NEW YORK CITY BAR

COMMITTEE ON PROFESSIONAL DISCIPLINE

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VIA E-MAIL

New York State Unified Court System
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
Attn: John W. McConnell, Esq.
Counsel, Office of Court Administration

Re: Comments of the New York City Bar Association's Committee on Professional Discipline to the Uniform Court System's Proposed Uniform Rules of the Appellate Division on Attorney Discipline

Dear Mr. McConnell:

In a memorandum dated November 4, 2015, you circulated to interested persons and organizations a draft of the proposed new statewide rules on attorney discipline procedure to replace the rules currently existing in the four Appellate Divisions.

Attached is the New York City Bar Association's Committee on Professional Discipline's analysis of OCA's proposed new rules with recommended changes. For ease of review, the Committee's comments are offered in a red-line format together with a brief explanation of its reasoning for each recommended change.

All in all, the Committee believes that the OCA draft marks an excellent start to the difficult process of crafting a reform measure that has eluded policymakers for many years. The Committee's comments are accordingly intended to be constructive and encouraging.

Very truly yours,

Devika Kewalramani

Rules for Attorney Disciplinary Matters

I.

Application; Appointment of Committees

1. Application

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

2. Definitions

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

EXPLANATION FOR CHANGE: The omitted language is vague and unnecessary. Rule 8.4(h) already prohibits attorneys from engaging in conduct "that adversely reflects" on their "fitness as a lawyer."

(b) Other Definitions

(1) Admonition: discipline issued at the direction of a Committee or the Court upon a finding that the respondent engaged in professional misconduct that does not warrant public discipline by the Court. An Admonition shall constitute private discipline, and shall be in writing.~~, but may be delivered to a recipient by personal appearance before the Committee.~~

EXPLANATION FOR CHANGE: The omitted language is unnecessary and potentially confusing as it might be mistakenly construed to permit a Committee to deliver an Admonition orally while retaining the written Admonition without providing the writing to the respondent.

(2) Committee: an attorney grievance committee established pursuant to these rules.

(3) Complainant: a person or entity that submits a complaint to a Committee.

(4) Court: the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over a complaint, investigation, proceeding or person covered by these rules.

(5) Censure: public discipline issued at the direction of the Court pursuant to Judiciary Law §90(2) that does not order Suspension or Disbarment.

EXPLANATION FOR CHANGE: All forms of discipline should be defined.

(6) Suspension: suspension from office pursuant to Judiciary Law §90(2).

EXPLANATION FOR CHANGE: All forms of discipline should be defined.

(7~~5~~) Disbarment: removale from office pursuant to Judiciary Law §90(2).

EXPLANATION FOR CHANGE: For sake of consistency, the definition should be of a noun, not a verb.

(8~~7~~) Letter of Advisement: letter issued at the direction of a Committee pursuant to section II.3(b)(1)(iv) of these Rules, upon a finding that the respondent has engaged in inappropriate behavior, or other behavior requiring comment, not warranting the imposition of discipline. A Letter of Advisement shall not constitute discipline.~~, but may be considered by a Committee or the Court in determining the extent of discipline to be imposed or action to be taken upon a subsequent finding of misconduct.~~

EXPLANATION FOR CHANGE: A Letter of Advisement is intended to educate an attorney and warn him or her not to engage in conduct that could be reasonably viewed as improper. If it is to be used later as evidence in aggravation of future misconduct, fundamental notions of fairness (if not constitutional requirements) dictate that the affected lawyer be able to challenge the finding of inappropriate behavior. In view of its limited use, and given the significant time and small benefit inherent in litigating an issue of non-disciplinary "inappropriateness," it would be better simply to issue a Letter of Advisement without any potential for using it in a subsequent proceeding.

(9~~6~~) Foreign jurisdiction: a legal jurisdiction of a state, territory, or district of the United States outside of New York State or foreign country.

EXPLANATION FOR CHANGE: With increasing numbers of New York lawyers admitted to overseas bar associations or practicing overseas, the definition of "foreign jurisdiction" should be expanded for reciprocal discipline and "serious crimes" purposes.

(10~~8~~) Respondent: an attorney, licensed legal consultant or law firm that ~~other person who~~ is the subject of an investigation or a proceeding before the Committee or the Court pursuant to these R~~r~~ules.

EXPLANATION FOR CHANGE: The amendments are intended to tighten and clarify the language in the rule, standardize identification of the "Rules," and remove an unnecessarily vague reference to "other person."

3. Discipline Under These Rules Not Preclusive

Discipline pursuant to these rules shall not bar or preclude further or other action by any court, bar association, or other entity with disciplinary authority.

4. Appointment of Committees

Each Department of the Appellate Division shall appoint such Attorney Grievance Committee or committees (hereinafter referred to as "Committee") within its jurisdiction as it may deem appropriate. Each Committee shall be comprised of at least 21 members, of which no fewer than 3 members shall be non-lawyers. A lawyer member of a Committee shall be appointed to serve as chairperson. All members of the Committee shall maintain an office for the practice of law, or reside, within the geographic jurisdiction of the Committee. Two-thirds of the membership of a Committee shall constitute a quorum for the conduct of business.; aAll Committee action shall require the affirmative vote of at least a majority of the members present, except that the Committee may pre-designate one or more individual members to review and approve recommendations by the Chief Counsel to dismiss a complaint, issue a Letter of Advisement or issue an Admonition.

EXPLANATION FOR CHANGE: Requiring a majority of Committee members to review and approve all determinations to reject or dismiss complaints or to issue Admonitions and Letters of Advisement seems unnecessarily cumbersome and may delay adjudications unnecessarily. Such a broad review should be reserved for matters where public discipline is recommended.

5. Committee Counsel and Staff

Each Department of the Appellate Division shall appoint a Committee or committees such chief attorneys and other staff as it deems appropriate.

6. Conflicts; Disqualifications form Representation

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

EXPLANATION FOR CHANGE: Committee-connected lawyers should not appear to be in a position to use their influence to assist either a respondent or a complainant. (See also subdivisions (b) and (c) immediately below.)

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

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

EXPLANATION FOR CHANGE: Harmonize references to the "Rules." (This amendment shall be made hereafter without repeating this comment.)

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

EXPLANATION FOR CHANGE: The stricken language is unnecessary and inconsistent with Rule 1.11, which prohibits only former government lawyers from representing private clients in cases that they worked on as government lawyers "personally and substantially." We are aware of no evidence suggesting that former staff counsel in private practice have exercised improper influence in matters where they represent respondents or advise complainants. While employed by the Committee, staff counsel exclusively work to enforce the Rules of Professional Conduct. Prohibiting them from thereafter accepting employment and applying their expertise would constitute an unnecessary impediment to attracting talented attorneys to public service while precluding respondents from retaining skilled advocates.

II.

Proceedings Before Committees

1. Complaint

(a) Investigations of professional misconduct may be authorized upon receipt by a Committee of a written ~~original~~ complaint, signed by the complainant, which need not be verified. Investigations may also be authorized by a Committee or the Court acting sua sponte.

EXPLANATION FOR CHANGE: The word "original" is unnecessary since it could be interpreted to require a "mailed" complaint with a fresh signature and preclude electronically-scanned complaints or facsimile letters. In addition, the Court should be permitted to authorize a sua sponte complaint.

(b) The complaint shall be filed initially in the Judicial Department encompassing the respondent's registration address on file with the Office of Court Administration ("OCA"). If that address lies outside New York State, the complaint shall be filed in the Judicial Department in which the respondent was admitted to the practice of law or otherwise professionally licensed in New York State. The Committee or the Court may transfer a complaint or proceeding to another Department or Committee as justice may require.

2. Investigation: Disclosure

(a) The Chief Attorney is authorized to:

(1) interview witnesses and obtain any records and reports necessary to determine the validity of a complaint;

(2) direct the respondent to appear and produce records before the Chief Attorney or a staff attorney for a formal interview or examination under oath;

(3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein; and

(4) take any other action deemed necessary for the proper disposition of a complaint.

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

EXPLANATION FOR CHANGE: A respondent should be permitted to review all of the Committee's non-privileged file materials, including any materials that qualify as exculpatory under Rule of Professional Conduct 3.8.

(c) Third Party Evidence. Unless manifestly unreasonable, the Chief Counsel shall, upon the respondent's written request, apply to the Clerk of Court for a subpoena to compel production by a third party of potentially exculpatory books and papers in accordance with the procedure described in section II.2(a)(3).

EXPLANATION FOR CHANGE: A respondent should have the ability during the investigation stage to reasonably request from a third party a production of potentially exonerating documents for the Committee's consideration.

3. Disposition and Review

(a) Disposition by the Chief Attorney.

(1) The Chief Attorney may, after initial screening, decline to investigate a complaint for reasons including but not limited to the following: (i) the matter involves a person or conduct not covered by these rules; (ii) the allegations, if true, would not constitute professional misconduct; (iii) the complaint seeks a legal remedy more appropriately obtained in another forum; or (iv) the allegations are intertwined with another pending legal action or proceeding.

(2) The Chief Attorney may, when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant.

(3) The complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Chief Attorney.

(b) Disposition by the Committee.

(1) After investigation of a complaint, with such appearances as the Committee may direct, a Committee may take one or more of the following actions:

(i) dismiss the complaint as unfounded by letter to the complainant and to the respondent;

(ii) when it appears that a complaint involves a fee dispute, a matter suitable for mediation, or a matter suitable for review by a bar association grievance committee, refer the complaint to a suitable alternative forum upon notice to the respondent and the complainant;

(iii) make an application for diversion pursuant to section III.5 of these Rules;

(iv) when the Committee finds that the respondent has engaged in inappropriate behavior that, under the facts of the case, does not warrant imposition of discipline, or other behavior requiring comment, issue a Letter of Advisement to the respondent;

(v) when the Committee finds, by a fair preponderance of the evidence, that the respondent has engaged in professional misconduct, and that it is appropriate to protect the public, preserve the reputation of the bar, and deter others from committing similar misconduct, issue a written Admonition to the respondent, which shall clearly state the facts forming the basis for such finding, and the specific rule or other announced standard that was violated. Prior to the imposition of an Admonition, the Committee shall give the respondent 20 days' notice by mail of the Committee's proposed action and shall, at the respondent's request, provide the respondent an opportunity to appear personally before the Committee, or a subcommittee thereof, to seek reconsideration of the proposed Admonition. Where the respondent exercises this right, the Chief Counsel shall be afforded a similar opportunity to oppose or otherwise comment upon the reconsideration request. The Committee's or subcommittee's resolution of the respondent's application shall be limited to sustaining or vacating the Admonition and will not be subject to further review by the Court.

EXPLANATION FOR CHANGE: As currently drafted, this proposed rule does not state clearly the procedure for reconsidering an Admonition. The new proposed language tracks the procedures already used effectively in the First Department, except that it provides for personal appearances rather than a submission of writings.

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

(2) As may be permitted by law, the complainant shall be provided with a brief description of the basis of any disposition of a complaint by the Committee.

(c) Review.

(1) Letter of Advisement.

~~(i)~~ Within 30 days of the issuance of a Letter of Advisement, the respondent may file a written request for reconsideration with the chair of the Committee, with a copy to the Chief Attorney. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

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

EXPLANATION FOR CHANGE: Because a Letter of Advisement is in the nature of a private non-disciplinary communication intended to educate a respondent against questionable conduct in the future, no "fundamental constitutional right" should be implicated by its issuance, provided that, as we recommend elsewhere, the Letter of Advisement remains private and will not be used or cited against the respondent in a future proceeding. This additional review process is therefore unnecessary.

(2) Admonition. Within 30 days of the issuance of an Admonition, the respondent may make an application to the Court, on notice to the Committee, to vacate the Admonition. Upon such application, the Court may consider the entire record and take whatever action it deems appropriate, including, if warranted, referral of the matter to the Committee for commencement of proceedings pursuant to section III.

EXPLANATION FOR CHANGE: The additional language makes clear what the proposed rule already permits; namely, that the Court can, in response to an application to vacate, grant the application but order the commencement of formal proceedings, which could conceivably result in a public sanction.

(3) Review of Dismissal or Declination to Investigate. Within 30 days of the issuance of notice to a complainant of a Chief Attorney's decision declining to investigate a

complaint, or of a Committee's dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.

(4) As may be permitted by law, the respondent and the complainant shall be provided with a brief description of the basis of disposition of any review sought or objection submitted pursuant to this section.

III.

Proceedings in the Appellate Division

1. Commencement; Procedure

(a) Procedure for formal disciplinary proceedings in the Appellate Division.

(1) Formal disciplinary proceedings shall be deemed special proceedings within the meaning of CPLR Article 4, and shall be conducted in a manner consistent with the rules of the Court, the rules and procedures set forth in this Part, and the requirements of Judiciary Law §90. There shall be a notice of petition and petition, which the Committee shall serve upon the Respondent in a manner consistent with Judiciary Law §90(6). Respondent shall file an answer to the petition within 20 days.~~, an answer, and a reply if appropriate.~~ No other pleadings, or amendment or supplement of pleadings, shall be permitted without leave of the Court. All pleadings shall be filed with the Court. Upon receipt of the statement described in section III.1.(a)(3), the Court shall, where appropriate, appoint a Referee at random from a list of qualified persons maintained by the Clerk of the Court. ~~The Court shall permit or require such appearances as it deems necessary in each case.~~

EXPLANATION FOR CHANGE: A respondent's time to answer the petition should be stated explicitly. Replies, which are rarely if ever done now, are unnecessary. There should be a clear provision setting forth when and how a Referee will be appointed.

(3)~~2~~) Statement of Disputed and Undisputed Facts. Within 3~~2~~0 days after service of the answer ~~or, if applicable, a reply,~~ each party shall file with the Court a statement of facts that identifies those allegations that the party contends are undisputed and those allegations that the party contends are disputed and for which a hearing is necessary. In the alternative, a party may file a statement advising the Court that the pleadings raise no issue of fact requiring a hearing, or the parties may jointly file a stipulation of disputed and undisputed facts.

EXPLANATION FOR CHANGE: The headnote for this subdivision should reflect that the "Statement" will relate to both disputed and undisputed facts. The parties should have 30 days to prepare the Statement in view of our recommendation that the parties exchange initial disclosures 14 days after an answer is filed. To ensure that the Rules are ordered chronologically, this subdivision should appear below the subdivision immediately below.

(2)~~3)~~ Disclosure Concerning Disputed Facts. Except as otherwise ordered by the Court, the Chief Counsel and respondent ~~a party~~ must, within 14 days after an answer is filed, ~~no later than 14 days after filing a statement of facts with the Court as required by section III.l(a)(2) of these rules,~~ provide to each other ~~any other party~~ a written list of ~~disclosure concerning the~~ allegations that each intends to prove or disprove ~~the party contends are disputed~~. The disclosure shall identify the following:

EXPLANATION FOR CHANGE: The proposed changes clarify that initial disclosures should be made at the outset, before the Statement of Disputed and Undisputed Facts is prepared.

(i) the name of each individual likely to have relevant and discoverable information that the disclosing party may use to support or contest the disputed allegation and a general description of the information likely possessed by that individual; and

(ii) a copy of each document that the disclosing party has in its possession or control that the party may use to support or contest the allegation, unless copying such documents would be unduly burdensome or expensive, in which case the disclosing party may provide a description of the documents by category and location, together with an opportunity to inspect and copy such documents.

(4) Discipline by Consent.

(i) At any time after the filing of the petition with proof of service, the parties may file a joint motion with the Court requesting the imposition of discipline by consent. The joint motion shall include:

(1) a stipulation of facts;

(2) the respondent's conditional admission of the acts of professional misconduct and the specific rules or standards of conduct violated;

(3) any relevant aggravating and mitigating factors, including the respondent's prior disciplinary record; and

(4) the agreed upon discipline to be imposed, which may include monetary restitution authorized by Judiciary Law § 90(6-a).

(ii) The joint motion shall be accompanied by an affidavit of the respondent acknowledging that the respondent:

(1) conditionally admits the facts set forth in the stipulation of facts;

(2) consents to the agreed upon discipline;

(3) gives the consent freely and voluntarily without coercion or duress; and

(4) is fully aware of the consequences of consenting to such discipline.

(iii) Notice of the joint motion, without its supporting papers, shall be served upon the referee, if one has been appointed, and all proceedings shall be stayed pending the Court's determination of the motion. If he motion is granted, the Court shall issue a decision imposing discipline upon the respondent based on the stipulated facts and as agreed upon in the joint motion. If the motion is denied, the conditional admissions shall be deemed withdrawn and shall not be used against the respondent, Committee or any other party in the pending proceeding or any other proceedings.

(b) Disposition by Appellate Division.

(1) Hearing. Following his or her appointment, ~~Upon application of any party, or on its own motion, the Court may refer a formal disciplinary proceeding to a referee for a hearing on any issue that the Court deems appropriate. T~~the Rreferee may grant requests for additional disclosure as justice may require, including examinations under oath of witnesses. Charges must be proven by a preponderance of the evidence and the rules of evidence applicable to CPLR Article 4 proceedings shall apply. Unless otherwise directed by the Court, the Rreferee shall complete the hearing within 60 days following the date of the entry of the order of reference, and shall, with 45 days of any ~~following~~ post-hearing submissions, file with the Court a written report setting forth the Rreferee's findings and recommendations. Within 30 days of the parties' receipt of the Referee's findings and recommendations, the Chief Counsel shall file a motion with the Court to ~~The parties may make such motions to~~ affirm or disaffirm the Rreferee's report ~~as permitted by the Court~~. The respondent shall be afforded an opportunity to oppose or consent to the Chief Counsel's motion to affirm or disaffirm. The timing of the respondent's submission shall be governed by the control date of the motion.

EXPLANATION FOR CHANGE: These amendments clarify the procedures for the hearing and set forth appropriate time limits. The standard of proof and rules of evidence should be expressly stated. Finally, to improve the current system, which now incentivizes parties to race to file a motion to affirm/disaffirm in order to give themselves a reply opportunity, the Chief Counsel, as the party with the burden of proof, should be designated to make the first motion.

(2) Discipline. In presenting arguments on the issue of appropriate discipline for misconduct, the parties may cite any relevant factor, including but not limited to the nature of the misconduct, aggravating and mitigating circumstances, and the parties' contentions regarding the appropriate sanction under the American Bar Association's Standards for Imposing Lawyer Sanctions and applicable case law. Upon a finding that any person covered by these rules has committed professional misconduct, the Court may impose discipline or take other action that is authorized by law and, in the discretion of the Court, is appropriate to protect the public, preserve the reputation of the bar and deter others from committing similar misconduct.

EXPLANATION FOR CHANGE: In deciding an appropriate measure of discipline, the Court's prior cases should be at least as persuasive as the ABA Standards.

2. Applications and Motions to the Appellate Division

Unless otherwise specified by these rules, applications and motions shall be made in accordance with the rules of the Court in which the proceeding is pending.

3. Interim Suspension While Investigation or Proceeding is Pending

(a) A respondent may be suspended from practice on an interim basis during the pendency of an investigation or proceeding on application or motion of a Committee, following personal service upon the respondent, or by substitute service in a manner approved by the Presiding Justice, and upon a finding by the Court that the respondent has engaged in conduct immediately threatening the public interest. Such a finding may be based upon: (1) the respondent's default in responding to a petition, notice to appear for formal interview, examination, or pursuant to subpoena under these rules; (2) the respondent's admission under oath to the commission of professional misconduct; (3) the respondent's failure to comply with a lawful demand of the Court or a Committee in an investigation, charges or proceeding under these rules; or (4) the respondent's willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, judgment, or other clear and convincing evidence. The Court may additionally suspend a respondent based on other uncontroverted evidence of professional misconduct that threatens the public interest ~~as justice may require~~.

EXPLANATION FOR CHANGE: The "as justice may require" standard is too vague. Interim suspensions should be reserved for situations where the respondent threatens the public interest.

(b) Unless otherwise ordered by the Court, a~~A~~n application for suspension pursuant to section III.3(a)~~this rule~~ shall ~~may~~ provide notice that a respondent who is suspended under this rule and who has failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of the order of suspension may be disbarred by the Court without further notice.

EXPLANATION FOR CHANGE: The amendment clarifies that the notice provision applies only to interim suspension motions. Notice should be required in every case unless the Court orders otherwise.

(c) Any order of interim suspension entered by the Court shall set forth the basis for the suspension and provide the respondent with an opportunity for a post-suspension hearing, which shall be expedited.

EXPLANATION FOR CHANGE: Interim suspension is a drastic measure and should be followed by a prompt hearing.

(d) An order of interim suspension together with any decision issued pursuant to this subdivision shall be deemed a public record. The papers upon which any such order is based shall be deemed confidential pursuant to Judiciary Law §90(10).

4. Resignation While Investigation or Proceeding is Pending

(a) A respondent may apply to resign by submitting to a Court an application in the form prescribed by the Court, with proof of service on the Committee, setting forth the nature of the charges or the allegations under investigation and attesting that:

(1) the proposed resignation is rendered voluntarily, without coercion or duress, and with full awareness of the consequences, and that the Court's approval of the application shall result in the entry of an order disbarring the respondent and striking the respondent's name from the roll of attorneys;

~~(2) the respondent admits the charges or allegations of misconduct;~~

(23) the respondent cannot successfully defend against the charges or allegations of misconduct; and

EXPLANATION FOR CHANGE: A statement by the respondent that he or she cannot defeat the charges has the same value for disciplinary purposes as an express admission of guilt.

(34) when the charges or allegations include the willful misappropriation or misapplication of funds or property, the respondent consents to the entry of an order of restitution.

(b) Upon receipt of an application for resignation, and after affording the Committee an opportunity to respond, the Court may accept the resignation and remove the respondent from office pursuant to Judiciary Law § 90(2).

5. Diversion to a Monitoring Program

(a) When in defense or as a mitigating factor in an investigation or formal disciplinary charges, the respondent raises a claim of impairment based on alcohol or substance abuse, depression or other mental health issues, the Court, upon application of any person or on its own motion, may stay the investigation or proceeding and direct the respondent to complete an appropriate treatment and monitoring program approved by the Court. In making such a determination, the Court shall consider:

(1) the nature of the alleged misconduct;

(2) whether the alleged misconduct occurred during a time period when the respondent suffered from the claimed impairment; and

(3) whether diverting the respondent to a monitoring program is in the public interest.

(b) Upon submission of written proof of successful completion of the monitoring program, the Court shall ~~may~~, absent compelling circumstances, direct the discontinuance ~~or resumption~~ of the investigation, charges or proceeding, or take other appropriate action. In the event the respondent fails to comply with the terms of a Court-ordered monitoring program, or the respondent commits additional misconduct during the pendency of the investigation or proceeding, the Court may, after affording the parties an opportunity to be heard, rescind the order of diversion and direct resumption of the disciplinary charges or investigation.

EXPLANATION FOR CHANGE: As currently worded, the Rule suggests to respondents that, even if they do everything required (including paying all costs), the Court might, for any reason, decide to continue prosecuting them. The proposed change encourages use of diversion by making clear that successful completion of a monitoring program shall normally result in abatement of an ongoing disciplinary matter.

(c) All aspects of a diversion application or a respondent's participation in a monitoring program pursuant to this rule and any records related thereto are confidential or privileged pursuant to Judiciary Law§§ 90 (10) and 499.

(d) Any costs associated with a respondent's participation in a monitoring program pursuant to this section shall be the responsibility of the respondent.

6. Attorneys Convicted of a Crime

(a) An attorney to whom the rules of this Part shall apply who has been found guilty of any crime in a court of the United States or any state, territory or district thereof, or foreign county, whether by plea of guilty or nolo contendere, or by verdict following trial, shall, within 30 days thereof notify the Committee having jurisdiction pursuant to section II.I(b) of these Rules of the fact of such adjudication. Such notification shall be in writing and shall be accompanied by a copy of any judgment, order or certificate of conviction memorializing such finding of guilt. The attorney shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

EXPLANATION FOR CHANGE: "Foreign country" should be added to make this subdivision consistent with the proposed definition of "foreign jurisdiction" above.

(b) Upon receipt of proof that an attorney has been found guilty of any crime described in subdivision (a) of this section, the Committee shall investigate the matter and proceed as follows:

(1) The Committee concludes that the crime in question is a felony or serious crime as those terms are defined in Judiciary Law § 90(4), it shall promptly apply to the Court for an order (i) striking the respondent's name from the roll of attorneys; or (ii) suspending the respondent pending further proceedings pursuant to these rules and issuance of a final order of disposition.

(2) If the Committee concludes that the crime in question is not a felony or serious crime, it may nonetheless take any action it deems appropriate pursuant to section II of these Rules.

(c) Upon application by the Committee, and after the respondent has been afforded an opportunity to be heard on the application, including any appearances that the Court may direct, the Court shall proceed as follows:

(1) Upon the Court's determination that the respondent has committed a felony within the meaning of Judiciary Law§ 90(4)(e), the Court shall strike the respondent's name from the roll of attorneys.

(2) Upon the Court's determination that the respondent has committed a serious crime within the meaning of Judiciary Law§ 90(4)(d),

(i) the Court may direct that the respondent show cause why a final order of suspension, censure or removal from office should not be made; and

(ii) the Court may suspend the respondent pending final disposition unless such a suspension would be inconsistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice; and

(iii) the Court, upon the request of the respondent, shall refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and

(iv) the Court, upon the request of the Committee or upon its own motion, may refer the matter to a referee or judge appointed by the Court for hearing, report and recommendation; and

(v) after the respondent has been afforded an opportunity to be heard, including any appearances that the Court may direct, the Court shall impose such discipline as it deems proper under the circumstances.

(3) Upon the Court's determination that the respondent has committed a crime not constituting a felony or serious crime, it may remit the matter to the Committee to take any action it deems appropriate pursuant to section II of these Rules, or direct the commencement of a formal proceeding pursuant to section III of these Rules.

(d) A certificate of the conviction of a respondent for any crime shall be conclusive evidence of the respondent's guilt of that crime in any disciplinary proceeding instituted against the respondent based on the conviction. At a hearing held pursuant to section III.6(c)(2)(iii) or (iv), the respondent may not introduce evidence in mitigation that is inconsistent with the elements of the respondent's conviction unless it is first established that the evidence was unavailable at or before the time of the conviction.

EXPLANATION FOR CHANGE: This proposed amendment would promote fairness by allowing a respondent to cite new evidence in mitigation in the rare instance where the evidence was not available at the time of conviction.

(e) Applications for reinstatement or to modify or vacate any order issued pursuant to this section shall be made pursuant to section IV.2 of these Rules.

(f) Absent compelling circumstances, pendency of an appeal shall not be grounds for postponing a determination of discipline under this subdivision.

EXPLANATION FOR CHANGE: This additional provision makes explicit that, while a certificate of conviction is conclusive, an imminent determination of a compelling appeal might provide a fair ground for a short postponement of proceedings.

7. Discipline for Misconduct in Another Jurisdiction

(a) Upon application by a Committee containing proof that a person covered by these rules has been disciplined by a foreign jurisdiction, the Court shall direct that person to demonstrate, on terms it deems just, why discipline should not be imposed in New York for the underlying misconduct.

(b) The respondent may file an affidavit stating defenses to the imposition of discipline and raising any mitigating factors. Unless unavailable to the respondent at the time discipline in the foreign jurisdiction was imposed, the affidavit may recite only facts pertaining to underlying conduct that were previously raised in the foreign disciplinary proceeding. Only the following defenses may be raised:

EXPLANATION FOR CHANGE: This provision seeks to ensure that respondents do not seek to rely on alleged facts that could have been cited in the prior proceeding unless such facts were then unknown.

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

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the respondent's misconduct; or

(3) that the misconduct for which the respondent was disciplined in the foreign jurisdiction does not constitute misconduct in New York.

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

there was insufficient proof that the respondent committed the misconduct, or that the imposition of discipline would be unjust.

(d) Any attorney to whom these rules shall apply who has been disciplined in a foreign jurisdiction shall, within 30 days after such discipline is imposed, advise the appropriate Court (as described in section 11.1(b) of these rules) and Committee of such discipline. Such notification shall be in writing and shall be accompanied by any judgment, order or certificate memorializing the discipline imposed. The respondent shall thereafter provide the Committee with any further documentation, transcripts or other materials the Committee shall deem necessary to further its investigation.

8. Attorney Incapacity

(a) ~~Upon application by a Committee that includes proof of a judicial determination that a respondent is in need of involuntary care or treatment in a facility for the mentally disabled, or is the subject of an order of incapacity, retention, commitment or treatment pursuant to the Mental Hygiene Law, T~~the Court may enter an order immediately suspending the respondent from the practice of law upon application by a Committee containing sufficient proof that:

(1) the respondent has been adjudicated an incompetent person or a person in need of a guardian within the meaning of Mental Hygiene Law Article 81; or

(2) a Temporary or Permanent Guardian has been appointed for the respondent pursuant to Mental Hygiene Law Article 81; or

(3) a court of competent jurisdiction has rendered a factual determination that the respondent is mentally incompetent, incapacitated, is in need of involuntary care or treatment, or has otherwise ordered the respondent's retention or commitment for treatment.

~~.~~The Committee shall serve a copy of the order upon the respondent, a Temporary or Permanent Gguardian appointed on behalf of the respondent or upon the director of the appropriate facility where the respondent resides, as directed by the Court.

EXPLANATION FOR CHANGE: These amendments are consistent with the substantive laws, procedure and terminology used in guardianship proceedings pursuant to Mental Hygiene Law Article 81.

(b) At any time during the pendency of a disciplinary proceeding or an investigation conducted pursuant to these Rrules, the Committee, or the respondent, may submit an application ~~apply~~ to the Court for a stay of the proceedings and an order immediately suspending ~~determination that~~ the respondent ~~is incapacitated~~ from practicing law by reason of incapacity due to mental disability or condition, alcohol or substance abuse, or any other mental or emotional condition that detrimentally impacts ~~renders~~ the respondent's ability ~~incapacitated from~~ to practice~~ing~~ law. Such~~A~~ applications by the respondents shall include medical proof of the respondent's alleged ~~demonstrating~~ incapacity. The Court may appoint a medical expert to examine the respondent and render a report. Upon a finding by ~~When~~ the Court ~~finds~~ that a

respondent lacks mental capacity to ~~is incapacitated from~~ practice~~ing~~ law, the Court shall enter an order immediately suspending the respondent from the practice of law and may stay the pending proceeding or investigation.

EXPLANATION FOR CHANGE: See the comments to subsection (a) immediately above.

IV.

Post-Disciplinary Proceedings

1. Conduct of Disbarred, Suspended or Resigned Attorneys

(a) Prohibition Against Practicing Law. Attorneys disbarred, suspended or resigned from practice shall comply with Judiciary Law§§ 478,479,484 and 486.

(b) Notification of Clients. Within 10 days of the effective date of an order of~~When a respondent is~~ disbarment~~red~~, suspension~~ded~~ from the practice of law or removal~~ed~~ from the roll of attorneys after resignation, the respondent shall ~~promptly~~ notify, by ~~registered or~~ certified mail and, where practical, electronic mail, each client, ~~and~~ the attorney for each party in any pending matter, the court in any pending matter and the Office of Court Administration for each action where a retainer statement has been filed pursuant to court rules. The notice shall state that the respondent is unable to act as counsel due to disbarment, suspension or removal from the roll of attorneys. A notice to a client shall advise the client to obtain new counsel. A notice to counsel for a party in a pending action, or to the Office of Court Administration in connection with an action where a retainer statement has been filed pursuant to court rule, shall include the name and address of the respondent's client. Communications to the court shall request immediate leave to withdraw as counsel for the client.

EXPLANATION FOR CHANGE: These amendments specify a time limit for the notices, delete "registered" mail as a means of delivering notices (insofar as that method is now rarely used), add email as an additional means of communication where practical, and add the court as a recipient of the notice while requiring the disbarred/suspended attorney to move to withdraw in conformance with the Rules of Professional Conduct.

(c) Duty to Return Property and Files. Within 30 days after being served with the order of suspension or disbarment, the respondent shall deliver to all clients or third parties, or to a successor attorney designated by such clients or third parties, all money and property (including legal files) in the possession of the respondent to which such clients or third parties are entitled.

~~(d) Duty to Withdraw From Pending Action or Proceeding. If a client in a pending action or proceeding fails to obtain new counsel within 30 days following entry of the order of disbarment, suspension or removal from the roll of attorneys, the respondent shall move, in the court where the action or proceeding is pending, for permission to withdraw as counsel.~~

EXPLANATION FOR CHANGE: This subdivision is not necessary in view of the proposed change to subdivision (b) above.

(e) Discontinuation of Attorney Advertising. Within 30 days after being served with the order of suspension or disbarment, the respondent shall discontinue all public and private notices through advertising, office stationery and signage, email signatures, voicemail messages, social media, and other methods, that assert that the respondent is authorized to ~~may~~ engage in the practice of law.

EXPLANATION FOR CHANGE: The proposed language updates and clarifies the draft Rule.

(f) Forfeiture of Secure Pass. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys ~~after resignation,~~ shall immediately surrender to the Office of Court Administration any Attorney S~~s~~ecure P~~p~~ass issued to him or her.

EXPLANATION FOR CHANGE: The stricken language is confusing and redundant. The reference to a "secure pass" should precisely state its actual title.

(g) Affidavit of Compliance. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys after resignation, shall file with the Court, no later than 45 days after being served with the order of disbarment, suspension or removal from the roll of attorneys, an affidavit showing a current mailing address for the respondent and that the respondent has complied with the order and these rules. The affidavit shall be served on the Committee and proof of service shall be filed with the Court.

(h) Compensation. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys ~~after resignation~~ may not share in any fee for legal services rendered by another attorney during the period of disbarment, suspension or removal from the roll of attorneys but may be compensated ~~on a quantum meruit basis~~ for services rendered prior to the effective date of the disbarment, suspension or removal from the roll of attorneys. On motion of the respondent, with notice to the client, the amount and manner of compensation shall be determined by the court or agency where the underlying action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.

EXPLANATION FOR CHANGE: The court presiding over the matter where the respondent provided pre-disbarment or pre-suspension services should have discretion to award a contingency fee under appropriate circumstances. See also subdivision (f) above.

(i) Required Records. A respondent who has been disbarred, suspended from the practice of law or removed from the roll of attorneys ~~after resignation~~ shall keep and maintain all electronic and hardcopy records of the respondent's compliance with this rule so that, upon any subsequent proceeding instituted by or against the respondent, proof of compliance with this rule and with the disbarment or suspension order or with the order accepting resignation will be available.

EXPLANATION FOR CHANGE: The new proposed language is more specific, mandatory and inclusive. See also subdivision (f) above.

2. Reinstatement of Disbarred or Suspended Attorneys

(a) Upon motion by a respondent who has been disbarred, suspended, or otherwise removed from the roll of attorneys for any reason other than ~~resignation for~~ a non-disciplinary reasons~~,~~ with notice to the Committee and the Lawyers' Fund for Client Protection, and following such other proceedings as the Court may direct, the Court may issue an order reinstating such respondent upon a showing, by clear and convincing evidence, that: the respondent has complied with the order of disbarment, suspension or the order removing the respondent from the roll of attorneys; the respondent has complied with the rules of the court during the period of disbarment, suspension or resigation; the respondent has the requisite character and fitness to practice law; and it would be in the public interest to reinstate the respondent to the practice of law.

EXPLANATION FOR CHANGE: The new language clarifies the Rule.

(b) Necessary papers. Papers on an application for reinstatement of a respondent who has been disbarred or suspended for more than six months shall include a copy of the order of disbarment or suspension, or the order striking the respondent from the roll of attorneys, and any related decision; a completed questionnaire in the form included in Appendix C to these rules; proof that the respondent has, no more than one year prior to the date the application is filed, successfully completed the Multistate Professional Responsibility Examination described in 22 NYCRR § 520.9. After the application has been filed, the Court may deny the application with leave to renew upon the submission of proof that the respondent has successfully completed the New York State Bar Examination described in 22 NYCRR § 520.8, or a specified requirement of continuing legal education, or both. A respondent who has been suspended for a period of six months or less shall not be required to submit proof that the respondent has successfully completed the Multistate Professional Responsibility Examination, unless otherwise directed by the Court.

(c) Time of application

(1) A respondent disbarred by order of the Court for misconduct, or stricken from the roll of attorneys for any reason other than resignation for non-disciplinary reasons may apply for reinstatement to practice after the expiration of seven years from the entry of the order of disbarment or the order striking the attorney's name from the roll of attorneys.

(2) A suspended respondent may apply for reinstatement after the expiration of the period of suspension or as otherwise directed by the Court.

(d) Respondents suspended for a fixed term of six months or less. Unless the Court directs otherwise, a respondent attorney who has been suspended for six months or less pursuant to

disciplinary proceedings shall be reinstated at the end of the period of suspension upon an order of the Court. No more than thirty days prior to the expiration of the term of suspension the respondent must file with the Court and serve upon the Committee an application for reinstatement together with an affidavit stating that the respondent has fully complied with the requirements of the suspension order and has paid any required fees and costs. Within thirty days of the date on which the application was served upon the Committee, or within such longer time as the Court may allow, the Committee may file an affidavit in opposition.

(e) The Court may establish an alternative expedited procedure for reinstatement of attorneys suspended for violation of the registration requirements set forth in Judiciary Law §468-a.

3. Reinstatement of Incapacitated Attorneys

(a) Time of application. A respondent suspended on incapacity grounds may apply for reinstatement at such time as the respondent is no longer incapacitated from practicing law.

(b) Necessary papers. Papers on an application for reinstatement following suspension on incapacity grounds shall include: a copy of the order of suspension~~,~~ and any related decision; proof, in evidentiary form, that the incapacity no longer exists, has been removed or no longer adversely impacts the applicant's fitness as a lawyer ~~of a declaration of competency or of the respondent's capacity to practice law~~; a completed questionnaire in a form approved by the Court; a copy of a letter to The Lawyers' Fund for Client Protection notifying the Fund that the application has been filed; and such other proofs as the Court may require. A copy of the complete application shall be served upon the Committee.

EXPLANATION FOR CHANGE: Courts generally do not make declarations of competency, but instead will terminate a guardianship or take other similar steps.

(c) Such application shall be granted by the Court upon showing by clear and convincing evidence that the incapacity that formed the basis of the suspension no longer exists, has been removed or no longer adversely impacts the applicant's fitness as a lawyer. ~~respondent's disability has been removed and the respondent is fit to resume the practice of law.~~ Upon such application, the Court may take or direct such action as it deems necessary or proper for a determination as to whether the respondent's disability has been removed, including a direction of an examination of the respondent by such qualified experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the respondent. In a proceeding under this section, the burden of proof shall rest with the suspended respondent.

EXPLANATION FOR CHANGE: See subdivision (b) immediately above.

(d) Where a respondent has been suspended by an order in accordance with the provisions of section III.8 of these Rules and thereafter, has made the showing required under section IV.3(c) in proceedings duly taken, ~~the respondent has been judicially declared to be competent,~~ the Court may dispense with further evidence that the respondent's disability has been removed and may direct the respondent's reinstatement upon such terms as are deemed proper and advisable.

EXPLANATION FOR CHANGE: See subdivision (b) above.

(e) Waiver of Doctor-Patient Privilege Upon Application for Reinstatement. The filing of an application for reinstatement by a respondent suspended for incapacity shall be deemed to constitute a waiver of any doctor-patient privilege existing between the respondent and any psychiatrist, psychologist, physician, ~~or~~ hospital or other facility who or which has examined or treated the respondent during the period of incapacity~~disability~~. The respondent shall be required to disclose the name of every psychiatrist, psychologist, physician, ~~and~~ hospital or facility by whom or at which the respondent has been examined or treated since the respondent's suspension, and the respondent shall furnish to the Court ~~written consent~~ a HIPAA release to each such professional or facility to divulge such information and records as may be requested by court-appointed experts or by the Clerk of the Court.

EXPLANATION FOR CHANGE: Treatment facilities in addition to hospitals should be included in the waiver and releases should be HIPAA compliant.

(f) The necessary costs and disbursements of an agency, committee or appointed attorney in conducting a proceeding under this section shall be paid in accordance with subdivision 6 of section 90 of the Judiciary Law.

V.

Additional Rules Applicable to Disciplinary Matters

1. Confidentiality

(a) All disciplinary investigations and proceedings shall be kept confidential by Court personnel, Committee members, staff, and their agents.

(b) All papers, records and documents upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any person under these rules are sealed and deemed private and confidential pursuant to Judiciary Law § 90 (10).

(c) All proceeding before a Committee or the Court shall be closed to the public unless the respondent submits to the Court a written waiver of confidentiality and there exists no due cause for closing the hearing notwithstanding the waiver, or the Court issues~~absent~~ a written order pursuant to Judiciary Law § 90(10) ~~of the Court~~ opening the proceedings in whole or in part.

EXPLANATION FOR CHANGE: In *Matter of Capoccia*, 59 N.Y.2d 549 (1983), the Court of Appeals ruled that upon "a duly executed waiver of confidentiality by th[e] attorney and his demand therefor, the hearings in his disciplinary proceeding must be made open to the public in the absence of a determination by the Appellate Division that for due cause demonstrated the hearings should be closed in whole or in part." The new proposed language tracks the holding in *Capoccia*, which remains controlling decisional law in New York.

(d) Application to Unseal Confidential Records or for Access to Closed Proceedings. Unless provided for elsewhere in these Rules, an application pursuant to Judiciary Law §90(10) to unseal confidential documents or records, for access to proceedings that are closed under these rules, shall be made to the Court and served upon other persons or entities as the Presiding Justice may direct, if any, and shall specify:

(1) the nature and scope of the inquiry or investigation for which disclosure is sought;

(2) the papers, records or documents sought to be disclosed, or the proceedings that are sought to be opened; and

(3) other methods, if any, of obtaining the information sought, and the reasons such methods are unavailable or impractical.

(e) Upon written request of a representative of The Lawyers' Fund for Client Protection ("Fund") certifying that a person or persons has filed a claim or claims seeking reimbursement from the Fund for the wrongful taking of money or property by any person who has been disciplined by the Court, the Committee is authorized to disclose to the Fund such information as it may have on file relating thereto.

2. Abatement; Effect of Pending Civil or Criminal Matters; Restitution

(a) Any person's refusal to participate in the investigation of a complaint or related proceeding shall not require abatement, deferral or termination of such investigation or proceeding.

(b) The acquittal of respondent on criminal charges, or a verdict, judgment, settlement or compromise in a civil litigation involving material allegations substantially similar to those at issue in the disciplinary matter, shall not require termination of a disciplinary investigation.

(c) The restitution of funds that were converted or misapplied by a person covered by these rules shall not bar the commencement or continuation of a disciplinary investigation or proceeding.

3. Appointment of Attorney to Protect Interests of Clients or Attorney

(a) When an attorney is suspended, disbarred or incapacitated from practicing law pursuant to these rules, or has resigned for disciplinary reasons, or when the Court determines that an attorney is otherwise unable to protect the interests of his or her clients and has thereby placed clients' interests at substantial risk, the Court may enter an order, upon such notice as it shall direct, appointing one or more attorneys to take possession of the attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the clients' interests. An application for such an order shall be by motion, with notice to the Committee, and shall include an affidavit setting forth the relationship, if any, as between the moving party, the attorney to be appointed and the suspended, disbarred or incapacitated attorney.

(b) Compensation. The Court may determine and award compensation and costs to an attorney appointed pursuant to this rule, and may direct that compensation of the appointee and any other expenses be paid by the attorney whose conduct or inaction gave rise to these expenses.

(c) Confidentiality. An attorney appointed pursuant to this rule shall not disclose any information contained in any client files without the client's consent, except as is necessary to carry out the order appointing the attorney or to protect the client's interests.

4. Resignation for Non-Disciplinary Reasons; Reinstatement

(a) Resignation of attorney for non-disciplinary reasons.

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

(2) When the Court determines that an attorney is eligible to resign for non-disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and note that the resignation is voluntary and not a consequence of discipline. ~~stating the non-disciplinary nature of the resignation~~.

EXPLANATION FOR CHANGE: The proposed language is confusing. Unless discipline is involved, no public policy purpose is served by stating the "nature" of the resignation.

(b) Reinstatement. An attorney who has resigned from the bar for non-disciplinary reasons may apply for reinstatement by filing with the Court an affidavit or affirmation in a form approved by the Court. The Court may grant the application and restore the attorney's name to the roll of attorneys; or deny the application with leave to renew upon proof that the applicant has successfully completed the Multistate Professional Responsibility Examination described in 22 NYCRR § 520, certain continuing legal education programs described in 22 NYCRR § 1500, or the New York State Bar Examination described in 22 NYCRR § 520.8 of this Title; or take such other action as it deems appropriate.

EXPLANATION FOR CHANGE: Depending on the circumstances presented, the Court could determine that a resigned attorney seeking non-disciplinary reinstatement should re-familiarize him or herself with substantive New York law principles or procedures.

5. Volunteers/Indemnification

Members of the committees, as well as referees, bar mediators, and pro bono special counsel acting pursuant to duties or assignments under these rules, are volunteers and are expressly authorized to participate in a State-sponsored volunteer program, pursuant to Public Officers Law §17(1).