

THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

NOVEMBER/DECEMBER 2000

VOL. 55, NO. 6



**LAWYERS'
QUALITY
OF LIFE**

THE RECORD

NOVEMBER/DECEMBER 2000

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HOW TO REACH THE ASSOCIATION

MAIN PHONE NUMBER:
(212) 382-6600

WORLD WIDE WEB ADDRESS:
<http://www.abcny.org>

PRESIDENT

Evan A. Davis
(212) 382-6700
edavis@abcny.org

EXECUTIVE DIRECTOR

Barbara Berger Opotowsky
(212) 382-6620
bopotowsky@abcny.org

GENERAL COUNSEL

Alan Rothstein
(212) 382-6623
arothstein@abcny.org

ADMINISTRATIVE SERVICES

Robin Gorsline
(212) 382-6689
rgorsline@abcny.org

ADVERTISING

Anna Nichols
(212) 382-6694
anichols@abcny.org

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(212) 382-6767
mhalili@abcny.org

CITY BAR FUND

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(212) 382-6678
mimperial@abcny.org

COMMITTEE MEMBERSHIP

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(212) 382-6664
srook@abcny.org

COMMUNICATIONS

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(212) 382-6713
amartin@abcny.org

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(212) 382-6606
mschwartz-clement@abcny.org

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Eileen Travis
(212) 382-5787
etravis@abcny.org

LEGAL REFERRAL SERVICE

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(212) 626-7373
lrs@abcny.org

LIBRARY

Richard Tuske
(212) 382-6742
rtuske@abcny.org

Copy Services: (212) 382-6711
Reference Desk: (212) 382-6666

MEETING SERVICES

Nick Marricco
(212) 382-6637
nmarricco@abcny.org

SMALL LAW FIRM CENTER

Carol Seelig
(212) 382-4751
cseelig@abcny.org

Of Note

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE Federal Bar Council have formed a Committee on Judicial Conduct. Its mission is to receive confidential written complaints from members of the Bar regarding the conduct (as opposed to the merits of the decisions) of Judges of the United States Court of Appeals for the Second Circuit and the United States District Courts for the Southern and Eastern Districts of New York, and, where appropriate and with the approval and *ex-officio* participation of the Presidents of both Bar Associations, to address such complaints in a constructive, confidential and effective manner.

Persons wishing to submit complaints to the Committee should send them in writing to the Committee on Judicial Conduct, c/o Evan A. Davis, Esq., President of the Association of the Bar of the City of New York, 42 West 44th Street, New York, N.Y. 10036-6689. All complaints must be signed, but the identity of any person submitting a complaint will be kept confidential and will not be disclosed to anyone other than the members of the Committee and the Presidents of the Bar Associations without that person's consent. The Committee will review all complaints submitted to it, and may make such inquiries and take such action, as it deems appropriate in the circumstances.

The following are the rules of the Committee:

RULES

1. *Complaints.*

(a) The Committee on Judicial Conduct (the "Committee") will receive written complaints regarding the conduct of specific Judges of the United States Court of Appeals for the Second Circuit and the United States District Courts for the Southern and Eastern Districts of New York ("Judges") from members of the Bar. All complaints must be signed by the complainant, and must include the complainant's address and telephone number.

(b) Complaints shall not deal with the merits of rulings by a Judge, but shall be specifically related to matters of judicial temperament and demeanor, alleged violations of the Code of Judicial Conduct, serious delay, and other issues that do not concern the merits of any matter.

2. Confidentiality.

(a) All complaints received by the committee, and all communications relating thereto, shall remain confidential. All complaints and other Committee documents shall be kept under lock and key, and shall be viewed only by members of the Committee and by the Presidents of The Association of the Bar of the City of New York and Federal Bar Council (the "Presidents").

(b) The identity of a complainant shall not be revealed without the express permission of the complainant.

3. Consideration of Complaints.

(a) The Committee shall review the complaints submitted, and may make such inquiries and recommend such action as it deems appropriate.

(b) The focus of the Committee will be upon complaints that indicate a possible pattern of behavior on the part of a Judge, but the Committee may also consider complaints dealing with a single occurrence.

(c) The work of the Committee shall be performed personally by its members and shall not be delegated to others.

4. Communications With Judges.

(a) Where the Committee determines that a complaint may have merit, its aim will be to address the gravamen of the complaints in a constructive, confidential, and effective manner.

(b) No communication shall be made by or on behalf of the Committee with any Judge without the prior approval of both Presidents.

(c) Presumptively, communications by or on behalf of the Committee with any Judge shall be made by, or shall include, both Presidents *ex officio*.

5. Committee Membership.

(a) The Committee shall consist of six members.

(b) The initial membership of the Committee shall be agreed upon by the Presidents of the Bar Associations. Two of the initial members shall serve for a term of three years, two for a term of four years, and two for a

term of five years; the determination of which initial members shall serve for each of these terms shall be made by lot.

(c) When any member of the Committee ceases to be a member, a successor member shall be chosen by agreement of the Presidents of the Bar Associations.

*

THE ASSOCIATION'S EXECUTIVE COMMITTEE HAS CREATED A SPECIAL Committee on State Governance Reform, to address, according to President Evan A. Davis, "the increasingly ineffectual New York State governmental process." Frederick A.O. Schwarz, Jr., will chair the committee.

The charge of the committee is to study the state's governance, with particular reference to the law-making process, to make recommendations for improving the effectiveness and responsiveness of state government, and to begin work to effectuate those recommendations.

Among the topics the committee will study are:

- the "three men in a room" method of governing, in which the Governor, Assembly Speaker and Senate Majority Leader make all the key decisions;
- the inability to bring important issues to the floor of the Legislature for a vote;
- the power of the legislative leaders, which may be inordinate, but yet is within the power of the other legislators to withhold;
- the influence of money and lobbying excesses on the state's political process, law-making and government decision-making; and
- the proper role of minority parties in each House.

"The Association, as a strong nonpartisan organization, has the responsibility to analyze how we have gotten to this point, diagnose the problem, and make and work to implement recommendations to improve the process," said Mr. Davis.

*

THE KATHRYN A. MCDONALD AWARD FOR EXCELLENCE IN SERVICE to the New York City Family Court was awarded at the Association on November 1, 2000.

O F N O T E

The award is named after Hon. Kathryn A. McDonald, who served as a distinguished Legal Aid Society lawyer and Family Court Judge, and Administrator of the New York City Family Court.

This year's recipients are: Hon. Michael Gage, Queens County Family Court; and Prof. Martin Guggenheim, New York University School of Law. Judith S. Kaye, Chief Judge of the New York Court of Appeals, and Ann McDonald, Robinson Murphy & McDonald, presented the awards.

*

IN OCTOBER, OVER 150 STUDENTS ATTENDED A WELCOMING RECEPTION for law students of color at the Association. The reception presented the students with an introduction to and general overview of the Association, including the Minority Fellowship Program, the Minority Internship Program, membership on committees, participation in public service programs, and networking opportunities.

Recent Committee Reports

Asian Affairs

A Chronology of Treaties, Communiques, and Other Agreements Concerning Taiwan's Political Status—1895-2000

Council on Judicial Administration

Report on Mandatory Retirement of Judges

Federal Courts

Comments to the Subcommittee on Class Actions of the Advisory Committee on Civil Rules

Immigration & Nationality Law

Letter to Congress re: Various Pending Immigration Bills

International Human Rights

Report on the Proposed Appointment of a United Nations Expert to Study All Aspects of the Question of Impunity

Letter to Minister of Foreign Affairs of Iran Dr. Kamal Kharrazi re: Shiraz Espionage Convictions

Lawyers' Quality of Life

Report of the Task Force on Lawyers' Quality of Life

Pro Bono and Legal Services

Letter to New York State CLE Board re: Proposed CLE Guidelines

Professional & Judicial Ethics Committee

Ethics Opinion 2000-04: Listing "Affiliated" Firms on Letterhead and Elsewhere; Affiliated Law Firms Clearing Conflicts as a Single Unit

Professional Discipline

Diverting Substance Abusing Lawyers from the Disciplinary Process: A Proposal

Sex and Law

Letter to United States Senate re: Reauthorization of the Violence Against Women Act of 1994 (S.2787)

Women in the Courts Committee

Procedures for Filing Bias Related Complaints Involving New York State Court Employees and New York State Judges

Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at skumara@abcny.org.

Formal Opinion 2000-04

Listing “Affiliated” Firms on Letterhead and Elsewhere; Affiliated Law Firms Clearing Conflicts as a Single Unit

*The Committee on
Professional and Judicial Ethics*

TOPIC: Professional Notices, Letterheads, and Signs;
Conflict of Interest; Imputation Rule

DIGEST: An attorney or firm may permit the name of another firm to appear on its letterhead together with the descriptive term “affiliated” or “affiliate” if the relationship between the attorney/firm and the “affiliated” firm is “close and regular, continuing and semi-permanent” (the equivalent of an of counsel relationship); “affiliated” attorneys/firms must consider themselves as one unit for conflict clearing purposes.

CODE: DR 2-101; DR 2-102; DR 5-105

QUESTION: May an attorney or firm list another firm as “affiliated” with or an “affiliate” of the attorney or firm and, if so, would the “affiliated” entities be required to consider all of their clients as one unit for conflicts of interest purposes?

OPINION

As the twenty-first century begins, state and national borders are giving way to international law firms and cooperation agreements among attorneys and law firms to share skills and clients. Increasingly, law firms and individual attorneys are pooling their resources with one another in order better to serve clients whose needs exceed the capacity of the individual lawyer or law firm. In this context, questions have been raised about whether it is permissible under the Code of Professional Responsibility to refer to the members of such a cooperative arrangement as “affiliates” on the letterheads, professional notices, and the like. In this connection, a related question arises whether the “affiliated” firms or attorneys are required to treat the clients of all the constituent firms as their own “clients” when determining whether a conflict exists in deciding if a new client can be accepted.

As indicated more fully below, attorneys and firms may use the term “affiliated” or “affiliate” in describing another member of a cooperative group provided that the relationship is “close and regular, continuing and semi-permanent” (the same requirement for the proper use of the more commonly used “Of Counsel” designation). By the same token, the close and enduring nature of the relationship among attorneys or law firms that is necessary to enable them to properly describe themselves as “affiliated” also mandates that they treat the clients of each constituent entity or “affiliate” as their own in determining whether or not conflicts of interest exist.

DISCUSSION

The issues raised here have been considered previously by this and other ethics committees. Because these precedents give context to our consideration and inform our conclusions, we describe them below.

Use of the Term “Affiliated”

In N.Y. City 82-28, this Committee rejected as misleading the use of the term “affiliated” to describe the relationship between two firms, despite the inclusion of lengthy disclaimers published by the subject firm to its prospective clients. Several years later, the Committee on Ethics and Professional Responsibility of the American Bar Association (“ABA”) approved the use of the terms “associated” or “affiliated” in describing the relationship between lawyers or law firms where that relationship was closely similar to that of “of counsel.” ABA Opinion 351 (1984) The ABA limited the use of “associated” and “affiliated” to relationships that were:

close and regular, continuing and semi-permanent and not

merely that of forwarder-receiver of business. The “affiliated” or “associated” firm must be available to the other firm and its clients for consultations and advice.

Id. In that same opinion, the ABA also required that conflicts of interest be cleared among all lawyers in the group considered as one unit:

When a firm elects to affiliate or associate another with it and to communicate that fact to the public and clients, there is no practical distinction between the relationship of affiliates under that arrangement and the relationship of separate offices in a law firm. Under both the Model Rules and the Model Code, the Committee would ordinarily apply the same analysis to both arrangements to determine when the firms have a disqualifying conflict of interest treating the “affiliated” or “associated” firms for this purpose as a single firm.

ABA Opinion 388

Ten years later, the ABA opined (ABA 388 (1984)) that where firms or lawyers are using the term “affiliated” and other similar terms, a detailed description of the terms of such arrangement should be provided to prospective clients where the retention made it appropriate to do so. Although the opinion expressed frustration with the expansion of lawyer to lawyer, and law firm to law firm, relationships and the terminology used to describe them in the decade since ABA 351 was issued, it had no difficulty in reaffirming the “one unit” conflict clearing requirement in the circumstances presented in ABA 351 and, we believe, here:

A client is also entitled to know of conflicting commitments where, as described in Formal Opinion 84-351, the relationship between the two firms is “close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business.” In that relationship one firm was “available to the other firm and its clients for consultation and advice.” Quite apart from the name that is applied to that relationship, the Opinion correctly concluded that lawyers of the “affiliated” or “associated” firm will not simultaneously represent persons whose interests conflict with the client’s interests, just as would be true of lawyers who occupy an “Of Counsel” relationship with the firm. The same expectation necessarily exists when two firms are “Of Counsel” to each other. Formal Opinion 90-357; Informal Opinion 1315 (1975). In each case, of course, if the lawyer believes the representation will not be adversely affected, the client can be asked to consent to the representation.

This Committee's Formal Opinion 1995-8

In Formal Opinion No. 1995-8, this Committee considered the scope of DR 2-102 (A)(4) and other related issues in analyzing the extent to which individual lawyers and firms ethically could identify themselves as part of a larger organization where their relationship fell short of partnership. In that opinion, we considered the circumstances under which one *firm* could be properly “of counsel” to another *firm*, and where it would be permissible for firms to state publicly that they were “associated” or “affiliated.”

While it does not refer to the use of the term “affiliated,” the Code of Professional Responsibility does discuss another form of cooperative venture: the “of counsel” relationship. The circumstances in which the phrase “of counsel” is properly used is found in DR 2-102(A)(4) which (as amended June 1999) provides that:

A lawyer or law firm may be designated “Of Counsel” on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate.

Use of the “of counsel” label is limited by the provisions of DR 2-101(A):

A lawyer ... shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive or misleading.

See also EC 2-10. Prior to 1995, this Committee had disapproved of the use of terms other than “of counsel” to describe a relationship of lawyers and law firms (other than “partnership” and similar formal structures) because at the time, those terms, “did not convey a sufficiently precise description of the lawyer’s relationship to the listing lawyer or law firm and thus are misleading.” NY City 81-71.

In Opinion 1995-8, the Committee agreed with ABA 357 (1990) which had expressed the view—contrary to the view then prevailing in New York—that one law firm could become “of counsel” to another law firm as long as the previously established conditions for the formation of such a relationship among individuals were present, namely, a close, continuing, regular and personal relationship.

In concluding that an “of counsel” relationship could properly exist between or among law firms, a relationship now specifically approved in DR 2-104(A)(4), this Committee reminded the Bar in 1995-8 that, when lawyers are in “of counsel” relationships, they must consider all lawyers

in that relationship as one unit for the purposes of analyzing conflicts of interest:

If the “of counsel” designation is employed, the attorneys will need to keep in mind that for purposes of analyzing conflicts of interest, “of counsel” relationships are treated as if the “counsel” and the firm are one unit. “In consequence there is attribution^[1] to the lawyer who is of counsel of all of the disqualifications of each firm, and, correspondingly, attribution from the of counsel lawyer to each firm, of each of those disqualifications. In consequence, the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.” ABA 90-357. *See also Nemet v. Nemet*, 112 A.D.2d 359 (2d Dept. 1985), *appeal dismissed*, 66 N.Y.2d 602 (1986). [Footnote added]

This Committee also permitted law firms and lawyers to use the designation “associated” or “affiliated” so long as

1. an “of counsel” relationship existed between the lawyers/law firm involved;
2. appropriate disclosure of the nature of the relationship were provided to clients and prospective clients; and
3. “the requisites for an ‘of counsel’ relationship are met.” (*i.e.*, that the lawyers/firms in the relationship were considered one unit for purposes of clearing conflicts).

Conflict Clearing Among “Affiliated Firms”

It has been suggested that, as the variety of lawyer/law firm cooperative arrangements multiplies, a broader use of the term “affiliated” should now be accepted. *See* ABA 388 (1994). Some have argued that it may be appropriate to permit the designation of “affiliated” to be extended to situations where the relationship between law firms would not be sufficiently close to require that they be considered one unit for conflict clearing purposes.

We continue to adhere to the view that the relationship between

1. The Court of Appeals in *Cardinals v. Gallinula*, 43 N.Y.2d 288 (1977) disqualified an entire firm, under the “principle of attribution,” when a lawyer “of counsel” to that firm attempted to represent a party in litigation when, at his prior firm, he had worked for the opposition. *Id.* at 296.

firms must be sufficiently close, personal and continuing to warrant the designation of “affiliated” and that this relationship mandates that we treat the clients of each member as clients of every member of the group. The Committee does not believe any reason exists to justify a change in the position we announced in 1995-8. We note that ABA 388 was referred to favorably in N.Y. City 1995-8 where the “one unit” clearing rule was specifically made a requirement in the circumstances present here. This Committee does not believe that the reasons which led to Opinion 1995-8 are any less valid today: namely, the potential for public confusion as to the nature of the relationship connoted by the term “affiliated.” Because the Committee believes it is not in the public’s interest to expand the acceptable meanings of the term “affiliated” to describe law firm relationships beyond its (relatively recently) approved meaning (*i.e.*, analogous for ethical purposes to “of counsel”),² it follows that “affiliated” firms must consider themselves as one unit for conflict clearing purposes.³ In the end, having decided to obtain the benefits of forming a close, regular, continuing and semi-permanent relationship, the participants should not be excused from the provisions of DR 5-105(D):

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of

2. While it is true that the term “affiliated” can and does have a variety of meanings, we believe that even sophisticated consumers of legal services would not, without more, conclude that it could reasonably describe an informal and infrequent client referral relationship. Loosening the approved use of the term, in the Committee’s view, would allow its application to proliferate to the point of meaninglessness.

3. While referring to the “of counsel” relationship, the Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, § 203, comment c(ii)) set out reasons justifying a “single unit” clearing rule that have equal validity here:

the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status.

Explanatory material circulated to clients, which may be helpful on some subjects, is not a satisfactory alternative to “one unit” clearing: the formation of the attorney-client relationship occurs very early in the legal relationship, often before any warnings about the absence of standard conflict clearing practices and the attendant effect on client confidentiality can be communicated to prospective clients. Written explanations of the degree to which a lawyer will not be observing ethical conflict of interest rules can be confusing where a prospective client might otherwise be led to believe the opposite by promotional material touting close-knit relationships with other firms.

them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105(A) or (B), DR 5-108 (A) or (B), or DR 9-101(B) except as otherwise provided therein.

Any other result would incentivize “growth” through the formation of “affiliated” groups or “alliances” rather than through more traditional growth within law firms in order to minimize conflicts of interest. We hasten to add that we have no view as to which form of growth is preferable. But we see no reason to limit conflicts to each “affiliate” which may have closer working relationships than the offices of some firms.

CONCLUSION

Attorneys and firms may use the term “affiliated” or “affiliate” in describing a cooperative firm so long as the relationship is “close and regular, continuing and semi-permanent” (the same requirement for the proper use of the more often used phrase “Of Counsel”). When attorneys/firms are thus “affiliated” they must consider all the clients of each constituent entity in determining whether a conflict of interest exists.

October 2000

The Committee on Professional and Judicial Ethics

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Report of the Task Force on Lawyers' Quality of Life

Task Force on Lawyers' Quality of Life

Introduction

The Task Force on Lawyers' Quality of Life of the Association of the Bar of the City of New York (the "Task Force") was formed in 1996 out of concern that disturbing numbers of lawyers—particularly young lawyers—were growing dissatisfied with their professional lives. Some of the factors contributing to this unhappiness are not unique to the practice of law; indeed, many American workers are experiencing heightened levels of stress due to economic conditions, increasing demands on time due to technological advances, and shifting expectations regarding family responsibilities.

But even after considering the significant impact of these economic and social forces, other sources of lawyer malaise remain. Individuals graduating from law school—with as much as \$100,000 of school debt—often begin their careers with negative expectations regarding the future. Those associates fear "exploitation by the firm," and may plan to "stick it out" for a brief period, perhaps just enough time to pay down the debt to a manageable level. Once at the firm, the associate faces the prospect of being assigned a huge and lengthy matter for which the lawyer can feel little excitement or responsibility. These attorneys are often working more than 2,100 hours annually for paying (and demanding) clients, leaving little time for family or friends, outside activities, *pro bono* cases, public

service activities, or even reading a book or going to the theater. In exchange for these efforts they face a decreasing likelihood of a partnership at the end of eight or nine years.

The implications and costs of this unhappiness are significant, as many bright attorneys grow disillusioned and cynical, with diminishing career opportunities. While at the firm, unhappy associates fail to achieve their full potential at a cost to them, their firms, their clients and their families. Invariably many lawyers leave the law firm, and even the practice of law, prematurely, resulting in undesirable and costly turnover.

The Task Force was charged with studying these issues and recommending solutions, where possible. It was understood that we were to address the problems of large firms in New York, including firms headquartered outside New York—not because small and medium-sized firms lacked problems, but because of the need to limit the scope of the undertaking. Our efforts began with the formation of a number of Focus Groups, comprised of associates at large firms throughout New York City. Focus Groups discussed sources of associate dissatisfaction, steps taken in response, and the perceived effectiveness of these measures. Through those Focus Groups, the Task Force identified a number of Quality of Life issues confronting associates, and began the identification of potential practices that may alleviate some of the dissatisfaction.

The Task Force expanded upon its efforts to identify potential solutions that had been actually considered or attempted at firms through a questionnaire. The questionnaire was 11 pages of detailed questions, and in February 1999 was delivered to 27 of the largest law firms in New York City. Over the course of the following several months, members of the Task Force conducted interviews at the firms that received the questionnaire. In total, 17 law firms provided information to the Task Force in response to the questionnaire. That information was analyzed and discussed by the Task Force, which ultimately came to a consensus on a series of Recommendations or Best Practices, all of which are discussed in this report.

This Report presents a discussion, organized in 9 sections, of particular quality of life issues. Each section addresses a somewhat distinct “category” of issues identified by the Task Force, including those identified via the Focus Groups; reports the results of the survey of the 17 firms; and presents a discussion of the Recommendations/Best Practices. For ease of reference, the Report concludes with an Executive Summary of the Recommendations/Best Practices agreed upon by the Task Force.

We offer several caveats.

First, the Task Force set as its goal the identification of policies or procedures actually applied at a law firm. Thus, although the Task Force spent significant time at its meetings discussing a wide variety of solutions and scenarios relevant to quality of life issues—including a maximum “cap” on the number of billable hours an attorney may work in any one year or increasing further associate compensation—the Task Force chose not to focus on such highly controversial and untested goals, but to leave that broader, important debate to other fora. The Best Practices recommended herein have all been applied by at least one large firm in New York City with at least some success; with that experience, the Task Force hopes that this Report will lead to other firms considering and adopting these practices.

Second, the Task Force is cognizant of the vast amount of work done by other committees at the City Bar on issues raised in this Report, in particular issues related to flex-time and part-time attorneys. The Task Force, by reporting its findings here, does not intend to present a comprehensive study of these important issues, but hopes that it can add to the discussion of those issues the experiences of the firms who responded to the questionnaire.

Third, the 17 firms that participated in responding to the questionnaire did so upon the promise of confidentiality. Those firms are listed in Appendix A, attached hereto, but the Report will not attribute any particular practice or policy to any particular firm. The Task Force is greatly in debt to these firms for agreeing to share their experiences with the Bar.

Finally, the Task Force hopes that this report will be regarded as a practical tool, and not an exercise in theory. We trust that those reading this document will learn what has worked—and what has failed—elsewhere, and believe that if the successful practices we have identified are emulated, this report will have made a modest contribution to the quality of lawyer’s lives in New York.

SECTION I OVERWORK/INEQUITABLE DISTRIBUTION OF WORK

The Task Force identified certain consistent issues relating to the difficulties associates face in balancing professional work demands against personal time and the negative impact this balancing challenge has on associate life. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—Excessive Work Demands

Identified Issue: While nearly all of the firms surveyed have either a minimum billable hour requirement or a budgeted number for administrative purposes, there is insufficient communication of the importance, or not, of meeting or exceeding this number as a measurement of success.

Survey Results: The Task Force's survey revealed inconsistency among New York law firms on Issue 1. Some surveyed firms explicitly do not have a standard or target number of hours, while others do. Many firms reported that while they do not have a formal minimum billable hour requirement, there is an informal "expectation" that a certain level of billable hours will be met. Of those firms surveyed, no firm had either a formal minimum or an informal expectation that was less than 2,000 hours per year. Also, a small number of surveyed firms report using a formal minimum billable hour requirement as a yardstick to determine year-end associate performance bonus amounts.

Of the firms that reported either a formal minimum billable hour requirement or an informal expectation, *pro bono* hours are almost universally stated to be viewed as the equivalent of billable hours.

The Task Force identified a lack of clarity at many firms regarding whether and to what extent meeting or exceeding a formal minimum billable hours requirement or an informal expectation is considered an important component of success at the firm. Presently, survey feedback indicates that both minimum billable hour requirements and informal expectations are viewed by associates as the bare minimum that must be met in order to get, and then remain, on partnership track. Whether this view is true or not at a given firm may be less important than a clear communication of its accuracy.

The Task Force also notes the recent significant increase in the associate pay scale at New York law firms, in response to competition from "dot-com" employers and overall strong and sustained business demand. This increase has triggered commentary within the legal community suggesting that the increased pay scale will likely increase the pressure on associates to generate higher and higher billable hour levels, at a cost to overall quality of life. Indeed, in response to the pay increases, at least two New York firms have informed their associates that the billable hour target is now mandatory and failure to achieve it will result in lower overall compensation. While noting this development, the Task Force does not comment on it, as the survey was conducted before the pay scale increase occurred, so that empirical data was neither solicited nor collected.

Recommendations/Best Practices: The Task Force survey results demon-

strate that there is a need for many New York firms to convey the reality of formal minimum billable hour requirements or informal expectations clearly, including *pro bono* hours, so that associates can understand and appreciate the relative importance, or not, of the issue. Without clear communication from the firm, the pressure to bill can permeate an associate's professional experience, lead to overwork and thus negatively impact quality of life.

Issue 2—Inequitable Work Distribution

Identified Issue: The Task Force identified certain issues involving the equitable distribution of work among associates at a large firm. The primary issues involve quantity of work, *i.e.*, that “good work tends to be rewarded with more work,” and quality of work, *i.e.*, that the “better” assignments go to the “better” associates. Stated differently, the issue presented is whether the associates who are (in the partners' view) most-qualified become overworked and resentful while the associates perceived as underperforming become more difficult to staff on matters and ultimately receive the same compensation for a shrinking workload.

Also noted were discrepancies in the level of demands placed upon associates of different departments of the same firm (*e.g.*, the corporate associates work harder than the litigation associates), that an associate who makes a good first impression invariably fares better than one who gets off to a slow start, and that reliance upon billable hours discourages efficiency and rewards gross hours billed.

Survey Results: All but a few firms recognized the goal of distributing similar assignments to associates of similar abilities. However, one firm bluntly indicated that equitable distribution of work among associates was not the aim of that firm's staffing system—rather, the staffing philosophy was that each partner would seek to staff his or her cases with the best people, because the client's needs came first. That firm recognized that this policy would result in an inequality of assignments among associates, but the firm decided it was prepared to live with that fact.

While only one firm made this explicit statement, the attitude of obtaining the best associate(s) on one's own cases is no doubt the prevailing view of most partners. To offset this somewhat-natural inclination towards self-interest, most firms have adopted various procedures, discussed below, designed to foster a more equitable work distribution and to serve the similar purpose of equalizing, to the extent possible, the amount of billable work assigned to associates of similar abilities. Most of the firms interviewed utilized some combination of the following 5 procedures:

1. The Assignment Person

Most firms interviewed indicated that one or two individuals were responsible for distributing assignments to associates. In most instances, assignments were done on a department or practice group level, *e.g.*, all litigators received their assignments from one (or perhaps two) assigning persons. As a result of centralizing assignments in this way, the firms have delegated the responsibility (and presumably the authority) of ensuring that associates of similar abilities receive similar work. Because all work is to be assigned through the assignment person, the firms believe that there is a person responsible for ensuring that work is distributed equally to comparable associates—in fact, several firms boasted that the assigning person made sure that associates were treated equally.

One item worth noting is that several firms employed someone other than a practicing attorney as the assignment person. Several firms had a “non-practicing attorney” distribute the assignments and a few firms employed a non-lawyer administrator in that role. On the other hand, approximately 40% of the firms rotated the assignment role among several practicing, and usually “younger,” partners.

Having one person responsible for delegating assignments to a group of lawyers would serve the goal of equitable distribution of assignments. Whether the assignment role should be filled by an administrative person or a practicing lawyer raises an interesting issue: a practicing partner would be more likely to have the respect of the associates and the partners, which is important to being able to say “no” to a partner who requests that a new task be assigned to an associate who is overworked relative to other comparable associates, but such an assigning partner likely would have less time available to the assignment responsibilities in light of his or her practice. On the other hand, a firm might be better served (assuming available financial resources) employing a person whose primary job is the equitable distribution of assignments—thereby eliminating a demand on a practicing attorney’s time—particularly if (a) that person is an attorney (and thus has some understanding of the demands on an associate) and (b) that person has the internal authority (and respect) requisite to ensuring that his or her assignments are followed and are not undercut, *i.e.*, that he or she can say “no” and it sticks.

2. Attorney Forecasts

A significant number of firms, although fewer than half those surveyed, have sought to enhance the assignment process by requiring associates to prepare forecasts, typically on a weekly basis, of the number of

hours that the associate expects to bill that week, as well as any other information that would impact upon the associate's ability to accept assignments during that week. These forecasts subsequently are compared with the associate's actual billed hours, and significant discrepancies are discussed. These forecasts are perceived by the firms utilizing them to be a tool in identifying those who have time available (at least relevant to other comparable associates).

3. Management Reports

Most of the firms stated that the assigning person had access to management reports, which indicated the number of hours billed by each associate over the past week, month, year, etc. Reviewing these reports was considered essential to ensuring equality of billed hours. Although forecasts could be to the contrary, the firms believed that associates would accurately bill their time, so that those with less billed time over a particular period were more readily available for additional work than those associates with higher hours. Further, these reports can be used to identify those associates who are significantly over-burdened or under-utilized. One firm employed an Executive Director of Associate Affairs to monitor associate hours on a monthly basis and to notify department chairs of associates who have worked more than 250 hours, or who have less than 5 calendar days off, during the previous month. When associates bill consistently less than the average of the other associates in their department, the Executive Director also consults with the department chair to understand the reasons and to help develop a strategy to improve the associate's performance.

4. Assignment Benchmarks

A fair number of firms indicated that the associate's professional development was monitored via the assignment/review process, as the individual(s) involved in the assignment process typically were either involved in associate evaluations or had access to them. These firms have a checklist, or a list of benchmarks, of the types of assignments that each associate should have completed by the conclusion of each year, so that the associate can gauge his or her development and request particular assignments to meet the checklist or benchmark. A few firms reviewed with associates their progress on the checklist as part of the annual review. (Some examples of these checklists are included in Appendix C to this Report.)

5. Mentoring

A few firms identified mentoring as a means of ensuring equitable

distribution of work to associates. These firms indicated that an associate's assigned mentor was involved in assigning work to the associate, which the firms stated would allow the mentor to assist in the direction of the associate's assignments (and therefore the associate's development). In this way the associate would have a mentor who could assist the associate's efforts in obtaining varied assignments. (Mentoring is discussed further in Section VII of this Report.)

Recommendations/Best Practices: Each of the tools identified above appears to serve the purpose of ensuring that similar associates receive similar work, and so it is difficult to argue that any of the above resources should not be utilized by a firm to the extent available. It appears important for a firm to recognize that its efforts at equitable work distribution will always be subject to the desires and demands of particular partners, and to establish procedures to avoid the "will" of a particular partner from unilaterally subverting the assignment process by cornering an associate into an assignment. Partner collegiality and cooperation are key to making an assignment program work.

The Task Force endorses the use of an assignment person with appropriate authority (item 1 above). This permits the associate an opportunity to decline an assignment for any of several reasons, including overwork, unsuitability to the associate's level of seniority, or diversification of assignments. Without an assigning person with authority, that associate is less likely to address concerns of this nature, and is prone to receive assignments from any partner with whom he or she has contact. Whether the assignment function is filled by an administrator or by a practicing partner, the Task Force believes that the individual must be equipped with the requisite authority; otherwise there will be a significant likelihood that the assignment system will be abused.

The Task Force also believes that the use of Attorney Forecasts (item 2 above) is a worthy tool for seeking equitable work distribution. These forecasts will increase the communication between associates and the assigning person regarding both the amount of work expected (and actually performed) and provide an additional—and regular—avenue for the associate to raise with the assigning person any perceived deficiencies in the type and quality of the assignments undertaken.

Issue 3—Ability to Take Vacation

Identified Issue: Procedures to ensure that associates schedule and take vacation and that these vacations are uninterrupted are not prevalent among the surveyed firms.

Survey Results: The Task Force found that while nearly all firms provide sufficient vacation time as a policy matter, in practice, associate vacations are often not respected and can be canceled or interrupted relatively easily. As a predicate matter, too many associates do not schedule and take the vacation days they are entitled to by policy. This is partly because many firms do not have formalized procedures to ensure that associates take vacation, and in part because the culture at certain firms does not encourage full utilization of available vacation time.

Although the majority of surveyed firms have no formalized procedures to ensure that associates take vacation, these same firms have generally instituted a "use it or lose it" policy regarding vacation time. If an associate does not utilize his or her vacation time in a given year, it cannot be carried over without formal approval of the assigning partner or department head, a process younger associates may be reluctant to pursue. The survey found that too often associates who have lost vacations because of workload ultimately do not take them, and the time is truly lost: the associate loses the original vacation and cannot accrue it, and while a firm may track actual associate vacation time taken, it does not track lost time.

A minority of firms are utilizing more formal procedures to ensure associate vacations are respected and taken. At one firm, vacations are coordinated through a central staffing partner for each department or group. There is an administrative staff whose responsibilities include monitoring associate vacations and following up with associates to make sure they take vacations. At another firm, a new vacation policy was implemented in 1998 to encourage associates to take vacations and to take them as scheduled without interruption: No associate vacation is to be canceled or abbreviated by a request to return to the office earlier than scheduled, unless the partner who requests that cancellation or call back, after consultation with the associate, obtains permission of both the relevant Practice Group Leader or Office Managing Partner and the Personnel Partner. In any case where partners prove insensitive to associate vacations, including repeated denial of an associate's request to schedule a vacation, the associate is urged to bring this to the attention of the Practice Group Leader or Office Managing Partner or, alternatively, to the attention of the Personnel Partner.

At yet another firm, the vacation policy requires formal submission of proposed vacation schedules for the entire year. Each March lawyers are asked to submit their proposed vacation for the remainder of the year. Associates who have a large amount of accrued time are strongly encouraged

at their spring evaluation meeting to take this time. Vacations are strongly encouraged, and partners do not interrupt vacations in the absence of an emergency. The survey found that this policy is strongly adhered to and well-respected within the firm, the result being that vacations are more likely to be taken when scheduled and not then be subject to interruption.

Recommendations/Best Practices: Firms must do more to respect associate vacations, and to foster a culture where vacations are viewed as a necessity and not a luxury. Likewise, associates themselves must also be pro-active in scheduling vacations well in advance. The Task Force believes that the formal vacation planning systems at the firms described above can serve as constructive models to achieve both of these goals.

Issue 4—Part-Time/Flex-Time Arrangements

Identified Issue: There is a lack of clearly articulated written guidelines for part-time and flex-time work, with a perception that firms tend to address the issue on an *ad hoc* basis. The availability and eligibility for such programs is overly restrictive, either because firms may limit the programs to associates with child care or health-related needs or because firms will not make partners from the ranks of part-time or flex-time associates. Part-time or flex-time programs also raise the possibility that a firm's workload will exert pressure on a part-time employee to devote full-time to the firm or that less desirable work assignments will be given to the part-time employees.

Survey Results: Each firm that responded to the survey offers some variant of a part-time or flex-time program for its associates, and each surveyed firm reported its view that associates are taking advantage of part-time and flex-time opportunities. Among the large firms providing numbers to the Task Force, an average of between 10 and 20 associates per firm are working on a reduced workload basis.

However, the Task Force found significant differences among the firms surveyed in the degree of formality of their part-time and flex-time policies. A number of firms appear to deal with requests for part-time and flex-time employment on an *ad hoc* basis, weighing each request against the needs of the firm or an associate's particular practice group. These firms allow associates to take on a reduced workload for reduced pay but appear to consider each request on a case-by-case basis without any specific guidelines articulating eligibility for part-time or flex-time status. Other firms have adopted written guidelines which communicate the availability of and eligibility for part-time or flex-time work, including for some firms brief policy statements reflecting a general commitment to provid-

ing flexibility to associates seeking a reduced schedule. Other firms spell out the policies in greater detail, establishing eligibility criteria and an approval process for part-time or flex-time status, as well as setting forth workload guidelines for part-time and flex-time associates. One firm has recently adopted a detailed flexible career path program specifically designed to provide alternative career tracks for associates and to provide opportunities for promotion to partner for those who have pursued such alternatives.

The Task Force found great variation in the scope and availability of part-time and flex-time programs from firm to firm. At one end of the spectrum are those firms that limit a reduced workload to those associates who are acting as care givers or have health-related needs. One firm reported that the program has been made available only to women with child-care responsibilities; others that offer the program more broadly advised that, in practice, only those associates with child-rearing responsibility have sought part-time or flex-time arrangements and that few male associates have sought such arrangements. At the other end of the spectrum, a number of firms informed the Task Force that part-time and flex-time programs are available to all associates, irrespective of the reason why a reduced workload is sought, subject to some minimum tenure (typically two years) at the firm. Other firms offer reduced workloads as a matter of course for associates with parenting or other family issues, but re-evaluate other requests on a case-by-case basis.

Many firms reserve the right to refuse part-time or flex-time status, depending upon the needs of the firm, and the probability that an associate can make a meaningful contribution while on a less than full time basis.

Most firms have a minimum workload for part-time or flex-time associates, typically 60% or more of a full work load. Fulfillment of the workload can be accomplished on a five-day per week reduced schedule or as few as two days in the office. A number of firms tie part-time or flex-time arrangements to a specified percentage of target billable hours. Other firms employ more flexible definitions, typically applied on a case-by-case basis, recognizing the diverse needs and demands of different areas of the practice. And a majority of firms impose time limits on participation in part-time or flex-time programs, subject to extension on a case-by-case basis.

Most firms report that part-time or flex-time status is not a bar to partnership. However, a minority of firms surveyed advised the Task Force that they will not consider associates for partnership until he or she re-

turns to full-time status. A number of firms reported that progress to partnership, if not impeded, is slowed by part-time status, with an increase in the number of years to partnership to be expected for associates working on a less than full-time basis for any significant period of time. Only a handful of firms reported that they have made partners of associates who have spent a significant portion of their career on part-time status. And those firms report that only one or two such partners were elected from the ranks of part-time associates.

Recommendations/Best Practices: Firms should adopt written guidelines for part-time and flex-time employment, and those guidelines should clearly articulate the eligibility for and availability of such programs. The Task Force believes that it is also a better practice to have clearly established written guidelines that spell out the firm's expectations as to what workload part-time or flex-time associates are expected to discharge. The policies should emphasize that, due to the nature of the practice of law, it is imperative that the firm and the part-time associate be *flexible* in the work arrangement; the practice of some firms in "adjusting" downward an associate's hours following a particularly busy period—so that the associate will then have a period in which he or she is working less than the agreed-upon target of hours—likely serves the dual goals of alleviating concerns regarding overwork and of ensuring the likelihood that part-time/flex-time associates will receive work commensurate with their class level.

The Task Force also recommends that part-time or flex-time programs should be made broadly available to all associates who are performing at class level, without limiting eligibility to those associates with child care or other family or health reasons for seeking less than full-time status. Although the Task Force recognizes that the demands of the profession are sometimes inconsistent with protracted part-time status, and that firms cannot effectively function without a sufficient number of full-time lawyers, it believes that firms should see employing part-time lawyers as a matter of self-interest. At a time when competent lawyers are in short supply, it is simply not sensible to exclude a readily available source of talent.

The Task Force further recommends that firms adopt policies that will enable part-time associates to be eligible for partnership consideration while maintaining part-time status. We do not propose to tell any firm what its partnership standards should be, and we understand that attorneys who have worked part-time for some number of their first 8 years may not have the breadth of experience required for election to

partnership. We are confident, however, that there are part-time or flex-time lawyers who meet those partnership standards (either in their eighth year or thereafter), and whose advancement should not be blocked because of the cultural demands of other obligations in their lives. As recommended more than 5 years ago by another Committee of this Association, firms should not "put artificial barriers to advancement in the way of attorneys taking advantage" of flexible work arrangements.¹

SECTION II TRAINING

The Task Force identified certain issues involving training of associates that impact an associate's experience and his or her professional development. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—Associate Training

Identified Issues: Neither law school programs nor new associate training programs adequately train incoming associates to do the routine work, particularly transactional work, expected of them; advanced training is not actively pursued or encouraged at senior associate levels; and supervision and training of junior associates are often left to senior or even mid-level associates who are often ill-equipped to perform the role.

Survey Results: To identify potential solutions to these issues, the Task Force sought to determine the extent and nature of associate training programs conducted by large law firms.

Practically every surveyed firm conducted some type of formal or regular training programs for its associates. Approximately one-half of the surveyed firms had special orientation sessions directed to all new associates, ranging from one day to a week. The content of these orientation programs varied, covering from basic orientation to the firm's support departments and computer training/Westlaw/Lexis training to the introduction of business concepts, firm management and other matters. A few firms conducted the orientation sessions offsite.

With respect to ongoing training programs, all firms appeared to conduct some form of program, either on a firm-wide basis or on a de-

1. The Task Force recommends to all those interested in considering further the issues related to flexible and part-time work arrangements the March 1995 report of the Association's Committee on Women in the Profession, entitled "A Report on the Need for, Availability and Viability of Flexible Work Arrangements in the New York Legal Community."

partment-by-department basis. The formality of these programs varied. Three firms specifically mentioned that they had multi-day training programs specifically designed for all mid-level (and in one instance senior) associates. All firms except one conducted training sessions that covered different areas of their practice; one firm stated only that it had a trial advocacy program. These training sessions were either conducted in multi-hour sessions covering substantive areas of the firm's practice, or breakfast or lunch sessions conducted by a department or group. The training sessions of at least five firms were eligible for CLE credits; other firms were reviewing their offerings with the view of enabling associates to fulfill their CLE requirements through internal programs. Most firms encouraged associates to attend training programs of outside providers, such as PLI and the National Institute for Trial Advocacy.

It appeared that most if not all training sessions at large firms were conducted by partners, with some firms also involving associate participation. Supervision of training programs varied from firm to firm, ranging from firms with a full-time "director of training" or administrator, to partners specifically identified within practice areas who were responsible for supervising training in those areas.

Associate input on the training programs also appeared to be fairly common, with associates in some instances participating in the picking of topics, teaching sessions and scheduling sessions. Only one firm stated that associates did not participate in designing the training programs.

Recommendations/Best Practices: The Task Force finds that it is commonly acknowledged that associates need more than their law school preparation and new associate orientations in order to become effective lawyers. The Task Force recommends the implementation of formal training programs for new associates and supplemental training programs for mid-level associates. Although most training occurs at the departmental level, the Task Force notes that there appears to be an increasing use of a full-time director of training or firm-wide committee charged with responsibility for overseeing and coordinating training activities. The Task Force recommends that firms also develop skills or knowledge checklists on a departmental or practice group level and periodically review the extent to which each associate has been afforded the opportunity to develop or acquire the required skills and knowledge. Because of work demands, whenever possible such training should be conducted off-site.

Perhaps the unstated, but nevertheless most important component, of associate training is to seek to make each associate's assignment as effective a training ground as possible, in which the associate gains new

skills and expertise to continue his or her professional development. In order to achieve this goal, the Task Force recommends that partners and senior associates be strongly encouraged to supervise the work of junior associates through direct and regular contact. In addition, the Task Force recommends that feedback be solicited from associates in order to assess whether the partner or senior associate involved in the matter is adequately training and supervising the people who work for him or her.

Attached to this report at Appendix B and C, respectively, are sample training course lists and sample skills checklists. Appendix B provides an overview of how various firms have structured a training program; Exhibit C includes checklists that firms provide to associates so they may gauge how well their assignments increase various skills.

Issue 2—Lack of Guidance

Identified Issue: Partners are often unavailable to provide guidance when issues arise in particular matters, particularly in smaller or more routine matters, and associates are reluctant to press for that guidance for fear that they will be perceived as incompetent or lacking in confidence.

Survey Results: The survey did not reveal any policies or procedures designed specifically to address the issue of partner guidance to associates.

Recommendations/Best Practices: The Task Force recommends that firms endeavor to create an environment that recognizes that junior associates lack knowledge in substantive practical areas and are entitled to seek appropriate guidance while assuming appropriate levels of responsibility. The Task Force also recommends that firms consider adopting policies to make it clear that senior and mid-level associates are expected to be available to assist junior associates, either as a result of working together on a particular transaction/matter or via a formal mentoring program (*see infra* Section VII).

Issue 3—Supervision of *Pro Bono* Work

Identified Issue: *Pro bono* work, which tends to allow more meaningful involvement by junior associates, while institutionally encouraged, is poorly implemented, inadequately supervised and receives less credit and respect relative to billable work.

Survey Results: To identify potential solutions to this issue, the Task Force sought to determine the nature and extent of the *pro bono* policies and practices of the surveyed firms.

All the surveyed firms state that they encourage *pro bono* work. At least one firm has a written policy regarding *pro bono* work, and two firms

have programs which allow associates to take fellowships or externships with public interest organizations.

Most firms have either a *pro bono* committee or a *pro bono* coordinator. The *pro bono* committees typically include partners and often a special counsel or senior associate who serves as a full-time *pro bono* coordinator. Some firms distribute *pro bono* work by circulating notices of available *pro bono* matters to attorneys, and at least three firms directly assign *pro bono* work to associates. Other firms do not assign *pro bono* work but encourage associates to choose *pro bono* assignments. One firm assigns *pro bono* work through partners who seek out associate assistance on *pro bono* matters. At least one firm staffs *pro bono* matters in such a way to ensure that junior associates have a partner or more-senior associate as a supervisor.

A majority of the surveyed firms stated that they count hours spent on *pro bono* matters as billable hours in evaluating associate work. At least three firms formally recognize attorneys who make significant contributions to their *pro bono* activities through bonuses or an annual awards events.

Recommendations/Best Practices: The Task Force believes that the use of a *pro bono* committee or coordinator for *pro bono* work is a best practice. The committee or coordinator may be by department or on a firm-wide basis.

The Task Force recommends that firms adopt a policy that designates for each junior associate doing *pro bono* work a more senior associate with experience in the subject matter of the *pro bono* project.

The Task Force recommends that firms adopt and announce specific policies regarding the extent to which *pro bono* hours will be regarded in the same manner as billable hours for all purposes, including promotion to partner and for compensation-related purposes such as satisfying a minimum-hours requirement for receipt of a bonus. The Task Force believes that it is an important practice to treat the lawyer's fulfillment of the ethical obligation to render *pro bono* and public interest service the same as billable hours.

Issue 4—Lack of Management Training

Identified Issue: No “management training” is provided at any level. Poor management of both people and matters continues as associates move up the ranks and contributes to a significant number of problems.

Survey Results: The survey did not reveal any policies or procedures designed specifically to address the issue of management training.

Recommendations/Best Practice: The Task Force recommends that firms

consider adoption of management training programs for mid-level and senior associates in appropriate areas, including supervision and training of junior associates; case/transaction organization; expectations of clients with respect to cost-effective delivery of legal services; matters relating to billing and collections, including appropriate methods of recording time for all work performed and describing work; and client servicing and development.

SECTION III FEEDBACK/EVALUATIONS

The Task Force identified certain issues involving feedback and evaluation of associate work performance. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—Timely Feedback

Identified Issue: Partners and senior associates do not take time to provide detailed feedback regarding particular work product of junior attorneys. Moreover, associates who have trouble early in their careers are not given the extra support and advice that will permit them to make improvements necessary to succeed. Finally, annual reviews tend to be nonsubstantive—they compound the lack of feedback received throughout the year by taking a “no news is good news” approach, and fail to provide associates with meaningful information regarding their long-term prospects with the firm.

Survey Results: Each firm responded that it had a formal review process in place, typically providing for annual or semi-annual (particularly for junior associates) reviews. A significant number of firms also indicated that informal feedback was encouraged as well. The firms were evenly split as to whether senior associates played a role in evaluating the work of more junior associates.

In most cases, the review process involved the completion of a written evaluation by all supervising attorneys, a review of the evaluations by a committee of partners, and delivery of a formal review by two partners. In almost all cases, it appears that review forms are not completed at the conclusion of an assignment, rather at the end of the annual or 6-month review period. A minority of firms encourage completion of written reviews upon the completion of a project, but compliance is strictly voluntary. One firm has instituted a policy pursuant to which each associate is required to be reviewed within 10 days of the completion of an assign-

ment to which he or she has devoted more than 35 hours. Feedback at this review is intended to be detailed and meaningful (including, where appropriate, a review of marked up documents). Other firms expressed their intent to move in the direction of requiring this form of more contemporaneous feedback.

Firms appear to have adopted a variety of approaches, ranging from informal (primarily nagging delinquent reviewers) to formal (including withholding partnership draws) to ensure that reviews are not unduly delayed.

Recommendations/Best Practices: Careful evaluation and the provision of useful feedback is critically important to young lawyers for at least two reasons. First, it is essential to their professional growth—inadequate evaluation and feedback deprives them of the benefits to be gained from working with more experienced lawyers who can help the younger lawyers learn from their own mistakes as well as, perhaps, avoid the mistakes their seniors made growing up in the practice. Second, it is essential to their ability to make informed judgments about their futures; knowing where one stands in an institution is an essential factor in determining whether to stay or move on to another career path. It is therefore no surprise that concerns over evaluation and feedback rank very high in the list of damaging morale issues. The survey results summarized above demonstrate that those concerns are justified at most of the City's large firms.

The two major difficulties appear to be (i) the quality of the information collected and provided to the associates and (ii) timing.

To address the first concern—the quality of information—firms should commit to have associates' written work reviewed by partners, and to have the partner who reviews any particular work product speak about it directly with the associate who produced it. The information conveyed in the review should be specific, rather than conclusory. This, of course, will take time, and the partners must be prepared to spend such additional time to provide feedback. Similarly, partners should make an effort, as associates become more senior, to observe them “on their feet”—whether that is in court, taking or defending depositions, negotiating a corporate transaction, dealing with adversaries, or delivering advice to clients. This, too, requires a commitment of some non-billable partner time. It will, however, improve the quality of the information about the associates available to the reviewing partners.

The timing of feedback is also important, and closely related to its quality. It is intuitively obvious that it should be easier to provide a detailed explanation of the strengths and weaknesses of a particular perfor-

mance or written product while the memory is fresh. The experience of the few firms that have tried to provide "project-based" feedback bears this out. In this regard, firms may wish to make review forms available on their computer networks as a means of facilitating timely compliance. Thus, the Task Force recommends that firms make an effort to provide immediate feedback to associates, from partners, with respect to at least some of the projects or performances of the associates throughout the year. Focusing on projects of a particular size or intensity appears to be an effective way of striking a balance between the desire to improve the quality of feedback and the already imposing demands placed on partners' time.

The Task Force believes that firms should also continue to provide fixed periodic general reviews, as those are the best forum for addressing standing issues or repeated concerns. For example, an associate's failure to meet a deadline would be a concern in the context of one project; failing consistently to meet deadlines over a six month or one year period would be cause for a slightly different discussion. Similarly, a penchant for being "tough" on support staff might not be noted in reviews of individual projects but may show up in a more general evaluation of an associate's conduct in the office.

The Task Force recommends that each firm adopt an approach of its choosing to ensure that reviews are not unduly delayed. Of course, the value of any of the above programs, if adopted, will depend almost entirely on the level of compliance by partners and senior lawyers. Although firms appear to meet with some success in correcting troublesome conduct by senior associates, many have difficulty encouraging recalcitrant partners to devote the time and energy required to improve feedback and evaluation. The Task Force recognizes that there is no "one size fits all" recommendation for this issue. Each firm must adopt an approach consistent with its culture and its method for encouraging partners to comply with other firm policies. Thus, if a firm relies on withholding partnership draws or distributions to force partners to record their time or send bills, it should consider using the same approach to encourage partners to provide timely feedback and evaluations. Doing so sends the clear message that the firm views such things as important. If the firm relies on the more subjective approach of factoring in timely performance of administrative responsibilities and treatment of staff in the periodic peer review or calculation of partner compensation, then it should make it known that partners' performance as evaluators and trainers of younger lawyers will be considered in the mix of data used to determine their compensa-

tion. While the Task Force cannot make a specific recommendation for all firms, it does recommend that each firm choose a method that will demonstrate, within the context of its particular culture, that the training, evaluation and treatment of its junior legal staff are important elements of the firm's, and its members', performance.

Issue 2—Monitoring the Treatment of Associates

Identified Issue: Junior and mid-level associates are often subjected to poor supervision and management by senior associates and partners.

Survey Results: Approximately one-half of the surveyed firms have instituted some form of upward review process, whereby associates review the senior associates, counsel, and partners with whom they have worked. The upward review procedures at each firm vary significantly. Some firms have an outside consulting firm conduct the reviews to ensure confidentiality, while others conduct the survey anonymously internally. At one firm, its associates' committee compiles lists of partners and associates who are "best supervisors," "worst supervisors," and a "watch list" of those whose skills border on the worst list. Firms utilizing an upward review process found that the feedback provided tended to be honest and relatively consistent.

The use of the information obtained from the upward review process also varies greatly. In some instances the information is shared only with the partner or associate reviewed. Other firms distribute the results to practice group leaders, the executive committee, the policy committee, and/or the compensation committee. Indeed, at some firms the evaluations are a factor in deciding a partner's compensation and/or an associate's evaluation for partnership.

Other than upward reviews, few firms have a formal mechanism to monitor and address inappropriate treatment of associates. Only two firms reported that the treatment of associates, *i.e.*, the management and supervision of associates, is part of a senior associate's review, and few firms have an identified person to whom such issues should be reported.

Recommendations/Best Practices: An important element in the quality of an associate's life is how he or she is treated by senior associates and partners. The ways in which an associate can be "mistreated"—in addition to simply failing to acknowledge or provide feedback about work completed—are fairly obvious and need not be catalogued here in detail, but include failing to acknowledge or give credit for good ideas or successes (and, worse, taking credit for them), letting projects gather dust and then dropping them on junior lawyers at the last minute, leaving

them to suffer the personal consequences of the senior lawyer's poor planning, and failing to provide opportunities to the associates to move to the "next level" of practice. Identifying such conduct on the part of senior lawyers is critical to putting a stop to it; failure to do so will drive the mistreated younger lawyer out of the firm and, in the worst cases, out of the profession. Where the "perpetrator" is a senior associate (as opposed to a partner, which presents different political issues), identifying the conduct and addressing it is, or should be, an essential element of that associate's professional and personal growth, as well as the evaluation of his or her prospects for continued success at the firm.

For these reasons, the Task Force recommends that firms adopt some formal method of identifying such conduct and acting on such information to (i) fix the problem for the junior lawyer and (ii) provide useful feedback to the senior lawyer responsible for the problem. Upward evaluation programs are one effective way to identify such problems. A more *ad hoc* method, which can be effective if it is structured to be credible within the culture of the particular firm, is an "ombudsman" approach under which the firm has a person—partner or human resources staff member—to whom an associate concerned about his or her treatment can speak, confidentially in the first instance. The credibility of any such program will depend in large measure on whether the associates see results over time. If the associates see chronic abusers modifying their conduct or, in the case of abusive senior associates, failing to become partners even where they might otherwise qualify, the approach will be credible. If a system is adopted but information about mistreatment disappears into a black hole, it will not. Thus, the Task Force recommends that firms consider carefully which type of program is likely to work best within its particular culture and adopt it only if the firm is committed to making it work. Once adopted, a program should stay in place for a period of years before the firm attempts to make a judgment as to whether it has been successful, as results are not likely to be immediate.

SECTION IV PARTNERSHIP SELECTION

The Task Force identified certain issues involving the partnership selection process. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Identified Issue: An up-and-out system creates resentment as mid-level and senior associates see respected friends required to leave the firm. The

secrecy of the partnership selection process compounds this problem because rationales for partnership decisions are not always well understood by associates. Similarly, policies and procedures for making partner from "counsel" or "senior attorney" positions are not well understood.

Survey Results: While a minority of the firms surveyed responded that they have a written policy describing the standards for partnership, approximately half of the firms surveyed responded that they do not advise associates of the standards for making partner. The remaining firms responding noted that while they do not have a written standard, associates are made aware of the standards for partnership through the formal review process conducted at each firm.

For the most part, each firm surveyed enunciated a clearly-defined process whereby associates are elected to partnership after having been recommended by a series of committees, followed by a vote of the entire partnership. Of the firms reporting, partnership track appears to be seven to ten years. While a few firms have undertaken to make the process known to associates via their internal websites or new attorney orientation, most firms reported that the process is made known to associates on a more informal basis.

A majority of the firms surveyed provide associates with an informal, non-binding assessment of their chances of making partner through the annual review process, usually beginning in their fourth, fifth or sixth year. One firm pays a \$50,000 bonus to eligible associates who are on track for partnership or counsel after their seventh year.

All of the firms surveyed have counsel positions in one form or another. A majority of such counsel programs permit counsel and special counsel to be promoted to partner. Most of the firms reported that the counsel programs are reserved for either part-time or flex-time attorneys, or consist of attorneys who, at the time, had not met the standards for partnership, but were not on an "up or out" track because they were viewed as high-quality, well-trained attorneys who would be difficult to replace.

Recommendations/Best Practices: Firms should implement a formal process through which associates learn about their partnership potential starting as early as possible in their careers. In particular, firms should, through their formal review programs, give each mid-level and senior associate an evaluation of partnership potential in addition to evaluating past performance.

The Task Force recommends that, at the end of an associate's sixth year (at the latest), each associate should receive, through a formal review process, clear and useful information about his or her prospects for being

advanced to a specified more senior position. During that assessment, the associate should also be told the areas in which he or she needs improvement.

In earlier years, beginning in an associate's fourth year, each associate should be told what skills need improvement, whether he or she has potential for a long-term career with the firm and whether he or she is realizing that potential. This should be done in a manner that does not discourage the associate, but instead informs the associate of what he or she needs to do to improve the chances of making partner or counsel. This process should take into account the fact that people mature at different speeds, and thus a more junior associate may well develop into a viable candidate for promotion. Similarly, those associates who have no substantial prospect for a long-term future with the firm should be told so unequivocally.

In addition, firms should provide information to associates about the standards and procedures for being promoted to the senior positions the firm offers. It is difficult for an associate to determine how best to strive for partnership if the standards are not articulated. An associate may have been receiving glowing reviews, but if, for example, the firm requires an associate to fill his or her own calendar in order to become a partner, and that is not articulated, the associate may not work to develop the ability to generate business. If the expectation is that partners should have the potential to be leaders in their field, associates will see a need to begin to build their reputations, for example, through bar association involvement.

SECTION V COMPENSATION AND PROMOTION ISSUES

The Task Force identified certain issues involving compensation and promotion that impact an associate's experience at a large law firm. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—Lock-step Compensation and Promotion

Identified Issue: Some associates argue that lock-step salary increases are counter-motivational, because they fail to reward talented associates for their good work. Further, the absence of merit-based promotion—where each class of associates is essentially “graduated” each January to a new seniority—poses a similar problem. The “carrot” of attaining partnership

is not a sufficient motivator because the goal is too distant for junior associates, and is either unattainable, uncertain, or undesirable for senior associates.

Survey Results: All firms surveyed, except two, pay the same salaries to members of the same class, although some firms noted a pay differential for less than satisfactory performance. Similarly, only one firm promotes associates based on performance and ability. All other firms surveyed automatically promote associates to the next class, though at least one firm will hold back associates who are performing below expectations. One firm surveyed that currently promotes lock step is considering bands of classes from which advancement would be earned.

Recommendations/Best Practices: The long-entrenched, essentially lock-step, systems that most large firms use to compensate and promote their associates have drawn sufficient well-reasoned criticism from associates that the Task Force believes those firms should at least consider whether an alternative system might be appropriate. This is particularly so in view of recent changes in two related paradigms: first, the apparent decrease in the desirability of partnership as a long-term goal and, second, the increase in other opportunities available to lawyers with equivalent (or better) compensation and equivalent or fewer hours. Those opportunities include not just the “dot-coms” and technology companies generally, but the consulting firms and investment banks as well—all of which pay and/or promote based on a merit-based system. Associates at the minority of firms that pay merit-based bonuses were generally in favor of that approach, and the few firms that have adopted merit-based salary increases or promotions reported encouraging reactions from their associates.

As discussed elsewhere in this Report, while all large firms engage in an annual associate evaluation process, it appears that, except for evaluations given to associates performing appreciably below their peers, the evaluations communicated to the associates are not generally perceived by them as meaningful. The Task Force believes that associate morale may be improved if the evaluation systems resulted in the tangible recognition of qualitatively different contributions by associates. Such recognition could come by distinguishing the better performers with larger pay increases, bonuses (or larger bonuses) than their classmates, or by “promotions,” should a firm move to a system where associates are grouped by bands (and thus receive higher compensation and recognition) based on merit as opposed to years at the firm.

While it is unlikely that any single compensation/promotion system will comfortably accommodate the various cultures found among the large

firms, the Task Force is of the view that experimentation with compensation and promotion distinctions among associates based on merit may lead to approaches that address associate discontent in these areas without destroying other important firm values.

Issue 2—Timing and Bases of Merit Bonuses

Identified Issue: The practice of many firms to announce salary increases and merit bonuses at the last minute and only based on actions of peer firms increases resentment of compensation decisions by associates. Bonuses based on billable hours fail to reward efficiency or quality work.

Survey Results: When asked whether they pay bonuses and, if so, the standards for such bonuses, the firms' responses varied. All firms paid some form of bonus. One firm paid bonuses based on firm performance, but distributed the bonus equally among class members. Because the bonuses are based on the firm's performance for the year, the bonus amount is not announced much in advance of payment. Fifty-nine percent (59%) of the responding firms pay a set bonus to each associate based on class year. Most of these firms announce the bonus amount at the beginning of the year in which the bonus is to be paid. Those firms also occasionally pay an additional bonus (also fixed by class year) in prosperous years. Many of the firms that pay lock-step bonuses will not pay bonuses to associates performing materially below the norm. The remaining thirty-five percent (35%) of the responding firms pay a merit-based bonus, based on a combination of quality of work and hours. In at least one firm where associates had been asked their views of the merit-based bonus, the associates did not believe that it created a more competitive environment, and though not all associates were happy with the results, associates thought the merit-based bonus provided an accurate assessment of partnership chances.

Recommendations/Best Practices: Whether a firm will choose to provide merit-based bonuses, either based upon the relatively objective factors of the firm's profitability or billable hours or upon the more subjective standard of the reviews of a particular associate, the Task Force believes that the standards for achieving the bonus should be communicated to the associates in a timely fashion. To announce after year-end that bonuses will be awarded to those who have billed "X" hours can be particularly harsh, and potentially have the unintended negative impact upon an associate who billed slightly less than "X" but took an extended vacation just prior to year-end. As noted in several sections of this Report, communication is empowerment: if the standard is hours-based and announced

in advance, the associate can choose to work towards the bonus or to work less and forego the bonus.

SECTION VI CLIENT/SERVICE RELATIONSHIP ISSUES

The Task Force identified potential ways in which a firm's efforts to foster strong client relationships may negatively impact an associate's work experience. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—Associate-Client Relationships

Identified Issue: Partners do not encourage clients to rely on associates, making associates' jobs more difficult and less satisfying and encouraging a lack of respect by clients.

Survey Results: To identify potential solutions to this issue, the Task Force sought to determine the practices and policies of the surveyed firms with respect to associate-client contact. With the exception of one firm, which stated that billing sensitivities sometimes caused partners to leave the junior associate behind, the surveyed firms uniformly indicated that associate contact with clients is encouraged and expected.

Regarding the means of encouraging such contact, approximately thirty percent of the surveyed firms indicated that they have set up non-billable accounts for the purpose of permitting associates to attend meetings, court appearances, etc., at no charge to the client, while the remaining surveyed firms require associates to bill all time to the client matter but note that the billing partner has discretion to write-off time if necessary.

With the exception of the non-billable accounts referred to above, none of the firms interviewed had formal procedures designed to encourage associate contact with clients. Rather, the surveyed firms uniformly stated that such contact naturally occurs by virtue of the demands of the transaction or other matter. Two of the firms interviewed did indicate that business development activities are encouraged by the firm, in one case through the provision of associate expense accounts and in the other case through fee sharing arrangements for associates that bring in new business.

Recommendations/Best Practice: The Task Force believes that the issue of associate/client relationships involves both quantity and quality. Accordingly, while the Task Force recognizes that there may be no single procedure or mechanism that firms should adopt in response to the problems perceived in this area, the Task Force encourages firms to be more sensitive

to the amount and type of interactions that its partners foster between clients and associates, particularly junior associates. The Task Force endorses the non-billable accounts as a means of increasing the quantity of client contact within the billing constraints imposed by clients and, for those firms without such a mechanism, the Task Force encourages firms to take a more flexible view of write-offs to the extent extra time was invested in developing the younger members of the matter team.

Issue 2—Client Demands

Identified Issue: Partners are unwilling to challenge unreasonable client demands on associates, resulting in increased associate stress.

Survey Results: The survey did not reveal any policies or procedures designed specifically to address the issue of partner response to unreasonable client demands.

Recommendations/Best Practice: The Task Force believes that one aspect of firm life that may tend to make associates feel more like commodities than valued professionals is the frequency with which their time is promised to clients without any consideration of what is necessary or possible in light of the associate's other responsibilities. While the Task Force understands the competitive nature of firm practice, the fast pace at which many matters move today, and the appropriateness of an expectation of associate commitment, the Task Force recommends that partners more carefully weigh each particular situation to determine whether it makes sense to meet an accelerated deadline or whether the partner should intervene to negotiate a revised schedule or obtain additional staffing.

**SECTION VII
RELATIONSHIPS AMONG FIRM COLLEAGUES**

The Task Force identified several issues concerning relationships among firm colleagues that impact an associate's experience at a large law firm. As a general matter, the ever-increasing demands of a law practice have inhibited the professional relationships that a lawyer formerly could have expected with other attorneys, both more senior and junior, at the firm. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—The Absence of Mentoring

Identified Issue: As firms have grown, collegiality has declined, especially among attorneys of different levels of seniority and in different

departments. In the pressure to meet tight time deadlines or keep billable hours within budget, partners and senior associates tend to exclude junior associates from key discussions, making them feel as though they are not part of the team. These and other demands have also led to an absence of mentors available to associates.

Survey Results: Though firms repeatedly note the importance of a mentoring relationship to the quality and enjoyment of a law practice, most firms appear to be failing at this important responsibility. Most mentoring “programs” at the firms—whether deemed formal or informal by the firm—are similar: the assignment of an incoming associate to a more senior lawyer (associate, counsel or partner) for purposes of advising the junior lawyer, monitoring the junior lawyer’s adjustment to the firm, and fostering long-term relationships among lawyers. Six firms assign partner mentors upon the associate’s arrival or shortly thereafter (within six months to a year); one firm assigns only an associate advisor; and four firms assign both associate and partner mentors. Several firms have no mentoring program, instead relying on *ad hoc* mentoring and the natural development of mentoring relationships arising out of work assignments. A few firms stated that the development (or improvement) of a formal mentoring program is in progress. Many firms expressed the view that their programs are hardly considered successful and that benefits, if any, are gained on a case-by-case basis with the best mentoring occurring informally.

The method of assigning mentors, in those firms that do, varies from firm to firm. One firm assigns an associate advisor to first-year and lateral associates upon their arrival. After six months, that firm’s associates are allowed to select a more senior lawyer as an additional advisor and, at the beginning of their second year, associates may elect to have a partner mentor assigned to them. Another firm allows each associate to select any lawyer to be his or her mentor. Lawyers who do not voluntarily select a mentor are assigned a partner mentor and new associates may select their own mentor at the associate’s first annual review. Some firms require that the assigned mentor practice in the same area as the associate; others do not. At most firms, associates play an important—and often informal—mentoring role.

Regarding mentoring activities, most firms encourage lunches and other informal meetings between the mentor and junior associate. At one firm, second through fourth year associates participate in a formal advising program with their partner advisor. That program includes periodic group advising meetings and regular, and confidential, individual meetings with the partner advisor. The agenda of the meetings is largely set by

the associate. That firm expects a time commitment of one hour a month from associates and partners involved in the formal advising relationship.

Of the firms surveyed, only one described in detail a comprehensive formal mentoring program. Through its mentoring program, that firm seeks to enhance the professional development of its associates by tracking each associate's career to ensure breadth and diversity of work, of partners with whom they work, and of clients with whom they develop relationships. To that end, the firm assigns to each associate a "counseling partner" who provides supervision and career development counseling. Each counseling partner—responsible for (at most) five associates— aids the associates in assessing professional goals, developing a plan to meet those goals and implementing the plan. This plan, set forth in a formal "career development form," is shared with department leaders to aid its progress, which is assessed every four months. In addition to assisting with the career development form, the counseling partner ensures that the associate is receiving feedback, attends the associate's review, and assists the associate in dealing with problems or concerns he or she encounters at the firm. After his or her first year of practice, each associate designates three choices for department counseling partners. The assigned counseling partner typically is not a partner with whom the associate works closely. Counseling partners are selected from a pool of partners who have agreed to devote the necessary time and energy to fulfill properly their roles. The intent of the program is to have no one counseling relationship exceed three years.

Recommendations/Best Practices: The Task Force recommends that firms adopt a formal structured mentoring program, including some of the features of the formal program described above. Specifically, the Task Force recommends that such a mentoring program involve the mentor in the evaluation process, whether as the person delivering the evaluation to the mentee or simply as an observer. The Task Force further emphasizes the importance of the "counseling" role of the mentor, particularly with respect to the professional development of the associate.

A formal mentoring program such as that discussed above and recommended here appears to provide the greatest chance of success for several reasons. First, failed mentoring programs often result from unwilling or unavailable mentors and unclear objectives for the mentoring relationship. A plan with clearly articulated goals, such as professional development, and defined responsibilities for the mentor will structure the relationship to make it easier for mentoring to take place. Moreover, involving only partners who are committed to the program's success elimi-

nates the risk that the program will fail through sheer negligence. It also ensures that associates who might otherwise slip through the cracks are mentored to at least some degree. Finally, associates consider professional development to be one of the most critical—and often lacking—aspects of their career at a large firm. A formal program with the express goal of improving associate professional development provides both a symbol to associates that professional development is a concern of the firm and a vehicle for addressing that concern.

Issue 2—Rapport Among Lawyers

Identified Issue: With the increasing demands of clients and deadlines, an attorney has less of a chance to establish a professional relationship with others at his or her firm. Such relationships can provide an associate with insights and contacts, and invariably can lead to a greater sense of collegiality and “togetherness.”

Survey Results: Most large firms employ some sort of social activity to promote respect and rapport among lawyers. These initiatives include teas or cocktail parties on a weekly or monthly basis, holiday parties, annual dinner dances, summer outings, department lunches and gatherings, lawyer retreats and sporting events, as well as smaller group functions such as floor pizza parties. Most firms also encourage lunches and other types of informal gatherings, including dining together in the firm cafeteria. One firm encourages partners to entertain associates outside of the office and purchases tickets to sporting and cultural events specifically for this purpose. Another firm sends a daily e-mail to all attorneys at the firm recognizing attorneys' legal or personal accomplishments.

Recommendations/Best Practices: Most firms surveyed appear to take several initiatives—largely social—towards fostering collegial relations among lawyers. The Task Force endorses these social activities, which appear to improve relations among firm lawyers. Each firm may have a particular culture or history in this regard, but the Task Force recommends that a firm sponsor or endorse a variety of activities, to ensure that the activities are inclusive, *i.e.*, that all attorneys at the firm have an outlet for socializing with others at the firm.

SECTION VIII TECHNOLOGY/SUPPORT ISSUES

The Task Force identified certain issues involving technology and support that impact an associate's experience at a large law firm. Those

issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—Support Priorities

Identified Issue: Where three lawyers are assigned to a secretary, junior associates are disproportionately burdened because their work is given last priority.

Survey Results: To identify potential solutions, the Task Force attempted to discern the number of attorneys assigned to a secretary and whether any procedures were implemented to ensure that the secretary completed work for junior associates, if applicable.

Firms generally assigned two to three lawyers to a secretary. Many firms assign one partner and two associates per secretary. At least one firm assigns three associates to a secretary. At some firms, secretaries with partner assignments are assigned one professional in addition to the partner, usually a legal assistant. If an assigned secretary is unable to satisfy workload, 29 percent of firms responded that excess work is delegated to less utilized secretaries on the floor, word processing departments or specified back-up secretaries.

Initiatives employed by firms to address the issue include analyzing the ratio of lawyers to secretaries and adjusting as necessary to ensure that a secretary could handle expected workflow; other less formal measures of secretarial workflow and intervention as appropriate; and increased use by secretaries of software programs such as boiler plates, macros, etc. to increase efficiency.

Recommendations/Best Practices: The implementation of a review process that focuses on the workload of a secretary together with such secretary's technical skills should allow firms to distribute work more equitably to the secretarial staff. Also, to alleviate the seniority issue in part, it may be beneficial for secretaries to be assigned three associates and for secretaries assigned to a partner to be assigned only one other professional. Another helpful solution is to provide software training to associates to increase their efficiency.

Issue 2—Increased Demands Resulting from Technological Advances

Identified Issue: Technological advances have resulted in a greater number of revisions to work product and less down time between revisions. Also, increasing use of e-mail and faxes at home, and the accessibility of voicemail, increases stress by making it more difficult for associates to leave work concerns at the office.

Survey Results: The survey results did not reveal any policies or procedures designed specifically to address the issue of how to relieve the additional demands placed on associates by technology, although some firms noted that they are providing associates with laptops.

Recommendations/Best Practices: The Task Force noted that attorneys often benefit from increased availability of laptop computers, cellular phones and home facsimile machines. While the temptation exists for partners and clients to expect greater productivity as a result of such availability, the Task Force noted that the efficiency of laptop computers, cellular phones and home facsimile machines as well as the ability to work from home outweighed the increased expectations from clients and partners. Partners and clients should, however, be aware of those increased demands and should address them whenever possible.

SECTION IX COMMUNICATIONS

The Task Force identified certain issues involving internal firm communications that impact an associate's experience at a large law firm. Those issues and the practices currently in place to address those issues at the surveyed firms are as follows:

Issue 1—Associate Input

Identified Issue: Efforts to seek associate input on various issues tend not to be comprehensive or systematic, resulting in only certain associate views being heard or considered.

Survey Results: To identify potential solutions to the issues relating to the insufficient solicitation of associate input, the Task Force sought to determine the practices employed by large firms to solicit such input. The firms were asked whether any committees that consider/decide/recommend firm policies have associate members, and what procedures were in place by which the firms solicit and obtain associate views on proposed policy changes.

With respect to associate involvement on committees that develop firm policy, 18 percent of the surveyed firms had no associate representation on such committees. Of the firms with associate representation, 64 percent have some form of associates' committee by which associates communicate issues and concerns to the partnership. Two-thirds of those firms that have associates' committees also involve associates on other committees.

Committees with associate involvement (excluding associates' com-

mittees) and the number of firms with associates on those committees include:²

Committee	No. of Firms	Committee	No. of Firms
Diversity	2	<i>Pro Bono</i>	5
Ethics	1	Policy	0
Executive	0	Recruiting	4
Finance	1	Sexual Harassment	1
Library	3	Space allocation	2
Management	1	Technology	4
Morale	1	Training/Orientation	3
Personnel ³	4		

Associates' committees vary from firm to firm. In some firms the committee consists only of associates, while others include partners and associates. Associates (and partner members) may be appointed or elected. In all instances the associates' committee is the forum in which issues, concerns, and recommendations are formally communicated to the partnership. These committees address a broad range of issues, including compensation, technology, secretarial support, and sensitivity training. At one firm, the associates' committee initiates salary increases, recommends partnership candidates, and conducts all reviews. That committee is appointed by the Executive Committee, and has 23 partner/associate members. Another firm has divided its associates' committee into the following subcommittees: Annual Reviews and Feedback; Collegiality; Management Training; Policies and Compensation; and Substantive Training, Orientation and Mentoring. The Policies and Compensation subcommittee serves as advisors on proposed policy changes.

Other methods of soliciting associate input again vary from firm to firm. Most of the firms with associates' committees rely on those committees to solicit associate input. The firms that have no associate involvement in committees tend not to solicit actively associate input. Those firms that do not have associates' committees but that permit associate involvement in certain committees employ informal methods, such as open-door policies, whereby an associate can speak with any partner with

2. One firm represented that all firm committees have associate representation, except the executive and associates' committees. That firm is not included in the summary set forth in the text.

3. Personnel Committees include secretarial, paralegal, and new associate committees.

whom the associate is comfortable, or lunches/ happy hours designed to permit associates to express grievances.

One firm has solicited associate feedback on new ideas and proposals via e-mail; another has "town meetings" conducted from time to time by the Management Committee to discuss areas of concern. Two firms have recently formed associate focus groups to obtain feedback on issues ranging from recruiting to retention issues, and to evaluate proposed recommendations. One of those firms used a consultant to lead the focus groups. A third firm is considering implementing focus groups.

Recommendations/Best Practice: The Task Force recommends that there be a formal mechanism by which associate views can be communicated to the partnership, and vice versa. Associates' committees composed of partners and associates have been found to be effective for addressing the broader issues that arise on a regular basis. Such committees should be firm-wide with associate representation from all departments and all seniority levels. The associate members should be chosen by their peers (preferably by election) and not appointed by partners. Associate members must solicit associate input prior to meetings.

When specific proposals are being considered by the partnership, associate focus groups formed solely to review and comment upon such proposals have been very successful. At least one firm to date has had a very positive experience with policy changes that resulted from associate focus groups. That firm did not hire a consultant to conduct the focus groups.

The Task Force also recommends as many informal mechanisms as possible; we believe that the more means of communication available, the more likely it is that issues will be aired and resolved. Such mechanisms include town meetings, pizza & beer parties, and happy hours.

Issue 2—Partner Candor

Identified Issue: Partners are not always realistic and candid in addressing associate concerns, sometimes creating unrealistic expectations rather than clearly stating that a particular policy or problem identified cannot or will not be changed.

Survey Results: The survey did not reveal any policies or procedures designed specifically to address the issue of partner candor, although the solution to that issue may be inherent in certain of the methods for associate input discussed above.

Recommendations/Best Practice: Essential to the associates' committee recommendation is the requirement that committee members be candid with each other regarding the issues raised and the likelihood that those

issues can be resolved. Although partners do not like to deliver bad news, it is better to tell associates the truth than to breed mistrust and thereby thwart open and productive communications. The success of an associates' committee requires the commitment of the partnership to remedy the issues presented whenever possible, or to provide an explanation for why such change cannot be accomplished.

Issue 3—Official Communications

Identified Issue: Associates often hear of new policies or important firm events through the rumor mill. Official communication is provided late, if at all.

Survey Results: Firms were asked how new policies were communicated to associates. The responses were fairly uniform. Most firms notify their associates of policy changes by memorandum or e-mail, with increasing reliance on e-mail. Significant policies may be communicated in a meeting, if feasible. At least one firm has an annual meeting of all associates where new policies and firm strategies are announced. Following associate notification, new policies are generally incorporated into each firm's policy and procedure manual.

One firm rolls out new policies to associates in stages. Once the need for a new policy is recognized, the director of associate affairs or the chair of the policy and compensation subcommittee, a subcommittee of the firm's associates' committee, formulates a proposal and discusses it with various partners. The issue and proposed policy is then introduced to the policy and compensation subcommittee, at which point associate input is sought. When necessary, the policy is reviewed by the firm's steering committee. New policies are then discussed at an associates' committee meeting, including, when appropriate, associate forums called specifically to address the issue, and meeting minutes are distributed to all attorneys. The new policy is then announced by memo to all attorneys.

Recommendations/Best Practice: Conveying firm policy changes and other events of significance should be done in a timely and open manner. E-mail presents the best means when such information cannot be shared with associates simultaneously in person.

Executive Summary of Recommendations/Best Practices

Set forth below is a brief summary of the recommendations and best practices discussed in this Report. The summary follows the outline of the Report; please refer to the specific sections of the Report for a fuller discussion of each of these recommendations and best practices.

I. Overwork/Inequitable Distribution of Work

- Firms should clearly convey the formal minimum billable hour requirements or informal expectations, including whether *pro bono* hours are included, so that associates can understand and appreciate the relative importance, or not, of the issue.
- Firms should use one or more of the tools available for insuring that similar associates receive similar work, both in terms of quality and amount. In particular, the Task Force endorses the distribution of all assignments in a particular practice group or department by an assignment person with appropriate authority, and recommends the use of Attorney Forecasts in connection with the distribution of assignments.
- Firms should do more to respect and encourage associate vacations, and to foster a culture where vacations are viewed as a necessity and not mere luxury. The Task Force believes that formal vacation planning systems can advance those goals.
- Firms should adopt written guidelines for part-time and flex-time employment, and those guidelines should clearly articulate the eligibility and availability of such programs. The Task Force recommends that these programs be made broadly available to all associates who are performing at class level, and that firms adopt written policies that enable part-time associates to be eligible for partnership consideration while maintaining part-time status.

II. Training

- Firms should implement formal training programs for new associates and supplementary training programs for mid-level associates, and should consider, to the extent economically feasible, the retention of a full-time director of training. In addition, firms should consider the use of a “skills checklist,” such as those attached to this Report.
- Firms should endeavor to create an environment that reflects the recognition that junior associates are entitled—and indeed are expected—to seek appropriate guidance from more senior lawyers, and to communicate to mid-level and senior associates, as well as partners, that their responsibilities include being available to younger lawyers for their questions.
- To encourage associates to perform *pro bono* work, firms should use a *pro bono* committee or coordinator, and should make a more-

senior associate or partner available to assist junior associates on *pro bono* projects.

- Firms should consider adopting management training programs in appropriate areas.

III. Feedback/Evaluations

- Firms should commit to have associates' work reviewed by partners, and to have the partner who reviews any particular work product speak about it directly with the associate who produced it. This feedback should contain specific recommendations, suggestions, or approvals, and should be delivered as soon after completion of the particular task as possible.
- Firms should continue to provide fixed, periodic general reviews.
- Firms should consider methods for encouraging partners to comply with the procedures for providing feedback and reviews, including withholding partnership draws or distributions should partners fail to provide timely feedback and evaluations.
- Firms should adopt some formal method of identifying how particular lawyers treat younger lawyers working with them and, where necessary, procedures to resolve problem areas and to provide feedback to senior lawyers responsible for such problems. Such procedures include, *inter alia*, upward reviews or use of a third-party ombudsman.

IV. Partnership Selection

- Firms should implement a formal process through which associates can learn of their partnership potential starting as early as possible in their careers. The Task Force recommends that, by the end of an associate's sixth year, that associate should be informed through the formal review process whether he or she has a "reasonable likelihood" of making partner or counsel, and should be provided with clear and useful information about his or her prospects for being advanced to a specified more senior position.
- Firms should communicate to associates the standards and procedures for making partner.

V. Compensation and Promotion Issues

- Firms should consider alternatives to the lock-step systems long used to compensate and promote associates, including consideration of the use of systems that distinguish the better-performing

associates with either larger pay increases or bonuses, or perhaps a more-rapid promotion in class.

- If a firm chooses to pay merit-based bonuses, that firm should communicate to the associates in a timely fashion the standards for achieving the bonus.

VI. Client-Service Relationship Issues

- Firms should be sensitive to the amount and type of interactions that its partners foster between clients and associates, particularly more-junior associates. The identification and use of non-billable accounts for associates to bill their time while observing a client meeting, negotiation, or court appearance, increases the quantity of associate-client contact within the client's billing constraints.
- Although recognizing that the practice of law has become increasingly competitive, firms should monitor the increased demands made by clients on an associate's time, so that, where warranted, the partner can intervene on the associate's behalf and seek a more reasonable schedule.

VII. Relationships Among Firm Colleagues

- Firms should adopt a formal mentoring program that articulates the purposes and goals of the mentoring relationship. Further, firms should consider involving the partner mentor in the evaluation process as a means of furthering the associate's professional development.
- To foster better relations among its lawyers, firms should sponsor or endorse a variety of social activities to ensure that the activities are inclusive, *i.e.*, that all attorneys at the firm have an outlet for socializing with others at the firm.

VIII. Technology/Support Issues

- Firms should implement a review process that focuses on a secretary's ability to handle the workload assigned to him or her, in addition to assessing the secretary's technical skills, so that firms may be able to assess accurately the effect of secretarial pairings.
- Firms should recognize that the advances in technology, including increased availability of laptop computers, cellular phones, and home facsimile machines, increases the ability to work from home, but also increases expectations of client and more-senior lawyers.

IX. Communications

- Firms should adopt a formal mechanism by which associate views can be communicated to the partnership, and vice versa. Associates' committees composed of partners and associates have been found to be effective.
- When a firm is considering acting upon a specific proposal that affects associates, the firm should consider the use of an associate focus group formed solely to review and comment upon such proposal.
- Firms should sponsor and encourage informal social gatherings, including town meetings or pizza meetings, as a means towards increasing communication.
- The success of an associates' committee requires the commitment of the partnership to remedy the issues presented whenever possible, or to provide an explanation for why such change cannot be accomplished.
- Firms should convey policy changes and other events of significance in a timely and open manner; e-mail presents the best means to share the information where an in-person meeting is not feasible.

October 2000

The Task Force on Lawyers' Quality of Life

Jeremy G. Epstein, *Chair*
James D. Herschlein, *Vice Chair*
Tammy P. Bieber, *Secretary*

Maripat Alpuche
Lynn Beth Bayard
Thomas M. Cerabino
Anne Elizabeth Cohen
Jay Cohen
Robert A. Cohen
James Cole, Jr.
Dana Hartman Freyer
David Robert Gelfand
Yukako Kawata
Adam M. Klinger

Jennifer C. Kurtis
Marni J. Lerner
Arnold Jay Levine
J. Kevin McCarthy
Saul P. Morgenstern
John Frederick Pritchard
Robert W. Reeder, III
Hon. Sidney H. Stein
Steven J. Steinman
Steven L. Wilner

ATTACHMENT A—Firms that Supplied Information for Questionnaire

Akin, Gump, Strauss, Hauer & Feld
Davis Polk & Wardwell
Debevoise & Plimpton
Dechert Price & Rhoads
Dewey Ballantine, LLP
Fried Frank Harris Shriver & Jacobson
Hunton & Williams
Kaye, Scholer, Fierman, Hays & Handler, LLP
Kirkland & Ellis
Latham & Watkins
Proskauer Rose LLP
Skadden Arps Slate Meagher & Flom LLP
Shearman & Sterling
Simpson Thacher & Bartlett
Stroock & Stroock & Lavan LLP
Sullivan & Cromwell
Wachtell, Lipton, Rosen & Katz

ATTACHMENT B—Sample Course Lists
TRAINING INSTITUTE FOR NEW ASSOCIATES
DAY ONE
THE FUNDAMENTALS FOR BECOMING
A SUCCESSFUL [LAW FIRM] ASSOCIATE

8:30 -9:00 a.m. *BREAKFAST - CONFERENCE ROOM 2600*

9:00-9:15 a.m. 15 minutes
Introductory Remarks - Overview to Day 1
Presenter -

9:15-10:45 a.m. 30 minutes
“Hello and Welcome to [Law Firm]”
Presenters -

Taking An Assignment: What Every Associate Should Know
Presenters -

10:45-11:00 a.m. *BREAK*

11:00-11:45 a.m. 45 minutes
[Law Firm] Standards and Expectations: An Overview
Presenters -

12:00 p.m. *LUNCH - CAFETERIA - 27th Floor*

1:15-2:45 p.m. CONFERENCE ROOM 2600 90 minutes
Legal Research: The Core Concepts
Presenters -

2:45-3:30 p.m. 45 minutes
Effective Verbal Communication Skills, Managing Your Assignment
and Continuing Obligations
Presenters -

3:30-3:45 p.m. *BREAK*

3:45-4:45 p.m. 60 minutes
Effective Legal Writing for the [Law Firm] Associate
Presenter -

4:45-5:00 p.m. 15 minutes
Concluding Remarks - Firm Structure, Firm Economics
Presenters -

DAY TWO

**TRANSACTIONAL
Corporate, Tax, Real Estate, Healthcare**

9:00 - 9:30 - *BREAKFAST - CONFERENCE ROOM 2600 C&D*

9:30-10:20 a.m. 50 Minutes
Introduction to M&A DEAL
Presenter -
Overview of DEAL and review assignment.
[Note: Fact Summary, Purchase Agreement of DEAL and assignment shall have been distributed to associates on Monday, September 27, 1999.]

10:20-10:30 a.m. *BREAK*

10:30-12:30 a.m. [include 15 min. break] 1 hour 45 minutes
Tax/Corporate Unit
Presenters -
Distinction between types of legal entities (partnership, LLC, corporation).
Discussion of tax and business implications of stock deal v. asset deal.
Discussion of taxable public deal v. non-taxable public deal.

12:30-2:15 p.m. *LUNCH (AT LOCAL RESTAURANTS)*

2:30-3:20 p.m. *CONFERENCE ROOM 2600 C&D* 50 Minutes
Representations & Warranties in Transactional Documents
Presenter -

3:20-3:30 p.m. *BREAK*

3:30- 4:20 p.m. 50 Minutes
Due Diligence
Presenter -
Goals of due diligence, war stories and relationship to DEAL.

4:20-4:30 p.m. *BREAK*

4:30-6:15 p.m. [incl. 15 min. break] 1 hour 45 minutes
Real Estate
Presenters -
Introduce basic aspects of a real estate lawyer's role in a transaction involving the purchase and sale of commercial real estate in Manhattan, including a discussion on the due diligence process (both physical and legal) and the negotiation of a Contract of Purchase and Sale.

DAY TWO

LABOR AND LITIGATION

9:00 - 9:30 a.m. *BREAKFAST - CONFERENCE ROOM - 2600 A&B*

9:30-10:45 a.m. 75 minutes

Module 1: Starting a Lawsuit/Initial Response to a Lawsuit

Presenters -

Interviewing client
Other investigation
Pleadings

10:45-11:00 a.m. BREAK

11:00 -12:30 p.m. 90 Minutes

Module 2: Discovery

Presenters:

12:30-2:00 p.m. LUNCH (AT LOCAL RESTAURANTS)

2:00-3:30 p.m. *CONFERENCE ROOM A&B*

Module 3: Motions

Presenters:

3:30 p.m. BREAK

3:45 p.m.

Leave for Court

4:15-6:15 p.m. 2 Hours

Module 4: Dealing with the Court

Presenters:

5:00 p.m. United States District Judge for the Southern District of New York

DAY THREE

TRANSACTIONAL

Corporate, Tax, Real Estate, Healthcare

- 8:30-9:00 a.m. *BREAKFAST - CONFERENCE ROOM 2600 C&D*
- 9:00-12:00 p.m. [*incl. 15 min. break*] 2 Hours 45 Minutes
Review of Purchase Agreement -
Presenter -
"Facilitators":
- 9:00 - 10:00: Facilitators to meet with small groups of Buyers and Sellers.
Breakout Conference Rooms: 2605, 2610, 2612, 2460
- 10:00 - 12:00: Buyers and Sellers to negotiate in 2 groups with Facilitators.
Negotiating Rooms 2500, 2587
- 12:00-1:30 p.m. *LUNCH* and Review of Negotiation Results
Conference Room 2600 C&D
- 1:30- 2:30 p.m. 60 Minutes
Closing The DEAL
Presenters -
- 2:30- 2:45 p.m. *BREAK*
- 2:45- 3:45 p.m. 60 Minutes
Litigation Minefields in Transactional Documents
Presenter:
- 3:45- 4:00 p.m. *BREAK*
- 4:00- 5:00 p.m. *CAFETERIA - 27th Floor* 60 minutes
Wrap up and Q&A
Presenters -
- 5:00 p.m.—Concluding Remarks *CONFERENCE ROOM 2600*

DAY THREE

LITIGATION

9:00 a.m. *BREAKFAST - CONFERENCE ROOM 2600 A*

9:30-10:45 a.m. 75 minutes
Module 1: What litigators need to know about corporate law/securities regulation
Presenters -

10:45 a.m. *BREAK*

11:00-12:30 p.m. 90 minutes
Module 2: In-depth application of topics from Day 2, focused on particular case.
Part 1:
Fact development - Preparation for Client Interview
Presenters-

12:30 -2:00 p.m. *LUNCH - CONFERENCE ROOM 2600 A*

2:00 p.m. *CONFERENCE ROOM 25-87* 75 minutes
Part 2.:
Client Interview (Demo)
Presenters -

3:15 p.m. *BREAK*

3:30 p.m. 75 minutes
Part 3:
Consideration of Defenses/Motions
Counterclaims/Third Party Claims
Presenters -

4:45 p.m. *BREAK*

5:00 p.m. Concluding Remarks - *CONFERENCE ROOM 2600*

CORPORATE DEPARTMENT TRAINING PROGRAMS 2000					
Program Name (# of Attendees)	#	Date/Time	Presenters	C.L.E. Credit	Level
Accounting Gamesmanship	13	March 2, 2000 Room 2600 C/D 9:00 a.m.-2:00 p.m.		4.5 Skills	Jr.
Building Blocks - Financing Agreements	TBD	TBD, 2000		Prof. Practice	Jr.
Building Blocks - Partnership Agreements, LLCs	TBD	TBD, 2000		Prof. Practice	Jr.
Building Blocks - Shareholders Agreements	TBD	TBD, 2000		Prof. Practice	Jr.
Building Blocks - Getting It Done— The Role & Responsibilities of a 1 st Year Associate	TBD	TBD, 2000		Prof. Practice	Jr.
Building Blocks - Securities Law ('33 Act)	TBD	TBD, 2000		Prof. Practice	Jr.
Building Blocks - Securities Law ('34 Act) Corporate/Securities Presentation	4	TBD, 2000 March 15, 2000 Research Center 12:30-3:00 p.m.		Prof. Practice	Jr.
Private Equity Funds	TBD	April 25, 2000 Room		2.5 Prof. Practice	Jr.-Mid.
Lawyers Creations of Corporate Value	14	February 28 & 29, 2000 Room 1700 9:00 a.m. - 1:00 p.m.		Prof. Practice 9.5 Practice Mgmt.	Mid-Sr. Senior Only

CORPORATE DEPARTMENT TRAINING PROGRAMS 2000						
Program Name (# of Attendees)	#	Date/Time	Presenters	C.L.E. Credit	Level	
Public M&A	TBD	May 23, 2000 Room 12:30-2:00 p.m.		1.0 Prof. Practice	TBD	
Financing	TBD	June 27, 2000 Room		1.0 Prof. Practice	TBD	
Taking Internet Companies Public	TBD	July 25, 2000 Room		TBD	TBD	
Environmental Topic	TBD	September 26, 2000 Room		TBD	TBD	
[Securities Law Topic]	TBD	October 24, 2000 Room		TBD	TBD	
[Venture Capital Topic]	TBD	November 28, 2000 Room		TBD	TBD	

LITIGATION DEPARTMENT TRAINING PROGRAMS 2000						
Program Name (# of Attendees)	#	Date/Time	Presenters	C.L.E. Credit	Level	
Management & Interpersonal Skills #1	TBD	To be Rescheduled		TBD	Jr.	
Handling Court Appearances	17	January 12, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		1.0 PMgmt	Jr.	
Pleadings	19	February 9, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		1.0 Skills	Jr.	
10 Things Lawyers Do That	TBD	June 21, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		TBD	Jr.	
Basics of Brief Writing	TBD	TBD, 2000		TBD	Jr.	
Expert Witnesses (Deposition & Trial)	19	April 12, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		1.0 Skills	Jr.-Mid.	
Trial Evidence	TBD	TBD, 2000		TBD	Mid.	
Appellate Practice & Advocacy	TBD	TBD, 2000		TBD	Mid.	
Basic Financial Accounting for Litigators	33	February 29, 2000 Room 2600 A/B 8:30 - 10:30 a.m.		2.0 Prof. Practice	All	
Basics of Antitrust Law	16	March 22, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		1.0 Prof. Practice	All	

LITIGATION DEPARTMENT TRAINING PROGRAMS 2000						
Program Name (# of Attendees)	#	Date/Time	Presenters	C.L.E. Credit	Level	
False Advertising - New Lecture	19	March 30, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		1.0 Prof. Practice	All	
Basics of Arbitration and Dispute Resolution	15	April 19, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		1.0 Skills	All	
Basics of Trademark Law and Unfair Competition	TBD	May 10, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		TBD	All	
Basics of Copyright Law	TBD	May 17, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		TBD	All	
Key Issues in Sports Law	TBD	June 14, 2000 Room 2600 A/B 9:00 - 10:00 a.m.		TBD	All	
Corporate Law for Litigators	TBD	TBD, 2000		TBD	All	
Insurance 101	TBD	TBD, 2000		TBD	All	
Fact Investigation, Interviewing and Counseling	TBD	TBD, 2000		TBD	All	
Class Actions	TBD	TBD, 2000		TBD	All	

ATTACHMENT C—SAMPLE SKILLS LIST

Practice Area: Corporate

First Year

Develop legal research and writing skills (preparation of legal research memoranda for internal use and distribution to clients).

Draft corporate organizational documents, board of directors resolutions, and other corporate records.

Learn basics of corporate records “due diligence” and participate in legal reviews of other business records (e.g., contracts, governmental approvals).

Prepare first drafts of simple transactional documents together with supervising attorney (e.g., employment agreements, commercial contracts, regulatory filings).

Prepare closing documents and participate in the closing of a corporate transaction.

Deal with government agencies and other third parties on discrete or routine matters.

Second Year

Continue to develop and improve skills listed above.

Prepare first drafts of increasingly complex transactional documents (e.g., acquisition agreement, shareholder agreements, partnership agreement, joint venture agreement).

Attend contract/document negotiating sessions, with responsibility to keep master and revise or review next draft.

Interface with firm attorneys in other practice areas (e.g., tax, environment, employee benefits, intellectual property, antitrust) and begin to develop an awareness of how these noncorporate legal issues influence the structuring and mechanics of business transactions.

Begin to interface directly with clients and opposing counsel on discrete or routine matters.

Assume responsibility (subject to supervising attorney review) for

document review and organization in due diligence phases and closing of at least one complex business transaction (e.g., business acquisition or sale, securities offering, or other corporate financing).

Obtain solid knowledge of the basics of corporate organization, corporate governance, and partnership laws.

Prepare first drafts of regulatory filings (e.g., HSR Notification Forms, simple '34 Act filings).

Learn basics of public company practice.

Third Year

Continue to develop and improve skills listed above, and develop increasing ability (a) to draft and analyze complex transactional documents and (b) to provide meaningful input, in the form of legal and fact analysis, in the structuring, negotiation, and closing phases of transactions.

Begin to work independently on smaller matters, involving direct client counseling (e.g., small business counseling and internal corporate organization and reorganization matters) and assume primary responsibility (subject to supervising attorney review) for documentation of corporate transactions not involving opposing counsel.

By the end of the third year, work on at least one significant transaction requiring familiarity with disclosure requirements under the securities laws (e.g., private or public securities offering, proxy statement, '34 Act reports).

Obtain sufficient generalized knowledge of the following substantive areas of the law to spot legal issues and independently research and analyze: (a) contracts, (b) UCC, (c) securities, (d) antitrust, (e) employee benefits and (f) tax.

Fourth Year

Continue to develop and improve skills listed above.

Assume primary responsibility (subject to supervising attorney review) for structuring, negotiating, and closing of a small transaction (e.g., business acquisition or sale, loan transaction, major commercial contract) involving opposing counsel.

Participate, together with supervising attorney, in drafting and negotiating legal opinions delivered in corporate transactions.

Begin to supervise work of more junior attorneys.

On matters handled independently, develop ability to identify areas where senior attorney guidance is appropriate and to obtain such guidance.

Fifth Year

Refine all skills listed above.

Work independently on significant nontransactional matters, serve as "first chair" on small-to-medium transactions, and assume primary responsibility for significant aspects of complex transactions. Supervise work of junior attorneys.

Work with clients and develop ability to inspire their confidence. By the end of the fifth year, work on at least one complex acquisition, credit facility, public offering, private placement, joint venture and partnership deal.

Sixth-Eighth Year

Refine all skills listed above.

Assume substantial responsibility (subject to supervising attorney review) for structuring, negotiating and closing of a complex transaction.

NAME and CLASS: _____

DATE: _____

LITIGATION DEPARTMENT CHECKLIST

	Yes/No	Comments
I. DRAFTING		
A. Pleadings		
Complaint	[] []	_____ _____
Answer	[] []	_____ _____
Other pleadings	[] []	_____ _____
B. Motion Papers and Briefs		
Order to show cause, TRO, preliminary injunction motion or other provisional remedies	[] []	_____ _____ _____
Discovery motion	[] []	_____ _____
Substantive motion	[] []	_____ _____
Trial brief (pre or post)	[] []	_____ _____
Appellate brief	[] []	_____ _____
C. Discovery		
Discovery requests and responses	[] []	_____ _____

	Conducted	Prepared Another to Conduct	Observed
II. ORAL ADVOCACY AND WITNESS EXAMINATION			
A. Arguments			
Discovery motion	[]	[]	[]
Substantive motion	[]	[]	[]
Preliminary injunction motion	[]	[]	[]
Appeal	[]	[]	[]
Court conference (i.e., discovery, status)	[]	[]	[]
B. Discovery			
	Conducted	Prepared Another to Conduct	Observed
Take deposition	[]	[]	[]
Defend deposition	[]	[]	[]
Prepare witness for deposition	[]	[]	[]
C. Trials (including Arbitrations and Hearings)			
Trial preparation, including witness preparation	[]	[]	[]
July selection	[]	[]	[]
Opening statement	[]	[]	[]
Direct or cross examination	[]	[]	[]
Trial objections, side-bar conference	[]	[]	[]
Closing statement	[]	[]	[]
III. NEGOTIATING AND COUNSELING			
Negotiating Settlement	[]	[]	[]
Negotiating discovery responses and objections	[]	[]	[]
Counseling client, including con- ferring and advising on strategy, pro- viding opinion as to strengths and weaknesses of positions	[]	[]	[]

IV. MISCELLANEOUS	Yes	No
Drafting settlement papers	[]	[]
Interviewing witnesses	[]	[]
Working with experts	[]	[]
Organizing, reviewing and producing documents	[]	[]
Participating in mediation	[]	[]

* * *

Feel free to elaborate on any of the above, or add additional information below:

Please indicate which, if any, of the following practice areas interest you. You may indicate your interest in priority order which "1" indicating your first choice, etc.

- Antitrust _____
- Bankruptcy _____
- Patents _____
- Trademark/Copyright _____
- Securities _____
- Sports _____
- White Collar Crime _____

Feel free to elaborate on any of the above, or add additional information below:

LITIGATION ASSOCIATE TRAINING GOALS PROFILE

By the End of Year One

- a. Draft complaint, including fact gathering with client contact (with or without a colleague)
- b. Draft answer, including fact gathering with client contact (with or without colleague)
- c. Draft document request
- d. Respond to document request (*i.e.*, prepare written response, including objections) and supervise document production with client contact
- e. Draft preliminary interrogatories (*i.e.*, identification of witnesses and organization)
- f. Prepare objections and answers to interrogatories with client contact
- g. Attend a deposition (as an observer)

By the End of Year Two

- a. Prepare papers, including lawyer's affidavit and brief (including research) on a simple motion (*e.g.*, a motion for expedited discovery)
- b. Attend court for argument of a simple motion
- c. Draft interrogatories dealing with the substance of the action and/or contention interrogatories
- d. Prepare deposition script and attend the deposition taken by a colleague
- e. Attend deposition witness preparation sessions conducted by a colleague
- f. Attend deposition defended by a colleague
- g. Prepare papers in support of or in opposition to a discovery motion, including attorney's affidavit
- h. Attend argument of discovery motion

Trial Tasks

- a. Prepare papers for evidentiary motion, including research
- b. Attend argument of evidentiary motion

By the End of Year Three

- a. Argue non-substantive (*e.g.*, discovery or evidentiary) motion
- b. Prepare witness for deposition
- c. Defend deposition
- d. Take deposition
- e. Prepare substantive motion or response thereto, including research. This includes preparation of briefs, affidavits, documentary support, etc.
- f. Attend argument of substantive motion
- g. Draft notice of appeal and prepare all or part of an appellate brief, including research and supporting appendix or record

Trial Tasks

- a. Prepare pretrial order
- b. Identify trial exhibits and witnesses
- c. Prepare direct examination of witness for trial
- d. Prepare cross-examination of witness for trial
- e. Prepare witness for trial testimony
- f. Prepare requests to charge
- g. Attend charge conference with court
- h. Prepare proposed findings of fact and conclusions of law
- i. Prepare voir dire
- j. Attend voir dire

By the End of Year Four

- a. Argue substantive motion

Trial Tasks

- a. Direct examination of witness at trial
- b. Cross-examination of witness at trial

Mandatory Retirement of Judges

The Council on Judicial Administration

INTRODUCTION

The purpose of this report is to present the recommendations of the Council regarding the Report of the Task Force on Mandatory Retirement of Judges, chaired by Retired Judge Walter M. Schackman, issued in June 1999 (hereinafter "the REPORT").

The REPORT makes the following major recommendations:

1. That the existing constitutional provision for certification of State Supreme Court Justices to serve beyond the constitutional age limit of 70 for up to three additional two-year terms until age 76 be expanded to all State-paid judges (thereby including judges of the Court of Claims, Surrogate's Court, Family Court, New York City Civil and Criminal Courts, and County, District and City Courts outside New York City).
2. That for all certificated judges the maximum age of service be raised from 76 to 78.
3. That a new "senior judge" system be instituted (apparently applicable to all the courts) permitting judges to elect senior status beginning at age 62, which would create a vacancy in their position and permit them to work less than full time but not less than half time.

The Council supports recommendation 1, but does not support recommendations 2 and 3.

1. EXPANSION OF CERTIFICATION

a. Historical Background

As the REPORT outlines, the mandatory retirement age of 70 for all State judges has been continuously in effect since the Constitution of 1869.¹ The amendment permitting Justices of the Supreme Court to be certificated for service as such until age 76 (which also permits retired Judges of the Court of Appeals to be certificated for service on the Supreme Court) was approved by the voters in 1961.² Constitution Article 6, § 25b, which contains these provisions, has been amended once, in 1966, to permit certificated Supreme Court Justices who are serving on the Appellate Division immediately preceding retirement age to be eligible for designation by the Governor as temporary or additional justices of the Appellate Division.³ See Appendix A for the text of Article 6, § 25b as currently in effect. Judiciary Law § 115 implements the constitutional provision by providing that certification of justices, upon their application, shall be by the Administrative Board of the Courts (the Chief Judge and the four Presiding Justices), and otherwise tracks the language of the Constitution.

The ill-fated proposed new constitution submitted by the 1967 New York State Constitutional Convention contained a revised Judiciary Article which included a provision (proposed Article V, § 22a) that would have expanded certification to age 76 to all judges compensated wholly or partly by the State. See Appendix B. However, the 1967 constitution, which was submitted to the voters as a whole for a single up or down vote, was defeated. There is no indication that the provisions for continued service by retired judges played any role in that constitution's defeat.⁴

1. REPORT p. 8.

2. REPORT p. 9.

3. REPORT p. 9, n.13. The REPORT is in error in stating that in 1966 the voters rejected an amendment to allow other judges to serve beyond retirement age. The only amendment to Article 6 rejected in that year would have permitted certificated Court of Appeals judges to continue on that court. See MCKINNEY'S 1966 SESSION LAWS OF NEW YORK p. IXL; MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 1967, pp. 1331, 1333.

4. See Peter J. Galie, ORDERED LIBERTY, A CONSTITUTIONAL HISTORY OF NEW YORK, Fordham University Press, at 325-7 (1996)

The issue raised by the REPORT's recommendation for expansion of certification was squarely placed before the voters in 1983. An amendment to Article 6, § 25b, submitted in that year would have extended certification to age 76 for continued service on their court to all judges subject to the constitutional age limit. See text in Appendix C. The proposal proved controversial. *The New York Times* supported the proposal as providing fair and overdue parity and extra service from experienced jurists.⁵ The Committee for Modern Courts opposed the proposal as unnecessarily imposing high costs for salary, staffing and facilities of the newly certified judges, who could more economically be appointed to serve as judicial hearing officers under recently enacted legislation.⁶ Citizens Union also opposed the amendment for similar reasons. The amendment, submitted as Proposal 4, was the only one of seven constitutional amendments submitted in 1983 to be defeated.⁷

The defeat of the proposed constitutional amendment was followed by unsuccessful efforts to achieve a similar result through litigation and through an interpretation of Federal legislation. In *Maresca v. Cuomo*, 64 N.Y.2d 242 (1984), *appeal dismissed for want of a substantial Federal question*, 474 U.S. 802 (1985), four plaintiffs who were judges of the Civil Court of the City of New York who reached the age of 70 in 1984 contended, *inter alia*, that the mandatory retirement restrictions of the State Constitution and the Judiciary Law are violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution on the ground that the provisions "discriminate against plaintiffs by permitting Justices of the Supreme Court and Judges of the Court of Appeals to receive certification for service, as Justices of the Supreme Court, until the age of 76, in contrast to those members of the judiciary who serve upon the Civil Court, Criminal Court, Family Court, County Court, Surrogate's Court and Court of Claims, none of whom may be so certified." 64 N.Y.2d at 250. The Court rejected this constitutional challenge on the ground that the complexity and diversity of Supreme Court matters "may rationally be deemed to require greater experience and manpower than are necessary in other courts." 64 N.Y.2d at 252.

The Federal Age Discrimination in Employment Act (ADEA) (29 USC

5. Editorial, *The New York Times*, October 28, 1983, Section A, p. 26.

6. Letter from executive director and associate director of Committee for Modern Courts, *The New York Times*, November 5, 1983, Section A, p. 26.

7. The vote was: Yes, 1,144,573; No, 1,466,970, a No margin of 56.2% to 43.8%. *MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 1984-85*, p. 1201.

§ 621 *et seq.*) made it unlawful for an employer, including a State or political subdivision of a State, to discharge an individual over 40 years of age “because of such individual’s age.” (29 USC § 623 [a]; § 631 [a].) The ADEA specifically excluded from its coverage elected State public officials, and appointed State officials “on the policymaking level” (29 USC § 630[f].) Initially, the Administrative Board of the Courts issued an opinion in 1987 that, because of ADEA, those judges who are appointed to judicial office—judges of the Court of Appeals, Court of Claims, New York City Family Court and New York City Criminal Court—may remain in office after the age of 70 until the completion of their terms notwithstanding the state constitutional proscription to the contrary. Based on this opinion, the Chief Administrator of the Courts, in a Unified Court System memo dated May 26, 1987, ruled that appointed New York State Judges could remain on the Bench past the age of 70. However, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court held that appointed state judges were “on the policymaking level”, and therefore equally exempt with elected judges from the protection of ADEA. Following this decision, the OCA notified those appointed judges whose terms had been extended beyond age 70 pursuant to the 1987 ruling that they would be relieved of their judicial duties and incur mandatory retirement as of July 31, 1991. This history is recounted in *Savarese v. Crosson*, 150 Misc.2d 180 (Sup. Ct. 1991), *aff’d sub nom. Beldock v. Cuomo*, 201 A.D.2d 445 (2nd Dep’t), *appeal dismissed*, 84 N.Y.2d 849 (1994), which rejected a contention by a New York City Criminal Court Judge, who was serving as an Acting Supreme Court Justice when he reached age 70 in 1989 and was initially continued in office based on the 1987 Administrative Board opinion, that he should be allowed to continue in office past the July 31, 1991 termination date until the expiration of his appointed term on December 31, 1998 in reliance on the 1987 Administrative Board opinion as an independent determination that for New York State purposes appointed judges were not policymaking officials and therefore protected by ADEA. As stated by the Appellate Division, “the appellant’s reliance upon the Administrative Board’s 1987 opinion interpreting the ADEA is misplaced, since that interpretation is no longer viable” under *Gregory v. Ashcroft*. 201 A.D.2d at 446.

One further effort at judicial intervention occurred in *Carey v. Cuomo*, 842 F. Supp. 113, 858 F. Supp. 385 (S.D.N.Y. 1994), in which a Westchester County Court Judge who had served during some periods as an acting Supreme Court Justice in the 9th District sought to litigate a different aspect of the equal protection issue decided in the *Maresca* case by arguing that there was no rational ground for distinguishing between acting

Supreme Court Justices and elected Supreme Court Justices in establishing eligibility for service beyond age 70. At 842 F. Supp. 113, the late Judge Broderick expressed the view that it might be doubtful that distinguishing between “titular” and acting state Supreme Court Justices in determining qualification for post-retirement services was so irrational as to violate the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, he held the matter in abeyance to give the plaintiff an opportunity to obtain remedial action from state legislative, administrative and judicial authorities. After the plaintiff unsuccessfully sought solely state administrative recourse, at 858 F. Supp. 385 Judge Broderick denied both sides’ motions for judgment on the pleadings and adhered to his initial disposition because he did not find irreparable injury of a type justifying accelerated Federal court intervention before exhaustion of available state remedies.

In the course of his second opinion, Judge Broderick expressed views which could well serve as policy arguments in favor of wider application of the certification system, namely:

Either titular or acting Supreme Court justices would seem to be equally able to fulfill any need for additional judicial services [beyond retirement age], provided actual experience and ability were found present.

The wider the scope of jurists with the relevant experience who may be considered, the greater the likelihood that the most qualified personnel can be recruited. This is so whether experience was acquired as an acting or titular Supreme Court justice. Any administrative difficulties could be ameliorated by adoption of guidelines based on such factors as recency and length of relevant prior service as well as other criteria. 858 F. Supp. at 389.

b. Support for the Proposal

As the REPORT states: “Under the current age restriction, the State is denied the experience and ability of many jurists working at the peak of their productivity and intellectual powers. The retirement demarcation of 70 has long since ceased to bear even a minimal relationship to the State’s goal of maintaining a qualified effective judiciary. To the contrary, the current retirement age is counterproductive to judicial efficiency and productivity. In too many cases, it dispenses with highly experienced jurists capable of discharging their duties with great effectiveness well beyond age 70.”⁸

⁸ REPORT p. 4.

Further, “[a]ccording to a prominent jurist and scholar who has studied the issue in depth, judging is a ‘late peak’ occupation in that judicial performance improves with age, is at its best late in life and remains stable for many productive years after age 70 or until the onset of senility.”⁹

As a policy matter, there appears to be no justification for a system of extended service beyond normal retirement age that applies only to a limited category of judges. As embodied in the views expressed by Judge Broderick in *Carey v. Cuomo* quoted above, there is even less justification for discriminating in the availability of extended service between elected Supreme Court Justices and judges of other courts who are serving as acting Supreme Court Justices under the authority of Article 6, § 26 of the State Constitution. As of December 31, 1999 there were 279 elected Supreme Court Justices in the State (not including 45 serving on the Appellate Division).¹⁰ As of January 2000, there were also 206 judges of the lower courts and the Court of Claims (or an additional 74%) serving as acting Supreme Court Justices statewide, including 120 (or more than 50%) of the 227 judges of the New York City Civil and Criminal Courts.¹¹ These “acting” justices have the same duties, remuneration, facilities and staff as elected justices, and to all outward appearances are indistinguishable.¹² Clearly these judges who have already been serving (some for many years) as Supreme Court Justices, are as “competent,” in the words of the Constitution, to perform the full duties of the office as those who have been formally elected to the post. Given that certification is discretionary with the Administrative Board of the Courts under Judiciary Law § 115, there is, however, no reason to limit the expansion to judges of other courts of the existing constitutional authorization to those who are already “acting Supremes.” The authorization in the Constitution should be broad, as in the ill-fated proposals of 1967 and 1983, and proper discretion may then be exercised as to which judges of the other courts are most competent to be certificated for continued service.

9. REPORT p. 5, citing Richard A. Posner, *AGING AND OLD AGE*, University of Chicago Press, at 180-181 (1995).

10. Table to appear in TWENTY-SECOND ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS FOR CALENDAR YEAR 1999, at p. 3.

11. Figures provided by the Assistant Deputy Counsel of the Office of Court Administration. There were also an additional 8 of the 47 New York City Family Court judges who were acting Supreme Court Justices. See Appendix D, showing the breakdown of the acting Supreme Court Justices in New York City.

12. Indeed, they are generally identified as Supreme Court Justices in the press without any reference to their acting status.

c. Administrative Details

Presently, as the Constitution requires, certificated Supreme Court Justices are subject to assignment by the Appellate Division of their residences.¹³ The REPORT¹⁴ proposes that certificated judges “be subject to assignment by the Chief Administrative Judge and the Presiding Justice of the Appellate Division of the judicial department of his or her residence.” We support appropriate constitutional and statutory amendments to effectuate this change. One of the reasons Citizens Union opposed the 1983 amendment was that it would have assigned responsibility for assigning certificated judges to the Administrative Board in place of the Appellate Division. Citizens Union said the OCA should have that responsibility, and the REPORT’s recommendation would largely accomplish that goal.

As previously noted, certification itself is currently carried out by the Administrative Board of the Courts under Judiciary Law § 115. The REPORT is not clear as to whether it recommends a change on this point. At page 15, it would appear to leave the process in the hands of the Administrative Board. However, at page 16 there is a detailed recommendation for a process leading to a final decision on certification by the Chief Administrative Judge in consultation with the appropriate Presiding Justice.¹⁵ Assuming that the constitutional provision as to the manner of certification is to be left, as now, to read “in the manner provided by law,” this question does not have to be resolved in drafting the necessary constitu-

13. Constitution Article 6, § 25b; Judiciary Law § 115, subd. 3.

14. At page 16.

15. This passage reads as follows:

We also recommend that the Chief Administrative Judge promulgate precise rules delineating the procedures and criteria governing the certification of judges, including creation of a five-member evaluatory panel in each judicial district consisting of the appropriate Administrative Judge, Deputy Chief Administrative Judge and three bar association representatives who practice within the district. The evaluatory panel would be responsible for assessing the need for a certificated judge in that district, the mental and physical capacities of the applicant and the applicant’s judicial performance. The panel would issue recommendations to the Chief Administrative Judge, who would make the final decision in consultation with the appropriate Presiding Justice.

If the need for an additional judge in that jurisdiction is not established, the judge may apply to an adjoining judicial district or resubmit his/her application again in the following year. Should the need for a certificated judge arise subsequently, applicants should be designated for service in the order in which they applied. REPORT p. 16.

tional amendment. If an amendment expanding certification is adopted, the necessity for a change on this point can be considered by the Legislature in drafting implementing legislation.

Currently, there are no rules or criteria governing the certification process. In a proceeding brought by a Supreme Court Justice who was elected to the post at age 66 and was denied certification on reaching age 70, *Matter of Marro v. Bartlett*, 46 N.Y.2d 674 (1979), the Court of Appeals held that the Administrative Board “had very nearly unfettered discretion in determining whether to grant applications of former Judges for certification,”¹⁶ and rejected the petitioner’s demands for a hearing and a statement of the reasons for the action of the Administrative Board. The court also said: “We find nothing in the plain language of Constitution or statute which suggests that the Administrative Board was expected to promulgate a set of criteria against which to measure individual applications.”¹⁷

However, there is nothing in either the Constitution or the statute that precludes the adoption of appropriate criteria, nor should there be. Accordingly, we support the REPORT’S recommendation that rules be adopted delineating the criteria governing certification. The REPORT sets forth a detailed set of recommended criteria,¹⁸ which we reproduce in Appendix E and support.

d. Response to Potential Criticism

As noted above, the major argument of those groups which advocated the defeat of the proposed 1983 amendment was the alleged high cost of the purported large number of additional judges who would become eligible for 6 years of additional service in the near future if the proposal were adopted, duplicating the cost of the judges who would have to be chosen to replace them in their original positions. The REPORT¹⁹ addresses this issue by assuming an average cost of approximately \$650,000 per year to operate a court part in New York and an average of 13 additional judges per year (this is the approximate number of non-Supreme Court or Appellate Division Justices who reached age 70 in each of 1997 and 1998) that would receive certification under the proposal. On this

16. 46 N.Y.2d at 681.

17. 46 N.Y.2d at 681.

18. At pages 17-18.

19. At pages 23-24.

basis, the REPORT calculated that the net additional annual cost to the State would be only 0.6% of the Judiciary's 1999-2000 budget. The following additional observations are in order.

(a) The OCA does not have readily available detailed year-by-year statistics on the number of judges who have applied for and received certification. Their general impression is that applications have almost always been approved. As the *Marro* case, *supra*, shows, there have been exceptions.²⁰ Taking 1989 as a random sample, the OCA advises that 17 out of 20 applications for certification in that year were approved. In 1999, it appears that all 48 applications received were approved.²¹ The total number of certificated retired Supreme Court Justices serving in the last 5 years appears in the table in Appendix F. Whatever the past pattern has been, there is no reason why a more discriminating approach cannot be followed if the certification system is extended beyond the Supreme Court, particularly if detailed criteria of the type set forth in Appendix E are adopted. Certification should then be approved only if it is shown that, in the existing words of the Constitution, the continued services of the judge in question "are necessary to expedite the business of the court" in which he or she has been serving, taking into account his or her replacement by another judge elected or appointed to fill the vacated position.

(b) As noted above, the REPORT assumes \$650,000 per year as the average cost of operating a court part in New York. Since the judges newly entitled to certification under the proposal will be judges of lower courts, query if the actual annual cost of continuation in office of the newly certificated judges will not be a lower figure, unless they are serving as acting Supreme Court Justices at the time of certification and continue in that capacity thereafter. Even in that case, the extra cost will not be that of the certificated acting Supreme, which will continue as before certification, but the cost of the lower court judge who will

20. An earlier case, brought on behalf of 13 retired Justices of the Supreme Court who had previously been denied certification, was dismissed on procedural grounds. *Matter of Lefkowitz v. Bartlett*, 52 A.D. 2d 657 (3d Dep't 1976), appeal dismissed, 40 N.Y.2d 1046 (1976).

21. This would include approvals both on initially reaching retirement age and for subsequent 2-year extensions. According to figures provided by the OCA, the number of New York City Civil and Criminal Court Judges currently between the ages of 60 and 69 is 54. This would indicate that the average number of judges from these courts who would become newly eligible for certification under the proposal over the next 10 years may be only 5 or 6 a year.

be elected or appointed to take the certificated judge's place in his or her original position.

(c) The REPORT expresses concern,²² with respect to appointed judgeships, that if the incumbents are allowed to be certificated when they reach age 70, the vacancy in their original position may not be timely filled. According to the table referred to in footnote 10, *supra*, the authorized number of judges for the New York City Criminal Court is 107. The most recent edition of the *New York City Green Book*, for 2000-2001, lists only 105 Criminal Court Judges serving by appointment of the Mayor.²³ If there is not now in fact any legal requirement that forces the Mayor to fill all Criminal Court vacancies, this actually may be advantageous under the proposal.²⁴ If a Criminal Court Judge who serves as an acting Supreme is allowed to be certificated on reaching retirement age, presumably his or her original position on the lower court has not been and likely will not be needed, and therefore need not be immediately filled. The result would be no net additional cost at all from the continuation in office of the newly certificated judge.

e. Interrelation with the Chief Judge's Court Restructuring Plan

Reproduced in Appendix G is the portion of the Council's Report on the Chief Judge's Court Restructuring Plan (hereinafter "the Plan") dealing with certification to serve beyond age 70.²⁵ Under the Plan, the constitutional limitations on the size of the Supreme Court would be eliminated, three of the courts from which acting Supreme Court Justices have been selected, the Court of Claims, Family Court, and County Courts outside New York City, would be merged into the Supreme Court, and the use of acting Supreme Court Justices would be phased out and the constitutional authority for their appointment eliminated. Presumably, the size of the Supreme Court will be increased to the extent of the positions now filled by acting Supremes, as and when their appointments are terminated.

22. REPORT p. 17.

23. 2000-01 Green Book, pp. 366-368. As of January 2000, the number of Criminal Court Judges serving as acting Supremes was 80. See Appendix D.

24. New York City Criminal Court Act § 22(2) says "As vacancies in the office of judge occur, the mayor shall fill such vacancies by appointment." There does not appear to have been any litigation over a mayor's failure to do so.

25. 52 THE RECORD 929, 959-60 (1997).

As the text in Appendix G indicates, adoption of the Plan would enlarge the pool of justices eligible for certification, without any change in the existing certification provisions. Indeed, adoption of the Plan would likely reduce some of the pressure for expansion of eligibility for certification, which appears to come especially from those who now or in the past have served as acting Supremes.

Nevertheless, we believe the justification set forth herein for expanding certification, which under the Plan would essentially be applicable only to judges of the new statewide District Court, will remain valid if the Plan is adopted. We also believe our recommendation herein is consistent with the views expressed in the Council's previous report as to the desirability of continuing the certification system.

As to whether the REPORT's proposal for expanding certification should be submitted to the voters as a separate proposal, or as part of a complete court restructuring if the Plan goes forward, we believe that is a political question on which we do not express a view. Whichever approach is chosen, the prior texts in Appendices B and C could serve as models from which appropriate language could be drawn.

2. Raising the Maximum Age of Service

The REPORT proposes extending certification, both for those now eligible and those to be newly covered, from 3 2-year terms ending at age 76 to 4 2-year terms ending at age 78. The REPORT presents no support for selecting this particular new age limit, other than the generalized discussion of the increase in life expectancy and the age at which average intelligence begins to decline. Whatever the merits of this proposal, given the past history of opposition to any expansion of certification, we believe it will be difficult enough to obtain extension to other courts of the present certification system, as is, without proposing a change that would apply as well to those judges currently eligible. Accordingly, we do not support this recommendation to raise the maximum age of certification.

3. The "Senior Judge" Proposal

The REPORT's third proposal would create a "senior judge" system pursuant to which eligible judges, from all courts, could continue in office, but on a part-time basis and at a reduced salary. The REPORT states that the introduction of a system of part-time judges is justified since the assumption of senior judge status would automatically create a judicial vacancy, thereby providing more opportunities for judicial service by minorities,

women and younger lawyers.²⁶ The REPORT does not explain why a senior judge system is more likely to achieve this goal than would the creation of additional judgeships. Nor does it address the question of whether the use of part-time judges benefits or detracts from the administration of justice.

Under the proposal, a judge's eligibility for senior status is to be based upon that judge's age and years of judicial service. The minimum age at which a judge could qualify for senior status would be 62 years. However, judges who reach that age may only seek senior status if they have at least ten years of judicial service. Using a sliding scale, the proposal would permit a judge who is 63 years of age to seek senior status provided he or she also had nine years of judicial service; a judge aged 64 would need only eight years of judicial service, and so on. Under this formula, judges who are 69 could seek senior status with only 3 years of judicial service. However, since all judges are required to retire at age 70 (subject to certification), all judges would also become eligible for senior status at that age, regardless of years of service, provided they are certificated biennially.²⁷ Thus, under the proposal, a Supreme Court judge who reaches retirement age and who merits certification may either work full-time as a certificated jurist, or on a less demanding schedule as a senior judge.

Senior judges would be treated as retired judges for pension purposes. Therefore, under the proposal, a senior judge must begin collecting pension benefits (as well as social security) upon assuming senior status. To provide further inducement to taking senior status, the REPORT also recommends that, until they reach age 70, senior judges be permitted to earn additional pension credits commensurate with the amount of time actually worked during the year in this semi-retired capacity.²⁸ The REPORT does not contain an analysis of the effect of this early retirement on the State's pension funds.

Senior judges would have the right to elect to work full time. On the other hand, they may not elect to work less than half of the days of the year on which full-time judges are expected to work.²⁹ The REPORT does not state whether senior judges would be entitled to any vacation time or to any other benefits normally afforded to full-time jurists, to which senior judges would not be entitled under the State's pension plan.

26. REPORT pp. 1, 13-14.

27. REPORT pp. 19-20.

28. REPORT p. 20.

29. REPORT p. 21.

A senior judge who opts to work less than full time may do so in several ways, including reducing the number of days worked weekly, or working only mornings or afternoons, or working for only certain months of the year.³⁰ Senior judges who work less than full time will have their salary reduced proportionately. However, the sum of that salary and the senior judge's retirement and social security benefits may not exceed the salary earned by a similarly situated non-senior judge.³¹ Thus, it is at least theoretically possible under the proposal that a retired senior judge's total compensation package (including pension and social security) would approach or equal the salary of a full-time jurist, thereby creating a disincentive for qualified jurists to remain productive on a full-time basis at least until they reach retirement age.

The REPORT recognizes that both need and competency must be considered in the decision to accept a judge's application for senior status. Thus, its proposal would create a panel in each judicial district which would be responsible for evaluating both the need for the judge in that jurisdiction and the judge's ability to continue to perform competently in that capacity.³² The determination of need would be the same as for certificated judges. However, the proposal does not mandate that this "need" is to be in the same court in which the judge is sitting at the time of his or her application for senior status. All that is required is a "need" generally in the judicial district in which the judge was sitting.³³ It therefore appears that the proposal would permit senior judges to be assigned to any court in the district, even one in which they had no experience before retirement.

If the panel does not find a need for an additional senior judge, the judge may apply to an adjoining judicial district; if no need exists there, the judge may resubmit his or her application in the following year.³⁴ Should the need for a senior status judge subsequently arise, senior judge applicants must be designated for senior status in the order in which they applied.

In any event, the determination of an evaluatory panel would only

30. REPORT p. 22.

31. REPORT p. 21.

32. The evaluatory panel would consist of the appropriate administrative judge, the deputy chief administrative judge and bar association representatives. REPORT p. 22.

33. REPORT p. 22-23.

34. REPORT p.23. It is unclear whether an eligible judge is limited to two such applications a year, or whether the judge may apply to all adjoining judicial districts.

constitute a recommendation to the Chief Administrative Judge, who would then make the final decision in consultation with the appropriate Presiding Justice.³⁵ It is not clear from the REPORT whether the recommendation would be available to the public and whether the Chief Administrative Judge would be empowered to reject a recommendation that senior status be denied.

Once senior status is granted, there is no provision for reassignment of senior judges to other judicial districts that might have a greater need for judicial help. There is also no provision for the removal of a judge from senior status should the existing need diminish or be satisfied. Once judges become senior, they would continue in that capacity unless removed pursuant to proceedings initiated by the Commission on Judicial Conduct. This tenure-like provision is different from certification, where a judge's qualifications for office are reviewed every two years.

The length of a judge's unexpired term in office is not a consideration in granting senior status. Accordingly, judges who believe that their re-election or re-appointment may be in doubt could nonetheless remain in office beyond their designated term by seeking—and obtaining—senior status.³⁶

As noted, the proposal also permits the senior judges to decide when in the month, week or year, and for how long, they will work (as long as that judge is working at least half-time). Since there would be no administrative control over the judge's schedule, there can be no assurance that, once senior status is granted, the judge will be available at those times most needed by his or her administrative judge. The proposal does not require that a judge's schedule be approved by the administrative judge, so as to ensure an equal availability of senior judges throughout the entire calendar year or to otherwise respond to the particular needs of the judicial district.

The REPORT does provide (i) that the availability of existing facilities should be a factor in determining whether to grant senior status designation in the first instance³⁷, and (ii) that senior judges who work less than

35. REPORT p.22.

36. The Council recognizes that certificated judges may also preside beyond their elected or appointed term, but they can only do so for a maximum six years, subject to the biennial reviewing process. A senior judge may have his or her term extended by an additional eight years (if the judge were 62 upon retirement), without any meaningful substantive review by the electorate or appointing executive, or, indeed, by the Office of Court Administration.

37. REPORT p. 26.

full-time would be required to share staff (presumably with other senior judges).³⁸ However, there is no provision for insuring an efficient use of either facilities or staff through administrative oversight that could ensure that senior judges stagger their work schedules in order to adapt to available facilities and/or staff. Under the proposal, for example, staff assigned to senior judges could be idle half the year and overworked the other half, depending upon when the senior judges elect to work. Similarly, facilities could sit unused or partially used for a significant portion of the year or, on the other hand, be unavailable for use by all senior judges, again depending upon when the judges choose to work.

The REPORT asserts that, since senior judges would be part-time and paid accordingly, the adoption of its proposal would result in a reduced personal service cost to the judiciary.³⁹ This may not be accurate. Under the REPORT's *raison d'être*, the assumption of senior status would create vacancies which would be promptly filled by new judges.⁴⁰ Thus, this senior status proposal would add judges and thereby actually increase the cost of judicial administration. The only cost saving that will flow from the senior judge system, which would not exist if additional new judges were added, would be measured by the amount of a senior judge's pension and social security benefits. The Council believes this saving is an insufficient justification for the inclusion into the judicial system of semi-retired jurists.⁴¹

The Council strongly endorses the REPORT's view that minorities, women and other qualified lawyers should have the opportunity to ascend to the bench.⁴² The Council also recognizes that, at least in certain courts in

38. REPORT p. 23.

39. REPORT p. 24.

40. The proposal would permit senior judge status to be sought at any time during the calendar year. This might enable the executive branch to fill vacancies in elected judgeships until the next general election. A replacement for a certificated judge can only be chose at a general election.

41. The REPORT suggests that the senior judge system would also result in savings through the elimination of the overtime pay for court personnel that is caused by the current shortage of judges and from the phasing out of the Judicial Hearing Officers program. Of course these same savings would result from the creation of additional full-time judgeships.

42. See text at n. 26, p. 10 *supra*. Such opportunities should arise in the normal course under present law. By way of example, in the First Judicial District, during the next 10 years, 14 sitting Supreme Court (including Appellate Division) Justices will create vacancies on reaching age 70. Of these, only three are women and three (all male) are minorities. The opportunities for greater diversity thus created will undoubtedly be at least as great in other Judicial

certain judicial districts, there is a shortage of judges. Nonetheless, we adhere to the belief that the orderly administration of justice is better and more efficiently served by increasing the number of full-time judges where warranted, not by experimenting with a state-wide program of senior judges.

October 2000

Districts, even without the increase in the size of the Supreme Court that would result from adoption of the Court Restructuring Plan discussed at p. 9 *supra*.

The Council on Judicial Administration*

William M. Dallas, Jr., *Chair*
Jeffrey T. Scott, *Secretary*

John L. Amabile	Robert C. Meade
Mal Barasch	Maria Milin
Helaine M. Barnett	Daniel R. Murdock
Lucy A. Billings	Richard Lee Price
Joseph P. Burden	Jay H. Rabin
Austin V. Campriello	William C. Rand
Carrie H. Cohen	Jay G. Safer
Carol A. Edmead	Barry R. Satine
Arthur F. Engoron	Richard J.J. Scarola
J.J. Gass	Richard J. Schager
Christopher P. Hall	Mariano Schwed
Sherry Klein Heitler	Jacqueline W. Silbermann
Lawrence S. Kahn	Jane Solomon
Barry M. Kamins	Philip S. Straniere
Afreida B. Kenny	Guy Miller Struve
Robert J. Levinsohn	Aviva O. Wertheimer
Joan B. Lobis	Ronald P. Younkens
Frank Maas	

* This report was prepared by a subcommittee composed of Jay G. Safer (Chair), John L. Amabile, Hon. Sherry Klein Heitler, Sandra W. Jacobson, Robert J. Levinsohn, Hon. Maria Milin and David Rosenberg. Messrs. Amabile and Levinsohn acted as principal reporters.

APPENDIX A

§ 25. [Compensation and retirement of judges and justices; continuation of services after retirement]

b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his residence. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted in determining the number of justices in a judicial district for purposes of section six subdivision d of this article.

APPENDIX B

§ 22. a. Each judge of every court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such retired judge whose compensation is paid wholly or partly by or is derived from the state retiring on or after the thirty-first day of December next preceding the operative date of this constitution may thereafter perform the duties of a judge as specified in this article, provided, however, that it shall be certified in the manner provided by law that the services of such judge are necessary to expedite the business of the unified court system and that he is mentally competent and physically able to perform the full

duties of such office. Any such certificate shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. A retired judge of the court of appeals upon his retirement may elect to assume the duties of a judge of the supreme court upon certification for such service as above provided. A retired judge of the supreme court thus certified for service who had been designated to and served as a judge of any appellate division immediately preceding his retirement shall thereafter perform the duties of a supreme court judge and shall be eligible for temporary designation to the appellate division or for additional designation thereto as provided in section four of this article. Every other retired judge thus certified for service shall thereafter perform the duties of a judge of the court to which he may be assigned.

APPENDIX C

STATE OF NEW YORK

988

1983-1984 Regular Sessions

IN SENATE

January 11, 1983

Introduced by Sens. BARCLAY, CALANDRA—read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY

proposing an amendment to article six of the constitution, in relation to the continuation of the services of a judge or justice after retirement

Section 1. Resolved (if the Assembly concur), That subdivision b of section twenty-five of article six of the constitution be amended to read as follows:

b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which

he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. [A retired]. Each such former judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. [A retired] Each such former judge or justice shall be subject to assignment by the [appellate division of the supreme court of the judicial department of his residence] administrative board. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. Notwithstanding any other provision of this section, the legislature may provide by law for the appointment by the administrative board of a retired judge or justice of any of the courts referred to in this subdivision to serve as and to perform the duties of a judge or justice of the court from which such judge or justice retired, including the performance of any temporary assignment authorized by the provisions of section twenty-six of this article, with power to hear and determine actions and proceedings, for specified periods of time, each of which shall not exceed two years, but in no event beyond the thirty-first day of December in the year in which he reaches the age of seventy-six years, provided, however, that it shall be certified in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office. A retired judge or justice shall not be counted in determining the number of judges or justices in a court or judicial district for purposes [of section six subdivision d] of this article.

§ 2. Resolved (if the Assembly concur). That the foregoing amendment be submitted to the people for approval at the general election to be held in the year nineteen hundred eighty-three in accordance with the provisions of the election law.

Explanation—Matter in *italics* (underscored) is new; matter in brackets [] is old law to be omitted.

APPENDIX D

**ACTING JUSTICES OF THE SUPREME COURT
NEW YORK CITY COURTS
(January 2000)**

	CRIMINAL COURT	CIVIL COURT	FAMILY COURT	COURT OF CLAIMS	TOTAL
N.Y. SUPREME CRIMINAL	25	3	0	7	35
N.Y. SUPREME CIVIL	0	18	1	1	20
BRONX SUPRME	19	6	0	8	33
KINGS SUPREME	7	5	2	6	20
QUEENS SUPREME	10	4	0	1	15
RICHMOND SUPREME	2	1	0	2	5
CRIMINAL COURT	16	--	--	--	16
CIVIL COURT	--	3	--	--	3
FAMILY COURT	1	--	5	--	6
TOTALS	80	40	8	25	153

APPENDIX E

1. Criteria for Designation

We recommend that in evaluating an applicant for service beyond age 70, the evaluatory panel consider the following criteria with respect to each judge:

- a. The need for additional judges in relevant jurisdictions. Specific criteria for each court type should be developed to determine if the need exists. For example, that need might be measured by reference to the number and/or percentage of cases over "Standards and Goals."

b. Whether after an examination the judge has been found to be physically and mentally competent to perform the duties of the office;

c. Scholarship, including knowledge and understanding of substantive, procedural and evidentiary law; attentiveness to factual and legal issues before the court; application of judicial precedents and other appropriate sources of authority; and quality and clarity of written opinions;

d. Productivity, including effective docket management and prompt case disposition;

e. Temperament, including the ability to deal patiently with and be courteous to all parties and participants;

f. Work ethic, including punctuality, preparation and attentiveness, and meeting commitments on time and according to the rules of the court; and

g. Whether any justified complaints have been filed with the Commission on Judicial Conduct or court administrators.

APPENDIX F

**NUMBER OF CERTIFICATED RETIRED JUSTICES
OF THE SUPREME COURT**

As of	Number of Justices	Number Temporarily Designated to Appellate Division ¹
12/31/95	57	12
12/31/96	57	9
12/31/97	55	12
12/31/98	77	12
12/31/99	67	10

Source: Table 1 in Annual Reports of the Chief Administrator of Courts

1. These figures are not included in the figures in the first column.

APPENDIX G

Certification to Serve Beyond Age 70

By creating an expanded Supreme Court, the restructuring proposals would enlarge the pool of justices who are eligible to be certificated to serve beyond age 70.¹² Supreme Court Justices, and an expanded Supreme Court may be certificated to serve for two year intervals until the age of 76.

It should be noted that the elimination of the cap on the number of Supreme Court Justices, and an expanded Supreme Court, may ultimately reduce or eliminate the need to certificate justices to serve beyond age 70. However, certification would remain a viable tool for keeping the Supreme Court bench adequately staffed, and especially, of meeting short-term staffing needs. The availability of certificated justices would also act as a safety net if the Legislature has difficulty agreeing on the number of permanent judgeships to be created, the method of selecting those judges, and the areas of the State where the judges should sit.

Moreover, we believe that certification would retain its value as a means of keeping some of our most distinguished and experienced jurists on the bench. The enlarged pool of justices eligible for certification in a restructured court system would enhance the value of this process.

However, we do recommend that, in determining how many justices to certificate, particular attention be paid to the constitutional requirement of the "need" for certificated judges. Sometimes in the past this requirement has not been adequately followed. We also suggest that the Office of Court Administration provide periodic reports which take into account the need for additional judgeships and the removal of the cap on the number of justices per 50,000 residents in a Judicial District.

12. Judges of the District Court would continue to be subject to mandatory retirement at age 70. We do not address the issue of whether District Court Judges should be eligible for certification.

Diverting Substance-Abusing Lawyers From the Disciplinary Process: A Proposal

The Committee on Professional Discipline

The evidence is overwhelming: substance abuse frequently causes lawyer misconduct which, in turn, often results in complaints to the disciplinary committee. But a disciplinary system that simply sanctions such lawyers for the effects of their misconduct has forgone an opportunity to correct the underlying problem.

The disciplinary system is not blind to the role that substance abuse plays in disciplinary cases. The reported cases reflect the willingness of disciplinary prosecutors, and of the Appellate Division itself, to permit the imposition of sanctions that recognize substance abuse as a mitigating factor and encourage lawyers to seek treatment.¹ Indeed, at least some

1. See, e.g., *Matter of Bambury*, 169 A.D.2d 168, 571 N.Y.S.2d 480 (1st Dep't 1991) (conditioning reinstatement upon monitored compliance with substance abuse treatment); *Matter of Marinangeli*, 211 A.D.2d 272, 628 N.Y.S.2d 79 (1st Dep't 1995) (ordering that reinstatement of suspended lawyer be automatic upon confirmation of compliance with substance abuse treatment). See also *Matter of Gajewski*, 217 A.D.2d 90, 634 N.Y.S.2d 704 (1st Dep't 1995) (lawyer

of New York's attorney disciplinary authorities have required, on a case-by-case basis, substance-abusing lawyers to be carefully monitored as a condition of their suspension and/or readmission to the Bar. Given the gravity of the problem of substance abuse, however, the bar and the public need more than this *ad hoc* approach.

The best way to protect clients from lawyers who suffer from substance abuse may be to help those lawyers help themselves. The disciplinary system is not typically viewed as part of such a therapeutic process; to the contrary, it is viewed with suspicion. During the preparation of this report we learned that many involved in New York's Lawyer Assistance Programs ("LAP") fear the involvement of disciplinary prosecutors, or even our committee, reasoning that lawyers suffering from substance abuse might forego counseling if reaching out for help leads to inquiry or punishment from a disciplinary body. That fear is understandable. But the disciplinary authorities may have an important role to play in both enabling substance abusing lawyers to come forward for treatment and solving the problem of how best to help such lawyers. When dealing with the substance-abusing lawyer who is already the subject of a client complaint, the coercive power of the disciplinary process may ensure that such a lawyer receives the treatment needed to alleviate the substance abuse, thereby helping the lawyer, his or her clients, and the public in general.

We do not propose something wholly new. In 1996, this Committee issued a report recommending the adoption of alternative disciplinary sanctions, including a diversion program much like that which this report proposes. And in recent years, the monitoring of substance-abusing lawyers has been a regular, if *ad hoc*, feature of the sanctions process. What we recommend here, then, is a narrow but clear set of rules, designed to ensure the maximum protection of clients and more consistent, compassionate treatment for substance abusing-lawyers. This refined focus reflects an attempt to balance the need to better define the role of substance abuse treatment in the disciplinary process with the concerns of those who are justifiably reluctant to embrace "soft" sanctions (with complicated administrative requirements) for lawyers whose personal problems may cause them to commit acts that severely prejudice the rights of their clients.

This report: (i) outlines the current Appellate Division rules concerning lawyers "incapacitated" or otherwise rendered unfit to practice by

charged with misconduct offered opportunity to avoid suspension by attending remedial program; failure to attend program, *inter alia*, resulted in suspension).

reason of substance abuse; (ii) describes how Lawyers Assistance Programs, Bar Associations and disciplinary authorities throughout the state currently help lawyers with substance abuse problems; and (iii) proposes that the Appellate Divisions adopt rules authorizing the Departmental Disciplinary and/or Grievance Committees (“DDC”) to divert a lawyer who has been the subject of an ethics complaint from the normal investigation and hearing process into a treatment program the strict compliance with which is monitored by DDC employees or trained volunteers working for DDC.²

I. THE CURRENT FRAMEWORK OF RULES

Each Appellate Department has rules that provide limited flexibility for dealing with a lawyer who is both suffering from substance abuse and the subject of a disciplinary complaint. *See* 22 N.Y.C.R.R. ‘603.16 (1st Dep’t); *id.* at ‘691.13 (2nd Dep’t); *id.* at ‘806.10 *et seq.* (3rd Dep’t); and *id.* at ‘1022.23 *et seq.* (4th Dep’t). Though there are administrative differences, these rules permit the respective Appellate Divisions to suspend (immediately, prior to the commencement of, or at the conclusion of disciplinary proceedings) a lawyer who has become incapacitated by reason of substance abuse.³ The rules are designed to deal with a situation in which the lawyer’s substance abuse has totally disabled him or her from continuing to practice. Therefore, unlike this report’s proposal, the existing rules do not afford a substance-abusing lawyer the opportunity to obtain treatment while continuing to practice, with disciplinary proceedings held in abeyance as the disciplinary prosecutor monitors the lawyer’s compliance with treatment.

This gap in the current rules, and the often punitive approach that those rules require, causes two significant difficulties for substance-abusing lawyers caught up in the disciplinary process. First, they are discouraged from revealing their substance abuse problem to disciplinary authorities (or even their own lawyers), even if this information could serve to mitigate their penalty, for fear that the authorities would seek immediately to suspend them. As a result, in a case which the disciplinary charges are relatively minor, an opportunity for the substance-abusing lawyer to come forward and obtain treatment is lost. Second, the disciplinary authorities

2. Under these rules, failure to comply with the treatment regimen would result in reinstatement of the disciplinary charges and continuation of their prosecution by DDC.

3. The rules also contemplate incapacitation caused by mental illness, but that area is beyond the scope of this report.

are reduced to allowing therapeutic interventions on a case-by-case basis, with no clear guidance as to which substance abusers should receive it and at what stage of the proceedings. While DDC attorneys have told us that they prefer this *ad hoc* approach because of the flexibility it gives them, it also means that similarly situated lawyers can be treated differently, and many lawyers who appear at the DDC unrepresented or represented by inexperienced counsel have no way of knowing that therapeutic options may be available to them. Indeed, just from reading the rules, these lawyers are actively *discouraged* from revealing the problem.

The current rules are described below.

A. The First and Second Departments

1. Suspension. The rules governing when a lawyer may be suspended because s/he is incapacitated by substance abuse are identical in the First and Second Departments. *Compare* 22 N.Y.C.R.R. '603.16 (b) & (c) *with* 22 N.Y.C.R.R. '691.13 (b) & (c). If the court determines upon application of the Disciplinary Committee that the attorney is "incapacitated from continuing to practice" by reason of "addiction to drugs or intoxicants," *id.*, §603.16(b), or finds upon application by the respondent that "because of addiction to drugs or intoxicants" the respondent cannot "adequately defend himself" in disciplinary proceedings, *id.*, §603.16(c)(1), the court may suspend the attorney from practice and hold any disciplinary proceedings in abeyance. Should the court find that the respondent is no longer incapacitated, "it shall take such action as it deems proper and advisable, including a direction for the resumption of the disciplinary proceedings against respondent." *Id.*, §603.16(c)(2); §691.13(c)(2).

2. Post-suspension procedure. "Whenever an attorney is suspended for incapacity or disability, th[e] court, upon such notice to him as th[e] court may direct, may appoint an attorney or attorneys to inventory the files of the suspended attorney and to take such action as seems indicated to protect the interests of his clients and for the protection of the interests of the suspended attorney." 22 N.Y.C.R.R. §603.16(d)(1); *see also id.*, §691.13(d)(1) (virtually identical language). Attorneys appointed to inventory the suspended attorney's files may not disclose their contents without court approval. *Id.*, §603.16(d)(2); §691.13(d)(2).

Both the First and Second Departments condition reinstatement on a "clear and convincing" showing that the disability has been removed, with the burden of proof on the suspended attorney. 22 N.Y.C.R.R. §§603.16(e), (f); §691.13(e), (f). A suspended attorney who petitions for reinstatement is deemed to have waived any doctor-patient privilege ex-

isting between the suspended attorney and any professional who has treated him or her for the underlying substance abuse, and must provide the court with the names of such professionals and a written release authorizing disclosure of their records. *Id.*, §603.16(g); §691.13(g). In any event, a lawyer who is temporarily suspended because of substance abuse loses his or her law license indefinitely—it may be months or years before the Appellate Division deems the lawyer fit to practice.

B. The Third Department

1. Suspension. The rules of the Third Department are essentially the same as the rules described above: on motion of either the disciplinary prosecutor or the respondent, the court will suspend an attorney who has been incapacitated by substance abuse and stay any pending disciplinary proceedings. 22 N.Y.C.R.R. §806.10(a), (b).

2. Post-suspension procedure. As described above in the First and Second Departments, in the Third Department the court may appoint a lawyer to review the suspended lawyer’s practice:

Whenever an attorney is . . . suspended for incapacity [or] disability . . . , or whenever there are reasonable grounds to believe that an attorney has abandoned or is seriously neglecting his practice to the prejudice of his clients, the court . . . may appoint one or more attorneys to inventory his files and take appropriate action to protect the interests of his clients. An attorney so appointed shall not render legal services to clients of the attorney with respect to any file so inventoried, nor disclose any information contained therein without the consent of the client to whom such file relates, except as necessary to carry out the provisions of the order which appointed him.

22 N.Y.C.R.R. §806.11.

The Third Department’s rules have one provision that governs all applications for reinstatement. This rule—§806.12—applies to disbarred attorneys, as well as those suspended because of substance-abuse-related incapacitation. The suspended lawyer will not be reinstated unless s/he shows by clear and convincing evidence that s/he “possesses the character and general fitness to resume the practice of law.” *Id.*, §806.12(b). The suspended lawyer moving for reinstatement “shall waive any doctor-patient privilege which would otherwise exist regarding medical or psychiatric care during his disability and shall submit a list of the persons

by whom and the facilities at which he received treatment, together with authorizations for the release of records relating thereto.” *Id.*, §806.12(a).⁴

C. The Fourth Department

1. *Suspension.* During the pendency of disciplinary proceedings, the chief counsel may petition the court (either on his or her own, or at the respondent’s request) “to determine whether [the respondent] is incapacitated from practicing law by reason of . . . addiction to drugs or intoxicants.” *Id.*, §1022.23(b). If the court determines that the respondent is incapacitated, s/he is immediately suspended for an indefinite period and disciplinary proceedings are stayed. *Id.*

2. *Post-suspension procedure.* As in the other three Appellate Departments, the Fourth Department provides for the appointment of an attorney “to examine the files of the suspended, disbarred, or incapacitated attorney.” *Id.*, §1022.24. In the Fourth Department, however, the appointed lawyer is vested with authority “to take any action to protect the interests of the clients involved.” *Id.* While this rule appears to confer broad authority on the appointed lawyer to protect the client’s interests, it also requires that the appointed lawyer show “due regard to the interests of the respondent attorney.” *Id.* While the rule appears to require that the client’s interests take precedence over the suspended lawyer’s, it is not altogether clear how the appointed lawyer is to balance these obligations, nor how the lawyer is to ensure that the client’s rights to confidentiality and to have counsel of their choice will be respected.

As in the Third Department, the Fourth Department’s rules have one provision that governs all applications for reinstatement. This rule—22 N.Y.C.R.R. §1022.28—applies to disbarred attorneys, as well as those suspended because of substance-abuse-related incapacitation. In the Fourth Department, a suspended lawyer will not be reinstated unless s/he shows by clear and convincing evidence that s/he “has fully complied with the provisions of the order of . . . suspension . . . , possesses the character and general fitness to resume the practice of law, and that the public interest would be served by restoring the applicant’s right to practice law.” *Id.*, §1022.28(d)(1). The suspended lawyer moving for reinstatement “shall waive any doctor-patient privilege which would otherwise exist regarding medical or psychiatric care during disability and shall submit a list of all

4. Read literally, this waiver does not apply to care administered by persons who are not medical doctors, for example, psychologists.

such persons or facilities treating such attorney and authorizations for the release of all such records.” *Id.*, §1022.28(c).⁵

II. THE TWO LAWYER ASSISTANCE PROGRAMS

New York State has two programs specifically designed to assist attorneys with substance abuse problems: (i) the Lawyers Assistance Program organized under the auspices of the New York State Bar Association and its Committee on Lawyer Alcoholism and Drug Abuse; and (ii) the Lawyer Assistance Program organized by the Association of the Bar of the City of New York in conjunction with its Committee on Alcoholism and Substance Abuse. Both are available to all New York State attorneys, judges, law school students and their immediate family members. These programs provide educational outreach to the legal community, as well as evaluation and referral of attorneys with substance abuse problems. The goal of the programs is to have the lawyer confront his or her disease, seek and obtain an appropriate course of treatment, avoid or ameliorate work-related problems caused by substance abuse, and, in the case of substance-abusing lawyers who commit misconduct in at least the First and Third Departments, provide monitoring services. The State Bar’s hotline is available 24 hours a day at 1 (800) 255-0569, while the ABCNY’s Lawyers Assistance Program operates a confidential help line at (212) 302-5787.

A lawyer who seeks and/or receives the counseling or other services offered by either the NYSBA or ABCNY Program is shielded by confidentiality. See New York Judiciary Law §499(1) (McKinney’s Interim Pocket Part 1999-2000). Monitors or counselors in those programs are protected by statutory immunity. *Id.* at §499(2). It is important to note that Kathleen Kettles-Russotti, Chair of the ABCNY’s Committee on Alcoholism and Substance Abuse, estimates that, state-wide, more than 60 substance-abusing lawyers have been monitored in connection with the disciplinary process; almost all, however, had been forced to go through the disciplinary process, had been found liable for misconduct, and were monitored as part of their penalty phase.

While these programs have helped many lawyers struggling with substance abuse, they cannot accomplish what this report proposes: a suspension of pending disciplinary proceedings, in appropriate cases, conditioned on monitored compliance with a specified regimen of treatment.

5. As in the Third Department, this waiver, read literally, does not apply to care administered by persons who are not medical doctors, for example, psychologists.

III. THE PROPOSAL

The committee proposes that the Appellate Divisions adopt rules authorizing the DDC to divert a lawyer who has been the subject of an ethics complaint from the normal investigation and hearing process into a treatment program the strict compliance with which is monitored by DDC. Under these rules, failure to comply with the treatment regimen would result in reinstatement of the disciplinary charges and continuation of their prosecution by DDC.

For the lawyer to receive more than a brief reprieve from the disciplinary process, of course, the diversion to treatment has to be meaningful. To that end, the proposed rules would enable DDC staff to refer a lawyer to the ABCNY or NYSBA LAPS for evaluation and referral to an appropriate treatment provider.⁶

Once an appropriate treatment has been identified, the DDC would assign a monitor to the case. The monitor would be specially trained; that training is already provided by ABCNY's LAP. The monitor would *not* be responsible for overseeing the lawyer's practice; the potential for liability is too great, and the issues of client consent, client confidentiality and choice of counsel are too knotty. The monitor's role is narrowly defined: s/he will monitor the course of the lawyer's adherence to the monitoring contract, which includes the treatment plan, and by reporting regularly to the DDC that the lawyer is making progress in treatment according to parameters established by the treatment provider and the contract. As the model regulations that follow make clear, the monitored lawyer *must abstain from use of the abused substance for the entire treatment period*; a lawyer who reverts to use of the substance *ipso facto* fails to comply with the terms of treatment.

The proposed program would be available to the lawyer who:

- has been the subject of a client complaint on any matter except misappropriation of client property or a serious crime, as defined in the Judiciary Law;
- admits to DDC that s/he has a substance abuse problem and that there is a causal relationship between that problem and the alleged misconduct; and
- is able in the judgment of DDC staff to continue to practice

6. The proposed rules are written with the First Judicial Department in mind. They can be easily adapted for use by the other Departments.

law while receiving treatment (which necessarily entails abstaining from use of the abused substance).

By definition, then, the lawyer eligible for diversion under these rules is not someone who has committed a transgression that can, in most instances, lead to disbarment, such as stealing escrow funds or committing crimes. The diversion program is not intended as a “free pass” for the most serious transgressors. Rather, it is designed for less serious offenders who acknowledge their substance abuse problem and the causal relationship between that problem and the substance abuse.

While limiting the program in this way should make the proposal palatable to the Appellate Divisions, it will not be easy to “sell” this program to the lawyers it is intended to benefit. To lawyers against whom an ethics complaint has been filed, the disciplinary prosecutor is the adversary. Moreover, as already noted, if disciplinary authorities learn about the substance abuse problem and determine that it is sufficiently severe, they can seek to have the lawyer immediately suspended. To have a chance of success, therefore, the program has to convince substance-abusing lawyers who have been subjected to complaints that the disciplinary process is genuinely committed to helping that lawyer obtain treatment. One way to build this trust is by instituting a strict confidentiality policy. Thus, the complainant may not be told that the attorney is receiving treatment for substance abuse. The proposed rules also prohibit the disciplinary prosecutor from gaining access to confidential treatment-related information, unless the treatment conditions are violated.

The proposal has two concrete parts. First is an addition to the Appellate Division rules which authorizes the DDC to employ a diversion program. Under the current First Department rules, for example, the proposed rule would fit most naturally under 22 N.Y.C.R.R. §605.9 as a new subparagraph—(c)—entitled “Diversion of Certain Matters Involving Substance Abuse.” A model of such a rule is set forth below. This new rule would authorize the second part of the proposal: a set of regulations set forth by the Appellate Divisions which would govern the administration of the diversion program. A model of these regulations also appears below.

I. THE AUTHORIZING STATUTE

22 N.Y.C.R.R. §605.9(c) Diversion of Certain Matters Involving Substance Abuse

(1) *Conditions.* An attorney who is the subject of an investigation or of charges by the DDC of professional misconduct may, at the discretion of the DDC, be diverted from the disciplinary process, and any investigation or proceeding stayed, provided that:

(a) the attorney's conduct does not involve misappropriation of funds or property of a client or a third party, or a serious crime as that is defined in the judiciary law and this court's rules;

(b) the attorney admits to DDC that s/he has a substance abuse problem and that there was a causal relationship between that problem and the attorney's misconduct ;

(c) the lawyer has not been disciplined within the last three years, or within the last five years for similar conduct; and

(d) the lawyer has not been previously diverted from the disciplinary process, as provided in this rule.

(2) *Administration.* The diversion from the disciplinary process authorized by this section shall be governed by rules promulgated by the court. If the DDC determines that the attorney has violated the rules or conditions of the diversion program, the disciplinary charges, and the investigation or prosecution thereof, may be reinstated.

II. THE GOVERNING RULES

**RECOVERY MONITORING PROGRAM
POLICIES & PROCEDURES**

1. *ESTABLISHMENT & PURPOSES.* Pursuant to 22 N.Y.C.R.R. §605.9(c), the DDC hereby establishes a Recovery Monitoring Program (the "Program") to further the following purposes:

a) To protect the interests of clients from harm caused by impaired lawyers;

b) To protect the integrity of the legal profession from harm caused by impaired lawyers;

c) To provide oversight of a monitored lawyer's compliance with the requirements of a conditional disciplinary action;

d) To provide prompt reporting to DDC of any noncompliance

by a monitored lawyer with the requirements of a conditional disciplinary action;

e) To provide an alternative to disciplinary sanctions when the interests of the public and the profession can be adequately protected by imposition of viable recovery conditions pursuant to conditional disciplinary actions.

2. DEFINITIONS

Conditional disciplinary action—Any disciplinary sanction imposed upon a lawyer and any action in lieu of discipline which requires the lawyer to comply with recovery conditions and to be subject to monitoring under this Program.

Monitoring period—That period of time during which the monitored lawyer is required to comply with the recovery conditions.

Recovery conditions—The conditions imposed as part of a conditional disciplinary action relating to recovery from substance abuse, compliance with which is to be monitored under this Program.

3. RECOVERY CONDITIONS

The recovery conditions shall include, but need not be limited to the following:

a) *Monitor and Reporting Requirements*. The monitored lawyer shall submit to supervision by a monitor selected and appointed in accordance with the provisions of this Program. The monitor will supervise the monitored lawyer's compliance with these recovery conditions and will report to DDC regarding the monitored lawyer's compliance or noncompliance with these recovery conditions.

The monitor will report on the monitored lawyer's compliance with these recovery conditions to DDC monthly, with a final report to DDC upon completion of the monitoring period, and will immediately report to DDC any noncompliance on the part of the monitored lawyer with these recovery conditions. Copies of each report shall also be provided to the monitored lawyer.

b) *Addiction Recovery—With Participation in 12 Step Approved Recovery Program*

i) The monitored lawyer shall remain abstinent as such term is defined by the appropriate 12 Step approved recovery program. Monitored lawyers recovering from substance abuse or chemical dependency shall remain abstinent from all alcohol and other mind-altering drugs, except when such drugs are prescribed by a treating physician or psychiatrist and taken in accordance with such prescription.

ii) The monitored lawyer shall work with an approved recovery program sponsor who is willing to disclose to the monitor that he or she is the monitored lawyer's sponsor.

iii) For the first 90 days of the monitoring period, the monitored lawyer will attend at least one approved recovery program meeting per day. Any exception to this condition must be approved in writing by the monitor.

iv) For the remainder of the first year of the monitoring period or for the remainder of the monitoring period if the monitoring period is less than one year, the monitored lawyer will attend at least three approved recovery program meetings per week. Any exception to this condition must be approved in writing by the monitor.

v) For any remaining duration of the monitoring period, the monitored lawyer will attend at least two approved recovery program meetings per week. Any exception to this condition must be approved in writing by the monitor.

vi) The monitored lawyer shall meet with the monitor weekly. Such meetings shall be in person at such place and time as is determined by the monitor. Exceptions must be approved in advance by the monitor.

vii) Monitored lawyers recovering from substance abuse or chemical dependency shall be subject to random alcohol/drug screens at a frequency determined by the monitor, to include arriving at the designated screening site within six hours of notification.

c) *Addiction Recovery—With Participation in Approved Recovery Program Other Than a 12 Step Recovery Program*

i) The monitored lawyer shall remain abstinent as such term is defined by the approved recovery program. Monitored lawyers recovering from substance abuse or chemical dependency shall remain abstinent from all alcohol and other mind-altering drugs, except when such drugs are prescribed by a treating physician or psychiatrist and taken in accordance with such prescription.

ii) The monitored lawyer shall actively participate in the approved recovery program throughout the duration of the monitoring period.

iii) Participation in the approved recovery program by the monitored lawyer shall be verified in the manner and on the forms prescribed by DDC for such approved recovery program.

iv) The monitored lawyer shall meet with the monitor weekly. Such meetings shall be in person at such place and time determined by the monitor. Exceptions must be approved in advance by the monitor.

v) Monitored lawyers recovering from substance abuse or chemical dependency shall be subject to random alcohol/drug screens at a frequency determined by the monitor, to include arriving at the designated screening site within six hours of notification.

d) *Costs.* The monitored lawyer shall be responsible for all costs and expenses incurred, directly or indirectly, in any assessment, treatment and drug screening required by the recovery conditions.

e) *Noncompliance.* Upon receipt of a report of noncompliance, DDC shall take such action with regard to the conditional disciplinary sanction as it deems appropriate and advisable.

4. APPOINTMENT OF MONITOR

a) *Appointment of a Monitor.* Within 3 business days following the imposition of a conditional disciplinary action, DDC shall appoint a monitor, shall give written notification of this appointment to the monitored lawyer and shall set a date for an initial meeting with the monitor, the monitored lawyer and a representative of DDC.⁷

b) *Execution of Program Documentation.* At this initial meeting DDC and the monitor shall review with the monitored lawyer: 1) the recovery conditions; 2) the duties and obligations of the monitored lawyer; and 3) the duties and obligations of the monitor. The monitored lawyer shall execute a supervision agreement and a valid release of information to allow and direct the monitor to make all reports required by the conditional disciplinary action. The monitor shall execute the Oath of Monitor.

5. REPORTING REQUIREMENTS

a) *Monthly Reports.* The monitor shall file a monthly report with DDC reporting on the monitored lawyer's compliance or noncompliance with the recovery conditions. Such monthly report shall be in writing and in the form prescribed by DDC. This monthly report shall also include a

7. The Committee recommends that the DDC utilize the experience and expertise of the IAP in appointing monitors in specific cases.

copy of the results of any drug screens required since the filing of the prior report. The monitor shall also send a copy of such compliance report to the monitored lawyer.

b) *Noncompliance Reports.* Upon discovering any evidence of the monitored lawyer's noncompliance with the recovery conditions, the monitor shall immediately notify DDC by telephone of such noncompliance. The monitor shall then immediately send a written noncompliance report to DDC. Such noncompliance report shall be on the form prescribed by DDC and shall also include a copy of the results of any drug screens evidencing noncompliance with the recovery conditions. The monitor shall also send a copy of the written noncompliance report to the monitored lawyer.

c) *Final Report.* Within 10 days following completion of the monitoring period, the monitor shall file a written final report with DDC summarizing the monitored lawyer's compliance and/or noncompliance with the recovery conditions. Such final report shall be on the form approved by DDC. The monitor shall also send a copy of the final report to the monitored lawyer.⁸

6. MONITORS

The DDC may appoint as a monitor any licensed member of the Bar who has been in good standing for a minimum of five years prior to the appointment, and who has successfully completed a training program sponsored by the ABCNY Lawyers Assistance Program or any other substantially similar training program.

7. REMOVAL OF MONITORS

a) *Discretionary Removal.* DDC may remove any monitor at any time, with or without cause.

b) *Mandatory Removal.* DDC shall remove a monitor upon receiving evidence:

- i) That the monitor no longer meets the qualifications set forth above, or
- ii) That the monitor has knowledge of noncompliance by the monitored lawyer and has failed to report such noncompliance to DDC pursuant to the requirements of this Program.

c) *Procedure.* To remove a monitor, DDC shall notify the monitor in writ-

8. We also might consider a rule that requires only monthly reporting if the monitored lawyer is complying, but requires immediate reporting of any material noncompliance. If the IAP is involved, we might also consider a rule that required copies of the reports to be sent there.

ing of his or her removal and, within five (5) days of such removal, appoint a replacement monitor and notify the monitored lawyer of such replacement.

8. CONFIDENTIALITY

a) *DDC and Monitors.* All records and information received or created by DDC and the monitor regarding any monitored lawyer are disciplinary records and information and are afforded the same confidentiality protection as any other disciplinary records and information under 22 N.Y.C.R.R. §605.24(a).

b) *Treatment information.* The monitor shall report, and the DDC is entitled to verify, that the monitored lawyer is complying with the treatment program. All information concerning the treatment program (including communication between the monitored lawyer and the treatment provider), however, is confidential and shall not be conveyed to the DDC.

c) *Communications between Lawyer and Monitor.* Other than the information required to be disclosed by paragraph (a) of this section, communications between a monitored lawyer and his or her monitor shall be deemed subject to the privilege conferred by Judiciary Law §499(1).

9. IMMUNITY

Monitors appointed by the DDC are protected by the immunity conferred by Judiciary Law §499(2).

June 2000

The Committee on Professional Discipline

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* member of subcommittee

** chair of subcommittee and principal author

*** Dissents

New Members

As of October 2000

	RESIDENT	DATE ADMITTED TO PRACTICE
Shinya Akiyama	Winthrop Stimson Putnam & Roberts New York NY	08/95
David J. Barrett	Latham & Watkins New York NY	12/91
Jennifer Bergenfeld	Keefe Bruyette & Wood Inc. New York NY	09/00
Alan S. Bergman	Alan S. Bergman & Associates New York NY	06/62
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Angelyn M. Bohland	Clifford Chance Rogers & Wells LLP New York NY	01/99
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Jason Brown	Holland & Knight LLP New York NY	07/88
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