

The logo for the New York City Bar, featuring the words "NEW YORK" and "CITY BAR" in a serif font, centered between two horizontal blue bars.

**REPORT BY THE NEW YORK CITY BAR ASSOCIATION'S
COMMITTEE ON PROFESSIONAL DISCIPLINE WITH RESPECT TO
THE REPORT AND RECOMMENDATIONS CONCERNING
DISCOVERY IN DISCIPLINARY PROCEEDINGS
ADOPTED BY THE NEW YORK STATE BAR ASSOCIATION'S
COMMITTEE ON PROFESSIONAL DISCIPLINE**

The Committee on Professional Discipline (the “Committee”) of the New York City Bar Association has reviewed the Report and Recommendations Concerning Discovery in Disciplinary Proceedings adopted by the New York State Bar Association’s Committee on Professional Discipline (the “NYSBA Report”). The Committee agrees with all five of the recommendations made in the NYSBA Report, subject to the understandings and comments below.

The Committee also believes that the NYSBA Report would benefit from inclusion of a new sixth recommendation to the effect that Disciplinary Counsel be required to adhere to the ethical standards embodied in Rule 3.8(b) and (c) of the New York Rules of Professional Conduct. The Committee’s views on this point, and the five NYSBA Report recommendations, are not affected by any argument that in some way one or more of these six recommendations may already be in effect. In any event, clarity on these issues is important and helpful.

Recommendation 1: In the Pre-Charge/Investigative phase, a Respondent should be provided with the initial Complaint, even if submitted by a member of the judiciary or a governmental employee, and to any responses/supplemental materials submitted by the Complainant.

The Committee agrees with this recommendation and believes it requires no explication.

Recommendation 2: In the Pre-Charge/Investigative Phase, Respondents should have access to exculpatory material and the non-work product portions of Disciplinary Counsel's files except where the Staff Attorney determines that such access might jeopardize the investigation.

The Committee agrees with this recommendation and believes it requires no explication.

Recommendation 3: In the Post-Charges Phase, to the extent that it is not already the practice in a jurisdiction, Respondents should have the ability to request documents from third-parties via so-ordered subpoena.

The Committee agrees with this recommendation, with the understanding that the intent of the recommendation is to provide for third-party discovery before a hearing, not as an adjunct to a subpoena to testify at a hearing. If there is any doubt about this, the language of the recommendation should be clarified appropriately.

Recommendation 4: In the Post-Charges Phase, Respondents should have the ability to request documents from Disciplinary Counsel.

The Committee agrees with this recommendation, with the understanding that the intent of the recommendation is that if Disciplinary Counsel disagrees with a request for documents, such disagreement will be timely communicated to the requesting party or his or her counsel, and that a referee will then decide (if the requesting party or counsel asks) to what extent the document request must be honored by Disciplinary Counsel. If there is any doubt about the availability of such a procedure, the language of the recommendation should be clarified appropriately.

Recommendation 5: In the Post-Charges Phase, for good cause shown and in appropriate circumstances, the Respondent may request the Referee to permit the depositions of complainant and any fact witness or experts that Disciplinary Counsel intends to call at a hearing, regardless of the availability of the witness to testify at the hearing.

The Committee agrees with this recommendation but notes that the phrase “for good cause shown,” particularly in relation to “in appropriate circumstances,” will require clarification. The Committee believes that “for good cause shown” should be interpreted not to favor depositions in most cases. Rather, “for good cause shown” should require a clear demonstration by the respondent (or his or her counsel) that a deposition is likely to adduce evidence on a disputed issue of fact that is material to an element of a charge against the respondent. In this sense, a deposition would be useful to clarify and particularize the factual dispute or, alternatively, to resolve the dispute. Either way, the efficiency and fairness of the disciplinary process itself would be enhanced. This standard does not mean that the case would have to be unusual to justify a deposition, but that the deposition would have to be meaningfully useful to the case.

The Committee also cautions that the potential lack of clarity in the phrase “for good cause shown” could exacerbate the current already grossly inappropriate differences in outcomes and procedural rights for similar claimed violations because of the lack of uniformity across our four Appellate Divisions (and the different Districts within some of them) on disciplinary matters. It would therefore be appropriate for the NYSBA Report to include examples of circumstances in which “good cause” likely would or would not exist.

Recommendation 6: Disciplinary Counsel should be required to adhere to New York Rules of Professional Conduct 3.8(b) and (c) on Special Responsibilities of Prosecutors and other Government Lawyers.

The Committee believes that the recommendations of the NYSBA Report are a good step forward. The Committee also believes, however, that it would be appropriate at this time to include a new recommendation with the intent to confirm clearly that the basic prosecutorial or quasi-prosecutorial obligations of government attorneys under the New York Rules of Professional Conduct apply to Disciplinary Counsel. Without such confirmation, the recommendations of the NYSBA Report that depend on the judgment by Disciplinary Counsel lack an adequate baseline as to what should inform those judgments. Given that the relevant portions of the New York Rules of Professional Conduct were designed to have general application, we see no principled basis on which to deny their application, especially the relevant rules on prosecutorial functions, to Disciplinary Counsel.¹

New York Rule of Professional Conduct 3.8(b) and (c) provides as follows:

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

(c) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutor's office;

or

¹ For example, the ABA's Model Rules for Lawyer Disciplinary Enforcement contain adjustments to the application of the ABA Model Rules of Professional Conduct to disciplinary counsel in some respects, but no such adjustments are recommended with respect to ABA Model Rule 3.8(d) and (g), the equivalent of Rule 3.8(b) and (c) of the New York Rules of Professional Conduct. *See, e.g.*, ABA Model Rule for Lawyer Disciplinary Enforcement 4.

- (2) if the conviction was obtained by that prosecutor's office,
- (A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;
- (B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and
- (C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.
- (d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.²

July 20, 2015

² The Committee notes that the language of Rule 3.8 (d) of the ABA Model Rules of Professional Conduct, which is substantially similar to New York Rule of Professional Conduct 3.8(b), states more precisely that the obligation is to disclose *all* evidence that tends to negate or mitigate. (The ABA Model Rule requires "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . ."). The Committee does not believe that, in the context of Disciplinary Counsel, there would or should be any difference in result between applying the New York Rule and the ABA Model Rule. The New York Rule clearly contemplates the actual turn-over of all such evidence, not merely informing a defendant, or his or her counsel, of its existence.

REPORT AND RECOMMENDATIONS

**CONCERNING DISCOVERY IN DISCIPLINARY
PROCEEDINGS**

ADOPTED BY

**THE NEW YORK STATE BAR ASSOCIATION'S
COMMITTEE ON PROFESSIONAL DISCIPLINE**

TABLE OF CONTENTS

INTRODUCTION AND EXECUTIVE SUMMARY	1
I. BACKGROUND OF THE REPORT.....	2
II. CURRENT NEW YORK DISCIPLINARY PROCEDURES	3
III. THE ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT.....	9
IV. JURISDICTION BY JURISDICTION SUMMARY REVIEW OF THE AVAILABLE DISCOVERY PROCEDURES IN THE STATE AND D.C. JURISDICTIONS	10
A. States With Little or No Discovery.....	11
B. States (and D.C.) With Limited Discovery.....	12
C. States With Greatest Amount of Discovery.....	14
V. DISCUSSION OF DISCOVERY RULES AVAILABLE IN STATES OTHER THAN NEW YORK	19
VI. COMPARISON OF NEW YORK WITH SELECTED STATES AND ABA MODEL RULES.....	21
VII. THE NEED FOR CHANGE IN NEW YORK AS TO DISCOVERY	21
VIII. RECOMMENDATIONS	22
IX. DISCUSSION OF OBJECTIONS	26
X. CONCLUSION	28

APPENDIX: JURISDICTION BY JURISDICTION SUMMARY OF AVAILABLE DISCOVERY

INTRODUCTION AND EXECUTIVE SUMMARY

This is the Final Report and Recommendations adopted by the New York State Bar Association's Committee on Professional Discipline concerning discovery in disciplinary proceedings. This report is divided into seven sections, summarized below.

Part I reviews the history leading up to this Report and Recommendations and sets forth the research and methodology of this document and the Appendix.

Part II discusses the current New York administrative procedure for handling disciplinary complaints. Unlike all other jurisdictions, New York has four separate sets of procedures because in New York, disciplinary complaints against attorneys are handled by Grievance Committees of the four Appellate Divisions of the New York State Supreme Court. All four Appellate Divisions have adopted their own procedural rules governing disciplinary matters. These rules generally provide for the Disciplinary Committee (First Department) or the Grievance Committee (Second and Fourth Departments) or the Committee on Professional Standards (Third Department) to conduct an initial investigation, followed by a dismissal, imposition of private discipline, or the bringing of formal charges against the respondent attorney. If the Committee brings formal charges accusing an attorney with violating the New York Rules of Professional Conduct, a hearing is held before a Referee. As set forth below in this section, there is very limited provision for discovery among the four Appellate Divisions, especially during the investigative stage.

Part III of this report reviews the recommended discovery procedures contained in the ABA Model Rules of Lawyer Disciplinary Enforcement. Under those ABA Model Rules, after charges and an answer, a respondent attorney may take depositions and obtain document production in accordance with the rules in the state governing civil procedure, and a respondent attorney may invoke the subpoena power for depositions and for document production.

Part IV summarizes the extent to which discovery procedures are available in all state jurisdictions and the District of Columbia in the United States. The states are broken down into three categories: (1) jurisdictions affording little or no discovery to respondents; (2) jurisdictions affording limited discovery rights to respondents; and (3) jurisdictions affording greater discovery rights to respondents. This survey shows that a large majority of states allow for discovery in the disciplinary process: of the fifty-one jurisdictions surveyed (counting New York as one jurisdiction), two thirds include provisions allowing for substantial discovery

in disciplinary proceedings and, specifically, a provision for depositions by respondents at some point in the process. All four Appellate Divisions in New York fall into the category of affording little or no discovery to respondents.

Part V provides a comparison of the nearly non-existent availability of discovery procedures in New York disciplinary cases with the availability of discovery procedures in states which provide greater discovery, such as Ohio, Illinois, California, and Florida.

Part VI discusses the rationale for New York to adopt procedures providing for more discovery than is currently provided by New York's four Appellate Divisions. The New York disciplinary systems are not working as well as they might; and the fact is that in the field of attorney disciplinary enforcement, most states and the ABA Model Rules for Lawyer Disciplinary Enforcement allow for greater discovery, reflecting a public model of justice, and an apparent corollary to the historical evolution of professional discipline from being based in aspirational norms for professionals to being based in rules of conduct for attorneys. Hazard, "The Future of Legal Ethics," 100 Yale L.J. 1239 (1991).

Part VII sets forth the recommendations approved by the Committee with a short explanation accompanying each recommendation.

Part VIII considers objections that have been raised about the rationale for change in New York law.

Part IX summarizes the rationale of the recommendations.

I. BACKGROUND OF THE REPORT

In April 2008, the New York State Bar Association Committee on Professional Discipline formed a Subcommittee to identify available discovery procedures in disciplinary proceedings in New York and in jurisdictions other than New York and to prepare a report to the Committee addressing the availability of discovery in all jurisdictions.

The appointed Subcommittee met and researched the availability of discovery in disciplinary proceedings in New York and in jurisdictions other than New York. The Subcommittee also researched rules governing evidence and confidentiality insofar as they affected the procedural rules.

The Subcommittee then prepared and, in June 2009, presented to the Committee an omnibus report, addressing rules governing discovery, evidence and confidentiality in disciplinary proceedings in all the jurisdictions of the United States. As discussed below, the report illustrated that New York, along with a few other jurisdictions, provided little or no discovery in disciplinary matters. In January 2010, the Committee approved that report. Following that approval, the Committee requested that the Subcommittee reconvene to discuss possible recommendations for changes to New York law on discovery procedures in disciplinary matters. The Subcommittee met several times, and again reviewed procedures in New York and other jurisdictions as well procedures available in New York for discipline of doctors and dentists.

A majority report with specific recommendations was prepared and, in December 2011, was presented to the Committee. After extensive debate and discussion during several meetings of the Committee, the Committee voted on the recommendations. Five recommendations were adopted by the Committee. Those recommendations are set forth in Part VII of this report.

This report, which is the result of several drafts, and consideration of the objections raised by a small minority of this Committee, contains the background, discussion of the current discovery provisions, the recommendations for adopting discovery rules, and the reasons for those recommendations. A Minority Report accompanies this Report.

II. CURRENT NEW YORK DISCIPLINARY PROCEDURES

In New York, pursuant to Judiciary Law Section 90.2, discipline of attorneys falls within the jurisdiction of four Appellate Division Judicial Departments of the New York Supreme Court. Each Judicial Department has established a Committee, or Committees, and an Office (or Offices) of Chief Counsel for the Committee, who investigate and prosecute allegations and/or charges of attorney misconduct. As noted, each Committee functions pursuant to the rules and procedures of that particular Judicial Department.

Generally, the process of attorney discipline can be divided into two distinct phases. The first phase consists of the investigation stage, in which the attorney is requested to respond to a complaint, and information is gathered by the Committees, and most often includes the deposition, or examination under oath, of a respondent attorney. The second phase consists of the filing and serving of formal disciplinary charges, either after court approval or upon the determination of the Committee. This stage includes all steps after the service of the charges,

including the referee hearing, any subsequent panel hearing, and filing of petitions or motions with the Court. In its discussion, this report will discuss discovery in terms of the investigative or pre-charges stage, or post-charges stage.

First Judicial Department – Departmental Disciplinary Committee

The Rules and Procedures of the Departmental Disciplinary Committee of the Appellate Division, First Department (22 NYCRR §605), establish the Departmental Disciplinary Committee, the Office of Chief Counsel for the Committee and set forth the disciplinary procedures for the Committee. Rule 605.5 states the types of discipline and whether imposed by the Court or the Committee. Rule 605.6 governs investigations of attorney misconduct by the Office of Chief Counsel and informal proceedings, including requirements for complaints and provision of complaints to the respondent attorney for the respondent's statement of position. Rule 605.6 also provides for the Office of Chief Counsel, following investigation, to recommend referral to another body; dismissal; admonition; or the institution of formal proceedings. Rule 605.7 sets forth the process for reviewing and approving or modifying the recommendation. With respect to discovery during the investigative stage, while the First Department rules provide for sending a copy of a written complaint to a respondent for an answer, there is no further provision for disclosure of a complaining witness's statements, either in reply to the respondent's submission, or in response to further inquiry by the Committee. Nor are these statements provided routinely, and, unless a specific request is made, are often not provided. Additionally, in the case of a *sua sponte* complaint, the underlying basis for the *sua sponte* complaint, e.g. a letter or report from a judge, or an OCA Inspector General's report, is not routinely provided, even upon request by the respondent.

Limited discovery during the investigative stage is provided for in Rule 603.5, which provides that an attorney under investigation or a party to disciplinary proceedings may apply to the Court to obtain subpoenas for attendance of persons or production of documents. Although this rule appears to provide for depositions of witnesses, as a practical matter, the requirement of approval by the Court means that depositions by respondents are hardly, if ever conducted.

If an investigation leads to a decision to formally charge a respondent with misconduct, Formal Charges pursuant to Rule 605.12 are prepared and approved by the Committee and served on the respondent attorney. Respondent serves an Answer to the Charges and a referee hearing is scheduled. Rule 605.12(d) provides that documents to be offered in evidence and facts both in dispute and not in dispute be set forth in a Pre-Hearing Stipulation. Rule 605.17 provides that a

Respondent may request subpoenas be issued by the Court to obtain documents and testimony for the hearing and, upon a showing of good cause, a deposition of a potential witness unavailable for the hearing.

There are no rules providing for the discovery of witness statements or exculpatory material to respondent and such discovery is left to policy decisions by a particular Committee or to the individual attorney handling the matter.

For cases where formal proceedings are approved, Rule 605.13 governs the conduct of referee proceedings

After the Referee has made Findings of Fact and Conclusions of Law, and if appropriate, has recommended a sanction, the matter is referred to a Hearing Panel composed of Committee members who review the Referee decisions and recommendations, and submit their own report. Both reports are then submitted to the Court.

Second Judicial Department, Grievance Committee for the 2nd, 11th, and 13th Judicial Districts and the Grievance Committee for the 9th and 10th Judicial Districts.

The disciplinary procedures for the Appellate Division-Second Department are set forth in 22 NYCRR Part 691. In the Second Department attorney misconduct complaints are investigated by the Committees, who may serve written charges and conduct a hearing before the Committee, or may recommend to the Court by way of Order to Show Cause the institution of a formal disciplinary proceeding. (22 NYCRR Section 691.1) Although not specified in the rules, if a disciplinary proceeding is ordered by the Court, a hearing is held before a Referee, who makes findings with respect to the Charges. A petition to confirm the Referee's findings is then submitted to the Court for final determination of Charges and sanction.

Section 691.5 of the Rules and Procedures of the Second Department provides that in an investigation into attorney misconduct, upon application of the chairman of or counsel to a Grievance Committee conducting such investigation, or upon application of an attorney under such investigation, the Clerk of the Second Department may issue subpoenas in the name of the Presiding Justice for the attendance of witnesses and the production of documents before a Grievance Committee or counsel to the Grievance Committee or a subcommittee of a Grievance Committee.

In the event that a disciplinary proceeding is instituted, Rule 691.5-a(a) provides that either the Committee or a respondent may apply to the Court for issuance of subpoenas for the attendance of witnesses or production of documents before a referee, or other hearing officer. This section also provides for the deposition of a witness who will be unavailable to testify at the time of a hearing.

As in the First Department, there are no rules governing the provision of witness statements other than the complaint itself. Some counsel routinely provide those statements; others do not, and the decision is largely left to staff counsel.

If the underlying basis for a *sua sponte* investigation is a letter of complaint or report by a judge, or a report by an Inspector General of an agency, such as OCA, those letters or reports are not routinely discoverable, and are provided, if at all, only upon request.

Third Judicial Department – Committee on Attorney Standards

The disciplinary procedures of the Third Department are found in 22 NYCCR Part 806. In the Third Department, investigations are conducted by the Office of the Chief Attorney. (22 NYCRR Section 806.4(b)) As part of an investigation, Rule 806.4(e) provides for a deposition of witnesses and production of documents by the Committee pursuant to a Court-ordered subpoena. However, there is no provision for a respondent to apply for a similar subpoena during the investigation of a complaint.

Rule 806.5 provides for the institution of a formal disciplinary proceeding to be held before a referee or judge, after Notice and Petition of Charges. There is no rule providing for discovery during the pre-hearing or hearing process.

While there is no rule or procedure governing other discovery, replies of a complaining witness to respondent's answer to a complaint are informally but routinely provided during the investigative stage. A complaint by a judge is deemed to be an "inquiry" (a *sua sponte* complaint) (Rule 806.4(a)), but the underlying letter or report is not provided. This Committee Subcommittee was unable to learn how the Third Department Committee on Attorney Standards deals with Inspector General reports.

Fourth Judicial Department – Grievance Committees for the 5th Judicial District; for the 7th Judicial District; and for the 8th Judicial District.

The disciplinary procedures of the Fourth Department are stated in 22 NYCRR Part 1022, Sections 1022.17-1022.28 .In the Fourth Department, investigations are conducted by the Committee and its legal staff. Should the Chief Attorney recommend in writing the institution of a formal disciplinary proceeding, the respondent may appear before the Committee to be heard in response to the written recommendation which must be provided to the attorney. (22NYCRR Section 1022.20) Should the Committee vote to file formal charges commencing a disciplinary proceeding, a Notice and Petition of Charges are filed with the Court, and served on the respondent attorney. After service of an answer, the respondent is required to personally appear before the Appellate Division on the return date. The Appellate Division may dispense with the personal appearance and refer the matter for a hearing before a referee or Justice of the Supreme Court. Although no rule governs the submission of a Referee's report to the Court, the Court website states that after the referee hears and reports on the charges, a motion is made to the Fourth Department to affirm, modify or disaffirm the referee's report, and oral argument is permitted on such motions.

There is no provision for discovery for a respondent attorney in the Fourth Department. Although Rule 1022.19(d)(1)(iv) provides that during an investigation by Committee Staff, the Chief Attorney may apply to the Court for a judicial subpoena to compel a deposition and document production before Committee staff, there is no corresponding right on the part of an attorney under investigation. The Fourth Department Committees routinely provide the witness statements in addition to the complaint if there is any new or different information in the statement. The complaining letter of a Judge will be provided unless the judge has requested confidentiality. The report of an Inspector General will be provided unless it has been sealed, in which case, it is not used as the basis for an investigation.

Although in the First and Second Departments there is provision, during the investigative stage for a respondent to take depositions and subpoena documents, such actions are only upon the order of a Court, and so rare that this Subcommittee was not able to find a single instance where such an application by a respondent had been made, much less granted. While the First Department provides for discovery in a Pre-Hearing Stipulation, those documents are typically provided immediately prior to the beginning of the hearing. There are no rules governing discovery in the post-charges stage in the Second Department, except for the taking of a potentially unavailable witness's testimony. In no Department is there formal provision for supplying witness statements, or reports which are sent by a judge or

an Inspector General, or even exculpatory information. These disclosures are left to informal request or delivery.

The current state of the discovery available in disciplinary proceedings in New York is fairly and accurately stated in Lieberman, Supple & Prager, *New York Attorney Discipline*, § 7-5, at pp. 108-109 (2015)(footnotes omitted):

Discovery in New York's disciplinary system is basically a one way street. The Fourth Department's rules, for example, give the Chief Attorney the right to apply for a judicial subpoena "when it appears necessary that the examination of any person is necessary for a proper determination of the validity of a complaint or that the production of relevant books and papers is necessary." The same rules accord no such right to the respondent. In the First, Second, and Third Departments, the rules, by their terms, provide that both [disciplinary] staff counsel and the respondent have the right to summon witnesses and require production of books and papers by issuance of subpoenas. But as a practical matter and based on the experience of the authors, the respondent's counsel is rarely given the opportunity to depose witnesses or require the production of documents. Rather, although a respondent under investigation can informally contact and interview potential witnesses, the respondent is, in practice otherwise precluded from conducting any meaningful prehearing discovery.

Not only can committee staff subpoena the respondent or any witness to attend a deposition, and issue investigatory subpoenas *duces tecum*, demanding the production of books, records, correspondence, and documents, but in addition, committee staff can propound the equivalent of interrogatories to which the respondent (unless asserting a Fifth Amendment privilege) must respond, because a lawyer's failure to cooperate with an investigation by a disciplinary agency constitutes professional misconduct in and of itself. Moreover, the respondent generally has no opportunity to attend an investigative deposition of a potential staff witness, nor do respondents have access to staff notes of informal witness interviews. In the First and Second Departments, the respondent is not entitled to depose a potential hearing witness unless there is good cause to believe that the testimony of the potential hearing witness will be

unavailable at the time of the hearing. The Third and Fourth Departments have no rules that bear on this issue.

It is clear from the foregoing that not only is there minimal provision for discovery either during the investigative stage or during the Formal Charges stage, what discovery is provided is informal, and entirely at the discretion of the Committee staff. Further, the practices vary widely from jurisdiction to jurisdiction, Committee to Committee.

More important, there is no provision for the discovery of exculpatory information. While this Subcommittee believes that in practice, exculpatory information is largely provided to respondents, there is no formal requirement anywhere that the Committees do so.

The rules and practices of New York's four Appellate Divisions with respect to disciplinary proceedings stand in contrast with discovery rules for civil litigation in New York. The New York CPLR provides, at section 3101(a), that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. . . ." The New York CPLR further provides, at sections 3106, 3107, 3111, 3113, 3123 and 3131, for depositions, demands for document production, request for admission, and interrogatories that may be utilized by any party to a litigation. Discovery in civil litigation in New York is very much a two-way street.

III. THE ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT

The Model Rules of Lawyer Disciplinary Enforcement were adopted by the ABA House of Delegates on August 8, 1989, and amended on August 11, 1993, August 5, 1996, February 8, 1999 and August 12, 2002. These Model Rules cover a variety of subjects, including the structure of an administrative disciplinary system, grounds for discipline, considerations in imposing different levels of sanctions and procedures for disciplinary proceedings. Model Rule 14 deals with subpoenas, and Model Rule 15 deals with discovery.

Model Rule 14(2) provides that "[be]fore formal charges have been filed, disciplinary counsel may, with the approval of the chairperson of a hearing committee, compel by subpoena the attendance of witnesses, and the production of pertinent books, papers, and documents, in accordance with [the appropriate state

rule of civil procedure].” There is no provision for respondent to subpoena witnesses and documents prior to charges being filed.

Model Rule 14(3) provides that “[a]fter formal charges are filed, disciplinary counsel or respondent may, [in accordance with the appropriate state rule of civil procedure], compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents at a deposition or hearing under these rules.” Thus, once formal charges are filed, under the ABA Model Rules for Lawyer Disciplinary Enforcement, a respondent may invoke the subpoena power for depositions and for document production.

Model Rule 15(1) provides that “[w]ithin [twenty] days following the filing of an answer to disciplinary charges, disciplinary counsel and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts” and that “[w]ithin [sixty] days following the filing of an answer, disciplinary counsel and the respondent may take depositions in accordance with [appropriate state rule of civil procedure], and shall comply with reasonable requests for (1) non-privileged information and evidence relevant to the charges or the respondent, and (2) other material upon good cause shown to the chair of the hearing committee [board].”

Model Rule 15(2) provides that “[d]isputes concerning discovery shall be determined by the chair of the hearing committee [board] before which the matter is pending” and that “[a]ll discovery orders by the chair are interlocutory and may not be appealed prior to the entry of the final order.”

Model Rule 15(3) provides that “[p]roceedings under these rules are not subject to the [state rules of civil procedure] regarding discovery except those relating to depositions and subpoenas.” (Emphasis supplied.) Thus, under the ABA Model Rules for Lawyer Disciplinary Enforcement, after charges and an answer, a respondent attorney may take depositions in accordance with the rules in the state governing civil procedure.

In short, the ABA Model Rules for Lawyer Disciplinary Enforcement contemplate the respondent attorney taking depositions and obtaining document production as in a civil litigation.

IV. JURISDICTION BY JURISDICTION SUMMARY REVIEW OF THE AVAILABLE DISCOVERY PROCEDURES IN THE STATES AND THE DISTRICT OF COLUMBIA

The summary below lists, in abbreviated form, the availability of discovery in the investigative, or pre-formal charges stage, in disciplinary matters before the state's disciplinary authority, and discovery provided after formal charges have been initiated. For ease of comparison, states are categorized as:

- A. Providing little or very limited discovery;
- B. Providing some discovery, generally including provision for deposition by respondent upon good cause shown; and
- C. Providing greatest discovery, generally including depositions as of right pursuant to state civil discovery rules and generally following or exceeding the discovery provisions in the Model rules.

We note that New York is unique in the United States as it does not have one state-wide disciplinary system, but four, as outlined above. Taken as a whole however, New York clearly falls into Category A, limited or no discovery, especially since two of the four Appellate Division jurisdictions have no provisions whatsoever for discovery, and no Appellate Division follows the Model Rules.

Of the fifty-one jurisdictions surveyed, only seven states, including New York, fall into the first category, in which there is no provision for discovery depositions, although in some states respondent may request subpoenas for documents, and depose witnesses who are unavailable for trial. Nine states have limited discovery, which consists generally of provision for some discovery as of right and depositions upon good cause. thirty-five states appear to provide for a fair amount of discovery, as described in "C" above.

A. States With Little Or No Discovery

The six states and four New York Judicial Departments that appear to afford expressly little or no discovery are:

- Connecticut (Conn. Practice Book, 2014 ed., Sec. 2-29 – 2-35) (No provision for Respondent discovery; witnesses may be subpoenaed for hearing);
- Kansas (Kansas Supreme Court Rules. 201 – 227) (Generally no discovery, although upon request, the Disciplinary Administrator shall disclose all relevant evidence in his possession; subpoena power is available, pursuant to Rule 216(a) for respondents to compel the attendance of witnesses and the production of documents before a hearing panel; depositions available if witness is unavailable);

- Massachusetts (Mass. Sup. Jud. Ct. R. 4:01) (No provisions for discovery, subpoena power can be used by Bar Counsel for depositions during investigations, subpoenas are also available to Respondent for testimony or production of evidence at a hearing, pursuant to Rule 4:01, Section 22);
- Pennsylvania (Pa. Code, Tit. 204, Part V (PA Rules of Disciplinary Enforcement R. 213) (Generally no discovery; at any stage of investigation Disciplinary Counsel and respondent attorney have the right to obtain subpoenas to compel witnesses before a hearing committee or special master and to produce documents before the same, and before appointment of hearing committee or special power, Disciplinary Counsel has right to require production of documents returnable to their office and respondent attorney has right to receive copies of those documents; with approval, depositions available for testimony if witness is unavailable);
- South Dakota (S.D. Stat. § 16-19) (No provisions for respondent discovery in the investigative stage; subpoena power is available to the board, its counsel and the attorney general, no provisions for respondent-initiated discovery);
- Virginia (Sup. Ct. Va. Rules, Part 6, Section IV, Paragraph 13-11); (Respondent has limited rights to receive copy of investigative report; after charges subpoenas and summons for witnesses and documents can be requested by Respondent and will be granted, unless unreasonable; no depositions unless witness unavailable for hearing and subpoenas available to respondent upon request to Bar Counsel);

B. States (and D.C.) With Limited Discovery

The nine states (including D.C.) that appear to provide for limited discovery are:

- Alabama (Alabama Rules of Disciplinary Procedure) (No provision for discovery in investigative stage; after formal charges discovery proceedings permitted in accordance with Alabama Rules of Civil Procedure such as initial disclosures, interrogatories and requests for document production, , and with consent of Hearing Officer or Chair of the Disciplinary Committee both sides may take depositions);
- District of Columbia (Rule XI of the Rules Governing the District of Columbia Bar) (No provision for discovery in investigative phase, Respondent can request review of non-privileged portions of Bar Counsel's

file; during proceedings, in theory, respondent has “right to reasonable discovery,” including depositions and document production, of non-parties upon a showing, by motion, of compelling need);

- Hawaii (Hawaii Supreme Court Rules of the Disciplinary Board R. 2) (Subpoenas available to respondent for attendance of witnesses and the production of documents before a hearing committee after formal disciplinary procedures are instituted, pursuant to Rule 2.12; no discovery proceedings except upon the order of the Board Chairperson for good cause shown; discovery may be permitted after pre-hearing conference, depositions upon “good cause” shown in written request to Hearing Officer or Hearing Committee);

- Maine (Maine Bar Rules Rule 7) (Once formal proceedings are instituted, Bar Counsel required to produce to respondent all exhibits to be presented to Grievance Commission, and depositions and other discovery under Rules 26 through 37 of the Maine Rules of Civil Procedure may be had upon showing of good cause by order of the court, and subpoenas appear to be available to respondents for authorized discovery);

- Michigan (Michigan Court Rules, Cha. 9) (Subpoenas for deposition or production of documents are available to Attorney Grievance Commission during investigative stage; after a formal complaint is filed, subpoenas available to respondent for testimony or production of documents at hearing; generally no depositions unless witness unavailable; but “for good cause shown,” the hearing panel may allow the parties to depose other witnesses; either party may demand production of documents and witness information after service of a formal complaint);

- Nevada (Nevada Supreme Court Rules 99–116) (Rules do not provide for respondent discovery in investigative stage; Nevada Rules of Civil Procedure applies to disciplinary proceedings, but short period of time between formal complaint and hearing allows little time for discovery that is not otherwise provided for; Rule 110 states that discovery by respondent is not permitted prior to the hearing, except by order of the chair for good cause, upon motion; respondent may inspect Bar Counsel summary of evidence, facts and witnesses);

- New Jersey (New Jersey Supreme Court Rules 1:20) (Rules do not provide for discovery by respondent in investigative stage; subpoenas available to Court for investigation and hearing pursuant to Rule 1:20-7(i); once formal

proceedings instituted, under Rule 1:20-5, discovery is available to “presenter” and to respondent attorney if Answer filed, but discovery is limited to non-work product or confidential, relevant information in the hands of “presenter”, and includes writings and objects, witness statements, results of examinations, witness names, police and investigative reports, identity of experts and any final disciplinary investigative report; Discovery but does not include interrogatories, requests for admission and depositions (unless witness is unavailable for hearing);

- New Mexico (New Mexico State Court Rules Governing Discipline) (For good cause shown prior to formal hearing Chair of Hearing Committee hearing may authorize discovery including depositions;, exchange of witness information is required);

- Tennessee (Tennessee Supreme Court Rule 9) (No respondent-initiated deposition discovery prior to formal proceedings; after formal proceedings, subpoenas are available to Respondents to compel the attendance of witnesses and the production of documents before a hearing panel. Testimony by deposition or interrogatory available if witness is unavailable; Rule 15.2(f) indicates that additional discovery is available after commencement of charges, upon application to the Chair of Board of Professional Responsibility upon good cause.

C. States With Greatest Amount Of Discovery

The thirty-five states that provide for the most discovery are:

- Alaska (Alaska Bar Rules 9-33.2) (Once formal proceedings are instituted, for 60 days following respondent's Answer, Alaska Rules of Civil Procedure govern discovery in disciplinary cases; depositions, document production, requests for admissions and subpoenas by respondents are available);

- Arizona (Rules of the Supreme Court of Arizona Rule 54) (Once formal proceedings are instituted, respondent attorneys have full rights to discovery under the Arizona State Civil Procedure Code, including depositions, and subpoenas are available for discovery);

- Arkansas (Rules and Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law) (Open file discovery to respondent after filing of formal complaint; upon request of Respondent for public hearing respondent attorney: (1) may take depositions in accordance with Rule 30 of the Arkansas Rules of Civil Procedure; and (2)

shall comply with reasonable requests for (i) non-privileged information and evidence relevant to the charges or attorney and (ii) other material upon good cause shown to the chair of the panel before which the matter pending);

- California (Rules of Procedure of the State Bar Court) (Once formal proceedings are instituted and before trial before a judge sitting in State Bar Court, any party may obtain discovery of any matter that is relevant and not privileged, by depositions, interrogatories, inspections of documents and places, request for admission, exchange of expert information and physical and mental examinations, and discovery subpoenas are available to respondents);

- Colorado (Colorado Rules of Civ. Proc. 251.1-260.8) (Investigator may subpoena witnesses and the production of documents and evidence under Rule 251.10; subpoenas available for witness and documents for hearing; disclosures from both parties are required, including exchange of witness information, documents and use of experts; under Rule 26(b)(2) of Colorado R. Civ. Pro., depositions, interrogatories and requests for production are permitted);

- Delaware (Delaware Lawyers' Rules of Disciplinary Procedure, Rules 9 and 12) (No provisions for no discovery by respondents prior to the filing of a petition for discipline; limited discovery following the filing of charges, including subpoenas for the testimony of witnesses and production of records, books paper and documents at a deposition or hearing; Mandatory exchange of witness names and documents for trial);

- Florida (Rules Regulating the Florida Bar Chapter 3) (Respondent entitled to all materials provided to Grievance Committee in deciding probable cause; after Formal Charges both parties may use Florida Rules of Civil Procedure including depositions and other discovery);

- Georgia (Georgia Rules of Professional Conduct Chapter 2) (No provision for discovery in investigative stage; after formal complaint depositions and other discovery available pursuant to Georgia Civil Practice Act applicable to disciplinary cases);

- Idaho (Idaho Bar Commission Rules Section V) (No provision for pre-formal charges discovery; once formal proceedings are instituted by the filing of a Complaint by Bar Counsel and the respondent submits an Answer, discovery is permitted in the manner provided by the Idaho Rules of Civil

Procedure, and subpoenas are available to both Bar Counsel and respondent for depositions);

- Illinois (Illinois Supreme Court Rules on Admission and Discipline of Attorneys) (Depositions and other discovery available pursuant to Illinois Rules of Civil Procedure);
- Indiana (Indiana Rules of Court, Rules for Admission to the Bar and Discipline of Attorneys)(No discovery prior to filing of Formal Complaint with Supreme Court; depositions and other discovery available following Indiana Rules of Trial Procedure pertaining to discovery);
- Iowa (Rules and Procedures of Iowa Supreme Court) (Open file discovery to respondent upon request after a complaint has been opened; in any action by the Disciplinary Board formal discovery (including depositions) is “as provided” by the Iowa Rules of Civil Procedure and must be commenced within 30 days of service of the complaint; if a complaint is referred to the Grievance Commission by the Disciplinary Board for formal public hearing, depositions and other discovery under Iowa Court Rules);
- Kentucky (Rules of the Supreme Court of Kentucky) (No discovery in investigative stage; after filing of formal charges depositions and other discovery available pursuant to Kentucky Rules of Civil Procedure);
- Louisiana (Rule XIX Rules of the Louisiana Supreme Court) (no discovery during investigation stage; after filing of formal charges, mutual exchange of witness information; within 60 days of the filing of an Answer to Formal Charges, disciplinary counsel and respondent may take depositions in accordance with Louisiana Code of Civil Procedure; and (2) shall comply with reasonable requests for non-privileged information and evidence;
- Maryland (Maryland Court Rules) (After investigation, Bar Counsel may file with Attorney Grievance Commission a Statement of Charges which is handled by Peer Review informally and can result in low level discipline; limited discovery is provided at this stage by requiring the Statement of Charges to have supporting documentation attached; Bar Counsel may recommend to Grievance Commission the filing of a Petition for Disciplinary Action in the Court of Appeals, or Commission may direct Bar Counsel to file, in which case discovery is governed by Title 2 Maryland Court Rules, and includes provision for normal civil discovery including depositions.

- Minnesota (Minnesota Rules on Lawyers' Professional Responsibility) (Respondent upon request may obtain a copy of the investigator's report; ; (after referral to a Panel for action including probable cause hearing, both parties can subpoena and/or depose under Minnesota Rules of Civil Procedure (Rule 9(d) and must provide all exhibits prior to the probable cause hearing);
- Mississippi (Rules of Discipline for Mississippi State Bar) (Respondent provided a copy of investigative report (Rule 5.2) Depositions and other discovery after Formal Charges are filed with Complaint Tribunal are available as Mississippi Rules of Civil Procedure are applicable to disciplinary cases (Rule 8.1));
- Missouri (Missouri Supreme Court Rules, Rule 5) (After an Information alleging disciplinary violations is served and filed, discovery is limited to depositions, production of documents and request for admission (Rule 5.15);
- Montana (Montana Supreme Court Rules for Lawyer Disciplinary Enforcement) No provision for pre-formal charges discovery; after filing of Formal Charges parties are entitled to reciprocal discovery subject to the control of the Hearing Chair; does not preclude depositions;
- Nebraska (Nebraska Supreme Court Rules Sections 3-3-1 – 3-328) (In court based process, discovery rules apply as in the state district courts of Nebraska, including depositions, but subpoenas by respondents limited to hearings);
- New Hampshire (Rules of the Supreme Court of New Hampshire Rule 37 and 37A) (Rule 37A (III)(B)(5)(A) provides certain discovery by a disciplinary counsel and a respondent once an Answer to Charges is filed, depositions of witnesses available upon request.
- North Carolina (Rules and Regulations of the North Carolina State Bar Section 0100) (No discovery prior to filing of Formal Complaint; thereafter, depositions and other discovery available to both parties under the North Carolina Rules of Civil Procedure;
- North Dakota (North Dakota Supreme Court Rules) (For sixty days following service of a petition in formal proceedings, disciplinary counsel and the respondent attorney are entitled to reciprocal discovery pursuant to North Dakota Rules of Civil Procedure of all non-privileged matters, but the availability of subpoenas to respondents is limited to hearings);

- Ohio (Supreme Court Rules for the Government of the Bar of Ohio, Rule V, Appendix II) (No provision for discovery by respondent in pre-probable cause stage; after complaint approved by probable cause Panel, answer demanded by respondent and hearing scheduled; after complaint served, depositions and other discovery in accordance with provisions of the Ohio Rules of Civil Procedure, which are applicable to Ohio disciplinary cases);
- Oklahoma (Oklahoma Statutes Title 5 Appendix 1-A) (After formal charges, depositions may be taken and documents and other evidence may be produced in the same manner as in civil cases; respondent attorney is entitled, upon written request made 15 days before trial, to names and addresses of prosecution witnesses, but the availability of subpoenas to respondents is only with respect to hearings);
- Oregon (Oregon State Bar Rules of Procedure) (No provision for discovery pre formal charges; after filing of formal charges permitted discovery includes depositions, production of documents and request for admission(OSB Rules of Procedure Rule 4.5));
- Rhode Island (Rhode Island Supreme Court Rules, Art. III) (No authorization in Rules for respondents to take depositions unless witness is unable to attend or give testimony at hearing, but respondents can request Disciplinary Board to authorize taking of depositions; subpoenas are available to Respondents to summon witnesses and require production of documents before the Board; available to Bar Counsel at any time, pursuant to Rule 11);
- South Carolina (South Carolina Rules for Lawyer Discipline) (Discovery available to respondent only after filing of formal charges including exchange of witness information, evidence, experts; , depositions by agreement of both parties, or upon ruling by Chair of Hearing Panel upon good cause shown);
- Texas (Texas Rules of Disciplinary Procedure) (No discovery prior to service of formal charges; if the hearing is before an Evidentiary Panel, subject to time periods, respondents may obtain witness information and statements, expert summaries, six hours of depositions, 25 interrogatories, production of documents and requests for admission (Rule 217 (D); (E); (F)); If the respondent elects to proceed by trial in District Court discovery is available as in civil cases generally (Rule 3.05));
- Utah (Rules Governing Utah State Bar Article 5, Chapter 14); (no provision for discovery prior to formal charges; disciplinary cases are court

actions in which the Utah Rules of Civil Procedure and the Utah Rules of Evidence apply and thus authorize the taking of depositions and other discovery. Rule 14-517(a));

- Vermont (Administrative Order No. 9 of the Vermont Supreme Court) (No discovery in investigative stage; Vermont Rules of Civil Procedure apply in attorney disciplinary cases; within 20 days of the filing of the Answer, disciplinary counsel and respondent are to exchange witness information, within 60 days of the filing of an Answer, disciplinary counsel and respondent may conduct depositions and comply with requests for the production of relevant and non-privileged documents).
- Washington (Washington Rules for Enforcement of Lawyer Conduct); (No provision for discovery pre formal charges; discovery allowed under rules similar to Superior Court Civil Rules, including entitlement to depositions upon application to hearing officer);
- West Virginia (West Virginia Rules of Lawyer Disciplinary Procedure) (No pre-formal charges discovery; after filing of formal charges mandatory pre-hearing disclosure by Disciplinary Counsel of witnesses, expert information, results of physical or mental examinations, hearing exhibits and exculpatory evidence, deposition of respondent attorney; respondent entitled to deposition of complainant, good cause required for other discovery. (Rule 3.4);
- Wisconsin (Wisconsin Supreme Court Rules Chapters 21 and 22) (No provision for discovery pre-formal charges. After filing of formal complaint referee will provide for depositions upon request of either party Rule 22.15(2)(a))
- Wyoming (Disciplinary Code of Wyoming State Bar) (No discovery or subpoena power for respondent prior to formal charges; after service of formal Charges, discovery as of right of any relevant matter through depositions, interrogatories, document production, physical or mental examinations and requests for admission (Rule 11);

V. DISCUSSION OF DISCOVERY RULES AVAILABLE IN STATES OTHER THAN NEW YORK.

The review of the discovery provisions for all states reveals that generally speaking, discovery provisions do not normally apply in prehearing stages of a

disciplinary matter. There are a very few jurisdictions, such as Iowa, which permit a Respondent access to an investigative report, or the file of Bar Counsel (excluding work product), prior to the institution of formal charges, or in the informal resolution stage of a complaint, but most states do not make such provisions. Thus, as a general rule, discovery applies almost exclusively to situations involving the institution of formal disciplinary charges and hearings, as in the ABA Model Rules, which provide that a respondent has as of right, the power to subpoena documents and witnesses for depositions, and can request other evidentiary matter.

The jurisdiction by jurisdiction survey shows that a large majority of states allow for discovery in the disciplinary process: two-thirds of the fifty-one jurisdictions surveyed (counting New York as one) include provisions allowing for discovery in disciplinary proceedings and, specifically, a provision for depositions by respondents after formal charges.

This discovery usually takes place in the context of an agency administrative disciplinary system; however, in a few states, the courts are involved in the pre-trial and trial disciplinary process, and discovery is had when the case is before the court. In Maryland, for example, disciplinary cases involving formal charges are court proceedings assigned to a judge who, as noted above, enters a scheduling order that includes pre-hearing discovery under Maryland's civil discovery rules.

Most states also provide for the issuance of subpoenas compelling the appearance of witnesses and production of documents at the hearing, and most states expressly provide for subpoenas to be issued at the request of the responsible disciplinary authority in aid of an investigation. In a few jurisdictions, such as South Dakota, Connecticut and the New York Appellate Division - Fourth Department, this subpoena power is available only to Disciplinary Counsel and a Disciplinary Committee. In some states, such as Virginia, a respondent attorney must request that the Disciplinary Counsel issue a subpoena. In many states, the Disciplinary Committee or the hearing panel chair is authorized to issue subpoenas to either the respondent or the Disciplinary Counsel. In a few states, such as Minnesota and Nebraska, a court or a court-appointed referee is authorized to issue subpoenas to either the respondent or the Disciplinary Counsel.

The majority of states authorize discovery pursuant to state rules of civil procedure, and subpoena power is available in aid of rule-authorized discovery. In some jurisdictions, such as Massachusetts, the subpoena power may allow for discovery that is not otherwise expressly allowed for by the rules of procedure.

VI. COMPARISON OF NEW YORK WITH SELECTED STATES AND ABA MODEL RULES

With respect to Disciplinary Proceedings, New York's four Appellate Divisions, as described in Part II of this Report, stand in marked contrast with the significant majority of states allowing for discovery through the rules of civil procedure in those states. For the most part, those state rules of civil procedure are patterned on the Federal Rules of Civil Procedure and thus carry into the disciplinary process the liberal discovery provisions of those rules.

For example, in Ohio, Illinois and Florida, depositions and other discovery may be conducted after formal proceedings are commenced in accordance with provisions of those states' Rules of Civil Procedure. In California, the Bar Rules set forth liberal discovery rights. Ohio, Illinois, Florida and California are all major states with large numbers of attorneys, and have attorney supervision and regulation issues comparable to those in New York.

Nine states have limited discovery, granting some subpoena power and exchange of documents, and depositions upon good cause shown (as opposed to depositions to preserve the testimony of an unavailable witness). These states, along with the six states other than New York which provide little or no discovery, are in the clear minority of states with respect to granting discovery to respondents.

VII. THE NEED FOR CHANGE IN NEW YORK AS TO DISCOVERY

The need for change in New York as to the availability of discovery in disciplinary cases is based on: (i) a perception that there is room for improvement in the New York disciplinary procedures; and (ii) the recognition that the opportunities for discovery conducted by respondents in New York is far more restricted than most jurisdictions in the country and in a way that does not comport with the rule-oriented nature of disciplinary rules today.

In the field of disciplinary enforcement, most states and the ABA Model Rules for Lawyer Disciplinary Enforcement allow for a fair amount of discovery, which, according to Professor Geoffrey C. Hazard, reflects a public model of justice and an apparent corollary to the historical evolution of professional discipline from being based in aspirational norms for professionals to being based

in rules of conduct for attorneys. Hazard, "The Future of Legal Ethics," 100 Yale L.J. 1239 (1991).

The underlying source for that evolution of procedure is the fundamental conception of due process of law. It is basic constitutional law that due process of law preserves the appearance and reality of fairness, generating the feeling, important to popular government, of justice being done. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). A law license is unquestionably "property" in the constitutional sense of a lawyer having a legitimate claim of entitlement to it, *Bell v. Burson*, 402 U.S. 535 (1971); *Barry v. Barchi*, 443 U.S. 55 (1979), particularly given the recognition of "property" in the constitutional sense in such interests as a college professor's position in *Perry v. Sindermann*, 408 U.S. 593 (1972), and disability benefits in *Matthew v. Eldridge*, 424 U.S. 319 (1976). It is also basic constitutional law that due process of law guarantees that "life, liberty, or property will not be taken on the basis of erroneous or distorted conception of the facts and the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Respondents-initiated discovery allows for a fairer and better process by enabling the improvement of the accuracy and balance of the fact-finding upon which disciplinary decisions are based. The public interest in the enforcement of the attorney disciplinary rules is only aided by more accurate, more balanced fact-finding process.

The provision for discovery in disciplinary proceedings by two-thirds of the 51 jurisdictions surveyed (counting New York as one) reflects the belief that the inclusion of discovery in the disciplinary process allows for more fair outcomes. This belief is embodied in the ABA Model Rules for Lawyer Disciplinary Enforcement, which, as noted above, provides for respondent-initiated depositions and document production after formal charges are brought. New York's current fractured process not only provides for different discovery in each of the four Appellate Divisions, which adversely affects fairness to respondents, but the exceedingly limited discovery in New York simply does not comport with the majority values in this country with respect to the attorney disciplinary process.

VIII. RECOMMENDATIONS

The following recommendations were approved by a majority of the Committee members voting at the meetings where the recommendations were discussed. One of the members of the Subcommittee did dissent, and the points of that dissent are discussed in this Report.

Recommendation 1: In the Pre-Charge/Investigative phase, a Respondent should be provided with the initial Complaint, even if submitted by a member of the judiciary or a governmental employee, and to any responses/supplemental materials submitted by the Complainant.

Simple due process dictates that Respondents should be informed of who filed a complaint, and should have access to the original complaint or governmental report, and to any subsequent statements or submissions of the complaining person or agency.

Respondents in New York are generally provided with the initial complaint filed with the disciplinary/grievance committee. There are, however, occasions that a complaint is filed by a member of the judiciary or another governmental agency. These complaints are often treated as “*sua sponte*” investigations, arguably because they are merely reports of an attorney’s conduct, and the complaint is not provided to the respondent. A respondent should receive a complaint filed by a member of the judiciary or another governmental agency whether or not it is merely a “report,” in the same way as the respondent receives other complaints

In the case of an actual *sua sponte* investigation, initiated by the Committee without a written complaint or report having been filed with the Committee, the respondent should be apprised of the facts supporting the investigation in a written statement.

The recommendation therefore contemplates the adoption of a rule mandating that the Disciplinary or Grievance Committee turn over to respondents copies of complaints or reports filed by a court or a governmental agency.

The recommendation to require Committees to provide responses/supplemental materials to a respondent is based on: (i) allowing a respondent to know better what is being claimed as to issues in the case and to assist in identifying what further information and documents are relevant and should be provided to Disciplinary Counsel’s Office; and (ii) facilitating the Disciplinary Counsel’s Office investigation by obtaining respondent’s supplemental comments to the responses/supplemental materials and possibly additional relevant documents from respondent.

The proposed very limited discovery of a complainant’s statements in the investigative stage does not constitute an unwarranted expansion of discovery rights. Fuller exchange of materials in the investigation stage may well assist in an

early disposition. This is different from “pre-litigation” discovery in civil matters because in the disciplinary arena, a respondent is charged with the duty to answer a complaint, to be deposed if the Committee requires it, and to produce documents during the investigative stage.

There is nothing comparable in private civil litigation. While New York CPLR 3102(c) does permit disclosure before commencement of an action, such discovery is only by special Order of the Court in order to preserve testimony, to aid in bringing an action or to aid in arbitration.

Although the ABA Model Rules do not expressly require such provision, they do not reject it and Model Rule 14(2), in giving full subpoena power to respondents for investigations, is consistent with what is another means of furthering the investigation.

Among the subjects of the deliberations had in connection with this recommendation is whether the deposition, by respondent, of the complainant would be appropriate during the investigation phase in order to obtain sworn allegations from a complainant and, thus, minimize the chances of Disciplinary Counsel and Respondents’ counsel spending significant time and resources in the pursuit of charges that are later found to be without a substantial foundation. It is important to remember that the “client” in the disciplinary system is the public. A countervailing and overriding concern was that such depositions would constitute a significant interference with the investigative phase of the disciplinary process. No states appear to permit depositions of witnesses (except of respondent by bar counsel) prior to the institution of formal charges. We do not believe that investigatory depositions by respondents should be instituted in New York at this time; of course, consistent with ABA Model Rule 14(2), any depositions by the Disciplinary Counsel Office of respondents and anyone else are appropriate in an investigation.

Recommendation 2: In the Pre-Charge/Investigative Phase, Respondents should have access to exculpatory material and the non-work product portions of Disciplinary Counsel’s files except where the Staff Attorney determines that such access might jeopardize the investigation.

Disciplinary Counsel has access to files and documents containing exculpatory materials or other evidentiary material, and Disciplinary Counsel has access to complainants and other witnesses who are not available to a Respondent

or Respondents' counsel. Access to exculpatory materials and evidentiary material in the possession of Disciplinary Counsel allows a respondent fairly to prepare a defense and respond in the investigation. Work product should be specifically excluded.

This Recommendation contemplates the adoption of a rule creating a right on the part of respondent to receive this material.

Recommendation 3: In the Post-Charges Phase, to the extent that it is not already the practice in a jurisdiction, Respondents should have the ability to request documents from third-parties via so-ordered subpoena.

Subpoena power is frequently provided by Rule in other jurisdictions to Respondents in disciplinary proceedings. Due process and the ability to adequately prepare a defense are highly important concerns in disciplinary proceedings. The ability to "request" a subpoena from a referee is insufficient. The ability to request documents from third-parties via so ordered subpoena should be by Rule so that in the normal course of a disciplinary case that has progressed to formal charges, a respondent attorney can avail himself or herself of the ability to subpoena documents from third-parties believed to be necessary and material to the defense.

Recommendation 4: In the Post-Charges Phase, Respondents should have the ability to request documents from Disciplinary Counsel.

After joinder of issue in formal proceedings (Charges and Answer), respondents in most jurisdictions have access by Rule to a broad variety of discovery tools, ranging from an automatic right to discovery and depositions, to the right to petition for paper discovery and depositions. Proposing an automatic right for respondents to receive exculpatory and evidentiary documents at the formal post-charges stage is a matter of fundamental fairness and due process. First, such an exchange eliminates the need for extensive briefing and argument regarding the right of access to information relevant to the defense of a disciplinary proceeding and would likely sharpen fact presentation and fact-finding. As a practical matter, such discovery would not slow down the process, but would rather tend to speed up the resolution of issues in the case. Further, the exchange of information would conform to the rules and practices in most states' disciplinary systems.

Recommendation 5: In the Post-Charges Phase, for good cause shown and in appropriate circumstances, the Respondent may request the Referee to permit the depositions of complainant and any fact witnesses or experts that Disciplinary Counsel intends to call at a hearing, regardless of the availability of the witness to testify at the hearing.

As set forth above in the summary of discovery rights in other states shown in Part III of this Report, respondents in most jurisdictions have an *automatic* right to deposition of a witness once formal charges have been filed. A minority of states permits deposition of a witness upon good cause shown. The reasons for depositions for good cause shown are manifest. A deposition may resolve issues, will prevent surprise testimony, and may expose facts which were unknown to the parties. It is theoretically possible that a deposition of a witness after charges are filed may slow the process slightly in some cases, but as a practical matter, the taking of a deposition for good cause, may speed up the hearing process by eliminating unnecessary testimony, or resolving otherwise contested issues. It is the Committee's belief that where good cause is shown, the benefit of this discovery would outweigh the burden of a delay. The argument that a deposition may discourage a witness from testifying at a hearing was considered by this Committee, but where good cause is shown, the potential for discouragement is outweighed by the benefits noted above. Given that the disciplinary procedural rules in most states and in the ABA Model Rules for Lawyer Disciplinary Enforcement permit respondent-initiated depositions as of right, this Recommendation is still less than what most states provide and short of the ABA Model Rules provisions.

IX. DISCUSSION OF OBJECTIONS

A number of objections to changing New York's present disciplinary procedures so as to give respondents more discovery opportunities were raised by a relatively small minority of this Committee. Those objections, addressed below, are aimed at efficiency and expense considerations; express concern that there is no reason to change the current system, and express the idea that respondents should not be entitled to the recommended discovery as they are subject to the authority and supervision of the Court.

First, making the recommended changes will not hinder efficiency. As noted in the recommendations, the suggested changes may well enhance efficiency by aiding in the early exchange of information and helping clear up potential issues

earlier in the disciplinary process. Further, efficiency is not the only objective of a procedural system and the focus on efficiency ignores the need that a disciplinary process be not just efficient, but also be fair and provide just results.

Expanded discovery will not necessarily add to the expense of the disciplinary process of the case. Providing respondents with the reports and complaints, responses and exculpatory and evidentiary matter early in the process will not cause significant further expense. Again, to the extent that providing this material eliminates further process at a later stage, this limited discovery may actually be cost saving. With respect to the recommendation to permit deposition of witnesses upon good cause shown to the hearing referee, such a deposition may also limit the amount of litigation during the hearing and thus maybe cost saving. To the extent that costs are increased, it is unlikely that such a limited right to depositions will add significantly to the cost of disciplinary hearing. Disciplinary cases are already expensive for respondents, but the expense of depositions and document production may provide a better defense for respondents, which may end up reducing the overall expense of the disciplinary case; and for the public, more discovery opportunities for respondent can result in more focused fact-finding and thereby fairer disciplinary results. Any added expense is worth the cost.

Additionally, as noted, there is ample justification for the view that allowing discovery to respondents will be helpful and improve the disciplinary process. The fact that two-thirds of the jurisdictions allow for a discovery in disciplinary cases -- in a number of cases, the same discovery as in civil litigation -- demonstrates that in the estimation of the authorities in those jurisdictions, discovery improves the system. Former Chief Judge Judith Kaye wrote on a number of occasions, referencing Justice Louis Brandeis's observation that states are the laboratories for American democracy. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 251, 567 N.E.2d 1270, 1279, 566 N.Y.S.2d 906, 915), cert. denied, 500 U.S. 954 (1991). The experience and practice of other jurisdictions should be instructive, especially when one considers that the practice of law is clearly on its way to a more national stage.

Nor is it significant that the discipline of other professions in New York does not provide those professionals with the kind of discovery recommended in this report. Given the limited state of discovery in the discipline of attorneys in New York, limited discovery for other professionals is hardly surprising. This Committee considered the fact that discovery is not provided to others in New York, but the majority concluded that it was far less germane than consideration of the attorney disciplinary processes in other jurisdictions.

Nor is the fact that in a great many cases Respondent has actual knowledge of the facts a reason not to provide discovery. A respondent is still entitled to know what evidence will be presented, to know what the witnesses will say, and to have all exculpatory material.

Additionally, the recommendations in this report do not go so far as to create equal discovery rights between the Disciplinary Counsel's Office and a respondent attorney. Many states do provide equal discovery pursuant to their rules of civil procedure after the institution of formal charges. Our recommendations are much more limited. Further, the duty of attorneys to cooperate with Disciplinary Counsel's Office, and the right of the Court to supervise the conduct of attorneys does not mean that respondents should not be provided with information and evidence which can illuminate the process and provide a fair environment for such supervision and oversight. The notion that expanded discovery does not result in a better functioning and fairer disciplinary system runs contrary to the modern view of managed discovery. Due process to respondents is a serious consideration, and the discovery recommended in this report provides basic, limited rights. Such discovery is fundamental to due process when an attorney's license to practice can be at stake.

Finally, the Committee considered the potential for witness intimidation or harassment in granting the limited discovery proposed in this report. First, currently most respondents are well aware of the identity of complainants, and could intimidate or harass them now. Anecdotally speaking, such tactics are extremely rare. Second, such tactics could result in further discipline should a respondent abuse discovery in this fashion. Disciplinary Bar counsel in Ohio, with experience in California, have informed the Committee that harassing behavior by a respondent would be considered extremely counterproductive behavior by a respondent, as such misconduct would lead to a more severe sanction. Most persuasive however is the fact that liberal discovery, including exchanging of witness statements, has not seemed to cause problems in the many states who have limited or liberal discovery. For example Disciplinary Bar counsel in Ohio, with experience in California, have informed the Committee that there never has been an experience of abuse, harassment or intimidation by respondents taking a deposition. Thus, the Committee concludes that intimidation and harassment concerns are not of sufficient weight to deny discovery.

X. CONCLUSION

The Committee on Professional Discipline recommends adoption of uniform Court Rules in each Appellate Division authorizing discovery of initial complaints, exculpatory material, witness statements, evidentiary material, and depositions of witnesses as outlined above. These recommendations are reasonable, and limited, and in fact, do not provide even as much discovery as that provided by thirty five of the fifty-one United States jurisdictions studied, or recommended by the American Bar Association. These recommendations are based upon basic due process considerations and on considerations for a speedy and efficient process and will bring New York, usually a front runner in improvements, somewhat closer to the due process norm in this country.

Recommendations Approved
May 23, 2014

Final Text Issued
June 26, 2015