

RESPONSE BY THE  
NEW YORK STATE  
**COMMISSION ON JUDICIAL CONDUCT**  
TO THE 2009 REPORT OF THE  
TASK FORCE ON JUDICIAL INDEPENDENCE OF THE  
NEW YORK COUNTY LAWYERS' ASSOCIATION



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## **Background**

The New York County Lawyers' Association (NYCLA) created a Task Force on Judicial Independence in 2006.<sup>1</sup> The Task Force held a number of “focus groups with judges” and at least one invitational forum where “judges discussed pressures from the media, judicial administration, institutional players and the New York State Commission on Judicial Conduct” (Rpt. 1).<sup>2</sup>

In 2007, the Task Force established a Subcommittee on the Commission on Judicial Conduct.<sup>3</sup> Over nearly a two-year period, the Subcommittee and the Commission's Administrator met three times and exchanged numerous emails on various rules, policies and procedures of the Commission as to which the Subcommittee was interested.

One valuable interim result of these discussions, at the Subcommittee's suggestion, was the Commission's publication in 2008 of its Policy Manual on its website. These policies, coupled with its promulgated Operating Procedures and Rules (22 NYCRR Part 7000, which is also on the website), constitute an extensive compilation of Commission practices. The Commission agreed with the Subcommittee's suggestion that they should be more widely available to judges and lawyers.

The Task Force and Subcommittee submitted a Report on the New York State Commission on Judicial Conduct to the NYCLA Board of Directors, which approved it in September and released it in November 2009.

The Commission agrees with some of the NYCLA recommendations and disagrees with others, as described more fully in the charts below.

## **The Commission's Mandate and Perspective**

The New York State Commission on Judicial Conduct is the independent agency established by the State Constitution to review complaints of misconduct against judges and justices of the State Unified Court System and, where appropriate, render public determinations of admonition, censure or removal from office, or retirement for disability. There are approximately 3,500 judges and justices in the system. The Commission receives and processes over 1,800 complaints per year.

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<sup>1</sup> The Task Force consists of 15 members and is co-chaired by Betty Weinberg Ellerin (retired Justice of the Appellate Division, First Department) and Norman L. Reimer (Executive Director of the National Association of Criminal Defense Lawyers and a past president of NYCLA).

<sup>2</sup> References to “Rpt.” are to pages in NYCLA's September 2009 report on the Commission.

<sup>3</sup> The subcommittee consists of six members and is co-chaired by Marcy L. Kahn (Justice of the Supreme Court, Manhattan) and Klaus Eppler (Proskauer Rose), a past president of NYCLA.

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The Commission's objective is to enforce high standards of conduct for judges, who must be free to act independently, on the merits and in good faith, but also must be held accountable should they commit misconduct. By absorbing, addressing and often defusing the intense criticism leveled at the judiciary by complainants, and disciplining those relatively few judges whose conduct demands it, the Commission protects the independence of the judicial branch to preside over cases and render decisions free from untoward influences.

While both the Commission and NYCLA are devoted to judicial independence, they understandably have different perspectives.

First, the Commission's constituency is not the judiciary but the public. The Commission endeavors to serve the public interest in a dynamic tripartite system of government in which the judiciary is independent yet operates ethically and within the rules. The Commission was created in 1974 because judicial discipline, which up to then had been the sole province of the Judicial Branch, was virtually nonexistent. The now-defunct Court on the Judiciary, for example, had convened only five times in the 25 years preceding the Commission's creation. The Legislature and three Governors (Nelson Rockefeller, Malcolm Wilson and Hugh Carey) instituted a more vigorous system of judicial ethics oversight and accountability, which was ratified at the ballot box in a constitutional amendment overwhelmingly approved by the public and made effective on April 1, 1978.

The test for changing the Commission system or procedures should be not what would please or solely benefit the judiciary but what would be consistent with the public interest in a fair but rigorous system of ethics enforcement. It appears in many instances that the NYCLA recommendations emphasize the judges' individual interests at the expense of the larger public values the Commission must serve.

Second and equally important, the Commission's procedures, by and large, have stood both the tests of time and judicial/appellate review, having been subjected to and withstood more than 100 procedural challenges over the years. Commission procedures, based on the State Administrative Procedures Act and appropriately adapted to meet the unique circumstances of its constitutional and statutory enactments, should not be changed unless clearly shown to be unfair, inconsistent with due process or not in service of the Commission's underlying mission.

While some recommendations in the NYCLA report are eminently reasonable, others do not meet one or both of the tests above.

## **The Role of the Court of Appeals**

There is no greater advocate for judicial independence than the New York State Court of Appeals, which has authority to review any Commission disciplinary determination, at the disciplined judge's request. The Court's authority over the Commission is a great safeguard to the fairness not only of the Commission's procedures and decisions but of its basic structure.

The Court has heard 91 such reviews.<sup>4</sup> A number of Commission procedures have been addressed and resolved in the Commission's favor by the Court of Appeals.<sup>5</sup> The Court has accepted 75 Commission determinations and modified 14 others. While on 12 occasions it reduced and on two occasions it increased the discipline imposed by the Commission, only once did the Court reject a Commission determination outright – in *Matter of Greenfield*, 76 NY2d 293 (1990), involving unreasonable delay in rendering decisions. However, that decision was effectively reversed by the Court's ruling in *Matter of Gilpatric*, 13 NY3d 586 (2009), which held that the *Greenfield* doctrine was “not workable” and affirmed the Commission's jurisdiction in delay cases.

Although the subject was discussed between NYCLA and the Commission's Administrator, the NYCLA report is silent on whether the Court of Appeals should have authority, on its own motion, to review any Commission disciplinary determination, even if the disciplined judge does not so request it – not only to be in line with the vast majority of states but as a further safeguard to judicial independence, insuring that the state's highest court is the final word on all matters of judicial discipline.

## **Overview of the NYCLA Report**

Although the NYCLA report does not identify the various individuals and constituencies its Task Force consulted on this project – other than the “focus group” of judges in New York City and at least some unnamed lawyers with experience before the Commission and attorney grievance committees<sup>6</sup> – it does not appear that NYCLA consulted with a representative group of upstate practitioners with Commission experience, or civic organizations long interested and experienced in Commission matters, such as the American Judicature Society and the Fund for Modern Courts. It

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<sup>4</sup> A list of the 91 cases, with citations, is available on the Commission's website: [www.scjc.state.ny.us](http://www.scjc.state.ny.us).

<sup>5</sup> For example, in *Matter of Seiffert*, 65 NY2d 278 (1985), the Commission's standard of proof was affirmed. In *Nicholson v. Commission* 50 NY2d 596 (1980) and *Matter of Doe*, 61 NY2d 56 (1984), the Commission's authority to investigate matters bearing a “reasonable relation to the subject matter under investigation” was affirmed. *Id.* at 61. In *Matter of Petrie*, 54 NY2d 807 (1981), the Commission's procedure for summary determination was upheld.

<sup>6</sup> Significantly, the NYCLA report states that these lawyers said Commission procedures “compare favorably” to attorney grievance committee procedures (Rpt. 12).

apparently did not meet with public officials who have regular interaction with the Commission, or groups of complainants or their attorneys. NYCLA does not appear to have consulted with a representative group of Commission referees, nor did it request copies of any Commission hearing transcripts or referee reports.

The ABA Model Code of Judicial Conduct defines judicial independence as “freedom from influence or controls other than those established by law.” The NYCLA Report is ostensibly intended “to analyze procedures and make recommendations for changes that would promote judicial independence.” However, many of the NYCLA recommendations seem less geared toward promoting the independence of the Judicial Branch and more toward affording judges significantly greater privileges than are the norm in disciplinary proceedings against lawyers, doctors, and other professionals or public officials. For example, it is difficult to understand how the NYCLA recommendation to switch from a single-referee to a 3-referee hearing system would have any impact on judicial independence. Whether one referee or three hear and report to the full Commission seems unlikely to affect any sitting judge’s perception of independence. In any event, while the Commission gives due deference to the referee’s report, it makes its own findings of fact and conclusions of law, pursuant to its constitutional and statutory responsibilities.

Some NYCLA recommendations seem inherently inconsistent. For example, while proposing strict time limits for the completion of investigations, NYCLA also proposes to offer extensive, time-consuming and unprecedented discovery procedures for judges during the investigative phase, virtually guaranteeing delay. Whether or not intended, some of the NYCLA-recommended practices would impede the Commission’s investigation and prosecution of complaints alleging misconduct.

Most of the NYCLA recommendations are presented without context or justification. For example, in proposing that the standard of proof be increased from “preponderance of the evidence” to “clear and convincing,” NYCLA does not identify a single instance in the Commission’s history in which use of the “preponderance” standard resulted in an injustice. It does not articulate how such a proposed change would enhance public confidence in either the judiciary or the disciplinary process. Nor does it rebut the unequivocal and unanimous declaration of the Court of Appeals that “preponderance” is the appropriate standard. *Matter of Seiffert*, 65 NY2d 278 (1985). (Excerpts from *Seiffert* are reproduced in the charts below.)

In proposing that Commission referees undergo training, and commenting in the body of its report about “potentially untrained” referees, NYCLA provides no context or evidence that the referees are incapable or unsuited for this task. As noted in the comments below, the Commission has a roster of approximately 60 referees, including former judges of the Court of Appeals, former presidents of the New York State and New York City Bar Associations and other lawyers and former judges who by any standard are

prominent members of the legal and judicial community and have great skill in conducting disciplinary proceedings. While individual respondent-judges may not always welcome the adverse findings these referees may render, it cannot fairly be said, nor has it been demonstrated, that any hearing presided over by a Commission referee has been unfair to or compromised the rights of a respondent. Indeed, in the course of its study, the NYCLA Task Force did not ask to review a single hearing transcript or referee's report, nor did it produce any examples of deficient or unskilled work by referees.

### **Formal Disciplinary Proceedings: Public or Private?**

There is one important subject the Administrator raised with the Task Force on which the NYCLA report is silent – whether formal judicial disciplinary proceedings should be public at the point of formal charges being instituted. New York is in the minority of states whose entire process is confidential, absent a waiver of confidentiality by the judge.<sup>7</sup>

In pursuit of NYCLA's articulated goal of making the Commission process more transparent, public proceedings – only in those cases where investigation has concluded and the Commission has found reasonable cause to institute formal charges – would seem logical.

The arguments for public proceedings need not be addressed here, insofar as NYCLA did not comment on the subject. The Commission notes, however, that legislation to this effect has been introduced in the Legislature, and debate on this topic among the legal, judicial and civic communities is likely to follow.

### **Commission Comments on Specific NYCLA Recommendations**

In summary form on the following pages, recommendations from the NYCLA report are presented, with side-by-side commentary. They are arranged by the same subcategories used in the NYCLA report: General Issues, Initial Review and Inquiry, Investigative Procedures and Formal Written Complaints.

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<sup>7</sup> The Commission has conducted over 700 formal disciplinary proceedings since 1978. Ten judges have waived confidentiality in the course of those proceedings. Two others waived confidentiality as to investigations.

## GENERAL ISSUES

### 1. Proposal to Separate Investigative and Adjudicative Functions

#### NYCLA Recommendation

Separate the investigative and adjudicative roles of the Commission members. Divide the Commission into rotating panels, where those who decide whether to investigate a particular case would play no role in later adjudicating the case if the matter proceeds to a Formal Written Complaint.

#### Commission Comment

New York is among the 42 states with a unitary judicial commission handling both investigative and adjudicative functions. Those states that separate the functions actually have two independent entities doing the jobs.

By constitutional amendment, New York switched in 1978 from a two-tier system to the unitary system. It would effectively nullify that enactment to create a two-tier system without another constitutional amendment.

According to the American Judicature Society, the argument that it is unfair for the same disciplinary commission to authorize and later adjudicate formal disciplinary charges has been rejected by every state high court that has considered the issue, including New York's, because decisions of the commission are reviewable by the high court.<sup>8</sup>

Nevertheless, it should be noted that the New York Commission in 1978 became the first in the country to bifurcate its staff, establishing the position of Clerk of the Commission. The Clerk plays no role in investigating or prosecuting complaints. The Clerk reports to the Commission, calendars its cases, keeps its

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<sup>8</sup> *In re Hanson*, 532 P.2d 303 (Alaska 1975); *In the Matter of Flournoy*, 990 P.2d 642 (Arizona 1999); *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995); *In re Zoarski*, 632 A.2d 1114 (Connecticut 1993); *In re Kelly*, 238 So. 2d 565 (Florida 1970); *In the Matter of Vaughn*, 462 S.E.2d 728 (Georgia 1995); *In the Matter of Holien*, 612 N.W.2d 789 (Iowa 2000); *In re Rome*, 542 P.2d 676 (Kansas 1975); *In re Bowers*, 721 So. 2d 875 (Louisiana 1998); *In re Diener*, 304 A.2d 587 (Maryland 1973); *In re Chrzanowski*, 636 N.W.2d 758 (Michigan 2001); *Commission on Judicial Performance v. Russell*, 691 So. 2d 929 (Mississippi 1997); *In re Elliston*, 789 S.W.2d 469 (Missouri 1990); *Mosley v. Commission on Judicial Discipline*, 22 P.3d 655 (Nevada 2001); *Friedman v. State of New York*, 249 N.E.2d 369 (New York 1969); *In re Nowell*, 237 S.E.2d 246 (North Carolina 1977); *In re Schenck*, 870 P.2d 185 (Oregon 1993); *In re Pirraglia* (Rhode Island Supreme Court February 28, 2007); *In re Brown*, 512 S.W.2d 317 (Texas 1974); *In re O'Dea*, 622 A.2d 507 (Vermont 1993); *In re Deming*, 736 P.2d 639, *as amended by* 744 P.2d 340 (Washington 1987).

minutes, drafts its decisions, coordinates the Commission's appointment of and communications with referees for formal disciplinary hearings, and otherwise performs the duties of a confidential law clerk, all without the participation of the Administrator and his staff.

While there is philosophical merit to both the unitary and two-tier systems, the NYCLA proposal is not based on any showing that any judge has been disciplined unfairly because of the unitary model or otherwise. Moreover, the proposal is impractical.

Present law reasonably requires a quorum of 8 and the concurrence of 6 Commission members to authorize formal disciplinary charges against a judge. This is both intrinsically fair and protective of the accused judge. Separating the Commission into investigative and adjudicative panels would leave neither group with enough members to vote or adjudicate charges under present law if there were a single vacancy, absence or recusal. While such a proposal might work if the Commission had 20 or 30 members, as some attorney disciplinary committees do, the NYCLA proposal would necessarily relegate this critical charging function to only 3 Commission members. It would require a constitutional amendment to increase the number of Commission members and a statutory amendment to decrease the number of Commission members needed to vote charges.

## **2. Proposal to Replace Single-Referee Hearing System with 3-Referee Panel**

### **NYCLA Recommendation**

Panels of 3 referees should preside over hearings instead of a single referee, with both sides picking one and the Commission picking the third.

[Note. The Commission has since its inception relied on a single-referee model. The Commission – not the Administrator or his staff, and not the respondent-judge – chooses a single referee to preside over an evidentiary disciplinary hearing and submit a report with proposed findings of fact and conclusions of law. Thereafter, the Administrator and the respondent are given the opportunity to address the referee’s report in briefs and oral argument before the Commission. In selecting and communicating with referees, the Commission has the assistance of the Clerk of the Commission – see Item 1 above, regarding the manner in which the staff is bifurcated so as to separate those who perform investigative and prosecutorial functions from the Clerk who assists in the adjudicative function.]

### **Commission Comment**

The NYCLA recommendation, designed on an arbitration model, seems inconsistent with the nature of a disciplinary proceeding, would add scheduling and logistical delays to every proceeding and is contrary to the trend in lawyer discipline.<sup>9</sup> One can only imagine the delay in waiting for 3 referee reports in every case where there is not unanimous agreement on all charges and draft opinions and dissents were circulating among them. Moreover, adopting a 3-referee model would be a costly “fix” to a non-existent problem, as the Commission would have to absorb costs for three referees in every case rather than one – stipend, travel, lodging and expenses, over a longer period of time.

The Commission has a roster of approximately 60 referees, including former judges of the Court of Appeals, former presidents of the New York State and New York City Bar Associations and other lawyers and former judges who by any standard are prominent members of the legal and judicial community. While individual respondents may not always appreciate the adverse findings these referees may render, it cannot fairly be said, nor has it been demonstrated, that any hearing presided over by a Commission referee has been unfair to or compromised the rights of a respondent.

In any event, it is unclear how changing from a 1-referee to a 3-referee hearing system would have any impact on judicial independence, particularly since, in either case, the Commission itself would still be reviewing the referee’s work and rendering decision after hearing directly from the parties, subject to review by the Court of Appeals.

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<sup>9</sup> The First Department’s Disciplinary Committee recently replaced its panel-system with a single-referee system of conducting hearings, dramatically reducing the time it took to complete proceedings.

**3. Proposal to Pay Attorney Fees for Judges**

**NYCLA Recommendation**

Professional Liability Insurance should be provided by OCA for judges against whom investigations or formal disciplinary charges are authorized by the Commission. Alternatively, the Legislature should permit judges to have access under the Public Officers Law to defense services, as do other public officials.

**Commission Comment**

This proposal does not appear to implicate Commission procedures, rules or policies.

Whether judges arrange for liability coverage, purchased as group insurance by participating judges or provided by their membership associations, is largely a matter of their own choosing. The Commission has no philosophical objection. However, the proposal that OCA or some other government entity pay the premiums or otherwise cover the costs, raises serious public policy concerns that should be fully considered. For example:

Under Public Officers Law §17, judges and other public officials are defended by the Attorney General in civil actions, *e.g.* Article 78 proceedings or other lawsuits, arising out of their official acts, but not when the state itself brings the charges, *e.g.* in the form of a criminal indictment or professional disciplinary action. Would it be unique for the state to indemnify judges against *ultra vires* misconduct charges brought against them by the state? Would it matter if the alleged misconduct was on or off the bench or turned out to involve an appropriate exercise of judicial discretion? Would a system of state-paid indemnification include town and village court justices, who make up the majority of the state's judiciary and the Commission's cases, but who are paid by local municipalities, not the state? Would payment of lawyer fees be contingent on the judge being cleared of all wrongdoing, and if so would that render Commission decisions suspect for being inappropriately influenced by the potential economic cost to the judge? Would it matter if the complaint proved to be frivolous or otherwise entirely meritless?

## INITIAL REVIEW AND INQUIRY

### 4. Proposal to Notify a Judge of a Pending New Complaint

#### NYCLA Recommendation

Where pre-investigation *initial review and inquiry* (i.e. clarification) of a new complaint takes more than 120 days, the judge should be notified.

#### Commission Comment

*Initial review and inquiry* consists of pre-investigative steps, primarily undertaken to clarify new complaints so the Commission has an adequate basis on which to decide whether to investigate or dismiss them. 22 NYCRR 7000.1(i). Most new complaints are disposed of within 90 days. The longest clarifications usually result from the need to have transcripts of court proceedings prepared by busy stenographers and forwarded to the Commission. Often such transcripts refute the allegations and the complaints are dismissed without need to inquire of the judge.

For more than 30 years, the Commission has insulated judges from knowledge of such complaints – indeed, as best it can from all complaints which are deemed without merit and dismissed without investigation – because it believes this protects judicial independence. In exercising their daily responsibilities, judges should be free from the unnecessary anxiety of complaints which prove baseless or frivolous. (Approximately 85% of complaints are dismissed without investigation because they either lack merit on their face or are refuted by initial review and inquiry.)

Moreover, it has been the Commission's experience that most judges wish to be insulated from knowledge of dismissed complaints, so that *inter alia* they can honestly say to a screening committee that they are unaware of any complaints against them.

This appears to be a NYCLA proposal that most judges would oppose as potentially and unnecessarily compromising their independence.

## INVESTIGATIVE PROCEDURES

### 5. Proposal to Withhold from the Commission Information Regarding Prior Complaints When It Considers a New Complaint Against the Same Judge

#### NYCLA Recommendation

On complaint summaries to the Commission, no information should be included about dismissed or unrelated complaints, but prior cautions should be listed.

#### Commission Comment

The Commission members see all new complaints, as well as information and material gathered by staff during an initial review and inquiry, as well as a staff summary, analysis and recommendation as to whether or not investigation is warranted. On such summaries, if investigation is recommended, information is included as to prior public discipline against the judge and any confidential cautionary letters previously issued to the judge. Information is also included as to any pending investigation against the judge. No information is included or considered regarding previous complaints against the judge that were dismissed outright. The Commission follows Rule 18 of the ABA Model Rules for Judicial Disciplinary Enforcement.<sup>10</sup>

Among the materials the Commission reviews at every meeting is a status report of every pending matter in the agency, in order to monitor the timeliness and thoroughness of its inquiries.

It may well affect a decision on assigning priorities, moving forward or holding a matter in abeyance, for the Commission to know that other matters on the same judge are pending and may appropriately be consolidated. Often, there would be common witnesses (particularly if court staff had to be interviewed).

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<sup>10</sup> Rule 18: “If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose in any judicial or lawyer disciplinary proceeding against the judge. If additional information becomes known to disciplinary counsel regarding a complaint that has been dismissed before the filing of formal charges, the allegations may be reinvestigated with permission of [the commission or] an investigative panel.”

**6. Proposal to Advise a Judge Promptly of an Investigation**

**NYCLA RECOMMENDATION**

Judges should be advised promptly when the Commission authorizes investigation of a complaint or complaints against them.

**COMMISSION COMMENT**

New York is among the many states that do not automatically notify a judge that investigation of a complaint has been authorized. The judge is only notified if it is determined that his or her response is necessary for the Commission to evaluate the merits of the complaint before rendering decision. Many investigations are closed and the complaints dismissed without need to hear from the judge because the allegations are persuasively refuted by documentary evidence and witness interviews. A judge is always notified and given an opportunity to respond to the complaint before staff recommends a caution or formal charges.

There are a number of reasons for this practice: to protect the integrity of the investigation,<sup>11</sup> to protect the judge from knowledge of complaints that are dismissed without need to inquire of them – and thus promote the independence of the judiciary by insulating it as best as possible from unsubstantiated accusations – and to protect and encourage complainants to come forward, knowing that their complaints will be handled discreetly and that the judge will only be notified if necessary.

In addition, as noted above, it has been the Commission's experience that most judges wish to be insulated from knowledge of dismissed complaints, so that *inter alia* they can honestly say to a screening committee that they are unaware of any complaints against them.

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<sup>11</sup> Unfortunately, the Commission has had experience over the years with judges concealing or altering evidence upon learning that the Commission was investigating. *See, Matter of Marshall*, 8 NY3d 741 (2007).

**7. Proposal to Make More Clear that Judges May Be Represented by Counsel**

**NYCLA RECOMMENDATION**

More extensive notice should be provided advising judges of their right to counsel.

**COMMISSION COMMENT**

It has been the Commission's unvarying practice and policy that a judge may be represented by counsel at any stage of a Commission proceeding, and to so apprise and remind the judge at various points in the investigative and adjudicative processes. Indeed, promulgated Commission rules and published policies, in addressing specific proceedings such as a judge's appearance for testimony during the investigation, refer both directly and indirectly to the right to counsel.

The Commission agrees, however, that a stand-alone universal rule on the right to counsel would be appropriate.

As a corollary, the Commission will also codify its practice of over three decades to require that, when a substantive written response to a Commission inquiry is submitted by a lawyer, the client-judge either co-sign or submit a separate statement indicating s/he has read and adopts the lawyer's response as his or her own. This would avoid the situation where a client subsequently says s/he never saw and does not agree with counsel's letter.

**8. Proposal to Advise a Judge of the Source of the Complaint**

**NYCLA RECOMMENDATION**

The judge should be advised of the source of the complaint, and be given copies of the transcript if there is one.

**COMMISSION COMMENT**

Pursuant to Policy 2.6 in the Commission's published Policy Manual, as a general practice, when a judge is asked to respond in writing to a complaint, a copy of the complaint is enclosed with the inquiry letter.<sup>12</sup> Pursuant to Judiciary Law 44(3), when a judge is called to testify during an investigation, a copy of the complaint is always provided to the judge.

When the Commission has authorized a complaint and investigation on its own motion, pursuant to Judiciary Law 44(2), the Administrator signs and files a complaint. Such an Administrator's Complaint may have been based upon a newspaper article, information discovered in the course of another inquiry, an anonymous but sufficiently detailed complaint, etc.

The Commission has no objection to adopting a corollary policy indicating that, as a general practice, where the judge is provided with an Administrator's Complaint, the judge should also be apprised of the underlying source of the complaint, recognizing that there are times when it is appropriate not to do so. The Commission will amend its Policy Manual to this effect.

As a general practice, when the Commission has a transcript relevant to a particular complaint, such transcript is provided to the judge, and if it is voluminous, specific sections germane to the complaint will be highlighted. The Commission has no objection to articulating this practice in its Policy Manual.

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<sup>12</sup> There are infrequent occasions when withholding the complaint is appropriate at this stage of an inquiry. Such decisions are made on individual basis, such as when the complaint names several judges and premature disclosure to one would compromise the confidentiality of all.

**9. Proposal to Grant Judges Subpoena Power and  
Other “Discovery” Rights During the Investigative Phase**

**NYCLA RECOMMENDATION**

Judges should have subpoena power and extensive discovery rights, and be provided with witness transcripts and other evidence, and sufficient time to conduct their own inquiries, including depositions, before coming in to testify at the Commission during an investigation.

**COMMISSION COMMENT**

Granting such authority to the person being investigated would be unprecedented and contrary to long-established public policy. Such practices are not permitted in lawyer or other professional disciplinary processes. Nor are they permitted in criminal investigations, where the target’s interest – his or her liberty – is arguably the most serious. No disciplinary, regulatory or prosecuting authority is required to give such investigatory power to the target of an inquiry, which would add to an investigation certain procedures that have long been reserved in law to adjudicatory proceedings. No compelling argument has been offered to give such extraordinary opportunities to a judge.

The Commission’s governing statute respects and reinforces this public policy by specifically setting forth what judges should get and when, and by carefully limiting subpoena and investigative power to those under the Commission’s control, *i.e.* the Administrator and referee.

Apart from everything else, this proposal (if adopted) would add many months to every investigation. Moreover, this delay-causing proposal seems incompatible with NYCLA’s proposal to dismiss complaints that are not disposed of within 12 months. (See item 11 below.)

**10. Proposal to Permit Judges to Rebut Staff Investigative Reports**

**NYCLA RECOMMENDATION**

At the conclusion of an investigation, if the staff intends to recommend formal charges or a caution, the judge should be permitted to submit evidence and a statement taking issue with the recommendation.

**COMMISSION COMMENT**

It has been the Commission's unvarying practice over 30 years to afford all judges the opportunity to make statements and submit material during the investigation, before the Commission votes on whether to authorize formal disciplinary charges or a caution. Even judges who were disbarred but declined to leave judicial office were afforded the opportunity to be heard. While this practice is addressed in part in the Commission's Policy Manual, *e.g.* Policy 2.8(2)-(3), and virtually all inquiry letters explicitly invite materials the judge deems relevant, the Commission agrees it would be appropriate to amend the Policy Manual to contain a stand-alone provision to this effect.

NYCLA's proposal to offer the investigated judge an additional opportunity to submit material and rebut a staff recommendation in the investigative phase has no parallel in attorney or other professional disciplinary proceedings. Nor does NYCLA address the logical converse, *i.e.* in cases where staff recommends dismissal of a complaint, giving to the complainant or other aggrieved party the opportunity to argue before the Commission that the judge should be formally charged with misconduct.

**11. Proposal to Dismiss Undisposed Complaints After 12 Months**

**NYCLA RECOMMENDATION**

Complaints not disposed of within 12 months should be dismissed, absent good cause, and the judge should be notified of extensions.

**COMMISSION COMMENT**

This proposal offers a “solution” to what the record suggests is not a “problem.”

The Commission receives between 1,800-1,950 complaints per year.

- Approximately 80% are dismissed within four months, including those in which initial review and inquiry (clarification) is undertaken.
- An additional 5% are dismissed within six months, primarily because trial transcripts and other materials needed for clarification purposes take time to produce and analyze.
- Approximately 15% are investigated. Of these, more than half are dismissed outright; the remainder result in confidential cautions, public discipline or closure when the judge vacates office.

Most investigations are completed within a year. As of February 17, 2010 (the date of this memorandum), only 12 judges had investigations pending more than a year. Another 19 had formal charges voted against them after investigation, where the aggregate time to investigate and prosecute, not unexpectedly, ran beyond a year. Most of these involved complex, voluminous and/or multiple allegations and records. Two have been held in abeyance by virtue of parallel civil or criminal proceedings. Several others were adjourned at the request of the judge or judge’s counsel for a variety of legitimate reasons. Thus, while the Commission processed roughly 5,500 complaints and commenced roughly 800 investigations in the last three years, only 31 judges have matters pending against them more than a year, and 19 of those have been the subject of both investigation and formal charges. In many of these cases, the judges themselves asked for and were granted extensions to prepare their submissions.

**12. Proposal to Codify Respect for Judges**

**NYCLA RECOMMENDATION**

Some judges have expressed the view to NYCLA that inquiry letters from the Commission's staff do not show appropriate respect to the judges. The Commission's Policy Manual should therefore include a provision requiring that "the Commission and its staff's communications to judges accord judges the highest degree of respect" (Rpt. 16).

**COMMISSION COMMENT**

It is the Commission's view that staff communications to judges are respectful.

The Administrator repeatedly asked NYCLA to provide examples, appropriately redacted to conceal judicial identities, in support of this claim that Commission staff was not appropriately respectful. No such examples were ever produced.

A certain tension between the judiciary and the Commission is inevitable, given the Commission's disciplinary enforcement role. While civility is the norm, some judges take offense at being asked to account for their behavior.

Mindful of the potential for hostility, it is the staff's unvarying practice for both a Deputy Administrator and the Administrator to approve all substantive letters to judges. All such letters are appended to staff reports sent to each Commission member, along with the judge's response. The Commission has seen no evidence of disrespect to judges in staff communications to judges.

The Commission's staff endeavors to abide by the same rule applicable to judges – to be patient, dignified and courteous toward all with whom they deal in an official capacity.

**FORMAL WRITTEN COMPLAINTS**

**13. Proposal that Commission Members and Referees Get Formal Training**

**NYCLA RECOMMENDATION**

Formal training should be provided to Commission members and referees. This theme is repeated at various parts of the report, which *e.g.* makes such references as “potentially untrained referee[s]” (Rpt. 7).

**COMMISSION COMMENT**

As noted above, the Commission has a roster of around 60 referees: former judges of the Court of Appeals, former presidents of the New York State and New York City Bar Associations and other lawyers and former judges who by any standard are prominent members of the legal and judicial community. Individual respondents may not welcome the adverse findings these referees may render, but it cannot fairly be said, nor has it been demonstrated, that any hearing presided over by a Commission referee has been unfair to or compromised the rights of a respondent. Indeed, in the course of its study, the NYCLA Task Force did not ask to review a single hearing transcript or referee’s report, nor did it identify any examples of deficient or unskilled work by referees. Still, the Commission monitors its referees carefully, and after every case invites the parties to submit confidential evaluations of the referee’s performance.

Commission members tend to bring with them significant experience in the law and public affairs. The varied membership on the Commission – 4 judges, 5 lawyers and 2 non-lawyers, all accomplished in their fields – insures balance, rigorous give and take, and fair proceedings and decisions that have stood the tests of appeals and time. Veteran members help to acclimate and mentor new members, who are provided with material produced specifically for new Commission members by the American Judicature Society. When resources permit, the Commission will from time to time conduct educational seminars, as it has in the past.

14. Proposal that the Commission Encourage “Settlements”

NYCLA RECOMMENDATION

The Commission should adopt a policy statement encouraging “settlements” (Rpt. 5-6).

COMMISSION COMMENT

The Commission and its staff endeavor to evaluate every case on its own merits and, as appropriate, proceed to hearing or resolve matters by other means.

Stipulated dispositions of formal disciplinary charges, *i.e.* Agreed Statements of Fact, are authorized in statute, as an alternative to an evidentiary hearing. The Administrator and the respondent-judge may stipulate to findings of fact, conclusions of law and appropriate sanction, which the Commission may accept or reject.

The majority of Commission cases are disposed of in this fashion. (From 2007 through 2009, out of a total of 73 public judicial disciplinary decisions, 43 were resolved by virtue of Agreed Statements of Fact, and 13 were resolved by other types of stipulation submitted jointly by the Administrator and respondent-judge to the Commission.)

A policy statement encouraging stipulations seems unnecessary and may send the wrong message to complainants, other aggrieved parties and the public, *i.e.* that the Commission is predisposed to “settling” with judges rather than evaluating each case on its own merits and, when necessary, making difficult disciplinary decisions.

**15. Proposal to Confer Subpoena Power on a Respondent-Judge**

**NYCLA RECOMMENDATION**

Respondent-judges should be able to subpoena witnesses and documents without the approval of a referee. A procedure should be established to handle motions to quash.

**COMMISSION COMMENT**

Submitting subpoenas to the referee is a fair and appropriate process and a check and balance against potential abuse of process. Referees are authorized by statute to issue subpoenas and by rule to grant “reasonable requests” for subpoenas. They tend to act as a restraint on both the judge and the staff with regard to subpoenas – which are issued in the name of the Commission and constitute an awesome power of government.

The Commission’s governing statute carefully and deliberately limits subpoena power to those within the Commission’s control. Ceding this power to any respondent, whether a non-lawyer town justice or a law-trained judge of a higher court, would be contrary to statute and an inappropriate delegation of an enormous governmental power.<sup>13</sup>

Applications to quash a subpoena are ordinarily handled by referees and in Supreme Court pursuant to the CPLR, in those rare circumstances where the parties cannot resolve their differences or choose to challenge the referee’s ruling. Creating a special procedure for motions to quash does not appear necessary and may well generate needless or purposefully delay-causing litigation.

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<sup>13</sup> Restraint is exercised during the investigatory stage as well. The Administrator will not sign a subpoena without an explanatory memorandum indicating exactly who or what is being subpoenaed, and why the subpoena is necessary. Whenever a judge’s personal financial records must be subpoenaed, the Commission is advised in advance and given the opportunity to prohibit it.

**16. Proposal to Permit Judges to Make Motions to Dismiss Before the Referee**

**NYCLA RECOMMENDATION**

Respondent-judges should be allowed to make motions to dismiss to a 3-referee panel, which would then make a recommendation to the Commission.

**COMMISSION COMMENT**

Only the Commission has statutory power to dispose of a Formal Written Complaint. The Commission rules now provide the respondent-judge with an opportunity to move before the Commission to dismiss the charges, before the hearing commences. 22 NYCRR 7000.6.

Inserting a role for the referee or a panel of referees would effectively delegate that authority and unnecessarily delay the adjudicatory process. There would be motions, briefs and replies to the referee, a report on the motion, briefs to the Commission advocating acceptance or rejection of the referee's recommendation – all without benefit of the fact-finding proceeding the Commission had originally determined was necessary to render decision.

**17. Proposal to Broaden a Judge’s Discovery Rights**

**NYCLA RECOMMENDATION**

Discovery rights for judges should be broadened. A continuing obligation to provide new exculpatory material should exist, including the disclosure of “all evidence useful to impeach the credibility of an Administrator’s witnesses.” A new standard should be adopted for determining whether the failure to provide exculpatory information should affect the validity of the proceedings – not whether the information would be “substantially prejudicial” but whether there is a “reasonable probability that had the evidence been disclosed, the result of the hearing would have been different” (Rpt. 23).

**COMMISSION COMMENT**

The Commission has already expanded the statutorily-determined pre-hearing discovery mandate from 5 days to 10. As a matter of practice, discovery is often made well before the 10 days, on a schedule worked out in a pre-hearing conference with the referee. Given that the facts and circumstances differ from case to case, such oversight by the referee works well and should not be disturbed.

Exculpatory information is always provided, as required by law, without regard to when it appears. No showing to the contrary could be made.

The new proposed standard would seem to make it more difficult for a respondent-judge to demonstrate prejudice from the withholding of evidence, in that “substantially prejudicial” appears to be an easier standard to meet than evidence so significant as to change the result of the hearing.

**18. Proposal to Adopt Time Frames for Certain Submissions**

**NYCLA RECOMMENDATION**

Time frames should be adopted for the preparation of hearing transcripts, submission of briefs to the referee, filing of a report by the referee to the Commission, etc.

**COMMISSION COMMENT**

The Commission rules do set time frames for the submission of briefs and the referee's report. 22 NYCRR 7000.6(k)-(l). The parties and referees usually agree on requests for reasonable extensions.

As for preparation of post-hearing transcripts, this is done in-house, as expeditiously as possible. Except for the most voluminous records, hearing transcripts are usually completed within a month. Because such records are transcribed from audio tapes, Commission hearing transcripts are highly accurate. Respondents have access to the tapes if the transcription is contested. There has never been a challenge to the accuracy of these transcripts, or time lost because of alleged inaccuracies in the transcriptions.

**19. Proposal to Raise the Standard of Proof Necessary to Sustain Charges**

**NYCLA RECOMMENDATION**

**COMMISSION COMMENT**

The standard of proof necessary to sustain charges of misconduct against a judge should be raised from the present *preponderance of the evidence to clear and convincing*.

In *Matter of Seiffert v. Commission on Judicial Conduct*, 65 NY2d 278 (1985), the Court of Appeals unanimously upheld “preponderance” and extensively commented on its rationale.<sup>14</sup>

After 32 years, and 91 reviews by the Court of Appeals, and absent any showing that this standard is unfair or has led to unjust results, the “preponderance” standard articulated by the Court of Appeals should not change. The NYCLA Task Force report does not identify a single case in which the “preponderance” standard has led to any unfair result, nor does it offer a compelling rationale for reversing a hallmark decision of our state’s highest court.

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<sup>14</sup> “We reject petitioner's contention that the standard of proof in this proceeding should be “clear and convincing evidence” rather than the “preponderance of the evidence” standard adopted by the Commission (*see*, 22 NYCRR 7000.6[i]). In *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388, 1396, 71 L.Ed.2d 599, relied upon by petitioner, the Supreme Court cited a variety of situations where it had mandated the “clear and convincing” standard in government-initiated proceedings that threatened the individual with “ ‘a significant deprivation of liberty’ or ‘stigma’ .” The nature of the individual interest threatened, however, is not the only consideration in deciding whether, in a particular type of proceeding, due process requires the use of the higher standard. The decision must be based upon a fair allocation between the State and the individual of the risk of an erroneous determination in the proceeding (*see*, *Santosky v. Kramer*, *supra*, p. 761, 102 S.Ct. at p. 1399). This, in turn, requires a weighing of the interests involved. “The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.” (*Addington v. Texas*, 441 U.S. 418, 427, 99 S.Ct. 1804, 1810, 60 L.Ed.2d 324, quoted in *Santosky v. Kramer*, *supra*, 455 U.S. at p. 768, 102 S.Ct. at p. 1402.)

“In approving the preponderance standard in attorney disciplinary proceedings, we pointed out that the privilege to practice law is not a personal or liberty interest, but “is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.” (*Matter of Capoccia*, 59 N.Y.2d 549, 553, 466 N.Y.S.2d 268, 453 N.E.2d 497.) So, too, is the right of a judge to continue in office more akin to a property, rather than a personal or liberty, interest. Moreover, even though removal from office is more serious than a “mere loss of money”, since it inflicts a “stigma” (*Addington v. Texas*, *supra*, 441 U.S. at pp. 424, 426, 99 S.Ct. at pp. 1808-1809), the interest of the State and of the public in a competent judiciary is superior to the interest of the individual Judge to continue in office. We have held that in a disbarment proceeding, the “concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession.” (*Matter of Mitchell*, 40 N.Y.2d 153, 156, 386 N.Y.S.2d 95, 351 N.E.2d 743.) Concern for the protection of the public interest weighs no less heavily in the present proceeding.”

**20. Proposal to Develop Special Procedures for Disability Cases**

**NYCLA RECOMMENDATION**

Special procedures should be developed for disability cases, and a “disability” not affecting a judge’s ability to perform judicial duties should be distinguished from an “incapacity” which does. A judge should be allowed to go on “inactive” status for a finite period of time and then apply for reinstatement (Rpt. 28-29).

**COMMISSION COMMENT**

The Commission has never prosecuted a pure disability case. Where a disability resulted in misconduct (*e.g.* intoxication on the bench, or a long-term absence constituting a “persistent failure to perform his/her duties,” which under the Constitution is a misconduct standard), the misconduct was charged. (If a disability does not manifest itself in misconduct, the matter is not likely to come to the Commission’s attention.) Where disability has been raised as a defense to a misconduct charge, the Administrator has tended to negotiate a settlement, such as a quiet departure from the bench (*e.g.* when a judge exhibiting bizarre behavior was found to have advanced Alzheimer’s) or has given the judge an opportunity to enter and successfully complete a treatment program. Such dispositions are presented to the Commission for approval.

Authorizing the Commission to put a judge on “inactive” status would be akin to suspending the judge from office, with pay – a power the Commission does not have and that would require a constitutional amendment. As a practical matter, when a judge is temporarily disabled, other judges tend to fill in, and the matter is not ripe for discipline in the short term. Where the absence due to disability becomes prolonged and the Commission is apprised, a mutually agreed upon retirement, rather than discipline, usually results.

This dual approach – charging only the misconduct (if any) that is manifested by the disability, and the humanitarian treatment of judges with legitimate medical issues – seems fair, balanced and without need of a separate formal procedural structure. The current structure appropriately accommodates these special circumstances.

**21. Proposal to Formalize “Deferred Discipline”**

**NYCLA RECOMMENDATION**

The *ad hoc* policy of “deferred discipline while the judge undergoes treatment or continuing education,” should be formalized (Rpt. 8, 31).

**COMMISSION COMMENT**

This “policy” appears to refer to those occasions when the Administrator has agreed to permit a judge to complete a rehabilitation program or supplemental judicial education and training, in advance of submitting an Agreed Statement of Facts for the Commission’s consideration. Such an Agreed Statement would typically recommend disciplining the judge for manifested misconduct while noting in mitigation that rehab or education was successfully completed. Such dispositions are negotiated on a case by case basis.

The Commission has no objection to noting in its Policy Manual that, in appropriate cases, such dispositions are appropriate.

**22. Proposal to Clarify the Constitutional Standards for Discipline**

**NYCLA RECOMMENDATION**

The standards set forth in the Constitution for discipline should be modified. [The current NY standard is that a judge may be disciplined “for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice.”]

Proposed standard from the ABA Model Rules for Judicial Disciplinary Enforcement: “The grounds for discipline are: (1) any conduct constituting a violation of the Code of Judicial Conduct or other applicable ethics codes; or (2) a willful violation of a valid order of the highest court, commission or panels of the commission in a proceeding under these Rules, a willful failure to appear personally as directed, or a knowing failure to respond to a lawful demand from a disciplinary authority.”

**COMMISSION COMMENT**

Inasmuch as the current constitutional standards have been extensively interpreted in case law, the Commission does not believe amending the Constitution for this purpose is wise or necessary. While its rules already contain some of the NYCLA-proposed references at 22 NYCRR 7000.9, the Commission has no objection to adopting the proposal as a rule in furtherance of the constitutional standards, particularly since the proposed language appears consistent with the manner in which the Court of Appeals has interpreted the Constitution.

Consistent with its own practice of basing formal charges on “reasonable cause,” the Commission would also incorporate the ABA definition of reasonable cause: “a reasonable ground for belief in the existence of facts warranting the filing of formal charges for discipline.” ABA Model Rules (Terminology).

**23. Proposal to Articulate Standards for Review of Referee Reports**

**NYCLA RECOMMENDATION**

The Commission should articulate standards for review of the referee's report. [NYCLA does not suggest any such standards, and the ABA Model Rules for Judicial Disciplinary Enforcement are silent on the subject.]

**COMMISSION COMMENT**

After a hearing and the submission of post-hearing briefs by the Administrator and the respondent-judge, the referee is required to issue a report with proposed findings of fact and conclusions of law, without recommendation as to sanction. 22 NYCRR 7000.6(1). Thereafter, the Commission considers written and oral argument from the Administrator and respondent-judge, evaluates the referee's report and record and applies relevant law to them, much as an appellate court would review the record and opinion of a trial court below.

As appellate advocates, the Administrator and respondent-judge make what they consider to be appropriate arguments regarding the referee's report on a case-by-case basis, *e.g.* that particular findings were consistent with or contrary to the weight of the evidence, that particular witnesses were or were not credible, that the applicable law was or was not appropriately applied to the facts of the case, etc. The Commission's evaluations and decisions are akin to those that both trial and appellate judges make all the time and are especially appropriate with regard to referee reports because, by statute and rule, the referee's role is not to render decision but to assist the Commission in rendering decision.

While the Commission gives due deference to the referee's report, it makes its own findings of fact and conclusions of law, pursuant to its constitutional and statutory responsibilities. *Matter of Marshall*, 8 NY3d 741 (2007).

The Commission will endeavor to articulate such standards in its Policy Manual.

**24. Proposal to Add Suspension as an Authorized Discipline**

**NYCLA RECOMMENDATION**

Suspension should be added as a disciplinary sanction available to the Commission.

**COMMISSION COMMENT**

The Constitution was amended in 1978 to eliminate suspension as a disciplinary sanction. The Commission opposed that change and since then has consistently called for the reinstatement of suspension as a sanction, which would require a constitutional amendment.

**Conclusion**

Public confidence in the independence, integrity, impartiality and high standards of the judiciary, and in an independent disciplinary system that helps keep judges accountable for their conduct, is essential to the rule of law. The members of the New York State Commission on Judicial Conduct are confident that the Commission's work contributes to those ideals, to a heightened sense of awareness of the appropriate standards of ethics incumbent on all judges, and to the fair and proper administration of justice.

The Commission appreciates the effort made by NYCLA's Task Force on Judicial Independence. The resulting NYCLA report makes some valuable recommendations which, to the extent indicated above, the Commission intends to incorporate in its rules or Policy Manual.