



The Chief Judge's Commission on Statewide Attorney Discipline

**Testimony of the New York City Bar Association, Committee on Professional Discipline,
By: J. Richard Supple Jr., Member of the Committee**

August 11, 2015

I am testifying today on behalf of the Committee on Professional Discipline of the New York City Bar Association, of which I am a member. The Committee on Professional Discipline focuses on issues relevant to the attorney disciplinary process and disciplinary laws and proposes recommendations and legislation, issues reports and papers and submits amicus briefs to improve and reshape the attorney disciplinary system in New York. By way of background, I am a partner in Hinshaw & Culbertson LLP, a longstanding practitioner in the area of professional legal ethics, a former chair of the Professional Discipline Committee, an adjunct professor at the Benjamin N. Cardozo Law School, and a co-author of *New York Attorney Discipline Practice and Procedure* (New York Law Journal 2015).

We are pleased that the Commission is undertaking a comprehensive review of New York's attorney discipline system. We urge that it focus particular attention on the following three areas where we believe improvement in the disciplinary system is needed most.

First, attorney discipline procedural rules should be uniform across the four Departments in New York State. Only the First Department has detailed procedural rules. The Second, Third and Fourth Departments have few rules governing procedure. Moreover, the rules that do exist demonstrate substantially different practices. For example, unlike many professionals subjected to discipline, an attorney-respondent has no opportunity to appear personally before the Court in



the First and Second Departments before he or she is censured, suspended or disbarred. In the Third and Fourth Department, in contrast, oral argument is available. Another example of differential standards is diversion of an attorney's case where alcohol or drug abuse is a causative factor. The Second, Third and Fourth Departments have diversion rules. The First Department does not. And while the Second and Fourth Departments can issue non-disciplinary Letters of Caution to remediate poor attorney conduct, and the Third Department has several non-disciplinary cautionary tools, the First Department allows only for dismissal or discipline (although it recently promulgated a new rule permitting dismissal with cautionary "guidance").

Different procedural opportunities portend unequal disciplinary outcomes. For purposes of evaluating and disciplining attorneys, it should not matter whether an attorney practices in Buffalo or Brooklyn.

Second, as the New York State Bar Association and the City Bar both recently proposed, fairness in the disciplinary process would be improved by adopting new rules (similar to rules already existing in most jurisdictions in the United States) permitting a respondent access to non-privileged materials in a prosecutor's file, and also permitting discovery following service of formal charges. To this end, we recommend the following new rules:

- after a complaint is filed and without having to make a formal request, respondents should be given copies of the complaint and any reply filed by a complainant. At present, some (but not all) staff counsel will refuse to provide, or refrain from automatically providing, a respondent with a complaint from a member of the judiciary, while most (but not all) staff counsel will forward a copy of a complainant's reply submission;



- after a complaint is filed, a respondent should automatically have access to exculpatory materials in staff counsel's file. Again, most prosecutors provide such access, but others do not;
- after charges are filed, a respondent should have the ability to request documents before a hearing from third parties via so-ordered subpoenas. At present, respondents may only subpoena third parties to appear with documents at a hearing;
- after staff counsel's investigation is completed and charges are filed, a respondent should be granted access to non-privileged materials in staff counsel's file; and
- after charges are filed, a respondent should be allowed to take depositions of the complainant and any fact witness or experts that staff counsel intends to call at a hearing, provided that respondent makes a clear showing that a proposed deposition is likely to adduce evidence on a disputed issue of fact that is material to an element of a charge. While such a standard would not favor depositions in most cases, in these limited circumstances a deposition will be useful to clarify and particularize the factual dispute or, alternatively, to confirm or refute a factual claim. We believe this last proposed rule would not adversely impact the speed and efficiency of the disciplinary system because it would be invoked relatively rarely, and, in fact, may well contribute to efficiencies by clarifying facts in a way that encourages and facilitates the kinds of agreed dispositions we propose above.

Third, disciplinary complaints take too long to be addressed and resolved. In the First Department, up to two years can pass before disciplinary staff counsel makes any follow up inquiry or takes action following receipt of a respondent-attorney's answer to a complaint. This



delay can occur even in cases where the attorney is alleged to have mishandled or misappropriated client funds. Substantial delays also plague the other Departments.

Lengthy delays can prejudice both the prosecution and defense for obvious reasons, including because witness memories fail or erode, or because electronically-stored evidence is disregarded or destroyed. Protracted delays also act as a disincentive to bringing complaints. In addition, during the long period that complaints are pending, attorneys may be burdened by unnecessarily increased malpractice insurance premiums or prevented from moving between law firms. In all such instances, public confidence in the system is undermined.

The City Bar is well aware that a principal cause of delays is reduced state funding for the attorney discipline system. Severe cuts to judiciary budgets have resulted in too few prosecutors to handle the persistently high numbers of complaints filed each year. Because it is unrealistic to expect that the Legislature will fully fund the attorney discipline system -- it has never done that before, even in prosperous times -- we believe the following changes could speed up the process by which disciplinary matters are evaluated and resolved without sacrificing the quality of justice.

- *Better “triage.”* Disciplinary prosecutors currently open matters even where there is only the remotest possibility that discipline will be imposed. We believe the system would be more efficient if senior disciplinary committee staff took a harder look (than they do today) at the viability of complaints during a “second screening” procedure after receiving an attorney’s answer and any reply from the complainant. Greater winnowing of complaints will prevent many matters from lingering on uselessly for months or years.



- *More use of mediation.* The City Bar and other bar associations have rosters of trained lawyers qualified to mediate disputes between attorneys and clients. Mediation is especially valuable where the attorney and complainant still maintain an attorney-client relationship and the gravamen of the complaint is a failure of effective or timely communication. The disciplinary committees across the different Departments tend to use mediation infrequently and inconsistently. More consistent use of mediation will result in a quicker resolution of referred matters while freeing up staff to concentrate on more serious cases.
- *Agreed resolutions.* Unlike many jurisdictions, New York disciplinary procedural rules do not permit staff counsel and attorneys to agree to a proposed resolution of a disciplinary matter subject to approval from the Court. In many (if not most) instances, the facts relevant to a complaint are not in sharp dispute. Accordingly, where staff counsel and a respondent can agree on facts, and agree that the law suggests a particular outcome in the respondent's disciplinary case, it makes no sense to hold hearings before a Referee and Hearing Panel. Instead, staff and the respondent could stipulate to the relevant facts and the relevant mitigating and aggravating evidence, and propose a resolution for the Court to accept or reject in its discretion. Such negotiated resolution not only would result in a faster disposition (while preventing an attorney from continuing to practice by virtue of an overly delayed process despite a virtually certain future suspension or disbarment), it also would save staff counsel substantial time and effort, freeing him or her up to handle other pending matters.
- *Streamlining jurisdiction.* As disciplinary procedural rules read today, a disciplinary or grievance committee may be empowered to investigate a lawyer admitted or



officed in its Department as well as conduct occurring in its Department. Many times – particularly when attorneys residing or practicing out-of-state are involved – it is unclear which grievance committee should take responsibility for a matter. As a result, cases can be treated like footballs passed back and forth before any particular grievance committee decides to take charge. Sometimes this process can take years. To minimize confusion, jurisdictional rules should be reformulated to make clear which Department should assume responsibility for a given matter. In this respect, we believe greatest weight should be accorded to the location of the attorney's office unless the attorney resides out-of-state, in which event jurisdiction should lie in the Department where the attorney was originally admitted.