules may, in the Department in which he or she was appointed, represent a

> respondent until the expiration of two years from the date of the submission of that referee's final report.
>
> (c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent in a matter investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service."

Issue: In large jurisdictions such as the First Department, law firms can have upward of a thousand members. At the same time, members of such large firms have contributed greatly over the years to the work of the First Department DDC. COSAC believes that the provision in section 6(a)(2) that disqualifies any lawyer in the firm of a member of a grievance committee from representing a respondent goes too far and could have the perverse effect of discouraging lawyers in large law firms from serving as members of grievance committees. Disqualification of the committee member from any personal involvement in such representation (*i.e.,* screening) is sufficient to address the conflict.

Additionally, the two-year bars set forth in §§ 6(b) and 6(c) call to mind the two-year bar in Public Officers Law § 73(8)(a)(i), and presumably are meant to serve similar purposes. That suggests the question of whether these rules, like § 73(8)(a)(i), also apply to "back-office" work, where the former referee works on a matter without actually appearing as a respondent's lawyer. As in the case of the Public Officers Law, they should be covered. The suggested language mirrors the Public Officers Law.

Suggested Revision:

> (a) No (1) current member of a Committee, ~~(2) partner, associate or member of a law firm associated with such member of the Committee~~, (2~~3~~) current member of the Committee's professional staff, or (3~~4~~) immediate family member of a current Committee member or Committee staff member, may represent a respondent in a matter investigated or prosecuted before that Committee.
>
> (b) No referee appointed to hear and report on the issues raised in a proceeding under these rules may, in the Department in which he or she was appointed, represent a respondent, or receive compensation for any services rendered by such referee on behalf of such respondent, until the

expiration of two years from the date of the submission of that referee's final report.

(c) No former member of the Committee, or former member of the Committee's professional staff, may represent a respondent, or receive compensation for any services rendered by such former member on behalf of such respondent, in a matter investigated or prosecuted by that Committee until the expiration of two years from that person's last date of Committee service.

B. Section II – Proceedings Before Committees

1. *Section 1(a) (Complaint)*

OCA Proposed Language: "Investigations of professional misconduct may be authorized upon receipt by a Committee of a written original complaint, signed by the complainant, which need not be verified. Investigations may also be authorized by a Committee acting *sua sponte*."

Issue: One of COSAD's key goals, enhancing efficiency, will suffer if the entire grievance committee must act before an investigation begins. The Chief Attorney is in a better position to do so quickly and efficiently, with appropriate oversight from the Committee and its Chair. The alternative — requiring action by the Committee itself – would have the opposite effect. Particularly in large jurisdictions, requiring action by the full Committee could delay investigations unreasonably. Giving the Chief Attorney authority to launch an investigation (as is current practice in the First Department) is more efficient.

Additionally, written communications are increasingly done electronically. As long as the required writing is signed by the complainant, whether by hand or electronically, it should be eligible to form the basis of a complaint in the same way as a letter would. Moreover, in rare instances, an anonymous complaint could be worthy of consideration, because some people with legitimate complaints may fear retaliation or other adverse consequences. For that reason, the Uniform Rules should state explicitly that anonymous complaints may be considered by the Chief Attorney and the Committee in deciding whether to proceed sua sponte, but they may also be summarily rejected in the first instance.

Suggested Revision: "Investigations of professional misconduct may be authorized upon receipt by a Committee of a written original complaint,

signed by the complainant, which need not be verified and may be in paper or electronic form. Investigations may also be authorized by the Chief Attorney or the ~~a~~ Committee acting *sua sponte*; provided that the Chief Attorney shall consult with the Chair of the Committee before proceeding *sua sponte*. Materials submitted anonymously may be considered in determining whether to authorize an investigation *sua sponte*, but materials that do not include a signed complaint or other substantial support may in the discretion of the Committee or the Chief Attorney be summarily rejected without further review. "

2. *Section 2(a)(1) (Investigation; Disclosure)*

OCA Proposed Language: "The Chief Attorney is authorized to: (1) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint."

Issue: Subsection (a) of section 2 sets forth the authority of the Chief Attorney with respect to investigations. Paragraph (1) is ambiguous in that it can be read to suggest that only the Chief Attorney may interview witnesses and obtain records, inasmuch as paragraph (2) empowers the Chief Attorney to direct respondents to appear and produce records either before her *or a staff attorney*. The intention here is likely to allow staff attorneys also to interview witnesses and obtain records and reports, and in any event allowing staff attorneys to do that would promote the efficient investigation of complaints.

Suggested Revision: "The Chief Attorney is authorized to: (1) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint, or authorize a staff attorney or paralegal or investigator to do so."

3. *Section 2(b) (Investigation; Disclosure)*

OCA Proposed Language:

"2. Investigation; Disclosure

* * * *

(b) Disclosure. The Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint. Prior to the taking of any action against

> a respondent pursuant to sections II.3(b)(l)(iv), (v) or (vi) of these rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent."

Issue: As discussed in the introduction to this report, COSAC applauds the provisions in Article III of the Proposed Rules that grant certain discovery as of right after formal discipline has commenced. This section, however, provides discovery as of right to a respondent in the pre-charging stage. This procedure is peculiar: the right to discovery in administrative enforcement proceedings of all kinds, or civil proceedings generally, does not typically begin until formal charges have been instituted. At that point, a fair process should certainly provide access to evidence, as the Article III proposal does.

Notably, COSAD's recommendation did not mention pre-filing discovery, but rather recommended that witness statements, exculpatory evidence, and "statements submitted by the complainant or other source which forms the basis for an investigation" be subject to discovery.[5]

The optimal stage for the exchange of evidence is the adjudicative stage, where respondents can use it to challenge the case or avail themselves of the new plea bargaining procedure. For that reason, we support the new disclosure provisions of Article III of the Proposed Rules whole-heartedly. But providing the kind of expansive discovery as of right required by Article II of the Proposed Rules would have the effect of making a very long process even longer, and would provide a benefit to respondents in lawyer discipline that is rarely, if ever, afforded in other forms of administrative enforcement. Members of the public who are not lawyers do not ordinarily have the right to pre-charging discovery in matters before, for example, the Securities and Exchange Commission, state and city ethics agencies, medical licensing boards, or other state or federal agencies. It is hard to understand why lawyers should be singled out for this benefit.

Suggested Revision:

> "2. Investigation~~; Disclosure~~
>
> * * * *

[5] COSAD Report, at 41-42.

~~(b) Disclosure. The Chief Attorney shall provide a copy of a pending complaint to the respondent within 60 days of receipt of that complaint. Prior to the taking of any action against a respondent pursuant to sections II.3(b)(l)(iv), (v) or (vi) of these rules, the Chief Attorney shall provide the respondent with the opportunity to review all written statements and other documents that form the basis of the proposed Committee action, excepting material that is attorney work product or otherwise deemed privileged by statute or case law, and materials previously provided to the Committee by the respondent."~~

4. *Section 3(a)(3) (Disposition and Review)*

OCA Proposed Language: "The complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney."

Issue: Both the complainant *and* the respondent should be informed of the disposition of a complaint in a timely manner.

Suggested Revision: "The complainant and the respondent shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney."

5. *Section 3(b)(1)(v) and (vi) (Disposition and Review)*

OCA Proposed Language:

(1) "After investigation of a complaint, . . . a Committee may take one or more of the following actions:

* * * *

"(v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, and that it is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days'

> notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, to seek reconsideration of the proposed Admonition;
>
> (vi) when the Committee finds, by a fair preponderance of the evidence, that there is probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section III of these Rules."

Issue: This paragraph, setting forth the actions that grievance committees may take following investigations, grafts an evidentiary standard more commonly associated with adversary proceedings – preponderance of the evidence – onto a decision that is to be made at a charging stage. More troublesome still, subparagraph (vi), defining the standard to be used when the committee wishes to commence a formal disciplinary proceeding, requires a "fair preponderance of the evidence" to establish "probable cause to believe that the respondent engaged in professional misconduct." This is highly confusing, and conflates two separate standards normally used in separate contexts.

In the case of Admonitions issued under subparagraph 1(v), COSAC is persuaded that, notwithstanding the lack of actual "evidence" presented at that stage, even private discipline should not be imposed without an evidentiary standard – here, "fair preponderance of the evidence" suffices. But with respect to initiating formal disciplinary proceedings under subparagraph (1)(vi), probable cause suffices at the charging stage. The concept of preponderance of the evidence, familiar in civil actions and proceedings, is out of place at this stage, where no formal evidence has been adduced. Rather, probable cause, a familiar charging standard in various contexts,[6] is preferable.

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[6] The most common context for using the probable cause standard is criminal procedure, where the Supreme Court has stated that "'[t]he substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt,'" which is "more than bare suspicion" but "'less than evidence which would justify condemnation' or conviction." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (citations omitted). Another example is the filing of ethics charges against public servants in the City of New York by the Conflicts of Interest Board ("COIB"). The COIB rules provide that charging determinations are based upon probable cause,

Probable cause, inherently, may be based on the results of an investigation, while a preponderance of the "evidence" by most definitions is predicated on the existence of admissible proof.[7]

Not insignificantly, the preponderance standard proposed by OCA for initiating charges would impose a higher hurdle for confidential disciplinary charges against lawyers than the law imposes for public criminal charges against the general public. COSAC sees no basis for according lawyers such special treatment at the charging stage, especially given that disciplinary charges against lawyers – unlike criminal charges and many other types of administrative actions – remain confidential unless and until public discipline is imposed.

Notably, although the Proposed Rules inject two standards at the charging stage, they contain no standard at all for adjudication of a formal charge by the referee. *Compare* II(3)(b)(1)(v) and (vi) *with* III(1)(b)(1) and (2). In the next section, COSAC proposes adding the "fair preponderance" standard to Article III.

Additionally, for the reasons stated with respect to section I(1)(2)(a), defining "Professional Misconduct," COSAC recommends deleting the phrase "or announced standard" in this subparagraph.

Finally, one reason cited in section 3(b)(1)(v) for issuing an Admonition is to "deter others from committing similar misconduct." Because this subparagraph deals only with *private* discipline, the deterrence clause seems out of place and should be deleted.

Suggested Revision:

(1) "After investigation of a complaint, . . . a Committee may take one or more of the following actions:

* * * *

> "(v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional

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while determinations at the adjudicative stage are made by a preponderance of the evidence. Rules of the City of New York, Vol. 12, T. 53, §§ 2-01(a), 2-03(d)(3).

[7] *See Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) ("[probable cause] does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands").

misconduct, and that it is appropriate to protect the public~~,~~ and preserve the reputation of the bar, ~~and deter others from committing similar misconduct,~~ issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule ~~or other announced standard~~ that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, to seek reconsideration of the proposed Admonition;

(vi) when the Committee finds~~, by a fair preponderance of the evidence, that there is~~ probable cause to believe that the respondent engaged in professional misconduct warranting the imposition of public discipline, and that such discipline is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, authorize a formal disciplinary proceeding as set forth in section III of these Rules."

5. *Section 3(c)(1)(ii) (Disposition and Review)*

OCA Proposed Language: "Within 30 days of the final determination denying a request for reconsideration, the respondent may seek review of a Letter of Advisement by submitting an application to the Court, on notice to the Committee, upon a showing that the issuance of the letter was in violation of a fundamental constitutional right. The respondent has the burden of establishing a violation of such a right."

Issue: This provision allows a respondent to seek review of a Letter of Advisement on the ground that issuance of the letter violated a "fundamental constitutional right." But it does not define how strong the link between the violation and the issuance of the letter must be, so this provision could result in unintended consequences. For example, once the respondent establishes such a violation, is the Court required to overturn the decision to issue the letter? And what about violations of constitutional rights that may not have directly resulted in the issuance of the letter but that did contribute to some of the evidence against the respondent?

A safety valve mechanism could avoid undesirable ancillary litigation over issues such as harmless error, suppression of evidence, proximate cause, and attenuation. Rather than delving into any of these areas, a simple way to

remedy the uncertainty is to make clear that establishing a violation of a fundamental constitutional right does not require any particular course of action by the Court, but rather simply grants the Court the discretion to rescind the Letter of Admonition.

Suggested Language: "Within 30 days of the final determination denying a request for reconsideration, the respondent may seek review of a Letter of Advisement by submitting an application to the Court, on notice to the Committee, upon a showing that the issuance of the letter was in violation of a fundamental constitutional right. The respondent has the burden of establishing a violation of such a right. If the respondent establishes a violation of such right, the Court may take whatever action it deems appropriate."

C. Section III – Proceedings in the Appellate Division

1. *Section 1(a)(4) (Discipline by Consent)*

This subsection sets out a procedure for joint motions for discipline, upon consent of both sides, including agreed-upon discipline to be imposed. The procedure also provides for a stay of all proceedings until the joint motion is determined, and for a deemed withdrawal of conditional admissions made by the respondent in connection with the joint motion if the joint motion is denied. At present, no "plea bargaining" system exists in any of the departments, despite the fact that it is "generally recognized that plea bargaining would expedite the disciplinary process, alleviate caseloads, and reduce backlogs . . . ."[8] This provision is an excellent idea and initiative. COSAC supports it as proposed, without any changes.

2. *Section 1(b)(1) (Hearing)*

OCA Proposed Language: "Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The referee may grant requests for additional disclosure as justice may require. Unless otherwise directed by the Court, the referee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, following post-hearing submissions, file with the Court a written report setting forth the referee's findings and recommendations. The parties may make such motions to affirm or disaffirm the referee's report as permitted by the Court."

[8] HAL R. LIEBERMAN, J. RICHARD SUPPLE, HARVEY PRAGER, NEW YORK ATTORNEY DISCIPLINE: PRACTICE AND PROCEDURE: 2016 (New York Law Journal) ("*New York Attorney Discipline*"), at 139.

Issue: This section does not articulate a standard of proof to sustain a determination against a respondent. In *New York Attorney Discipline*, the authors observe as follows:

> In New York, the standard of proof required to establish professional conduct is "fair preponderance of the evidence," the civil standard. In this respect, New York is unlike most state and federal jurisdictions, which apply "clear and convincing evidence" as the standard. ...
>
> In sum, because the Court of Appeals has categorized the right to practice law as a "property interest" rather than a "personal or liberty right," the Appellate Divisions only require proof by a "fair preponderance of the evidence" in order to establish professional misconduct.[9]

It would be appropriate to make the standard of proof explicit.

Suggested Revision: "Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. The referee may grant requests for additional disclosure as justice may require. Unless otherwise directed by the Court, the referee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, following post-hearing submissions, file with the Court a written report setting forth the referee's findings and recommendations. Formal disciplinary charges may be sustained when the referee finds, by a fair preponderance of the evidence, each essential element of the charge. The parties may make such motions to affirm or disaffirm the referee's report as permitted by the Court."

3. *Section 7 (Discipline for Misconduct in Another Jurisdiction)*

OCA Proposed Language:

"(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Only the following defenses may be raised:

> (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

[9] Id. at 118-119 (footnotes omitted).

> (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or
> (3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.

(c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds that the procedure in the foreign jurisdiction deprived the respondent of due process of law, that there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.

Issue: Subparagraph (b) of the Proposed Rule lists the defenses that may be raised in opposition to reciprocal discipline, while subparagraph (c) lists the reasons why the Court may decline to impose reciprocal discipline. Each contains three reasons, but only two – lack of due process and lack of proof – overlap. Subparagraph (b) says that a defense may be raised to the effect "that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York," while subparagraph (c) allows the Court to reject reciprocal discipline if "the imposition of discipline would be unjust." This appears to be an oversight; it is likely that all four factors were meant to be both allowable as defenses and allowable as grounds to deny reciprocal discipline. For that reason, each subparagraph should include the additional factor that is currently missing.

Additionally, the use of the word "or" in between each factor could lead to the conclusion that only one such defense may be used in any reciprocal discipline proceeding. COSAC's suggested revision clarifies that any or all may be used.

Suggested Revision:

> "(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Any or all of ~~Only~~ the following defenses may be raised:
>
> > (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; ~~or~~

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; ~~or~~
(3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.;
(4) that the imposition of discipline would be unjust.

(c) After the respondent has had an opportunity to be heard, and upon review of the order entered by the foreign jurisdiction, and the record of the proceeding in that jurisdiction, if such record or part thereof is submitted by a party and deemed relevant by the Court, the Court may discipline the respondent for the misconduct committed in the foreign jurisdiction unless it finds one or more of the following: (i) that the procedure in the foreign jurisdiction deprived the respondent of due process of law, (ii) that there was insufficient proof that the respondent committed the misconduct, (iii) that the misconduct in the foreign jurisdiction does not constitute misconduct in New York, or (iv) that the imposition of discipline would be unjust.

D. Section IV – Post-Disciplinary Proceedings

1. *Section 1 (Conduct of Disbarred, Suspended or Resigned Attorneys)*

OCA Proposed Language:

(b) "Notification of Clients. When a respondent is disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, the respondent shall promptly notify, by registered or certified mail, each client and the client for each party in any pending matter, and the Office of Court Administration for each action where a retainer has been filed pursuant to court rules. The notice shall state that the respondent 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 has been filed pursuant to court rule, shall include the

> name and address of respondent's client.
>
> (c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.
>
> (d) Duty to Withdraw From Pending Action or Proceeding. If a client in a pending action or proceeding fails to obtain new counsel within 30 days following entry of the order of disbarment, suspension or removal from the roll of attorneys, the respondent shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.
>
> (h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation 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. On motion of the respondent, with notice to the client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent 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."

Issue: The notice provision in (b) does not address what the full protocol should be where the respondent is serving as counsel appointed by the court. In these circumstances, notice should also be provided to the appointing court. Otherwise, the respondent's client may not understand how to obtain new counsel, and the court may be unaware that it needs to appoint substitute counsel.

The language in (b) would also be clearer if it stated directly that the required notice to the "client" is to a *respondent's* client. Similarly, in (c) the word "respondent's" should be inserted before the phrase "all clients," and in (d)

the phrase "of respondent's" should be inserted before the word "clients." Finally, in (h) the word "respondent's" should be inserted before the word "client" in the second sentence.

Suggested Revision:

> (b) "Duty to Notify Clients and Others. When a respondent is disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, the respondent shall promptly notify, by registered or certified mail, (i) each client of the respondent, ~~and~~ (ii) the attorney for each party in any pending matter, and (iii) the Office of Court Administration for each action where a retainer has been filed pursuant to court rules. The notice shall state that respondent is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a respondent's 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 pursuant to court rule, shall include the name and address of the respondent's client. Where counsel has been appointed by a court, notice shall also be provided to the appointing court."
>
> (c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all of respondent's clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.
>
> (d) Duty to Withdraw From Pending Action or Proceeding. If a respondent's client in a pending action or proceeding fails to obtain new counsel within 30 days following entry of the order of disbarment, suspension or removal from the roll of attorneys, the respondent shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.
>
> (h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation 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. On motion of the respondent, with notice to the respondent's client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent 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."

2. *Section 2 (Reinstatement of Disbarred Attorneys)*

OCA Proposed Language:

"(c)(1) A respondent disbarred by order of the Court for misconduct, or stricken from the roll of attorneys for any reason other than resignation for non-disciplinary reasons 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's name from the roll of attorneys.

(d) Respondents suspended for a fixed term of six months or less. Unless the Court directs otherwise, a respondent attorney who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the suspension upon order of the Court. No more than thirty days prior to the expiration of the term of suspension the respondent must file with the Court and serve upon the Committee an application for reinstatement together with an affidavit stating that the respondent has fully complied with the requirements of the suspension order and has paid any required fees and costs. Within thirty days of the date on which the application was served upon the Committee, or within such longer time as the Court may allow, the Committee may file an affidavit in opposition."

Issue: To be consistent, references to "attorney" in § 2(c)(1) and 2(d) should use the term "respondent" rather than simply "attorney." Thus, in § 2(c)(1) the word "respondent's" should replace the word "attorney's" before the word "name," and in the second sentence of § 2(d), the word "attorney" should be deleted.

Suggested Revision:

> (c)(1) "A respondent disbarred by order of the Court for misconduct, or stricken from the roll of attorneys for any reason other than resignation for non-disciplinary reasons, 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 respondent's ~~attorney's~~ name from the roll of attorneys.
>
> (d) Respondents suspended for a fixed term of six months or less. Unless the Court directs otherwise, a respondent ~~attorney~~ who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the suspension upon order of the Court. No more than thirty days prior to the expiration of the term of suspension the respondent must file with the Court and serve upon the Committee an application for reinstatement together with an affidavit stating that the respondent has fully complied with the requirements of the suspension order and has paid any required fees and costs. Within thirty days of the date on which the application was served upon the Committee, or within such longer time as the Court may allow, the Committee may file an affidavit in opposition."

E. Section V – Additional Rules Applicable to Disciplinary Matter

1. *Section 1 (Confidentiality)*

OCA Proposed Language: [Heading only] "Confidentiality"

Issue: This section covers not only confidentiality but also related matters such as an application to unseal records or to gain access to closed proceedings, and reimbursement for injured parties. Someone searching for the law might find it helpful to see a longer heading.

Suggested Revision: "Confidentiality; Application to Unseal Records or Gain Access to Closed Proceedings"

2. *Sections 1(b); 1(e) (Confidentiality)*

OCA Proposed Language:

> (b) "All papers, records, and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any person under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).
>
> * * * *
>
> (e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or claims seeking reimbursement from the Fund for the wrongful taking of money or property by any person who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto."

Issue: For greater clarity and specificity, and to distinguish between a claimant and a respondent, the word "person" should be changed to the word "respondent" in both § (1)(b) and § (1)(e).

Suggested Revision:

> (b) "All papers, records, and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any ~~person~~ respondent under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).
>
> * * * *
>
> (e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or claims seeking reimbursement from the Fund for the wrongful taking of money or property by any ~~person~~ respondent who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto."

3. *Section 3 (Appointment of Attorney to Protect Interests of Clients or Attorney)*

OCA Proposed Language: [Heading only] "Appointment of Attorney to Protect Interests of Clients or Attorney"

Issue: The heading does not fully capture the contents and therefore requires more information.

Suggested Revision: "Appointment of Attorney to Protect Interests of Clients or Attorney; Compensation; Confidentiality"

4. *Section 3(a) (Appointment of Attorney to Protect Interests of Clients or Attorney)*

OCA Proposed Language: "When an attorney is suspended, disbarred or incapacitated from practicing law pursuant to these rules, or has resigned for disciplinary reasons, or when the Court determines that an attorney is otherwise unable to protect the interests of his or her clients and has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct, appointing 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. An application for such an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney to be appointed and the suspended, disbarred or incapacitated attorney."

Issue: This subsection does not distinguish between two very different classes of attorneys whose clients may be at risk, although the remedy is the same. The classes would better be identified as "respondents" or "incapacitated attorneys," and their category references should be kept separate. In addition, the attorneys appointed by the Court to assist with client matters should also be clearly identified.

Suggested Revision: "When ~~an attorney is~~ a respondent has been suspended or disbarred~~ or incapacitated from practicing law pursuant to these rules~~, or has resigned for disciplinary reasons, or when~~ the Court determines that~~ an attorney is ~~otherwise~~ incapacitated and the Court has determine~~s~~d that the attorney is ~~otherwise~~ unable to protect the interests of his or her clients, and, in either instance, has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct appointing one or more designated attorneys to: (i) take possession of the ~~attorney's~~

respondent's files or the incapacitated attorney's files; (ii) examine the files; (iii) advise the clients to secure another attorney; and (iv) take any other action necessary to protect the clients' interests. An application for an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney (or attorneys) to be appointed, and the suspended, disbarred or incapacitated attorney."

5. *Section 4(a)(1)(Resignation for Non-Disciplinary Reasons; Reinstatement)*

OCA Proposed Language: "An attorney may apply to the Court for permission to resign from the bar for nondisciplinary reasons by submitting an affidavit or affirmation in the form included in Appendix B to these rules. A copy of the application shall be served upon the Committee and the Lawyers' Fund for Client Protection, and such other persons as the Court may direct."

Issue: The Proposed Rule creates minor confusion by using "application" in the second sentence rather than "affidavit or affirmation," which it used in the first sentence.

Suggested Revision: "An attorney may apply to the Court for permission to resign from the bar for nondisciplinary reasons by submitting an affidavit or affirmation in the form included in Appendix B to these rules. A copy of the ~~application~~ affidavit or affirmation shall be served upon the Committee and The Lawyers Fund for Client Protection, and such other persons as the Court may direct."

Respectfully submitted,

Committee on Standards of Attorney Conduct
New York State Bar Association