



**GENERAL ASSEMBLY
FRIDAY, JANUARY 18, 2019 – 9:00 A.M.
TRIANON BALLROOM, THIRD FLOOR
NEW YORK HILTON MIDTOWN**

AGENDA

THE NEW YORK BAR FOUNDATION ANNUAL MEETING

9:00 a.m.

(The members of the House of Delegates also serve as members of
The New York Bar Foundation)

**Ms. Lesley Rosenthal
President, presiding**

1. Approval of the minutes of the January 26, 2018 Annual Meeting
2. Report of the officers – Ms. Lesley Rosenthal
3. Ratification and confirmation of the actions of the Board of Directors since the 2018 Annual Meeting – Ms. Lesley Rosenthal
4. Report of Bylaws Committee – Hon. Cheryl M. Chambers
5. Report of the Nominating Committee – Mr. David M. Schraver
6. Other matters
7. Adjournment

ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION

9:15 a.m.

**Mr. Michael Miller
President, presiding**

1. Call to order, Pledge of Allegiance and invocation by Hon. Milton Tingling
2. Approval of the minutes of the January 26, 2018 Annual Meeting
3. Report of Nominating Committee and election of elected delegates to the House of Delegates – Mr. David P. Miranda
4. Report of Treasurer – Mr. Scott M. Karson
5. Report and recommendations of Committee on Bylaws – Mr. Robert T. Schofield, IV
6. Adjournment

HOUSE OF DELEGATES MEETING**9:30 a.m.****Mr. Henry M. Greenberg
Chair, presiding**

1. Approval of minutes of November 3, 2018 meeting 9:30 a.m.
2. Report of Treasurer – Mr. Scott M. Karson 9:33 a.m.
3. Report of Nominating Committee and election of officers and members-at-large of the Executive Committee – Mr. David P. Miranda 9:35 a.m.
4. Memorial for Paul Michael Hassett – Ms. Sharon Stern Gerstman 9:45 a.m.
5. Presentation of awards by Committee on Bar Leaders of New York State – Ms. Marne Onderdonk 9:55 a.m.
6. Address by Hon. Janet DiFiore, Chief Judge of the State of New York 10:00 a.m.
7. Presentation of Ruth G. Schapiro Award – Mr. Michael Miller 10:15 a.m.
8. Report and recommendations of Committee on Standards of Attorney Conduct – Prof. Roy D. Simon, Prof. Barbara S. Gillers and Mr. Joseph E. Neuhaus 10:30 a.m.
9. Report of President – Mr. Michael Miller 10:55 a.m.
10. Report of Committee on Membership – Mr. Thomas J. Maroney 11:10 a.m.
11. Report and recommendations of Working Group on Judiciary Law §470 – Mr. David M. Schraver 11:20 a.m.
12. Report and recommendations of Task Force on Evaluating Candidates for Election to Judicial Office – Mr. Robert L. Haig and Hon. Susan P. Read 11:40 a.m.
13. Report of Task Force on Wrongful Convictions – Hon. Barry Kamins and Hon. Robert S. Smith 12:00 p.m.
14. Report of Task Force on Incarceration Release Planning and Programs – Mr. Scott M. Karson and Ms. Sherry Levin Wallach 12:15 p.m.
15. Report of Task Force on School to Prison Pipeline – Mr. John H. Gross and Ms. Sheila A. Gaddis 12:30 p.m.
16. Administrative items – Mr. Henry M. Greenberg 12:45 p.m.
17. New business 12:50 p.m.
18. Date and place of next meeting:
Saturday, April 13, 2019
Bar Center, Albany



**The New York Bar Foundation
Annual Meeting**

**MINUTES
January 26, 2018
New York City**

PRESENT: Aaron; Abramson; Alcott; Alomar; Alvarez; Barclay; Barreiro; Bennett; Berman; Billings; Block; Bloom; Bowler; Braunstein; Brown Spitzmueller; Brown, T.A.; Bruno; Buholtz; Burke, J.; Burns; Castellano; Chambers; Chandrasekhar; Chang, V.; Christensen; Christopher; Cilenti; Clarke; Cohen, C.; Cohen, D.; Cohen, O.; Cohn; Connery; Davis; Denton; DiFalco; Disare; Doxey; Eberle; Edgar; Effman; Fennell; Fernandez; Ferris; Finerty; First; Fishberg; Foley; Fox; Freedman; Frumkin; Gaddis; Gallagher; Galligan; Genoa; Gensini; Gerbini; Gerstman; Gische; Gold; Goldfarb; Goldschmidt; Grays; Greenberg; Griesemer; Grimaldi; Grogan; Gutekunst; Gutenberger Grossman; Gutierrez; Hack; Haig; Heath; Heller; Hetherington; Himes; Hoffman; Hollyer; Hyer; Jackson; Jaglom; James; Jochmans; Kamins; Karson; Kase; Kean; Kelly; Kiernan; Kiesel; King, B.; Kobak; Koch; Krausz; Lamberti; Lanouette; LaRose; Lau-Kee; Lawrence; Leber; Lessard; Levin Wallach; Levin; Levy; Madden; Madigan; Mancuso; Mandell; Margolin; Mariano; Marinaccio; Maroney; Martin; May; McCann; McGinn; McNamara, C.; McNamara, M.; Meisenheimer; Miller, C.; Miller, M.; Millett; Millon; Minkoff; Miranda; Moretti; Moskowitz; Murphy; Napoletano; Nowotarski; Onderdonk; Ostertag; Owens; Pappalardo; Perlman; Pitegoff; Poster-Zimmerman; Prager; Pruzansky; Quartaro; Richardson; Richman; Richter; Rivera; Rodriguez; Rosner; Russell; Ryan; Safer; Samuels; Santiago; Schofield; Scott; Schraver; Schriever; Schub; Sciocchetti; Shamoan; Sharkey; Shautsova; Sigmond; Silkenat; Singer, C.; Singer, D.; Sonberg; Spicer; Sppirer; Spitler; Standard; Starkman; Steinhardt; Stieglitz; Stong; Strenger; Sullivan; Sweet; Tarver; Tennant; Tesser; Triebwasser; Tully; Udell; Vigdor; Vitacco; Weathers; Weiss; Weston; Whiting; Whittingham; Wicks; Wildgrube; Williams; Wolff; Young; Younger.

President John H. Gross called the meeting to order at 9:00 a.m.

Approval of minutes: On a motion duly made and carried, the minutes of the Annual Meeting of The New York Bar Foundation on January 27, 2017 were approved.

Report of Nominating Committee: Reporting on behalf of the Nominating Committee, committee chair David M. Schraver placed in nomination the following slate of nominees presented by the Committee for the position of Director for terms commencing June 1, 2018 for term ending May 31, 2021:

- Gioia Gensini, Syracuse
- Ellen Makofsky, Garden City

A motion was adopted electing said Directors.

Report of officers: John H. Gross, President presented the 2017 Annual Report of The New York Bar Foundation, copies of which were distributed. The Annual Report sets forth in detail the operations and activities of the Foundation during 2017. Mr. Gross highlighted the growth of the Foundation over the past three years including:

1. The number of grants and the amount distributed has increased significantly. The Foundation anticipates awarding over 100 grants to organizations this year.
2. Revenue has increased over the last three years by \$300,000 due to the generosity of New York Lawyers.
3. The Foundation awarded 77 scholarships three years ago which has now grown to more than 200. This is due in large part to the administration of the Catalyst Fellowship program.
4. The Business Law, Family Law and General Practice sections of the New York State Bar Association have established new restricted funds to provide grants that are parallel with their missions.
5. Several new initiatives have been implemented including the development of the Young Lawyer Friends of the Foundation giving group, the annual 24-hour veteran's campaign, the annual meeting week campaign, and disaster relief efforts.
6. The Foundation has been recognized for governance and philanthropic efforts.
7. The Foundation has begun to receive grants as well, including one from Casey Family Programs.

Ratification and confirmation of actions of the Board: A motion was adopted ratifying, confirming and approving the actions of the Board of Directors since the 2017 Annual Meeting.

Mr. Gross closed his report by showing a brief video and reminding attendees that the Foundation is holding their annual meeting week appeal.



TO: Members of The New York Bar Foundation

FROM: Nominating Committee of The New York Bar Foundation
David M. Schraver, Chair
Christine Cioffi
John H. Gross

DATE: January 18, 2019

RE: Report of the Nominating Committee

The Nominating Committee of The New York Bar Foundation is pleased to submit the following slate of nominations as Directors of The Foundation Board of Directors commencing June 1, 2019.

For a term ending May 31, 2022

New directors for a term commencing June 1, 2019 and concluding May 31, 2022:

- John P. Christopher, Glen Head
- C. Bruce Lawrence, Rochester
- David C. Singer, New York City

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF ANNUAL MEETING
NEW YORK HILTON MIDTOWN, NEW YORK CITY
JANUARY 26, 2018**

.....

PRESENT: Aaron; Abramson; Alcott; Alomar; Alvarez; Barclay; Barreiro; Bennett; Berman; Billings; Block; Bloom; Bowler; Braunstein; Brown Spitzmueller; Brown, T.A; Bruno; Buholtz; Burke, J.; Burns; Castellano; Chambers; Chandrasekhar; Chang, V.; Christensen; Christopher; Cilenti; Clarke; Cohen, C.; Cohen, D.; Cohen, O.; Cohn; Connery; Davis; Denton; DiFalco; Disare; Doxey; Eberle; Edgar; Effman; Fennell; Fernandez; Ferris; Finerty; First; Fishberg; Foley; Fox; Freedman; Frumkin; Gaddis; Gallagher; Galligan; Genoa; Gensini; Gerbini; Gerstman; Gische; Gold; Goldfarb; Goldschmidt; Grays; Greenberg; Griesemer; Grimaldi; Grogan; Gutekunst; Gutenberger Grossman; Gutierrez; Hack; Haig; Heath; Heller; Hetherington; Himes; Hoffman; Hollyer; Hyer; Jackson; Jaglom; James; Jochmans; Kamins; Karson; Kase; Kean; Kelly; Kiernan; Kiesel; King, B.; Kobak; Koch; Krausz; Lamberti; Lanouette; LaRose; Lau-Kee; Lawrence; Leber; Lessard; Levin Wallach; Levin; Levy; Madden; Madigan; Mancuso; Mandell; Margolin; Mariano; Marinaccio; Maroney; Martin; May; McCann; McGinn; McNamara, C.; McNamara, M.; Meisenheimer; Miller, C.; Miller, M.; Millett; Millon; Minkoff; Miranda; Moretti; Moskowitz; Murphy; Napoletano; Nowotarski; Onderdonk; Ostertag; Owens; Pappalardo; Perlman; Pitegoff; Poster-Zimmerman; Prager; Pruzansky; Quartaro; Richardson; Richman; Richter; Rivera; Rodriguez; Rosner; Russell; Ryan; Safer; Samuels; Santiago; Schofield; Scott; Schraver; Schriever; Schub; Sciocchetti; Shamoan; Sharkey; Shautsova; Sigmond; Silkenat; Singer, C.; Singer, D.; Sonberg; Spicer; Sppirer; Spitler; Standard; Starkman; Steinhardt; Stieglitz; Stong; Strenger; Sullivan; Sweet; Tarver; Tennant; Tesser; Triebwasser; Tully; Udell; Vigdor; Vitacco; Weathers; Weiss; Weston; Whiting; Whittingham; Wicks; Wildgrube; Williams; Wolff; Young; Younger.

Ms. Gerstman presided over the meeting as President of the Association.

1. The meeting was called to order and the Pledge of Allegiance recited, with the presentation of colors by the New York State Courts Ceremonial Unit.
2. Approval of minutes of the January 27, 2017 meeting. The minutes, as previously distributed, were accepted.
3. Report of the Nominating Committee and election of elected delegates to the House of Delegates. Glenn Lau-Kee, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election as elected delegates to the House of Delegates for the 2018-2019 Association year:

First District: James B. Kobak, Jr., Stewart Aaron, and Peter Harvey, all of New York City;

Second District: Andrew M. Fallek, Andrea E. Bonina, and Barton Slavin, all of Brooklyn;

Third District: Glinessa D. Gaillard, Elena DeFio Kean, and Hermes Fernandez, all of Albany;

Fourth District: Marne L. Onderdonk of Albany, Patricia L.R. Rodriguez of Schenectady, and Peter V. Coffey of Schenectady;

Fifth District: Courtney S. Radick of Oswego, Donald C. Doerr of Syracuse, and L. Graeme Spicer of Syracuse;

Sixth District: Patrick J. Flanagan of Norwich, Robert M. Shafer of Tully, and Michael R. May of Ithaca;

Seventh District: LaMarr J. Jackson of Rochester, June M. Castellano of Rochester, and Amy L. Christenson of Bath;

Eighth District: Kathleen Sweet, Cheryl Smith Fisher, and Oliver C. Young, all of Buffalo;

Ninth District: Jonah I. Triebwasser of Red Hook, Andrew P. Schriever of White Plains, and Steven M. Stieglitz of White Plains;

Tenth District: William T. Ferris III of Islandia, Rosemarie Tully of Huntington, and Peter J. Mancuso of North Bellmore;

Eleventh District: Lourdes M. Ventura of Albertson, Steven Wimpfheimer of Whitestone, and Guy R. Vitacco, Jr. of Elmhurst;

Twelfth District: Samuel M. Braverman of the Bronx, Carlos M. Calderón of Scarsdale, and Michael A. Marinaccio of White Plains;

Thirteenth District: Orin J. Cohen, Edwina Frances Martin, and Claire Cody Miller, all of Staten Island.

There being no further nominations, a motion was made and carried for the Secretary to cast a single ballot for the elected delegates to the House of Delegates.

4. Report of Treasurer. Scott M. Karson, Treasurer, reported on the 2017 operating budget, comparing the amounts to those as of December 31, 2016. He reported that through December 31, 2017, the Association's total revenue was \$22 million, a decrease of approximately \$1 million from the previous year, and total expenses were \$22 million, an increase of approximately \$449,000 from the previous year. The operating deficit prior to audit was approximately \$131,000. Mr. Karson also reviewed selected revenue and expense items, with a focus on membership dues revenue. The report was received with thanks.
5. Adjournment. There being no further business, the Annual Meeting of the Association was adjourned.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Sherry', followed by a long horizontal flourish that extends to the right.

Sherry Levin Wallach
Secretary

**ANNUAL MEETING
Agenda Item #3**

**Election of
2019-2020 Elected Delegates to the
House of Delegates**

- 1st District Susan B. Lindenauer, New York
Stewart Aaron, New York
Peter Harvey, New York
- 2nd District Andrew M. Fallek, Brooklyn
Michelle Weston, Brooklyn
Pauline Yeung-Ha, Brooklyn
- 3rd District Hermes Fernandez, Albany
Elena DeFio Kean, Albany
Sandra Rivera, Albany
- 4th District Margaret E. Gilmartin, Saratoga Springs
Matthew R. Coseo, Ballston Spa
Peter V. Coffey, Schenectady
- 5th District Courtney S. Radick, Oswego
Donald C. Doerr, Syracuse
L. Graeme Spicer, Syracuse
- 6th District Patrick J. Flanagan, Norwich
Robert M. Shafer, Tully
Michael R. May, Ithaca
- 7th District LaMarr J. Jackson, Rochester
June M. Castellano, Rochester
Amy L. Christensen, Bath
- 8th District Kathleen Sweet, Buffalo
Michael M. Mohun, Warsaw
Oliver C. Young, Buffalo
- 9th District John A. Pappalardo, White Plains
Andrew P. Schriever, White Plains
Joseph J. Ranni, Florida
- 10th District Steven G. Leventhal, Roslyn
Peter H. Levy, Jericho
A. Craig Purcell, Stony Brook

11th District Lourdes M. Ventura, Albertson
 Steven Wimpfheimer, Whitestone
 Guy R. Vitacco, Jr., Elmhurst

12th District Steven E. Millon, Bronx
 Carlos A. Calderón, Scarsdale
 Daniel D. Cassidy, Bronx

13th District Edwina Frances Martin, Staten Island
 Orin J. Cohen, Staten Island
 Claire Cody Miller, Staten Island



Staff Memorandum

ANNUAL MEETING Agenda Item #4

Attached for your reference are the financial statements for the period ending November 30, 2018.

**NEW YORK STATE BAR ASSOCIATION
2018 OPERATING BUDGET
ELEVEN MONTHS OF CALENDAR YEAR 2018**

REVENUE

	2018 BUDGET	ADJUST- MENTS	2018 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 11/30/2018	% RECEIVED 11/30/2018	2017 BUDGET	UNAUDITED RECEIVED 11/30/2017	% RECEIVED 11/30/2017
MEMBERSHIP DUES	10,050,000		10,050,000	9,900,372	98.51%	10,925,000	10,046,645	91.96%
SECTIONS:								
Dues	1,341,574		1,341,574	1,292,065	96.31%	1,411,600	1,306,791	92.58%
Programs	2,894,561		2,894,561	2,518,970	87.02%	2,763,550	2,458,564	88.96%
INVESTMENT INCOME	477,000		477,000	348,780	73.12%	345,000	334,772	97.04%
ADVERTISING	296,000		296,000	220,018	74.33%	133,000	71,346	53.64%
CONTINUING LEGAL EDUCATION	3,635,000		3,635,000	3,089,637	85.00%	3,900,000	2,987,843	76.61%
USI AFFINITY PAYMENT	2,262,000		2,262,000	2,013,705	89.02%	2,269,000	2,021,210	89.08%
ANNUAL MEETING	930,000		930,000	838,838	90.20%	869,500	897,247	103.19%
HOUSE OF DELEGATES & COMMITTEES	211,500		211,500	186,707	88.28%	108,100	74,718	69.12%
PUBLICATIONS, ROYALTIES AND OTHER	296,500		296,500	265,750	89.63%	274,200	177,786	64.84%
REFERENCE MATERIALS	1,310,000		1,310,000	830,117	63.37%	1,350,000	909,368	67.36%
TOTAL REVENUE	23,704,135	-	23,704,135	21,504,959	90.72%	24,348,950	21,286,290	87.42%

EXPENSE

	2018 BUDGET	ADJUST- MENTS	2018 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 11/30/2018	% EXPENDED 11/30/2018	2017 BUDGET	UNAUDITED EXPENDED 11/30/2017	% EXPENDED 11/30/2017
SALARIES & FRINGE	10,105,550		10,105,550	8,213,687	81.28%	10,409,950	8,739,838	83.96%
BAR CENTER:								
Rent	287,000		287,000	258,437	90.05%	305,000	258,437	84.73%
Building Services	238,250		238,250	189,910	79.71%	283,250	183,868	64.91%
Insurance	142,000		142,000	146,452	103.14%	142,000	148,656	104.69%
Taxes	5,250		5,250	4,395	83.71%	5,250	11,605	221.05%
Plant and Equipment	904,600		904,600	748,479	82.74%	858,500	837,307	97.53%
Administration	607,600		607,600	330,887	54.46%	543,500	502,756	92.50%
SECTIONS	4,198,850		4,198,850	3,734,511	88.94%	4,171,175	3,565,105	85.47%
PUBLICATIONS:								
Reference Materials	389,050		389,050	193,376	49.70%	430,150	272,532	63.36%
Journal	378,200		378,200	351,265	92.88%	431,200	404,932	93.91%
Law Digest	187,800		187,800	150,786	80.29%	187,800	146,116	77.80%
State Bar News	242,300		242,300	130,307	53.78%	247,300	171,193	69.22%
MEETINGS:								
Annual Meeting	345,800		345,800	272,996	78.95%	348,200	337,543	96.94%
House of Delegates, Officers and Executive Committee	526,950		526,950	458,836	87.07%	520,600	522,561	100.38%
COMMITTEES:								
Continuing Legal Education	1,711,950		1,711,950	1,404,883	82.06%	1,767,875	1,488,560	84.20%
LPM / Electronic Communication Committee	72,800		72,800	42,493	58.37%	86,250	61,623	71.45%
Marketing / Membership	798,100		798,100	634,732	79.53%	971,200	665,698	68.54%
Media Services	98,900		98,900	38,209	38.63%	115,300	33,159	28.76%
All Other Committees and Departments	2,556,410		2,556,410	2,223,298	86.97%	2,489,075	2,165,349	86.99%
TOTAL EXPENSE	23,797,360	-	23,797,360	19,527,939	82.06%	24,313,575	20,516,838	84.38%
BUDGETED SURPLUS	(93,225)	-	(93,225)	1,977,020		35,375	769,452	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF NOVEMBER 30, 2018

<u>ASSETS</u>	<u>UNAUDITED</u> <u>11/30/2018</u>	<u>UNAUDITED</u> <u>11/30/2017</u>	<u>UNAUDITED</u> <u>12/31/2017</u>
<u>Current Assets:</u>			
General Cash and Cash Equivalents	14,817,623	12,590,609	13,900,890
Accounts Receivable	176,628	136,438	135,391
Prepaid expenses	833,489	590,975	1,212,640
Royalties and Admin. Fees receivable	318,479	288,671	710,605
Total Current Assets	16,146,219	13,606,693	15,959,526
<u>Board Designated Accounts:</u>			
<u>Cromwell Fund:</u>			
Cash and Investments at Market Value	2,325,603	2,344,935	2,365,477
Accrued interest receivable	0	0	0
	<u>2,325,603</u>	<u>2,344,935</u>	<u>2,365,477</u>
<u>Replacement Reserve Account:</u>			
Equipment replacement reserve	1,117,309	1,116,973	1,117,002
Repairs replacement reserve	794,182	793,944	793,964
Furniture replacement reserve	219,899	219,833	219,839
	<u>2,131,390</u>	<u>2,130,750</u>	<u>2,130,805</u>
<u>Long-Term Reserve Account:</u>			
Cash and Investments at Market Value	23,093,470	22,689,442	22,901,794
Accrued interest receivable	0	0	123,864
	<u>23,093,470</u>	<u>22,689,442</u>	<u>23,025,658</u>
<u>Sections Accounts:</u>			
Section Accounts Cash equivalents and Investments at market value	3,665,665	3,631,161	3,629,262
Cash	100,402	200,250	76,245
	<u>3,766,067</u>	<u>3,831,411</u>	<u>3,705,507</u>
<u>Fixed Assets:</u>			
Furniture and fixtures	1,432,266	1,373,307	1,377,127
Leasehold Improvements	1,407,496	1,368,781	1,368,781
Equipment	8,181,562	8,298,834	8,298,344
Telephone	107,636	107,636	107,636
	<u>11,128,960</u>	<u>11,148,558</u>	<u>11,151,888</u>
Less accumulated depreciation	9,130,786	8,843,369	8,839,286
Net fixed assets	1,998,174	2,305,189	2,312,602
Total Assets	49,460,923	46,908,420	49,499,575
<u>LIABILITIES AND FUND BALANCES</u>			
<u>Current liabilities:</u>			
Accounts Payable & other accrued expenses	785,099	598,914	1,247,871
Deferred dues	6,448,959	5,288,263	7,717,027
Deferred income special	711,538	942,307	923,076
Deferred grant revenue	32,406	55,413	34,630
Other deferred revenue	568,237	445,801	852,291
Unearned Income - CLE	101,899	114,705	47,819
Payable To The New York Bar Foundation	24,939	26,568	0
Total current liabilities & Deferred Revenue	8,673,077	7,471,971	10,822,714
<u>Long Term Liabilities:</u>			
Accrued Pension Costs	0	0	0
Accrued Other Postretirement Benefit Costs	7,826,026	7,487,723	7,551,026
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	330,000	330,000	309,739
Total Liabilities & Deferred Revenue	16,829,103	15,289,694	18,683,479
<u>Board designated for:</u>			
Cromwell Account	2,325,603	2,344,935	2,365,477
Replacement Reserve Account	2,131,390	2,130,750	2,130,805
Long-Term Reserve Account	14,937,444	14,871,719	15,041,029
Section Accounts	3,766,067	3,831,411	3,705,507
Invested in Fixed Assets (Less capital lease)	1,998,174	2,305,189	2,312,602
Undesignated	7,473,142	6,134,722	5,260,676
Total Net Assets	32,631,820	31,618,726	30,816,096
Total Liabilities and Net Assets	49,460,923	46,908,420	49,499,575

New York State Bar Association
Statement of Activities
For the Eleven Months Ending November 30, 2018

	November 2018	November 2017	December 2017
REVENUES AND OTHER SUPPORT			
Membership dues	9,900,372	10,046,645	10,053,580
Section revenues			
Dues	1,292,065	1,306,791	1,306,781
Programs	2,518,970	2,458,564	2,464,057
Continuing legal education program	3,089,637	2,987,843	3,154,300
Administrative fee and royalty revenue	2,255,287	2,186,882	2,475,953
Annual meeting	838,838	897,247	897,247
Investment income	664,156	618,749	1,034,947
Reference Books, Formbooks and Disk Products	830,117	909,368	1,204,335
Other revenue	465,909	145,746	167,602
Total revenue and other support	21,855,351	21,557,835	22,758,802
PROGRAM EXPENSES			
Continuing legal education program	2,184,991	2,206,545	2,449,563
Graphics	1,733,162	1,698,086	1,795,789
Government relations program	464,156	573,662	614,867
Law, youth and citizenship program	71,634	180,613	181,679
Lawyer assistance program	104,262	172,442	173,693
Lawyer referral and information services	116,233	166,099	173,154
Law practice management services	80,168	94,474	94,752
Media / public relations services	326,566	402,661	424,720
Marketing and Membership services	1,417,879	1,393,393	1,554,945
Pro bono program	198,603	203,852	222,562
Local bar program	98,371	93,659	103,500
House of delegates	407,420	465,394	480,754
Executive committee	51,416	57,167	57,647
Other committees	608,210	572,411	589,813
Sections	3,734,511	3,565,105	3,694,593
Section newsletters	155,258	132,800	144,813
Reference Books, Formbooks and Disk Products	735,621	884,985	965,600
Publications	632,358	722,241	789,495
Annual meeting expenses	272,996	337,543	338,205
Total program expenses	13,393,815	13,923,132	14,850,144
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	2,958,720	3,151,367	3,893,223
Pension plans and other employee benefit plan costs	604,601	608,897	651,939
Rent and equipment costs	1,012,825	941,853	1,047,999
Consultant and other fees	791,442	927,964	1,004,809
Depreciation and amortization	619,300	690,800	722,019
Other expenses	147,238	272,832	312,701
Total management and general expenses	6,134,126	6,593,713	7,632,690
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
	2,327,410	1,040,990	275,968
Realized and unrealized gain (loss) on investments	(511,632)	2,838,721	2,790,613
CHANGES IN NET ASSETS	1,815,778	3,879,711	3,066,581
Net assets, beginning of year	30,816,103	27,749,522	27,749,522
Net assets, end of year	32,631,881	31,629,233	30,816,103



Staff Memorandum

ANNUAL MEETING Agenda Item #5

REQUESTED ACTION: Approval of a Bylaws amendment proposed by the Committee on Bylaws.

The Committee on Bylaws has reviewed a proposal from the Nominating Committee to remove the requirement that candidates for member-at-large of the Executive Committee be “members of the House of Delegates or section or committee chairpersons” at the time of selection or within three years preceding selection and replace it with a requirement that candidates be “Active members of the Association.” The attached memorandum from the committee outlines the recommended amendments. A copy of the Bylaws provision marked to show changes from the existing version is attached to the committee’s report, together from a memorandum from the Nominating Committee requesting the amendment.

Under procedures established in the Bylaws, the proposed amendments were subscribed to by a majority of all members of the House of Delegates in order to be considered at this meeting.

The report will be presented at the January 18 meeting by Robert T. Schofield, IV, Chair of the Committee on Bylaws.

COMMITTEE ON BYLAWS

ROBERT T. SCHOFIELD, IV
Chair
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
518/487-7616
FAX 518/487-7777
rschofield@woh.com

October 19, 2018

To: Members of the House of Delegates

Re: Report on Proposed Bylaws Amendment

INTRODUCTION

At the request of the Nominating Committee, the Bylaws Committee considered a proposal to simplify eligibility and expand the pool of candidates for member-at-large of the Executive Committee. It is our recommendation that the Bylaws be amended to remove the requirement that members-at-large must be “members of the House of Delegates or section or committee chairpersons at the time of selection, or who have served as members of the House of Delegates or section or committee chairpersons within three years preceding the time of such selection” and replace it with the requirement that members-at-large must be “Active members of the Association” as defined in Bylaws Article III, Section 3.A.

For ease of reference, our proposed amendment and rationale is set forth below. New language is indicated by underlining, and deleted language is indicated by strikethrough.

MEMBERS-AT-LARGE OF THE EXECUTIVE COMMITTEE

The Nominating Committee has found that few people apply each year to be members-at-large of the Executive Committee. In 2016, the Bylaws were amended to allow committee chairpersons to be eligible to apply; previously, eligibility was limited to members of the House or section chairpersons. Despite the amendment, the Nominating Committee has observed that the numbers of candidates has not appreciably increased.

In addition, it appears that members are uncertain about the requirements for becoming a member-at-large, and the Nominating Committee observed that the only requirement for Vice President, Secretary and Treasurer is that they be “Active members of the Association.” Through its regular interview and deliberation process, the Nominating Committee will be able to ensure that only well-qualified members are selected for the position.

To incorporate this change in the Bylaws, we propose the Bylaws amendments set forth below:

VII. EXECUTIVE COMMITTEE

Section 1. Composition. The Executive Committee shall be a committee of the House of Delegates and shall consist of:

* * *

F. 1.”Eight members-at-large who shall be ~~members of the House of Delegates or section or committee chairpersons~~ Active members of the Association at the time of selection, ~~or who have served as members of the House of Delegates or section or committee chairpersons within three years preceding the time of such nomination.~~”

* * *

CONCLUSION

Our committee believes that the foregoing amendment, which we are recommending, will provide an expanded pool of candidates for consideration by the Nominating Committee as members-at-large of the Executive Committee. We commend it to you for your consideration and subscription at the November 3, 2018 meeting of the House of Delegates. If subscribed, the above amendment will be presented for discussion and adoption at the 2019 Annual Meeting.

Respectfully submitted,

COMMITTEE ON BYLAWS

Robert T. Schofield, IV, Chair
Eileen E. Buholtz
Michael E. Getnick
LaMarr J. Jackson
A. Thomas Levin
Kathryn Grant Madigan
Anita L. Pelletier
Jay G. Safer
Oliver C. Young
Executive Committee liaison: Henry M. Greenberg
Staff liaison: Kathleen R. Mulligan Baxter

DATE: October 12, 2018

TO: NYSBA President Michael Miller, President-elect Henry Greenberg;
Chair of Bylaws Committee

FROM: NYSBA Nominating Committee
David P. Miranda, Chair

RE: Proposal To Amend NYSBA Bylaws Article VII, Section 1.F.1

Proposal: To simplify eligibility and broaden the pool of available candidates for member-at-large of the NYSBA Executive Committee, the NYSBA Nominating Committee recommends that the NYSBA Bylaws be amended to remove the requirement that members-at-large must be “members of the House of Delegates or section or committee chairpersons at the time of selection, or who have served as members or the House of Delegates or section or committee chairpersons within three years preceding the time of such nomination” and replace it with the requirement that members-at-large must be “Active members of the Association.” (Bylaws Article VII, Section 1.F.1)

Rationale: NYSBA seeks to broaden the pool of members seeking leadership positions in the Association. For many years, the Nominating Committee has found that few people apply each year to become members-at-large of the Executive Committee. To attempt to remedy this situation, the Bylaws were amended in January 2016 to make committee chairpersons eligible to serve as members-at-large of the Executive Committee (previously, only members of the House of Delegates or section chairpersons were eligible). Despite efforts to publicize the expanded opportunity to become a member-at-large of the Executive Committee, the number of candidates has not increased appreciably in the three years since that amendment. Members of the Nominating Committee and others in NYSBA leadership also have continued to hear that people are uncertain about the requirements for becoming a member-at-large of the Executive Committee.

In contrast to the complicated statement of eligibility for member-at-large, the only eligibility requirement for officers (other than President-Elect) is that they be “active members of the Association.” (Bylaws Section IV) The Nominating Committee believes that the same simple eligibility requirement should apply for members-at-large as for Vice-Presidents, Secretary and Treasurer. If this amendment is adopted, the Nominating Committee would publicize this change and encourage NYSBA members to seek to become members-at-large of the Executive Committee. Through its normal interview and deliberation process, the Nominating Committee will be able to ensure that only well-qualified candidates are selected for the position.

Proposed Language and Blacklined Version of First Sentence of Article VII, Section 1.F.1:

Proposed First Sentence of Article VII, Section 1.F.1:

“Eight members-at-large who shall be Active members of the Association at the time of selection.”

Blacklined Version Showing Changes from Current Language of First Sentence of Article VII, Section 1.F.1:

“Eight members-at-large who shall be ~~members of the House of Delegates or section or committee chairpersons~~ Active members of the Association at the time of selection, ~~or who have served as members or the House of Delegates or section or committee chairpersons within three years preceding the time of such nomination.~~”

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY, NEW YORK
NOVEMBER 3, 2018**

Mr. Greenberg presided over the meeting as Chair of the House.

PRESENT: Alomar; Barclay; Battistoni; Baum; Bauman; Belowich; Ben-Asher; Bennett; Billings; Block; Braunstein; Braverman; Breeding; Brown Spitzmueller; Brown, T.A.; Buholtz; Castellano; Chambers; Christian; Coffey; Cohen, O.; Connery; Dean; DeFelice; Di Pietro; Disare; Doerr; Doyle; Eberle; Effman; Eng; England; Entin Maroney; Fallek; Foy; Fernandez; Finerty; Fishberg; Fogel; Foley; Fox; Freedman, H.; Friedman; Galliard; Gerstman; Getnick; Glover; Gold; Grays; Greenberg; Griesemer; Grimaldi; Grimmick; Grogan; Gutekunst; Gutenberger Grossman; Gutierrez; Haig; Heath; Hines; Hoffman; Hyer; Jaglom; James; Kamins; Karson; Kean; Kearns; Kehoe; Kelly; Kendall; Kirby; Kobak; Lamberti; Lau-Kee; Leo; Lessard; Leventhal; Levin Wallach; Levin; Levy; Lindenauer; Lugo; MacLean; Madden; Madigan; Maldonado; Mancuso; Marinaccio; Markowitz; Maroney; Marotta; Martin Owens; Martin; May; McCann; McGinn; McGowan; McNamara, C.; McNamara, M.; Meyer; Miller, C.; Miller, H.; Miller, M.; Miller, R.; Millon; Minkoff; Miranda; Moskowitz; Napoletano; Nardacci; Nowotarski; O’Connell; Onderdonk; Ostertag; Owens; Palermo, A.; Perlman; Pitegoff; Pleat; Poster-Zimmerman; Radick; Richman; Richter; Rodriguez; Rosenthal; Rosner; Rothberg; Saleh; Scheinkman; Schofield; Schrauer; Schwenker; Scott; Sen; Shafer; Shamon; Sharkey; Shishov; Shoemaker; Sigmund; Silkenat; Silverman; Singer, C.; Singer, D.; Slavitt; Spierer; Stancliff; Standard; Stieglitz; Strong; Strenger; Sweet; Tarver; Teff; Tennant; Tesser; Thevenin; Triebwasser; Trunkes; Weathers; Westlake; Weston; Whiting; Wimpfheimer; Witmer; Wolff; Young; Younger.

1. Approval of minutes of June 16, 2018 meeting. The minutes were deemed accepted as previously distributed.
2. Report of Treasurer. Scott M. Karson, Treasurer, reported that through September 30, 2018, the Association’s total revenue was \$19.7 million, an increase of approximately \$334,000 from the previous year, and total expenses were \$17 million, a decrease of approximately \$746,000 over 2017. Mr. Karson also provided a report on the status of the long-term reserve investments. The report was received with thanks.
3. Report and recommendations of Finance Committee re proposed 2019 income and expense budget. T. Andrew Brown, chair of the Finance Committee, reviewed the proposed budget for 2019, which projects income of \$23,006,890, expenses of \$23,006,588, and a projected surplus of \$302. After discussion, a motion was adopted to approve the proposed 2019 budget. Mr. Levin abstained.
4. Report and recommendations of the Committee on Bylaws. Robert T. Schofield, IV, chair of the Bylaws Committee, presented the Committee’s proposals to amend the Bylaws to remove the requirement that candidates for member-at-large of the Executive Committee be “members of the House of Delegates or section or committee chairpersons” at the time of selection or within three years preceding selection and replace it with a requirement that candidates be “Active members of the Association.” Subscription forms were provided to the delegates to subscribe to the proposed amendments in order to place the proposed amendments on the agenda for action at the Annual Meeting. The proposed amendment received the required subscriptions to permit its consideration at the Annual Meeting.

5. Memorial for Henry T. King. Past President Henry G. Miller offered a memorial for Mr. King, who was NYSBA President 1988-89 and who passed away June 18, 2018. A moment of silence was observed in memory of Mr. King and his contributions to the Association and the profession.
6. Report and recommendations of Committee on Mandated Representation. Linda Gehron, a member of the Committee on Mandated Representation, presented the committee's report recommending an amendment to the Standards for Mandated Representation to provide for the pre-petition representation of parents in child welfare cases modifying the current provision mandating representations at the "early stages" of a Family Court proceeding. After discussion, a motion was adopted to approve the report and recommendations.
7. Report of Committee on Standards of Attorney Conduct. David M. Schraver, a member of the Committee on Standards of Attorney Conduct, reviewed proposed amendments to the Rules of Professional Conduct relating to conflicts of interest and tribunals. The proposals will be presented to the House for debate and vote at the January 2019 meeting. The report was received with thanks.
8. Report of President. Mr. Miller reflected on recent events and the role that attorneys can play when confronted with troubling situations and to deliver a message of civility. He referred members to his written report, a copy of which is appended to these minutes, for details regarding recent Association activity.
9. Report of Nominating Committee. David P. Miranda, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2019-2020 Association year: President-Elect: Scott M. Karson, Melville; Secretary: Sherry Levin Wallach, White Plains; Treasurer: Domenick Napoletano, Brooklyn; Vice Presidents: 1st District – Diana S. Sen, New York City and Carol A. Sigmond, New York City; 2nd District – Aimee L. Richter, Brooklyn; 3rd District – Robert T. Schofield, IV, Albany; 4th District – Marne Onderdonk, Saratoga Springs; 5th District – Jean Marie Westlake, East Syracuse; 6th District – Richard C. Lewis, Binghamton; 7th District – David H. Tennant, Rochester; 8th District – Norman P. Effman, Warsaw; 9th District – Mark T. Starkman, New Windsor; 10th District – Donna England, Centereach; 11th District – Karina E. Alomar, Ridgewood; 12th District – Michael AS. Marinaccio, White Plains; 13th District – Jonathan B. Behrins, Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2019: Richard M. Gutierrez (Diversity Seat), Forest Hills; Margaret J. Finerty, New York City and William T. Russell, Jr., New York City Nominated as Section Member-at-Large was Andre R. Jaglom, New York City. Nominated as Young Lawyer Member-at-Large was John P. Christopher, Glen Head. The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2019-2021 term: Claire P. Gutekunst, Yonkers; Seymour W. James, Jr., New York City; Scott M. Karson, Melville; Bernice K. Leber, New York City; and Michael Miller, New York City. The report was received with thanks.
10. Address by Hon. Rolando T. Acosta – Presiding Justice, Appellate Division, First Department. Presiding Justice Acosta reviewed initiatives being undertaken in the First Department with respect to technology, case management, and the implementation of statewide appellate practice rules. The Chair received the report with thanks.
11. Report of Task Force on Wrongful Convictions. Hon. Barry Kamins, co-chair of the Task Force, reviewed the Task Force's work to date in updating the report approved by the House in 2009 and new developments to reduce wrongful convictions. He reported that the Task Force plans to

present its report with recommendations on an informational basis at the January 2019 meeting with debate and vote to follow in April 2019. The report was received with thanks.

12. Report and recommendations of Local and State Government Law Section. Richard K. Zuckerman, chair of the section, outlined the section's proposed Model Pro Bono Policy for Attorney Employees of Local Governments and Local Government Agencies. After discussion, a motion was adopted to approve the policy.
13. Report of The New York Bar Foundation. Lesley Rosenthal, President of The Foundation, outlined methods by which members could donate to The Foundation's fundraising efforts in support of its philanthropic programs. The report was received with thanks.
14. Administrative items. Mr. Greenberg reported that the House of Delegates Dinner will take place on Thursday, January 25, 2018 at the Metropolitan Club, 1 East 60th Street, New York City.
15. New Business. Mr. Greenberg observed that Paul Michael Hassett, who served as Association President 2000-01, had passed away on October 26 and that a full memorial in his memory would be presented at the January 2019 meeting.
16. Date and place of next meeting. Mr. Miller announced that the next meeting of the House of Delegates would take place on Friday, January 18, 2019 at the New York Hilton Midtown, New York City.
17. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned in memory of Mr. Hassett.

Respectfully submitted,



Sherry Levin Wallach
Secretary

Michael Miller
President
Law Office of Michael Miller
666 Fifth Avenue, Suite 1717
New York, New York 10103
mmiller@nysba.org
212.545.7000

**President's Report
to the House of Delegates
November 3, 2018**

As I travel throughout the state, as well as other states and countries, I continue to be gratified by the important work being done by lawyers for the good of our profession and our society. In these pages, I want to highlight some of the contributions made by our members over the past few months.

The commonwealth of Puerto Rico continues to struggle in its efforts to recover from the devastation brought upon it by Hurricane Maria in 2017. In August, together with New York City Bar Association President Roger Juan Maldonado, I made a presentation to the American Bar Association House of Delegates recommending a permanent exemption from the Jones Act, which causes Puerto Rico to pay higher shipping costs from the U.S. mainland for food, fuel and other basic goods. Our presentation was based on the report approved by our House of Delegates this past June. I am gratified to advise that the ABA House unanimously approved the resolution we offered. Since the ABA House acted, we have begun working with members of Congress to secure this needed exemption. In addition, our Working Group on Puerto Rico, co-chaired by Richard Gutierrez, Drew Jaglom, Hilary Jochmans and Maria Matos, is identifying other measures that might assist the people of Puerto Rico.

The committees that were appointed in June to pursue the initiatives I outlined at our last meeting are well into developing reports that will be presented to you during the coming year. At this meeting Hon. Barry Kamins will present an informational report on the Task Force on Wrongful Convictions, which plans to present a report for action in April 2019. The Task Force is co-chaired by Judge Kamins and Hon. Robert S. Smith, retired judge of the Court of Appeals.

The Task Force on the Evaluation of Candidates for Election to Judicial Office, co-chaired by Hon. Susan Read and Robert Haig, has met with Chief Administrative Judge Lawrence Marks and people from around New York as to how current evaluations are conducted. It also has surveyed bar associations for feedback on current reviews. The Task Force plans to present an informational report to the House in January 2019.

The Task Force on Incarceration Release Planning and Programs is holding an open meeting in Albany next week to consider all relevant issues including options for those released into urban and rural settings; possible inconsistency in rules; limited availability of substance abuse and

mental health treatment programs; housing options and limited availability of housing; and the impact on recidivism and public safety that results from inadequate release planning. The Task Force, co-chaired by Sherry Levin Wallach and Scott Karson, plans to present an informational report in January.

In September, the Task Force on Mass Shootings and Assault Weapons had a presentation by members of the New York Police Department on assault weapons and 3-D printed weapons. The Task Force is co-chaired by Margaret Finerty and David Schraver.

The Task Force on the Role of Paralegals, co-chaired by Vincent Chang, Maryann Saccomando Freedman and Margaret Phillips, is updating the 1997 report on paralegal guidelines adopted by the House of Delegates and is also exploring relevant issues to make recommendations for best practices for the use of paralegals in the context of the modern 21st century law office. The task force will also explore the question of whether NYSBA should enroll paralegals as members or ancillary members.

During the summer more than 300 immigrants were relocated from the southern border of our country to the Albany County Correctional Facility. Many arrived in Albany having no idea where they were. Over 400 volunteer lawyer and interpreters, including many NYSBA members, volunteered their time at the facility to determine whether these immigrants were seeking asylum and to help prepare them for credible fear interviews. In August, NYSBA hosted a luncheon to recognize these volunteers for their significant contributions to helping insure access to justice.

I am very pleased to report that the Governor has signed into law legislation proposed by our Association and the New York City Bar Association to extend attorney-client privilege to communications between lawyer referral services and persons contacting those services to find an attorney or be directed to an appropriate resource. Those contacting lawyer referral services do so under the assumption that the information communicated to the services is confidential; this legislation makes clear that such communications are privileged on the same basis as those between attorney and client.

One of the most important functions of our bar association is the improvement of the judicial system for those in need of legal services but who cannot afford to retain a lawyer. In September I served on a panel with the Chief Judge and the Appellate Division Presiding Justices to hear from statewide witnesses on the significant benefits to low-income people of accessible, publicly funded civil legal services. A few days later, I testified at a hearing of the NYS Commission on Parental Legal Representation on assurance of quality representation for persons entitled to assigned counsel in Family Court matters.

Several weeks ago NYSBA sponsored the bi-annual Partnership Conference, with the theme "Uniting for Justice." Over 550 people attended the conference, which included 45 different programs with CLE credit. The Denison Ray Civil Awards and Phil Dailey Award dinner was attended by approximately 380 people. The two guest speakers for the awards dinner were Court of Appeals Associate Judge Jenny Rivera and Assembly Member Harvey Epstein.

A privilege of serving as your President is being able to meet so many of our members and be in contact with other bar associations both within and outside New York State. In July, in connection with our Torts, Insurance and Compensation Law Section's summer meeting in Ireland, we held a member reception in Dublin at The Bar of Ireland, preceded by a meeting with

Ireland's Chief Justice the Hon. Mr. Frank Clarke. Another member reception, held in London, took place at the Outer Temple. I was gratified to meet many members who practice outside the United States. In addition to those meetings, I attended the Family Law Section meeting in Manchester, Vermont, the Trusts and Estates Law Section meeting in Bolton Landing, and the International Section meeting in Montreal; welcomed students at the University of Buffalo School of Law; and attended the Federal Bar Association's annual meeting and convention and the celebration of the 80th Anniversary of the Appellate Division, Second Department.

Our 2019 Annual Meeting will take place January 14-19 at the New York Hilton Midtown in New York City. My Presidential Summit, which will be held on Wednesday, January 16, will address three important, timely topics: "Listening to #MeToo – Why Laws to Prevent Sexual Harassment Have Been Ineffective, and What Attorneys Can Do"; "Wrongful Convictions and the Role of Prosecutors"; and "Enlisting the Public in the Fight Against Fraud: How Whistleblower Laws Work, How They Have Evolved and the Courage it Takes to Be a Whistleblower." I look forward to seeing you at the Summit and at many of the other programs and activities that will be taking place during Annual Meeting.

A handwritten signature in black ink that reads "Michael Miller". The signature is written in a cursive style with a prominent underline.



Michael Miller

President

Law Office of Michael Miller
666 Fifth Avenue, Suite 1717
New York, New York 10103
mmiller@nysba.org
212.545.7000

**President's Report
to the House of Delegates
January 18, 2019**

A little more than halfway through my term as New York State Bar Association president, I want to take this opportunity to applaud the tremendous work being done by lawyers across New York, across the United States and around the world to protect and advance the rule of law.

I write this even as I note events in recent months that jeopardize the fundamental rule of law and the democratic principles that it supports. More than 30 attorneys in the Philippines have been targeted and murdered over the past two years. In Hungary, a new “administrative court system” controlled by the executive branch has been established to handle certain cases, including corruption, election law, and the right to privacy. Europe’s highest court recently ordered the Polish government to reinstate two dozen judges who had been ousted from office for decisions unfavorable to the government. In our own country, U.S. Supreme Court Chief Justice John Roberts issued a forceful defense an independent judiciary, a rare public statement from a sitting member of the court.

At this writing, large parts of the federal government are shut down due to the inability of the President and Congress to come to an agreement on funding. NYSBA expressed its concerns about the impact of the shutdown on the operations of the federal judiciary and called upon Congress and the President to ensure sufficient funding to enable the court system to fulfill its constitutional duties. In a statement that was picked up by the *New York Law Journal* and other media sources and in an on-air interview that was broadcast in eight upstate New York television markets, I noted that operations of the federal courts – and, indeed, justice for all Americans – should not and must not be subject to the vagaries of politics.

NYSBA Sections, Committees, Task Forces, Working Groups & Advocacy

As in the past, NYSBA’s sections and committees continue to conduct excellent meetings of substance, superb CLE programs and opportunities for members to improve their professional skills, our profession and our community. Our various entities produce excellent reports on issues of relevance and concern, affording our House of Delegates valuable opportunities to take policy positions and advocate for improvements in the law and support for the rule of law. Today, a number of reports of consequence will be presented for consideration. It is gratifying to note that our Women in Law Section, one of the fastest growing sections in NYSBA’s history, offers enhanced opportunities to explore inequities and advocate for gender equality. And our International Section has done an excellent job at increasing membership.

The task forces appointed in June and those previously appointed have been hard at work and are developing reports that will be presented to you during 2019. Before I highlight for you some of their work, it is important to note that the large number of initiatives we have undertaken pose considerable additional burdens on certain members of NYSBA's dedicated staff. They have been incredibly supportive and have made truly meaningful contributions. I want to express special recognition and appreciation to Kathy Baxter, Ron Kennedy, Kevin Kerwin, Pam McDevitt, Kit McNary, Kathy Suchocki, Dan Weiller and Mark Wilson for their considerable efforts in assisting the various task forces and working groups.

The **Task Force on the Evaluation of Candidates for Election to Judicial Office**, co-chaired by Hon. Susan P. Read and Robert L. Haig, has developed a comprehensive report that it will present to you on an informational basis at this meeting and for debate and vote at the April meeting.

That task force, working through the summer and fall, collected and examined a vast amount of background information, including a review of the work of the New York State Commission to Promote Public Confidence in Judicial Elections [the Feerick Commission], the Independent Judicial Election Qualification Commissions [IJEQCs], and local, affinity and specialty bar associations that evaluate judicial candidates subject to election. The task force also researched judicial screening in other states, and surveyed local, affinity and specialty bar associations asking them to assess their work and positions on judicial screening and their work with the IJEQCs.

The task force solicited views on judicial screening and the efficacy of the current judicial screening regimen from political party leadership in each county, individual members of the IJEQCs and sitting elected judges. Its conclusions and recommendations are driven by the facts ascertained during its extensive investigations of current practices throughout New York State.

The **Task Force on Incarceration Release Planning and Programs**, co-chaired by NYSBA secretary Sherry Levin Wallach and president-elect designee Scott M. Karson, is reviewing issues that incarcerated people face upon release along with ways to enhance their successful reintegration into urban, suburban and rural communities throughout the state. The task force is looking at how to address a range of barriers to re-entry including availability of housing, education and vocational training; restoration of rights; inconsistency in rules; limited availability of substance abuse and mental health treatment programs; and housing options and limited availability of housing. The task force is also examining the impact on our communities and on formerly incarcerated people that results from inadequate release planning.

The task force held an open meeting on November 9 with formerly incarcerated individuals, representatives from several state and local agencies, and not-for-profit organizations, to discuss all aspects of release planning and programs. The information that was obtained from that meeting will be incorporated into the final report. The task force will be presenting an informational report at this meeting, with the final report scheduled for April 2019.

The **Task Force on Wrongful Convictions**, co-chaired by Hon. Barry Kamins and Hon. Robert S. Smith, has been hard at work, building upon NYSBA's ground-breaking 2009 report. The task force is in the process of updating the previous report with focus on four primary areas: conviction review units, forensic science issues, actual innocence claims and monitoring implementation of new procedures. The task force will be making an informational report at this

meeting and expects to submit a report and recommendations for consideration at the April meeting.

The **Task Force on Mass Shootings and Assault Weapons**, co-chaired by Margaret J. Finerty and past President David M. Schraver, is considering the connection between mental health and mass shootings, the relationship between domestic violence and mass shootings, and whether assault weapons belong in civilian hands, issues which are constantly in the news. It has met a number of times, one of which included an extraordinary presentation by NYPD senior weapons experts.

The **Task Force on the Role of Paralegals**, co-chaired by Vincent Ted Chang, past President Maryann Saccomando Freedman and Margaret L. Phillips, is updating the 1997 paralegal guidelines adopted by the House of Delegates and is also exploring relevant issues to make recommendations for best practices for the use of paralegals in the modern 21st century law office. The task force also is considering whether NYSBA should enroll paralegals as members or ancillary members.

The **Working Group on Puerto Rico**, co-chaired by Richard M. Gutierrez, Drew Jaglom, Hilary F. Jochmans and Maria Matos, continues to identify steps that can be taken to assist the people of Puerto Rico in their continued recovery efforts. In addition, with the 116th Congress taking office this month, we will continue our efforts to secure an exemption from the Jones Act for Puerto Rico.

You may recall that last month, the New York Court of Appeals upheld Civil Rights Law §50-a, which bars the disclosure of police officer personnel records except under limited circumstances. Last spring, after our Committee on Media Law and Committee on Civil Rights presented a report to the Executive Committee on this statute, we established a **Working Group on Civil Rights Law §50-a** co-chaired by Catherine A. Christian and Norman P. Effman to examine whether the statute should be repealed or amended. The working group is expected to issue a report shortly.

Our **Working Group on Judiciary Law §470**, chaired by past President David M. Schraver, has worked diligently in collaboration with our CPLR Committee. Judiciary Law §470 requires generally that in order to appear as an attorney of record in New York courts, an attorney must have a physical office in New York. This requirement dates back to an 1862 predecessor law. For decades, critics have argued that this requirement is an anachronistic vestige of the past. This topic has frequently been raised by our non-resident members when I have attended meetings and receptions outside New York. The Working Group will be presenting a report and recommendations at this meeting.

The **Task Force on School to Prison Pipeline**, chaired by Sheila A. Gaddis and John H. Gross, was established last year by past president Sharon Stern Gerstman. The task force has submitted a thoughtful report to the House with substantive recommendations. It will be making an informational presentation at this meeting and will seek adoption of its report and recommendations in April.

Communications & Membership

I have often said that “all roads lead to membership.” In partnership with staff, association leaders have worked hard to enhance the membership experience through programs and media coverage emphasizing NYSBA’s relevance in today’s world. Thanks to the commitment of the

Rapid Response Advisory Group established in June and chaired by past President David P. Miranda, NYSBA has been able to speak out more quickly and effectively in forceful support of the rule of law. And thanks to the leadership of NYSBA's Senior Director of Communications Dan Weiller, our media presence has been heightened significantly.

Director of Attorney Retention and Engagement Victoria Shaw developed a comprehensive strategic and tactical plan which is reaping promising results. Some months ago, we established a weekly year-over-year membership report looking back five years. This gives us an opportunity to compare revenue collected, total members, total paid members, retention rates, differences from prior years, trends and other relevant information.

Utilizing this information and creative billing changes, I am very pleased to report that our retention rate of 64.0% is the highest it has been since before 2013. Paid count and revenue collected are the highest they have been at this point in the renewal cycle since 2015. Additionally, we reached our goal of 70,000 total members a few weeks ago. As of December 31, our total membership stood at 70,307 members.

We contemplate embarking upon a strategic membership recruitment campaign to begin February 1, with two separate campaigns in 2019. The first will occur from February through April and the second from September through November. The goal of these campaigns will be to recruit new members. Our invoice cycle runs through February, at which point we will do one round of telemarketing outreach and will encourage our insurance partners at USI to reach out to members ahead of drops. In order for members to continue to qualify for reduced group rates, they must continue to be NYSBA members. After drops, we will reach out to USI to have them do a second outreach to dropped members.

Also, our dedicated Membership Committee, co-chaired by Thomas Maroney and Mitchell Katz, has been hard at work. Amongst other efforts, it has held a number of receptions and gatherings of young and diverse attorneys in New York City and Albany, affording those members with greater opportunities to connect with colleagues and to develop a greater sense of membership value. Other events are contemplated around the state.

NYSBA is actively examining our global membership and our potential global market and developing a growth strategy for 2019 with support from our International Section. Our international membership has grown considerably over the past decade and we believe we have enormous opportunity for expansion with a thoughtful and strategic plan. Our sales representative, MCI, examined NYSBA's international membership in Canada, the United Kingdom, Germany, France, China, Japan and Hong Kong – the countries with the highest NYSBA membership. They also surveyed New York-registered attorneys who were not NYSBA members in those countries. It is gratifying to report that our brand is remarkably strong in those important markets. We have begun outreach to our members and non-members alike and the results seem promising.

Budget, Finance and Technology

Detailed information on finances will be provided in the Treasurer's Report, but I want to highlight the fact that the 2018 budget year ended on very positive notes: we stabilized dues revenue, substantially increased non-dues revenue and reduced expenses. As a result, I am pleased to report that NYSBA ended the year with a surplus rather than a deficit, as we had at the close of 2017. Over the past two years, the Finance Committee, chaired by T. Andrew Brown, devoted a great deal of time scrutinizing every aspect of NYSBA's budget and assisted

leadership and senior management in making difficult and complex decisions about staffing and other resources.

We have been keenly focused on increasing non-dues revenue and NYSBA staff has employed creative ways to develop new and enhance existing streams of non-dues revenue. In 2017, we had only five non-revenue streams for advertising. Last year, we added 12 new advertising streams, bringing the total to 17, and we have already brought that number to 20 this year.

Our sales representative MCI has far exceeded goals in advertising space sales in the NYSBA Journal and other publications, as well as sponsorships and exhibit space at the Annual Meeting and other events. Last year, we had 20 vendors at the Annual Meeting. Thanks to the hard work of MCI, we added an additional 30 vendors and for the first time ever, space for the Annual Meeting was entirely sold out. MCI has asked us to arrange for even more exhibition space to be available to sell next year.

By more effective placement on our website and sending a weekly email, our job board revenue doubled in 2018 to approximately \$100,000. Additionally, we are in the final stages of negotiating an agreement with Kaplan Test Prep which will provide NYSBA student members with a significant discount, and a royalty payment to NYSBA.

The primary drivers of the budget surplus were stable dues revenue, substantial increases in non-dues revenue, targeted reductions in the costs associated with previously budgeted large expense items, and open staff positions in our IT department. These open positions relate in turn to our work to update our 20-year-old association management system, as well as our outdated website and other IT functions. We are currently working with a technology consulting company to help us evaluate IT needs throughout NYSBA and determine the appropriate resources, staffing and skill-sets required to master and manage the most advanced new systems.

Adaptable and dependable IT systems and state-of-the-art websites are more important than ever for professional organizations such as NYSBA. The changes that we contemplate in IT will ensure that our data is accurate and readily available and can be used to make smart and strategic decisions that help us retain and recruit members. We hope to roll out a new website in 2019 that will allow us to present trusted NYSBA content most effectively and streamline web commerce, membership and program registration functions. Together, these projects will provide a much-improved IT experience for members, potential members and the public – and for NYSBA leadership and staff.

NYSBA CLE

It is exciting to report that beginning this month, all NYSBA CLE programs in New York City are based at Convene, located at 810 Seventh Avenue at 53rd Street. The sleek Convene space includes state-of-the-art classroom spaces as well as comfortable lounge areas featuring complimentary beverages and snacks. Over the past year, we explored many options to create a home base for our New York City CLE programs. We believe that our partnership with Convene offers the most convenient and practical setting for our program participants. No CLE provider in New York City offers a comparable environment.

Building upon the large inventory of New York-specific content, Senior Director of Continuing Legal Education & Law Practice Management Katherine Suchocki and or CLE Committee, ably chaired by James Barnes, have done a spectacular job of coordinating and marketing our offerings. Their efforts helped NYSBA sell more than one million dollars of online programming

in 2018, a goal never before achieved. Also, thanks to their initiative, we will very shortly be moving our online programming to a new state-of-the-art platform that will give our customers a significantly enhanced CLE experience.

Annual Meeting

This Annual Meeting week has been a whirlwind of meetings, programs, receptions and dinners. I am gratified to have seen so many of you participating in these events and connecting with other members of our profession in this setting. Our staff, led ably by Executive Director Pamela McDevitt, did an exceptional job of coordinating and planning and I am most grateful for their hard work and dedication. Special recognition goes to Director of Section and Meeting Services Patricia B. Stockli and Kimberly A. McHargue, executive assistant to the executive director, who worked tirelessly to make the Annual Meeting a success.

While programs, meetings and networking may be the focus of Annual Meeting for our members, selling exhibitor space at the event is an increasingly important non-dues revenue opportunity for NYSBA. I hope you had a chance to visit the new exhibitor space in Rhineland North this year. As I mentioned above, thanks to the hard work of MCI, space for the Annual Meeting was entirely sold out for the first time ever.

I am pleased to report that planning for the 2020 annual meeting is already underway with a view towards spending resources efficiently and in a manner that creates opportunities for as many members as possible to participate. To that end, plans are in the works for a single gala-style dinner open to all members, in lieu of the Thursday evening House Dinner and Saturday evening President's Dinner. President-Elect Hank Greenberg is working on the event with John Gross, the immediate past president of the New York Bar Foundation and chair of the dinner planning committee, as well as past Presidents Stephen P. Younger, Vincent E. Doyle III and others.

Representing NYSBA

Since my last report, I have been pleased to represent NYSBA at many events honoring lawyers who have made special contributions to our profession. Among the events I attended were:

- The New York County Lawyers Association Edward Weinfeld Award Luncheon, at which chief judge of the Federal District Court for the Eastern District of New York Dora Irizarry was honored;
- The Haywood Burns Award ceremony at CUNY School of Law in Long Island City, at which our Committee on Civil Rights presented the 2018 Haywood Burns Memorial Award to Esmeralda Simmons, executive director of the Center for Law and Social Justice at Medgar Evers College, in recognition of her work in advocacy, community education, coalition-building and public policy campaigns on behalf of underserved communities;
- The Bar Association of Erie County Reception in Buffalo honoring retired Court of Appeals Judge Eugene Pigott;
- The Scales of Justice Academy Scholarship Reception at Fordham University School of Law, at which NYSBA's Family Law Section was honored for its substantial support over the years;
- The Foundation for the Judicial Friends, Inc. annual Rivers, Toney, Watson Dinner;
- The joint dinner meeting of the Nassau and Suffolk County Bar Associations Executive Committees at the Nassau County Bar Association in Garden City;

- A luncheon at Patterson Belknap with NYSBA Vice President Taa Grays, arranged by past President Stephen Younger, with approximately 50 Patterson associates in connection with our large firm membership initiative;
- Our Bridging the Gap CLE program at our new New York City CLE home location in midtown Manhattan;
- The Albany County Bar Holiday Party;
- The joint holiday party of the New Rochelle, Port Chester, Rye, Harrison, Larchmont and Mamaroneck Bar Associations at the John Jay Mansion in Rye; and
- The NYSBA staff holiday pizza party at the Bar Center in Albany.

With the determined support and assistance of Ronald Minkoff, I participated in multiple conference calls with various ABA committees and entities concerning NYSBA's resolution seeking adoption of best practices for online legal document providers. In the spirit of cooperation, we adopted many proposed revisions and are hopeful that our resolution will be adopted by the ABA House at the end of January, resulting in Best Practice Guidelines for online legal document providers which will afford consumers certain protections and reliability.

I was pleased to attend a number of meetings of NYSBA committees, section executive committees, working groups and task forces and participated in many of their conference calls. It is always inspiring and gratifying to witness so many colleagues working to improve our profession, make the law more effective, support the rule of law, enhance access to justice and make our world a little bit better. Additionally, I had the extraordinary opportunity to meet with various congressional leaders and their staff members on January 2nd and 3rd in Washington, D.C. at swearing-in and reception ceremonies for the new Congress.

Last month, I was very honored to receive the New York County Lawyers Association's prestigious Boris Kostelanetz President's Medal at their Annual Dinner. Participation in local bar associations is extremely valuable both personally and professionally, and I am humbled to receive such recognition for contributions to the legal profession.

In closing, I would be remiss if I failed to acknowledge the extraordinary support and counsel I receive from President-Elect Hank Greenberg. His advice is always thoughtful and sound, his support unwavering, his friendship unshakeable.

The next meeting of the House of Delegates will occur on Saturday, April 13, 2019 at the Bar Center in Albany. I look forward to seeing you there.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael Miller". The signature is written in a cursive style with a long, sweeping underline.

**HOUSE OF DELEGATES
Agenda Item #3**

**ELECTION OF 2019-2020
OFFICERS AND MEMBERS-AT-LARGE
OF THE EXECUTIVE COMMITTEE**

PRESIDENT-ELECT

Scott M. Karson, Melville

SECRETARY

Sherry Levin Wallach, White Plains

TREASURER

Domenick Napoletano, Brooklyn

DISTRICT VICE-PRESIDENTS

FIRST:

Diana S. Sen, New York City
Carol A. Sigmond, New York City

SEVENTH:

David H. Tennant, Rochester

SECOND:

Aimee L. Richter, Brooklyn

EIGHTH:

Norman P. Effman, Warsaw

THIRD:

Robert T. Schofield IV, Albany

NINTH:

Mark T. Starkman, New Windsor

FOURTH:

Marne Onderdonk, Albany

TENTH:

Donna England, Centereach

FIFTH:

Jean Marie Westlake, East Syracuse

ELEVENTH:

Karina E. Alomar, Ridgewood

SIXTH:

Richard C. Lewis, Binghamton

TWELFTH:

Michael A. Marinaccio, White Plains

THIRTEENTH:

Jonathan B. Behrins, Staten Island

AT-LARGE MEMBERS OF THE EXECUTIVE COMMITTEE

Margaret J. Finerty, New York City
William T. Russell, Jr., New York City
Richard M. Gutierrez, Forest Hills (Diversity Seat)
Andre R. Jaglom, New York City (Section Seat)
John P. Christopher, Glen Head (Young Lawyer Section Seat)



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. In 2018, COSAC published for comment draft amendments to the rules relating to (a) conflicts of interest and (b) tribunals. COSAC received comments from several individuals and entities (attached to the committee's report) and revised its draft to take into account the comments received. It made further revisions to its proposals after it made an informal presentation at the November 2018 House meeting. These changes are summarized at the beginning of the report.

The proposed amendments may be summarized as follows:

CONFLICTS

- **Rule 1.0.** Eliminate the definition of “differing interests” currently found in Rule 1.0(f), because COSAC proposes to eliminate the phrase “differing interests” from Rule 1.7 and from other Rules and Comments where it appears.
- **Rule 1.7.** Eliminate the term “differing interests” in Rule 1.7 (New York’s basic current-client conflict Rule), and adopt instead the formulation of the ABA Model Rules barring representations “directly adverse” to a current client and representations where the representation of a client would be “materially limited” by the lawyer’s responsibilities to another client or the lawyer’s personal interests.
- **Rule 1.8.** Change the wording of Rules 1.8(a), (b) and (c), which deal with certain specific conflict of interest rules, and move Rule 1.10(h) to Rule 1.8.
- **Rule 1.10.** In Rule 1.10, which governs imputation of conflicts among lawyers in a law firm: (i) remove imputation for most personal conflicts; (ii) permit screening to avoid imputation of lateral-hire conflicts; and (iii) address conflicts that would

arise solely from information that resides in databases or files of a law firm where all lawyers who worked on the matter in question have left the firm. (NOTE: this proposal has been amended to add a new paragraph (c)(3) and a new comment to place a limitation on screening.)

- **Rules 1.11 and 1.12.** Eliminate the “appearance of impropriety” standard that limits the use of screening to address conflicts of former government lawyers and former judges and arbitrators in Rules 1.11 and 1.12. That vague standard has otherwise been eliminated from the New York Rules of Professional Conduct.
- **Rule 1.11.** Clarify in Rule 1.11 that the conflicts of lawyers entering or serving in government law offices are not imputed to other lawyers in the office, and thus can generally be cured by recusal of the disqualified lawyer. (NOTE: this proposal has been amended to address the possibility that a conflict with a current private client might arise from the private practice of a part-time government lawyer.)
- **Rule 1.11.** Clarify in Rules 1.11 and 1.12 that law clerks to judges may negotiate for employment with lawyers or parties appearing before the judge or other adjudicative officer after notifying the judge or adjudicative officer.
- **Rule 6.5.** Revise Rule 6.5, which addresses participation in short-term pro bono representations (such as legal services clinics), in a number of ways to clarify the operation of the Rule.

TRIBUNALS

- **Rule 1.16(c)(5).** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client “deliberately disregards” an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”
- **Rule 3.3(c).** Insert a proviso that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the “the unlawful destruction or unlawful deletion of any document having potential evidentiary value.”

- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” so that it prohibits presenting “criminal or disciplinary charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*”
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads “*Notwithstanding* paragraph (a)” rather than “Provided that the statement complies with paragraph (a).” The amendment will make Rule 3.6(c) a true safe harbor.

Comments on the proposals are attached.

The report will be presented at the January 18 meeting by Profs. Roy D. Simon and Barbara S. Gillers, co-chairs of COSAC, and past COSAC chair Joseph E. Neuhaus.

MEMORANDUM

January 4, 2019

To: NYSBA Executive Committee

Cc: Kathy Baxter, NYSBA General Counsel

From: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
Roy D. Simon, Co-Chair of COSAC
Barbara S. Gillers, Co-Chair of COSAC
Joseph E. Neuhaus, COSAC Review Committee Chair

Subject: COSAC Proposals Regarding Conflict of Interest Provisions
Revised Final Report Responding to Public Comments

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct (the “Rules”). On May 3, 2018, COSAC circulated, for public comment, proposals to amend the New York Rules governing conflicts of interest (the “Public Comment Conflicts Report”). After analyzing the public comments, COSAC presented a Final Report to the House of Delegates at its November 2018 meeting for informational purposes.

During the discussion in the House of Delegates, a concern was expressed about the proposed amendment to Rule 1.10(c), which would permit screening, with notice, to cure certain conflicts arising from lateral movement of a lawyer to a new firm. In light of that concern, COSAC now proposes an alternative amendment to Rule 1.10(c) – adding a new subparagraph (c)(3) – that would not permit screening alone to cure conflicts where the lawyer with “primary responsibility” for a litigation matter “switched sides” If the House approves subparagraph (c)(3), then COSAC recommends adding a new Comment [5F] to Rule 1.10 to explain the limitation on screening. (See pp. 20-21, 25 & 28 below.)

In addition, COSAC has slightly revised the proposed screening procedures for current government lawyers in proposed Rule 1.11(e), and has revised proposed Comment [9C] to the Rule, to take account of the possibility that a conflict with a current private client might arise from the private practice of a part-time government lawyer. (See pp. 32-33, 35 & 37 below.)

COSAC is now forwarding this report to the Executive Committee of the Association for consideration by the House of Delegates at its January meeting. Below are COSAC’s revised proposals. We summarize the issues that led COSAC to propose each particular amendment, and set out the proposed amendments in legislative style, striking out deleted language (in red) and underscoring added language (in blue).

Summary of Proposals

COSAC proposes changes to the Rules and Comments dealing with conflicts of interest. COSAC is proposing to amend the black letter text of the Rules in the following principal ways:

- **Rule 1.0.** Eliminate the definition of “differing interests” currently found in Rule 1.0(f), because COSAC proposes to eliminate the phrase “differing interests” from Rule 1.7 and from other Rules and Comments where it appears.
- **Rule 1.7.** Eliminate the term “differing interests” in Rule 1.7 (New York’s basic current-client conflict Rule), and adopt instead the formulation of the ABA Model Rules barring representations “directly adverse” to a current client and representations where the representation of a client would be “materially limited” by the lawyer’s responsibilities to another client or the lawyer’s personal interests.
- **Rule 1.8.** Change the wording of Rules 1.8(a), (b) and (c), which deal with certain specific conflict of interest rules, and move Rule 1.10(h) to Rule 1.8.
- **Rule 1.10.** In Rule 1.10, which governs imputation of conflicts among lawyers in a law firm: (i) remove imputation for most personal conflicts; (ii) permit screening to avoid imputation of lateral-hire conflicts; and (iii) address conflicts that would arise solely from information that resides in databases or files of a law firm where all lawyers who worked on the matter in question have left the firm. (For the screening provision, COSAC proposes two alternatives – one with and one without a limiting paragraph.)
- **Rule 1.11.** Clarify in Rule 1.11 that the conflicts of lawyers entering or serving in government law offices are not imputed to other lawyers in the office, and thus can generally be cured by screening and recusal of the disqualified lawyer.
- **Rule 1.11.** Address conflicts of interest arising from a government lawyer’s part-time private law practice (a common situation in upstate New York).
- **Rules 1.11 and 1.12.** Eliminate the “appearance of impropriety” standard that limits the use of screening to address conflicts of former government lawyers and former judges and arbitrators in Rules 1.11 and 1.12. (That vague standard has otherwise been eliminated from the New York Rules of Professional Conduct.)
- **Rules 1.11 and 1.12.** Clarify in Rules 1.11 and 1.12 that law clerks to judges may negotiate for employment with lawyers or parties appearing before the judge or other adjudicative officer after notifying the judge or adjudicative officer.

- **Rule 6.5.** Revise Rule 6.5, which addresses participation in short-term pro bono representations (such as legal services clinics), in a number of ways to clarify the operation of the Rule.

Proposed changes to the black letter Rules can take effect only if they are adopted by the Appellate Divisions of the New York state courts. In contrast, proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval (although some proposed changes to the Comments are contingent on Appellate Division approval of the related changes to the black letter Rules).

Rule 1.7

(Conflict of Interest: Current Clients)

and Comments to Rule 1.7 and Other Rules

Incorporating the “Differing Interests” Standard

COSAC recommends that New York abandon its vague “differing interests” standard in Rule 1.7 and adopt instead the more specific and more helpful standard found in ABA Model Rule 1.7(a)(1) and (a)(2). In addition, we address below proposed changes to Comments [21], [34] and [34A] to Rule 1.7. These Comments deal with revoking consent and with certain considerations regarding conflicts in representing clients adverse to an affiliate of an organizational client. We also address a change to a sentence in Comment [6] to Rule 1.7.

Proposal to abandon the “differing interests” standard and adopt a more useful standard

New York’s current-client conflict of interest rule, Rule 1.7, is an outlier among the states. It incorporates the “differing interests” standard of the former ABA Model Code of Professional Responsibility. No other state uses that standard, and COSAC believes the revised standard we now propose offers more guidance to lawyers and courts.

Under current Rule 1.7(a)(1), a lawyer has a conflict if a reasonable lawyer would conclude that the representation “will involve the lawyer in representing differing interests.” The term “differing interests” is then defined, in Rule 1.0(f), as “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.” This formulation has, in our view, a number of weaknesses. It starts with a highly vague term – “differing interests” – that would seem to be triggered even by very limited differences in client interests, including purely economic differences (for example, the development of a product by one client that will compete with another client’s product). The definition does not provide sufficient guidance because it ultimately rests on an inquiry into whether the differing interests will adversely affect “either the judgment or the loyalty of a lawyer to a client.” While the concept of an effect on the “judgment” of a lawyer is a concept that can be readily understood, the concept of an effect on the “loyalty” of a lawyer ultimately reflects a value or policy judgment as to what the extent of a lawyer’s loyalty to a client should be. In the end, the Rule provides no guidance on that question.

A further objection to the current Rule is that, by its terms, it is triggered only when a reasonable lawyer would conclude that the representation “will” involve representation of differing interests and “differing interests” exist only when the lawyer’s judgment or loyalty “will” be affected. In other words, the Rule by its terms finds a conflict only when a reasonable lawyer would be certain that differing interests will arise. There is no room to accommodate the numerous situations in which a divergence of interests is likely or reasonably possible. In practice, lawyers often consider themselves to have a conflict when a divergence in interest is likely but not certain, so the Rule does not describe the understanding of prudent lawyers.

In drafting the ABA Model Rules that the ABA House of Delegates ultimately adopted in 1983, the ABA abandoned the “differing interests” formulation early on – it does not appear in any of the discussion drafts from 1980 to 1983 posted on the ABA website.¹ While there was extensive discussion of the precise formulation of a conflict standard, apparently no one proposed returning to the old standard.

In its current form, ABA Model Rule 1.7 retains the concepts behind the two core elements in the definition of “differing interests,” but articulates those concepts differently and with greater precision. ABA Model Rule 1.7 replaces the concept of an adverse effect on the “judgment” of the lawyer with the concept of a “material limitation” on the lawyer’s “representation” of the client; and it replaces the concept of an adverse effect on the lawyer’s “loyalty” by defining precisely what is meant by the term “loyalty”: the lawyer cannot be “directly adverse” to the client. This latter shift accurately captures what lawyers generally believe to be a conflict of interest, and it is far clearer than the “differing interests” standard. The twin prohibitions on representations that are “directly adverse” or “materially limited” have been adopted, in the same or substantially similar forms, by all other states except California, Georgia, and North Dakota.²

For the same reasons, COSAC recommends deleting the definition of “differing interests” in Rule 1.0(f). If COSAC’s recommendation to replace the “differing interests” standard is adopted, there will be no need to define the term because it will no longer appear in the Rules.

We also propose to insert the term “significant risk” in place of “will” in New York Rule 1.7(a)(2). Under our proposal, a conflict arises if a reasonable lawyer would conclude that there is a “significant risk” of a material limitation on the representation. Again, we believe this accurately captures the practice of prudent lawyers today.

In recommending adoption of the current Rule and Comments in the years leading up to the New York State Bar Association’s 2008 recommendation to the courts, COSAC likewise

¹https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts.html.

² The California, Georgia and North Dakota Rules find a conflict only if the representation or relationship with another client or a third party will have an adverse effect on the representation of a client, essentially eliminating the “directly adverse” aspect of the test. Other jurisdictions have adopted minor variations on the “directly adverse/materially limited” model. For example, the District of Columbia uses the term “adverse positions” in place of the concept “directly adverse,” and Texas replaces the term “materially limited” with the phrase “adversely limited.”

recommended that New York abandon the “differing interests” standard. At that time the New York Courts chose, as they did on a number of points, to adhere more closely to language in the former New York Code of Professional Responsibility, but for the reasons outlined above, COSAC believes the time has come to reconsider that decision.

Specifically, in 2005-2008, COSAC recommended altering the New York Rules in three ways, all of which we also recommend at this time, with a few minor modifications to the 2008 proposals.

First, COSAC recommended “retain[ing] New York’s traditional reference to a lawyer’s ‘independent professional judgment,’” a term contained in former DR 5-105, noting that “the concept of independent professional judgment is understandable and meaningful to New York lawyers” and that “New York courts and ethics authorities have developed over time a rich body of decisional law that has reinforced and illuminated it.” At the same time, COSAC observed that “in some circumstances, it may be easier for a lawyer to understand the consequences of a conflict in terms of its impact on the *representation* itself, rather than its impact on the lawyer’s own *judgment*” (emphasis added), so COSAC proposed using both terms.³ We still agree with that dual articulation. The concept of an effect on independent professional judgment is easy to understand, and is discussed in the existing Comments to the New York Rule, but it does not exhaust the realm of conflicts. For example, a lawyer may have a conflict if the lawyer is advancing a legal position for Client A that is contrary to the position the lawyer is taking (or has previously taken) for Client B, where, because of the timing or prominence of the argument, the fact that the lawyer is making the argument on behalf of Client A may be used against Client B. That situation could “materially limit” the lawyer’s *representation* of Client B even if the lawyer’s *judgment* was not affected. However, we believe any adverse effect on the lawyer’s independent professional judgment would be a “material limitation” on the representation, so instead of recommending that the two terms be included as co-equal alternatives, as COSAC did in 2008, we now recommend a formulation that refers to an adverse effect on “independent professional judgment” as well as to the representation “otherwise” being materially limited. This tracks the discussion in existing Comment [8] to New York Rule 1.7.

Second, COSAC recommends departing from the ABA Model Rule by incorporating the existing New York phrase “a reasonable lawyer would conclude” in the introductory language to Rule 1.7(a), before defining the two general types of conflicts. This makes explicit what we believe is implicit in the ABA Model Rule and, as noted, is consistent with the current New York Rule.

Third, where the ABA Model Rule refers simply to the “personal interest of the lawyer,” we recommend retaining the existing New York term “the lawyer’s own financial, business, property or other personal interests.” This is a useful expansion of the concept of personal interest conflicts. It identifies the most common personal interests that give rise to conflicts, and is a term with which New York courts and lawyers are familiar.

³ New York State Bar Association, Proposed New York Rules of Professional Conduct: Report and Recommendations of Committee on Standards of Attorney Conduct 68-69 (Sept. 30, 2005).

The changes set forth below reflect the above recommendations, including certain places where Rule 1.7's current "differing interests" standard is mentioned in Comments to other Rules. In addition, in the next section of this report we recommend deleting the reference to "differing interests" in Rule 1.8(a) and the reference to "interests differ" in former Rule 1.10(h) (which we propose be moved to new Rule 1.8(i)).

Proposal to amend Comments [6], [21], [34] and [34A] to Rule 1.7

COSAC proposes several other amendments to the Comments to Rule 1.7.

Comment [6] provides that a client "is likely to feel betrayed" every time a lawyer who may represent a client in unrelated matters appears on the other side of a matter. This is undoubtedly sometimes true of some clients, but COSAC does not believe that it is always true of all clients. COSAC proposes to moderate this language as shown in the redline below.

Comment [21] addresses the effect of one client's revocation of a previously given consent on the lawyer's ability to continue representing other clients in the same matter or in a conflicting matter. COSAC believes Comment [21] pays insufficient attention to the interests of the other clients who may have relied on the advance consent when retaining and subsequently relying on and expending resources on the lawyer's services. The suggested amendments in the redlines below place greater emphasis on the interests of the non-revoking clients.

Comments [34] and [34A] address whether a conflict exists where a law firm represents a constituent or an affiliate of an organizational client and seeks to act adversely to another constituent or affiliate of the organizational client. The focus is on the relationship between the constituent entities involved. COSAC proposes to revise those Comments to include, among other things, a discussion of how closely related the matters are. This revision is consistent with case law on disqualification motions that refer to the well-understood "substantial relationship" test in such circumstances. *E.g.*, *Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 254 A.D. 2d 947, 679 N.Y.S.2d 30 (2d Dep't. 1998); *see generally* Richard Flamm, *Conflicts of Interest* §§17.1 & 17.2 (2015 and Supp. 2016); Roy D. Simon & Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated* 382-83 (Thomson Reuters 2017 ed.).

Redlined proposals to delete Rule 1.0(f), amend Rule 1.7(a), and amend related Comments

For the foregoing reasons, COSAC proposes to delete Rule 1.0(f), amend Rule 1.7(a), and amend the related Comments, as indicated below.

Rule 1.0
Terminology

(f) **[Reserved.] ~~"Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.~~**

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if either:

(1) the representation of one client will be directly adverse to another client ~~will involve the lawyer in representing differing interests~~; or

(2) there is a significant risk that (i) the lawyer's independent professional judgment on behalf of a client will be adversely affected by, or (ii) the representation of one or more clients otherwise will be materially limited by, the lawyer's responsibilities to another client, a former client or a third person or by the lawyer's own financial, business, property or other personal interests.

....

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's independent professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise independent professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "~~differing interests,~~" "informed consent," "writing" or "written," and "confirmed in writing," see Rules 1.0(~~f~~), (j), ~~and~~ (e), and (x), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's independent professional judgment may be impaired or the lawyer's ~~loyalty may be divided~~ representation will be materially limited if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include ~~all-both~~ of the clients ~~who may have differing interests under~~ referred to in paragraph (a)(1) and ~~any~~ the one or more clients whose representation might be ~~adversely affected~~ materially limited under paragraph (a)(2).

....

Identifying Conflicts of Interest: Direct Adversity

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. ~~The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example~~ Thus, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. ~~The~~ Some clients as to whom the representation is adverse ~~is likely to~~ could feel betrayed, and in those circumstances the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of independent professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a direct adversity conflict may arise when a lawyer is required to cross-examine another current client who is appearing as a witness in a lawsuit ~~involving another client, as when especially if~~ the testimony of the client to be cross-examined will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] ~~Differing interests~~ Direct adversity conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] ~~Differing interests~~ Even where there is no direct adversity, a concurrent conflict of interest exists if there is a significant risk that a lawyer's exercise of independent professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the independent professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's independent professional judgment in

considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

....

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. ~~Whether r~~ Revoking consent to the client's own representation does not necessarily precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result. Whether the lawyer may continue to represent such other clients ordinarily depends on whether the other clients reasonably relied on the revoking client's consent, whether any understanding existed at the time of the original engagement as to the lawyer's ability to represent other clients in the event of revocation, and whether (and to what extent) the lawyer and the other clients will suffer harm. On the other hand, withdrawal from the other representation might be required depending on the severity of the conflict, a client's reason for revoking consent (such as a lawyer's misuse of confidential information or the lawyer's failure to follow a client's instructions because of conflicted loyalties), or a material change in circumstances after the consent was given.

....

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should ~~always seek informed consent of the client organization~~ consider informing the entity the lawyer represents and seeking consent as a prudential matter before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer ~~will avoid~~ shall not undertake representation adverse to ~~the client's~~ an identified affiliate or affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of independent professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. ~~Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate.~~ For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, a shared legal department, general counsel and other management personnel, shared information systems, and the client's overall mode of doing business in a unitary manner, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances,

the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] ~~Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate.~~ In other circumstances, the key consideration, as in many other instances of determining whether a conflict exists, is whether the representation adverse to one affiliate will be materially limited by the lawyer's representation of another affiliate that the lawyer or lawyer's firm represents in other matters. This will often depend on whether there is a substantial relationship between matters or whether an affiliate has imparted confidential information to the lawyer in one representation that may be used in a manner detrimental to the interests of another affiliate in another representation. Further, ~~w~~Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

Comments to Rule 1.8 Relating to Rule 1.7

Current Clients: Specific Conflict of Interest Rules

Comment

Business Transactions Between Client and Lawyer

....

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's independent professional judgment will be adversely affected by,⁴ ~~or the~~ representation of the client will be materially ~~adversely affected~~ limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal

⁴ In her comments on an earlier version of these proposals, Nancy Ann Connery, a member of the Bar, observed that COSAC's proposed change did not capture all of the circumstances set forth in Rules 1.7 and 1.8 that constitute a conflict, and specifically did not include the phrase "adversely affected by" from Rule 1.7(a)(2). COSAC has amended the proposal that appeared in its Public Comment Report to take Ms. Connery's suggestion into account.

advice in a way that favors the lawyer's interests at the client's expense. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer's business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is also required to make such additional disclosures to the client as are necessary to obtain the client's informed consent to the continuation of the representation.

....

[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be ~~adversely affected~~ materially limited by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. *See* Rules 1.0(e) (defining "confirmed in writing"), 1.0(j) (defining "informed consent"), and 1.7(b)(4) (governing consent to concurrent conflicts).

....

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest ~~may exist if the lawyer will be involved in representing differing interests or~~ if there is a significant risk that either the lawyer's independent professional judgment on behalf of the client will be adversely affected or the representation otherwise will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. *See* Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

Comments to Rule 5.7 Relating to Rule 1.7 Responsibilities Regarding Nonlegal Services

Comment

....

[5A] Under Rule 1.7(a)(2), a concurrent conflict of interest exists when (among other things) a reasonable lawyer would conclude that there is a significant risk that the lawyer's independent professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or personal interests. When a lawyer or law firm provides both legal and nonlegal services in the same matter (or in

substantially related matters), a conflict with the lawyer’s own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer’s own interests under Rule 1.7(a)(2) is likely to arise. However, when seeking the consent of a client to such a conflict, the lawyer should comply with both Rule 1.7(b) regarding the conflict affecting the legal representation of the client and Rule 1.8(a) regarding the business transaction with the client.

Rule 1.8

Current Clients: Specific Conflict of Interest

COSAC proposes a number of changes to the text of Rule 1.8 and accompanying Comments.

Proposal to amend Rule 1.8(a) and Comment [1] to Rule 1.8

Rule 1.8(a) currently bars a lawyer from entering into a business transaction with a client, unless certain criteria are met (*e.g.*, the client signs a writing giving informed consent, and the transaction meets a test of fairness and reasonableness), if the lawyer and client “have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” These last two requirements (differing interests and the client’s expectation) are not included in the ABA Model Rules. COSAC recommends deleting the requirement that the lawyer and client “have differing interests therein,” because it is redundant. If a lawyer and client are entering into a business transaction with each other, they will always have differing interests in the transaction. A parallel change would be made to Comment [1].

Proposal to delete Rule 1.8(b) and Comment [5] to Rule 1.8

COSAC recommends deleting Rule 1.8(b) and Comment [5] to Rule 1.8, and marking them “[RESERVED].”

Rule 1.8(b) currently provides, “A lawyer shall not *use* information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.” (Emphasis added.)

Rule 1.8(b) was not proposed by COSAC but was adopted by the Courts *sua sponte*. COSAC did not propose Rule 1.8(b) because COSAC considered it redundant of other Rules and because the substance of it was included in Rule 1.6(a) as proposed by COSAC and adopted by the Courts. Rule 1.6(a) provides, in part:

A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or *use* such information *to the disadvantage of a client* or for the advantage of the lawyer or a third person, unless: (1) the client gives informed consent, as defined in Rule 1.0(j); (2) the disclosure is impliedly authorized . . .; (3) the disclosure is permitted by paragraph (b). [Emphasis added.]

The ABA Model Rules include Rule 1.8(b), but the Model Rules do not contain the same redundancy as New York Rule 1.8(b) because the Model Rules distinguish between “revealing” confidential information and “using” confidential information. The ABA Model Rules deal with “revealing” confidential information in Model Rule 1.6, and deal with “using” such information to the disadvantage of the client in Model Rule 1.8(b). New York’s Rules instead combine those two points (“revealing” and “using” confidential information to the disadvantage of the client) in a single rule, New York Rule 1.6(a).

In 2008, the Courts added the language of ABA Model Rule 1.8(b) to the Rules proposed by COSAC. For this reason, New York Rule 1.8(b) contains the ABA Model Rules’ broader and vaguer definition of protected information – “information relating to representation of a client” – even though New York chose to retain in New York Rule 1.6(a) a definition of “confidential information” similar to the definition of “confidences” and “secrets” that had appeared in DR 4-101(A) of the former New York Code of Professional Responsibility.

COSAC proposes to delete New York Rule 1.8(b) entirely (as well as to delete the corresponding Comment [5] to Rule 1.8) for three reasons. First, Rule 1.8(b) overlaps and largely duplicates Rule 1.6(a). Second, Rule 1.6(a) already sufficiently protects confidential information. Third, Comment [4B] to Rule 1.6 already captures most of the ideas in Comment [5] to Rule 1.8 (sometimes in identical language). We recognize that Rule 1.8(b) is not identical to Rule 1.6(a) – it is narrower in some ways and broader in others – but on balance we think Rule 1.8(b) is not necessary to protect clients and creates confusion for lawyers. Indeed, Rule 1.8(b) effectively refers to Rule 1.6 by the final clause of Rule 1.8(b), which says “except as permitted or required by these Rules.”

Proposal to revise Rule 1.8(c)(1) and (c)(2)

New York Rule 1.8(c) currently provides as follows:

- (c) A lawyer shall not:
 - (1) solicit *any gift* from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
 - (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer *any gift*, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship. [Emphasis added.]

New York Rule 1.8(c) is more restrictive than ABA Model Rule 1.8(c). The ABA Model Rule prohibits a lawyer from soliciting any “substantial” gift from a client, or preparing an instrument giving any “substantial” gift to the lawyer or a person related to the lawyer, unless the lawyer or other recipient of the gift is related to the client. In the Public Comment Conflicts Report,

COSAC proposed to relax the near-absolute ban on gifts in New York Rule 1.8(c) and adopt instead the ABA's prohibitions only on soliciting or preparing an instrument for "substantial" gifts.

The NYSBA Ethics Committee disagreed with this proposal, stating, "We believe allowing lawyers to solicit gifts—even ones that are not 'substantial', however defined—is likely to put lawyers in a bad light." The Ethics Committee therefore urged that New York Rule 1.8(c) be retained in its current form.

COSAC is persuaded that New York Rule 1.8(c) should be retained in its current form and that no change is warranted. There do not appear to have been interpretive difficulties with New York's language or real-world problems with its enforcement. Rule 1.8(c) sensibly distinguishes between (i) *preparation* of instruments giving lawyers gifts, which are permitted in narrow circumstances where the client is related to the lawyer and the transaction is fair and reasonable (as when a fully informed client insists on it), and (ii) *solicitation* of gifts, which is prohibited in all circumstances.

Proposal to move Rule 1.10(h) to Rule 1.8 and to update the wording of Rule 1.10(h)

For the reasons explained below in connection with Rule 1.10, COSAC proposes to move Rule 1.10(h), which is a special conflict rule and not an imputation rule, to Rule 1.8, as a new paragraph (l) at the end of existing Rule 1.8. As noted above in connection with the changes to Rule 1.7 deleting the phrase "differing interests," COSAC also proposes in Rule 1.10(h) to change the phrase "a client whose *interests differ* from" to the phrase "a client whose *interests conflict under Rule 1.7(a)* with."

To further update the language in existing Rule 1.10(h) to make it consistent with wording used elsewhere in the New York Rules of Professional Conduct, COSAC also proposes to change the phrase "client consents after *full disclosure*" to the phrase "client gives *informed consent*," which is the phrase used in Rule 1.7(b)(4), and to change the phrase "the lawyer *concludes* that the lawyer can adequately represent the interests of the client" to the phrase "the lawyer *reasonably believes* that the lawyer will be able to *provide competent and diligent representation*" to the client, which is the phrase used in Rule 1.7(b)(1). Here is a redline showing the changes COSAC recommends making to former Rule 1.10(h) to create new Rule 1.8(l):

(l) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests ~~differ~~ conflict under Rule 1.7(a) with those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client gives informed consents ~~after full disclosure~~ and the lawyer ~~concludes~~ reasonably believes that the lawyer ~~can adequately represent~~ will be able to provide competent and diligent representation to the client.

Redlined proposal to amend Rule 1.8(a)-(c), amend Comments [1] and [5]-[7], and add new Rule 1.8(l)

Thus, COSAC proposes to revise New York Rule 1.8(a), (b) and (c), to revise Comments [1], [5], [6] and [7] to Rule 1.8, and to add a new Rule 1.8(l), so that Rule 1.8 would read as follows:

(a) A lawyer shall not enter into a business transaction with a client ~~if they have differing interests therein and~~ if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) ~~[Reserved.] A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.~~

....

(l) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests conflict under Rule 1.7(a) with those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client gives informed consent to the representation and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met if ~~the client and lawyer have differing interests in the transaction and~~ the client expects the lawyer to exercise professional judgment therein for the benefit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, such as the sale of title insurance or

investment services to existing clients of the lawyer's legal practice. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent.

....

~~[5] [\[Reserved.\]](#) A lawyer's use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or a business associate of the lawyer, at the expense of a client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. But the rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits use of client information to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. Rules that permit or require use of client information to the disadvantage of the client include Rules 1.6, 1.9(e), and 3.3.~~

Rule 1.10

Imputation of Conflicts of Interest

Overview

COSAC proposes the following four changes to Rule 1.10:

- (A) Remove imputation for personal conflicts;
- (B) Permit screening to avoid imputation of lateral-hire conflicts;
- (C) Avoid imputation of conflicts to a firm that is no longer associated with any lawyers who worked on a conflicting matter, but continues to have information regarding the matter in its databases or paper files, provided the firm meets certain conditions; and
- (D) Move Rule 1.10(h), which is not an imputation rule, to Rule 1.8.

Each of these proposals is explained below. In addition, for reasons set forth in the discussion of our proposal to amend Rule 1.11(d), relating to imputation of conflicts of current government employees, COSAC proposes to add a new paragraph (i) to Rule 1.10 and to amend Comment [7] to that Rule.

Proposal to remove imputation for personal conflicts

COSAC proposes to eliminate New York's minority rule that categorically imputes to associated lawyers all conflicts that arise from a lawyer's own financial, business, property or

other personal interest (“personal conflicts”). New York’s inflexible rule is shared by only five other states: Alabama, California, Georgia, Mississippi, and Texas. All other states appear to have adopted the position in ABA Model Rule 1.10(a) that such conflicts are not ordinarily imputed to the law firm as a whole.

The New York rule is an unrealistic standard that creates a conflict where, as Comment [3] to ABA Model Rule 1.10 puts it, “neither questions of client loyalty nor protection of confidential information are presented.” Many personal conflicts affecting one lawyer in a firm pose no risks whatsoever to clients of other lawyers in the firm. For example, if a spouse of a lawyer in a large firm works for the contractual counterparty of the firm’s client, or if the strong religious or political beliefs of one lawyer in the firm would prevent that lawyer from working on a particular matter, there is typically no risk that the independent professional judgment of other lawyers in the firm would be affected.

New York’s rule imputing personal conflicts has been the subject of numerous ethics opinions, and has resulted in imputation (and hence disqualification of an entire firm) that often seems unwarranted in light of the minimal risks presented. *See, e.g.*, N.Y. State 900 (conflicts imputed from lawyer serving as a mediator); N.Y. State 881, 890, 895, and 941 (conflicts with lawyer’s spouse imputed to firm); N.Y. State 925 (conflicts arising from lawyer’s business relationship with law partner’s adversary imputed to firm); N.Y. State 968 (conflict imputed from government lawyer with personal claim against agency for imposing furlough program); N.Y. State 994 (conflict imputed from part-time football coach where firm represents clients with claims against town); *see also* N.Y. State 798 and 909 (concluding that legislator-law enforcement conflicts are *not* imputed to firm because prohibition arises from Rule 8.4 and not from one of the conflicts rules).

Nevertheless, to ensure that client interests will be protected in the unusual cases in which personal conflicts in fact do present risks to client loyalty or confidentiality, COSAC proposes amending Rule 1.10(a) to provide for a safeguard. The safeguard is that the rule would provide for non-imputation of personal conflicts only if, “under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely effected.”

The formulation we propose was previously proposed by COSAC in 2008 and varies from ABA Model Rule 1.10 in two ways: (1) COSAC expands the ABA term “personal interest” to the more descriptive phrase already in New York’s Rule 1.7, “a lawyer’s own financial, business, property or other personal interest”; and (2) COSAC replaces the ABA’s language “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm” with the language quoted above, which we believe is clearer and expressly provides for an objective, “reasonable lawyer” test rather than a subjective determination.

COSAC also considered variations on the ABA language from other jurisdictions, such as the District of Columbia’s change from “materially limiting” to “adversely affecting,” and North Dakota’s adoption of a definition of a “personal conflict” to be a conflict “created by a lawyer’s interests other than those arising from the representation of other clients or the owing of fiduciary duties to some third party.” These changes do not seem to justify a further departure from the ABA Model Rule, and COSAC decided not to propose them.

COSAC also proposes to make two parallel changes to New York’s Comments to Rule 1.10. First, COSAC proposes to add all of ABA Comment [3], which explains why personal conflicts generally should not be imputed. Second, COSAC proposes to expand New York Comment [4] to include a sentence from the ABA Comment making clear that there is no imputation of personal conflicts if a lawyer is personally disqualified “because of events before the person became a lawyer, for example, work that the person did while a law student.” This later provision was removed from COSAC’s proposed New York Comments after the New York Courts rejected COSAC’s 2008 proposal not to impute most personal conflicts.

Proposal for screening to remove imputation arising from lateral hire conflicts

COSAC proposes that New York join more than a dozen other states whose rules provide that screening, with various conditions, will prevent imputation of conflicts from lateral-hire lawyers.⁵

Current Comment [4A] to New York Rule 1.10 notes the following rationale for permitting screening to avoid imputation of lateral-hire conflicts:

[4A] ... If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client’s reasonable confidentiality interests is appropriate in balancing the competing interests.

New York’s current version of Rule 1.10(a) imputes a lateral-hire lawyer’s conflicts arising out of his or her former representation of a client in all cases except where “the newly associated lawyer did not acquire any information protected by Rule 1.6 or 1.9(c) that is material to the current matter” — an extremely limited exception that typically applies only to a very junior

⁵ States providing that screening, with various conditions, will prevent imputation of conflicts from all lateral-hire lawyers are Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wyoming. Further, as discussed in more detail below, another group of states have adopted rules providing for screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards, such as “did not have primary responsibility” or had “no substantial responsibility.” These states are Arizona, California, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, and Wisconsin.

lawyer who did only abstract legal research for a former client and was exposed to no client confidences.

COSAC believes that Rule 1.10 should permit screening to avoid imputation of a lateral hire's conflicts with appropriate safeguards. The current rule creates a significant obstacle to the movement of lawyers between firms, particularly early in their careers. Obtaining a former client's consent to a conflict is frequently difficult, because the moving lawyer generally has no continuing relationship with the former client or with his or her former firm, and because neither the firm nor the client has any particular interest in promptly providing the required waiver.

As noted, in addition to the many states that have adopted lateral-hire screening by rule, some states have approved of screening for lateral hires via state court decisions. Further, federal courts in New York have repeatedly approved of screening to cure lateral-hire conflicts in decisions declining to disqualify counsel. *E.g.*, *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (approving of screening to cure conflict from laterally-hired of-counsel lawyer); *Maricultura del Norte, S. de R.L. de C.V. v. Worldbusiness Capital, Inc.*, 2015 WL 1062167, at *15 (S.D.N.Y. Mar. 9, 2015) (surveying case law in Second Circuit and concluding that “[i]n every other post-*Hempstead* case I have located within this circuit, the district court, after considering whether an ethical screen was sufficient, has found the presumption rebutted and denied a motion to disqualify”). COSAC proposes to codify these federal court decisions in New York's Rule 1.10(a), which would then be applicable in state courts and in disciplinary proceedings and would provide clear guidance for the day-to-day practice of law firms in New York State.

Under the current New York Rules, screening is permitted to avoid imputation of conflicts of former government lawyers (Rule 1.11(b)), former judges, arbitrators and law clerks (Rule 1.12(d)), and lawyers who have received significantly harmful information from prospective clients (Rule 1.18(d)(2)). We propose to import into Rule 1.10 the screening procedures set forth in Rules 1.11, 1.12 and 1.18, with two exceptions noted below.

COSAC does not propose that New York adopt the screening procedures in ABA Model Rule 1.10, because they have some unusual provisions requiring: (i) “a statement that review may be available before a tribunal”; (ii) “an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures”; and (iii) periodic certifications of compliance with the screening procedures, to be provided to the former client at reasonable intervals upon the former client's written request. These ABA provisions, adopted in full by only three states (Connecticut, Idaho, and Wyoming), are cumbersome and could encourage disputes over compliance. The ABA provisions, moreover, provide for a different screening procedure in Rule 1.10 from the screening procedure provided in Rules 1.11, 1.12 and 1.18. Finally, the ABA provisions appear to COSAC to be unduly complicated and unjustified. We see no substantial reason to distinguish among laterally-hired former government lawyers, laterally-hired former law clerks, and laterally-hired lawyers previously employed at other private law firms.

In 2008, COSAC proposed a limited form of lateral-hire screening. Under that proposed rule, if the lateral hire had acquired information that was material to the current matter while at his or her former firm, then screening could avoid imputation only if “a reasonable lawyer would

conclude that any such information, if used, is not likely to be to the former client's material disadvantage." COSAC no longer supports that proposal. Apparently a compromise, the 2008 proposal would not apply to many representations and would often require a fairly searching inquiry into the information that the lateral hire had acquired in the course of the former representation, thus potentially jeopardizing the very information the screening proposal was designed to protect. Further, the proposal would not alleviate the difficulties in obtaining consent from former clients in the vast majority of cases. Under Rule 1.9, a lateral hire conflict exists in the first place only where a lawyer "has acquired information protected by Rule 1.6 [*i.e.*, confidential client information] ... that is material to the matter," generally measured by whether the lawyer worked on a matter.

As a consequence, many firms already believe that if a lateral-hire lawyer had very limited involvement in a matter (such as a junior associate who did only legal research on discrete issues), the risk of conflicts is limited and can be managed by screening under the current rules. State court decisions have declined to disqualify lawyers who are properly screened in such circumstances. *E.g.*, *Nimkoff v. Nimkoff*, 18 A.D.3d 344, 346, 797 N.Y.S.2d 3, 6 (1st Dep't 2005) (if party seeking to avoid disqualification proves that any information acquired by the lateral "is unlikely to be significant or material in the litigation," then "a 'Chinese Wall' around the disqualified [lateral] lawyer would be sufficient to avoid firm disqualification"); *see Matter of Jalicia G.*, 41 Misc. 3d 931, 971 N.Y.S.2d 831 (Bronx County Family Ct. 2013) (permitting Legal Aid Society to oppose a former client in a substantially related matter as long as (i) all LAS personnel working on current matter avoid any contact with records relating to representation of former client and (ii) all LAS staff who worked on former client's matter are screened from current matter). *See also Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 617 (1999) (disqualifying firm in particular matter but saying, in dicta, that screening at a lateral hire's new firm would be sufficient to avoid disqualification where new firm can prove that "any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation").

In response to concerns expressed when COSAC presented its proposals to the NYSBA House of Delegates in November 2018 for informational purposes, COSAC has drafted an alternative to its prior proposal. Specifically, concern was expressed that COSAC's proposed provision regarding lateral-hire screening did not sufficiently protect a former client in a classic (albeit rare) case in which a client's lawyer, in the midst of a hotly litigated matter, moves to the opposing firm. As an alternative, COSAC has drafted language that would limit the situations in which screening would avoid imputation of lateral-hire conflicts. Under the alternative provision – which COSAC does not favor – screening will not overcome a former client's objection to the conflict arising from the extreme conflict that caused concern. In other words, under COSAC's alternative proposal, screening will *not* substitute for the former client's informed consent if the lawyer with "primary responsibility" for a litigated matter moves to the opposing law firm while the matter is pending. Screening in that situation will not overcome the former client's objection even though the lawyer who had primary responsibility at the former firm will play no role whatsoever on the matter at the new firm and will have no access to the new firm's confidential information about the matter.

Several states have adopted limitations on screening similar to COSAC's alternative proposal. Arizona and Indiana limit screening to lawyers who did not have "primary responsibility" for the matter that is causing the disqualification; New Jersey and Tennessee bar screening in litigated matters where the lawyer had "primary responsibility" (New Jersey), or was "substantially involved" (Tennessee), in the representation.⁶

In addition another ten states have adopted screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards, such as "performed no more than minor or isolated services" or "did not have a substantial role in the matter."⁷

To be clear, COSAC opposes any exception to lateral screening. If any exception is adopted, however, COSAC believes that the exception should be narrow and should above all be objective and clearly expressed, so as not to swallow the rule by uncertainty. Thus, proposed Rule 1.10(c)(3) – which is an alternative to Rule 1.10(c)(2) without subparagraph (c)(3) – would specify that "screening as set forth in subparagraphs (i)-(iv) is not available to prevent imputation of conflicts where the matter involves an adjudicative proceeding for which the newly associated lawyer had *primary responsibility*." A proposed new Comment [5F] would explain this provision.

COSAC also proposes two modifications to the screening procedures set out in existing New York Rules 1.11, 1.12 and 1.18.

First, COSAC proposes a self-executing provision that would permit the law firm to postpone sending the screening notice to lateral-hire's former client if the notice would disclose confidential information protected by Rule 1.6. The notice would usually disclose confidential information, for example, (a) in merger and acquisition matters where the new firm was working for a potential bidder in an auction where the lateral-hire had previously worked for the target on the sale process, but the bidder's interest has not yet been disclosed; or (b) in litigation matters where the new firm was in the process of investigating a claim that might be asserted against the lateral-hire's former client. When the exception allowing a delayed screening notice applies, the

⁶ Arizona Rule 1.10(d) and Indiana Rule 1.10(c) both limit lateral-hire screening to situations in which the lateral hire lawyer "did not have primary responsibility for the matter that causes the disqualification." New Jersey Rule 1.10(c) permits screening to cure lateral-hire conflicts only where "the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility"; the term "primary responsibility" is defined to mean "actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions." Tennessee Rule 1.10(d) specifies that screening is unavailable where "(1) the disqualified lawyer was substantially involved in the representation of a former client; and (2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and (3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms."

⁷ The states setting out language regarding lateral-hire lawyers who had limited participation in the prior matter are California, Colorado, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, and Wisconsin.

notice would be provided to the former client once the confidential aspect of the work was otherwise disclosed to the former client or was otherwise no longer subject to protection under Rule 1.6. (As set forth below, COSAC is also recommending a parallel change to the screening procedures in Rules 1.11, 1.12 and 1.18.)

COSAC's proposal for delayed notice to former clients roughly resembles a District of Columbia provision permitting a law firm to file the required notice with the D.C. Disciplinary Council if a firm's current client has requested confidentiality, with the notice to be released to the former client when the new matter is no longer confidential. This D.C. provision is designed for situations where the existing or new matter at the lateral-hire's new firm is confidential. It is a sensible innovation, but it would require constructing new infrastructure in New York authorizing disciplinary authorities to receive and embargo such notices. We do not believe that infrastructure would be worth the cost, because we think our proposed self-executing provision will achieve the same purpose without the new infrastructure.

Second, COSAC's proposal for screening procedures does not include the requirement set forth in current New York Rules 1.11 and 1.12 that "there are no other circumstances in the particular representation that create an appearance of impropriety." As explained in the discussions below with respect to Rules 1.11 and 1.12, the "appearance of impropriety" provision is not found in New York Rule 1.18 and incorporates the former Code's otherwise now-discarded appearance-of-impropriety test. COSAC recommends that this vague highly subjective test also be eliminated from Rules 1.11 and 1.12.

We also propose amending the New York Comments to incorporate the substance of the Comments on these screening procedures that appear in the existing Comments to Rule 1.11 (Comments [6] – [7B]), Rule 1.12 (Comments [3] – [5]) and Rule 1.18 (Comments [7] – [8]). Proposed new Comment [5D] to Rule 1.10 modifies language taken from the existing Comments to Rules 1.11, 1.12 and 1.18. Here is the unmodified fourth sentence of existing Comment [7A] to New York Rule 1.11:

[7A] ... If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. ...

The identical language currently appears in Comment [4C] to Rule 1.12 and in Comment [7C] to Rule 1.18. In new Comment [5D] to Rule 1.10, COSAC proposes to modify this sentence by inserting an exception for disclosures permitted or required by other Rules (*e.g.*, permitted by Rules 1.6(b)(4) and 1.9(c), or required by Rule 3.3(a) or (b)). The modified sentence would thus read as follows:

[5D] ... *Except as these Rules would permit or require with respect to a current client or when information has become generally known,* If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent effort to institute or maintain screening will not avoid the firm's disqualification.

Rule 1.6 provides a number of exceptions to the protections usually given to confidential information, including, for example, disclosure to prevent a client from committing a crime or disclosure in order to obtain legal advice about a lawyer's ethical obligations. Disclosure that is permitted by another Rule would not ordinarily be subject to the consequences set forth in the Comment. COSAC believes this qualification was likely implied in any event. (COSAC also proposes identical amendments to Comment [7A] to Rule 1.11, Comment [4C] to Rule 1.12, and Comment [7C] to Rule 1.18.)

In the Public Comment Conflicts Report, COSAC also proposed replacing the phrase "confidential information *about* the matter," which is currently in Comment [5D] to Rule 1.10, with the phrase "confidential information *material* to the matter," so that an immaterial leak or breach in screening procedures would not nullify the entire screen. (The same phrase also appears in Comment [7A] to Rule 1.11, Comment [4C] to Rule 1.12, and Comment [7C] to Rule 1.18.) The NYSBA Ethics Committee disagreed with this proposal. It stated that lawyers and the public were already skeptical about the efficacy of information walls and that adopting a "materiality" standard would weaken the incentive to make sure that walls are impermeable. COSAC is persuaded that adding a materiality standard is unnecessary and potentially unwise, and COSAC has withdrawn that recommendation. The phrase "confidential information about the matter" will therefore remain unchanged in all of the Comments in which it currently appears.

Proposal to clarify that conflicts based on former-client information solely in databases will not be imputed

We propose that Rule 1.10(b) be amended to clarify that, when all the lawyers who have worked on a matter have left a firm, the firm will not be disqualified from representing a party adverse to the former client based solely on information residing only in the firm's databases, as long as no lawyer presently at the firm has actual knowledge of, or has accessed, the information in the firm's databases. Under the current version of New York Rule 1.10(b), a law firm is prohibited from representing a person adverse to its former client "if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter." We think that standard is too harsh.

Our proposed amendment codifies the result in a recent New Jersey appellate decision, *Estate of Francis P. Kennedy v. Rosenblatt*, 149 A.3d 5 (N.J. Super. Ct. App. Div. 2016). The court there found that New Jersey's version of this rule was not violated where all the lawyers who had worked on the earlier matter had left the firm, even though the firm continued to maintain materials in its electronic files relating to the former representation, because no lawyer presently at the firm had accessed the electronic files (other than to determine that the files existed). The Superior Court reached that conclusion because New Jersey's version of Rule 1.10(b) refers to the condition that "any *lawyer* remaining in the firm has information protected by [Rule] 1.6 or [Rule] 1.9(c) that is material to the matter" (emphasis added), but New Jersey's version does not refer to the *firm* having such information.

The New Jersey interpretation cannot easily be reached under New York’s current version of Rule 1.10, but the New Jersey approach makes sense in an age when the vast majority of the client information in law firm files is maintained electronically and those files are not typically deleted as lawyers who worked on matters leave the firm. COSAC therefore recommends amending Rule 1.10(b) to accord with New Jersey’s practical approach to electronic files.

Proposal to move Rule 1.10(h) to Rule 1.8

Rule 1.10(h) currently reads:

A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

This rule is not a rule governing imputation of conflicts to lawyers in a law firm, but rather a special conflict rule dealing with family conflicts. The rule, which does not appear in the ABA Model Rules at all, presumably appears in Rule 1.10 in order to *avoid* imputation, which would otherwise apply if it appeared in Rule 1.8. If, as we propose, personal conflicts are not subject to imputation, then Rule 1.10(h) can safely be moved to Rule 1.8, which deals with “Current Clients: Specific Conflict of Interest Rules.” That is where the rule logically belongs.

The NYSBA Ethics Committee recommended changing the phrase “the other lawyer” in this sentence to “the related lawyer” for clarity. COSAC does not see this change as necessary or particularly clarifying and therefore recommends no change in the language of Rule 1.10(h).

Redlined proposal to amend Rule 1.10(a), (b), (c), (h) and (i) and Comments [3], [4], [5], [5A] and [7]

We propose to revise New York Rule 1.10(a), (b), (c), (h) and (i) and the accompanying Comments (in relevant part) to read as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein, unless:

(1) the prohibition is based on a lawyer’s own financial, business, property or other personal interests within the meaning of Rule 1.7(a)(2), and

(2) under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if ~~the firm or~~ any lawyer remaining in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless

(1) the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter; or

(2) the newly associated lawyer's current firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the former client to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the former client or is otherwise no longer protected by Rule 1.6;

[Note from COSAC: Below is a proposed new paragraph (c)(3), which would be combined with paragraph (c)(2) as an alternative to paragraph (c)(2) standing alone. In other words, COSAC is offering two screening choices: paragraph (c)(2)(i)-(iv) alone, or paragraph (c)(2)(i)-(iv) plus paragraph (c)(3).]

(3) Notwithstanding paragraph (c)(2), the screening measures set forth in subparagraphs (c)(2)(i)-(iv) of this Rule are not available to prevent imputation of conflicts where the matter is a litigation, arbitration or other adjudicative proceeding for which the newly associated lawyer had primary responsibility at the prior firm.

....

~~(h) [Moved to Rule 1.8(I).] A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.~~

(i) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and not by this Rule.⁸

Comment

....

Principles of Imputed Disqualification

....

[3] ~~[Reserved.]~~ The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. For example, where one lawyer in a firm could not provide competent and diligent representation to a given client because of strong political beliefs, but that lawyer will do no work on the matter and the political beliefs of that lawyer are unlikely to materially limit the representation by others in the firm or to adversely affect their independent professional judgment, the firm should not be disqualified. On the other hand, if an opposing corporate party in a matter were owned by a lawyer in the law firm, and there is a significant risk that others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm where the disqualified lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of

⁸ New paragraph (i) in Rule 1.10 is explained below in the section of this report focusing on COSAC's recommended amendments to Rule 1.11.

confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(t), 5.3.

Lawyers Moving Between Firms

....

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, under Rule 1.7 the law firm may not represent a client with interests directly adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 ~~and~~ or Rule 1.9(c) that is material to the matter.

[5A] If all lawyers who have worked on a matter or have confidential information about a matter have left a firm, then the fact that the law firm retains confidential information in its electronic databases or paper files regarding the matter will not by itself give rise to a conflict as long as (i) no lawyer currently in the firm has reviewed that information, and (ii) the firm takes appropriate steps to limit access to such information. Merely accessing files to determine whether information exists, without reading the confidential information, would not ordinarily constitute reviewing confidential information material to the matter. ~~In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.~~

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided that either (i) the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter, or (ii) the newly associated lawyer is timely and effectively screened from the work on the current matter pursuant to Rule 1.10(c)(2). Situations in which a lawyer may accept employment from an adversary's law firm may arise in many circumstances, such as law firm mergers or geographical moves, or desires for changes in practice areas dictated by personal circumstances and may involve future assignment to matters unrelated to the lawyer's previous work on the matters creating adversity. Nevertheless, despite the possibility of subsequent screening, lawyers must continue to consider the ethical implications of discussing employment with an adversary's counsel while a matter is pending. *See* Comment [10] to Rule 1.7.

[5C] Paragraph (c)(2) contemplates the use of screening procedures that permit the law firm of a personally disqualified lawyer to avoid imputed disqualification. *See* Rule 1.0(t) for the definition of "screened" and "screening." A firm seeking to avoid disqualification

under this Rule should consider its ability to implement, maintain, and monitor the screening procedures described by paragraph (c)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. Although the size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (c)(2).

[5D] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. Except as these Rules would permit or require with respect to a current client or when information has become generally known, if any lawyer in the firm acquires confidential information material to the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not avoid the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

[5E] To enable the former client to determine compliance with the Rule, notice to the former client generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the former client or is otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.10(c)(2).

[Note from COSAC: Below is proposed new Comment [5F], which should be adopted only if the House of Delegates also approves both subparagraph (c)(2)(i)-(iv) and new subparagraph (c)(3) (the limiting paragraph). In other words, if the House of Delegates approves subparagraph (c)(2)(i)-(iv) plus subparagraph (c)(3), then COSAC also recommends that the House approve the following new Comment [5F] to explain subparagraph (c)(3).]

[5F] Paragraph (c)(3) makes clear that the screening procedures set forth in paragraph (c)(2) are ineffective to prevent the imputation of conflicts where a lawyer having primary responsibility for a litigation, arbitration or other adjudicative proceeding moves during the proceeding to a law firm representing a party whose interests are materially adverse to the interests of that lawyer’s former client in the same or a substantially related matter. Screening under the terms described in paragraph (c)(2) and Comments [5C]-[5E] remains available to cure conflicts, however, in (i) all non-litigated matters and (ii) litigated matters where a law firm is hiring lawyers (such as associates or collaterally involved partners) who worked on the matter at the opposing law firm matter but did not have “primary responsibility” for the matter. The lawyer with primary responsibility for the matter will generally be the lawyer who had the primary decision-making role in the matter.

....

Current and Former Government Lawyers

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), if a lawyer represents the government after having served clients in private practice, in nongovernmental employment, or in another government agency, then former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees

COSAC recommends changes to Rule 1.11 and various Comments. We explain each of these changes below.

Proposal to delete Rule 1.11(b)(2) and amend Comment [6] to Rule 1.11

COSAC proposes the elimination of 1.11(b)(2), which requires that “there are no other circumstances in the particular representation that create an appearance of impropriety” in order for a firm’s screening of a disqualified former government lawyer to prevent imputation. The “appearance of impropriety” standard was intentionally omitted from the ABA Model Rules and has drawn criticism from courts and commentators due to its vagueness and the difficulty of providing any definition, and therefore its inherently subjective and unpredictable application.

The rationale for deleting the phrase from the ABA Model Rules was explained by one commentator as follows:

When it comes to disciplining a lawyer for an appearance of impropriety, the primary criticism is that the standard is too vague and its contours are too difficult to define. The Restatement (Third) of the Law Governing Lawyers asserts that the breadth of the provision “creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it.” Courts in several jurisdictions concurred.

Kathleen Maher, *Keeping Up Appearances*, available at <http://bit.ly/2C2CkXQ>.

COSAC agrees and now recommends that the appearance of impropriety standard be eliminated from Rule 1.11(b). Courts that apply the appearance of impropriety standard in deciding motions for disqualification may still, of course, continue to do so as their jurisdictions’ jurisprudence allows. However, we do not think it advisable to make lawyers and firms subject to discipline under an ethical standard that provides so little guidance as to the contours of its scope. (On the same basis, we also recommended the elimination of Rule 1.12(d)(2)’s reference to “the appearance of impropriety” in the context of various former judges, arbitrators, mediators or other third-party neutrals.)

In tandem with the proposed elimination of 1.11(b)(2) and its reference to an “appearance of impropriety,” we propose the removal of the second, third, and fourth sentences of Comment [6].

Proposal to amend Comment [7A] to Rule 1.11

The fourth sentence of Comment [7A] to Rule 1.11 currently provides: “If *any* lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of the Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm’s disqualification.” (Emphasis added.) For the reasons set forth in connection with the parallel language in the new proposed Comment [5D] to Rule 1.10, COSAC proposes that this sentence be amended by providing an exception for disclosures required or permitted by other Rules (such as Rules 1.6(b)(4), 1.9, and 3.3(a)-(b)).

Similarly, Rule 1.9(b)(2) provides that a lawyer who changes law firms is barred from representing a client who is adverse to a former client on the same or a substantially related matter only if the lawyer has acquired confidential information “material to the matter,” and Rule 1.9(c)(2) permits a lawyer who has formerly represented a client to “reveal confidential information of the former client protected by Rule 1.6 *except as these Rules would permit or require with respect to a current client.*” (Emphasis added.)

In COSAC's view, the Rules should not require screening procedures to provide greater protection for confidential information than Rules 1.6 and 1.9 provide.

The language of Comment [7A] to Rule 1.11 is repeated in Comments [4C] to Rule 1.12 and [7C] to Rule 1.18. COSAC is making the same recommendation with respect to those Comments, and proposes the same revised language for the new Comment [5D] to Rule 1.10 discussed above.

Proposal to amend Rule 1.11(d) and Comments [2], [3], [5], [9] and [9A] to Rule 1.11

The text of the present Rules does not address the extent to which Rules 1.7, 1.9 and 1.10 apply to current government lawyers. The ABA Model Rules provide in Rules 1.10(d) and 1.11(d) that current government lawyers are governed by Rule 1.7 and 1.9 but not by Rule 1.10. Comment [2] to ABA Rule 1.11 explains,

[2] ... Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

There is no parallel language in the New York Rules. As a result, Comment [9B] to the New York Rules provides that all three Rules apply fully to current government lawyers, which means that if a lawyer enters a government office that is conducting a matter adverse to the lawyer's former client and the entering lawyer is conflicted from working on the matter, then the entire government office is disqualified unless the former client consents. While this parallels the treatment of private lawyers, it has at least two anomalous effects: (1) lawyers *leaving* government jobs for private practice can resolve conflicts by screening and providing notice to the agency under Rule 1.11(b), while lawyers *entering* government must obtain consent from their former client or the entire office is conflicted; and (2) there is no applicable rule of necessity by which the particular lawyer or anyone in the government office could work on the matter if no one else would be authorized to act, notwithstanding that Rule 1.11 has a so-called "rule of necessity" exception for a closely analogous situation. Specifically, Rule 1.11(d) bars a government lawyer from working on any matter on which he worked personally and substantially in private practice "unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."

Further, COSAC believes that government law offices in New York do not agree with (or rigorously apply) the interpretation of the Rule in Comment [9B], but rather often simply recuse an incoming lawyer who worked on conflicting matters in private practice. This recusal practice is common even if the government office is directly and materially adverse to the incoming lawyer's former private client. New York case law seems to be consistent with this recusal practice. Taking into account the nature of the conflict and the size of the government law office, New York courts have frequently declined to disqualify counsel, or have declined to

reverse convictions, where a conflicted government lawyer did not participate in the matter causing a conflict in a government law office.⁹

In 2008, COSAC proposed an approach stating that Rules 1.7 and 1.9 apply to current government lawyers, but Rule 1.10 does not. As a corollary, COSAC also provided for screening within a government office to cure any conflicts, with notice to any affected former client of the government lawyer. The New York Courts declined to adopt this change at that time, but COSAC believes the Courts should reconsider that position in view of the anomalies set forth above.

COSAC thus proposes to amend Rule 1.11(d) as follows:

- (1) state explicitly that Rules 1.7 and 1.9 apply to government lawyers (so, for example, government lawyers may not act if they have a personal conflict or former-client conflict), but also state explicitly that Rule 1.10 does not apply to government lawyers;
- (2) make clear that a conflict under Rules 1.7 and 1.9 can be overridden in the case of necessity (*i.e.*, where no one else can act); but
- (3) provide for screening procedures within the government law office that parallel those applicable to former government lawyers in private law firms; and
- (4) insert into a new black letter paragraph into Rule 1.10 making clear that in private firms and in government law offices, disqualification based on the presence of current or former government lawyers is governed by Rule 1.11 and not by Rule 1.10.

These changes will avoid confusion about which Rules apply to lawyers currently and formerly employed in government.

The new black letter paragraph that COSAC recommends adding to Rule 1.10 is modeled on ABA Model Rule 1.10(d). This new paragraph will make clear that when former or current government lawyers are associated in a firm (including a government law office), disqualification is governed by Rule 1.11 and not by Rule 1.10 (a position now stated only in the Comments to New York Rule 1.10). The new paragraph would duplicate the proposed new provision in Rule 1.11(d)(2), but it would also make clear that imputation of the conflicts of former government lawyers is governed by Rule 1.11(b) and not by Rule 1.10. This new provision, and an accompanying change to Comment [7] to Rule 1.10, are set forth above together with other proposed changes to Rule 1.10.

⁹ See, e.g., *People v. English*, 88 N.Y.2d 30, 34 (1996) (no reversal of conviction where defendant's former lawyer was employed by a "huge" metropolitan DA's office and assigned to bureaus that had nothing to do with prosecution); *People v. Dennis*, 141 A.D.3d 730, 733 (2d Dep't 2016) (same); *In re Stephanie X*, 6 A.D.3d 778, 780 (3d Dep't 2004) (concluding that former-client conflicts of current government lawyers not imputed under the former Code of Professional Responsibility). Cf. *People v. Gaines*, 277 A.D.2d 900, 901(4th Dep't 2000) (conviction reversed where conflicted lawyer joined a smaller DA's office).

In its Public Comment Conflicts Report, COSAC recommended that there be no provision for screening in a government law office to cure a conflict arising from Rule 1.9. This position was driven by the fact that the New York Courts had rejected the screening proposal when COSAC proposed it in 2008. The NYSBA Ethics Committee commented that the Courts' rejection appears to have been based on (i) a misapprehension that conflicts would not be imputed within government law offices, which is the approach in the ABA Model Rules, and on (ii) a concern about the requirement that a government lawyer's former clients be notified of screening procedures being implemented. We are persuaded by the NYSBA Ethics Committee's comment, and we conclude that government law offices hiring private lawyers should be placed in the same position as private law firms hiring government lawyers: any conflicts arising out of their former work can be cured by screening, with notice to affected clients where possible.

After this Report was presented to the House of Delegates for informational purposes in November 2018, COSAC refined the proposed screening provisions in proposed Rule 1.11(e) in one respect. As originally proposed, the provisions would have limited the notice requirements to situations in which the conflict arose under Rule 1.9, which addresses conflicts with former clients. The intention was to avoid imputation of personal-interest conflicts under Rule 1.7(a)(2), where the government lawyer is barred from working on the matter in the government law office because of a risk that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests. But in New York many part-time government lawyers conduct a private law practice as well, and a conflict with a current client could arise between the lawyer's part-time private practice and the lawyer's part-time government service. *See, e.g.*, N.Y. State Ethics Op. 859 (2011) (discussing conflicts arising from part-time practice as a government lawyer). In such cases, the lawyer's current private client should receive notice of the screening procedures put in place within the government law office, just as a former private client would receive such notice. A current private client of a part-time government lawyer should not have lesser rights than a former client of that same lawyer. COSAC has thus eliminated language in the prior draft of Rule 1.11(e) that had limited the notice requirement to former-client conflicts arising under Rule 1.9.

The NYSBA Ethics Committee proposed a slightly different screening procedure from the procedure applicable to government lawyers who transfer to a private law firm. The difference is that the NYSBA Ethics Committee's proposed procedure for government law offices would include (in addition to screening protocols and notice to the affected former client) an express requirement that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation." The NYSBA Ethics Committee apparently believes that this additional requirement (which was part of COSAC's 2008 proposals) would serve as a reminder that screening will not work if, for example, the conflicted lawyer occupies a senior position in the agency, so that other lawyers might be influenced by the screened lawyer's loyalty to, or information about, a former client.

COSAC has weighed these considerations and concludes that this additional requirement regarding competent and diligent representation is unnecessary, because Rules 1.1 and 1.3

already require lawyers in all circumstances to provide competent and diligent representation. COSAC also concludes that the additional requirement is unwise, because no such requirement appears in Rule 1.11(b) (which applies to conflicts arising when former government lawyers transition to private law practice) or in Rule 1.9 (which applies when lawyers obtain consent to a waive a former-client conflict under Rule 1.9). COSAC believes there is no reason to have a more stringent screening procedure for government law offices than for private law firms in similar circumstances. Moreover, COSAC is also proposing new Comments [9B] and [9C], modeled on COSAC's 2008 proposals, to explain the government agency screening procedures.

Proposal to modify the notice requirement of Rule 1.11(b) and Comment [7B] to protect confidential information

For the reasons set forth above in connection with Rule 1.10 above, COSAC proposes to modify Rule 1.11(b) and the accompanying Comment [7B] to permit the law firm to postpone sending the required notice of screening to the lateral-hire's former government employer if the notice would disclose confidential information protected by Rule 1.6. But the notice must be sent promptly after such confidential information becomes known to the government agency, or after the information ceases to be protected under Rule 1.6 for some other reason.

Proposal to insert a reference to law clerk employment applications

For the reasons set forth below in connection with Rule 1.12 , COSAC proposes to add a provision to Rule 1.12(c) to specifically address employment applications by law clerks to parties or counsel involved in a matter in which the law clerk is participating, in line with the ABA Model Rules. COSAC also proposes to include in Rule 1.11(d) a reference to that new provision, as in the ABA Model Rules.

Redlined proposals to amend Rule 1.11(b) and (d) and Comments [2], [3], [5], [6], [7A], [7B], [9], [9A] and [9B] and add Comment [9C] to Rule 1.11

Thus, COSAC recommends that Rule 1.11(b) and (d) and the accompanying Comments ~~should~~ be amended to provide as follows:

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

~~(1) the firm acts promptly and reasonably to:~~

~~(i)~~ (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

~~(ii)~~ (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

~~(iii)~~ (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

~~(iv)~~ (4) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6, then the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the government agency or is otherwise no longer protected by Rule 1.6.; ~~and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

....

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee ~~shall not~~:

(1) is subject to Rules 1.7 and 1.9 but is not subject to Rule 1.10;

~~(1)(2)~~ shall not participate in a matter, unless under applicable law no one is (or by lawful delegation may be) authorized to act in the lawyer's stead in the matter, in which if the lawyer either (i) has a conflict under Rule 1.7 or 1.9, or (ii) participated personally and substantially in the matter while in private practice or nongovernmental employment; and unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

~~(2)(3)~~ shall not negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment as permitted by Rule 1.12(c) and subject to the conditions stated therein.

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may

knowingly undertake or continue representation in the matter unless the office, agency or department acts promptly and reasonably to:

(1) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(3) give written notice to any affected current or former client to enable it to ascertain compliance with the provisions of this Rule, except (i) if the notice to such client is prohibited by law no notice shall be given or (ii) if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to such client or is otherwise no longer protected by Rule 1.6.

[Note from COSAC: To make room for new paragraph (e), existing subparagraphs (e) and (f) in Rule 1.11 would be re-designated as subparagraphs (f) and (g).]

Comment

....

[2] Paragraphs (a), (d), (e) and (f) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 does not apply to the conflicts of interest addressed by this Rule. Rather, pParagraph (b) sets forth special imputation rules for former government lawyers, with screening and notice provisions, ~~and Rule 1.10 is not applicable to these conflicts.~~ See Comments [6]-[7B] concerning imputation of the conflicts of former government lawyers.

[3] Paragraphs (a)(2), (d), (e) and (f) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a municipality and subsequently is employed by a federal agency. The question whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. *See* Rule 1.13, Comment [9].

Former Government Lawyers: Using Screening to Avoid Imputed Disqualification

[6] Paragraphs (b) and (c) contemplate the use of screening procedures that permit the law firm of a personally disqualified former government lawyer to avoid imputed disqualification. ~~Nevertheless, there may be circumstances where, despite screening, representation by the personally disqualified lawyer's firm could still undermine the public's confidence in the integrity of the legal system. Such a circumstance may arise, for example, where the personally disqualified lawyer occupied a highly visible government position prior to entering private practice, or where other facts and circumstances of the representation itself create an appearance of impropriety. Where the particular circumstances create an appearance of impropriety, a law firm must decline the representation.—~~*See* Rule 1.0(t) for the definition of “screen” and “screening.”

....

[7A] ... Except as these Rules would permit or require with respect to a current client or when information has become generally known, ~~I~~if any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of the Rule cannot be met, and any subsequent efforts to institute or maintain screening will not ~~be effective in~~ avoid~~ing~~ the firm's disqualification.

[7B] To enable the government agency to determine compliance with the Rule, notice to the appropriate government agency generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the government agency or is otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.11(b).

....

[9] Paragraphs (a) and (d) ~~do~~es not prohibit a lawyer from representing a private party and a government agency jointly when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Current Government Lawyers: Using Screening to Avoid Imputed Disqualification

[9A] Under paragraph (d), Rule 1.9 applies to a lawyer currently serving as a government officer or employee. The lawyer is therefore barred from participating in a matter in which the government agency is proceeding adversely to the lawyer's former

client if the lawyer previously represented the former client in the same or a substantially related matter, unless the former client consents in accordance with Rule 1.9(a). However, under paragraph (d)(2)(i), the lawyer would not be barred from participating in a matter adverse to the former client where, under applicable law no one else is, or by lawful designation could be, authorized to act in the lawyer's stead. (This exception is often called the "Rule of Necessity.") Separately, pParagraph (d)(12)(ii) prohibits a lawyer who is currently serving as a government officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice or other non-governmental employment, unless, again, under applicable law no one else is, or by lawful designation could be, authorized to act in the lawyer's stead. Informed consent on the part of the government agency is not required where such necessity exists. ~~Conversely~~, but informed consent does not suffice to overcome the conflict in the absence of necessity.

[9B] Paragraph (e) permits a current government lawyer to undertake or continue a representation notwithstanding the disqualification of another lawyer in the same office, agency or department if the office acts promptly and reasonably to comply with the notice and screening requirements of paragraph (e).

[9C] If the conflict arises from the government lawyer's former representation of a client, or if the conflict arises from a part-time government lawyer's current representation of another client, then the government office, agency or department is required to notify the affected other client of the circumstances warranting the use of screening and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would violate a law or would violate Rule 1.6. The requirement that the government lawyer's former client or other current client be notified is suspended if notice would make information public that the agency is required to keep secret. For example, a prosecutor's office would not be required to notify a personally disqualified lawyer's former client if that former client is now the subject of a pending grand jury investigation.

~~[9B] Unlike paragraphs (a) and (e), paragraph (d)(1) contains no special rules providing for imputation of the conflict addressed in paragraph (d)(1) to other lawyers in the same agency. Moreover, Rule 1.10 by its terms does not apply to conflicts under paragraph (d)(1). Thus, even where paragraph (d)(1) bars one lawyer in a government law office from working on a matter, other lawyers in the office may ordinarily work on the matter unless prohibited by other law. Where a government law office's representation is materially adverse to a government lawyer's former private client, however, the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9. Rule 1.10 remains applicable to that former client conflict so as to impute the conflict to all lawyers associated in the same government law office. In applying Rule 1.10 to such conflicts, see Rule 1.0(h) (defining "firm" and "law firm").~~

Rule 1.12

Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

COSAC recommends changes to Rule 1.12(c) and (d) and to Comment [4C] to Rule 1.12. We explain each of these changes below.

Proposal to amend Rule 1.12(c) to address law clerk employment applications

COSAC recommends including a provision addressing law clerk employment negotiations or applications with a party, law firm, or lawyer currently involved in a matter before the law clerk's employer (such as a judge or arbitrator). Currently, New York Rule 1.12(c) is silent on law clerks—it simply provides that a lawyer “shall not negotiate for employment with parties or their lawyers in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.” This same language appears in the ABA Model Rules, but the ABA Rules go on to address law clerk employment applications in a separate sentence.

As commentators have noted, the ABA Model Rule provision for law clerks is more relaxed than the rule for judges. Unlike judges, law clerks can “negotiate over future employment even when they are personally involved in a matter, but they are required to disclose these negotiations to the current employer ... [in order to] allow the judge to factor in the possibility of bias in the clerk's work and to respond accordingly”. GEOFFREY HAZARD, WILLIAM HODES & PETER JARVIS, *THE LAW OF LAWYERING* § 17.06 (4th ed. 2017). COSAC proposes adopting an additional sentence from the ABA Rules, with one modification, which is to add a reference to any rules that tribunals or agencies may have adopted to deal with law clerk employment negotiations and applications. COSAC suggests adding the reference, because court rules and rules of other tribunals and agencies frequently address this issue.

The new sentence in Rule 1.12(c) would say:

A lawyer serving as a law clerk to a judge or other adjudicative officer may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

The NYSBA Ethics Committee proposed three further revisions to the proposed new sentence and accompanying Comment: (i) add a reference in the Rule to lawyers in a pool serving multiple judges or other adjudicative officers; (ii) add a sentence to the Rule specifying that the law clerk must abide by any determination of the appropriate judge requiring that the clerk be screened from a particular matter; and (iii) add a Comment to the Rule noting, among other

things, that the Office of Court Administration’s Advisory Committee on Judicial Ethics has published opinions recommending that a law clerk be “insulated” or “screened” from the matter.

COSAC does not believe these additional features are necessary or appropriate. The rule change that COSAC recommends simply leaves the requirements for law clerks applying or negotiating for jobs in the hands of the judge for whom the law clerk works. The extent of the ethical requirement is that the law clerk must inform the judge. We believe this is the appropriate extent of regulation. In COSAC’s view, the ethics rules should not urge the judge to take any particular step, such as screening, and should not otherwise interfere in how judges run their chambers. We also think law clerks working in pools are clearly already covered by the language in COSAC’s proposal, and we think that the pool situation is not prominent enough to warrant specifically addressing.

Proposal to modify the notice requirement of Rule 1.12(d) and Comment [5] to protect confidential information

For the reasons set forth above in connection with Rule 1.10 above, COSAC proposes to modify Rule 1.12(d) and the accompanying Comment [5] to Rule 1.12 to permit the law firm to postpone sending the required notice of screening to the parties and the tribunal if the notice would disclose confidential information protected by Rule 1.6.

Proposal to amend Rule 1.12(d) to remove the “appearance of impropriety” standard

For the reasons set forth in connection with the proposed amendment to Rule 1.11(b) above, COSAC recommends deleting the reference to the “appearance of impropriety” as one ground for disqualifying a firm that otherwise maintains a screen adequate to protect against disqualification under Rule 1.12(d). No Comment requires amendments on account of removing this language.

Proposal to amend Comment [4C] to Rule 1.12

For the reasons set forth in connection with the parallel language in the new proposed Comment [5D] to Rule 1.10, COSAC recommends that the fourth sentence of Comment [4C] to Rule 1.12, dealing with arguable breaches of screening procedures, be amended to provide an exception for disclosures required or permitted by other Rules (such as Rules 1.6(b)(4), 1.9, and 3.3).

Redlined proposal to amend Rule 1.12(c) and (d) and Comments [4C] and [5]

Thus, COSAC recommends that Rule 1.12(c) and (d), the fourth sentence of Comment [4C] and Comment [5] should provide as follows:

- (c) **A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a**

matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

~~(1) the firm acts promptly and reasonably to:~~

~~(i) (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;~~

~~(ii) (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;~~

~~(iii) (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and~~

~~(iv) (4) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the parties and tribunal or is otherwise no longer protected by Rule 1.6; and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

Comment

....
[4C] ...Except as these Rules would permit or require with respect to a current client or when information has become generally known, If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of the Rule cannot be met, and any subsequent efforts to institute or maintain screening will not ~~be effective in~~ avoid~~ing~~ the firm's disqualification.

...
[5] To enable the tribunal to determine compliance with the Rule, notice to the parties and any appropriate tribunal generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the parties and the tribunal or is

otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.12(d).

Rule 1.18

Duties to Prospective Clients

For the reasons set forth above in connection with Rule 1.10, *supra*, COSAC proposes to modify Rule 1.18(d) and the accompanying Comment [8] to permit the law firm to postpone sending the required notice of screening to the prospective client if the notice would disclose confidential information protected by Rule 1.6. Thus, Rule 1.18(d)(2)(iv) and Comment [8] would read:

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

...

(iv) written notice is promptly given to the prospective client, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the prospective client or is otherwise no longer protected by Rule 1.6; and

...

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted and of the screening measures employed, generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the prospective client or is otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.18(d).

For the reasons set forth with respect to the the parallel language in the new proposed Comment [5D] to Rule 1.10, *supra*, COSAC also recommends amending Comment [7C] to Rule 1.18 to read as follows:

[7C] ... Except as these Rules would permit or require with respect to a current client or when information has become generally known, if any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not ~~be effective in~~ avoiding the firm's disqualification.

Rule 6.5

Participation in Limited

Pro Bono Legal Services Programs

COSAC proposes the following changes to Rule 6.5 and its Comments:

Proposal to eliminate references to Rule 1.8 in Rule 6.5(a)(1)

Rule 6.5 provides that Rule 1.8 does not apply to a short-term limited representation unless the lawyer knows of a conflict at the *outset* of the representation. Rule 1.8, however, contains a set of rules that deal with conflicts arising out of conduct by a lawyer *during* the course of a representation, such as business transactions with the client, advancing financial assistance to a client in litigation, and soliciting gifts from a client. All of these and other restrictions in Rule 1.8 should apply to a short-term limited scope representation, regardless of whether the lawyer knew that there was a conflict at the outset.

Proposal to delete “conflicts as ... defined in these Rules” in Rule 6.5(a)(1)

COSAC proposes to eliminate from Rule 6.5(a)(1) the explanatory reference “concerning restrictions on representations where there are or may be conflicts of interests *as that term is defined in these Rules.*” (Emphasis added.) That reference is incorrect. The term “conflicts of interest” is not defined anywhere in the New York Rules. Moreover, the words are inconsistent with the style of the Rules, which nowhere else contain a short-hand description of the conflicts rules.

Proposal to change “actual knowledge” to “knows” in Rule 6.5(a)(1) and (a)(2)

Rule 6.5(a)(1)-(2) refers to a lawyer having “actual knowledge” of certain conflicts. Because Rule 1.0(k) defines “know” or “knows” to mean “*actual knowledge* of the fact in question,” COSAC proposes to replace the phrase “if the lawyer *has actual knowledge*” with the phrase “if the lawyer *knows.*”

Proposal to change “affected by” to “disqualified by” in Rule 6.5(a)(2)

Rule 6.5(a)(2) refers to knowledge that “another lawyer associated with the lawyer in a law firm is *affected by* Rules 1.7, 1.8 and 1.9.” ABA Model Rule 6.5 uses the term “disqualified by,” which is a more precise and accurate term. The term “affected by” in Rule 6.5(a)(2) made sense when Rule 6.5 referred to Rule 1.8, because the provisions of Rule 1.8 “affect” a lawyer’s conduct without disqualifying the lawyer – but if the reference to Rule 1.8 is deleted from Rule 6.5 as we recommend, then the word “disqualified” is more accurate than the word “affected.”

Proposal to change “Rules 1.7 and 1.9” to “Rule 1.7 or 1.9” in Rule 6.5(a)(2)

If the references to Rule 1.8 are deleted, Rule 6.5(a)(2) will end with the phrase “disqualified by Rules 1.7 and 1.9.” COSAC proposes changing the phrase “Rules 1.7 *and* 1.9” to the phrase

“Rule 1.7 *or* 1.9,” because the disqualification would likely be under either Rule 1.7 or Rule 1.9, but not both.

Proposal to change “Rules 1.7 and 1.9” to “Rule 1.10.” in Rule 6.5(b)

Rule 6.5(b) states: “Except as provided in paragraph (a)(2), Rules 1.7 and 1.9 are inapplicable to a representation governed by this Rule.” The reference to paragraph (a)(2) is in error, because Rule 6.5(a)(2) does not provide that Rules 1.7 and 1.9 would apply to the representation. Rather, Rule 6.5(a)(2) deals with whether *Rule 1.10* applies to the representation. COSAC therefore proposes inserting Rule 1.10 in place of the reference to Rules 1.7 and 1.9.

As so amended, Rule 6.5(b) would make clear that any conflicts arising out of a short-term limited representation ordinarily would not be imputed to other lawyers in the firm. That is consistent with the likely reading of Rule 6.5(a) even absent Rule 6.5(b), because Rule 6.5(a) expressly eliminates conflicts under Rule 1.7 and 1.9 that would otherwise disqualify the short-term-limited-representation lawyer. Nevertheless, Rule 6.5(b) serves a useful purpose by emphasizing the lack of imputation. (Also, amended Rule 6.5(b) would complement the amendments COSAC proposes to Rule 6.5(e) below.)

Proposal to address situations not clearly dealt with in Rule 6.5(e)

Rule 6.5(e) addresses what happens if, during the course of a short-term limited scope representation, a lawyer providing short-term services becomes aware of a conflict of interest under Rule 1.7 or 1.9 that precludes further representation. In that circumstance, Rule 6.5(e) currently says: “This Rule shall not apply.” That leaves an ambiguity as to whether Rule 1.10 would apply with full force in that circumstance.

If Rule 1.10 would apply with full force (as the current language seems to suggest), that would require the short-term lawyer’s firm to enter the short-term limited scope representation into the firm’s conflict checking system, as required by Rule 1.10(e), even though the lawyer may not have gathered the information necessary to do that. It would also mean that, to comply with Rules 1.9 and 1.10(a), the firm would need to obtain the informed consent of its now-former short-term client before continuing to represent the firm’s ongoing client. COSAC does not believe that the drafters (the New York Courts) intended that harsh result. The likely intent was simply that Rule 6.5 would *no longer* apply (*i.e.*, would “cease to apply”) and would thus no longer allow the short-term limited representation to *continue* without appropriate a waiver (*i.e.*, informed consent) from the former client pursuant to Rule 1.9. The changes we propose make this result clear.

In addition, a New York State Bar Association ethics committee opinion, N.Y. State 1012 (2014), raised two situations that are not clearly dealt with in Rule 6.5(e): (i) the situation where the *short-term lawyer* later undertakes a new representation that is both adverse to the former client and substantially related to the former representation, and (ii) the situation where *another lawyer* in the firm undertakes such a new representation. Opinion 1012 concluded that the short-term lawyer personally should be precluded from participating in such a new adverse and substantially related representation, but that other lawyers in the firm should not be precluded. (In other words, the short-term lawyer’s conflict would not be imputed to the entire firm.)

Nothing in the language of Rule 6.5 makes that result clear, however, if no conflict existed *during* the limited short-term representation.

Indeed, because Rule 6.5(a)(1) states that Rule 1.9 does not apply to the representation in that circumstance, nothing appears to prevent the short-term lawyer from taking on a new engagement adverse to the former short-term client. COSAC's proposed revision of Rule 6.5(e) remedies this problem as well, so that the short-term lawyer is personally barred from representing another client adverse to the former short-term client in a substantially related matter, but other lawyers in the firm (except any who have learned confidential information of the former client) are not barred. A new Comment [4A] to Rule 6.5 would explain the operation of Rule 6.5(e).

In addition, COSAC proposes to replace the narrow term "court" in Rule 6.5(e) with the broader term "tribunal," a term defined in Rule 1.0(w) to include not only courts but also arbitrators, administrative agencies, and other bodies "acting in an adjudicative capacity." Using the word "tribunal" reflects that the short-term representation might be before, for example, an administrative tribunal, such as an unemployment compensation hearing officer, that might not be considered a "court."

The changes that COSAC proposes would align New York's Rule 6.5 more closely with ABA Model Rule 6.5, thus giving New York lawyers access to a wider range of ethics opinions and other sources interpreting Rule 6.5.

Redlined proposal to amend Rule 6.5 and Comments [3], [4], [4A] and [5]

Thus, COSAC recommends that Rule 6.5 and accompanying Comments (in relevant part) read as follows:

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, ~~1.8~~ and 1.9, ~~concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules,~~ only if the lawyer ~~has actual knowledge~~ knows at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer ~~has actual knowledge~~ knows at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is ~~affected~~ disqualified by Rules 1.7, ~~1.8~~ and or 1.9.

(b) Except as provided in paragraph (a)(2), ~~Rule 1.7 and Rule 1.9 are~~ Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall ~~not cease to~~ apply where the ~~court-tribunal~~ before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation, but Rule 1.10 shall remain inapplicable to the representation conducted under this Rule.

(f) A lawyer who has represented a client under this Rule, or who has obtained confidential information of the client as a result of such representation, shall not thereafter represent another client if the lawyer knows that the subsequent representation would violate Rule 1.9.

Comment

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7,~~1.8~~ and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and requires compliance with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is ~~affected~~ disqualified by these Rules.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rules ~~1.7 and 1.9 are~~ 1.10 is inapplicable to a representation governed by this Rule, except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 only when the lawyer knows at the time of commencement of the representation that the lawyer's firm is ~~affected~~ disqualified by Rules 1.7,~~1.8~~ or 1.9.

[4A] If a tribunal determines or a lawyer comes to know during the course of the short-term limited representation that a conflict exists precluding continued representation, then Rule 6.5 will cease to provide a safe-harbor for the short-term limited representation, but the conflict arising from the short-term limited representation will not be imputed to other lawyers associated in the firm. Thus, a law firm need not record short-term limited representations in the conflicts-checking system that Rule 1.10(e) requires the law firm to maintain, and conflicts discovered during short-term limited

representations will not restrict lawyers who are associated in the firm from representing other clients. But in these circumstances, or where the lawyer learns later of a conflict created by the short-term limited representation, the lawyer who personally rendered legal services during a short-term limited representation (and any other lawyer associated in the firm who obtained any of the short-term client's confidential information) will continue to be restricted by Rule 1.9 from knowingly undertaking a future representation that creates a conflict with the former short-term client, unless the former short-term client provides informed consent to the conflict pursuant to Rule 1.9.

MEMORANDUM

January 3, 2019

To: NYSBA Executive Committee

Cc: Kathy Baxter, NYSBA General Counsel

From: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
Roy D. Simon, Co-Chair of COSAC
Barbara S. Gillers, Co-Chair of COSAC
Joseph E. Neuhaus, Chair of COSAC Review Committee

Subject: COSAC Proposals Regarding Rules 1.16, 3.3, 3.4, and 3.6

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct (the “Rules”). On July 19, 2018, COSAC circulated for public comment the proposals below to amend the Rules 1.16, 3.3, 3.4, and 3.6 of the New York Rules of Professional Conduct and related Comments. COSAC did not receive any public comments during the 90-day comment period.

COSAC presented the proposals to the House of Delegates at its November 2018 meeting for informational purposes. During the discussion in the House of Delegates, one member of the House expressed opposition to COSAC’s proposal (pp. 4-7 below) to insert a new clause into Rule 3.3(c) providing that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding. (The current version of Rule 3.3(c) does not specify any termination date for that duty.) COSAC acknowledges this member’s concern but has not revised its proposal. Another House member pointed out the significance of COSAC’s proposed amendments to Rule 3.4(e) (pp. 8-9 below) but did not take a position on it.

COSAC is now forwarding this report to the Executive Committee of the Association for consideration by the House of Delegates at its January 2019 Meeting. Below are COSAC’s proposals in the same form in which they were circulated for public comment and presented to the House of Delegates in November 2018. We summarize the issues that led COSAC to propose each particular amendment, and set out the proposed amendments in legislative style, striking out deleted language (in red) and underscoring added language (in blue).

Summary of Proposals

COSAC proposes the following changes to the black letter Rules, along with corresponding changes to the Comments:

- **Rule 1.16(c)(5).** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client “deliberately disregards” an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”
- **Rule 3.3(c).** Insert a proviso that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the “the unlawful destruction or unlawful deletion of any document having potential evidentiary value.”
- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” so that it prohibits presenting “criminal *or disciplinary* charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*”
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads “*Notwithstanding* paragraph (a)” rather than “Provided that the statement complies with paragraph (a).” The amendment will make Rule 3.6(c) a true safe harbor.

Rule 1.16

Declining or Terminating Representation

New York Rule 1.16(c)(5) currently provides that a lawyer may withdraw from representing a client (with court permission, if necessary) when “the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.” When read literally, this standard can prevent an attorney from seeking to withdraw if a client cannot afford to pay fees or expenses. In *United States v. Parker*, 439 F.3d 81 (2d Cir. 2006), for example, the court said: “Non-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation.” *See also* N.Y. State 783 n.2 (2005) (withdrawal may “not necessarily be appropriate where the client is financially unable to pay”); N.Y. State 719 (“Mere failure to pay an agreed fee, which is not deliberate, is not a ground for requesting” permission to withdraw). The “deliberately disregards” standard thus has the potential to create a hardship on an attorney where a client is willing, but nonetheless unable, to meet financial obligations to the attorney.

However, many courts and ethics opinions have recognized this potential hardship for attorneys who are not getting paid and have interpreted the phrase “deliberately disregards” in a manner more favorable to attorneys. The most expansive discussion of “deliberately” appears in N.Y. State 598 (1989), where the question was: “May an attorney withdraw from employment in a litigated matter because of nonpayment of fees where the client is financially unable to make

payment?” The Committee recognized that “a client’s “mere failure to pay an agreed fee, which is not deliberate,” does not warrant withdrawal by the attorney (*citing* N.Y. State 212 (1971)). Nevertheless, the Committee said:

[W]e conclude that *a client’s non-payment of fees because of an inability to pay may in certain circumstances be deemed a “deliberate” breach of the client’s obligation* to counsel and, therefore, warrant permissive withdrawal from the representation by counsel. Such withdrawal will be appropriate in a litigated matter only if the attorney has provided clear notice to the client of the attorney’s desire to withdraw, taken reasonable steps to avoid foreseeable prejudice to the client and obtained permission from the tribunal to withdraw [Emphasis added.]

Noting that the “key word is ‘deliberately,’” the Committee in N.Y. State 598 elaborated on the meaning of that word, stating:

... We believe that a client “deliberately disregards an agreement or obligation” to pay legal fees whenever the failure is conscious rather than inadvertent, and is not *de minimus* in either amount or duration. A client’s knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify the lawyer’s withdrawal from employment *This would be so even where the failure results from inability to pay.* [Emphasis added.]

N.Y. State 598 also cited and expressly agreed with half a dozen judicial decisions that had expressed the same position, including two New York decisions, *Boyle v. Revici*, 1987 WL 28707 (S.D.N.Y. Dec. 16, 1987) (permitting withdrawal where clients had owed lawyers \$25,000 for several months and had “not been able to assure them that the \$25,000 or amounts due for future work will be paid at any time”), and *Cullen v. Olins Leasing*, 91 A.D.2d 537, 457 N.Y.S.2d 9 (1st Dep’t 1982) (law firm retained by insurance company to defend insureds was permitted to withdraw after insurance company was placed in liquidation and could not pay fees).

More recent cases are in accord with the cases cited in N.Y. State 598 – *see, e.g., Aveos Fleet Performance Inc. v. Vision Airlines, Inc.*, 2013 WL 12250347 (N.D.N.Y. March 19, 2013) (client’s “inability to make significant contributions to a large, outstanding debt for a term of several months” is “sufficient to satisfy good cause” for withdrawal, *citing Boyle* and N.Y. State 598); *Riverside Capital Advisers, Inc. v. First Secured Capital Corp.*, 2010 WL 4167222 (Nassau County Sup. Ct. Oct. 5, 2010) (granting motion to withdraw where “the non-payment issue has existed for some time” but client “cannot pay”).

Although N.Y. State 598 was decided based on DR 2-110(C)(1)(f), which was the predecessor to current Rule 1.16(c)(5), it remains the leading ethics opinion on the meaning of “deliberately,” and it continues to be cited. *See, e.g.,* N.Y. State 1061 (2015) (noting that “lawyers are not compelled to provide free legal services to all clients,” *citing* N.Y. State 598 for the proposition that “client’s knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify lawyer’s withdrawal from employment”); N.Y. State 910 (2012) (*citing* N.Y. State 598 for discussion of “when a failure to pay a legal fee is ‘deliberate’”).

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6
January 3, 2019

To bring the wording of Rule 1.16(c)(5) more closely into line with the interpretation by courts and ethics committees, and to avoid financial hardship to attorneys while also remaining fair to clients, COSAC proposes to amend Rule 1.16(c)(5) as follows:

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when . . . (5) the client ~~deliberately disregards an agreement or obligation to the lawyer as to expenses or fees~~ fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

This change makes New York's provision nearly identical to ABA Model Rule 1.16(b)(5). (The only difference is that the ABA lead-in clause uses the word "if" instead of "when" – a difference in style, not substance.) This formulation reflects the conclusion in N.Y. State 598 that a "knowing and *substantial failure* to satisfy his or her financial obligations to a lawyer would justify the lawyer's withdrawal from employment ... even where the failure results from inability to pay" (emphasis added). It also enhances protection of clients by adding the condition that a lawyer seeking to withdraw for nonpayment of fees must first give the client "reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." Where a client is unable to pay, the "warning" clause will give the client a reasonable time to borrow money, solicit financial support from relatives, or otherwise find a way to pay past due and future fees.

In litigation matters, current Rule 1.16(d) will provide an additional safeguard for clients. In matters pending before a tribunal, lawyers will ordinarily need to obtain court permission to withdraw pursuant to Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." Thus, courts will be able to ensure that lawyers do not abandon clients without substantial financial cause.

In non-litigation matters, a lawyer will have the option to withdraw when a client substantially fails to pay fees when due or otherwise substantially fails to abide by financial obligations in a retainer agreement or letter of engagement. COSAC does not think lawyers will abuse this right any more than lawyers abuse the dozen other grounds for optional withdrawal in Rule 1.16(c). Moreover, lawyers will often have a financial incentive to work out a payment plan or other arrangement that will enable the lawyers to get paid and keep the client rather than withdraw.

To preserve consistency with the amended text, COSAC also suggests amending current New York Comment [8] to match the ABA Model Rule version of Comment [8] to Rule 1.16. New York Comment [8] to Rule 1.16 would thus be modified to provide as follows:

[8] A lawyer may withdraw if the client ~~refuses~~ fails substantially to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Rule 3.3
Conduct Before a Tribunal

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer “has offered material evidence” and “the lawyer comes to know of its falsity,” *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal “knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding,” *see* Rule 3.3(b), then the lawyer “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal,” *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

ABA Model Rule 3.3(c) addresses the end point by providing that the duties in paragraphs (a) and (b) “continue to the conclusion of the proceeding.” COSAC recommended that language to the Courts in 2008, but the Courts declined to adopt that recommendation, and did not substitute any alternative end point. Thus, New York Rule 3.3 does not specify when a lawyer’s duty to take reasonable remedial measures under Rules 3.3(a) and 3.3(b) terminates. Rather, New York Rule 3.3(c) says only that the duties stated in paragraphs (a) and (b) of Rule 3.3 “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6” (New York’s basic confidentiality rule).

Various New York ethics opinions have attempted to interpret Rule 3.3 to articulate a workable and practical time limit under Rule 3.3(c). These opinions have done so by limiting the phrase “remedial measures” to situations where disclosure or other measures will actually remedy the problem of false evidence. In N.Y. State 831 n.4 (2009), for example, the Committee said:

We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, we do not believe the Rule 3.3 disclosure duty applies.

N.Y. State 837 (2010) revisited this issue and said:

16. ... [T]he duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. ... *[T]he endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available*, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. [Emphasis added; citations omitted.]

N.Y. City 2013-2 (2013) reached a similar conclusion, saying:

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6
January 3, 2019

[T]he obligations under Rule 3.3(a)(3) survive the “conclusion of a proceeding” where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase “conclusion of a proceeding” means “when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.” We believe that the courts’ rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident.

N.Y. City 2013-2 thus concluded that Rule 3.3(c) requires a lawyer to disclose false evidence (i) to the tribunal to which the evidence was presented “as long as it is still possible to reopen the proceeding based on this disclosure,” or (ii) “to opposing counsel where another tribunal could amend, modify or vacate the prior judgment.”

COSAC believes that these tests inject too much uncertainty into determining whether disclosing false testimony to a tribunal or to opposing counsel, or taking other remedial measures, is still required after the conclusion of a proceeding. For the same reason, COSAC rejected the Texas version of Rule 3.3(c), which provides that a lawyer’s duties continue until remedial legal measures are “no longer reasonably possible.” *See* Texas Rule 3.03(c) (“The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible”). Comment [14] to Texas Rule 3.04 elaborates on this test by saying: “The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.”

In COSAC’s view, Rule 3.3(c) should articulate a bright line to mark the end point of the duty to take remedial measures under Rule 3.3(a) and (b). The certainty of a bright line is necessary both (i) to protect clients against belated accusations of perjury that may have no appreciable effect beyond damaging a client’s reputation, and (ii) to protect lawyers against discipline for failing to attempt remedial measures when a lawyer believes in good faith that remedial measures are no longer possible. COSAC therefore recommends that New York amend Rule 3.3(c) to match ABA Model Rule 3.3(c), which ends the lawyer’s obligation upon the “conclusion of the proceeding.” On balance, COSAC believes this bright line termination of the duty – at the conclusion of the proceeding – is preferable to New York’s current open-ended formulation, and is preferable to alternative formulations based on when remedial measures are no longer possible.

COSAC recognizes that, under the proposed formulation, some fraud on tribunals may go unremedied because the false evidence or other impropriety will not be discovered until after the conclusion of a proceeding. New York has a long tradition of a strong duty of confidentiality. Indeed, DR 7-102(B) in the old New York Code of Professional Responsibility did not ordinarily allow disclosure even to remedy a client’s fraud on a court if the information to be disclosed was protected as a confidence or secret.¹ New York did not appear to suffer from frequent unremedied

¹ DR 7-102(B) provided as follows:

B. A lawyer who receives information clearly establishing that:

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6
January 3, 2019

fraud on tribunals under the Code. Nevertheless, COSAC is separately considering whether Rule 1.6 should include a discretionary exception to the duty of confidentiality that would permit (but not require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

In any event, COSAC believes that a lawyer who has offered false evidence will most often come to know of its falsity per Rule 3.3(a)(3) before the conclusion of the proceeding (perhaps when an opposing party's cross-examination exposes the false evidence). Likewise, COSAC believes that a lawyer usually will learn before the conclusion of a proceeding that a person has engaged in criminal or fraudulent conduct related to the proceeding. Although no empirical evidence is available on these points, COSAC believes that the potential damage to confidentiality by *requiring* disclosure (or other remedial measures) after the conclusion of a proceeding outweighs the potential gain to the system of justice by retaining New York's current version of Rule 3.3(c). Trust is the fundamental bedrock of a strong attorney-client relationship, and the broader the exceptions to the duty of confidentiality, the more difficult it will be for attorneys to gain and maintain the trust of their clients.

Thus, although there are arguments that requiring a lawyer to take remedial measures beyond the conclusion of the proceeding furthers the interests of justice, COSAC believes that adopting the ABA version of Rule 3.3(c) and the related Comments strikes a better balance and will provide needed clarity and certainty in this important area. In reviewing the Rules of Professional Conduct adopted by other states, COSAC noted that only three other states (Florida, Texas, and Wisconsin) require remedial measures after the close of proceedings. In contrast, more than thirty jurisdictions terminate Rule 3.3 remedial duties under Rule 3.3(a) and (b) at the conclusion of the proceeding, in line with ABA Model Rule 3.3(c) – see https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3_authcheckdam.pdf or <https://bit.ly/2kfYBpx>.

Accordingly, COSAC recommends amending Rule 3.3(c) as follows:

- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

-
1. The *client* has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal the fraud* to the affected person or tribunal, *except when the information is protected as a confidence or secret*.
 2. A person *other than the client* has perpetrated a fraud upon a tribunal *shall reveal the fraud* to the tribunal. [Emphasis added.]

COSAC also recommends adopting ABA Comment [13] as new Comment [13] to New York Rule 3.3, with revisions to refer not only to “when a final judgment in the proceeding has been affirmed on appeal,” as in the ABA Comment, but also more broadly to “when a final judgment or order in the proceeding has been entered after appeal.” Thus, new Comment [13] would explain the time limit in Rule 3.3(c) as follows:

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment or order in the proceeding has been entered after appeal or the time for review has passed.

(Existing New York Comment [13] to Rule 3.3, which is on a different topic and has no equivalent in the ABA Model Rules, would be renumbered as New York Comment [13B]. That renumbering would maintain consistency with ABA numbering and would continue New York’s convention of using capital letters to mark Comments adopted by New York but not by the ABA.)

Rule 3.4

Fairness to Opposing Party and Counsel

COSAC has two recommendations for changes to Rule 3.4.

First, amend Rule 3.4(a) to add the following new subparagraph (a)(6):

A lawyer shall not . . . (6) knowingly participate in or counsel the unlawful destruction or unlawful deletion of any document or material having potential evidentiary value.

The reason for the additional language is that Rule 3.4(a) currently prohibits *creating* false evidence, but does not prohibit *destroying* evidence. It should prohibit both, and should also prohibit the destruction of documents or materials that are not technically “evidence” but that have potential evidentiary value.

The recommended amendment would also align New York Rule 3.4(a) more closely with ABA Model Rule 3.4(a), which provides that a lawyer shall not “(a) unlawfully obstruct another party’s access to evidence or *unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. . .*” (Emphasis added.)

However, despite the general advantages of uniformity with the ABA (and with jurisdictions that have adopted ABA Model Rule 3.4), COSAC does not recommend adding the ABA clause “unlawfully obstruct another party’s access to evidence.” COSAC does not recommend adopting that clause because it duplicates other subparagraphs of New York Rule 3.4(a) not found in ABA Model Rule 3.4. For example, New York Rule 3.4(a)(1) provides that a lawyer shall not “suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce,” and New York Rule 3.4(a)(3) provides that a lawyer shall not “conceal or knowingly fail to

disclose that which the lawyer is required by law to reveal.” New York subparagraphs (a)(1) and (a)(3) of Rule 3.34 thus already effectively prohibit a lawyer from unlawfully obstructing another party’s access to evidence.

(Current New York Rule 3.4(a)(6), which prohibits a lawyer from knowingly engaging in “other illegal conduct or conduct contrary to these Rules,” would be moved to Rule 3.4(a)(7), since a catch-all provision should come at the end of a rule.)

Second, COSAC recommends amending Rule 3.4(e) by expanding the rule to cover disciplinary charges and by narrowing the rule via adding two qualifying phrases. As amended, Rule 3.4(e) would provide:

A lawyer shall not ... (e) present, participate in presenting, or threaten to present criminal or disciplinary charges to obtain an advantage in a civil matter, if those charges are not advanced in good faith or are unrelated to the civil matter.

COSAC believes that, in its current form, Rule 3.4(e) is both too broad and too narrow. It is too broad because it might preclude a threat to honestly report a crime in an effort to obtain restitution for the harm done by the crime, something that Comment [5] to Rule 3.4 expressly says would not be improper. Comment [5] says:

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), *the lawyer’s threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done.* But extortion is committed if the threat involves conduct of the third person *unrelated* to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute). [Emphasis added.]

Since COSAC believes that Comment [5] correctly states the law, COSAC also believes that the current blanket ban on threatening to present criminal charges is too broad.

Rule 3.4(e) is also too narrow because it does not prohibit threatening meritless or unrelated *disciplinary* charges in ways that might be as improperly coercive as a threat to present criminal charges and might also pressure lawyers who are the target of such charges to act in ways that conflict with their clients’ best interests. For example, a lawyer who has been threatened with disciplinary charges might seek to settle litigation or might yield to a negotiating demand in a transaction on terms unfavorable to the lawyer’s client in the hope (or on the express condition) that the opposing lawyer would then drop the threat to file meritless disciplinary charges.

COSAC’s proposed changes to Rule 3.4(e) attempt to rectify these two problems.

Rule 3.6

Trial Publicity

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6
January 3, 2019

COSAC recommends a small but significant amendment to Rule 3.6(a). Unlike the ABA Model Rule, New York Rule 3.6(a) prohibits *all* extrajudicial statements (with one exception, discussed below) that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” A lawyer violates this rule if the lawyer knows, or reasonably should know, that the lawyer’s statement (a) will be disseminated by public communication and (b) will meet the “substantial likelihood” test just quoted.

ABA Model Rule 3.6(a) uses the same overarching “substantial likelihood” test, but creates a safe harbor for an enumerated list of certain types of statements that the ABA Rule says do not run afoul of the proscription, “notwithstanding” the “substantial likelihood” test above. The types of statements listed in the ABA Model Rule for both civil and criminal cases are either innocuous or necessary types of statements, boiling down in essence to:

- charge and defense information, including names of key people involved
- anything in a public record
- the fact of a pending investigation
- scheduling matters
- requests for assistance in obtaining evidence, and
- warnings of danger about people involved in litigation

Additionally, in criminal cases only, the following fall within the ABA safe harbor:

- pedigree information about the accused
- information necessary to aid in apprehending the accused
- the fact, time and place of arrest, and
- the identity of investigating and arresting officers or agencies involved

New York Rule 3.6(b) contains a nearly identical list, but instead of permitting extrajudicial statements regarding the items on the list “*notwithstanding*” the “substantial likelihood” test of 3.6(a), New York instead dictates that the statements on the list may be made only “[p]rovided that the statement complies with” the “substantial likelihood” test. New York’s “provided that” language deprives lawyers of a useful bright-line test and safe harbor, and therefore chills public statements of the type that are included on the list, for fear that even public statements falling within the safe harbors might be second-guessed based on the “substantial likelihood” test. Providing this safe harbor without the qualification would allay that fear, and would also help harmonize the New York Rules with the ABA Model Rules.

Accordingly, COSAC recommends the following change to Rule 3.6(c):

~~(c) Provided that the statement complies with paragraph (a);~~ Notwithstanding paragraph (a), a lawyer may state the following without elaboration

MEMORANDUM

To: Committee on Standards of Attorney Conduct (COSAC)

From: NYCLA Committee on Professional Ethics

Date: December 19, 2018

Re: Proposed Amendments to Rules 1.16, 3.3, 3.4, and 3.6 of the New York Rules of Professional Conduct

The NYCLA Committee on Professional Ethics (the “Committee”) has reviewed COSAC’s Proposed Amendments and has compiled the comments summarized below.¹

1. Rule 3.3(c): The Committee is in favor of clarifying when a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct ends. This has been a point of confusion for New York lawyers for quite some time, and only slightly alleviated by opinions acknowledging that under the current rule, the obligation extends beyond the conclusion of a proceeding but prior to the point when remedial measures are no longer reasonably available. N.Y. State 837 (2010); N.Y. City 2013-2 (2013).

We note, however, that providing a bright line that ends the obligation at the conclusion of the proceeding could permit some fraudulent conduct to go unremedied where there may still be an opportunity for redress. For example, while a proceeding may have been concluded, there still may be a procedural mechanism to reopen the earlier proceeding and address the late-discovered fraud. Therefore, we recommend that COSAC implement the rule change, but suggest that either the Rule or a comment to the rule make clear that a lawyer may still seek to redress a late-discovered fraud after the conclusion of the proceedings, but will not be subject to possible discipline for failing to pursue remedial measures if the proceeding has concluded.

¹ The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas. The views expressed are those of the NYCLA Committee on Professional Ethics only and approved for dissemination by the President; these views have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

2. Rule 3.4(e): COSAC has recommended amending the current prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” to prohibit presenting “criminal or disciplinary charges” to obtain an advantage in a civil matter” if those charges are not advanced in good faith or are unrelated to the civil matter.” Our Committee agrees with the expansion to include a threat of disciplinary charges in the prohibition, but is concerned about authorizing a lawyer to threaten criminal charges to obtain an advantage in a civil case as long as the criminal charges and civil case are unrelated. While we appreciate that this narrowing is consistent with Comment [5] to the Rule, which describes the crime of extortion, we believe the Rule is intended to require that ethical conduct by lawyers encompass more than that which is already a crime, and therefore no narrowing is either necessary or desirable. Accordingly, with respect to COSAC’s proposed modification of Rule 3.4(e), we would delete the words “or are unrelated to the civil matter, and instead would provide “A lawyer shall not . . . (e) present, participate in presenting, or threaten to present criminal or disciplinary charges to obtain an advantage in a civil matter, if those charges are not advanced in good faith.”

Respectfully submitted,

James Q. Walker, *Chair, NYCLA Committee on Professional Ethics*

From: "Larson Jr., Wallace L." <wlarson@cgsh.com>
Subject: NYC Bar Professional Responsibility Committee - support for recent COSAC proposed changes to NY Rules of Professional Conduct
Date: August 10, 2018 at 11:05:29 AM EDT
To: "roy.simon@hofstra.edu" <roy.simon@hofstra.edu>
Cc: "aroffi@orrick.com" <aroffi@orrick.com>, Maria Cilenti <MCILENTI@NYCBAR.org>, Mary Margulis-Ohnuma <MMargulis-Ohnuma@nycbar.org>, Elizabeth Kocienda <ekocienda@nycbar.org>

EXTERNAL MESSAGE

Roy –

The New York City Bar Association's Professional Responsibility Committee supports the COSAC Proposals Regarding Conflict of Interest Provisions set forth in its memorandum for public comment dated May 3, 2018 (attached for reference). The Committee welcomes further efforts at improving and updating the New York Rules of Professional Conduct and stands ready to assist in such efforts.

Wally Larson

Chair of the NYC Bar Association's Professional Responsibility Committee

Wallace L. Larson Jr.

Cleary Gottlieb Steen & Hamilton LLP Assistant: kahussain@cgsh.com One Liberty Plaza, New York NY 10006 T: +1 212 225 2359 | F: +1 212 225 3999

wlarson@cgsh.com | clearygottlieb.com

This message is being sent from a law firm and may contain confidential or privileged information. If you are not the intended recipient, please advise the sender immediately by reply e-mail and delete this message and any attachments without retaining a copy.

Throughout this communication, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

MEMORANDUM

Dated: July 24, 2018

To: NYSBA Committee on Standards of Attorney Conduct

From: NYSBA Committee on Professional Ethics

Re: COSAC May 3, 2018 Proposals Regarding Conflict of Interest Provisions

The Committee on Professional Ethics (the “Ethics Committee”) is pleased to provide these comments on COSAC’s May 3, 2018 Proposals Regarding the Conflict of Interest Provisions of New York’s Rules of Professional Conduct. Although several members of COSAC are also members of the Ethics Committee, they did not participate in voting on these comments.

Rule 1.7.

We support the proposal to eliminate the term “differing interests” in Rule 1.7 and adopt a modified version of the ABA’s formulation instead. The ABA replaces the concept of an adverse effect on the lawyer’s professional judgment with the concept of a “material limitation” on the lawyer’s representation of the client. It replaces the concept of an adverse effect on the “loyalty” of the lawyer by stating that the lawyer may not accept a representation that is “directly adverse” to the client. We believe it is significant that New York is the only state to retain the differing interest standard. We believe the ABA’s tests strike an appropriate balance and will be easier for lawyers to apply than the “differing interests” test.

We agree with COSAC’s recommendation to amend Rule 1.7 to allow for screening of lateral hire attorneys. We agree that enabling lawyer mobility is an important goal. However, while we agree that there should be an exception for “disclosures required or permitted by other rules,” we disagree with the language in proposed Comment [5D] to Rule 1.10 (and similar comments to Rules 1.11 (Comment [7A]), Rule 1.12 (Comment [4C]) and Rule 1.18 (Comment [7C]) limiting disqualification to situations where the confidential information is “material to the matter.”

Comment [7A] to Rule 1.11 currently provides “If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm’s disqualification.” COSAC proposes to amend this standard so that a leak that is not “material” to the matter would not disqualify the firm. The Ethics Committee believes that both lawyers and the public are already skeptical about the efficacy of information walls. This amendment seems to be a recognition that information does indeed regularly cross the walls. We believe adopting the “materiality” standard will weaken the incentive of law firms to make sure their walls are impermeable.

COSAC justifies the new standard by pointing out that the definition of “screening” only requires procedures that are “reasonably adequate” to protect information that the isolated lawyer or the firm is obligated to protect. Rule 1.6(c) similarly requires a lawyer to make “reasonable efforts” to prevent the inadvertent or unauthorized disclosure or use of information protected by Rules 1.6, 1.9() or 1.18. We believe these “reasonableness” standards ensure that the lawyer or firm is not subject to discipline where there is a failure despite reasonable precautions. However, the sanction of disqualification is entirely appropriate for wall violations. We are not aware that the stricter standard currently applicable has been impossible to meet. We would therefore retain the current language of Comment [5D], in all three places.

We approve COSAC’s recommendation to amend comment [21] to deal with the effect of one client’s revocation of a previously given consent to a conflicted representation.

Rule 1.8.

COSAC recommends amending Rule 1.8(c)(1) to limit the bar on soliciting a gift from a client to “substantial” gifts. The term “substantial” is not defined in the proposal and there is no existing definition in the NY Rules. The ABA Model Rules contain a definition of “substantial” in the definition section and which is referred to in the “definitional cross-reference” listing under Rule 1.8. Although the Bar Association approved this change in 2008, we do not agree with it.

Before 2009, the ethical rules in New York prohibited a lawyer from suggesting that the client make a gift to the lawyer. EC 5-5 allowed a lawyer to accept an unsolicited gift from a client, but commented: “If a lawyer accepts gift from the client, the lawyer is peculiarly susceptible to the charge that he or she unduly influenced or overreached the client.” We believe allowing lawyers to solicit gifts – even ones that are not “substantial”, however defined – is likely to put lawyers in a bad light. We would therefore retain Rule 1.8(c)(1) as it currently exists.

Rule 1.10.

We agree with the proposal to remove imputation for most personal conflicts. Where the relationship between the first and second lawyers is such that the second lawyer’s professional judgment on behalf of the client would be affected, the second lawyer would be disqualified by the personal interest conflict. Imputed disqualification in this circumstance is not necessary. Where the second lawyer has no such personal interest conflict, imputed disqualification is unnecessary.

Rule 1.11.

We disagree with COSAC’s proposal to eliminate imputation of conflicts of lawyers entering or serving in government offices without requiring screening of the disqualified lawyer. Before 2009, the general rule in New York was that, when one lawyer in a firm is disqualified, all lawyers in the firm are disqualified. The definition of “firm” has always included a government law office.

Immediately before the Rules were adopted in 2009, DR 5-105(D) provided: While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of

them practicing alone would be prohibited from doing so under . . . DR 9-101(B) In 2003, COSAC recommended (and in 2008, the House of Delegates adopted) that the imputation with respect to government lawyers be eliminated in Rule 1.10, but that the imputation be included in Rule 1.11(e). The proposal adopted by the Bar Association was as follows:

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation; and

(2) the office, agency or department acts promptly and reasonable to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(iii) where the disqualification is based on the application of Rule 1.9, advise the personally disqualified lawyer's former client in writing of the circumstances that warranted implementation of the screening procedures requires by this Rule and of the actions taken to comply with this Ryle, unless notice to the former client is prohibited by law or Rule 1.6.

COSAC knew that its proposal differed from that of the ABA:

“¶(e) represents a middle ground between the ABA position that conflicts of current government lawyers are not imputed and the existing New York Rule, DR 5-105(D), which imputes the conflicts of current government lawyers to other lawyers employed by the same government office, agency or department on the same basis as lawyers in private law firms but addresses the special problems created by intra-government imputation through . . . the “rule of necessity” provision. . . . [T]he ABA’s no-imputation provision was also unsatisfactory because it failed to fully respect the legitimate interests of the government lawyer’s former client. The Proposed Rule represents an attempt to reconcile these competing interests.”

Unfortunately, the Administrative Board rejected the COSAC proposal for Rule 1.11(e) without restoring imputed disqualification of government lawyers in Rule 1.10. The Interim Report, dated September 11, 2008, of the Administrative Board’s Ochs Committee explains the Ochs Committee’s proposal to the Administrative Board:

Rule 1.11(d) is essentially identical to DR 9-101(B)(3). The Committee rejected three significant changes contained in the State Bar version. First, the State Bar deleted the “rule of necessity” language contained in (B)(3)(a) [now proposed (d)(1)] in exchange for a “consentability” option provided to the government agency. . . . Third, the State Bar version included a special imputed disqualification rule for government lawyers not found in the existing Disciplinary Rules [this is obviously incorrect; it was in DR 5-105 rather than in DR 9-101(b)] or in the ABA version. The Rule would apply the same screening requirements set forth in 1.11(b) to lawyers moving from

government to private employment, but also further requires the government agency to advise the personally disqualified lawyer's former client in writing of the circumstances regarding the conflict and screening. No justification for this added requirement is set forth in the comments or the Reporter's Notes.

Thus, the conclusion that government lawyers should not be subject to imputed disqualification is based on a misunderstanding of DR 5-105(D) and the conclusion as to screening seems to have been based on an objection to notifying the private client.

The Administrative Board adopted the Ochs Committee recommendation without change. To deal with the differences between the original COSAC proposal and what the Administrative Board adopted, COSAC made a number of changes in late 2008 to the comments to Rule 1.11, which stressed that Rule 1.10 did not apply to conflicts under Rule 1.11. However, on April 10, 2012, COSAC recommended to the House of Delegates that they add Comments 9A and 9B to Rule 1.11. Comment [9B] pointed out that imputation still applies in limited circumstances:

Where a government law office's representation is materially adverse to a government lawyers former private client, however, the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9. Rule 1.10 remains applicable to that former client conflict so as to impute the conflict to all lawyers associated in the same government law office.

COSAC's report on the change explained:

As proposed by the State Bar Rule 1.11(d) would have prohibited a current government official from participating in a matter in which the lawyer participated while in private practice, unless the government agency gives its written consent. As adopted by the Appellate Divisions, Rule 1.11(d) retains the slightly different rule of DR 9-101(B)(3), which prohibited a government lawyer from participating in a matter in which the lawyer was personally and substantially involved while in private practice unless no one is legally authorized to act in the lawyer's place in the matter. Paragraph (d) does not provide for informed consent by the government agency to overcome the conflict. After the new Rules were adopted, COSAC struck the proposed Comment that had addressed these provisions because that Comment had interpreted the COSAC proposal rather than the Rule as adopted by the Appellate Divisions.

The proposed Comment above fills the resulting gap. First, it restated the central elements of the Rule. Second, it notes the absence of any provision for the government agency to consent. Third, it addresses the imputation of conflicts under paragraph (d) to other lawyers in the government agency. On this last point, as proposed by COSAC, Rule 1.11(d) stated that current government lawyers are not subject to Rule 1.10, the general rule on imputation of conflicts, and Rule 1.11(e) permitted screening to avoid imputation of conflicts created by Rule 1.11(d) to other lawyers at the lawyer's agency. The Courts deleted both the proposed express exemption of current government lawyers from Rule 1.10 and the screening procedures. Rule 1.10 by its terms does not apply to conflicts arising under paragraph (d) – Rule 1.10 applies only to conflicts arising under Rules 1.7, 1.8 or 1.9 – but lawyers in government offices are still governed by Rules Rule 1.7, 1.8 and 1.9. As the proposed Comment explains, this means that, while the lawyer's conflict arising under paragraph (d)(1) is not imputed to other lawyers in the same government

law office the lawyer cannot act adversely to his or her former client, and *that* conflict is imputed to other lawyers in the government law office by Rule 1.10.

While Comment [9B] is perfectly correct, it represents a somewhat convoluted, back-door approach to reaching the right result and is not clear from black letter Rule 1.11, which is where a government lawyer would naturally look for the applicable rule. The Ethics Committee maintains that the position of the Administrative Board in 2008 should not be dispositive of the outcome now. The Bar now has another opportunity to fix this problem through the front door. We disagree with continuing to utilize the back door approach.

COSAC does not explain in its report why it should now be sufficient if the lawyer with the actual conflict is disqualified from the representation (other than the fact that it's the ABA approach). It also does not explain why, if screening is not required by the black letter rule, Comment [2] to Rule 1.10 should be amended to say "ordinarily it will be prudent to screen such lawyers." We believe that public confidence in the integrity of government requires that a personally-disqualified lawyer be screened for all the reasons set forth in the 2008 COSAC report. We would recommend adoption of the 2008 State Bar proposal. The language would read as follows:

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation; and

(2) the office, agency or department acts promptly and reasonable to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(iii) where the disqualification is based on the application of Rule 1.9, advise the personally disqualified lawyer's former client in writing of the circumstances that warranted implementation of the screening procedures requires by this Rule and of the actions taken to comply with this Rule, unless notice to the former client is prohibited by law or Rule 1.6.

We would also adopt the comments originally proposed by COSAC in 2005.

Rules 1.11(d)(2) and 1.12(c).

We would go farther in imposing conditions on a law clerk who negotiates for employment with a party or lawyer with a matter on which the law clerk is working. We believe the clerk should not only inform the judge but follow any instruction from the judge that the clerk should be screened from the matter. We agree with the opinions of the OCA's Advisory Committee on Judicial Conduct that the judge is in the best position to determine the point at which the clerk should be screened. Below, we suggest a revision to Rule 1.12 (c) and a new comment.

There are several opinions of the Advisory Committee on Judicial Conduct that hold that a judge in this circumstance should screen the affected clerk. See Joint Opinion 07-87/07-95 (June 7, 2007) (judge who learns that law clerk has been contacted by a law firm about post-clerkship employment should insulate the law clerk from any matters involving the firm and disclose such insulation to the parties); Opinion 07-174 (October 18, 2007) (it is discretionary for a criminal court judge to disclose that the judge's court attorney has applied for employment with a district attorney's office staffed by hundreds of assistant district attorneys, or to insulate the court attorney from all matters the DA's office prosecutes; but if the DA's office has offered employment to the court attorney, the judge should insulate the court attorney); Opinion 15-15 (the judge does not need to insulate the law clerk until the judge learns the prospective employer offered employment to the law clerk or they are engaged in negotiations).

In any event, we believe that the second sentence of Rule 1.11(c) should be amended to include law clerks who serve a pool of judges (with the consent of the administrative judge to whom the pool reports) as well as to clerks to individual judges. The amended proposal would read:

A lawyer serving as a law clerk to a judge or other adjudicative officer or in a pool serving multiple judges or other adjudicative officers may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a matter in which he clerk is participating personally and substantially, but only after the lawyer has notified the relevant judge or other adjudicative officer. The law clerk must abide by any determination of the appropriate judge requiring that the clerk be screened from any matter in which such party or lawyer is involved.

We also recommend the following new Comment [3A] to Rule 1.12.

[3A] Law clerks to state court judges may have a conflict of interest when they apply for a position with a party or lawyer involved in a matter in which they are personally and substantially involved. Those interests are covered by Rule 1.12(c) rather than Rule 1.7(a). In addition, the actions of a law clerk may reflect on the judge, particularly under Rule 3E of the Code of Judicial Conduct, which requires the recusal of a judge in any proceeding where the judge's impartiality might reasonably be questioned. The OCA's Advisory Committee on Judicial Conduct has published several opinions discussing what a judge should do when the judge's clerk applies for another position, interviews for such a position, receives an offer of subsequent employment or is negotiating the terms of such employment. The Advisory Committee recommends that the law clerk be "insulated" or "screened" from the matter, no later than the time employment is offered to the clerk, but leaves it to the discretion of the judge when

screening should be initiated. At the time when discussions between the law clerk and a prospective employer become serious, screening will be appropriate. The judge is in the best position to determine when the discussions have reached this point.

Rule 1.8(l).

COSAC proposes to move from Rule 1.10(h) to Rule 1.8(l) the rule with respect to conflicts of related lawyers. We do not object to the move; however, we believe the section (which is one sentence with many clauses) would benefit by changing the phrase “the other lawyer” to “the related lawyer.”



Staff Memorandum

**HOUSE OF DELEGATES
Agenda Item # 8**

To supplement the materials you previously received, attached are comments from the Bar Association of Erie County and the Dispute Resolution Section.

DISPUTE RESOLUTION SECTION

2018-2019 Officers

DEBORAH MASUCCI

Chair
Masucci Dispute Management and
Resolution Services
20 Polhemus Place
Brooklyn, NY 11215
646/670-7224
dm@debmasucciadr.com

To: Committee on Standards of Attorney Conduct
From: Deborah Masucci, Chair of the Dispute Resolution Section
Re: Proposed Changes to New York Rule 3.4 (e)
Date: January 7, 2019

THEODORE K. CHENG

Chair-Elect
ADR Office of Theo Cheng LLC
66 Carwright Drive
Princeton Junction, NJ 08550
917/459-3669
tcheng@theocheng.com

BARBARA ANTONELLO MENTZ

Vice-Chair
bmentz@mentz.org

ALFREIDA B. KENNY

Secretary
Law Office of Alfreida B. Kenny
111 John Street, Suite 800
New York, NY 10038
212/809-2700
abkenny@abkenny.com

The Executive Committee of the New York State Bar Association's Dispute Resolution Section ("the Section"), and the Section's Ethics Committee, reviewed the Committee on Standards of Attorney Conduct's ("COSAC") proposed change to New York Rule 3.4(e).

KRISTA GOTTLIEB

Treasurer
ADR Center & Law Office
43 Court Street, Suite 1100
Buffalo, NY 14202-3111
716/218-2188
kg@kristagottlieb.com

The Section lauds the efforts of COSAC to clarify the obligations of counsel under the Rules of Professional Conduct. This area involves competing considerations. On one hand, principled bargaining, whether in negotiation or mediation, can involve coordinated discussions with an eye towards satisfying the interests of all parties. On the other hand, threatening disciplinary or criminal action could generate a counterproductive culture of coercion, manipulation and recrimination.

Rule 3.4(e) is significant to the field of Dispute Resolution, which includes negotiation and mediation. It is the experience of members of this Section that threats of this kind do, in fact, surface, at times, during negotiations and mediations. For purposes of regulating the culture of negotiation and mediation in which counsel are involved, and to retain or enhance the civility of those proceedings while also furthering the interests of all parties and the legitimate interests of counsel, the Section provides the following comment.

First, the Section supports the inclusion of the phrase "**or disciplinary**" in the Rule. Prohibition of a threat of this kind is entirely apt. In this context, it can be helpful to consider all pertinent and material information, including the risk of discipline or criminal action.

Second, the Section recommends that the balance of the proposed change should be withdrawn for further study. Recognizing that there are challenges on either side of this equation -- and that this is an area with serious impact on the domains of dispute resolution with potentially criminal legal implications -- the Section recommends that the additional changes be withdrawn for further study. The Section, in particular, recommends study and comment by the Criminal Justice Section of the NYSBA. The Section offers a representative to study the potential changes and its impact on negotiations within the context of mediation and settlement discussion.



**BAR ASSOCIATION
OF ERIE COUNTY**

OFFICERS 2018-2019

MARIANNE MARIANO
President

BRIDGET M. O'CONNELL
Vice President

MICHELLE PARKER
Treasurer

CRAIG R. BUCKI
Deputy Treasurer

ANNE M. NOBLE
Executive Director

DIRECTORS

Hilary C. Banker

Christopher J. Belling

Susan S. Hogan

Meghann N. Roehl

Jennifer L. Fay

Mario A. Giacobbe

Jonathan S. Hickey

Peter Matthew Kooshoian

Lauren E. Breen

Reetuparna (Reena) Dutta

Elizabeth A. Kraengel

Michael L. McCabe

438 Main Street, Sixth Floor

Buffalo, New York 14202

Phone 716-852-8687

Fax 716-852-7641

mail@eriebar.org

www.eriebar.org

January 8, 2019

Via email

Kathleen Baxter, Esq., General Counsel
New York State Bar Association
1 Elk Street
Albany, NY 12207

Re: COSAC Proposals Regarding Conflict of Interest Provisions

Dear Ms. Baxter:

The Board of Directors for the Bar Association of Erie County and our Professional Ethics Committee has reviewed the proposed amendments of the New York Rules of Professional Conduct. I write to convey our concern with one of the proposals. The BAEC believes the proposed amendment of Rule 1.11 regarding conflicts of interest for judicial law clerks does not go far enough. We favor greater transparency. The current proposal provides that a law clerk, who applies for employment with one of the parties or its counsel, while the clerk is personally and substantially working on the litigation, need only disclose this fact to his or her judge. The BAEC proposes that the rule require that the parties be advised of the employment application to allow the parties to make such motions as they deem advisable.

We have no objection to the other proposals and thank the NYSBA Committee on Standards of Attorney Conduct for their work on this matter.

Best Regards,

MARIANNE MARIANO
President

cc: Anne M. Noble, Executive Director



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #11

REQUESTED ACTION: Approval of the report and recommendations of the Working Group on Judiciary Law §470.

Judiciary Law §470 requires a lawyer admitted to practice in New York but residing in another state to maintain a physical law office in New York State. In *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2016), the Second Circuit found that the statute does not violate the Privileges and Immunities Clause of the U.S. Constitution.

The Working Group on Judiciary Law §470 was appointed to address the issues raised by requiring non-resident lawyers to maintain a law office in the state. The Working Group has concluded that §470 is outdated and is not required to ensure that a non-resident lawyer can be served with process. The Working Group's report, together with a memorandum prepared by the Committee on CPLR, is attached.

This report was posted in the Reports Community in November 2018. The Committee on Professional Ethics has indicated that it supports the recommendations.

The report will be presented at the January 18 meeting by Working Group chair David M. Schraver.

REPORT OF THE NYSBA WORKING GROUP ON JUDICIARY LAW §470

Background

Judiciary Law §470 provides:

A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.

In 2009, Ekaterina Schoenefeld, an attorney licensed to practice in New York, but residing in New Jersey and having an office only in New Jersey, commenced an action in federal court in the Northern District of New York to challenge Judiciary Law §470 under the United States Constitution. In 2011, the District Court found §470 unconstitutional under the Privileges and Immunities Clause.¹ The Attorney General appealed the decision to the Second Circuit, and the Second Circuit certified the question of what constituted an office within the state to the New York Court of Appeals.²

The Court of Appeals accepted the certification³ and, interpreting the statute for the first time, held that §470 “requires nonresident attorneys to maintain a physical office in New York.”⁴ In its opinion, the Court of Appeals recognized that the State “does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here.” However, the Court acknowledged that currently “there would appear to be adequate measures in place relating to service on nonresident attorneys” under the CPLR and its own Court rules and that the Legislature could take additional action if necessary.

On June 30, 2015, while the appeal was pending before the Second Circuit, then NYSBA President David Miranda appointed the Working Group to address the issue of the requirements on non-resident attorneys to practice in New York and to make a recommendation once the Second Circuit determined the issue of the statute’s constitutionality.

On April 22, 2016, the Second Circuit upheld §470, holding that the statute did not violate the Privileges and Immunities Clause.⁵ Ms. Schoenefeld filed a petition for certiorari before the Supreme Court of the United States, but on April 17, 2017, the Supreme Court denied the petition.⁶ The Working Group then met to discuss whether to recommend that §470 be

¹ *Schoenefeld v. New York*, 907 F. Supp.2d 252 (N.D.N.Y. 2011). The action asserted claims under the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause. The court found a violation of the Privileges and Immunities Clause but dismissed the claims under the Commerce and Equal Protection Clauses. Plaintiff never appealed the dismissal of those claims, so they were never further adjudicated.

² *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014).

³ *Schoenefeld v. State*, 23 N.Y.3d 941 (2014).

⁴ *Schoenefeld v. State*, 25 N.Y.3d 22 (2015).

⁵ *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016).

⁶ *Schoenefeld v. Schneiderman*, ___ U.S. ___, 137 S.Ct. 1580 (2017).

changed and, if so, whether any such change should be effected by amending § 470 or instead by repealing it entirely.

Analysis and Recommendation

Judiciary Law §470 is outdated and is no longer needed to serve the purpose for which it was originally enacted. Section 470 was initially enacted in 1909.⁷ At that time, residency within the State of New York was required in order to practice law.

In 1979, the New York Court of Appeals struck down the residency requirement on ground that it violated the Privileges and Immunities Clause,⁸ but the New York Legislature did not amend the language of § 470. The statute thus applies to all non-resident lawyers licensed to practice in New York regardless of where they live.⁹ If non-resident lawyers do not maintain a physical office for the practice of law in New York, then they are violating § 470 by practicing here.

The most frequent consequence of § 470 has been dismissal of actions brought by non-resident attorneys who do not maintain a physical office within New York.¹⁰ The Second Circuit determined that the purpose of §470 when enacted was entirely related to the question of whether an attorney could be served with process. The Legislature in 1909 believed that a non-resident attorney with an office in New York could be served at his or her office.¹¹ The implication was that a non-resident attorney who did not have an office in New York might not be amenable to service of process.

The Working Group has concluded that §470 is no longer necessary to ensure that a non-resident attorney who is a member of the New York bar may be served with process. Moreover, the requirement of a physical office is often onerous to non-resident attorneys, but there is no nondiscriminatory basis for imposing that burden.

The Working Group is also satisfied that non-resident attorneys are subject to disciplinary proceedings within New York State, because service could be made on the clerk of the Appellate Division based on the designation required at the time of admission and biennial registration.

The Working Group did discuss, however, whether any amendment might be necessary to the CPLR (or to § 470) with respect to the service on a non-resident attorney without a physical office within the state. Currently, CPLR 2103(b) authorizes interlocutory service, and CPLR 313 permits service outside the state where there is a jurisdictional basis under CPLR 301 (which permits a New York court to “exercise such jurisdiction over persons ... as might have been exercised heretofore) or under CPLR 302 (which provides for “long arm jurisdiction” over persons outside New York).

⁷ A predecessor section in substantially the same form was enacted in 1877 in the Code of Civil Procedure.

⁸ *In re Gordon*, 48 N.Y.2d 266 (1979).

⁹ *White River Paper Co., Ltd. V. Ashmont Tissue, Inc.*, 110 Misc.2d 373 (Civ.Ct. Bronx Co. 1981)

¹⁰ *E.g., Kinder Morgan Energy Partners, LP v. Ace American Ins. Co.*, 51 A.D.3d 580 (1st Dept. 2008).

¹¹ *Schoenefeld v. Schneiderman*, 821 F.3d 273, 282 (2d Cir. 2016).

The issues raised regarding service and jurisdiction were referred to the Association’s CPLR Committee. That committee concluded that: CPLR 2103(b) already contemplates service on an attorney at his or her office outside the state; that attorneys resident outside the state, but within the United States, may use first class mail for interlocutory service;¹² and that attorneys resident outside the United States may use other methods of service, such as overnight delivery under CPLR 2103(b)(6) or electronic means under CPLR 2103(b)(7). The CPLR Committee further concluded, with respect to jurisdiction over an attorney defendant, that a non-resident attorney who practices law or transacts business in New York, or contracts anywhere to provide services in New York, is “supplying goods and services within the state” within the meaning of CPLR 302(a)(1), thus allowing service on the attorney outside the state. (The Working Group notes that §470 does not purport to restrict New York lawyers from practicing outside the state.) A memorandum from the CPLR Committee addressing these issues is attached.

For these reasons, the Working Group recommends an outright repeal of Judiciary Law §470, and does not recommend replacing § 470 with any new or amended language in the Judiciary Law, the CPLR, or elsewhere in New York’s statutes.

Working Group on Judiciary Law §470

David M. Schrauer, Chair
Samuel F. Abernethy
Tracee E. Davis
Constantine P. Economides
Cheryl Smith Fisher
Evan M. Goldberg
Colleen Mary Grady
Sarah Jo Hamilton
Susan L. Harper
Hilary F. Jochmans
Elena DeFio Kean
Eileen D. Millett
Joseph E. Neuhaus
Richard Rifkin
Sandra Rivera
Mitchell J. Rotbert
John B. Sheehan
Linda Silberman
Roy D. Simon
Sharon Stern Gerstman, Executive Committee Liaison

¹² CPLR 2103(f)(1) defines “mailing” as depositing a paper in a first class wrapper “in a post office or official depository under the exclusive care and custody of the United States Postal Service within the United States.”

**NYSBA CIVIL PRACTICE LAW AND RULES COMMITTEE
SUB-COMMITTEE MEMORANDUM REPORT**

From: Domenick Napoletano, Esq. Sub-Committee Chair and Co-Chair of the NYSBA CPLR Committee.

To: Michael Miller, NYSBA President.

Date: September 17, 2018.

SUB-COMMITTEE MEMBERS: Souren A. Israelyan, Esq. Co-Chair; Domenick Napoletano, Esq. Co-Chair and Sub-Committee Chair; Sharon Stern Gerstman, Esq.; James Edward Pelzer, Esq. and Thomas F. Gleason, Esq.

MEMBERS PRESENT: Souren A. Israelyan, Esq. Co-Chair; Domenick Napoletano, Esq. Co-Chair and Sub-Committee Chair; Sharon Stern Gerstman, Esq.; James Edward Pelzer, Esq. (Thomas F. Gleason, Esq. was excused).

Subject of Sub-Committee's inquiry; "How to assure that jurisdiction is obtained over out of state attorneys, and any other procedural issues, if any".

Judiciary Law § 470 provides that: "A person, regularly admitted to practice as an attorney and counselor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counselor, although he resides in an adjoining state".

The majority of the CPLR committee that examined the issue of jurisdiction over non-resident attorneys, believes that CPLR 302 (a) (1), which permits exercise of personal jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state," provides sufficient basis to obtain jurisdiction over a non-resident attorney who practices law or transacts business in New York, or contracts anywhere to provide services in New York.

The sub-committee likewise examined the service provisions of CPLR § 2103 (b) and its interplay in obtaining jurisdiction over non-resident attorneys as said attorneys are defined by Judiciary Law § 470.

After much discussion the committee resolved that Judiciary Law § 470 need not be amended so as to incorporate jurisdiction service provisions given the service of process provisions contained in CPLR § 2103 (b) which provide for service upon an attorney: "Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney". Thereby defining service upon an attorney as adequate when made under CPLR § 2103 (b)(2) "by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state and six days if the mailing is made from outside the state but within the geographic boundaries of the United States", mailing being defined as meaning "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the United States"¹.

Respectfully Submitted,

DOMENICK NAPOLETANO, ESQ.

Cc: Souren A. Israelyan, Esq

¹ See CPLR § 2103 (f)



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: None, as the report is informational at this meeting.

Attached is a report from the Task Force on the Evaluation of Candidates for Election to Judicial Office. The Task Force was appointed in 2018 to review the existing methods of vetting judicial candidates and propose best practices, guidelines and minimum standards for review of candidates. Its aim is to assist bar associations, good government groups and others in developing nonpartisan screening and evaluation processes and improving those that already exist.

The Task Force notes that at the outset, it had been advised that the Independent Judicial Elections Qualification Commissions (IJEQCs), overseen by the Office of Court Administration, would be disbanded at the end of 2018. Concerns had been expressed that the commissions were not working well and that questions had been raised as to whether it was appropriate for the court system to interject itself into the election process by administering a system of evaluating judicial candidates. Consequently, the Task Force believed it necessary to work quickly to insure the continued availability of screening in 2019.

The Task Force reviewed the background of judicial evaluation in New York and surveyed local, affinity and specialty bar associations as to their thoughts on evaluations, as well as members of the IJEQCs, judges, and political leaders. It found that systems utilized by bar associations vary from county to county, and it concluded that a one-size-fits-all approach for screening would not work for New York State. Where existing reviews are effective, the Task Force urges their continuation; in particular, the Task Force noted that existing systems in place in New York City, on Long Island, and several upstate urban counties – which comprise over three-quarters of the state’s population – are currently well served.

For those counties not currently served by existing screening entities, the Task Force recommends the establishment of regional or district screening committees. Underwriting support for these efforts should come from the Office of Court Administration. NYSBA would establish a working group to help implement these panels and create resource guides.

Finally, the Task Force has developed a set of best practices to guide local bar and regional screening committees, addressing composition of the committees; use of questionnaires and the conduct of investigations; evaluation criteria; and rating and appeals processes. NYSBA should work with local bar/regional committees in making ratings known to the public.

The report references a number of appendices: the NYC Bar Association Uniform Questionnaire; select bar association bylaws for judicial committees; the National Center for State Courts survey of judicial evaluation systems; the Task Force bar association survey and results; the Task Force IJEQC member survey; the Task Force survey of judges; the Task Force survey of political leaders; and the IJEQC Waiver of Confidentiality form. For the sake of reproduction, the appendices are not included in the printed materials, but may be accessed online at www.nysba.org/judicialevaluation.

The report was posted in the Reports Community in December 2018. It is being presented to you on an informational basis at this meeting, and will be scheduled for debate and vote at the April 13 meeting.

Robert L. Haig and Hon. Susan Phillips Read, co-chairs of the Task Force, will present the report at the January 18 meeting.

NEW YORK STATE BAR ASSOCIATION



NYSBA

Task Force on the Evaluation of Candidates for Election to Judicial Office

Informational Report

December 2018



Opinions expressed are those of the Task Force preparing this Report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Table of Contents

	<u>Page</u>
I Introduction to the Work of the Task Force	1
A. The Task Force and Its Mandate	1
B. The Task Force Surveys	3
1. Survey of Bar Associations	3
2. Survey of Members of the Independent Judicial Election Qualification Commissions...4	4
3. Survey of Judges	4
4. Survey of County Political Leaders.....	5
5. Other Potential Inquiries	5
II Executive Summary	7
III The Background of the Judicial Evaluation Process in New York.....	10
A. The Early History	10
B. The Feerick Commission.....	18
C. The Independent Judicial Election Qualification Commissions.....	19
D. Judicial Evaluation by New York Bar Associations	21
1. The Statewide Associations.....	21
(a) The New York State Bar Association	21
(b) Women’s Bar Association of the State of New York [WBASNY]	22
2. The Association of the Bar of the City of New York [City Bar]	22
3. The Major Suburban and Urban County Bar Associations.....	23
(a) Albany County Bar Association	23
(b) Broome County Bar Association.....	24
(c) Erie County Bar Association	24
(d) Monroe County Bar Association.....	25
(e) Nassau County Bar Association	25
(f) Oneida County Bar Association.....	26
(g) Onondaga County Bar Association	26
(h) Suffolk County Bar Association	27
(i) Westchester County Bar Association.....	28
4. Smaller, Affinity and Specialty Bar Associations.....	28
(a) Central New York Women’s Bar Association (based in Syracuse)	28
(b) Greater Rochester Association for Women Attorneys	29
(c) Oswego County Bar Association.....	30

Table of Contents

	<u>Page</u>
(d) Ulster County Bar Association.....	30
E. Evaluation Systems Employed by Other States.....	30
IV Analyzing Judicial Screening in New York State	32
A. Different Regional Approaches Throughout the State	32
B. Different Standards Throughout the State	33
C. The Role of the Political Parties	35
D. The Multiplicity of Bar Associations	36
V Recommendations and Conclusions	37
A. General Recommendations.....	37
B. Best Practices for Bar Association Evaluation Committees.....	39
1. Judiciary Committee	40
2. Terms of Committee Members	40
3. Questionnaire	40
4. Investigations and Meetings	41
5. Criteria for Evaluation	41
6. Ratings	41
7. Voting Procedures.....	42
8. Reconsideration.....	43
9. Appeals Process	43
10. Conflicts Policy.....	43
11. Candidate Waiver of Confidentiality Forms.....	44
12. Diversity.....	44
13. Non-Lawyer Members on the Judiciary Committee.....	45
14. Confidentiality	45
15. Withdrawal by Candidates	45
16. Feedback to Candidates	45
17. The Duration of the Judicial Rating.....	45
18. Timing of the Ratings Process	46
C. Outreach and Publicity of Ratings.....	46
D. Aspirational Goals.....	46
VI Resolution for House of Delegates Consideration.....	48
VII Appendices	49

Report of Task Force on the Evaluation of Candidates for Election to Judicial Office

“Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process.” Concurring Opinion of Mr. Justice Kennedy in *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008).

I Introduction to the Work of the Task Force

A. The Task Force and Its Mandate

The New York State Bar Association’s [NYSBA] Executive Committee on June 1, 2018 established the “Task Force on the Evaluation of Candidates for Election to Judicial Office” [Task Force]. The mission statement provides that the Task Force:

will investigate and report on the various vetting structures that exist throughout New York State pertaining to candidates for election to judicial office. Based upon its investigation, the task force will propose best practices, guidelines and minimum standards for review of such judicial candidates. It will also make recommendations to assist local bar associations, good government groups and other stakeholders in developing effective non-partisan evaluation and screening of candidates for election to judicial office and improving those efforts that already exist.

President Michael Miller in his speech to the House of Delegates at NYSBA’s June 16, 2018 meeting at Cooperstown elaborated on the role of the Task Force. He stated:

There is no more important pillar to the foundation of our justice system than the quality of our judiciary. It has long been the policy of NYSBA to advocate for the selection of judges by appointment, rather than by election. However, as long as there are judicial elections, it is vitally important that the process of evaluation is fair and fosters the best judiciary possible. I have heard from the highest levels of the court system that there are significant concerns regarding the existing evaluation system. Therefore, we have established the Task Force on the Evaluation of Candidates for Election to Judicial Office, co-chaired by Robert L. Haig, and former Court of Appeals Judge Susan Phillips Read.¹

At the initial meeting of the Task Force on August 1, 2018, President Miller reiterated the significance of the work of the Task Force. His charge to the members of the Task Force was, “I

¹ Michael Miller, “President’s Report to the House of Delegates,” June 16, 2018.

don't need to have to tell you folks how important the quality of our judiciary is...It's not hyperbole; this is incredibly important stuff." President Miller found that as stewards of the judicial system, the Bar Association should not be allowing a vacuum where no process is in place to review the qualifications of candidates for judicial office.

President Miller's thoughts were similarly emphasized by the Hon. Lawrence K. Marks, the Chief Administrative Judge of the Courts. Judge Marks, on behalf of the Administrative Board of the Courts advised the Task Force that the Independent Judicial Elections Qualification Commissions would be disbanded at the end of 2018. "A decision had been made to take the Judiciary out of the business of evaluating judicial candidates." Judge Marks stated, "The plan is to disband them at the end of the calendar year." The concerns are, despite the best efforts of the commission members, that the judicial election qualification commissions are not working well and that the system is "not fulfilling the goals it was set out to do." Judge Marks also questioned whether it was appropriate for the court system to be injecting itself into administering a political process by administering a system of evaluating judicial candidates.

With the imminent termination of the Independent Judicial Election Qualification Commissions, the importance of the work of the Task Force has grown significantly. Action would need to be taken in 2019 to insure the continued availability of judicial screening throughout New York State.

The 26-member Task Force is co-chaired by Robert L. Haig, Esq. of Kelley Drye & Warren LLP and the Hon. Susan Phillips Read (Court of Appeals, ret.) of Greenberg Traurig LLP. The other members of this geographically, experientially and otherwise diverse Task Force are:

- Alyssa M. Barreiro, Esq., Wilmington Trust [Broome County]
- Eileen E. Buholtz, Esq., Connors, Corcoran & Buholtz, PLLC [Monroe County]
- Jeffrey T. Buley, Esq., Brown & Weinraub LLC [Albany County]
- David Louis Cohen, Esq., Law Office of David L. Cohen, Esq. [Queens County]
- Vincent E. Doyle, III, Esq., Connors LLP [Erie County]
- Norman P. Effman, Esq., Wyoming County Public Defender [Wyoming County]
- Timothy J. Fennell, Esq., Amdursky, Pelky Fennell & Wallen, P.C. [Oswego County]
- Lucas A. Ferrara, Esq., Newman Ferrara LLP [New York County]
- Michael J. Gaffney, Esq., Law Office of Michael J. Gaffney [Richmond County]
- Elena DeFio Kean, Esq., DeFio Kean, PLLC [Albany County]
- Daniel J. Kornstein, Esq., Emery Celli Brinckerhoff & Abady LLP [New York County]
- A. Thomas Levin, Esq., Meyer, Suozzi, English & Klein P.C. [Nassau County]
- Lawrence A. Mandelker, Esq., Eiseman Levine Lehrhaupt & Kakoyiannis, PC [New York County]
- Alan Mansfield, Esq., Greenberg Traurig LLP [New York County]
- Michael J. McNamara, Esq., Seward & Kissel LLP [New York County]
- Neil Merkl, Esq., Kelley Drye & Warren LLP [New York County]
- Eileen D. Millett, Esq., Phillips Nizer LLP [New York County]

- Thomas E. Myers, Esq., Bond, Schoeneck & King, PLLC [Onondaga County]
- Domenick Napoletano, Esq. [Kings County]
- Sandra Rivera, Esq., Rivera Law, PLLC [Albany County]
- Robert T. Schofield, IV, Esq., Whiteman Osterman & Hanna LLP [Albany County]
- Kevin S. Schwartz, Esq., Wachtell, Lipton, Rosen & Katz [New York County]
- Kathleen Marie Sweet, Esq., Gibson McAskill & Crosby LLP [Erie County]
- G. Robert Witmer, Jr., Esq., Nixon Peabody LLP [Monroe County]

Kevin M. Kerwin, Esq. has served as the Staff Liaison for NYSBA, and Bennett M. Liebman, Esq., a Government Lawyer in Residence at Albany Law School, has served as the Reporter for the Task Force.

The Task Force conducted meetings on August 1, 2018, October 3, 2018, November 15, 2018 and December 3, 2018.

The Task Force reviewed the work of the New York State Commission to Promote Public Confidence in Judicial Elections [the Feerick Commission], the Independent Judicial Election Qualification Commissions [IJEQCs], and local, affinity and specialty bar associations that evaluate judicial candidates subject to election; and researched judicial screening in other states.

The Task Force surveyed local, affinity and specialty bar associations asking them to assess their work and positions on judicial screening and their work with the IJEQCs. The Task Force solicited views on judicial screening and the efficacy of the current judicial screening regimen from political party leadership in each county, individual members of the IJEQCs and sitting elected judges.

The conclusions and recommendations of the Task Force are very much driven by the facts that the Task Force ascertained during its extensive investigations of current practices throughout New York State. For example, in many parts of the state, bar associations provide excellent judicial screening, and we are not inclined to reconstruct what is not broken.

Perhaps most importantly, individual members of the Task Force engaged in reporting their own assessments on the work of local bar associations in screening candidates, on the role of the IJEQCs, and on what they believed to be both politically achievable and desirable in the uncertain and complex world of New York State government.

The Task Force worked collaboratively and with extraordinary collegiality to achieve the goals established by its mission statement.

B. The Task Force Surveys

1. Survey of Bar Associations

The Task Force in early August of 2018 sent a survey to 130 local, affinity and specialty bar associations to ascertain their thoughts on the evaluation of candidates for election to judicial office and their interactions with the IJEQCs. Responses to the survey were spotty with slightly more than 10% of the organizations responding to the survey. While most of the respondents had

little to do with the IJEQCs, those that had worked with the IJEQCs had a mixed response. Some credited the IJEQCs as being a positive experience while others questioned the value and the knowledge of the IJEQCs in their districts. In the absence of the IJEQCs, all the bar associations that are currently conducting evaluations would continue to do so. Many of the respondents welcomed the possible opportunity to participate in a NYSBA/regional effort to conduct candidate evaluations.

2. Survey of Members of the Independent Judicial Election Qualification Commissions

An email questionnaire was sent in mid-October to 180 members of the IJEQCs. 43 members (24%) responded to the questionnaire.

An overwhelming majority of those Commission members who responded thought that the current process was effective, and almost all respondents believed that the candidate interviews were crucially important. There was considerable controversy over the ratings system. Many believed that the rating system was effective but could benefit from greater clarity. The most serious point seemed to be the use of the “Highly Qualified” ratings and its relationship to the “Qualified” rating. Several people thought “Highly Qualified” favored sitting judges only. Others thought there should be more clarity and differentiation between the two ratings, and in general more specific criteria and more choices. To some, the categories, especially “Qualified,” were too broad. The respondents also believed that calling references (especially those not listed by the candidate) was important, and that the Commissions should continue.

The responses also favored mandatory participation, greater publicity, and more willingness to make adverse findings.

3. Survey of Judges

With the assistance of the Office of Court Administration, in mid-October, emails were sent to a database that included approximately 1,200 sitting judges in New York State. Responses were due by November 1, 2018. 98 elected judges (8.2% of the 1,200 judges) representing 11 of the 13 judicial districts responded. It is possible that the limited time frame for responses could have affected the number of judges who responded to the survey.

The survey results showed several common themes. A number of respondents believed that the screening committee questionnaires should be standardized or uniform, that the screening committee members be independent and knowledgeable about the relevant courts, that the public be clearly informed about the rating system, that results should be published and that local bar associations should coordinate their work so that candidates need not participate in multiple interviews and complete multiple questionnaires. Some of the responses displayed a wide range of sentiments. For example, while many respondents believed that the screening process should be mandatory, others believe that screening should be eliminated and determinations about candidates be left to the voters.

Overall, the survey results suggest that: NYSBA and/or local bar associations should publicize the names of judicial candidates who refuse to participate in judicial screening so that voters can take that information into account before voting; political party leaders should encourage

candidates to participate in judicial screening; NYSBA and local bar associations should organize regional judicial screening for those counties that do not have local judicial screening; and the local bar associations should be encouraged to coordinate their questionnaires, interviews and ratings.

4. Survey of County Political Leaders

Given the outsized role played by political party leadership in the determination of who serves as a judge in New York State, the Task Force sent an electronic questionnaire to the Democratic and Republican Party leaders in all of New York's 62 counties.

The six-question survey submitted to the county leaders was designed to ascertain how political parties felt about the entrance of the bar associations into their electoral realm. Was there a common attitude among party leaders about using non-partisan screening committees to evaluate the qualifications of candidates for elective judicial office? The leaders were asked whether there should be pre-nomination screening of all judicial candidates, when the results of such screening should be publicly disclosed, whether they would even trust bar association screening and whether they would view bar association involvement as a challenge to their control of the judicial nomination process.

Only 16 of the 124 county political leaders (12.9%) chose to respond to the survey. Over 80% of the respondents agreed that a screening committee should evaluate the qualifications of all judicial candidates prior to the date of their nomination, and the same 80% would support evaluation of judicial candidates by a screening panel, the members of which were selected with input from their party. 90% of the respondents stated that their party does not require a potential judicial candidate to obtain the party's permission before agreeing to be evaluated by the relevant bar associations.

On the other hand, nine of the 16 respondents would not support evaluation of judicial candidates by a screening panel, the members of which were selected without input from their party. Only nine of the 16 respondents believed that the evaluations should be disclosed to the media for dissemination prior to the candidates' nomination, and that same nine of 16 stated that their party would not nominate a judicial candidate who declined to be evaluated by the relevant bar associations.

While it may be hard to draw any firm conclusions from this limited survey size and the self-selection of the respondents, there appeared to be significant support of judicial screening and evaluation in theory. Yet, where the screening of judicial candidates might be viewed as impinging on the prerogatives of political selection, that support for judicial screening grew less.

5. Other Potential Inquiries

The Task Force considered whether or not to poll New York voters for their views on the screening of candidates for the judiciary. While the members of the Task Force believed that a survey might produce useful information on the public's views on the qualification of judges, the costs involved in conducting a poll, coupled with the limited time period for the Task Force's report, were sufficient to convince the majority of the Task Force members that a poll was

unnecessary. Some expressed the view that there was little reason to believe that a poll would provide information that was significantly different than the polls undertaken in the prior decade by the Feerick Commission.²

Similarly, given the considerable work that the Feerick Commission had performed with focus groups, the Task Force saw little reason to utilize focus groups.

² The polling of registered voters undertaken by the Marist Institute for Public Opinion for the Feerick Commission in October of 2003 showed that voters were divided over how well they thought elected judges were performing their jobs in New York State. 45% of the voters believed that the judges were good or excellent while 48% rated the job performance of judges as fair or poor. While over two-thirds of voters believed that judges were fair and impartial, Latino and African-American voters were considerably less likely than white voters to believe that judges were fair and impartial. The voters believed that wealthier parties receive more favorable treatment than others. 90% of voters believed that it was important that judges be independent from political party leaders and campaign contributors, but 86% of voters believed that political party leaders had a great deal or some influence over who becomes a judge. The Marist poll data is contained in Appendix B of the Feerick Commission's June 29, 2004 report.

II Executive Summary

The Task Force’s review of judicial screening systems in New York State found that the discontinuation of the independent judicial election qualification commissions in 2019 will leave a significant vacuum in the evaluation of elected judicial candidates in some areas of New York State. If the Task Force is to be successful in its mission of “developing effective non-partisan evaluation and screening of candidates for election to judicial office and improving those efforts that already exist,” it is vital to help effectuate systems that will truly foster the best judiciary possible.

The Task Force understands that its goals are to develop recommendations, best practices and guidelines that are effective, practical and politically achievable. It does little good to recommend a utopian judicial evaluation system for New York State that cannot realistically be accomplished. New Yorkers deserve a system that can be put in place in 2019. The Task Force’s recommendations in no manner depart from the NYSBA’s longstanding commitment to the commission based appointive system for selecting judges in New York State.

The Task Force believes that in 2019, NYSBA needs to address and to recommend actions to assure that all candidates for election to the judiciary in New York State are effectively screened to determine their qualifications.

The systems in place by local bar associations vary from county to county. County, affinity and specialty bar associations have their own evaluation systems. Some local bar associations have a significant number of members and resources, and do an extensive, complete and non-partisan job in evaluating judicial candidates. Other bar associations – especially outside the City of New York – lack this capacity. In some counties, the bar association screening processes are active, robust and efficacious. In others, there is minimal screening.

The Task Force believes that the one-size-fits-all approach to determining the composition of judicial screening panels will not work for New York State. The State and the local bar associations are extremely diverse, with widely varying resources, and the methods for selecting judges in this state are extraordinarily complex. The Task Force is not trying to impose a single judicial evaluation structure on the entire state. A top-down one-sized approach providing a statewide uniform structure is likely to be a recipe for failure.

Where the existing bar association reviews are effective, the Task Force recommends their continuation. There are dozens of judicial screening review processes in place throughout New York State. The culture, the assets, the procedures and the mechanics of local bar associations vary tremendously. The Task Force believes that in some areas of the State, the systems that are in place are operating effectively. They should not be changed.

In New York City, the City Bar– working with the five county bar associations within the City – has a vigorous and successful system in place that works to promote the highest standards of the judiciary. On Long Island, in the 10th Judicial District, both the Nassau County Bar Association and the Suffolk County Bar Association maintain vibrant judicial

evaluation systems that are working effectively. In many of the upstate urban counties, the county bar associations are working forcefully and are employing evaluation systems that serve the public and the judiciary well. The Task Force believes that these bar associations should be encouraged to continue their efforts. There are effective judicial evaluation systems in place in ten of the 11 largest counties in New York State. Nearly three-quarters of the state's population is currently being well served by the work of the local bar associations.

Nonetheless, there are some judicial districts (such as the 7th Judicial District, which encompasses Monroe County and seven smaller counties) where there is almost no judicial screening whatsoever. There are many small counties in other districts (such as Hamilton County in the 4th District and Lewis County in the 5th District) where the size of the county and the absence of a significant body of resident attorneys in the county virtually precludes the possibility or even the potential for any meaningful judicial screening.

The Task Force believes that increased judicial screening needs to be encouraged throughout the state. NYSBA should not allow the systematic screening currently performed by the IJEQs to fall through the potential upstate cracks. Screening ought to be available for all judicial candidates. In order to assist those judicial districts with limited screening, the Task Force recommends that NYSBA work with all local bar associations in those districts to establish regional or district screening committees in 2019. Underwriting support for this initiative should come from the Office of Court Administration which has funded and staffed the IJEQs.

NYSBA must take appropriate action to continue non-partisan evaluation and screening of candidates for election to judicial office. This should include the establishment of a NYSBA working group to help implement the availability of screening panels throughout the state and the creation of resource guides as well as web pages to assist bar associations on the subject of judicial screening.

In keeping with its mission, the Task Force accordingly has developed a series of best practices that should help guide local bar associations and regional screening commissions in their role in evaluating candidates for judicial office. These best practices should include:

1. The bar association should establish a separate judiciary committee which would be charged with the duty of investigating and evaluating candidates for judgeships.
2. Judiciary committees should consider and establish term limits for members of the committee to ensure new members with diverse perspectives and opinions.
3. The questionnaire used by the City Bar to evaluate candidates should be used as a suggested model for other bar associations conducting evaluations, with local bar associations using variations to fit their needs and capabilities.
4. The members of the judiciary committee, or a subcommittee of the judiciary committee, would conduct investigations of the candidates for the judiciary.
5. The judiciary committee should use six basic criteria to evaluate judicial candidates. These criteria would be integrity, independence, intellect, judgment, temperament, and experience. Individual bar associations would be free to add additional criteria, but these six standards should serve as best practices at the heart of the evaluation process.

6. The judiciary committee should use a two-tiered rating system where candidates would be rated either as “Approved” or “Not Approved.”
7. Where a judiciary committee offered only two ratings to candidates, a majority vote would be needed to secure an “Approved” rating.
8. Candidates who received the “Not Approved” rating should be entitled to petition the judiciary committee to reconsider its evaluation.
9. An appeals process should be a required feature of a judicial evaluation process.
10. A judiciary committee should implement exclusion and recusal provisions to address actual or perceived conflicts of interest.
11. The judiciary committee should consider utilization of candidate waiver of confidentiality forms, such as those used by the IJEQCs.
12. Membership on judiciary committees should reflect the state and region’s diversity in order to promote public confidence in the court system.
13. Bar associations should consider the possibility of naming non-lawyers to the judiciary committees.
14. The entire operation of the judicial screening system must be held in the highest confidentiality.
15. Candidates who receive a “Not Approved” rating and who expeditiously withdraw their candidacy for judicial office should not have their rating publicized in any manner.
16. Bar associations should consider, without revealing confidential information, providing informal feedback to candidates about their performance.
17. Bar associations should determine a policy as to whether the judiciary committee’s rating of a candidate will remain valid beyond the immediate election ratings for which the review is being conducted and, if so, for how many years a rating for a judicial candidate would be valid.
18. Bar association ratings of judicial candidates should be conducted at the earliest possible point in the election cycle.

NYSBA should work with the local bar associations in making the ratings of judicial candidates known to the public. Where the local bar association does seek NYSBA involvement, NYSBA should work with the local bar to maximize the public distribution and exposure of the candidate ratings.

III The Background of the Judicial Evaluation Process in New York

A. The Early History

New York State has for 172 years been largely committed to the election of judges. As a result of the 1846 Constitutional Convention, the state shifted from a system of appointive judges to one where all judges were elected.³

While the number of appointed judges has increased, the Feerick Commission reported that “73% of the State's 1,143 full-time judges are elected.”⁴ In addition, New York’s methods for judicial selection make for a complete enigma. “New York uses almost as many methods of judicial selection as there are courts.”⁵ “New York State has a complicated judicial system, perhaps the most complicated in the nation. We have at least 11 different levels of courts, although some people claim that there are actually 13 distinct courts. And we select judges for different courts in different ways—a judge may be appointed by the Governor from a list open to all lawyers, or appointed from a pool of elected trial court judges, or elected through a primary system, or elected through a nomination system. In some cases, judges for the same court may be elected in certain parts of the state and appointed in others.”⁶

After the 1846 Constitution, at the state supreme court level, the political parties directly chose their candidates.⁷ In 1911, towards the close of the Progressive era, and after years of intense advocacy for direct primaries by former Governor Charles Evans Hughes (as well as support from former President Theodore Roosevelt⁸), primary elections were mandated for most every elected position in the State by the Ferris-Blauvelt Direct Nominations bill.⁹

³ Constitution of 1846, Article VI, §12 “The judges of the court of appeals shall be elected by the electors of the state, and the justices of the supreme court by the electors of the several judicial districts, at such times as may be prescribed by law.” The question of whether and how best to select state judges and how to structure the State court system was arguably the principal topic of the 1846 Convention. “The importance of the subject was fully appreciated by the Convention, and the suggestion was made several times while the judiciary article was under consideration, that the reconstruction of the judicial system was the chief reason for calling the Convention.” Charles Z. Lincoln, 2 *The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905*, 140 (1906).

⁴ Commission To Promote Public Confidence In Judicial Elections, *Final Report To The Chief Judge Of The State Of New York*, 5 (2006). [hereinafter referred to as Final Report].

⁵ Commission To Promote Public Confidence In Judicial Elections, *Report to the Chief Judge of the State of New York*, 5 (2004). [hereinafter referred to as 2004 Report].

⁶ *Id.*, Appendix A at 36.

⁷ A joint legislative committee in 1910 stated, “The investigation of this Committee convinces it that no political movement in recent years has so excited the public mind, has aroused so much animosity, has split national parties into such bitterly opposing factions, as has the agitation for and the operation of direct nomination systems in the several northern States which are trying the experiment.” *Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate Primary and Election Laws of this and Other States* (1910).

⁸ See “State Convention Mere Device for Registering Decrees of the Bosses Says Roosevelt at Elmwood Meeting,” *Buffalo Courier* June 11, 1913; Theodore Roosevelt, “Two Issues: Direct Primaries and Judges of The Right Type,” *Outlook*, July 12, 1913.

⁹ L. 1911, ch. 891. “Direct Primary Bill Is Passed,” *New York Sun*, October 5, 1911. “Voters to Enroll Soon After Nov. 15,” *New York Times*, October 8, 1911. The Ferris-Blauvelt law was amended by Chapter 820, L.1913. “Bills All Passed by Legislature,” *New York Tribune*, December 13, 1913, “Legislature’s Deathbed Repentance” *New York*

The workings of the Ferris-Blauvelt law were such that many believed that it gave party bosses excessive control over judicial nominations. Former Chief Judge of the Court of Appeals Edgar Cullen stated, “Already nearly everyone sees that Judges ought to be selected by conventions rather than by direct primaries.”¹⁰ While one might have assumed that direct primaries might have lessened the role of the political parties in determining the candidates, in the case of judicial elections – where there was limited public interest and minimal public knowledge of the qualifications of individual candidates – many believed that the party leaders had carte blanche to select their judicial choices.¹¹

Republican legislators had been generally opposed to the Ferris-Blauvelt law, and in 1920, Republican Nathan Miller (a former judge of the Court of Appeals) was elected Governor. Miller was an outspoken opponent of the direct primary system for judges.¹² In 1921, a joint legislative committee recommended the abolition of the direct primary for Supreme Court justices and its replacement by “judicial district conventions.”¹³ The Legislature soon took action, and the direct primaries for the supreme court were replaced by nominations via party conventions. The legislation specified that “party nominations of candidates for the office of the justice of the supreme court, shall be made by party conventions.”¹⁴

This 1921 system has lasted until the current day. As described by the United States Court of Appeals for the Second Circuit, “The Legislature did not entirely dispense with primary elections. Instead, it enacted a three-part scheme that combines a primary election, a nominating convention, and a general election. During the first phase, the State holds a primary election at which rank-and-file party members elect judicial delegates. N.Y. Elec. L. §§ 6–106, –124. Next, those delegates attend a convention at which they select their party’s nominees. N.Y. Elec. L. §§ 6–106, –124, –158. The individual so chosen receives a place on the general election ballot as

Tribune, December 13, 1913, stating “The state will have a direct primary law abolishing all nominations by party convention and an Election Day ballot minus the party column.”

¹⁰ “The State Convention,” *New York Times*, May 1, 1917. See also “Noted Men Attack the Direct Primary System,” *New York Times*, March 14, 1918.

¹¹ Successful 1920 Republican gubernatorial candidate Nathan Miller stated, “The direct primary we have was inaugurated in the interest of Tammany Hall, to enable Tammany to control the Democracy of the State of New York.” “Hoover Makes Strong Plea for Judge Miller,” *New York Tribune*, October 23, 1920.

¹² “Miller Declares Primary a Fraud,” *New York Times*, Oct. 23, 1920; “Miller Ready to Lead Fight on Primaries,” *Albany Times Union*, March 11, 1921. By contrast, Republican Charles Whitman, who served as governor from 1914-1918, had been a supporter of the primary system. See “Republicans Hold to Direct Primary,” *New York Times*, September 29, 1916. Legislation to end the direct primary for supreme court justices had been vetoed by Governor Alfred E. Smith in 1920. See “Vetoes Bill to Name Judges by Convention,” *New York Times*, May 18, 1920; “Smith Vetoes Bill for Convention to Nominate Justices,” *New York Tribune*, May 18, 1920. In his veto message Smith wrote, “The fitness of any candidate, for any office, can best be discussed by all the members of the party which makes the nomination. It is infinitely better for the State that every candidate, particularly a candidate for a place in the judiciary, receives his nomination at the hands of a majority of the voters of his party, than through the favor of the few.” “To Amend the Election Law so as to Break Down the Direct Primary System by Substituting Party Nominating Conventions for the Office of Justice of the Supreme Court,” *Public Papers of Alfred E. Smith, Governor*. 324 (1920).

¹³ *Report of the Joint Legislative Committee on Election Law*, 6 (1921).

¹⁴ L. 1921, Ch. 479 §4. See also “Leaders Rush Repeal Vote of Primary,” *New York Times*, April 11, 1921. Besides ending primaries for supreme court justices, the legislation also ended primaries for all statewide political offices. Primaries for statewide offices in New York were only reauthorized in 1967. See L. 1967, ch.716. See also Richard Madden, “Rockefeller Signs Bill Authorizing Direct Primaries,” *New York Times*, May 3, 1967.

the party's nominee. N.Y. Elec. L. § 7-116(1). Last, the State holds a general election at which Justices are elected. N.Y. Elec. L. § 8-100(1)(c)."¹⁵

Most significantly, the 1921 system has withstood constitutional scrutiny. A unanimous Supreme Court in *Lopez-Torres v. New York St. Board of Elections*,¹⁶ ruled that the law did not violate the First Amendment associational rights of independent candidates challenging candidates favored by the party convention system. The Justices did not rule on the wisdom of the New York Law. Justice Souter's concurring opinion read in its entirety:

While I join Justice Scalia's cogent resolution of the constitutional issues raised by this case, I think it appropriate to emphasize the distinction between constitutionality and wise policy. Our holding with respect to the former should not be misread as endorsement of the electoral system under review, or disagreement with the findings of the District Court that describe glaring deficiencies in that system and even lend support to the broader proposition that the very practice of electing judges is unwise. But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."¹⁷

Justice Kennedy in his concurring opinion wrote:

Even in flawed election systems there emerge brave and honorable judges who exemplify the law's ideals. But it is unfair to them and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse.

Rule of law is secured only by the principled exercise of political will. If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now.¹⁸

At no point in the existing system is there any government requirement that judicial candidates subject to election be evaluated or screened for their capabilities, integrity and independence.

The idea of screening judicial candidates is hardly a new one. Many local organizations use a sort of screening process to identify preferred judicial candidates for their constituents. For instance, local bar associations and local branches of the League of Women Voters often interview and rate candidates for local judicial office."¹⁹

For more than a half century, NYSBA leadership has supported the concept of judicial screening to promote an independent, principled and qualified judiciary. In 1961, as local governments in

¹⁵ *Lopez-Torres v. New York St. Board of Elections*, 453 F. 161, 172 (2nd Cir. 2006); rev'd 552 U.S. 196 (2008).

¹⁶ 552 U.S. 196 (2008). Justice Scalia's opinion for the Court found plaintiff's claimed "associational right not only to join, but to have a certain degree of influence in, the party" had no support in the First Amendment or the precedents of the Court. *Id.* at 203.

¹⁷ *Id.* at 209

¹⁸ *Id.* at 212-213.

¹⁹ *Id.* at 37.

New York State began the consideration of formally utilizing judicial screening procedures, the State Bar Association's Executive Committee adopted the following resolution:

WHEREAS to assure the election of qualified candidates for judicial office it is vital that the organized bar be consulted on the qualifications of judicial candidates before nominations be made; therefore be it resolved that the New York State Bar Association in convention assembled;

Before any judicial nomination is made, an adequate opportunity should be given by the appropriate bar associations to report on the qualifications of candidates for judicial office.²⁰

In 1962, New York City Mayor Robert Wagner inaugurated the concept of a nonpartisan evaluation committee to review his potential judicial nominees.²¹ He started a voluntary merit selection system for the city's criminal and family courts.²² In commenting on the Wagner action, NYSBA president, and former Presiding Justice of the Appellate Division, First Department, David Peck termed Wagner's work "as 'the most exciting development' in the drive by the organized bar to gain a stronger voice in the selection of judges."²³ Justice Peck added that the Wagner evaluation committee was a "happy augury for the better judicial selections in New York City."²⁴

The State Bar Association was similarly positive about a plan worked out by the Nassau County Bar Association²⁵ with the political leaders in that county under which the parties would submit potential judicial candidates to the bar association for approval before they were recommended for party nomination.²⁶

While the Wagner administration's "Mayor's Committee on the Judiciary" was continued during the administrations of Mayors Lindsay and Beame,²⁷ little action was taken at the state level. The closest the state may have come to enacting a screening policy for elected judges came in 1970. Assembly Speaker Perry Duryea gave his support to legislation that required the screening of all candidates for the Supreme Court. No individual could be nominated by a political party unless the screening committee had determined that the nominee was highly qualified.²⁸ The Assembly leadership stated that the leadership of the State Senate supported the mandatory screening bill.²⁹ State Republican Party leaders were said to be in favor of mandatory screening.³⁰ State Senator

²⁰ "Association Activities," 33 *N.Y. St. B. J.* 205, 206 (1961).

²¹ Peter Kihss, "Judgeship Panel Takes First Step," *New York Times*, June 6, 1962. See also James Edward Lozier, "Judicial Selection in New York: A Need for Change," 3 *Fordham Urban Law Journal* 605, 626 (1975).

²² Martin I. Kaminsky, *A Proposal for Mandatory Preselection Screening for State Court Judges*, 51 *St. John's L. Rev.* 516, 541 (1977).

²³ Douglas Dales, "Screening Policy on Judges Hailed," *New York Times*, June 23, 1962.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Charles P. Buckley, Jr., "The 'Nassau Plan' for Selection of Better Judges," 34 *N.Y. St. B. J.* 345 (1962)

²⁷ Lozier *supra* at note 21.

²⁸ Thomas P. Ronan, "Bill in Albany Would Require Screening of Judiciary Aspirants," *New York Times*, January 30, 1970. See Assembly Bill No. 3195 (1970) by Mr. Hansen.

²⁹ *Id.*, Edward G. Smith, "Panel Is Sought to OK Judges," *Newsday*, January 30, 1970.

³⁰ Dick Zander, "Judicial Screening Favored," *Newsday*, January 31, 1970.

John Dunne from Nassau County declared, “This appears to be a highly desirable aid to choosing the best possible candidates for the Supreme Court.”³¹ Nonetheless, State Senate Majority Leader Earl Brydges, withdrew his support of the mandatory screening bill and stated that he doubted it would pass the Senate.³² Instead, he supported the use of advisory screening panels whose advice would be “highly respected” but not binding upon nominating conventions.³³

In the absence of any chance that Speaker Duryea’s proposal would be acted on by the Senate, the Speaker’s own proposal was defeated in the Assembly by a vote of 79-64.³⁴ The State Senate then passed the advisory judicial screening bill supported by Senator Brydges by a vote of 33-23.³⁵ The Senate proposal was not taken up by the Assembly.

With the Legislature not supporting judicial screening,³⁶ any state judicial screening needed to be established by the Governor’s Office, and it would only extend to judges appointed by the Governor. Governor Hugh Carey in February of 1975 formally introduced the concept of judicial screening to the State.³⁷ He promulgated an Executive Order creating judicial nominating commissions to recommend “well qualified” candidates to the Governor for those judicial offices for which the Governor had the power of appointment.³⁸ Every successive Governor has utilized a variant of the system instituted by Governor Carey to provide for judicial nominating/screening commissions. Currently in place is Governor Cuomo’s Executive Order No. 15.³⁹

That Order establishes a series of judicial screening commissions. These commissions are to recommend candidates for appointment who are highly qualified, and the governor is to select an appointee from the candidates recommended by the commissions. There is a state screening commission to screen candidates for the Court of Claims. There are four departmental judicial screening commissions that evaluate candidates for the Appellate Division and vacancies in the office of Supreme Court Justice. Finally, there are county judicial screening committees which recommend appointments “to the offices of Judge of the County Court, Judge of the Surrogate's Court, and Judge of the Family Court outside of the City of New York.”⁴⁰

³¹ Smith, *supra* at note 29.

³² Francis X. Clines, “State Judicial Reform Bill Hits a Snag,” *New York Times*, March 5, 1970.

³³ *Id.* Senate Bill No. 4621 (1970) by Mr. Brydges. Similar advisory screening bills introduced by Senator Brydges passed the Senate in both 1969 (S.4621) and in 1971 (S. 1899).

³⁴ William E. Farrell, “Judicial Reform Backed by Duryea Is Defeated,” *New York Times*, March 17, 1970; Robert Reno, “Duryea Court Bill Fails,” *Newsday*, March 17, 1970, “Duryea-Backed Bill to Reform Judicial Plan Fails in Albany,” *Schenectady Gazette*, March 17, 1970. Democratic opposition to the bill was based on the belief that the screening committees would likely have more Republican than Democratic members. At the conclusion of the legislative session, on April 19, 1970, when it was certain that the Senate would not act on the Duryea –supported bill, the Assembly repassed the legislation.

³⁵ Francis X. Clines, “Bill on Judiciary Gains in Albany,” *New York Times*, March 25, 1970.

³⁶ Even as of 1977, the *New York Times* could write, “Scores of proposals for restructuring the courts have been made only to meet defeat in the Legislature.” Tom Goldstein, Appointment of Judges Winning,” *New York Times*, November 9, 1977.

³⁷ Lozier, *supra* note 21 at 631. By his Executive Order No. 5, Governor Carey created a system of judicial nominating committees for his selections.

³⁸ 9 NYCRR §3.5 (February 21, 1975).

³⁹ 9 NYCRR §8.15.

⁴⁰ *Id.*

While the Legislature has not seen fit to require the use of judicial screening committees for elected judges, there is a judicial screening committee in legislation for selecting nominees to the Court of Appeals. In 1977, the Constitution was amended to make the positions of Judges on the Court of Appeals appointive rather than elected positions.⁴¹ The Judges would be selected by the Governor, subject to the advice and consent of the Senate. The Governor's nominee would need to come from a list of candidates determined to be well qualified based on their "character, temperament, professional aptitude and experience"⁴² by a newly created Commission on Judicial Nomination. The legislature was charged under the Constitution with the duty of providing for the organization and procedure of the Commission on Judicial Nomination.⁴³

The Legislature in 1978 established the framework for the process of selecting judges of the Court of Appeals.⁴⁴ The Commission would submit to the Governor seven candidates for appointment to the position of Chief Judge and between three to five nominees for the position of Associate Judge.⁴⁵ In 1983, the maximum number of candidates to be recommended for Associate Judge was increased from five to seven.⁴⁶ The Commission has been in place now for 40 years and has screened all Court of Appeals judges from Chief Judge Lawrence Cooke in 1979 to Associate Judge Paul Feinman in 2017.

NYSBA continued its support for judicial screening in its review of the Feerick Commission report. Soon after the first Feerick Commission report was issued in 2003, NYSBA established the Special Committee on Court Structure and Judicial Selection chaired by former Court of Appeals Judge Richard D. Simons. The Special Committee supported the basic concept developed by the Feerick Commission for independent judicial evaluation qualifications commissions. In late June of 2004, the Special Committee voted in favor of the Feerick Commission recommendations subject to the need to further involve local bar associations in the screening process and the need to provide judicial candidates with a right to appeal from IJEQC determinations.

After the Chief Administrative Judge proposed rules in November of 2004 to establish IJEQCs, the Special Committee again supported the IJEQC screening process.⁴⁷ It also continued to press for a right to appeal determinations and the need to ensure that local bar associations played a meaningful role in the process.

The Executive Committee of the State Bar in 2004 largely supported the findings of the Special Committee. The Executive Committee recommended the adoption of the proposed IJEQC rules of the Chief Administrator of the Courts with the additional procedural safeguards. The Executive Committee desired more participation by local bar associations, a right of appeal by

⁴¹ "Amendment Victory Spurs Court Change," *New York Times*, November 10, 1977.

⁴² NY Constitution, Article VI, §2.c.

⁴³ *Id.*

⁴⁴ L. 1978, ch. 156.

⁴⁵ See generally Sheila Rule, "Court Amendments Still Face a Hurdle," *New York Times*, March 30, 1978.

⁴⁶ L.1983, ch. 35.

⁴⁷ The Special Committee would have preferred making participation in the IJEQ process mandatory for all candidates.

candidates to contest a finding by the IJEQCs, the barring of sitting judges from serving on IJEQCs, and the mandatory evaluation of all candidates.⁴⁸

B. The Feerick Commission

Chief Judge Judith S. Kaye in April of 2003 formed the 29-member New York State Commission to Promote Public Confidence in Judicial Elections [Feerick Commission]⁴⁹ in order "to provide New York's courts with a blueprint for preserving the dignity of judicial elections and promoting meaningful voter participation, which will serve to reaffirm public trust in our judiciary."⁵⁰ Dean Feerick has noted that Chief Judge Kaye's specific instruction to him was, "Don't get hung up with appointive systems and changing the elective system and the idea of amending the New York State Constitution, because you know there's no support for that."⁵¹ "Finding out what we could do to promote confidence in judicial elections was the task and assignment of our commission, a commission of twenty-nine citizens and judges—a lot of different backgrounds, from every part of the state."⁵²

The Feerick Commission issued its first interim report in December 2003, a second in June 2004, and its third final Supplemental Report in February 2006. Chief Judge Kaye, in reviewing the body of work of the Feerick Commission, stated, "In their totality, these reports represent a body of work unprecedented in depth and quality. The Feerick Commission held statewide public hearings, conducted citizen focus groups, sponsored a public opinion poll and a survey of judges, met with political leaders, addressed bar and judicial groups, testified before legislative committees, and heard from numerous individuals in meetings and correspondence."⁵³ The Feerick Commission itself noted that it had held public hearings, conducted focus group meetings, sponsored a public opinion poll, conducted a survey of sitting judges, met with political leaders, addressed bar, judicial and civic groups, testified before the Senate Judiciary Committee and heard from many citizens in private meetings."⁵⁴ "The Commission also conducted extensive research on the history of judicial elections in New York State and elsewhere."⁵⁵

The Feerick Commission determined to develop "an interdependent set of reforms to the current judicial election system."⁵⁶ It created an "integral model comprised of recommendations—on candidate selection, campaign conduct, campaign finance and voter education—meant to be instituted together."⁵⁷ In its first interim report issued on December 3, 2003, the Commission

⁴⁸ New York State Bar Association, Minutes of Executive Committee, Conference Call Meeting December 16, 2004.

⁴⁹ John D. Feerick Esq., the former dean of Fordham Law School, served as the chair of the Commission.

⁵⁰ Press Release, New York State Unified Court System, *Commission to Foster Public Confidence in State's Elected Judges and the Electoral Process* (Apr. 16, 2003). See also James C. McKinley, Jr., "State Can't Afford to Let Court System Remain Inefficient, New York's Chief Judge Says," *New York Times*, January 4, 2003.

⁵¹ John D. Feerick, "Why We Seek Reform," 34 *Fordham Urb. L.J.* 3, 4 (2007).

⁵² *Id.* at 4.

⁵³ Judith S. Kaye, The State of the Judiciary 2006 www.nycourts.gov/Admin/stateofjudiciary/soj2007.pdf - 178k - 2007-02-26 [last viewed October 15, 2018].

⁵⁴ Final Report, *supra* at note 4.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

recommended “establishment of independent commissions to evaluate the qualifications of judicial candidates throughout the State; amendments to the Chief Administrator’s Rules Governing Judicial Conduct concerning campaign speech restrictions, disqualification and campaign expenditures; the creation of a campaign ethics and conduct center; the expansion of judicial campaign finance disclosure; and the establishment of a State-sponsored judicial election voter guide.”⁵⁸

Specifically, as part of its candidate selection focus, the Feerick Commission recommended that the independent judicial election qualifications commissions should have the following jurisdiction and authority:

“Each judicial district should have a commission;

- The commission members should reflect the State’s great diversity;
- The commissions should actively recruit judicial candidates;
- The commissions should publish a list of all candidates found well qualified;
- The commissions should apply consistent and public criteria to all candidates;
- Member terms should be limited;
- Uniform rules should govern commission proceedings and its members’ conduct;
- The commissions should have the necessary resources to fulfill their functions; and
- The Chief Administrator’s Rules Governing Judicial Conduct should require all judicial candidates to participate in the IJEQCC process.”⁵⁹

The June 2004 Report “provided more detail on the interim recommendations for State-sponsored independent judicial election qualifications commissions, for a State-sponsored judicial voter guide and an update on the Commission’s campaign finance disclosure recommendation. It also addressed issues of public financing, voter education, retention elections and the enforcement of the judicial conduct rules.”⁶⁰

The June 2004 report recommended a 15-member independent judicial election qualification commission in each of New York’s judicial districts. The selections to the IJEQCs would be made by the Governor, the legislative leaders, the Chief Judge, the Presiding Justice of the applicable Appellate Division, the State Bar Association and four local bar associations.

Members would only serve a single three-year term. They would become re-eligible to serve on the panel after a one-year absence. Membership on the IJEQCs should reflect the state’s diversity in order to promote public confidence in the court system.

The IJEQCs would actively recruit judicial candidates, use uniform rules and consistent procedures, and apply a rigorous process to the judicial applicants. Two-thirds vote of a quorum of the IJEQC would be needed to find a candidate qualified. Finally, all candidates were to be

⁵⁸ *Id.*

⁵⁹ Final Report *supra* note 4 at Appendix A. See also 2004 Report *supra* note 5 at 18-19.

⁶⁰ *Id.* A summary of the recommendations of the 2003 and 2004 Feerick Commission reports can be found in Appendix A of its Final Report.

required to participate in the IJEQC process, and the IJEQCs would publish a list of all the qualified candidates.⁶¹

The final 2006 report focused on the use of judicial nominating commissions as the means to nominate candidates to the Supreme Court. The report was issued one week after the federal district court decision in *Lopez Torres v. New York State Bd. of Elections*,⁶² which found that the use of nominating commissions infringed the First Amendment rights of candidates for the Supreme Court. In that report, the Feerick Commission concluded that in the absence of public financing of judicial elections, the primary system – the assumed alternative to replace the convention system – was not superior to the convention system. Instead, the Commission proposed a series of reforms to the convention system to make it more open and equitable to potential candidates, including a reduction in the number of delegates to the judicial district convention; a minimum of two delegates to the convention from each assembly district; weighted voting, reducing the number of signatures required for nomination as a delegate or alternate delegate candidate to 250; and additional reforms designed to make the delegates to the nominating convention more independent.

While legislation was introduced to implement many of the Feerick Commission recommendations, these legislative proposals were largely unsuccessful. The State Assembly in 2004⁶³ and 2005⁶⁴ passed its “Judiciary Qualification Act,” introduced by Assembly Member Helene Weinstein which proposed many of the Feerick Commission’s recommendations including the establishment of mandatory judicial candidate screening panels. While the Senate in 2005 did hold a hearing on the independent screening of judges⁶⁵, the Judiciary Qualification Act was not acted upon by the state Senate. Assemblywoman Weinstein’s “Judiciary Qualification Act” was not passed by the Assembly in 2006 or 2007.⁶⁶ Only enacted was a single bill in 2005, which implemented the Commission’s recommendation that all judicial candidates’ campaign finance disclosures be made available online in a timely, inexpensive and accessible format.⁶⁷

C. The Independent Judicial Election Qualification Commissions

Soon after the initial report by the Feerick Commission supported the introduction of independent judicial election qualification commissions, the leadership of New York’s state court system began to look at the process of establishing IJEQCs via court rule. On November 8, 2004, Chief Administrative Judge Jonathan Lippman released for public comment proposed rule changes based on the work of the Feerick Commission. These administrative efforts picked up momentum as the legislature failed to act on the IJEQC recommendation of the Feerick Commission.

⁶¹ 2004 Report, *supra* note 5 at 19-22.

⁶² 411 F. Supp. 2d 212 (EDNY 2006) aff’d 462 F. 3rd 161 (2nd Cir 2006); rev’d 552 US 196 (2008).

⁶³ Assembly Bill No. 11456 (2004) by the Assembly Rules Committee at the request of Ms. Weinstein.

⁶⁴ Assembly Bill No. 7 (2005) by Ms. Weinstein.

⁶⁵ Matt Smith, *Associated Press*, “State Judge-Selection Process Scrutinized During Hearing,” March 9, 2005.

⁶⁶ See Assembly Bill No. 2897 (2007).

⁶⁷ L. 2005, ch. 406. That chapter applied to all political committees and not simply to those involved with judicial elections.

In 2006, the Court of Appeals approved rules establishing a statewide system of independent judicial qualification commissions and screening all candidates for elective judicial office. Chief Judge Kaye emphasized that “these commissions do not alter the current elective system but rather bolster it by providing credible, independent local bodies to evaluate the qualifications of judicial aspirants. The ratings issued by these panels will stand as assurance to the public that whoever ultimately appears on the ballot has been found qualified for judicial service.”⁶⁸

In early 2007 Chief Judge Kaye and Chief Administrative Judge Lippman announced “the appointment of first-rate qualification commissions in every Judicial District of the State. These commissions, consisting of local lawyers and members of the public appointed by the Presiding Justices, the Chief Judge, and the State and local bar associations, will screen candidates for election beginning in April, so that the process can be complete before candidates have to go on the ballot. A published list of candidates found qualified will be provided to the media and made available in voter guides.”⁶⁹

The IJEQCs were established by the rules of the Chief Administrator of the Courts, effective on February 14, 2006,⁷⁰ which created a new part 150 of the rules relating to the operations of independent judicial election qualifications commissions. The preamble to the substantive rule stated “It is essential to the effectiveness of an elected judiciary that well qualified candidates obtain judicial office. Yet the public frequently is unaware of the qualifications of candidates who run for judicial office, because the candidate-designation process often is not conducted in public view. The public will have greater confidence in the judicial election process if they know that those judicial candidates who appear on the ballot were screened by independent screening panels and found to possess the qualities necessary for effective judicial performance.”⁷¹

There would be a 15-member panel created for each judicial district. The judges would be screened for “public election to the Supreme Court, County Court, Surrogate's Court, Family Court, New York City Civil Court, District Courts and City Courts.”⁷² The Chief Judge would select five of the members (two of whom would be non-lawyers). The Presiding Justice of the applicable Appellate Division would select five members (again with two of the members being non-lawyers). The State Bar Association would select one member, and four local bar associations, as designated by the Presiding Justice would name one member. The Chief Judge would select the chair of the panel.⁷³

Initially, the IJEQCs standard for evaluation included “professional ability, character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience.”⁷⁴ Over the years that standard was amended to include:

⁶⁸ Judith S. Kaye, *The State of the Judiciary* 2006 5 (2006).

⁶⁹ Judith S. Kaye, *The State of the Judiciary* 2007 5 (2007)

⁷⁰ 2006-10 N.Y. St Reg. 101 (March 8, 2006).

⁷¹ 22 NYCRR § 150.0.

⁷² 22 NYCRR § 150.1.

⁷³ 22 NYCRR § 150.2. See generally Rebecca Love Kourlis; Jordan M. Singer, *A Strategy for Judicial Performance Evaluation in New York*, 72 Alb. L. Rev. 655, 661- 664 (2009).

⁷⁴ New York State Register 28 N.Y. Reg. (March 8, 2006).

professional ability; character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience. Candidates found highly qualified must be preeminent members of the legal profession in their community; have outstanding professional ability, work ethic, intellect, judgement and breadth of experience relevant to the office being sought; possess the highest reputation for honesty, integrity and good character, including the absence of any significant professional disciplinary record; and either demonstrate or exhibit the highest capacity for distinguished judicial temperament, including courtesy, patience, independence, impartiality and respect for all participants in the legal process.⁷⁵

Initially, a two-thirds vote of a quorum was needed in order to find a candidate “Qualified” for judicial office.⁷⁶ Currently, there is an added category of “Highly Qualified.”⁷⁷ A majority vote of a quorum is now required to find a candidate “Qualified” for judicial office. A two-thirds majority of the quorum is needed to find a candidate to be “Highly Qualified.”⁷⁸

Given the issues involving the court system’s authority to impose its procedures on candidates for elective office, the Chief Administrative Judge did not make participation in the IJEQC review process mandatory. Consequently, the failure to participate in the IJEQC process is not an ethical violation. Nothing “requires judges or candidates for elective judicial office to cooperate with the Part 150 Commissions. Absent such a mandate, there is no ethics violation should a judge or candidate for elective judicial office decline to engage in the Commissions’ evaluation process.”⁷⁹

An appendix to Part 150 provides most of the procedures to be followed by the IJEQCs in the course of their reviews of candidates.⁸⁰ The procedures, when viewed in their totality, represent what should be regarded as a court operated vigorous process.

Whatever the good intentions of the founders of the IJEQC system, it should be clear that its evaluations have not received much public notice. While in the early days of the existence of the IJEQCs, there was some media scrutiny on the evaluations of the candidates, by now it is clear that the IJEQC evaluations are given minimal attention by the media.⁸¹ Several Task Force members observed that almost no New Yorkers — including the majority of lawyers — are even aware of the existence of the IJEQCs, with the belief that nobody would know if and when the IJEQCs go out of existence.

While a noble experiment, there have been concerns that it is not working well and that it is not fulfilling the goals it was set out to fill. Too many candidates opt out because the process is seen too often as burdensome, duplicative and risky.

⁷⁵ 22 NYCRR §150.5(b).

⁷⁶ State Register *supra* at note 70.

⁷⁷ See 22 NYCRR §150.10 Appendix A, Section 3.

⁷⁸ 22 NYCRR §150.5(c).

⁷⁹ Advisory Committee on Judicial Ethics, *Opinion 07-91*, June 7, 2007.

⁸⁰ 22 NYCRR §150.10.

⁸¹ See Robert Magee, “The Trial, the Bench, the Net, and the First Amendment: The Possibilities of Reform in New York State Judicial Elections,” 25 *Touro L. Rev.* 1003, 1064 (2009) suggesting that the IJEQCs should play more of an educational role and less of an evaluative role.

Moreover, some have maintained that the Court system is not the right branch of government to be involved in the evaluation of its own elective officials. There is a philosophical issue as to whether that the courts are the right entity to run what is seen as a political process. No other jurisdiction handles judicial evaluation through the court system, and it can be argued that the IJEQCs are not an appropriate part of a court system.

In any event, it is certain the IJEQC system will come to an end in 2018. The Task Force was advised definitively that the IJEQCs would cease their work at the end of the 2018 calendar year. Despite high hopes, over the years of its operation, the IJEQC system has experienced limited participation by judicial candidates and dwindling publicity for its ratings. Accordingly, the current leadership of the State Courts has decided to discontinue the Part 150 Commissions as of December 31, 2018, and NYSBA pledged to undertake this Task Force to vet and build on statewide and local bar association initiatives already in place throughout the State and ensure robust evaluation of judicial candidates tailored to reflect local needs.

D. Judicial Evaluation by New York Bar Associations

1. The Statewide Associations

(a) The New York State Bar Association

NYSBA has guidelines for evaluating the qualifications of certain judicial positions. There is a Committee to Review Judicial Nominations, which reviews candidates for the Court of Appeals, and, upon the request of the president of NYSBA, other federal and state appointive judicial candidates.

Candidates are evaluated on their “professional ability and experience, character, temperament, and the possession of the special qualities necessary or desirable for the performance of the duties of the office.” There are three rating categories, “Not Qualified,” “Qualified” and “Well Qualified.” The rating of “Well Qualified” is reserved for candidates who possess “preeminent qualifications.”

A subcommittee actively investigates each candidate. Determinations of the ratings are made by a concurrence of the lesser of two-thirds of the full membership of the committee or three-quarters of the committee members present. Voters must be present in person, and their votes are by secret ballot.

Candidates who are rated as “Not Qualified,” have a right of appeal. The appellate panel consists of the President and President-Elect of NYSBA and seven members of the Executive Committee. A vote to modify the finding of the Judicial Nominations committee also requires the concurrence of the lesser of two-thirds of the full membership of the appellate panel or three-quarters of the members of the appellate panel who are present. The entire work of the committee and the appellate panel is confidential.

(b) Women’s Bar Association of the State of New York [WBASNY]

Members of the judiciary/courts committee are appointed by the President from each chapter of WBASNY. There are currently 20 chapters. Each member serves a three-year term, and members can be reappointed for additional terms. There are very strict recusal provisions for committee members.

An investigative subcommittee is appointed for each candidate. The evaluation criteria are “experience,” “integrity,” “professional competence,” “judicial temperament” and “service to the law and contribution to the effective administration of justice and/or the community.”

There are three ratings plus a fourth additional discretionary rating. The three grades are “Approved,” “Approved as Highly Qualified,” and “Not Approved.” The discretionary grade is for “Commended” where the candidate has “demonstrated an outstanding sensitivity to issues of gender bias women, children and minorities.” For candidates who do not participate in the evaluation process, there are possible ratings of “Disapproved for Refusal to Participate” or “Not Rated for a Legitimate Purpose.”

The rating of “Approved” requires a majority vote, but a two-thirds vote is needed to achieve the “Approved as Highly Qualified” or a “Commended” rating.

The committee reports its findings to the President and the officers of WBASNY. By a two-thirds vote, the officers can either change the rating – if the committee decision was made by a margin of three or fewer votes - or disapprove the rating and return the evaluation to the committee for reconsideration. If the officers take no action to disapprove or change the rating, the committee’s report is deemed approved.

The proceedings are considered highly confidential.

2. The Association of the Bar of the City of New York [City Bar]

The City Bar, over a period of 150 years, dating to the era of the Tweed Ring, has developed detailed procedures to govern its judicial evaluation process. There is a standing Committee on the Judiciary composed of 50 members from across the City. Significant efforts are made to secure membership on the committee that reflects the geographic and other diversity of the City. Members serve a three-year term, and every year one-third of the committee rotates off. Once a member’s term expires, that member cannot be reappointed to the committee for at least a year.

A subcommittee is appointed to perform a detailed investigation of the qualifications of each candidate. The candidate completes a uniform judicial questionnaire, which is similar to the form that has been used by the IJEQCs. A member of the Judiciary Committee serves as the subcommittee’s Reporter and Chair. The Reporter “must prepare a report setting forth the results of the subcommittee’s investigation.”

The City Bar reviews the qualifications of all candidates for judicial office for courts based in New York City. The City Bar works cooperatively with all five county bar associations within New York City as part of its screening.

The full Judiciary Committee considers the report of the subcommittee and an interview with each candidate. In evaluating candidates for judicial office, the Committee on the Judiciary should determine whether the candidates have the following qualifications: “integrity, impartiality, intellectual ability, knowledge of the law, industriousness, and judicial demeanor and temperament.”

Candidates receive either a grade of “Approved or “Not Approved.” The “Approved” ratings are reserved for “candidates who have affirmatively demonstrated qualifications which are regarded by the committee to be necessary for the office for which they are being considered.”

Candidates who are found “Not Approved” may ask for a rehearing, which is subject to the “sole discretion” of the chair of the Judiciary Committee. “Not Approved” candidates may in prescribed circumstances, appeal the rating to the Executive Committee. In order to appeal, there must have been a requisite number of votes among voting members of the committee in support of finding the candidate “Approved.” The City Bar maintains strict rules requiring recusals and disqualifications from voting by judiciary committee members. “No members of the Judiciary Committee, or of the subcommittee investigating the candidate’s qualifications may make such a [campaign] contribution directly or indirectly, or participate actively in the campaign of any candidate for judicial or other office within the jurisdiction of this Committee.”

All of the work of the committee forming the basis of its rating determinations is confidential.

3. The Major Suburban and Urban County Bar Associations

(a) Albany County Bar Association

The Albany County Bar Association has a judiciary committee of 15 members selected by the Association president. Members serve three-year terms and may serve no more than two consecutive terms. “At least three new members shall be designated each year.” The Association strives for a diverse membership on the judiciary committee. No more than six members of the committee may be from the same political party.

The committee reviews Supreme Court candidates and candidates for countywide positions. It does not review Albany city court judges. The committee requires a completed written questionnaire and a personal interview. A minimum of nine committee members must “be present at the interviewing of and voting on any applicant.” There is no proxy voting.

There are 11 separate criteria for rating candidates. These criteria are very broad and include integrity, experience, professional ability, education, reputation and a host of other factors. The criteria are to “be given equal weight with no single factor being determinative or preclusive of any particular rating.” There are four grades for candidates. They are “Outstanding,” “Well Qualified,” “Qualified” and “Not Recommended.” An 80% vote of committee members is needed to achieve the “outstanding” rating. A 60% vote is required for “Well Qualified.” “Qualified” and “Not Recommended” ratings require a majority vote.

Individuals with “Not Recommended” ratings may appeal the rating to the Executive Committee of the Association. The Executive Committee determines whether the judiciary committee’s

“rating was erroneous in light of the evidence presented to it” and then determines what the candidate’s rating will be.

There is a conflict policy, and all proceedings are confidential.

(b) Broome County Bar Association

The Broome County Bar Association has a judicial candidate committee which is composed of 24 members serving three-year terms. The membership “should reflect the diversity of the membership” of the association.

There are term limits. A committee member may serve a maximum of six consecutive years or seven consecutive years if the member serves as an alternate member. Once the member is term limited, the member may not serve on the committee for two years.

The candidates are evaluated based on a set of 11 attributes. These are “competence,” “temperament,” “courteousness,” “dignity,” “diligence,” “fairness,” “freedom from prejudice,” “impartiality,” “integrity,” “promptness” and “ability and/or experience”

There are four authorized ratings: “Highly Qualified,” “Qualified,” “Not Qualified” and “Not Rated.” A two-thirds vote is needed to achieve the “Highly Qualified” rating. A majority vote is needed to achieve the “Qualified” rating. Failure to receive the “Qualified” rating marks the candidate as “Not Qualified.”

Any candidate who does not achieve a “Highly Qualified” rating can appeal the rating to the board. The board by majority vote may remand the decision to the committee for review. The board may also review the decision itself. The board by a majority vote can affirm the committee decision, set aside the committee decision if it finds by a majority vote that the initial decision was “arbitrary and capricious” or remand the decision to the committee.

The entire evaluation procedure is confidential.

(c) Erie County Bar Association

The Erie County Bar Association has a judiciary committee which is composed of 29 members. The board of directors of the association appoints the committee members. There are nine new members each year, and not more than 14 members may belong to the same political party. Fifteen members are needed for a quorum.

The candidates are rated on 11 separate benchmarks which include integrity, experience, professional ability, education, reputation, industry and temperament. There are four ratings: “Outstanding,” “Well Qualified,” “Qualified” and “Not Recommended.”

An 80% vote of the committee is needed for the “Outstanding” rating. A two-third’s vote is needed for “Well Qualified.” A majority vote is needed for “Qualified” and “Not Recommended.” A candidate who receives the “Not Recommended” rating may request reconsideration by the committee. The board’s procedures include a mechanism “whereby the applicant’s request for reconsideration is first presented to the committee, which will make

recommendations to the board in accordance with the board's procedures for reconsideration." The board will then make a final determination on the candidate.

A candidate can appeal a "Not Recommended" rating to the board of the Bar Association.

There are recusal and conflict-of-interest provisions, and the procedures are held in "strictest confidence."

(d) Monroe County Bar Association

The Monroe County Bar Association no longer screens judicial candidates. A longstanding feud between one of the political leaders and the bar association escalated to a point where more than a year ago, the association decided to end judicial screening.

(e) Nassau County Bar Association

The Nassau County Bar Association has extensive written rules governing its operations. Its Judiciary Committee consists of 21 members appointed by the President with the approval of the Board of Directors. No judicial or non-judicial employee of a court of record may be a member of the Committee.

Members are appointed in two classes, for two-year terms. There are term limits. These permit a maximum of three consecutive terms and no more than seven years in any nine-year period. Once the member reaches the term limit, there is a required two-year waiting period before the member can return to the Committee.

No more than ten members of the Committee may be enrolled in the same political party. Committee members are prohibited from serving as an officer or member of any campaign committee for any candidate for judicial office in New York State.

Committee members may not directly or indirectly contribute to, support, or participate in the campaign of any candidate for judicial office in New York State.

13 members of the Committee constitute a quorum. All actions of the Committee are taken by a majority of the members present and voting. All proceedings are confidential.

A secret ballot is taken to determine by majority vote, of those present and voting, whether the candidate is "Well Qualified" or "Not Approved at This Time." No matter how many committee members are present, at least seven affirmative votes are required for the "Well Qualified" rating.

Criteria are whether or not (1) the person has established a reputation for good character and temperament, (2) the person has a sufficient degree of professional experience, scholarship and ability to perform the duties of the office for which the person is being considered, (3) whether the conduct of such person has been above reproach, (4) whether such person is known as a conscientious, studious, thorough, courteous, patient, punctual, just and unbiased person who can be counted upon to be fearless and truthful when subject to public and/or political pressure,

(5) whether such person is of good moral character and (6) whether such person is emotionally, cognitively and physically able, with any reasonable accommodations, to fulfill the duties of the office for which the person is being considered.

Any person found “Not Approved at this Time” may request reconsideration by the Committee. The reconsideration is de novo.

Candidates dissatisfied with the results can appeal to the Board of Directors and be heard in executive session. The Board of Directors’ review is treated as an appellate review, not a de novo review. The Board of Directors’ decision is either “Well Qualified” or “Not Approved at This Time.” Decisions contrary to that of the Committee require the support of a two-thirds vote of the Directors present and voting.

(f) Oneida County Bar Association

The Oneida County Bar Association has a 13-person judiciary committee. The committee makes a recommendation to the board of directors. The committee members have one-year terms and are limited to a maximum of six consecutive years.

There are four ratings: “Highly Qualified,” “Qualified,” “Not Qualified,” and “No Rating” for candidates who fail to cooperate. The recommendations are made by majority vote.

(g) Onondaga County Bar Association

The Onondaga County Bar Association has a 39-person judiciary committee which is elected by the Board of Directors of the association. “In so far as possible, the membership of the committee shall be representative of the bar association as a whole.” The committee makes its recommendations on candidates to the board of directors. A three-person subcommittee performs the investigation. The committee members serve one-year terms. Twenty committee members in person are required for a quorum on voting on the qualifications of candidates.

There are two grades for candidates: “Recommended as Qualified” and “Not Recommended.” A two-thirds vote is required to achieve the “Recommended as Qualified” rating. If a candidate scores less than the two-thirds vote, that candidate is “Not Recommended.” The criteria for rating candidates are: “competence, courteousness, dignity, diligence, fairness, freedom from prejudice, impartiality, integrity, promptness and temperament.”

There are disqualification rules, and candidates rated “Not Recommended” may appeal to the directors of the board of the Bar Association. The board can only reverse the recommendation of the committee by a two-thirds vote. On appeal, a candidate and/or a representative may appear before the board.

The entire process is confidential.

(h) Suffolk County Bar Association

The Suffolk County Bar Association has a Judicial Screening Committee consisting of 25 members, five of whom are designated from the Suffolk County Criminal Bar Association. Terms are three years, and the terms are staggered. All are appointed by the Association President subject to the approval of the Board of Directors. Committee members may not be members of the Executive Committee of a political party during their Committee tenure. In addition, the Committee is specifically directed to “discourage political considerations from outweighing fitness in the election or appointment of candidates for judicial office.”

Officers or Directors of the bar association may not represent a candidate before the Committee with regard to qualifications while in office or for a period of three years thereafter.

All candidates are “required to complete a questionnaire, the form and content of which shall be proposed by the Committee” and to submit to an interview. The Committee can dispense with the questionnaire and interview of a candidate interviewed by the Committee during a previous one- year period.

The burden is upon the candidate to affirmatively establish qualifications for the office sought. “No candidate shall be presumed to be qualified for office.” Candidates may request disqualification of any member of the Committee. The Chair determines whether prejudice or other good cause exists for disqualification.

The Committee considers, and votes by secret ballot separately as to each of the following criteria: Temperament, Character and Integrity, Legal Scholarship and Professional Ability and Reputation. The rules for the Committee establish definitions for each of the criteria.

After these initial deliberations are completed, the Committee first votes by secret ballot as to the issue of “character and integrity.” The Committee member either votes that the candidate is: (1) “Qualified” or (2) “Not Approved at This Time.”

Each ballot cast for “Not Approved at This Time” must include the Committee member’s statement about the reasons for his/her vote.

A two-thirds vote is required for a finding of “Qualified,” which means the candidate possesses affirmative qualities with respect to candor, impartiality and respect for and adherence to ethical standards and conduct.

If the candidate fails to receive the two-thirds vote, on the character and integrity criterion (known as a “passing vote”), the candidate is found “Not Approved at This Time” for the office under consideration.

The Committee members then vote on the remaining three criteria. If the candidate receives a majority vote in his or her favor on the other three criteria (and has achieved the two-thirds vote on the “character and integrity” criterion), then the candidate is found “Qualified” by the Committee.

There is a limited right to a rehearing based on “good cause.” At least one-third of the Committee members who made the “Not Approved” finding must agree to a rehearing.

Adverse committee determinations may be appealed to the Board of Directors. The committee’s decision is given “substantial deference” and can only be reversed if the Board finds that the committee decision was arbitrary, capricious or irrational by clear and convincing evidence.

The proceedings are confidential.

(i) Westchester County Bar Association

The Westchester Bar Association has a Judiciary Committee which meets prior to each annual election to interview candidates who have completed an extensive questionnaire. The Committee reviews the qualifications of the candidates, reviews state records concerning the ethics and judicial conduct of the candidates and conducts in-person interviews.

The Executive Committee of the Bar Association needs to confirm the recommendations of the Judiciary Committee.

The Judiciary Committee has six ratings. These are “Exceptionally Well Qualified,” “Well Qualified,” “Qualified,” “Meets Minimum Requirements,” “Not Qualified,” and “Not Qualified by Failure to Appear.” Where a candidate fails to appear for the interview, that candidate is rated either “Not Qualified” or “Not Qualified by Failure to Appear.”

4. Smaller, Affinity and Specialty Bar Associations

(a) Central New York Women’s Bar Association (based in Syracuse)

The Central New York Women’s Bar Association has a judiciary committee with a minimum of 12 members who serve three-year terms.

There are four rating categories: “Commended,” “Qualified,” “Not Qualified” and “Not Rated.” Candidates are graded on seven separate factors. These are “judicial temperament,” “legal ability and experience,” “legal writing ability,” “general reputation,” “industriousness,” “impartiality” and “attitudes towards gender neutrality and sensitivity to gender issues.” In order to achieve the “Commended” status, the candidate must score well in the first six categories and especially well in the “attitude towards gender neutrality” category.

Three-fourths of the judiciary committee must be present at the interviewing and voting on each candidate. A majority vote determines the rating to be given each candidate.

The full board of directors can request the judiciary committee to reconsider its decision. Candidates given the “Not Qualified” rating may appeal the decision. The appeal is heard by five Board members appointed by the Board of Directors.

The procedures are confidential.

(b) Greater Rochester Association for Women Attorneys

The Greater Rochester Association for Women Attorneys has a judiciary committee composed of a minimum of 15 members who serve two-year terms. Members can serve past their initial term, and it is recommended that not more than half the members rotate off at one time. The committee strives for an even balance between “political parties, large firms/small firms, public sector representation, and litigators as well as non-litigators.”

The Association has extensive conflict of interest provisions for committee members.

The criteria for evaluating candidates include five explicit categories. These are “experience,” “integrity,” “professional competence,” “judicial temperament,” and “service to the law and contribution to the effective administration of justice and/or the community.” These are the same criteria used by the WBASNY.

There are five rankings. Candidates can be judged “Exceptionally Well Qualified,” “Well Qualified,” “Qualified” or “Not Qualified.” Candidates who reach the rating of “Qualified” or better can receive the additional rating of “Commended” if they demonstrate “outstanding sensitivity to issues of women, minorities and bias.”

“Qualified” and “Well Qualified” candidates need a majority of members voting. “Exceptionally Well Qualified” candidates need a three-quarters vote. To achieve the “Commended” rating, the successful candidate needs a three-quarters vote plus one additional vote. The judiciary committee formally makes a recommendation to the board of directors. The board by a majority vote will either accept the rating or remand the rating to the judiciary committee.

A candidate who receives a “Not Qualified” rating may appeal the rating to the board where it is heard by a five-member appeals panel. The appeals panel determined whether the committee’s rating “was erroneous in light of the evidence presented to it.”

The entire evaluation procedure is confidential.

(c) Oswego County Bar Association

The Oswego County Bar Association has a nine-member judicial screening committee. Membership on the screening committee is intended to be representative of the membership of the Bar Association. Members on the committee serve one-year terms.

The candidates are judged on the following criteria: competence, courteousness, dignity, diligence, fairness, freedom from prejudice, impartiality, integrity, promptness and temperament.

There are only two ratings given candidates: “Recommended as Qualified” and “Not Qualified.” The vote is a majority vote. The committee vote is a recommendation to the full Bar Association. Candidates who have received a “Not Qualified” grade can appeal the recommendation.

The review procedures are confidential.

(d) Ulster County Bar Association

The Ulster County Bar Association may create evaluation committees composed of 6-10 members “to pass upon the qualifications of candidates for election or appointment.” The committee is chaired by the first vice president of the bar association. The committee members are “solicited annually from the members of the Ulster County Bar Association” and must be admitted to practice law for at least eight years.

The evaluation committees review each candidate’s credentials and assign ratings of “Highly Qualified,” “Qualified” and “Not Qualified” to candidates. The ratings are determined by majority vote. A “committee may also compose a brief paragraph or list of strong points, areas in need of improvement and general comments about each candidate.”

The evaluation committee will not publicize a “Not Qualified” rating if the candidate, within three business days, agrees to withdraw from consideration for the office.

E. Evaluation Systems Employed by Other States

Upon the request of the Task Force, the National Center for State Courts provided information on how judicial screening is implemented or carried out in other states. The data comes from states where judicial screening is mandated either by the state’s laws or constitution. The 15 states are Alaska, Arizona, Colorado, Connecticut, Hawaii, Iowa, Kansas, Missouri, Nebraska, New Mexico, Rhode Island, South Carolina, Utah, Vermont and Wyoming. In these states, the screening is typically done for appointive – rather than for elective – judiciary positions.

As a general rule, these states in their screening for trial court judge follow what they term the “classic” structure, which was advocated by the American Judicature Society and the American Bar Association. This “classic” structure involves a 3-3-1 composition mix where there are three bar members selected by the leadership of the state bar, three non-attorneys selected by the governor or other elected officials, and one judge of a higher court who often serves as the chair of the committee. In some states, selections of the governor for the screening commission are frequently subject to a form of legislative confirmation. For example, in Alaska, three non-attorney members of the judicial council are selected by the governor, subject to confirmation by the full legislature, three are selected by the state bar, and the seventh member is the chief justice of the supreme court, who also serves as the chair of the council.⁸²

For circuit court judges in Missouri, there is a circuit court judicial commission. It consists of five members. One is the chief judge of the intermediate appellate court for the district. Two are selected by the members of the state bar in the district, and two non-lawyers are selected by the governor.⁸³

⁸² AK Const. Art. 4, § 8. A similar 3-3-1 commission is in place in Wyoming, WY CONST Art. 5, § 4.(c). For the trial court nominating commission in Utah, the governor appoints all six members, but two are from nominations submitted by the state bar. The chief justice appoints an ex officio non-voting member. Only a maximum of four members can be attorneys. UT ST § 78A-10-302.

⁸³ V.A.M.S. Const. Art. 5, § 25(d).

In other states, the leadership of the legislative body is involved in the selection of the screening commission. For example, in Connecticut, the judicial selection commission is composed of 12 individuals, all selected by elected officials. The governor selects six members, half of whom are non-lawyers. Individual legislative leaders pick one each, and the law specifies whether they are to select lawyers. Not more than six members can belong to the same party.⁸⁴

In Vermont, there is a judicial nominating board which nominates supreme court judges, superior court judges and magistrates. It is an 11-member board. Attorneys admitted to practice before the supreme court select three members. The House and the Senate select three members each, and the governor selects two members. The board appointments are structured in a way that non-lawyers will constitute a majority of the board.⁸⁵

⁸⁴ C.G.S.A. § 51-44a.

⁸⁵ VT ST T. 4 § 601.

IV Analyzing Judicial Screening in New York State

In addition to the screening done by the IJEQCs, there is a considerable amount of judicial screening taking place in New York State. The local, affinity and specialty bar associations throughout the state have taken it on themselves to screen judicial candidates.

The framework for judicial screening is basically similar throughout the bar associations. The association appoints a committee – typically a judiciary committee – which reviews the written submissions and interviews judicial candidates. The committee then votes on the qualification of the candidates, and candidates found to be unqualified are generally entitled to ask the committee for reconsideration and/or appeal the committee’s decision to the executive body of the bar association.

Yet, within this basic framework of candidate review, there are myriad issues and considerations. No bar association handles the candidate screening process in the same manner. The differences among the practices of the bar associations are considerable. There are no minimum basic standards. There are no best practices. Each bar association does as it sees fit.

This critique is not in any way meant to imply or suggest that the bar associations are performing their screening in a less than satisfactory manner. In fact, the evidence is to the contrary. The bar associations that are doing judicial screening are, by and large, providing excellent work in their screening. The bar association members are volunteering enormous amounts of time to improve the judicial process. They should only be commended for their time, efforts, patience and services. The screening systems work because of the dedication of the members of the local bar associations.

Yet the differences among the bar association practices and policies are significant, and they largely define any analysis of the judicial screening process in New York.

A. Different Regional Approaches Throughout the State

The Task Force believes that in some areas of the State, the systems that are in place are operating effectively. Not surprisingly, the performance of the bar associations often depends on the resources that they can bring to the process. In New York City, the City Bar – working with the five county bar associations in the City – devotes significant time and resources to the process. The City Bar has a system in place that works to promote the highest standards of the judiciary. The system is working well within New York City. The traditionally competitive bar associations have joined together collaboratively to establish an effective evaluation system.

Outside the City of New York, the workings of the judicial evaluation systems vary. The fact is that the evaluation process in New York City while highly admirable, is not replicable outside New York City. Yet in many of the suburban and upstate urban counties, the existing screening processes are efficacious.

On Long Island, in the 10th Judicial District, both the Nassau County Bar Association and the Suffolk County Bar Association maintain vibrant judicial evaluation systems that are working effectively. In many of the upstate urban counties, (which would include Albany, Broome, Erie,

Oneida and Onondaga counties) the county bar associations are working forcefully and are employing evaluation systems that serve the public and the judiciary well.

Nonetheless, there are 35 counties in upstate New York with a population of less than 100,000. 15 counties have populations below 50,000, with less than 5,000 in Hamilton County. The county bar associations in these 35 counties have limited financial resources. There are only a few elected judicial positions in counties with small populations. They have a limited pool of attorneys, and these factors virtually preclude the possibility or even the potential for any meaningful judicial screening. Screening works in some upstate areas but not in all areas.

B. Different Standards Throughout the State

The bar associations have implemented different sets of procedures and standards in their assessment of candidates. The procedures and standards that differ throughout the state include the following:

- Who selects the judiciary panel? Is it the president or the board of directors of the bar association?
- Do the members of the judiciary panel serve fixed terms? Are there term limits for the members? Are the terms of the members staggered? Is there a cooling-off period during which panel members who have been term-limited may not rejoin the panel?
- Is there a questionnaire requirement, and how does it differ from the IJEQC questionnaire or the City Bar's questionnaire?
- Who casts the binding votes on the candidate rating qualifications? Is it the judiciary panel, or does the governing body of the bar association review what are essentially advisory recommendations of the judiciary committee?
- Is there an in-depth investigation of judicial candidates? Is it undertaken by a subcommittee of the judiciary panel or by a single member of the panel?
- Is diversity in membership a stated goal for the judiciary panel? Is the diversity goal to establish a panel that is representative of bar association membership or, should it be representative of the demographics of the area served by the bar association?
- Are non-lawyers permitted to serve on a judiciary panel?
- Is there a secret ballot at the meeting where the candidates are rated? Is proxy voting authorized, and is there a need to be physically present at a meeting in order to vote? Can a panelist utilizing a phone or other form of electronic communication be deemed present?
- Must a panel member participate in screening of all candidates for a particular office in order for that panelist to participate in rating candidates for that particular office?
- What is the quorum requirement for meetings of the judiciary panel?
- What should the conflict policy be for members of the judiciary panel? Must they recuse for political contributions to a candidate? Prior legal association with the candidate or the candidate's firm? Previous work with the candidate on that candidate's election campaigns? Previous business relationship with the candidate? Can public officials

(including judges) or party officials be part of a judiciary panel? Can a written conflicts policy be effective?

- What are the criteria to be used for the ratings of judicial candidates? The survey of the bar associations showed up to 11 criteria in regular use by the bar associations. How does a bar association determine which criteria to use, and is there much of a difference between the individual criteria? For example, the IJEQCs utilize six separate criteria: “professional ability; character, independence and integrity; reputation for fairness and lack of bias; and temperament, including courtesy and patience.” Is integrity, however, different than independence? Is character different than integrity? Is patience different than temperament? There reaches a point where adding additional attributes to judicial qualities may simply be gilding the lily. Can there be an excess of judicial criteria?
- Should there be negative criteria which the panel should be precluded from utilizing? For example, the judicial screening committees established by the Governor are precluded from giving “any consideration to the age, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or political party affiliation of the candidate.”
- How many grades can a panel give to a candidate? While in some associations, candidates receive only two possible grades and can be rated as either as “Approved/Qualified,” or “Not Approved/Qualified,” other bar associations use from three to six grades. In a three-grade system, there is often the added grade of “Highly Approved/Qualified.” Some associations give a separate grade to candidates who are not rated because they refused to participate in the process. Some associations add a “Commended” category to demonstrate that candidate’s sensitivity to issues that are particularly important and relevant to that bar association. For example, the Greater Rochester Association for Women Attorneys ranks candidates as “Exceptionally Well Qualified,” “Well Qualified,” “Qualified” or “Not Qualified.” Candidates ranked “Qualified” or higher can receive the additional rating of “Commended.”
- Should candidates be graded either as “Approved” or “Qualified?”
- Is there a majority or a super-majority requirement for certain candidate grades?
- Will the judiciary panel evaluate a candidate who does not appear for evaluation?
- Are rehearings authorized? Who decides on the rehearing, the judiciary panel, the chair of the judiciary committee, or the full executive board? Do you need a certain number of dissenters from a rating to authorize a rehearing? If there is a rehearing, is the original rating decision entitled to respect, or is there a de novo review of the original rating?
- Can a candidate deemed unqualified withdraw before a report is made public?
- Who can appeal the rating? Is the appeal authorized for anyone who did not receive the top rating (i.e., candidates who received an “Approved/Qualified” rating in an association that utilized the “Highly Approved/Qualified” rating) or only for individuals found “Not Approved/Qualified?” Who hears the appeal: the full executive board or a committee of the board? Is the appellant entitled to representation at the meeting of the appeals board? What respect is given to the original decision of the judiciary panel? Can new evidence that was not before the judiciary panel be submitted by the appellant? Can the appeals

body remand the decision back to the judiciary panel for its decision, or must the appeals board make the decision itself?

- In associations where the board makes the actual decisions based on recommendations by the judiciary panel, can the judiciary panel recommendation be changed by a majority vote or is there a need for a super-majority vote to change a recommendation? In these associations, is the board limited to reviewing “Not Approved/Qualified” applications, or could a board change a rating from “Approved/Qualified” to “Highly Approved/Qualified?”
- At what point in time during the political process should the judiciary committee issue its ratings?
- For what period of time is a candidate rating valid? Should it be for one year or a period of time greater than one year? Should the rating only apply to the position for which the candidate was initially evaluated?
- Are the reasons for the decision made public? Is the reasoning supporting the decision made available to the candidates? If a candidate is appealing an adverse panel decision, is the basis for the panel’s decision disclosed to the candidate in order to assist that candidate with the appeal? Should the judiciary panel provide feedback to the candidates? Should it provide detailed feedback on judicial performance?
- How much of the process is confidential?
- How is the public advised of the ratings?
- How is the public advised of candidates who refused to participate in the screening process?

C. The Role of the Political Parties

No analysis of the judicial selection system can ignore the fact that it is largely part and parcel of the political process. Political party leadership has the decisive say in who becomes an elected judge in New York State. This is a veritable fact of life.

The relationship between political party leadership and the bar associations involved in screening judges varies across the state. Some political leaders cooperate with bar associations. Others do not. Some political leaders are openly antagonistic to the work of the bar associations.

Members of the Task Force generally understood that when push came to shove, the political leaders would make decisions in their own interest and not consistent with the interests of the evaluation systems of the bar associations.

The November 2018 Supreme Court elections in New York State help to illustrate the reach of the political leadership. In the 11 judicial districts where more than one candidate was running for a judgeship, the dominant party in the district won 49 of the 50 contests. The dominant party’s candidates were often unopposed or ran with cross-endorsements from other parties. Few

of the contested elections were remotely close.⁸⁶ Judicial elections inhabit a political world; the bar associations find themselves in supporting roles.

The Task Force members understand the reality of the role of the political parties in judicial elections. The intention of the Task Force is to develop best practices that will garner the support of the political leaders and make them part of a system that legitimately evaluates the qualifications of all candidates seeking elective judicial office.

D. The Multiplicity of Bar Associations

The Task Force is encouraged by the fact that numerous local, affinity and specialty bar associations are engaged in the process of screening judicial candidates. That is the proper role of bar associations and what they should be doing. The Task Force believes that the process of judicial candidate evaluation will only be enhanced by the active involvement of more bar associations.

The primary concern of the Task Force is that the active participation of so many bar associations does not overburden judicial candidates. It should not in any way serve to deter qualified candidates from seeking judicial office.

The Task Force encourages bar associations in their respective judicial districts to use the same basic judicial questionnaire and to coordinate their activities with other bar associations to make the review process less onerous for candidates for the judiciary.

⁸⁶ In the one exception in 2018, the winning candidate from the non-dominant party had endorsements from two minor parties. The one dominant party candidate who lost the election lacked the endorsement of the two minor parties.

V Recommendations and Conclusions

A. General Recommendations

The Task Force's review of judicial screening systems in New York State found that the discontinuation of the independent judicial election qualification commissions will leave a significant vacuum in the evaluation of elected judicial candidates in some areas of New York State. Whether or not the IJEQCs ever were able to succeed in their mission of ensuring New York voters of a well-qualified judiciary, the absence of any formalized statewide review of judicial candidates will leave New Yorkers in some areas of the state in a weaker position to judge the merits of judicial candidates. If the Task Force is to be successful in its mission of "developing effective non-partisan evaluation and screening of candidates for election to judicial office and improving those efforts that already exist," it is vital to help effectuate systems that will truly foster the best judiciary possible.

The Task Force understands that its goals are to develop recommendations, best practices and guidelines that are effective, practical and politically achievable. It does little good to recommend a utopian judicial evaluation system for New York State that cannot realistically be accomplished. New Yorkers deserve a system that can be put in place in 2019.

To that end, the Task Force in its review of the current bar association practices has postulated a number of core precepts. The Task Force's recommendations in no manner depart from the NYSBA's longstanding commitment to the merit selection of judges in New York State.

Rather, the Task Force's belief is that in 2019, the State Bar Association needs to address and to recommend actions to assure that candidates for election to the judiciary in New York State are effectively screened to determine their qualifications.

The systems in place by local bar associations vary from county to county. County, affinity and specialty bar associations have their own evaluation systems. Some local bar associations have a significant number of members and resources, and do an extensive, complete and non-partisan job in evaluating judicial candidates. Other bar associations – especially outside the City of New York – lack this capacity. In some counties, the bar association screening processes are active, robust and efficacious. In others, there is minimal screening.

The Task Force believes that the one-size-fits-all approach to determining the composition of judicial screening panels will not work for New York State. The State and the local bar associations are extremely diverse, and the methods for selecting judges in this state are extraordinarily complex. What works in Soho may not work in Schenectady or Skaneateles. What works in Garden City may not work in Gowanda. The Task Force is not trying to impose a single judicial evaluation structure on the entire state. A top-down one-sized approach providing a statewide uniform structure is likely to be a recipe for failure.

Where the existing bar association reviews are effective, the Task Force recommends their continuation. It is simple. It is not rocket science. Where the screening system is not broken, the Task Force sees no reason to fix it.

The simpler the evaluation system, the easier it will be to implement. There are dozens of judicial screening review processes in place throughout New York State. The culture, the assets, the procedures and the mechanics of local bar associations vary tremendously. The simpler and more uniform we make the process, the more likely the process will be successful. The Task Force accordingly has developed a series of best practices that should help guide local bar associations in their role in evaluating candidates for judicial office. The Task Force believes that the adoption of these practical guidelines will help to assure a high-quality judiciary for New York State.

The Task Force believes that in some areas of the State, the systems that are in place are operating effectively. They should not be changed. As the Task Force noted previously, this is the case in New York City where the City Bar— working with the five county bar associations within the City – has a vigorous and successful system in place that works to promote the highest standards of the judiciary. There is strong participation by the judicial candidates, and even the candidates are generally satisfied with the workings of the evaluation system.

On Long Island, in the 10th Judicial District, both the Nassau County Bar Association and the Suffolk County Bar Association maintain vibrant judicial evaluation systems that are working effectively. In many of the upstate urban counties, the county bar associations are working forcefully and are employing evaluation systems that serve the public and the judiciary well. The Task Force believes that these bar associations should be encouraged to continue their efforts.

In reviewing the work of the local bar associations, there are effective judicial evaluation systems in place in ten of the 11 most populous counties in New York State. Nearly three-quarters of the state’s population is currently being well served by the work of the local bar associations.

Nonetheless, there are some judicial districts (such as the 7th Judicial District, which encompasses Monroe County and seven smaller counties) where there is almost no judicial screening whatsoever.⁸⁷ There are many small counties in other districts (such as Hamilton County in the 4th District and Lewis County in the 5th District) where the size of the county and the absence of a significant body of resident attorneys in the county virtually preclude the possibility or even the potential for any meaningful judicial screening. Moreover, there are very few elected, judicial positions in small population counties. For example, Lewis County has no city court judges and only one county-wide judge elected once every ten years, i.e., a “three hat judge” (Surrogate/County Court/Family Court Judge).

The Task Force believes that increased judicial screening needs to be encouraged throughout the state. The State Bar should not allow the systematic screening currently performed by the

⁸⁷ Monroe County, the ninth largest county in the state with a population of approximately 750,000, is the largest county where the county bar association does not conduct judicial screening. See https://www.newyork-demographics.com/counties_by_population [last viewed November 26, 2018].

IJECQs to fall through the upstate cracks. Screening ought to be available for all judicial candidates. In order to assist those judicial districts with limited screening, the Task Force recommends that the State Bar work with all local bar associations in those districts to establish regional screening committees in 2019. Underwriting support for this initiative should come from the Office of Court Administration which has funded and staffed the IJECQs.

These regional screening panels should have broad representation from counties in the judicial district. The State Bar must take appropriate action to continue non-partisan evaluation and screening of candidates for election to judicial office. This should include the establishment of a State Bar working group to help implement the availability of screening panels throughout the state and the creation of resource guides as well as web pages to assist bar associations on the subject of judicial screening. The Task Force believes that it would be valuable to include local officials and representatives of local bar associations in any working group.

Again, while a uniform system will not work for every district in New York, the State Bar needs to join forces with local bar associations to create regional systems that will work to improve and ensure the overall quality of the state's judiciary.

B. Best Practices for Bar Association Evaluation Committees

The qualities of a jurist do not know any geographical boundaries. Therefore, the judicial screening systems in place in the state ought to –as much as possible – be using the same procedures in order to properly evaluate candidates. This is part of the mandate of the Task Force. Our mission statement requires that “the task force will propose best practices, guidelines and minimum standards for review of such judicial candidates.” Given the overwhelming number of potential issues involved in creating and maintaining a judicial screening system, the Task Force focused on the most important elements of a “best practices” program. The Task Force believes that the establishment of best practices will help to improve the judiciary and make the evaluation process simpler for both the candidates and those charged with evaluating the candidates.

The determination of “best practices” was not an easy task for the Task Force. Some members of the Task Force believed that the overall goal of an independent and well-accomplished judiciary would be better served by the establishment of what might be termed “apple pie” minimum standards for rating judicial candidates rather than the use of “best practices.” Many also believed that in reviewing the individual best practice benchmarks, the use of minimum standards — rather than the mandating of detailed criteria — could prove helpful to local bar associations in achieving these “best practice” benchmarks.⁸⁸ While the Task Force was able to come to quick agreement on many of the best practice benchmarks, a number of these measures were subject to significant debate.

The Task Force members also wanted to assure bar associations that in no manner was there a belief that the “best practices” would serve as mandates. Local bar associations have their own

⁸⁸ For example, instead of providing in detail all the conflict of interest standards that would be appropriate for members of a judiciary committee, it might be preferable and simpler to suggest that judiciary committees establish certain basic conflict standards.

customs and their own history. They may have limited resources. As a rule, they are the best judges of what evaluation procedures work best in their communities. Rather, the “best practices” are designed to provide direction and a course to set for the future of judicial screening.

1. Judiciary Committee

The bar association should establish a separate judiciary committee which would be charged with the duty of investigating and evaluating candidates for judgeships. The members of the judiciary committee should be appointed either by the board of directors or the executive committee of the bar association or by the president of the association. The committee should be constituted in a manner to avoid the appearance of any political partisanship or domination. The determinations of the judiciary committee should stand on their own as independent valid decisions and should not merely be considered as recommendations to the governing board of the bar association.⁸⁹

2. Terms of Committee Members

The Task Force would encourage and recommend as a best practice that judiciary committees consider and establish term limits for members of the committee to ensure members with diverse perspectives and opinions. The Task Force believed that it was a worthy goal to have a blend of both experienced and new members on the judiciary committee. To that end, the Task Force’s position is that: (a) members of the judiciary committee should serve specific terms,⁹⁰ (b) the terms of members should be staggered and (c) members should be term limited. The members who are term-limited should be obliged to wait a minimum period of time (likely a year) before being able to rejoin the judiciary committee. In selecting committee members, bar associations should take into consideration different practice areas, and seek to have committee membership which is representative of the population of the State and the local region.

3. Questionnaire

The Task Force believed that the questionnaire used by the City Bar to evaluate candidates should be used as a suggested model for other bar associations in conducting evaluations. The City Bar questionnaire is comprehensive but not overtaxing. Bar associations that believe that questionnaire to be unduly burdensome would be free to omit some of the City Bar questions, or adopt questionnaires more suitable to their needs and procedures.⁹¹ The use of a single questionnaire in each respective judicial district would prevent candidates for judicial office from being subject to the potentially superfluous filing of multitudinous forms.

⁸⁹ A discussion was held by the Task Force on the question of whether it might be preferable if the governing board of the bar association actually issued the rating to candidates based upon the recommendation of the judiciary committee.

⁹⁰ The Task Force, having reviewed information gathered from various bar associations, found that the length of the term of judiciary committee members varies, but many have terms lasting approximately three years.

⁹¹ Some of the questions on the questionnaire may raise complex issues that are beyond the scope of this report, including questions concerning the mental and physical health of applicants.

4. Investigations and Meetings

The members of the judiciary committee, or a subcommittee of the judiciary committee, would conduct investigations of the candidates for the judiciary. The results of these investigations would be reported at a meeting of the judiciary committee. Candidates for judicial office would also be afforded an opportunity to meet with the judiciary committee.⁹² A member of the judiciary committee should be required to vote on the qualifications of all candidates who are competing for the same judicial position.⁹³

5. Criteria for Evaluation

The subject of what criteria should be used to evaluate judicial candidates drew considerable discussion from the Task Force. The potential for the inclusion of a smorgasbord of criteria that would rival the Girl Scout and Boy Scout laws in length was not found to be a desirable ideal for a screening commission. Instead, the Task Force believed that the criteria should contain a basic statement of core judicial attributes. The basic six criteria would be integrity, independence, intellect, judgment, temperament, and experience. Individual bar associations would be free to add additional criteria, but these six standards should serve as best practices at the heart of the evaluation process.

6. Ratings

The Task Force first debated whether to have two or three ratings for judicial candidates. Under the two-tiered rating system, candidates would be either rated as “Not Approved/Qualified” or “Approved/Qualified.” The three-tiered rating system would add a third category. Candidates would be rated as “Not Approved/Qualified,” “Approved/Qualified,” or “Highly Approved/Qualified.” The advocates for the three-tiered rating system argued that if the goal of the evaluation system was to select the most highly qualified judicial candidates and to retain the best judges, then a three-tiered system which specifically rated top candidates as “Highly Approved/Qualified” would be the best way to achieve this goal. The advocates for the two-tiered system were concerned that some candidates might not participate in the process if they feared they would not receive the “Highly Approved/Qualified” rating. (The candidates might fear that the failure to obtain a “Highly Approved/Qualified” rating might affect their opportunities for advancement in the court system.) They also feared that adding the “Highly Approved/Qualified” rating would unduly place the judiciary committee in the position of putting a thumb on the judicial selection process scale by unduly favoring selected candidates. Backers of the two-tiered system also believed that the goal of the judiciary committee was simply to determine which candidates were qualified. Some advocates for the two-tiered rating

⁹² The issue was raised as to whether a candidate, who submits a questionnaire but who, for whatever reason, is unable to appear for an interview, should be rated “Not Approved” as a candidate. This best practice affords the candidate an opportunity for an interview. It leaves full flexibility to bar associations to determine the candidate’s rating. Bar associations are not being advised that they must find a candidate “Not Approved” based on the failure to appear in person for an interview.

⁹³ For example, if there are three candidates vying for a position on the supreme court, a judiciary committee member should vote on the qualifications of all three candidates.

system also contended that multi-tiered systems undercut the success that two-tiered systems have had, both downstate and upstate, in saying “no” to very weak attorney candidates, who frequently withdraw their candidacies after a “Not Approved/Qualified” review.

The Task Force determined that the two-tiered rating system was preferable.

The Task Force also debated the issue of whether the rating given to candidates should be that of either “Qualified” or “Approved.” This particular debate was further complicated by the related issue of whether the rating given candidates who were found not to be “Approved/Qualified” should be a simple “Not Approved/Qualified” or a the more provisory “Not Approved/Qualified *at this Time*” rating.

Advocates for the “Qualified” grade believed that use of this term would be beneficial in trying to attain the best qualified candidates for the judiciary. A “Qualified” judiciary should not be diluted by the idea of an “Approved” Judiciary. They also believed that the use of the word “Approved” gave the appearance that the judiciary committee had endorsed a candidate.

On the other hand, the advocates for the “Approved” grade believed that an “Approved” grade realistically established that the candidate had been found to have affirmatively demonstrated the necessary qualifications for the performance of the office that he or she was seeking. Thus, there was no reason to find that the “Approved” grade had in any manner been diluted. They similarly did not believe that the use of the term “Approved” established that the judiciary committee had endorsed any candidates. The advocates for the “Approved” grade also believed that the use of “Not Qualified” as a grade for candidates might be interpreted as pejorative and excessively demeaning to candidates, and would unnecessarily encourage appeals from candidates wanting to remove such a negative finding from the record.

On the issue of whether to use “Not Approved/Qualified” rating or the “Not Approved/Qualified *at this Time*” rating, the supporters of the “Not Approved/Qualified *at this Time*” standard believed that by seeming less demeaning, it prevented disappointed candidates from appealing the ratings. The backers of the “Not Approved/Qualified” rating believed that it forced more candidates into participating in the bar association evaluation process because candidates otherwise did not see that receiving a “Not Approved/Qualified *at this Time*” rating hurt their candidacy.

The Task Force determined to use the “Approved” and “Not Approved” grading system. The Task Force did not approve the use of the “Not Approved *at this Time*” or “Not Qualified” standards.

7. Voting Procedures

In many ways, the Task Force debate on whether a super-majority (assumedly a two-thirds vote) would be needed to secure an “Approved” rating, echoed the debate on the issue of the tiered ratings. Some members believed that the goal of a high-quality judiciary would be best secured by the requirement of a super-majority vote. The Task Force took the position that where a bar association offered only two ratings to candidates, a majority vote would be needed to secure an

“Approved” rating. In bar associations offering three ratings, a super-majority would be proper to secure a “Highly Approved” rating.

8. Reconsideration

The members of the Task Force believed that candidates who received the “Not Approved” rating should be entitled to petition the judiciary committee to reconsider its evaluation. The Task Force adopted the approach of the City Bar and took the position that reconsideration should be determined at the discretion of the chair of the judiciary committee.

9. Appeals Process

The Task Force agreed that an appeals process was a necessary feature of a judicial evaluation process.⁹⁴ The appeal would be to the board of the bar association that created the judiciary committee. Appeals would need to be taken swiftly after the judiciary committee had issued a “Not Approved” rating. There are questions over whether the appellate board should directly overrule the decision of the judiciary committee or whether the board should refer the decision back to the judiciary committee for reevaluation. The Task Force believed that this was a decision best left to the local bar association.

The Task Force also took the position that individual bar associations should establish their own understandable and transparent policies that would govern the other issues involved in the appeals process. These issues would include: (a) Is there a requirement that there must be a sufficient number of dissents to the determination at the judiciary committee in order for a candidate to have a right to appeal?; (b) Should the appellate board hear the appeal de novo, or should it give the judiciary committee’s decision a degree of deference?; and (c) Should the candidate be entitled to legal representation at the meeting of the appellate board?

10. Conflicts Policy

The Task Force believed that the judiciary committees should implement exclusion and recusal provisions to address actual or perceived conflicts of interest. Best practices for a conflicts policy should include the following: (1) Elected officials and judicial office holders should not be a part of the judiciary committee. (2) Recusal from evaluation of a candidate should occur when there is a conflict of interest or appearance of one. Recusal will exclude a committee member from participating in investigation, deliberation and vote on a particular candidate, and all other candidates for the same office under the following circumstances: (a) a committee member or a close family member or business associate is involved in a candidate’s nomination process, including, but not limited to, political contribution in cash or in kind at any time during the election cycle, or work on a candidate’s election committee; (b) a candidate is associated with the committee member’s law firm or practice; and (c) a committee member has family, employment or business affiliation or other relationship with a candidate that is so close or adversarial that the committee member’s participation in the evaluation would present an actual conflict of interest or the perception of one.

⁹⁴ In the case of the regional screening panels suggested in this report, there would of necessity be no appeal, and the candidates would need to ask the screening panel for reconsideration.

Few issues before the Task Force prompted more debate than the issue of establishing a conflict of interest policy for members of judiciary committees. Several upstate members of the Task Force were concerned that a blanket ban on public officials serving on judiciary committees would unduly restrict the number of knowledgeable potential members of judiciary committees. Some Task Force members believed that the conflicts specified in (2) should result in an exclusion from the judiciary committee and not merely a recusal. There were issues over the definition to be given the term “family,” and the meaning of an “election cycle.” Questions were raised over whether law firm political contributions to candidates should trigger recusals with a majority of the Task Force of the opinion that a firm’s contribution should require the recusal of a judiciary committee member. The minority view noted that many firms give to all candidates, making such a rule unnecessary and unduly-limiting.

11. Candidate Waiver of Confidentiality Forms

The Task Force discussed the importance of judiciary committees obtaining information on candidates from the New York State Commission on Judicial Conduct and from Department or local attorney disciplinary/grievance committees. Many local bar associations have historically required candidates for elective judicial office to sign waivers of confidentiality protections, and the bar associations have obtained relevant information from these governmental or bar association agencies. Task Force members noted that the IJEQCs had developed excellent standardized waiver forms covering: (a) the State Commission on Judicial Conduct, and (b) all local attorney grievance committees. Several local bar associations have been convinced to use the IJEQC waiver forms for the convenience of candidates on a regional basis. The Task Force suggests the utilization of these IJEQC forms as models because they are easily adapted for future local or regional use.⁹⁵

12. Diversity

Task Force members believed that membership on the judiciary committees should reflect the state and region’s diversity in order to promote public confidence in the court system. As such, the committees should promote and advance the full and equal participation of attorneys of color and other diverse attorneys in the assessment of the qualifications of judicial candidates.

Diversity in gender, race, color, ethnic origin, national origin, religion, sexual orientation, age and disability offers an opportunity for judiciary committees to evaluate candidates through the benefit of various perspectives.⁹⁶ NYSBA has a long history of encouraging and promoting diversity and inclusion and elimination of bias in the legal profession as well as in our society. In keeping with that history, bar associations and other judiciary committees should work to ensure diversity of their members.

⁹⁵ The IJEQC waiver forms are included in Appendix I to this report.

⁹⁶ Members of the Task Force also believed that diversity in fields of practice as well as diversity in practice setting (e.g. sizes of firms, employment in not-for-profit organization and government employment) would be of value in the selection of membership on a judiciary committee.

13. Non-Lawyer Members on the Judiciary Committee

Task Force members were divided on the issue of whether non-lawyers should be part of the judiciary committees. On the one hand, the screening committees in other states created by state laws or constitutions generally have non-lawyer members, and non-lawyer members could increase diversity and bring greater public credibility to the screening process. The Commission on Judicial Nomination — established to evaluate Court of Appeals candidates — has non-lawyer members. So do the screening committees established by the Governor’s Executive Order on judicial nominations. Nonetheless, the bar associations do not name any of the non-lawyer members to these state-created commissions. It could hardly be expected that a bar association would name to a judiciary committee someone who was not a member of the bar association. The Task Force took the position that bar associations should consider the possibility of naming non-lawyers to the judiciary committees.

14. Confidentiality

The Task Force believed that entire operation of the judicial screening system must be held in the highest confidentiality.

15. Withdrawal by Candidates

The Task Force believed that a candidate who receives a “Not Approved” rating and who expeditiously withdraw his/her candidacy for judicial office should not have his/her rating publicized in any manner.

16. Feedback to Candidates

The Task Force believed that local bar associations should consider, without revealing confidential information, providing informal feedback to candidates about their performance. The feedback could be provided at approximately the same time as the screening or as part of a separate process. On the whole, the members of the Task Force believed that informal feedback could provide opportunities to improve judicial and/or legal performance. Concerns were voiced by other Task Force members that candidates might not be pleased to receive negative feedback, and there were fears that dissatisfied candidates could conceivably retaliate against judiciary committee members.

17. The Duration of the Judicial Rating

The Task Force believed that local bar associations should establish policies that would determine for how many years a rating for a judicial applicant would be valid. That rating would only be valid for the particular judicial office for which the applicant was a candidate. It was also acknowledged and suggested that there be a mechanism established that should there be a change of circumstance during the period in which the rating is valid, the rating could be altered or potentially withdrawn. As such, bar associations should consider those factors that would be considered a change of circumstances and identify same to all candidates prior to the interview process. Such potential change in circumstances might include: criminal activity, judicial or attorney discipline, or a pending or open investigation of judicial or attorney complaints.

The bar associations should also provide guidance to candidates on how they might utilize and advertise these ratings as well as how a change in circumstance might be considered and addressed by the judicial screening committee.

18. Timing of the Ratings Process

The Task Force noted that the usefulness and impact of local bar association ratings can be influenced by their timing in the nominating/election process. It was the Task Force's view that ratings should be conducted at the earliest possible point in the election cycle, ideally before a candidate has been endorsed by his/her county committee, and well-before his/her formal nomination, whether by party endorsement, primary, or convention nomination. By rating candidates at an early stage, the local bar association will increase the potential that its ratings will influence the nominating process, while also making it less likely that the local bar screening process will be seen as politically influenced. The Task Force recognized that in some counties, political realities may prevent the ratings process from occurring at the earliest stages, but it found that holding the ratings process as early in the election cycle as possible was the best practice.

C. Outreach and Publicity of Ratings

The Task Force took the position that the State Bar should work with the local bar associations in making the ratings of judicial candidates known to the public. Where the local bar association does not want added publicity for its ratings, or where the local bar association does not seek State Bar involvement, the State Bar should not be involved in distributing the results of the ratings. This should be a local bar association choice.

Where, however, the local bar association does seek State Bar involvement, the State Bar should work to maximize the public distribution and exposure of the candidate ratings. The State Bar should share the ratings with other public news media outlets, and use its own social media capacities to make the ratings available to the general public. The State Bar needs to ensure that judicial ratings are well publicized and should encourage local bar associations to seek appropriate publicity for their ratings.

The State Bar should also use its resources to make sure that the gubernatorial screening committees and other judicial screening committees are made aware of the candidate ratings made by the local bar associations.

D. Aspirational Goals

The Task Force remains committed to the goal of a well-administered comprehensive public screening system for the review of judicial candidates. The Task Force — absent political concerns — would favor mandatory screening for all judicial candidates and would suggest that any mandatory screening requirement be accompanied by a program that would provide campaign seed money to candidates whom the screening committees find to be "Qualified." The availability of public campaign funds might help encourage qualified candidates and also make it more likely that there would be competitive elections in districts often considered to be safe for one political party.

Finally, the Task Force believes that the State Bar should continue its efforts to educate the public about judicial elections. The Task Force understands that this has always been a most difficult task. The rise of social media — and the concomitant decline in the influence of traditional public news sources — has only made this task more difficult. Nonetheless, a well-informed public that understands the importance of the judiciary in maintaining the rule of law is a necessity in a working democracy. The State Bar must continue to devote efforts to educating the public about judicial elections.

VI Resolution for House of Delegates Consideration

[to be drafted]

VII Appendices

NOTE: Due to their large volume, the appendices are being converted into the appropriate electronic format. The report will be updated with the complete appendices in the coming days.

- A. Association of the Bar of the City of New York Uniform Questionnaire for Judicial Candidates
- B. Association of the Bar of the City of New York Handbook for Evaluating Judicial Candidates
- C. Select Judiciary Committee Bylaws from Bar Associations in New York State
- D. National Center for State Courts Survey of Judicial Evaluation Systems
- E. Task Force Survey and Responses from Local, Affinity and Specialty Bar Associations – Summary by Robert T. Schofield, IV, Esq.
- F. Task Force Survey and Responses from Members of IJEQCs – Summary by Elena DeFio Kean, Esq., and Daniel Kornstein, Esq.
- G. Task Force Survey and Responses from Judges – Summary by Alan Mansfield, Esq., and Michael J. McNamara, Esq.
- H. Task Force Survey and Responses from County Political Leaders – Summary by Lawrence A. Mandelker, Esq.
- I. Candidate Waiver of Confidentiality Forms used by the IJEQCs



NEW YORK STATE BAR ASSOCIATION
One Elk Street
Albany, NY 12207



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: Approval of a scheduling resolution to govern consideration of the report of the Task Force on Evaluating Candidates for Election to Judicial Office at the April 13, 2019 meeting.

Attached is a resolution offered by the Task Force on Evaluating Candidates for Election to Judicial Office to govern the House's consideration of the Task Force's report and recommendations at the April 13, 2019 House meeting. The resolution sets a March 15, 2019 deadline for submission of comments on the report in order to allow the Task Force time for review and sets rules for debate and vote at the April 13 meeting.

The resolution will be presented at the January 18 meeting by Task Force co-chairs Hon. Susan P. Read and Robert L. Haig.

**PROPOSED RESOLUTION TO GOVERN CONSIDERATION
OF THE REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON
EVALUATION OF CANDIDATES FOR ELECTION TO JUDICIAL OFFICE**

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the April 13, 2019 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Task Force on Evaluation of Candidates for Election to Judicial Office:

1. The report and recommendations of the Task Force will be circulated to members of the House, sections and committees, county and local bar associations, and other interested parties.
2. **Comments on report and recommendations:** Any comments on the Special Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by March 15, 2019; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the April 13, 2019 meeting.
3. **Consideration of the report and recommendations at the April 13, 2019 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the April 13, 2019 meeting and considered in the following manner:
 - a. The Task Force shall be given an opportunity to present its report and recommendations.
 - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
 - c. The Task Force may respond to questions and comments as appropriate.
 - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
 - e. A vote on the report and recommendations shall be taken at the conclusion of the debate.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #15

REQUESTED ACTION: None, as the report is informational at this meeting.

Attached is a report from the Task Force on School to Prison Pipeline. The Task Force was appointed in 2017 to compile information about current practices with respect to school discipline, examine the current law relating to discipline, outline appropriate sanctions and restorative justice alternatives, and create “best practices” for school districts as to discipline and restorative justice.

The report provides an overview of New York Education Law §3214, which sets forth the procedures to be used by school districts in disciplining students with respect to out-of-school suspensions. The Task Force reviews studies documenting that students who are excluded from school face adverse consequences, including lower academic achievement, higher truancy, higher dropout rates, and higher contact with the juvenile justice system. These adverse impacts are experienced at higher rates by students of color, students with disabilities, and LGBTQ students.

The report reviews the use of restorative justice alternatives rather than the use of suspensions for bad behavior. While these alternatives take many forms, the aim of each is to bring individuals together in constructive dialogue to address the root of conflict. The report notes research indicates that the use of these models can result in a decrease in the use of suspensions and decrease the disparity in adverse impacts.

The Task Force makes the following recommendations:

- Education Law §3214 should be amended to permit the use of restorative justice practices in lieu of suspensions.
- School districts should review their codes of conduct to include restorative justice practices for specific code violations.
- The State Education Department should consider (1) the development of a standardized methodology for measuring disparities in discipline and report data annually to the public and (2) develop model materials and processes that districts can use to analyze the root causes of disparities.

The report references three appendices: The proposed amendment to Education Law §3214, the December 2018 report of the New York Equity Coalition, and examples of codes of conduct. For the sake of reproduction, the appendices are not included in the printed materials, but may be accessed online at www.nysba.org/pipelinerreport.

The report was posted in the Reports Community on January 2. It is being presented to you on an informational basis at this meeting, and will be scheduled for debate and vote at the April 13 meeting.

Sheila A. Gaddis and John H. Gross, co-chairs of the Task Force, will present the report at the January 18 meeting.

**NEW YORK STATE BAR ASSOCIATION
TASK FORCE
ON THE SCHOOL TO PRISON PIPELINE¹
INFORMATIONAL REPORT**

¹ Opinions expressed are those of the Task Force preparing this Report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Task Force on the School to Prison Pipeline

John H. Gross, Esq., Co-Chair

Sheila A. Gaddis, Esq. Co-Chair

Reporters

Steven A. Goodstadt, Esq.

Rose A. Nankervis, Esq.

Members and Representatives

Lena M. Ackerman, Esq.

Kathy A. Ahearn, Esq.

Adele Bovard

Katrina Charland

Catherine A. Christian, Esq.

Cliff Anthony Christophe, Esq.

Amy M. D'Amico, Esq.

Bryan D. Hetherington, Esq.

Professor John Klofas

Victoria E. Kossover, Esq.

Elizabeth Meeker, Psy.D

Tara Lynn Moffett, Esq.

Professor Shaun Nelms

Nicholas Hiroshi Parr, Esq.

Christopher M. Powers, Esq.

Patricia L. R. Rodriguez, Esq.

Ronald J. Tabak, Esq.

Ashley R. Westbrook, Esq.

Jay Worona, Esq.

Task Force Staff

Kevin Kerwin, Esq.

Table of Contents

I. Executive Summary	1
A. Task Force Mission.....	1
B. Brief Synopsis of N.Y. Education Law § 3214 and the School-to-Prison Pipeline	1
C. Recommendations.....	3
II. Introduction/Overview of the School to Prison Pipeline	4
III. Overview of the Current Law	6
A. Education Law § 3214: Student Discipline Proceedings.....	9
B. Dignity for All Students Act (DASA)	31
IV. Sub-Committee Reports and Observations	45
A. Populations Subject to Disparate Treatment.....	45
1. Does New York have a Disparities Problem?	47
2. The Role of Implicit Bias, Coupled with Vague Definitions of Misconduct, in Creating Disparities	51
B. Restorative Justice & Current Productive Practices.....	53
1. Current Productive Practices and School Wide Prevention Models.....	58
2. Restorative Justice Practices as Intervention.....	60
V. Detailed Recommendation: Amending Education Law Section 3214 to Include Restorative Justice	63
VI. Conclusion	66
Appendices	67
Appendix A - Amendment to N.Y. Education Law § 3214.....	67
Appendix B - Report By The New York Equity Coalition, December 2018.....	70
Appendix C - Example Codes of Conduct	90

I. Executive Summary

A. Task Force Mission

Sharon Gerstman, Esq., during her term as President of the New York State Bar Foundation, established the Task Force on the School to Prison Pipeline. The Task Force was charged with the following mission:

The mission of this Task Force was to compile information concerning current practices in schools regarding discipline, examine current law regarding school discipline, appropriate disciplinary sanctions, and institution of restorative justice alternatives including youth courts, and create a “best practices” for school districts regarding discipline and restorative justice.

B. Brief Synopsis of N.Y. Education Law § 3214 and the School to Prison Pipeline

New York Education Law Section 3214 sets forth the procedures that school districts may use when disciplining students for various code of conduct violations. Education Law Section 3214 also provides procedures for disciplining special education students, including but not limited to those students with an individualized education plan (“IEP”), or plan in accordance with Section 504 of the Rehabilitation Act (“504 Plan”). Currently, the only form of discipline that may be issued against a student is out of school suspension. As explained in greater detail *infra*, the following disciplinary punishments may be issued:

1. Principal Suspension:

The principal of a school district may issue an out of school suspension of up to five days to a student for a code of conduct violation. Prior to issuing the suspension, the principal must advise the parent(s)/guardian(s) of the student of their rights for an informal conference in which the parent(s)/guardian(s) can question the complaining witness.

2. Superintendent’s Hearing:

If the principal deems that the code of conduct violation warrants a suspension of longer than five days, he/she can refer the violation to the Superintendent of Schools for a Superintendent’s hearing. The Superintendent or his/her designee will convene a due process hearing. During said hearing, the

parent(s)/guardian(s) have the ability to cross-examine District witness(es) and call witnesses on their behalf.

3. *Disciplinary Punishments for Students with Disabilities*

If a student has an IEP or a 504 plan and has violated the school district's code of conduct, a manifestation hearing is held to determine whether the charged conduct was a manifestation of the IEP or 504 plan. If the charged conduct is determined to be a manifestation, then a student can be transferred to an alternative placement for no more than 45 cumulative days during a given school year. If there is no manifestation, then the student may be issued discipline like a general education student.

The "School to Prison Pipeline" has developed due to the nature of these suspensions. The current system punishes misconduct by exclusion. Students with code of conduct violations are being removed from the school setting and into situations in which supervision, and more importantly instruction and the positive socialization effects of a school setting are not present during the day, providing the unfortunate opportunity for students to become caught up in unacceptable and possible criminal activity. Further, whether knowingly or not, certain school districts are suspending students of color and students with a disability at a greater propensity and frequency than students who are Caucasian or do not have an IEP or 504 plan. This disparate treatment of minority students and students with disabilities is shown in greater detail *infra*, in Section IV(A) entitled "Populations Subject to Disparate Treatment," through case studies and other statistical data from the United States Department of Education's Office of Civil Rights. Due to the fact that suspension is the statutorily endorsed discipline that may be issued in accordance with Education Law Section 3214, this trend will only continue to worsen without any ameliorative statutory change.

School districts have not only suspended students for misconduct on school grounds, but have referred misconduct to law enforcement. As described more fully in Section IV(A)(1) *infra*, Law Enforcement referrals have increased significantly in 2018 and there is data that demonstrates implicit biases have led to higher referrals for students of color and/or students with a disability. Students who have been suspended or referred to law enforcement are more likely to enter the juvenile system causing the School to Prison Pipeline to grow.

C. Recommendations

This Report includes the following recommendations that should be made to Education Law Section 3214. This Task Force believes that the inclusion of language in Education Law Section 3214 to permit the use of restorative justice practices in lieu of suspension of students would help rectify this growing problem of the School to Prison Pipeline. By statutorily endorsing school district use of alternative disciplinary procedures to suspension, this Task Force believes that many more school districts will utilize this model to treat with student misconduct. The Task Force hopes that this will interrupt the disturbing trend of the School to Prison Pipeline. The Task Force appreciates that there are several of the over seven hundred New York school districts that have exercised local discretion and have instituted restorative justice techniques. Our recommendation should not be taken to suggest that school districts are without authority to adopt restorative justice procedures.

This Task Force also recommends that school districts review their code of conducts to include the use of restorative justice practices for specific code of conduct violations. While this Task Force does not suggest a change in the law mandating the use of restorative justice practices for code of conduct violations, the New York State Education Department (“NYSED”) and the Board of Regents should undertake review of this issue.

Finally, the Task Force urges that the New York State Education Department study and consider the following:

1. The development of a standardized methodology for measuring disparities in discipline at both district and school levels across the protected classes of race, gender, disability and, if possible, by LGBTQ status. NYSED would report the data annually to districts and the public.
2. The study and development of model materials and processes that districts and schools can use to analyze the root causes of the disparities demonstrated in their data. The Task Force suggests that this include information on strategies including training, services, courses, materials, consultants and best practices that have been shown to successfully reduce disparities in discipline to assist schools and/or districts in recognizing and addressing such disparities.

II. Overview of the School to Prison Pipeline

The School to Prison Pipeline Task Force (“Task Force”) of the New York State Bar Association is cognizant that student suspension from school is often the first step in a chain of events leading to undesirable consequences. In an attempt to address this important issue extant in many New York State school districts, the Task Force studied workable alternatives to student suspensions and thus urges the New York State Bar Association to affirmatively recommend that the Student Suspension statute, Education Law §3214 be amended to ensure that school districts consider employing restorative practices in their codes of conduct.

Research sets forth that students who are excluded from school face dire consequences including lower academic achievement; higher truancy; higher dropout rates and a higher contact with the juvenile justice system. All of this leads to lower local and state economic growth.² In addition, the Office of Civil Rights (“OCR”) has documented that students of certain racial groups tend to be disciplined more than their peers. For example, African-American students without disabilities are more than three (3) times as likely as white peers without disabilities to be suspended or expelled.³

Statistics further demonstrate that students who are suspended are three times more likely to have risk of contact with the judicial system and two times more likely to drop out of school than are students who are not suspended from school. Furthermore, students with a first arrest and court appearance are four times more likely to drop out of school and students even who are treated as a juvenile in a court proceeding are seven times more likely to secure a future of adult criminal records.⁴

According to the Center for Urban Education Success, Restorative Justice Practice is an increasingly acknowledged and employed approach to school discipline, behavior, and relationships. Rather than focusing upon punitive measures, which lead to anger, shame and ostracism, Restorative Justice Practice is focused on repair and reconciliation. Its principles are rooted in indigenous communities and religious

² See generally, Russel J. Skiba, Mariella I. Arredondo, & M. Karega Rausch, *New and Developing Research on Disparities in Discipline*, DISCIPLINE DISPARITIES: A RESEARCH TO PRACTICE COLLABORATIVE AT INDIANA UNIVERSITY, March 2014.

³ U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

⁴ Fred Cheesman, *Facts about the School-to-Prison Pipeline*, NAT’L CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE CTS., (2016), available at <http://www.national-consortium.org/~media/Microsites/Files/National%20Consortium/Conferences/2016/Materials/School-to-Prison-fact-sheet.ashx>; see also Steven C. Teske, & J. Brian Huff, *The Court’s Role in Dismantling the School-to-Prison Pipeline*, JUV. AND FAM. JUST. TODAY, Winter 2011, at 14-17.

traditions⁵ where the concept of justice relies on an assumption that everyone in a community is relationally connected to one another and to their community and that when a wrong has occurred, “it represents a wound in the community, a tear in the web of relationships”⁶ which requires repair. Restorative Justice Practice holds accountable everyone involved in a relationship – offenders, victims, and community members. Unlike exclusionary discipline, which separates victims and offenders, Restorative Justice Practice techniques are designed to bring these stakeholders together where they can take turns speaking in a safe listening space. Using both proactive and interventional strategies, students, teachers, and everyone else in the school community (social workers, staff, administrators, parents, school safety officers, etc.) meet in various formats, such as restorative circles, community building circles, restorative conversations and peer mediation⁷ which steers the conversations away from retribution and toward reintegrating wrongdoers back into the community. These Restorative Justice strategies are particularly beneficial in school settings where members of the community will be seeing each other repeatedly and often following a conflict.⁸ Similar to punitive discipline, Restorative Justice philosophy and practices can lead to community transformation⁹ over time, but deepened relationships and community rather than crime and isolation characterize the transformed culture.

The Late Chief Judge Judith Kaye had tirelessly worked to secure legislation which would move school districts away from imposing only punitive disciplining measures on students and towards the employment of restorative practices. The New York State Bar Association should move in a direction to make Judge Kaye’s vision a reality and to work toward the goal of dismantling the School to Prison Pipeline, which presently exists.

One note of caution – the Task Force does not recommend the dismantling of student discipline under Section 3214 of the Education Law. There is little doubt that across

⁵ Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 455-475 (2008).

⁶ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 29 (2015).

⁷ Tom Cavanaugh, Patricia Vigil & Estrellita Garcia, *A Story Legitimizing the Voices of Latino/Hispanic Students and Their Parents: Creating a Restorative Justice Response to Wrongdoing and Conflict in Schools*, 47 EQUITY & EXCELLENCE IN EDUC. 565, 565-79 (2014); Anne Gregory, Russi Soffer, Easton Gaines, Aria Hurley & Neela Karikhalli, *Implementing Restorative Justice in Schools: Lessons Learned From Restorative Justice Practitioners in Four Brooklyn Schools*, BROOKLYN COMMUNITY FOUNDATION, Nov. 2016, http://www.brooklyncommunityfoundation.org/sites/default/files/lessons_learned_about_early_implementation_of_restorative_justice_in_schools_for_distribution.pdf; Allison Ann Payne & Kelly Welch, *The Effect of School Conditions on the Use of Restorative Justice in Schools*, 16 YOUTH VIOLENCE AND JUV. JUST. 224, 224-40 (2017).

⁸ Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 281-335 (2012).

⁹ Jeanne B. Stinchcomb, Gordon Bazemore & Nancy Riestenberg, *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, 4 YOUTH VIOLENCE AND JUV. JUST. 123, 123-47 (2006).

New York State many school districts use the tools of this statute appropriately, effectively in accord with student due process protection.

III. Overview of the Current Law

Every board of education, board of trustees, board of cooperative educational services and county vocational extension board must adopt and amend a code of conduct to maintain order on school property¹⁰ or at a school function.¹¹ The code of conduct governs the conduct of students, teachers, school personnel, and visitors. At a minimum the code of conduct must include:

- **Conduct Guidelines:** appropriate conduct, language and dress on school property and acceptable treatment of teachers, school administrators, other school personnel, students and visitors on school property;¹²
- **Disciplinary Measures:** appropriate range of disciplinary measures that may be imposed for violation of the code;¹³
- **Roles:** roles of teachers, administrators, other school personnel, the board or other governing body, and parents;¹⁴
- **Provisions Against Bullying and Harassment:** provisions “prohibiting harassment, bullying, and/or discrimination against any student, by employees or students that creates a hostile school environment by conduct or by threats, intimidation or abuse, including cyberbullying” as defined in N.Y. Education Law § 11(8);¹⁵
- **Security Procedures:** standards and procedures to assure the security and safety of students and school personnel;¹⁶
- **Removal Procedures:** provisions for removing students and other persons who violate the code from the classroom or school property;¹⁷

¹⁰ School property means “[1] in or within any building, structure, athletic playing field, playground, parking lot or land contained within the real property boundary line of a public elementary or secondary school; or [2] in or on a school bus, as defined by section [142] of the vehicle and traffic law.” N.Y. EDUC. LAW § 11(1) (McKinney 2018).

¹¹ 8 NYCRR § 100.2(l)(2); School function is defined as “a school-sponsored extracurricular event or activity.” N.Y. EDUC. LAW § 11(2) (McKinney 2018).

¹² 8 NYCRR § 100.2(l)(2)(ii)(a).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* § 100.2(l)(2)(ii)(b).

¹⁶ *Id.* § 100.2(l)(2)(ii)(c).

- **Disruptive Pupils:** provisions “prescribing the period for which a disruptive pupil may be removed from the classroom for each incident, provided that no such pupil shall return to the classroom until the principal makes a final determination pursuant to Education Law § 3214(3-a)(c), or the period of removal expires, whichever is less;”¹⁸
- **Specific Disciplinary Measures:** disciplinary measures to be taken against those who possess or use weapons or illegal substances, use physical force, commit acts of vandalism, violate another student’s civil rights, threaten violence, or harass, bully, and/or discriminate against other students;¹⁹
- **Responding to Bullying, Harassment, and/or Discrimination:** provisions “for responding to acts of harassment, bullying, and/or discrimination against students by employees or students ..., which with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student’s behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student’s behaviors had on the individual(s) who was physically injured and/or emotionally harmed;”²⁰
- **Disciplinary Procedures and Alternative Education:** provisions for the detention, suspension and removal from the classroom of students, consistent with applicable laws, including policies and procedures to ensure the continued educational programming and activities for students who are placed in detention, suspended from school or removed from the classroom;²¹
- **Reporting and Enforcement:** procedures to report and determine violations and procedures to impose and carry out disciplinary measures;²²
- **Compliance with Other Laws:** procedures to ensure that the code and its enforcement comply with state and federal laws;²³

¹⁷ *Id.* § 100.2(l)(2)(ii)(d).

¹⁸ *Id.* § 100.2(l)(2)(ii)(e).

¹⁹ *Id.* § 100.2(l)(2)(ii)(f)-(g).

²⁰ *Id.* § 100.2(l)(2)(ii)(h).

²¹ *Id.* § 100.2(l)(2)(ii)(i).

²² *Id.* § 100.2(l)(2)(ii)(j).

- **Criminal Acts:** provisions for notifying local law enforcement agencies about which code violations constitute a crime;²⁴
- **Parental Notification:** circumstances under and procedures by which persons in parental relation to the student will be notified of code violations;²⁵
- **Court Complaints:** circumstances under and procedures by which a complaint in criminal court, a juvenile delinquency petition, or person in need of supervision petition will be filed;²⁶
- **Referrals to Human Service Agencies:** circumstances under and procedures by which referrals to appropriate human service agencies are made;²⁷
- **Minimum Suspension Periods:** a minimum suspension period for students who repeatedly are substantially disruptive of the educational process or substantially interfere with the teacher's authority over the classroom (suspending authority may reduce this period on a case-by-case basis to be consistent with any other state or federal law);²⁸
- **Violent Students:** a minimum suspension period for acts that would qualify the student as a violent pupil as defined by section 3214 of the Education Law (suspending authority may reduce this period on a case-by-case basis to be consistent with any other state or federal law);²⁹
- **Student Bill of Rights:** a bill of rights and responsibilities of students that focuses on positive student behavior and that will be annually publicized and explained to all students;³⁰
- **In-Service Programs:** guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of the school policy on student conduct and discipline;³¹ and

²³ *Id.* § 100.2(l)(2)(ii)(k).

²⁴ *Id.* § 100.2(l)(2)(ii)(l).

²⁵ *Id.* § 100.2(l)(2)(ii)(m).

²⁶ *Id.* § 100.2(l)(2)(ii)(n).

²⁷ *Id.* § 100.2(l)(2)(ii)(o).

²⁸ *Id.* § 100.2(l)(2)(ii)(p).

²⁹ *Id.* § 100.2(l)(2)(ii)(q).

³⁰ *Id.* § 100.2(l)(2)(ii)(r).

³¹ *Id.* § 100.2(l)(2)(ii)(s).

- **Retaliation:** a provision “prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.”³²

The code of conduct must be developed in collaboration with students, teachers, administrators, parent organizations, and school personnel.³³ Each school district must file a copy of its code of conduct and any amendments to the code of conduct with the Commissioner no later than thirty days after their adoption.³⁴ As set forth above, a school district’s code of conduct lays the foundation for student disciplinary procedures.

A. Education Law § 3214: Student Discipline Proceedings

The Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law”³⁵ In 1975, the United States Supreme Court, in *Goss v. Lopez*, held that the Fourteenth Amendment “protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.”³⁶ More importantly, in such case, the Court held for the first time that a student’s entitlement to a public education is a property interest protected by the Fourteenth Amendment’s Due Process Clause “which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”³⁷

Furthermore, in *Goss v. Lopez*, the Court noted that “young people” who attend the public school system “do not ‘shed their constitutional rights’ at the schoolhouse door.”³⁸ More specifically, the Court observed that a “10-day suspension from school is not *de minimis* ... and may not be imposed in complete disregard of the Due Process Clause.” Although a short suspension is far less serious than an expulsion, the Court found that “[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.”³⁹

³² *Id.* § 100.2(l)(2)(ii)(t).

³³ *Id.* § 100.2(l)(1)(i).

³⁴ *Id.* § 100.2(l)(2)(iii)(a).

³⁵ U.S. CONST. amend. XIV, § 1.

³⁶ *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

³⁷ *Id.*

³⁸ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

³⁹ *Id.* at 576.

The Court's holding in *Goss v. Lopez* set the ground rules for state disciplinary procedures. While attempting to balance the interests of students and schools, the Court held that:

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.⁴⁰

The ruling established in *Goss v. Lopez* affords students the right to due process prior to being suspended or expelled but it does not afford them the utmost protections under the law. For example, student discipline proceedings need not take the form of a judicial or quasi-judicial trial and students do not have the right to legal counsel or the right to confront and cross-examine witnesses for a suspension of 10 days or less.⁴¹

Even though the *Goss v. Lopez* decision focused primarily on suspensions of ten days or less, the Court nonetheless recognized that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”⁴² Therefore, the Court left it up to the states to determine exactly what “more formal procedures” are required for long-term suspensions or expulsions.

Overall, the Court in *Goss* established the principle that fundamental fairness is inherent to the student discipline process. Therefore, *Goss v. Lopez* remains the cornerstone for student discipline proceedings in most, if not all states, especially New York.

The New York State Legislature created Education Law Section 3214 in 1947 as a procedure to discipline students, which includes suspension.⁴³ A school district's board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal of a school may suspend the pupils from required attendance upon instruction for the following conduct:

- Insubordination
- Being Disorderly
- Being Violent
- Being Disruptive

⁴⁰ *Id.* at 581.

⁴¹ *Id.* at 583.

⁴² *Id.* at 584.

⁴³ N.Y. EDUC. LAW § 3214 (McKinney 2018).

- or Conduct otherwise endangers the safety, morals, health or welfare of others.⁴⁴

A violent pupil is defined as an elementary student or secondary student under twenty-one years of age who:⁴⁵

- Commits an act of violence upon a teacher, administrator, or other school employee;⁴⁶
- Commits, while on school district property, an act of violence upon another student or any other person lawfully upon said property;⁴⁷
- Possesses, while on school district property, a gun, knife, explosive, or incendiary bomb, or other dangerous instrument capable of causing physical injury or death;⁴⁸
- Displays while on school district property, what appears to be a gun, knife, explosive or incendiary bomb or other dangerous instrument capable of causing death or physical injury;⁴⁹
- Threatens, while on school district property, to use any instrument that appears to be capable of causing physical injury or death;⁵⁰
- Knowingly and intentionally damages or destroys the personal property of a teacher, administrator, other school district employee or any person lawfully upon school district property;⁵¹ or,
- Knowingly or intentionally damages or destroys school district property.⁵²

A disruptive pupil is an elementary or secondary student under twenty-one years of age who is substantially disruptive of the educational process or substantially interferes with the teacher's authority over the classroom.⁵³

1. Corporal Punishment or Aversive Interventions

Section 3214 of the Education Law provides disciplinary procedures for disciplining students but it does not provide for the use of corporal punishment. No teacher, administrator, officer, employee or agent of a school district in New York State or Board of Cooperative Educational Services (BOCES), a charter school, state-operated or state

⁴⁴ *Id.* § 3214(3)(a).

⁴⁵ *Id.* § 3214(2-a).

⁴⁶ *Id.* § 3214(2-a)(1).

⁴⁷ *Id.* § 3214(2-a)(2).

⁴⁸ *Id.* § 3214(2-a)(3).

⁴⁹ *Id.* § 3214(2-a)(4).

⁵⁰ *Id.* § 3214(2-a)(5).

⁵¹ *Id.* § 3214(2-a)(6).

⁵² *Id.* § 3214(2-a)(7).

⁵³ *Id.* § 3214(2-a)(b).

supported school, may use corporal punishment against a pupil.⁵⁴ Corporal punishment is defined as any act of physical force upon a pupil for the purpose of punishing that pupil.⁵⁵

However, there are certain, and very limited instances, in which reasonable physical force can be used, including:⁵⁶

- i. To protect oneself from physical injury;⁵⁷
- ii. To protect another pupil or teacher or any person from physical injury;⁵⁸
- iii. To protect the property of the school, school district or others;⁵⁹ or
- iv. To restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school or school district functions, powers and duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.⁶⁰

Further aversive interventions cannot be used against pupils as a tool to reduce or eliminate maladaptive behaviors.⁶¹ An aversive intervention is defined as an intervention that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors, including:⁶²

- i. Contingent application of noxious, painful, intrusive stimuli or activities; strangling, shoving, deep muscle squeezes or other similar stimuli;⁶³
- ii. Any form of noxious, painful or intrusive spray, inhalant or tastes;⁶⁴
- iii. Contingent food programs that include the denial or delay of the provision of meals or intentionally altering staple food or drink in order to make it distasteful;⁶⁵
- iv. Movement limitation used as punishment, including but not limited to helmets and mechanical restraint devices;⁶⁶ or
- v. Other stimuli or actions similar to the interventions described above.⁶⁷

⁵⁴ 8 NYCRR § 19.5(a)(1).

⁵⁵ *Id.* § 19.5(a)(2); 8 NYCRR § 100.2(l)(3)(i).

⁵⁶ 8 NYCRR § 19.5(3); 8 NYCRR § 100.2(l)(3)(i).

⁵⁷ 8 NYCRR § 19.5(3)(i); 8 NYCRR § 100.2(l)(3)(i)(a).

⁵⁸ 8 NYCRR § 19.5(3)(ii); 8 NYCRR § 100.2(l)(3)(i)(b).

⁵⁹ 8 NYCRR § 19.5(3)(iii); 8 NYCRR § 100.2(l)(3)(i)(c).

⁶⁰ 8 NYCRR § 19.5(3)(iv); 8 NYCRR § 100.2(l)(3)(i)(d).

⁶¹ 8 NYCRR § 19.5(b)(1).

⁶² *Id.* § 19.5(b)(2).

⁶³ *Id.* § 19.5(b)(2)(i).

⁶⁴ *Id.* § 19.5(b)(2)(ii).

⁶⁵ *Id.* § 19.5(b)(2)(iii).

⁶⁶ *Id.* § 19.5(b)(2)(iv).

⁶⁷ *Id.* § 19.5(b)(2)(v).

However, an aversive intervention does not include voice control, limited to loud, firm commands; time-limited ignoring of a specific behavior; token fines as part of a token economy system brief physical prompts to interrupt or prevent a specific behavioral interventions medically necessary for the treatment or protection of the student; or other similar interventions.⁶⁸

2. Off Campus Conduct and Social Media

Pupils may be disciplined for off-campus misconduct when it is “reasonably foreseeable” that the misconduct will “create a risk of a material and substantial disruption” in the school setting.⁶⁹ The board may take disciplinary action against a student who committed a school-related criminal act or school-related act that indicates the student’s presence in school poses a danger to the health, safety, morals, or welfare of other students.⁷⁰ However, a school district may not punish a student’s criminal conduct if it does not affect the school setting.⁷¹

The New York State Education Department (“NYSED”) and New York’s Attorney General have released guidance documents which define cyberbullying as the repeated use of information technology, including email, instant messaging, blogs, chat rooms, cell phones and gaming systems to deliberately harass, threaten, antagonize or intimidate others.⁷² Students have routinely been disciplined for conduct that occurred on social media, for example, posts relating to violence at school,⁷³ and cyberbullying, to both teachers and students.⁷⁴

With regard to searching students’ personal devices, students have a legitimate expectation of privacy in school, and school officials must balance that expectation of privacy against the school’s interest in maintaining order and discipline.⁷⁵ When determining whether a school appropriately searched a student’s device for the purpose

⁶⁸ *Id.* § 19.5(b).

⁶⁹ *Doninger v. Niehoff*, 527 F.3d 41 (2d. Cir 2008); *Appeal of S. W.*, 44 Ed. Dept. Rep. 446 (2005); *Appeal of K.S.*, 43 Ed. Dept. Rep. 492 (2004); *Appeal of R.C.*, 41 Ed. Dept. Rep. 446 (2002); *Appeal of Mangaroo*, 33 Ed. Dept. Rep. 286 (1993).

⁷⁰ *Appeal of Pollnow*, 21 Ed. Dept. Rep. 291 (1981).

⁷¹ *Id.*

⁷² *The New York State Dignity for All Students Act: A Resource and Promising Practices for School Administrators & Faculty*, NEW YORK STATE EDUCATION DEPARTMENT, (December 2017), <http://www.p12.nysed.gov/dignityact/documents/FINALDignityForAllStudentsActGuidanceDec2017.pdf>; *Cyberbullying*, ATTORNEY GENERAL: BARBARA D. UNDERWOOD, <https://ag.ny.gov/internet/cyberbullying> (last visited December 21, 2018). The term cyberbullying is also defined in the Dignity for All Students Act as harassment or bullying which occurs through any form of electronic communication. N.Y. EDUC. LAW. § 11(8) (McKinney 2018).

⁷³ *Wisniewski v. Bd. of Educ. of the Weedsport C.S.D.*, 494 F.3d 34 (2d Cir. 2007).

⁷⁴ *Appeal of E.S.*, 50 Ed. Dept. Rep. ____, Decision No. 16,105 (2010); *Appeal of J.F. and J.F.*, 46 Ed. Dept. Rep. 205 (2006); *Appeal of Ravlik*, 40 Ed. Dept. Rep. 262 (2000); *Appeal of Leahy*, 39 Ed. Dept. Rep. 375 (1999).

⁷⁵ *New Jersey v. T.L.O.*, 469 U.S. 341 (1985).

of discipline, a school must determine: 1) whether the search was justified in its inception, and 2) was the search reasonably related in scope to the circumstances which justified the interference in the first place.⁷⁶

3. Procedure for Suspension or Removal of Pupils

i. Teacher Removal of Disruptive Students.

Teachers have the power and authority to remove a disruptive pupil from his/her classroom consistent with discipline measures contained in the district's code of conduct.⁷⁷ School authorities must establish policies and procedures to ensure that the educational programming and activities for students removed from the classroom continues.⁷⁸ Students may not be removed in violation of any state or federal law or regulation.⁷⁹ The teacher must inform the student and school principal of the reasons for the removal.⁸⁰

If the teacher finds that the pupil's continued presence in the classroom does not pose a continuing danger to persons or property and does not present an ongoing threat of disruption to the academic process, the teacher has to explain the basis for the removal to the student, allowing the student to informally present his/her version of the incident, prior to removing the student from the classroom.⁸¹

In all other cases, the teacher must explain the basis for the removal to the student and provide an informal opportunity to be heard within twenty-four hours of the student's removal.⁸² If the twenty-four hour period does not end on a school day, it will be extended to the corresponding time on the next school day.⁸³

The principal must inform the student's parent or person in parental relation to the student of the removal and the basis for it within twenty-four hours. If the twenty-four hour period does not end on a school day, it will be extended to the corresponding time on the next school day.⁸⁴ The student and his/her parent will, upon request, be given an opportunity for an informal conference with the principal to discuss the reasons for the removal.⁸⁵

⁷⁶ *Id.*

⁷⁷ N.Y. EDUC. LAW § 3214(3-a) (McKinney 2018).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

If the student denies the charges, the principal will explain the basis for the removal and allow the student and his/her parent an opportunity to present the student's version of the incidents.⁸⁶ The informal hearing must be held within forty-eight hours of the student's removal.⁸⁷ If the forty-eight hour period does not end on a school day, it will be extended to the corresponding time on the second school day next following the student's removal.⁸⁸

The principal will not set aside the discipline imposed by the teacher unless he/she finds that the charges against the student are not supported by substantial evidence, that the student's removal violates the law, or that the conduct warrants suspension from school (suspension will then be imposed).⁸⁹ The principal's determination must be made by the close of business on the day succeeding the forty-eight hour period for an informal hearing.⁹⁰

Students may not return to the classroom until the principal makes a final determination, or the period of removal expires, whichever is less.⁹¹ The principal may, in his/her discretion, designate a school district administrator to carry out these functions.⁹²

ii. Suspensions of Five Days or Less

A student's legitimate entitlement to a public education may not be taken away for misconduct without due process.⁹³ As previously mentioned, only a school district's board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools or principal of the school where the pupil attends will have the power to suspend a pupil for a period not to exceed five school days.⁹⁴ When a pupil is to be suspended, the board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal must provide the pupil with notice of the charged misconduct prior to the suspension.⁹⁵ The school district must also immediately notify the parent(s) or person in parental relation

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See Goss*, 419 U.S. 565.

⁹⁴ N.Y. EDUC. LAW § 3214(3)(b)(1) (McKinney 2018). The principal's authority to suspend may not be delegated. *See Appeal of A.L., Jr.*, 42 Ed. Dept. Rep. 368 (2003) (finding that a suspension imposed by the assistant principal was improper); *see Appeal of T.B.*, 52 Ed. Dept. Rep. _____, Decision No. 16,385 (2012).

⁹⁵ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

in writing that the student may be suspended from school.⁹⁶ Such written notice must be provided by personal delivery, express mail delivery or an equivalent means reasonably calculated to assure that the parent receives the notice within 24 hours of the suspension decision.⁹⁷ Notification sent by regular mail does not satisfy the delivery requirement.⁹⁸ The notice must describe the incident for which the suspension is proposed and inform the parent of his/her right to request an immediate informal conference with the principal.⁹⁹ The notice must also state that the student and parent have a right to an informal conference and that they have the right to question the complaining witness.¹⁰⁰ Failure to notify of these rights will result in expunging the suspension from the student's record.¹⁰¹

Furthermore, the board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal, must provide an explanation for the suspension if the pupil denies the misconduct.¹⁰² The pupil and the person in parental relation to the pupil must be afforded an opportunity for an informal conference with the principal, person, or body authorized to impose discipline¹⁰³ at which the pupil and/or person in parental relation will be authorized to present the pupil's version of the event(s) and to ask questions of the complaining witness.¹⁰⁴ Such informal conference must take place prior to the suspension.¹⁰⁵ However, should the pupil's presence in the school pose a continuing danger to persons or property, or an ongoing threat of disruption to the academic process, the pupil's notice and opportunity for an informal conference will take place as soon after the suspension as is reasonably practicable.¹⁰⁶ Notwithstanding, a teacher should immediately report and refer a violent pupil to the principal or superintendent for a

⁹⁶ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999) (holding that telephone notification does not satisfy the writing requirement); *see also Appeal of V.G.*, 44 Ed. Dept. Rep. 271 (2005); *Appeal of T.B.*, 52 Ed. Dept. Rep. _____, Decision No. 16,385 (2012). Further, such written notice must be provided in the parent's primary language or mode of communication. *Appeal of S.C.*, 44 Ed. Dept. Rep. 164 (2004).

⁹⁷ *Appeal of a Student with a Disability*, 44 Ed. Dept. Rep. 136 (2004).

⁹⁸ *Id.*

⁹⁹ *Appeal of a Student Suspected of Having a Disability*, 38 Ed. Dept. Rep. 52 (1998).

¹⁰⁰ *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of P.R. and C.R.*, 41 Ed. Dept. Rep. 48 (2001).

¹⁰¹ *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of P.R. and C.R.*, 41 Ed. Dept. Rep. 48 (2001).

¹⁰² N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

¹⁰³ *Appeal of Somers*, 32 Ed. Dept. Rep. 431 (1993).

¹⁰⁴ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565. It is insufficient to merely provide the student and his/her parent an opportunity to speak with the principal without the complaining witnesses present or an opportunity to speak to the complaining witnesses without the principal present. *Appeal of A.L., Jr.*, 42 Ed. Dept. Rep. 368 (2003); *Appeal of Allert*, 32 Ed. Dept. Rep. 342 (1992).

¹⁰⁵ *Appeal of a Student with a Disability*, 44 Ed. Dept. Rep. 136 (2004).

¹⁰⁶ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

violation of the code of conduct pursuant to N.Y. Education Law §2801 and a minimum suspension.¹⁰⁷

As for in-school suspensions, a full §3214 disciplinary hearing is not required. Due process requires that a student be given an opportunity to appear informally before the person or body authorized to impose discipline to discuss the conduct.¹⁰⁸ Also, similar to suspensions for five days or less, school districts are not required to maintain a record of the informal meeting for an in-school suspension.¹⁰⁹

A student or person in parental relation to the student may appeal a suspension of five days or less directly to the Commissioner of Education, unless the board of education has a board policy which sets forth the proper appeal procedures for such suspension.¹¹⁰ Failure to strictly adhere to the due process requirements outlined above, will result in the Commissioner of Education issuing a directive to expunge the suspension from the student's record.¹¹¹ However, school districts may correct alleged procedural due process violations by holding a curative hearing and by allowing the student to return to school from the time the due process violation occurred to the date of the curative hearing.¹¹²

iii. Suspensions Exceeding Five Days

Education Law §3214 also develops procedures for suspensions exceeding five days, which also require notice and an opportunity for a fair hearing. The timing, contents of the notice, and nature of the hearing depend on the circumstances of the case.¹¹³

¹⁰⁷ N.Y. EDUC. LAW § 3214(3)(b)(2) (McKinney 2018).

¹⁰⁸ *Appeal of Watts*, 23 Ed. Dept. Rep. 459 (1984).

¹⁰⁹ *Id.*

¹¹⁰ *Appeal of S.C.*, 44 Ed. Dept. Rep. 164 (2004); *see also Appeal of A.B.*, 57 Ed. Dept. Rep. ____, Decision No. 17,172 (2017). Commissioner of Education will only overturn a suspension if it was determined to be arbitrary, capricious, lacked rational basis or was affected by error of law. *Bd. of Educ. of Monticello Cent. Sch. Dist. v. Comm'r of Educ.*, 91 N.Y.2d 133 (1997).

¹¹¹ *See Appeal of P.B.*, 53 Ed. Dept. Rep. ____, Decision No. 16,533 (2013) (ordering the student's suspension be expunged for the following reasons: (1) the parent's right to an informal conference was not provided in the notice prior to the student's suspension; (2) the district failed to personally deliver the notice or use a method reasonably calculated to ensure receipt within 24 hours; and (3) the district failed to provide the parent(s)/guardian(s) with a meaningful opportunity to attend the informal conference and speak to witnesses prior to the imposition of the suspension); *see also Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998); New York State School Boards Association, New York State Association of School Attorneys, "Student discipline, never easy, gets a little harder," (January 27, 2014) *available at* <http://www.nyssba.org/news/2014/01/24/on-board-online-january-27-2014/student-discipline-never-easy-gets-a-little-harder/>.

¹¹² *Appeal of C.Q. and J.Q.*, 41 Ed. Dept. Rep. 294 (2002).

¹¹³ N.Y. EDUC. LAW § 3214(3)(c)(1) (McKinney 2018); *see also Goss*, 419 U.S. 565.

However, if the pupil is a student with a disability, or presumed with a disability, a manifestation proceeding must occur pursuant to N.Y. Education Law 3214(3)(g).¹¹⁴

In contrast to suspensions for five days or less, only the superintendent and the board have authority to suspend a student for more than five days. The pupil must have had the opportunity for a fair hearing, upon reasonable notice,¹¹⁵ at which such pupil will have the right of representation by counsel,¹¹⁶ who has the right to question witnesses¹¹⁷ against such pupil and to present witnesses and other evidence¹¹⁸ on his or her behalf.¹¹⁹ This type of hearing is called a Superintendent's Hearing, as the superintendent of schools, district superintendent of schools, or community superintendent, or his/her designee will personally hear and determine the proceeding or will designate a hearing officer to conduct the hearing.¹²⁰ The hearing does not need to be held within five days of the suspension, but the student must be allowed to return to school after five days if no hearing has been held.¹²¹ A pupil who has previously been suspended for an action by a principal, can be disciplined through a Superintendent's hearing for the same misconduct.¹²² During a hearing, the hearing officer may administer oaths and issue subpoenas in connection with the proceeding.¹²³ Unlike suspensions of five days or less, a record of the hearing must be maintained but no stenographic transcript is

¹¹⁴ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹¹⁵ Reasonable notice varies under the circumstances of each case but one day's notice is insufficient. *Appeal of Eisenhauser*, 33 Ed. Dept. Rep. 604 (1994); see also *Carey v. Savino*, 91 Misc. 2d 50 (holding that less than one day's notice is insufficient to comport with due process because it does not allow the student enough time to secure counsel). Such notice "must provide the student with enough information to prepare an effective defense, but need not particularize every single charge against a student." *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 428 (1999); *Monticello*, 91 N.Y.2d 133 (finding that notice must allow the student and his/her counsel, if any, to prepare and present an adequate defense). Furthermore, the charges must be "sufficiently specific to advise the student and his counsel of the activities or incidents which have given rise to the proceeding and which will form the basis for the hearing." *Appeal of M.P.*, 44 Ed. Dept. Rep. 132 (2004).

¹¹⁶ There is no requirement that a student must be represented by counsel. *Appeal of Albicocco*, 21 Ed. Dept. Rep. 166 (1981).

¹¹⁷ Written statements of witnesses in lieu of testimony cannot be introduced by the school district during a hearing because such introduction violates the student's right to question witnesses. *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of D.C.*, 41 Ed. Dept. Rep. 277 (2002).

¹¹⁸ *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 428 (1999) ("As long as students are given a fair opportunity to tell their side of the story and rebut the evidence against them, due process is served.").

¹¹⁹ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹²⁰ A due process violation does not occur where the superintendent imposes the suspension and acts as the hearing officer. *Appeal of Labriola*, 20 Ed. Dept. Rep. 74 (1980); *Appeal of Payne*, 18 Ed. Dept. Rep. 280 (1978) (finding that the performance of multiple functions by the same person is not a *per se* due process violation).

¹²¹ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

¹²² A short suspension imposed in conjunction with a further penalty for the same action does not constitute double jeopardy. *Appeal of Swingle*, 32 Ed. Dept. Rep. 245 (1992).

¹²³ N.Y. EDUC. LAW § 3214(3)(c)(1).

required, and a tape recording is satisfactory.¹²⁴ At the conclusion of the hearing, the hearing officer will make findings of fact and recommendations to the superintendent as to the appropriate measure of discipline.¹²⁵ Unless completed by the superintendent, the hearing officer's report will be advisory only, and the superintendent can accept all or any part thereof.¹²⁶ However, the decision to suspend a student must be based on "competent and substantial evidence that the student participated in the objectionable conduct."¹²⁷ A student's admission of misconduct is sufficient proof of guilt¹²⁸ and hearsay evidence may also constitute competent and substantial evidence.¹²⁹

A Superintendent's Hearing determination can be appealed to the school district's board of education who will make its decisions solely upon the record of the hearing.¹³⁰ The board of education may adopt, in whole or in part, the decision of the superintendent of schools.¹³¹ However, if the basis for the suspension is the possession of any firearm, rifle, shotgun, dagger, dangerous knife, dirk, razor, stiletto, or any of the weapons, instruments, or appliances specified in N.Y. Penal Law §265.01¹³² on school

¹²⁴ *Id.* No *per se* due process violation occurs when there are inaudible portions of the tape recording. *Appeal of A.G.*, 41 Ed. Dept. Rep. 262 (2002) (holding that the petitioner must show how the inaudible portions of the hearing record may have mitigated against the finding of guilt or penalty imposed before a due process violation will be found to have occurred); *Appeal of Labriola*, 20 Ed. Dept. Rep. 74 (1980) (finding that the inaudible portions of the hearing record did not violate the student's due process rights where the school district gave the student the opportunity to correct any errors). School districts are not required to make a record for suspensions of five days or less. *Appeal of Lee, D.*, 38 Ed. Dept. Rep. 262 (1998).

¹²⁵ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹²⁶ *Id.*; see *Appeal of Cellini*, 30 Ed. Dept. Rep. 473 (1991).

¹²⁷ *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 427 (1999); see also *Appeal of Gorzka*, 35 Ed. Dept. Rep. 20 (1995); *Appeal of Swingle*, 32 Ed. Dept. Rep. 245 (1992); *Appeal of Albicocco*, 21 Ed. Dept. Rep. 166 (1981).

¹²⁸ *Appeal of Esther E.*, 39 Ed. Dept. Rep. 357 (1999); *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997); see also *Monticello*, 91 N.Y.2d 133 (holding that unimpeached testimony that the student admitted the misconduct supports a finding of guilty).

¹²⁹ *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 127 (1999); *Monticello*, 91 N.Y.2d 133.

¹³⁰ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹³¹ *Id.*

¹³² A person is guilty of criminal possession of a weapon in the fourth degree when:

- (1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chukka stick, sand bag, sand club, wrist-brace type slingshot or slingshot, shank or "Kung Fu star"; or
- (2) He or she possesses any dagger, dangerous knife, dirk, machete, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or
- (3) [repealed]
- (4) He possesses a rifle, shotgun, antique firearm, black powder rifle, black powder shotgun, or any muzzle-loading firearm, and has been convicted of a felony or serious offense; or

grounds or school property by the student, the hearing officer or superintendent will not be barred from considering the admissibility of such weapon, instrument, or appliance as evidence, notwithstanding a determination by a court in a criminal or juvenile delinquency proceeding that the recovery of such weapon, instrument or appliance was the result of an unlawful search or seizure.¹³³ Furthermore, student disciplinary hearings may still occur even if there are pending criminal charges against the student involving the same behavior because it is illogical to bar students who have committed lesser offenses from attendance at school for five days while allowing those who committed serious crimes to return pending disposition of the criminal charges.¹³⁴

Should a student be suspended for more than five days by the board of education, the Board may hear and determine the proceeding or appoint a hearing officer who will have the same powers and duties as the Board with respect to a Superintendent's Hearing.¹³⁵

The penalty imposed by either the superintendent or the board must be proportionate to the offense.¹³⁶ A penalty imposed by a school district will be overturned if it is so excessive to warrant substitution of the Commissioner's judgment for that of the superintendent or the board.¹³⁷ Furthermore, school districts may only impose penalties that are legally permissible under §3214 of the Education Law.¹³⁸ The only legally permissible penalty under §3214 is suspension from attendance.¹³⁹ School

(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States; or

(6) He is a person who has been certified not suitable to possess a rifle or shotgun, as defined in subdivision sixteen of section 265.00, and refuses to yield possession of such rifle or shotgun upon the demand of a police officer. Whenever a person is certified not suitable to possess a rifle or shotgun, a member of the police department to which such certification is made, or of the state police, will forthwith seize any rifle or shotgun possessed by such person. A rifle or shotgun seized as herein provided will not be destroyed, but will be delivered to the headquarters of such police department, or state police, and there retained until the aforesaid certificate has been rescinded by the director or physician in charge, or other disposition of such rifle or shotgun has been ordered or authorized by a court of competent jurisdiction.

(7) He knowingly possesses a bullet containing an explosive substance designed to detonate upon impact.

(8) He possesses any armor piercing ammunition with intent to use the same unlawfully against another.

N.Y. PENAL LAW § 265.01 (McKinney 2018).

¹³³ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹³⁴ *Pollnow v. Glennon*, 594 F.Supp. 220 (S.D.N.Y. 1984).

¹³⁵ N.Y. EDUC. LAW § 3214(3)(c)(2); see *Appeal of Cellini*, 30 Ed. Dept. Rep. 473 (1991).

¹³⁶ *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997).

¹³⁷ *Id.*

¹³⁸ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999).

¹³⁹ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

districts may not impose alcohol/drug assessments, counseling services, psychiatric evaluations or community service as a penalty.¹⁴⁰ A permanent suspension is an extreme penalty that may only be applied in extraordinary circumstances where the student shows “an alarming disregard for the safety of others”¹⁴¹ and where it is necessary to safeguard other students, which is discussed more fully below.

iv. Suspension of Pupils who Possess a Weapon on School Property

If a pupil brings a weapon¹⁴² on school property, the pupil will be immediately suspended for a period of not less than one calendar year.¹⁴³ Further, any nonpublic school pupil participating in a program operated by a public school district using funds,¹⁴⁴ who is determined to have brought a firearm to or possessed a firearm at a public school, or other premises used by the school district to provide such programs, will be suspended for a period of not less than one calendar year from participation in such program.¹⁴⁵ School districts may also impose permanent suspension on students who bring guns to school.¹⁴⁶ A superintendent of schools, district superintendent of schools, or community superintendent will have the authority to modify the suspension requirement on a case by case basis.¹⁴⁷ The determination of a superintendent will be subject to review by the board of education which is similar to any suspension of a student for longer than five days, and by the Commissioner of Education pursuant to Education Law §310.¹⁴⁸

Notwithstanding the foregoing, Education Law §3214 does not permit a superintendent to suspend a student with a disability in violation of the Individuals with Disabilities Education Act (“IDEA”) or Article 89 of the Education Law.¹⁴⁹ If the pupil is under the age of sixteen, the Superintendent will refer the pupil to a presentment agency for a juvenile delinquency proceeding consistent with Article Three of the Family Court Act, unless the student is fourteen or fifteen years of age in which they would qualify for

¹⁴⁰ See e.g., *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 427 (1999); *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999); *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998); *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997).

¹⁴¹ *Appeal of A.S. and S.K.*, 44 Ed. Dept. Rep. 129 (1994).

¹⁴² 18 U.S.C. § 930(2)(g).

¹⁴³ N.Y. EDUC. LAW § 3214(3)(d)(1) (McKinney 2018); see also Federal Gun-Free Schools Act, 20 U.S.C. § 4141 *et. seq.*

¹⁴⁴ Pursuant to the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301, *et. seq.*

¹⁴⁵ N.Y. EDUC. LAW § 3214(3)(d)(1); see also 20 U.S.C. § 4141 *et. seq.*; 20 U.S.C. § 6301, *et. seq.*

¹⁴⁶ *Appeal of Henry*, 34 Ed. Dept. Rep. 470 (1995).

¹⁴⁷ N.Y. EDUC. LAW § 3214(3)(d)(1).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

juvenile offender status.¹⁵⁰ Further, should the pupil have written authorization¹⁵¹ of such educational institution possession of such weapon would not warrant discipline.¹⁵²

v. Disciplining Pupils in Possession of Drugs, Alcohol, and Tobacco

School districts have the authority to discipline pupils for possessing, selling, using, or being under the influence of drugs, alcohol, or tobacco while on school property.¹⁵³ School districts may suspend students for such activities because those activities endanger the safety, morals, health, and welfare of others, and are likely a violation of the school district's code of conduct.¹⁵⁴ The Commissioner of Education has held that it is not irrational or an abuse of discretion to impose a greater penalty for drugs than for alcohol or tobacco.¹⁵⁵

For a school to discipline a pupil for being under the influence of alcohol they need to first determine whether the pupil is under the influence of alcohol by acquiring competent and substantial evidence. One way to acquire such evidence is through the use of breathalyzers for such determination.¹⁵⁶ School districts must properly administer such devices since the use of a breathalyzer constitutes a search under the Fourth Amendment.¹⁵⁷ A search must be: (1) justified at its inception; and (2) reasonably related in scope to the circumstances that justified the inception of the search.¹⁵⁸ In addition to the use of a breathalyzer, a school district may acquire competent and substantial evidence that a pupil has consumed alcohol by smelling alcohol on a pupil's breath or observing out of character behavior.¹⁵⁹

Certain activities involving drugs, alcohol, and tobacco constitute crimes under the New York Penal Law. Therefore pupils who engage in these activities will be disciplined and may also be referred to local law enforcement agencies.¹⁶⁰

vi. Waiver of the Right to a Student Disciplinary Hearing

¹⁵⁰ *Id.*; N.Y. CRIM. PROC. LAW § 1.20(42) (McKinney 2018).

¹⁵¹ Written authorization must be in a manner authorized by N.Y. PENAL LAW § 265 for activities approved and authorities by the trustees or board of education or other governing body of the public school and such governing body adopts appropriate safeguards to ensure student safety. N.Y. EDUC. LAW § 3214(3)(d)(2).

¹⁵² N.Y. EDUC. LAW § 3214(3)(d)(2).

¹⁵³ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003); *Appeal of Cynthia and Robert W.*, 37 Ed. Dept. Rep. 437 (1998).

¹⁵⁴ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003); *Appeal of Cynthia and Robert W.*, 37 Ed. Dept. Rep. 437 (1998).

¹⁵⁵ *Appeal of J.P.*, 44 Ed. Dept. Rep. 204 (2004); *Appeal of C.C.*, 44 Ed. Dept. Rep. 207 (2004).

¹⁵⁶ *Appeal of James*, 39 Ed. Dept. Rep. 482 (2000).

¹⁵⁷ *Id.*; *O'Connor v. Ortega*, 480 U.S. 709 (1987).

¹⁵⁸ *O'Connor*, 480 U.S. 709.

¹⁵⁹ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003).

¹⁶⁰ 8 NYCRR § 100.2.

A student's due process right to an opportunity for a student disciplinary hearing may be waived if the waiver is intelligent, knowing and voluntary.¹⁶¹ For a waiver to be valid, the student and his/her parent must be informed of their rights and the consequences of waiving those rights.¹⁶² The school district must provide the student and his/her parent with a written document that explains their rights and the consequences of waiving those rights.¹⁶³ A lawful waiver may only allow penalties that are legally permissible under §3214 of the Education Law.¹⁶⁴ In other words, a school district's waiver system must only allow the imposition of penalties that are legally permissible.¹⁶⁵

vii. Procedure for After a Pupil Has Been Suspended

If a suspended pupil is of compulsory attendance age,¹⁶⁶ immediate steps must be taken for his/her attendance upon instruction elsewhere or for supervision or detention of said pupil pursuant to Article Seven of the Family Court Act.¹⁶⁷ In other words, any student of compulsory age who is suspended from attendance at school must receive an alternative education.¹⁶⁸ Such alternative instruction must be substantially equivalent to the student's regular classroom program.¹⁶⁹ If a pupil has been suspended for cause, the suspension may be revoked by the board of education whenever it is in the best interest of the school and the pupil to do so.¹⁷⁰ The board of education may also condition a student's early return to school and suspension revocation on the pupil's voluntary participation in counseling or specialized classes, including anger management or dispute resolution.¹⁷¹

viii. Involuntary Transfer¹⁷² of Students

The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may transfer a pupil who has not been determined to be a student with a disability or a student presumed to have a disability for discipline

¹⁶¹ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999).

¹⁶² *Id.*

¹⁶³ *Appeal of V.L.*, 44 Ed. Dept. Rep. 160 (2004).

¹⁶⁴ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

¹⁶⁵ *Id.*

¹⁶⁶ N.Y. EDUC. LAW § 3205 (McKinney 2018) ("In each school district of the state, each minor from six to sixteen years of age will attend upon full time instruction.").

¹⁶⁷ *Id.* § 3214(3)(e). School districts must promptly, not instantaneously, provide alternative instruction. *Appeal of Deborah F.*, 42 Ed. Dept. Rep. 178 (2002).

¹⁶⁸ *Appeal of Pickney*, 37 Ed. Dept. Rep. 284 (1998).

¹⁶⁹ *Appeal of A.L., Jr.*, 41 Ed. Dept. Rep. 368 (2003).

¹⁷⁰ N.Y. EDUC. LAW § 3214(3)(e).

¹⁷¹ *Id.*

¹⁷² Involuntary Transfer does not include a transfer made by a school district as part of a plan to reduce racial imbalance within the schools or as a change in school attendance zones or geographical boundaries. *Id.* § 3214(5)(a).

purposes from regular classroom instruction to an appropriate educational setting in another school upon the written recommendation of the school principal and following independent review.¹⁷³

A school principal may initiate a non-requested transfer where it is believed that such a pupil would benefit from the transfer, or when the pupil would receive an adequate and appropriate education in another school program or facility.¹⁷⁴ No recommendation for pupil transfer will be initiated by the principal until such pupil and a person in a parental relation has been sent written notification of the consideration of transfer recommendation.¹⁷⁵ The notice sent to the parents, sets a time and place of an informal conference with the principal and will inform such person in parental relation and such pupil of their right to be accompanied by counsel or an individual of their choice.¹⁷⁶

After the informal conference, should the principal conclude that the pupil would benefit from a transfer or that the pupil would receive an adequate and appropriate education in another school program or facility, the principal may issue a recommendation of transfer to the superintendent.¹⁷⁷ The recommendation will include a description of behavior and/or academic problems indicative of the need for transfer and a description of alternatives explored and prior action taken to resolve the problem.¹⁷⁸ A copy of the letter must be sent to the person in parental relation and to the pupil.¹⁷⁹

Upon receipt of the principal's recommendation for transfer and a determination to consider that recommendation, the superintendent must notify the person in parental relation and the pupil of the proposed transfer and of their right to a fair hearing,¹⁸⁰ and must list community agencies and free legal assistance which may be of assistance.¹⁸¹ The written notice must include a statement that the pupil or person in parental relation has ten (10) days to request a hearing and that the proposed transfer will not take effect, except upon written parental consent, until the ten (10) day period has elapsed or if a fair hearing is requested, until after a formal decision following the hearing is rendered, whichever is later.¹⁸²

¹⁷³ *Id.*

¹⁷⁴ *Id.* § 3214(5)(b).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 3214(5)(c).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* § 3214(3)(c).

¹⁸¹ *Id.* § 3214(5)(d).

¹⁸² *Id.*

ix. Manifestation Proceeding: For Students with Disabilities

a. Discipline Procedures for Students with Disabilities under N.Y. Education Law § 3214

As previously discussed, Education Law §3214 sets forth a specific procedure for disciplining students with disabilities,¹⁸³ or students presumed to have a disability.¹⁸⁴ This is referred to as a manifestation proceeding. A student with, or presumed to have a disability¹⁸⁵ may be suspended or removed from his or her current educational placement for violation of school rules only in accordance with the procedures established for a manifestation¹⁸⁶ proceeding.¹⁸⁷

The trustees or board of education of any school district, a district superintendent of schools, or building principal has the authority to order the placement of a student with

¹⁸³ *Id.* § 4401(1).

A “student with a disability” means a person under the age of twenty-one who is entitled to attend public schools pursuant to section thirty-two hundred two of this chapter and who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education. Such term does not include a child whose educational needs are due primarily to unfamiliarity with the English language, environmental, cultural or economic factors. Lack of appropriate instruction in reading, including in the essential components of reading instruction as defined in subsection three of section twelve hundred eight of the elementary and secondary education act of nineteen hundred sixty-five, or lack of appropriate instruction in mathematics or limited English proficiency will not be the determinant factor in identifying a student as a student with a disability. “Special education” means specially designed instruction which includes special services or programs as delineated in subdivision two of this section, and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability. A “child with a handicapping condition” means a child with a disability.

Id.

¹⁸⁴ Student presumed to have a disability is defined as a student who the school district is deemed to have knowledge was a student with a disability before the behavior that precipitated disciplinary action. N.Y. EDUC. LAW § 3214(3)(g)(2); *see also* 20 U.S.C. § 1415(k).

¹⁸⁵ A school district is deemed to have knowledge that the student had a disability if prior to the time the behavior occurred: (1) the student’s parent has expressed concern to school district personnel in writing that the student is in need of special education (may be oral if parent does not know how to write or has a disability that prevents a written statement); (2) the student’s behavior or performance demonstrates the need for special education; (3) the student’s parent has requested that an individual evaluation of the student be conducted; or (4) the student’s teacher, or other school district personnel, has expressed concern about the student’s behavior or performance to the director of special education or to other school district personnel in accordance with the district’s established child find or special education referral system. 8 NYCRR § 201.5(b); *see also Appeal of a Student Suspected of Having a Disability*, 41 Ed. Dept. Rep. 341 (2002).

¹⁸⁶ N.Y. EDUC. LAW § 3214(3)(g)(2)(ii) (A manifestation team is a representative of the school district, the parent or person in parental relation, and relevant members of the committee on special education, as determined by the parent or person in parental relation).

¹⁸⁷ *Id.* § 3214(3)(g)(1).

a disability into an appropriate interim alternative educational setting (“IAES”), or another setting.¹⁸⁸ They also have the authority to suspend a pupil for a period not to exceed five consecutive school days where such student is suspended as long as the suspension does not result in a change in placement,¹⁸⁹ or if determined upon a recommendation of a hearing officer.¹⁹⁰

The superintendent of schools of a school district, either directly or upon recommendation of a hearing officer, may do the following: 1) order the placement of a student with a disability into an IAES, or another setting; 2) suspension for up to ten (10) consecutive school days, inclusive of any period in which the student is placed in an appropriate interim alternative educational placement, another setting or suspension, where the superintendent determines that the student has engaged in behavior that warrants a suspension and does not result in change of placement;¹⁹¹ and 3) order the change in placement of a student with a disability to an IAES for up to forty-five (45) days, but not to exceed the period of suspension ordered by a superintendent.¹⁹²

However, should a Committee on Special Education (“CSE”) determine that the behavior of a student with a disability was not a manifestation of the student’s disability, then the student can be disciplined similar to a student that does not have a disability, except that such student must continue to receive services, albeit in an interim alternative setting.¹⁹³

b. Discipline Procedures for Students with (or presumed to have) a Disability under the Commissioner’s Regulations

The Commissioner of Education has adopted regulations for suspensions and removals of students with disabilities. A manifestation of a review of the relationship between the student’s disability and the behavior subject to disciplinary action must be made immediately, if possible, but in no case later than ten (10) school days after:

- 1) A decision is made by a superintendent of schools to change the placement of a student to an IAES; or

¹⁸⁸ *Id.* §§ 3214(3)(g)(3)(ii), (iv).

¹⁸⁹ The United States Supreme Court has held that removing a student from school for more than ten days constitutes a change in educational placement. *Honig v. Doe*, 484 U.S. 305 (1988).

¹⁹⁰ N.Y. EDUC. LAW §§ 3214(3)(g)(3)(ii), (iv).

¹⁹¹ *Id.* § 3214(3)(g)(3)(iii). Such short-term suspensions may be used to temporarily remove a disabled student who violated the school district’s code of conduct or who poses an immediate threat to the safety of others, even if the behavior related to the disability. *Appeal of a Student with a Disability*, 34 Ed. Dept. Rep. 634 (1995).

¹⁹² N.Y. EDUC. LAW § 3214(3)(g)(3)(iv).

¹⁹³ *Id.* § 3214(3)(g)(3)(vi).

- 2) A decision is made by an impartial hearing officer to place a student in an IAES;
or
- 3) A decision is made by a board of education, district superintendent of schools, building principal or superintendent to impose a suspension that constitutes a disciplinary change in placement.¹⁹⁴

A manifestation review is conducted by a manifestation team following the determination by a hearing officer that the student is found guilty of the misconduct.¹⁹⁵ The manifestation team includes a representative of the school district knowledgeable about the student and the interpretation of information about child behavior.¹⁹⁶ The parent and other relevant members of the CSE are also included in the manifestation review.¹⁹⁷ The manifestation team reviews all relevant information in the student's file, including the student's individualized education plan ("IEP"), any teacher observations, and any relevant information provided by the parents to determine if:

- 1) The conduct in question was caused by or had a direct and substantial relationship to the student's disability; or
- 2) The conduct in question was the direct result of the school district's failure to implement the IEP.¹⁹⁸

If either of these conditions are met, then it is determined that the conduct was a manifestation of the student's disability.¹⁹⁹ If a nexus is found between the misconduct and the student's disability, a suspension beyond ten school days may not be imposed, unless the student's presence constitutes a dangerous situation.²⁰⁰ Also, if the manifestation team ultimately determines that the conduct was a manifestation of the student's disability, a referral must be made to the CSE to determine whether a program modification is required.²⁰¹ In order to make such determination, the CSE must conduct a functional behavioral assessment ("FBA") and return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan ("BIP").²⁰² If no nexus is found between the student's misconduct and his/her

¹⁹⁴ 8 NYCRR § 201.4(a).

¹⁹⁵ *Id.* § 201.4(b). Students with disabilities are "entitled to an assessment by a multidisciplinary team to recommend accommodations and modifications necessary to meet the educational needs of the student." *Appeal of a Student with a Disability*, 34 Ed. Dept. Rep. 634 (1995).

¹⁹⁶ 8 NYCRR § 201.4(b).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* § 201.4(c).

¹⁹⁹ *Id.* § 201.4(d)(1).

²⁰⁰ *Appeal of a Student with a Disability*, 35 Ed. Dept. Rep. 22 (1995).

²⁰¹ *Id.*

²⁰² 8 NYCRR § 201.4(d)(2).

disability, the school district may impose a penalty.²⁰³ However, the student's placement may not be changed without compliance with due process requirements.²⁰⁴

No later than the date on which a decision is made to change the placement of a student with a disability to an interim alternate educational setting ("IAES"),²⁰⁵ or a decision to impose a suspension or removal,²⁰⁶ that constitutes a disciplinary change in placement,²⁰⁷ the parent must be notified of such decision and will be provided with the procedural safeguards notice.²⁰⁸

²⁰³ *Appeal of a Student with a Disability*, 36 Ed. Dept. Rep. 273 (1996). If no nexus is found, a student's anecdotal record may be considered but only under these circumstances. *Id.*

²⁰⁴ *Appeal of a Student with a Disability*, 35 Ed. Dept. Rep. 22 (1995).

²⁰⁵ 8 NYCRR § 201.2(k).

An interim alternative educational setting or IAES is a temporary educational placement, other than the student's current placement at the time the behavior precipitating the IAES placement occurred. A student who is placed in an IAES will:

- 1) Continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and
- 2) Receive as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

Id.

²⁰⁶ 8 NYCRR § 201.2(l) (Removal is defined as: "1) a removal of a student with a disability for disciplinary reasons from that student's current educational placement and 2) the change in placement of a student with a disability to an IAES by an impartial hearing officer.").

²⁰⁷ *Id.* § 201.2(e).

A disciplinary change in placement means a suspension or removal from a student's current educational placement that is either:

- 1) For more than 10 consecutive school days or
- 2) For a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year; because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and because such additional factors as the length of each suspension or removal, the total amount of time the student has been removed and the proximity of the suspensions or removals to one another. The school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

Id.

²⁰⁸ 8 NYCRR § 201.4(3).

Prior written notice must include:

- (i) a description of the action proposed or refused by the district;
- (ii) an explanation of why the district proposes or refuses to take the action;
- (iii) a description of other options that the CSE considered and the reasons why those options were rejected;
- (iv) a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action;
- (v) a description of other factors that are relevant to the CSE's proposal or refusal;

The trustees or board of education of any school district, a district superintendent of schools, or a building principal with the authority to suspend students pursuant to Education Law §3214 will have the authority to order the placement of a student with a disability into an appropriate IAES, another setting or suspension for a period not to exceed five (5) consecutive school days, and not to exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior.²⁰⁹

A superintendent of schools, either directly or upon recommendation of a hearing officer designated to conduct a superintendent's hearing, may order the placement of a student with a disability into an IAES, another setting, or suspension for up to ten (10) consecutive school days, inclusive of any period in which the student has been suspended or removed²¹⁰ for the same behavior.²¹¹ Should the superintendent determine that the student has engaged in behavior that warrants a suspension, the duration of any such suspension or removal will not exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior.²¹² Except for when a student with a disability has a pattern of suspensions or removals, a superintendent of schools may only order additional suspensions of not more than ten (10) consecutive school days in the same school year for separate incidents of misconduct.²¹³

However, a student with a disability may not be removed other than imposition of the five (5) or ten (10) school day suspension if the removal would result in a disciplinary change in placement based on pattern of suspensions or removal as determined by school personnel.²¹⁴ If the manifestation team has determined that the behavior was not a manifestation of such student's disability or the student is placed in an IAES, the student may be removed.²¹⁵

Should a student with a disability be charged with behavior involving serious bodily injury, weapons, illegal drugs or controlled substances, a superintendent of schools,

-
- (vi) a statement that the parents of a student with a disability have protection under the procedural safeguards of this Part, and, if this notice is not an initial referral for an evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
 - (vii) sources for parents to contact to obtain assistance in understanding the provisions of this Part.

Id. § 201.7.

²⁰⁹ 8 NYCRR § 201.7(b).

²¹⁰ Irrespective of any suspension of five days or less for the same behavior issued by the Principal under 8 NYCRR § 201.7(b).

²¹¹ 8 NYCRR § 201.7(c).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* § 201.7(d).

²¹⁵ *Id.* § 201.7(d).

either directly or upon recommendation of a hearing officer, may order the change in placement of a student with a disability to an appropriate IAES, to be determined by the CSE for up to forty-five (45) school days, but not to exceed the period of suspension ordered by the Hearing Officer,²¹⁶ where the student:²¹⁷

- 1) Has inflicted serious bodily injury,²¹⁸ upon another person while at school, on school premises or at a school function under the jurisdiction of the educational agency;²¹⁹
- 2) Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of the educational agency;²²⁰ or
- 3) Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of the educational agency.²²¹

Notwithstanding the foregoing, the period of suspension or removal ordered by the superintendent may not exceed the amount of time that a nondisabled student would be suspended for the same behavior.²²² School personnel may also consider any unique circumstances on a case-by-case basis when determining whether a change in placement consistent with the other requirements of Part 201 of the Commissioner's Regulations is appropriate for a student with a disability who violates a school district's Student Code of Conduct.²²³

During any period of suspension, a student with a disability will be provided services to the extent required.²²⁴ During a suspension or removal for periods of up to ten (10) school days in a school year that do not constitute a disciplinary change in placement, students of compulsory attendance age with a disability will be provided with alternative instruction on the same basis as nondisabled students.²²⁵

²¹⁶ N.Y. EDUC. LAW § 3214(3).

²¹⁷ 8 NYCRR § 201.7(e)(1).

²¹⁸ *Id.* § 201.2(m) ("Serious bodily injury means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.").

²¹⁹ *Id.* § 201.7(e)(1)(i).

²²⁰ *Id.* § 201.7(e)(1)(ii).

²²¹ *Id.* § 201.7(e)(1)(iii).

²²² *Id.* § 201.7(e)(2).

²²³ *Id.* § 201.7(f).

²²⁴ *Id.* § 201.10(a).

²²⁵ *Id.* § 201.4(b).

B. Dignity for All Students Act (DASA)

The Dignity for All Students Act (“DASA”) was signed into law on September 13, 2010, and took effect on July 1, 2012 (with supplemental provisions on cyberbullying taking effect in July of 2013), to afford all students in public schools a safe and supportive school environment free of harassment, bullying and discrimination.²²⁶ The legislation amended the Education Law by creating Article 2, “Dignity for All Students.” The Act also expanded Section 801-a of the Education Law by requiring that the mandated course of instruction in grades kindergarten through twelve, in civility, citizenship and character education include a component raising awareness and sensitivity to discrimination or harassment and civility.²²⁷ Additionally, DASA amended Education Law, Section 2801 by requiring the inclusion of language, compliant with DASA, into school districts’ Codes of Conduct.²²⁸

1. Requirements for School Districts

i. Article 2 of the Education Law

DASA provides that no student will be subjected to harassment or bullying, nor will any student be subjected to discrimination based on the student’s “actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender²²⁹ or sex.”²³⁰ The law’s broad definition of harassment makes it clear that the law protects students from threats, intimidation and abuse based on, but not limited to, the above categories.²³¹ DASA applies to harassment, bullying or

²²⁶ N.Y. EDUC. LAW § 12 (McKinney 2018); *see also The Dignity Act for All Students*, N.Y. ST. EDUC. DEP’T (NYSED), <http://www.p12.nysed.gov/dignityact/> (last updated July 9, 2018).

²²⁷ N.Y. EDUC. LAW § 801-a (McKinney 2018).

²²⁸ *Id.* § 2801(n).

²²⁹ DASA states that “gender” means “actual or perceived sex and will include a person’s gender identity or expression.” *Id.* § 11(6).

²³⁰ *Id.* § 12(1).

²³¹ DASA defines harassment and bullying as:

the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that (a) has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being; or (b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

Id. § 11(7). The conduct, verbal threats, intimidation or abuse includes but is not limited to such acts “based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.” *Id.* The statute also includes the

discrimination of students by employees or students on school property or at a school function.²³² However, DASA does not prohibit denial of admission into, or exclusion from, a course of instruction based on a person's gender otherwise permissible under law, or to prohibit, as discrimination based on disability, actions that would otherwise be permissible under law.²³³

Under DASA, a school district's Board of Education is required to create policies and guidelines implementing its provisions. School districts must establish policies intended to create a school environment that is free from harassment, bullying, and discrimination; guidelines to be used in school training programs to discourage the development of harassment, bullying, and discrimination, and to make school employees aware of the effects of harassment, bullying, cyberbullying, and discrimination on students; guidelines that are designed to raise employees' awareness and sensitivity to potential harassment, bullying and discrimination, and to enable employees to prevent and respond to incidents of harassment, bullying and discrimination; as well as guidelines relating to the development of nondiscriminatory instructional and counseling methods.²³⁴

Additionally, a Dignity Act Coordinator must be appointed at every school. The Dignity Act Coordinator is an individual "thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex."²³⁵

Provisions in the policies and procedures must include, but not be limited to, provisions which:

1. Identify the principal, superintendent, or either individual's designee as the school employee charged with receiving reports of harassment, bullying and discrimination;²³⁶

2. Enable students and parents to make an oral or written report of harassment, bullying or discrimination to teachers, administrators and other school personnel that the school district deems appropriate;²³⁷

3. Require school employees who witness harassment, bullying or discrimination, or who receive an oral or written report of such incidents, to promptly

definition of "cyberbullying," which is defined as harassment or bullying occurring through any form of electronic communication. *Id.* § 11(8).

²³² N.Y. EDUC. LAW § 12(1).

²³³ *Id.*

²³⁴ *Id.* § 13(1)-(3).

²³⁵ *Id.* § 13(3).

²³⁶ *Id.* § 13(1)(A).

²³⁷ *Id.* § 13(1)(B).

orally notify the principal, superintendent or either individual's designee not later than one school day after such school employee witnesses or receives a report of harassment, bullying or discrimination, and to file a written report with the principal, superintendent or either individual's designee not later than two school days after making such oral report;²³⁸

4. Require the principal, superintendent or either individual's designee to lead or supervise the thorough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports;²³⁹

5. Require that when an investigation reveals any such verified harassment, bullying or discrimination, the school take prompt actions reasonably calculated to end the harassment, bullying or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such harassment, bullying or discrimination was directed. The actions must be consistent with the guidelines to be created by the school district related to the development of measured, balanced and age-appropriate responses to such incidents;²⁴⁰

6. Prohibit retaliation against any individual who, in good faith, reports, or assists in the investigation of harassment, bullying or discrimination;²⁴¹

7. Include a school strategy to prevent harassment, bullying and discrimination;²⁴²

8. Require the principal to make a regular report to the superintendent on data and trends related to harassment, bullying and discrimination;²⁴³

9. Require the principal, superintendent or either individual's designee to promptly notify the appropriate local law enforcement agency when such individual believes that any harassment, bullying or discrimination constitutes criminal conduct;²⁴⁴

10. Include appropriate references to the provisions of the school district's code of conduct that are relevant to harassment, bullying and discrimination;²⁴⁵

²³⁸ *Id.* § 13(1)(C).

²³⁹ *Id.* § 13(1)(D).

²⁴⁰ *Id.* § 13(1)(E).

²⁴¹ *Id.* § 13(1)(F).

²⁴² *Id.* § 13(1)(G).

²⁴³ *Id.* § 13(1)(H).

²⁴⁴ *Id.* § 13(1)(I).

²⁴⁵ *Id.* § 13(1)(J).

11. Require that at least once during each school year, each school provide all school employees, students and parents with a written or electronic copy of the school district's policies on bullying, harassment and discrimination created in accordance with DASA, or a plain-language summary thereof, which includes a notification of the process by which students, parents and school employees may report harassment, bullying and discrimination. However, it is not necessary for school districts to further distribute such policies and guidelines to school employees, students and parents if they otherwise do so;²⁴⁶ and

12. Require the school district to maintain current versions of the school district's policies created pursuant to the requirements of DASA, on the school district's internet website, if one exists.²⁴⁷

School Training Programs under DASA

Back in May of 2012, the Board of Regents adopted Regulations with respect to training requirements.²⁴⁸ The Regulations require school districts to establish guidelines to implement school employee training programs, which promote a positive school environment free from harassment, bullying, and discrimination, and to discourage and respond to such incidents. In addition, these Regulations were amended in 2013 to require school districts to create guidelines that also address bullying, and that make school employees aware of the effects of harassment, bullying, cyberbullying, and discrimination.²⁴⁹ The guidelines will include, but not be limited to, the following:

- training to raise awareness and sensitivity to potential acts of discrimination and/or harassment directed at students, committed by employees or students, on school property or at school functions, including but not limited to, discrimination and/or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. Such training must address the "social patterns of harassment, bullying and discrimination, the identification and mitigation of such acts, and strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings;"²⁵⁰
- training to enable employees to prevent and respond to incidents of discrimination, bullying and/or harassment;²⁵¹

²⁴⁶ *Id.* § 13(1)(K).

²⁴⁷ *Id.* § 13(1)(L).

²⁴⁸ *See* 8 NYCRR § 100.2.

²⁴⁹ N.Y. EDUC. LAW § 13(2).

²⁵⁰ 8 NYCRR § 100.2(jj)(3)(i); N.Y. EDUC. LAW § 13(5).

²⁵¹ 8 NYCRR § 100.2(jj)(3)(ii).

- training to make employees aware of the effects of harassment, bullying, cyberbullying, and/or discrimination on students;²⁵²
- training to ensure the effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging harassment, bullying and/or discrimination against students by students and/or school employees;²⁵³ and
- training to include safe and supportive school climate concepts in curriculum and classroom management.²⁵⁴

The Regulations do not specify the extent of the training required; however, the Regulations provide it may be incorporated into an existing professional development plan required under the Commissioner’s Regulations and/or conducted in conjunction with any other training for school employees.²⁵⁵ DASA and its accompanying regulations also require a school district’s board of education to create guidelines relating to the development of measured, balanced and age-appropriate responses to instances of harassment, bullying or discrimination by students. Such guidelines must include: (a) remedies and procedures that follow a progressive model that make appropriate use of intervention, discipline and education, which vary in method according to the nature of the behavior, the developmental age of the student and the student’s history of problem behaviors, and (b) are consistent with the school district’s code of conduct.²⁵⁶

Dignity Act Coordinator Training & Dissemination of Dignity Act Coordinator Information

Under DASA, Dignity Act Coordinators are required to receive training that coincides with the requirements of school training programs under Education Law §13. Therefore, Dignity Act Coordinators are required to be provided with training:

1. which addresses the social patterns of harassment, bullying and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;²⁵⁷

²⁵² *Id.* § 100.2(jj)(3)(iii).

²⁵³ *Id.* § 100.2(jj)(3)(iv).

²⁵⁴ *Id.* § 100.2(jj)(3)(v).

²⁵⁵ *See id.* § 100.2(jj)(3)(vi).

²⁵⁶ N.Y. EDUC. LAW § 13(4).

²⁵⁷ 8 NYCRR § 100.2(jj)(4)(iii).

2. in the identification and mitigation of harassment, bullying and discrimination;²⁵⁸ and

3. in strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings.²⁵⁹

Furthermore, Dignity Act Coordinators and school employees should be informed during the training program that the Regulations should not be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender, or to prohibit discrimination based on disability, that would be permissible under law.²⁶⁰

Additionally, the Commissioner's Regulations include requirements for appointment of, and dissemination of information regarding, the Dignity Act Coordinator(s). The Dignity Act Coordinator(s) must be approved by the board of education, trustees or board of trustees and "be employed by such school district, BOCES or charter school, as applicable, and be licensed and/or certified by the Commissioner as a classroom teacher, school counselor, school psychologist, school nurse, school social worker, school administrator or supervisor, or superintendent of schools."²⁶¹ Also, their name(s) and contact information must be shared with all personnel, students and parents.

The Regulations require that contact information be disseminated in the following manner:

1. listing the information in the Code of Conduct and updates thereto posted on the school district's website;²⁶²
2. including the information in the plain language summary of the Code of Conduct provided to all parents at the beginning of the year;²⁶³
3. including the information to parents and persons in parental relation at least once per school year in a manner determined by the school, including, but not limited to, through electronic communication and/or sending the information home with students;²⁶⁴
4. posting the information in highly-visible areas of school buildings;²⁶⁵ and

²⁵⁸ *Id.* § 100.2(jj)(4)(iv).

²⁵⁹ *Id.* § 100.2(jj)(4)(v).

²⁶⁰ *Id.* § 100.2(jj)(5).

²⁶¹ *Id.* § 100.2(jj)(4)(vi).

²⁶² *Id.* § 100.2(jj)(4)(vii)(a).

²⁶³ *Id.* § 100.2(jj)(4)(vii)(d).

²⁶⁴ *Id.* § 100.2(jj)(4)(vii)(e).

²⁶⁵ *Id.* § 100.2(jj)(4)(vii)(b).

5. making the information available at the school district and at school-level administrative offices.²⁶⁶

In the event the Dignity Act Coordinator vacates his/her position, another school employee will immediately be designated for an interim appointment as Coordinator, pending approval of a successor Coordinator within thirty (30) days.²⁶⁷

ii. Education Law, Section 801-a

Under Education Law, Section 801-a, school districts are required to provide instruction in civility, citizenship and character education which includes a component instructing students on the principles of honesty, tolerance, personal responsibility, respect for others, observance of laws and rules, courtesy, dignity and other traits that will enhance the quality of students' experiences in, and contributions to, the community.²⁶⁸ The course must also include an additional component which emphasizes discouraging acts of harassment, bullying and discrimination. This component must include instruction of safe, responsible use of the Internet and electronic communications. DASA expands the concepts of "tolerance," "respect for others" and "dignity" by requiring school districts, when providing the required civility, citizenship, and character education, to include in such instruction, raising "awareness and sensitivity to discrimination, bullying or harassment and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes."²⁶⁹

Commissioner's Regulations

In line with Section 801-a of the Education Law, Section 100.2(c) of the Commissioner's Regulations outlines the required subjects of instruction in elementary and secondary schools.²⁷⁰ The regulation includes a requirement that all public school students, other than students in charter schools, receive instruction in civility, citizenship and character education as required by Section 801-a of the Education Law.

Additionally, the Board of Regents adopted a Regulation that became effective on July 1, 2012, which includes a provision requiring charter schools to provide instruction that supports the development of a school environment free of harassment, bullying, and discrimination as required by DASA.²⁷¹ Charter schools were previously exempt from the requirement. The instruction must contain the same components as the instruction

²⁶⁶ *Id.* § 100.2(jj)(4)(vii)(c).

²⁶⁷ *Id.* § 100.2(jj)(4)(viii).

²⁶⁸ N.Y. EDUC. LAW § 801-a.

²⁶⁹ *Id.*

²⁷⁰ *See* 8 NYCRR § 100.2(c).

²⁷¹ *See id.* § 119.6.

provided by other public schools. However, because it is not necessary for charter schools to provide a curriculum component on civility, citizenship and charter education, the instruction must be incorporated into another portion of a charter school's curriculum.²⁷²

iii. Education Law Section 2801 and Codes of Conduct

DASA amended Section 2801 of the Education Law, by requiring school districts to include in their Codes of Conduct provisions in compliance with Article 2 of the Education Law, or DASA. Specifically, Article 2 of the Education Law requires inclusion into a school district's Code of Conduct, a version of the policy prohibiting harassment and bullying of students by employees or students, and/or discrimination by same, based upon a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.²⁷³ The policy must be age appropriate and written in plain language.²⁷⁴ Currently, Education Law § 2801(5) requires school districts to annually review their Codes of Conduct and update them if necessary.²⁷⁵

Commissioner's Regulations

Section 100.2(l)(2) of the Commissioner's Regulations, which sets forth the provisions required to be included in a Code of Conduct, were amended in accordance with DASA. Specifically, the Regulations require that school districts modify their Codes of Conduct to include:

- “provisions prohibiting harassment, bullying and/or discrimination against any student, by employees or students, [on school property and/or at a school function or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property,] that creates a hostile environment by conduct, [with or without physical contact and/or by verbal] threats, intimidation or abuse, including cyberbullying [of such a severe nature] that either: (1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (2) reasonably causes or would reasonably be expected to cause physical injury to a student to fear for his or her physical safety. ... Such conduct will include, but is

²⁷² See *id.* § 100.2(c)(2); see also *id.* § 119.6.

²⁷³ N.Y. EDUC. LAW § 12; see also N.Y. EDUC. LAW ART. 2.

²⁷⁴ N.Y. EDUC. LAW § 12(2).

²⁷⁵ *Id.* § 2801(5).

not limited to, acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, or sex."²⁷⁶

- "disciplinary measures to be taken for incidents on school property or at school functions involving harassment, bullying and/or discrimination."²⁷⁷
- "provisions for responding to acts of bullying, harassment and/or discrimination against students by employees or students ... which, with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses will be reasonably calculated to end the harassment, bullying and/or discrimination, prevent recurrence, and eliminate the hostile environment. The progressive model of student discipline will be consistent with the other provisions of the code of conduct."²⁷⁸
- "provisions setting forth the procedures by which local law enforcement agencies will be notified promptly of code violations, including but not limited to incidents of harassment, bullying, and/or discrimination, which may constitute a crime."²⁷⁹
- "a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which will be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis."²⁸⁰
- "guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, harassment, bullying and discrimination against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management."²⁸¹

²⁷⁶ 8 NYCRR § 100.2(l)(2)(ii)(b).

²⁷⁷ *Id.* § 100.2(l)(2)(ii)(g).

²⁷⁸ *Id.* § 100.2(l)(2)(ii)(h).

²⁷⁹ *Id.* § 100.2(l)(2)(ii)(l).

²⁸⁰ *Id.* § 100.2(l)(2)(ii)(r).

²⁸¹ *Id.* § 100.2(l)(2)(ii)(s).

- “provisions prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.”²⁸²

Furthermore, Section 100.2(1)(2) of the Commissioner’s Regulations also requires Boards of Education and Boards of Cooperative Educational Services to ensure community awareness of their Codes of Conduct by posting the complete Code of Conduct, including any annual updates or amendments thereto, on their website, if they maintain one, and by providing copies of a summary of the Code of Conduct to all students, in an age-appropriate, plain-language version, either at a school assembly held at the beginning of each school year or by mailing it to all persons in parental relation before the beginning of each school year.²⁸³ Additionally, school districts are to provide a complete copy of the Code of Conduct to all existing and new teachers and to make a complete copy available for review by students, parents, other school staff and other community members.²⁸⁴

iv. School Safety Plans

In addition to codes of conduct, school districts must also adopt and amend a comprehensive district-wide school safety plan and building level emergency response plans regarding crisis intervention, emergency response, and management.²⁸⁵ These plans must be developed by a district-wide school safety team and a building level emergency response team.²⁸⁶

Such comprehensive district wide safety plans must include the following:

- 1) Policies and procedures for responding to implied or direct threats of violence by students, teachers, or other school personnel as well as visitors to the school, including threats by students against themselves, including suicide.²⁸⁷
- 2) Policies and procedures for responding to acts of violence by students, teachers, other school personnel, as well as school visitors, including consideration of zero-tolerance policies for school violence.²⁸⁸
- 3) Appropriate prevention and intervention strategies, including:²⁸⁹

²⁸² *Id.* § 100.2(1)(2)(ii)(t).

²⁸³ *Id.* § 100.2(1)(2)(iii)(b).

²⁸⁴ *Id.*

²⁸⁵ N.Y. EDUC. LAW § 2801-a(1) (McKinney 2018).

²⁸⁶ *Id.*

²⁸⁷ *Id.* § 2801-a(2)(a).

²⁸⁸ *Id.* § 2801-a(2)(b).

- a) Collaborative arrangements with state and local law enforcement officials, designed to ensure that school safety officers and other security personnel are adequately trained, including being trained to de-escalate potentially violent situations;²⁹⁰
 - b) Non-violent conflict resolution training programs;²⁹¹
 - c) Peer mediation programs and youth courts;²⁹² and
 - d) Extended day and other school safety programs.²⁹³
- 4) Policies and procedures for contacting appropriate law enforcement officials in the event of a violent incident.²⁹⁴
 - 5) Policies and procedures for contacting parents, guardians or persons in parental relation to the students of the district in the event of a violent incident and policies and procedures for contacting parents, guardians, or persons in parental relation to an individual student of the district in the event of an implied or direct threat of violence by such student against themselves, including suicide.²⁹⁵
 - 6) Policies and procedures relating to school building security, including where appropriate the use of school safety officers and/or security devices or procedures.²⁹⁶
 - 7) Policies and procedures for the dissemination of informative materials regarding the early detection of potentially violent behaviors.²⁹⁷
 - 8) Policies and procedures for annual school safety training for staff and students.²⁹⁸
 - 9) Protocols for responding to bomb threats, hostage taking, intrusions, and kidnappings.²⁹⁹

²⁸⁹ *Id.* § 2801-a(2)(c).

²⁹⁰ *Id.* § 2801-a(2)(c)(i).

²⁹¹ *Id.* § 2801-a(2)(c)(ii).

²⁹² *Id.* § 2801-a(2)(c)(iii).

²⁹³ *Id.* § 2801-a(2)(c)(iv).

²⁹⁴ *Id.* § 2801-a(2)(d).

²⁹⁵ *Id.* § 2801-a(2)(e).

²⁹⁶ *Id.* § 2801-a(2)(f).

²⁹⁷ *Id.* § 2801-a(2)(g).

²⁹⁸ *Id.* § 2801-a(2)(h).

²⁹⁹ *Id.* § 2801-a(2)(i).

- 10) Strategies for improving communication among students and between students and staff and reporting of potentially violent incidents, such as the establishment of youth-run programs, peer mediation, conflict resolution, creating a forum or designating a mentor for students concerned with bullying or violence and establishing anonymous reporting mechanism for school violence.³⁰⁰
- 11) A description of the duties of hall monitors and any other school safety personnel.³⁰¹

A building level emergency response plan must include the following elements:

- 1) Policies and procedures for response to emergency situations, such as those requiring evacuation, sheltering, and lock-down.³⁰²
- 2) Designation of an emergency response team comprised of school personnel, law enforcement officials, fire officials, and representatives from local regional and/or state emergency response agencies.³⁰³
- 3) Floor plans, blueprints, schematics, or other maps of the school interior, school grounds and road maps.³⁰⁴
- 4) Establishment of internal and external communication systems in emergencies.³⁰⁵
- 5) Definition of the chain of command in a manner consistent with the national interagency incident management system/incident command system.³⁰⁶
- 6) Coordination of the emergency response plan with the state-wide plan for disaster mental health services to assure that the school has access to federal, state, and local mental health resources.³⁰⁷
- 7) Procedures for review and the conduct of drills and other exercises to test components of the emergency response plan.³⁰⁸

³⁰⁰ *Id.* § 2801-a(2)(j).

³⁰¹ *Id.* § 2801-a(2)(k).

³⁰² *Id.* § 2801-a(3)(a).

³⁰³ *Id.* § 2801-a(3)(b).

³⁰⁴ *Id.* § 2801-a(3)(c).

³⁰⁵ *Id.* § 2801-a(3)(d).

³⁰⁶ *Id.* § 2801-a(3)(e).

³⁰⁷ *Id.* § 2801-a(3)(f).

³⁰⁸ *Id.* § 2801-a(3)(g).

- 8) Policies and procedures for securing and restricting access to the crime scene in order to preserve evidence in cases of violent crimes on school property.³⁰⁹

2. Requirements for the Commissioner of Education

DASA requires the Commissioner of Education to provide direction, which may include model policies, to school districts to prevent harassment, bullying, and discrimination.³¹⁰ The Commissioner must also provide grants to school districts to facilitate the implementation of the guidelines.³¹¹ In addition, DASA requires the Commissioner to promulgate regulations to assist school districts in implementing this law, as well as provide guidance related to the application of the regulations. Such regulations will include, “but not [be] limited to, regulations to assist school districts in developing measured, balanced and age appropriate responses to violations of this policy, with remedies and procedures following a progressive model that makes appropriate use of intervention, discipline and education.”³¹²

Additionally, DASA requires the Commissioner to create a procedure so that school districts report to the State Education Department, at least annually, material incidents of discrimination, bullying and harassment on school grounds or at a school function.³¹³ The reports must delineate the specific nature of the incidents of harassment, bullying or discrimination and may comply with the reporting requirements through the use of the existing uniform violent incident reporting system.³¹⁴

Furthermore, the Commissioner must provide school districts with guidance and educational materials relating to best practices in addressing cyberbullying and which help families and communities work cooperatively with schools in addressing cyberbullying, whether it occurs on or off school property, or at or away from a school function.³¹⁵

The Commissioner will also prescribe regulations that require, in addition to all other certification and licensing requirements, that school professionals applying for a certificate or a license, on or after July 1, 2013, have completed training on the social patterns of harassment, bullying and discrimination and the identification and mitigation of same, as well as strategies for effectively addressing problems of exclusion, bias and aggression in educational settings. This includes, but is not limited to, certificates or licenses for service as a classroom teacher, school counselor, school

³⁰⁹ *Id.* § 2801-a(3)(h).

³¹⁰ *Id.* § 14(1).

³¹¹ *Id.* § 14(2).

³¹² *Id.* § 14(3).

³¹³ *Id.* § 15.

³¹⁴ *Id.*

³¹⁵ *Id.* § 14(4).

psychologist, school social worker, school administrator or supervisor, or superintendent of schools.³¹⁶

Reporting Regulations

The Commissioner has created Regulations amending Section 100.2 of the Commissioner's Regulations to add a Dignity Act reporting requirement. The Regulations require each school district to submit to the Commissioner an annual report of material incidents of discrimination, bullying and harassment that occurred in such school year, in accordance with Education Law Section 15 and the Commissioner's Regulations. The reports will be submitted in a manner prescribed by the Commissioner, on or before the basic educational data system (BEDS) reporting deadline or at such other date as determined by the Commissioner.³¹⁷ The reports will include material incidents of harassment, bullying, and/or discrimination resulting from an investigation of a written or oral complaint made to the superintendent, school principal or their designee, or any other school employee; or are otherwise directly observed by such individuals regardless of whether a complaint is made.³¹⁸

In accordance with the Regulations, a "material incident of harassment, bullying, and/or discrimination" is:

"a single verified incident or a series of related verified incidents where a student is subjected to harassment, bullying, and/or discrimination by a student and/or employee on school property or at a school function. In addition, such terms will include a verified incident or series of related incidents of harassment or bullying that occur off school property, [where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property], and is the subject of a written or oral complaint to the superintendent, principal, or their designee, or other school employee. Such conduct will include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender or sex."³¹⁹ Denials of admission into, or exclusion from a course of instruction, based on gender or disability that would be permissible under law are excluded from this definition.

The report will include: the types of bias involved and where multiple types of bias are involved, all should be reported; whether the incident resulted from student and/or employee conduct; whether the incident involved physical contact and/or verbal

³¹⁶ *Id.* § 14(5).

³¹⁷ 8 NYCRR § 100.2(kk)(3)(i).

³¹⁸ *Id.* § 100.2(kk)(3)(ii).

³¹⁹ *Id.* § 100.2(kk)(1)(ix).

threats, intimidation or abuse, including cyberbullying; and the location where the incident occurred.³²⁰

3. Immunity from Liability for Reporting Incidents

DASA provides for immunity for good faith reporting. Specifically, any person having reasonable cause to suspect that a student has been subjected to discrimination, bullying or harassment who, acting reasonably and in good faith, reports such incident to school officials, the Commissioner, or police, or otherwise initiates, testifies, participates or assists in a proceeding, will have immunity from any civil liability that arises from taking of such action. No school district or employee will retaliate against such person.³²¹

Reporting Regulation

The aforementioned Regulation regarding reporting requirements includes a provision protecting good faith reporters and prohibiting retaliation that is directly in line with Article 2 of the Education Law.

4. Application to Charter Schools

Under Regulation 8 NYCRR § 119.6, each charter school must include in its Code of Conduct provisions prohibiting harassment, bullying and discrimination, in accordance with the requirements for public schools.

IV. Sub-Committee Reports and Observations

The readily available research discussed below demonstrates that despite efforts to comply with the mandates of the Education Law, other alternatives are necessary to treat with those unfortunate situations when a chain of events starting with a student suspension lead to the undesirable consequences of the School to Prison Pipeline.

A. Populations Subject to Disparate Treatment

The suspensions or other disciplinary measures currently taken against students pursuant to Education Law Section 3214 is of an extreme disparate nature. In the School to Prison Pipeline Report issued by the American Bar Association (hereinafter referred to as “ABA Report”), it concludes that students of color, students with disabilities, and LGBTQ students all experience the adverse impacts caused by suspensions and other disciplinary actions at far higher rates than would be expected

³²⁰ *Id.* § 100.2(kk)(3)(iii).

³²¹ N.Y. EDUC. LAW § 16 (McKinney 2018).

based on their numbers in the student population.³²² Such disparate treatment of these classes of students is also evident in New York due to the application of Education Law Section 3214.

While the School to Prison Pipeline has been a genuine problem for quite some time, recent data from the U.S. Department of Education's Civil Rights Data Collection shows that there is significant disparity among certain classes of students. "This disproportionality manifests itself all along the educational pipeline from preschool to juvenile justice and even to adult prison for students of color, for students with disabilities, for LGBTQ students, and for other groups in particular settings. These students are poorly served at every juncture."³²³

The ABA Report specifically states that "[s]tudents of color are disproportionately:

- lower achievers and unable to read at basic or above [average];
- damaged by lower expectations and lack of engagement[;]
- retained in grade or excluded because of high stakes testing[;]
- subject to more frequent and harsher punishment[;]
- placed in alternative disciplinary schools or settings[;]
- referred to law enforcement or subject to school-related arrest[;]
- pushed or dropping out of school[;]
- failing to graduate from high school[; and]
- feel threatened at school and suffer consequences as victims."³²⁴

The disproportionality mentioned above also manifests itself in similar ways for students with disabilities, and other factors such as race and ethnicity, gender, and disability compound the disproportionality. Specifically, "[s]tudents with disabilities (or those who are labeled as disabled by the school) are disproportionately:

- students of color, especially in discretionary categories under the Individuals with Disabilities Education Act (IDEA);
- less likely to be academically proficient;
- disciplined, and more harshly so;
- retained in grade, but still dropping out or failing to graduate;
- more likely to be placed in alternative disciplinary schools or settings;
- or otherwise more likely to spend time out of the regular classroom, to be secluded or restrained; and

³²² Sarah E. Redfield & Jason P. Nance, *American Bar Association Joint Task Force on Reversing the School-to-Prison-Pipeline*, AMERICAN BAR ASSOCIATION 10-11 (2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf [hereinafter ABA Report].

³²³ *Id.* at 10.

³²⁴ *Id.*

- o referred to law enforcement or subject to school-related arrest and incarceration.”³²⁵

Further, the ABA Report found that the disparities in treatment for student suspensions are also present in the juvenile justice system where youth of color, youth with disabilities, and LGBTQ youth are typically disproportionately arrested, referred, detained (longer), charged, found delinquent (or transferred to adult court).³²⁶ The juveniles in the system statistically have been disproportionately imprisoned rather than sentenced to a diversion program or probation in order to help rehabilitate the person.³²⁷ As a byproduct, those caught in the School-to-Prison Pipeline are less likely to have access to meaningful education to enable them to graduate from high school and prepare them for higher education and work opportunities.³²⁸

The ABA Report ultimately concludes that the disproportionality of suspensions among social and racial classes cannot be explained by the notion that “certain groups are more likely to be engaged in bad or delinquent behavior.”³²⁹ Rather, the authors of the ABA report cite major causes of the disparities such as the wide discretion contained in most student discipline codes.³³⁰ Since there is a strong correlation between attendance and academic success, multiple suspensions lead to academic failure and a far higher risk of criminal justice system involvement.³³¹ Most importantly, it is evident from the data that that disciplinary actions, including suspensions, do not lead to better outcomes for students, nor does it help provide for a safer school setting.³³²

The ABA Report detailed the disparate nature of the School to Prison Pipeline on a national level. The national data portrays the use of student suspensions as a tool to support the biases that are held in everyday life. As stated above, this Task Force was tasked with the mission to determine whether such biases and disparate treatments extend to New York State School Districts based on the language of Education Law §3214.

1. Does New York Have a Disparities Problem?

As discussed *infra*, Education Law Section 3214 permits school districts to suspend students as a means of disciplinary action. Such suspensions can be levied by a School Principal of five or less days, or by the Superintendent of Schools, if the suspension is to

³²⁵ *Id.* at 11.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 20.

³³⁰ *Id.* at 18-20.

³³¹ *Id.* at 20-22.

³³² *Id.* at 22-24.

be longer than five days.³³³ In each type of suspension, the student is entitled to due process in the form of an informal conference, if the suspension is issued by the Principal, or in the form of a Superintendent's Hearing, if the suspension is issued by the Superintendent. It is apparent from the data regarding out of school suspensions within New York State that the disparities problem explained below is predominant among large urban school districts.

During the 2016-2017 school year, there were 35,234 total suspensions in New York City Schools.³³⁴ 25,696 (72.9%) of these suspensions were a short-term principal's suspension while 9,538 (27.1%) of these suspensions were long-term suspensions.³³⁵ Of those suspensions, 46.9% of the suspensions were of black students, even though black students encompassed only 26.5% of the entire student population.³³⁶ 38.9% of the suspensions were students that had an individualized education plan ("IEP"), despite only 19.4% of the entire student population having an IEP.³³⁷ In 2015-2016, nearly 50% of the 37,647 suspensions were Black students, whereas 38.6% of the suspensions were students with an IEP.³³⁸ The student population was only 27.1% Black and 18.7% of students had an IEP.³³⁹ It is evident from this data, that there is clearly a disparity of suspensions for Black students and students with IEPs.

Furthermore, during the 2016-2017 school year, black students in school districts outside of New York City were suspended at a rate of four times more than the suspension of white students.³⁴⁰ Additionally, while the total suspension rate of students was the highest in high schools across New York State, black students in

³³³ N.Y. EDUC. LAW § 3214.

³³⁴ *Student Safety Act Reporting on Suspensions: 2016-2017 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_factsheet_2016-2017.pdf (last visited Dec. 19, 2018). The total number of suspensions reported by New York City for the 2017-2018 academic year has increased to 36,668 which amounts to a 4.1% from 2016-2017. *Student Safety Act Reporting on Suspensions: 2017-2018 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_fact_sheet_2017-2018.pdf (last visited Dec. 19, 2018).

³³⁵ *Student Safety Act Reporting on Suspensions: 2016-2017 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_factsheet_2016-2017.pdf (last visited Dec. 19, 2018).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Student Safety Act Reporting on Suspensions: 2015-2016 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/SSA_Suspension_FactSheet_2015-2016.pdf (last visited Dec. 19, 2018).

³³⁹ *Id.*

³⁴⁰ *Stolen Time: New York State's Suspension Crisis*, THE NEW YORK EQUITY COALITION 4-7 (Dec. 2018), available at <https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/sites/5/2018/12/09090556/Stolen-Time.pdf>.

primary and middle schools were suspended nearly five times more than white students.³⁴¹

Research also shows that students of color are more likely to be referred to law enforcement for disciplinary infractions than Caucasian students.³⁴² In the second quarter of 2018, 58% of the law enforcement arrests in New York City schools were black students while only 6.3% of arrests were white students.³⁴³ As these students are referred to law enforcement, the likelihood of future referrals outside of student code of conduct referrals increases. In a study completed in Texas, students who were suspended or received referrals were three times as likely as a non-suspended student to enter the juvenile system within one year of the disciplinary infraction.³⁴⁴

This nationwide issue also extends to school districts in New York. As stated previously, the data collected by the United States Department of Education, Office of Civil Rights, indicates that school districts suspend students of color and students with disabilities at significantly higher rates than white students and those without disabilities.³⁴⁵ A comprehensive report was completed by a Task Force chaired by former Chief Judge Judith Kaye, which found that in the New York City School District:

- Most suspensions are for minor and common school misbehavior;
- Students of Color and students receiving special education services are suspended in disproportionate numbers;
- There was no evidence that the higher rate of suspensions for students of color was linked to higher rates of misbehavior;
- The disproportionality of suspensions for students of color had increased as the number of suspensions overall had decreased; and
- The majority of suspensions were concentrated among a small number of schools.³⁴⁶

³⁴¹ *Id.*

³⁴² American Civil Liberties Union, *School-to-Prison Pipeline [Infographic]*, ACLU <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/school-prison-pipeline-infographic> (last visited Dec. 28, 2018).

³⁴³ New York Civil Liberties Union, *Student Safety Act Reporting*, NYCLU https://www.nyclu.org/sites/default/files/ssa_2018_q2_nyclu.pdf (last visited Dec. 28, 2018).

³⁴⁴ Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, COUNCIL OF ST. GOV'TS JUST. CENTER, xii (July 2011), available at https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.

³⁴⁵ U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., *supra* note 3.

³⁴⁶ *Keeping Kids In School and Out of Court: New York City School Justice Partnership Task Force Report and Recommendations*, N.Y. ST. PERMANENT JUD. COMMISSION ON JUST. FOR CHILD., 4-6 (2013), <https://www.nycourts.gov/IP/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>.

As stated above, across New York State, there is evidence of disparate treatment of suspensions toward minority students and those students with IEPs. The issue of disproportional treatment towards student suspensions in school districts is not limited to New York City. In 2014 the New York State Attorney General’s Office entered into consent decrees with the cities of Syracuse³⁴⁷ and Albany³⁴⁸ School Districts in an effort to correct disparate discipline.

In Syracuse, the New York State Attorney General’s Office determined that:

[R]acial disparities exist throughout the disciplinary process, as black students are disciplined at higher rates than white students. Overall, during the 2011-2012 school year, almost 44% of black students received at least one teacher referral, while the figure for white students was nearly 26%. For in-school suspensions, nearly 27% of black students received at least one in-school suspension, while 15% of white students received such a suspension. Finally, 25% of black students received at least one suspension out of school, while 12% of white students received at least one such suspension. For black students in middle school grades, 62% received at least one teacher referral, 44% received at least one in-school suspension, and 42% received at least one out-of-school suspension, compared to figures of 41%, 26% and 28% for white students, respectively. Black students were recommended for Superintendent’s Hearings—a necessary precursor to Long-Term Suspensions—at twice the rate as white students. During the 2012-2013 school year, one in every ten black students in secondary school (grades 6-12) was recommended for Superintendent’s Hearings, whereas one in every twenty white students in secondary school received such a recommendation.³⁴⁹

Additionally, in Albany, the New York State Attorney General’s Office determined that there was “significant racial disparities in rates of referral.”³⁵⁰

For each school year between August 2009 and May 2014, over 40% of all black students received at least one office referral, compared to 20% of all white students. These disparities result from policies that vest wide

³⁴⁷ Investigation of Eric T. Schneiderman, Att’y Gen. of the State of N.Y. of Syracuse City Sch. Dist., AOD No. 14-159, (Off. of the Att’y Gen. of the State of N.Y., Civ. Rts. Bureau July 10, 2014), *available at* https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/Syracuse_City_School_District_AOD-Executed.pdf [hereinafter Syracuse City Sch. Dist. Consent Decree].

³⁴⁸ Investigation of Eric T. Schneiderman, Att’y Gen. of the State of N.Y. of the City Sch. Dist. of Albany, AOD No. 15-243, (Off. of the Att’y Gen. of the State of N.Y., Civil Rights Bureau Dec. 4, 2015), *available at* https://www.albanyschools.org/district/Programs/AG_report/2015-16/AG_agreement_12-15.pdf [hereinafter City Sch. Dist. of Albany Consent Decree].

³⁴⁹ Syracuse City Sch. Dist. Consent Decree, *supra* note 347, at 6.

³⁵⁰ City Sch. Dist. of Albany Consent Decree, *supra* note 348, at 8.

discretion in staff to remove students from the classroom without adequate guidance or limitation on exercising that discretion. Since 2012, the District has made concerted efforts to increase training opportunities for staff in classroom management, cultural competency, and positive behavior interventions and supports.³⁵¹

Further, the school district also engaged in disparate treatment towards other minority students, as well as students with disabilities. Such disparate treatment was also seen in gender based cases as well as amongst age groups.

While there are school districts with significant disproportionality among certain student groups when issuing suspensions and are inappropriately influenced by gender, race, disability, there are many school districts that do not administer discipline in a disproportionate manner. This suggests that some school districts within New York State may be models for reform within a district.

2. *The Role of Implicit Bias, Coupled with Vague Definitions of Misconduct, in Creating Disparities*

The ABA Report,³⁵² and recent reports from the NAACP Legal Defense Fund (“NAACPLDF”)³⁵³ and the U.S Government Accountability Office³⁵⁴ identify the combination of implicit bias and the discretion offered by vaguely defined offenses, like disobedience, defiance and disruption, as factors that permit unintended disparities to be created.

The NAACPLDF Report succinctly explains the interrelationship between implicit bias and vague disciplinary standards:

“The inclusion of discretionary offenses for which students may be suspended has disproportionately harmed Black students even though Black students are not more likely to act out in school. Research has consistently established that Black students do not have higher rates of misconduct than other students. Rather, Black students are disproportionately disciplined for more subjective offenses, such as disrespecting a teacher or being perceived as a threat, than their White

³⁵¹ *Id.* at 8-9.

³⁵² See ABA Report, *supra* note 322, at 18-20, 54-56.

³⁵³ AJMEL QUERESHI & JASON OKONOFUA, LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE 4 (Jin Hin Lee et al. eds., 2017), https://www.naacpldf.org/wp-content/uploads/LDF_Bias_Report_WEB-2.pdf [hereinafter NAACPLDF Report].

³⁵⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-258, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 4 (2018).

counterparts. These disparities result from and perpetuate stereotypes about Black students, specifically the stereotype that they are aggressive and dangerous.

Only recently have we fully understood that not only do such disparities perpetuate stereotypes regarding students of color, but are themselves the product of stereotypes subconsciously present in almost all of us. Every day, each of us is exposed to a variety of media that communicate negative stereotypes about persons of color. These stereotypes, unknowingly, affect behaviors of all people, including teachers. Teachers develop implicit biases that cause them to interpret otherwise innocent behavior as part of a pattern of negative behavior inherent in the student. Paired with disciplinary codes that define misconduct in vague terms, stereotypes significantly shape teacher decisions as to which students they punish. These discriminatory behaviors affect not only teachers, but the students who are their victims. Reacting to years of discriminatory treatment, students may adjust their behavior, reacting coldly to teachers with whom they are not familiar, fearing that the teacher, like others, will unfairly target them for discipline.”³⁵⁵

In order to reduce the disparities in discipline that contribute to the School to Prison Pipeline school districts need timely and accurate information on the location and populations within their district where disparities are shown to be occurring, and access to research based tools to remedy them. The Trump Administration’s Federal Commission on School Safety stated in a report issued on December 18, 2018, that the 2014 guidance issued jointly by the U.S. Department of Education and the Department of Justice, which requires schools to monitor and remediate disparities in discipline by race, disabilities and other factors, should be abandoned.³⁵⁶ The New York State Education Department (“NYSED”) already collects information on discipline that can be used to identify disparities by race, gender, and disability (and by combinations of them) at both the district and school level. Since the 2014 Federal guidance forms the basis of NYSED’s requirements,³⁵⁷ the Task Force recommends that NYSED adopt its own disparities regulations that do not depend on the Federal guidance. Since the research discussed above shows that simply reducing the total number of suspensions

³⁵⁵ NAACPLDF Report, *supra* note 349, at 4 (citations omitted) (internal quotation marks omitted).

³⁵⁶ Federal Commission on School Safety, *Final Report of the Federal Commission on School Safety*, 67-72 (Dec. 18, 2018), available at <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

³⁵⁷ The “2014 School Discipline Guidance Package” issued by the U.S. Department of Education and the U.S. Department of Justice can be found on the U.S. Department of Education’s website. *School Climate and Discipline: Federal Efforts*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html> (last modified Dec. 8, 2015). The guidance package contains four documents: (1) Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline; (2) Guiding Principles; (3) Directory of Federal School Climate and Discipline Resources; and (4) Compendium of School Discipline Laws and Regulations.

alone will not cure the disparities problem and may indeed make it worse, an approach that is explicitly targeted at reducing disparities will be needed to actually reduce disparities in discipline across protected groups and to reduce the School-to-Prison Pipeline. One such approach is the use of restorative justice practices which is described below in more detail.

In an effort to achieve an informed approach to the adoption of disparities regulations, the Task Force suggests the New York State Education Department/Board of Regents consider the following regarding the collection of data. While existing data does suggest implicit bias and the resulting disparate treatment of students of color or who have disabilities in the state's large urban areas, there are hundreds of suburban and rural school districts in the State.

1. The adoption of a standardized methodology for measuring disparities in discipline at both district and school levels across the protected classes of race, gender, disability and, if possible, by LGBTQ status. Annually this information should be reported to Districts and the public. Districts that have district-wide or school disparities above a threshold point set by the State Education Department would be required to develop remedial plans with targets and goals to reduce the disparities below the threshold within a reasonable period of time.
2. Using the current research on strategies that are effective in the reduction of disparities, the State Education Department should consider the development of model materials and processes that districts can use to analyze the root causes of the disparities shown in their data and information on strategies including training, services, courses, materials, consultants, and best practices that have been shown to successfully reduce disparities in discipline.

B. Restorative Justice & Current Productive Practices

Efforts have been made throughout the country regarding utilization of restorative justice as an integral part of the student disciplinary process. New York has been among one of the states to begin exploring the use of restorative justice alternatives rather than only using the traditional punitive model of suspending students for bad behavior. As explained in further detail below, restorative justice alternatives allow for a more instructive and effective model of discipline by permitting students to learn and grow from their mistakes while continuing their educational path.

Restorative justice is an increasingly acknowledged and employed approach to school discipline, behavior, and relationships. Restorative justice operates with an underlying thesis that "human beings are happier, more cooperative and productive, and more

likely to make positive changes in their behavior when those in positions of authority do things *with* them, rather than *to* or *for* them.”³⁵⁸ Restorative justice lies at the intersection of criminal justice, school culture, and professional development. As an increasing amount of evidence demonstrates the long-standing system of punitive discipline to be not only ineffective in reducing behavioral incidents but to be detrimental to young people, particularly those of color, school districts are increasingly turning to the research-supported practices of restorative justice.³⁵⁹ In New York State, numerous cities have introduced initiatives to bring restorative justice into their schools. For example, in 2015, New York City’s Department of Education instituted a policy toward behavior that incorporated restorative justice, which was precipitated by a two-decade long rise in student suspensions and an overrepresentation of black students being suspended.³⁶⁰ Similarly, the Rochester City School District has recently reworked its code of conduct with a de-emphasis on suspensions through the use of restorative justice.³⁶¹

The effectiveness of restorative justice is most often measured by quantitative studies that document its repeated success in reducing the severity and frequency of school violations.³⁶² To that end, restorative justice has been found to be an effective means of narrowing the discipline gap that disproportionately punishes students of color,³⁶³

³⁵⁸ Allison Ann Payne & Kelly Welch, *supra* note 7, at 226.

³⁵⁹ VALERIE L. MARSH, BECOMING RESTORATIVE: THREE SCHOOLS TRANSITIONING TO A RESTORATIVE PRACTICES CULTURE (2017), available at http://urcues.org/wp-content/uploads/2017/10/Restorative-Practices-Brief-2_final-25_EDITED.pdf; VALERIE L. MARSH, RESTORATIVE PRACTICES: HISTORY, SUCCESSES, CHALLENGES & RECOMMENDATIONS (2017), available at http://urcues.org/wp-content/uploads/2017/06/Restorative-Practices-Brief-1_final.pdf.

³⁶⁰ SAMANTHA POWNALL, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE, (Johanna Miller et al. eds., 2013), available at https://www.nyclu.org/sites/default/files/publications/nyclu_STPP_1021_FINAL.pdf.

³⁶¹ Justin Murphy, *RCS D Board Approves New Code of Conduct*, DEMOCRAT & CHRONICLE (June 16, 2016), <http://www.democratandchronicle.com/story/news/2016/06/16/rcsd-code-of-conduct-suspensions-restorative/85978032/>.

³⁶² GORDON BAZEMORE & MARA SCHIFF, “NO TIME TO TALK:” A CAUTIOUSLY OPTIMISTIC TALE OF RESTORATIVE JUSTICE AND RELATED APPROACHES TO SCHOOL DISCIPLINE 77 (2010); Thalia González, *supra* note 8; Sarah Guckenberger et al., *Restorative Justice in U.S. Schools: Summary Findings from Interviews with Experts*, WESTED (Oct. 2015), <https://jprc.wested.org/wp-content/uploads/2015/11/1447101213resourcerestorativejusticeinusschoolsummaryfindingsfrominterviewswithexperts.pdf>; David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 35 YOUTH & SOC’Y 249, 249-72 (2001); Brenda E. Morrison, *Regulating Safe School Communities: Being Responsive and Restorative*, 41 J. OF EDUC. ADMIN. 690, 690-704 (2003); Mara Schiff, *Dignity, Disparity, and Desistance: Effective Restorative Justice Strategies to Plug the “School-to-Prison Pipeline,”* UCLA: THE CIV. RTS. PROJECT (Jan. 2013), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/dignity-disparity-and-desistance-effective-restorative-justice-strategies-to-plug-the-201cschool-to-prison-pipeline/schiff-dignity-disparity-ccrr-conf-2013.pdf>; Jeanne B. Stinchcomb, et al., *supra* note 9; Ted Wachtel, *Defining Restorative*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES (2013), <https://www.iirp.edu/pdf/Defining-Restorative.pdf>.

³⁶³ Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and*

resulting in disruption of the School-to-Prison Pipeline. However, restorative justice is more than a discipline reform. It is also an approach to transforming school culture.³⁶⁴ Studies that include qualitative methods are particularly helpful in learning about how restorative justice affects relationships, especially among students and teachers. These studies show that students prefer restorative justice to traditional punitive measures³⁶⁵ and that restorative justice has a large positive impact on the entire school culture. With restorative justice practices in place, students gain a voice in their communities and teachers experience less stress.³⁶⁶

The evidence is clear – restorative justice works as a viable alternative to punitive discipline in schools. In contrast to restorative justice, there is a vast amount of evidence that finds the punitive approach to be ineffective in improving discipline and associated with a constellation of additional problems, such as social justice offenses, fueling the School-to-Prison Pipeline, decreased achievement, increased misbehavior, and increased likelihood that communities both inside and outside the school will suffer. Restorative justice offers more than the traditional punitive discipline, such as community, relationship, repair, decreased incidences of misbehavior, improved school culture, decreased racial discipline gap, and student agency. The road to reform is never easy, nor is it ever quick to achieve effective reform; however, restorative justice provides incentives supported by evidence that school communities can improve the experiences of all members/participants – including staff, parents, teachers, administrators, and especially students.

As mentioned previously, New York has explored the use of restorative justice practices by forming its own School-Justice Partnership which examined the disciplinary challenges in New York referred to above and issued recommendations for addressing disparities in discipline. The Task Force, led by the late Chief Judge Judith S. Kaye and supported by the New York State Permanent Judicial Commission on Justice for Children, issued a comprehensive array of recommendations to combat discipline disparities in New York schools. Among them was a recommendation to use

Achieve Equity in School Discipline, 26 J. EDUC. AND PSYCHOL. CONSULTATION 325, 325-53 (2016); Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 59-68 (2010); Mara Schiff, *supra* note 362.

³⁶⁴ Anne Gregory et al., *supra* note 363; Tom Cavanaugh, Patricia Vigil & Estrellita Garcia, *supra* note 7; Allison Ann Payne & Kelly Welch, *supra* note 7.

³⁶⁵ Wendy J. Drewery, *Conferencing in Schools: Punishment, Restorative Justice, and the Productive Importance of the Process of Conversation*, 14 J. COMMUNITY AND APPLIED SOC. PSYCHOL. 332, 332-44 (2004); Barry A. Fields, *Restitution and Restorative Justice in Juvenile Justice and School Discipline*, 22 YOUTH STUD. AUSTL. 44, 44-51 (2003); Anne Gregory et al., *supra* note 363; Jane O’Dea & Craig Loewen, *Life in the hallway: Students’ Perceptions of Violent and Disruptive Behaviour in Their Schools*, in BUILDING FOUNDATIONS FOR SAFE AND CARING SCHOOLS: RESEARCH ON DISRUPTIVE BEHAVIOR AND VIOLENCE, 47-82 (Grace Malicky et al. eds., 1999).

³⁶⁶ Guckenberger et al., *supra* note 362.

“Restorative Approaches”³⁶⁷ to build the capacity for schools to implement and institutionalize the commitment to use positive interventions with their students. Restorative justice is by no means a new concept, but this was one of the early appearances of the practice in this context in the state of New York.

In New York State as well as many other parts of the country, there has been an increased recognition that punitive disciplinary measures such as school suspensions often cause more problems than they solve and aggravate existing problems. As a result of such recognition, a consensus is growing that the use of more proactive, solution-oriented alternatives are worthwhile. While these alternatives take many forms and the effectiveness of some of them is not yet entirely clear, one common aspect of all of them is that they aim to achieve restorative justice. The various forms of restorative justice seek to bring individuals involved in a conflict together to engage in a constructive dialogue to resolve the conflict at its root, in the belief that by doing so, we will likely reduce future conflict. In other words, each modality of restorative justice shifts the focus of a disciplinary hearing or inquiry toward repairing the harm caused in a conflict and away from punishment as a stand-alone resolution. Inherent in all restorative justice’s iterations is a belief that when we do the difficult work of resolving conflict at its root, we reduce future conflict and come away from the process with more empathy and a decreased likelihood of repeating the same mistakes that led to the original conflict.

The use of restorative justice practices has spread across New York schools at an impressive pace. In April 2017, the New York State School Boards Association released a report entitled “Rethinking School Discipline.”³⁶⁸ The report advocates for a dramatic shift away from punitive disciplinary practices and toward restorative justice.³⁶⁹ This is but one example of the broad consensus that is building around the effectiveness and importance of using restorative justice practices rather than relying on suspension and expulsion of students to change behavior.

Across the country, restorative justice models adopted by large districts have resulted in dramatic decreases in the numbers of suspensions. In Chicago, for example, upon adoption of a restorative justice approach, school suspensions were reduced from 23 percent of the student body to 16 percent over the course of five academic years.³⁷⁰

³⁶⁷ *Keeping Kids In School and Out of Court: New York City School Justice Partnership Task Force Report and Recommendations*, *supra* note 346, at 31.

³⁶⁸ GAYLE SIMIDIAN, *RETHINKING SCHOOL DISCIPLINE* (David Albert ed., 2017), available at https://www.nyssba.org/clientuploads/nyssba_pdf/rethinking-school-discipline-04272017.pdf.

³⁶⁹ *Id.*

³⁷⁰ W. David Stevens et al., *Discipline Practices in Chicago Schools: Trends in the Use of Suspensions and Arrests*, UNIV. OF CHICAGO CONSORTIUM ON CHICAGO SCH. RES. (March 2015), <https://consortium.uchicago.edu/sites/default/files/publications/Discipline%20Report.pdf>

Though restorative justice alone does not fully account for the reduction, the shift in focus and goals that it represents appeared to play a significant role.

Various models have been adopted across New York State as well, with varying degrees of success. The Buffalo City School District has included restorative justice in its updated code of conduct and has begun to move some schools within the District towards a restorative model. In New York City, there have been sustained efforts across several boroughs to bring restorative justice into both schools and the juvenile justice system. Some thought leaders have included Common Justice, Brooklyn Restorative Justice Project, and the Red Hook Community Justice Center.

In Syracuse, suspension rates were among the highest in the nation at 35 percent of the District's student population being suspended. Not only was the suspension rate at Syracuse high but the racial disparity among students receiving suspensions was also very high. It was so high that the Attorney General's office took notice and launched an investigation in 2013.³⁷¹ Eventually, the District entered into an "Assurance of Discontinuance" with the Attorney General's office to implement restorative justice practices along with a host of other adjustments to the District's disciplinary practices. Despite the School District decreasing the total suspensions in half over a period of three years, the District has been unable to resolve its disproportionality of suspensions, as Black male students are being suspended at a rate that is disproportionate to their peers, rendering them twice as likely to be suspended.

Across the state, smaller school districts have also sought to implement restorative justice practices in their schools. In the Rochester area, Partners in Restorative Initiatives (PIRI) has trained both schools inside the Rochester City School District and schools outside of Rochester and has produced great results. In East High School, located in Rochester, suspensions dropped from 2,541 during the 2015-2016 academic year, to only 909 the following academic year. Again, while this dramatic drop which is the largest in the District cannot be attributed to restorative justice practices alone, it does seem to suggest their utility. Outside of Rochester, PIRI also works in the Avon Central School District in Avon, New York to implement a comprehensive list of restorative options for various challenges in schools. While no empirical data exists as to the efficacy of this program, the school continues to successfully use Community-Building Circles, Talking Circles, Celebration or Honoring Circles, Academic Circles, Circles of Understanding, Healing Circles and Conflict Circles. The District also has a restorative committee and they meet with each building to discuss the progress and success of restorative justice

³⁷¹ Julie McMahon, *Black Students Twice as Likely to be Suspended in Syracuse Despite Discipline Overhaul*, SYRACUSE.COM: THE POST STANDARD (Jan. 12, 2017) https://www.syracuse.com/schools/index.ssf/2017/01/black_students_twice_as_likely_to_be_suspended_in_syracuse_despite_discipline_ov.html.

practices. The District has spent time looking at their disciplinary referrals and have found that increasing the number of community building activities such as circles and community-wide assemblies and activities reduces the monthly number of referrals.

The empirical evidence supporting use of restorative justice exists in studies of students in countries outside the United States, but there is still room for a significant amount of analysis of the effectiveness of these programs within the United States. The Federal Office of Juvenile Justice and Delinquency Prevention did complete a study in July of 2017 demonstrating a moderate reduction of recidivism rates in students who participated in restorative justice in comparison to students who were brought through the traditional juvenile justice court system. Additionally, the study confirmed a higher level of victim satisfaction among those victims who participated in restorative justice rather than the traditional criminal justice system. Significantly more research is needed into the various models and their efficacy across the diverse student populations that make up New York State. Thus, as discussed below, the Task Force recommends that any implemented models also contain a data collection component to allow for evidence-based analysis going forward.

1. Current Productive Practices and School Wide Prevention Models

There are several models and programs that schools may implement as an alternative to traditional punitive models of school discipline. Suspensions are currently the primary means of discipline for student misconduct as set forth in New York State Education Law Section 3214.

Recognizing that suspensions are an exclusionary means of discipline, as explained in more detail below, we recommend that School Districts be provided by statute with the opportunity to use restorative practices in addition to or instead of suspensions. Students who are disconnected from their schools through the use of suspensions are more likely to fall behind academically, become further involved in criminal behavior, and ultimately become more likely to enter the School to Prison Pipeline.

Furthermore, the use of suspensions rarely offers a resolution to behavioral problems. The use of restorative justice practices offers the benefits of keeping students in school, providing a resolution to the initial misconduct, and promoting positive, prosocial bonds between students and faculty.

The following school response models are options that schools may choose to use in their districts. The following models address the school climate in its entirety, including students, teachers, and administrators, with a focus on building a positive community within the school itself and addressing root causes of disciplinary issues. These models are designed to help address discipline issues prior to an incident occurring and/or

prior to escalation. Schools should have the option to choose a model that best fits the needs of their specific community.

One school response model is the Multi-tiered System of Support. The New York State Board of Regents considered a report in May 2018 on Social Emotional Learning (SEL).³⁷² In accordance with the recommendations of the Safe Schools Task Force, Department staff and the Task Force’s School Climate and Student Engagement Workgroup have developed new SEL guidance materials and are prepared to present benchmarks for voluntary implementation by the field and a framework for SEL implementation in New York State beginning in June 2018. The report focused on a “whole child/whole school approach to supporting and educating young people that are healthy, safe, engaged, and challenged, [which] is the foundation upon which SEL implementation must take place. Such an approach works with the whole school community to integrate SEL principles into the fabric of school life.”³⁷³

Facilitating SEL schoolwide involves multiple components of school life including, but not limited to the following: (i) Alignment of district and school support, personnel policies, and existing and new practices in a multi-tiered system of support (MTSS); and (ii) Addressing discipline as an opportunity for social emotional growth that seeks concurrent accountability and behavioral change through SEL-based restorative justice practices.

The system **used for facilitation social emotional learning** is built on a Multi-Tiered System of Support (MTSS) incorporating tiers of intervention and support for both academic instruction and behavioral instruction. The tiers are as follows:

Tier 1: Universal intentions that are school wide in each classroom serving all students. (80% of the total population)

Tier 2: Specialized interventions serving at risk students. (5 - 15% of the total population)

Tier 3: Tertiary Interventions - serves high risk students (1 - 5% of the total population)

MTSS is predicated on five (5) pillars: (i) Social Emotional Learning; (ii) Mental Health Support; (iii) Behavioral Supports and Interventions; (iv) Restorative Practices; and (v) Academic Supports and Interventions/RTI, as seen below on the following chart.

³⁷² N.Y. STATE EDUC. DEP’T, *Introducing New Guidance and Resources for Social Emotional Learning*, (May 2, 2018), available at <http://www.regents.nysed.gov/common/regents/files/518brd1.pdf>.

³⁷³ N.Y. STATE EDUC. DEP’T, *Social Emotional Learning Essential for Learning, Essential for Life: Attachment 2* May 2018 Regents Item, 22 (May 2, 2018), available at <http://www.regents.nysed.gov/common/regents/files/518brd1.pdf>.

	SEL	Mental Health Support	Behavioral Supports & Interventions	Restorative Practices	Academic Supports & Interventions/RTI
Tier 3	<ul style="list-style-type: none"> Individual instruction in SEL competencies strategies and skills Practice and coaching 	<ul style="list-style-type: none"> Crisis intervention Individual counseling/support plan Family Collaborations Referral to services 	<ul style="list-style-type: none"> Wraparound services Functional Behavioral Assessments (FBAs), Behavioral Intervention Plans (BIPs) Faculty/staff mentor Academic and/or behavioral coach 	<ul style="list-style-type: none"> Family Conferences/Collaborations Formal Restorative Conference(s) 	<ul style="list-style-type: none"> Intensive instruction (1-2 students) After school tutoring Computer-assisted programs Specially-designed instruction (SDI)
Tier 2	<ul style="list-style-type: none"> Targeted explicit instruction in SEL competencies, strategies, and skills Practice and coaching with feedback Peer-to-peer SEL workshops SEL focused community building circles 	<ul style="list-style-type: none"> Individual/small group counseling Support groups (e.g. anger management, etc.) Family Engagement Substance abuse prevention counseling Referral to services 	<ul style="list-style-type: none"> Faculty/staff mentor Daily Check In/Check Out Daily Progress Reports (DPR) Social and Academic Instructional Groups (Small Group) Individual Behavior Contract Academic and/or behavioral coach Targeted afterschool support program(s) 	<ul style="list-style-type: none"> Peer Mediation Restorative Problem-Solving Circles Formal Restorative Conference Community service 	<ul style="list-style-type: none"> Peer Tutoring and Paired Reading Small group supplemental instruction Guided instruction Visual/auditory aids/cues and manipulatives
Tier 1	<ul style="list-style-type: none"> Explicit instruction in SEL Competencies Integration of SEL within the content areas General teaching practices that model and support SEL School climate surveys (student, staff, families) SEL Plan based on survey and other student data Family engagement 	<ul style="list-style-type: none"> Mental health education Mental health screening Prevention/ Intervention supports (e.g. stress management, wellness, drug/substance abuse/ suicide prevention, etc.) Trauma-Informed/ trauma-sensitive approach Peer education 	<ul style="list-style-type: none"> Schoolwide Behavioral Expectations Evidence-based classroom management Guidance conference(s) Training of peer educators Student leadership opportunities Bullying prevention (i.e., DASA) Culturally responsive practices Student government, extracurriculars Afterschool and summer programs Community schools Community service opportunities 	<ul style="list-style-type: none"> Community Building Circles Negotiation Skills Training Peer Mediation Restorative Circles Community service Student circle keeper training Family Engagement Responsive discipline policies 	<ul style="list-style-type: none"> Standards-aligned, differentiated, data informed, cross-curricular, culturally responsive instruction Goal-setting for learning Student self/peer assessments Project based learning/ assessments Family engagement Universal Design for Learning Health Education Coordination

Adapted from Illinois SS/HS State Group and Erie 2 BOCES

A second model is known as the **School Responder Model**, which is a multi-systemic approach to prevention and early intervention for youth at risk of justice involvement. Key components include: Identifying at-risk youth, the implementation of community-based services, and developing a behavioral health team to appropriately respond to students in need of behavioral interventions. This proactive approach recognizes that students with behavior issues may have other underlying issues, such as adverse childhood experiences, learning disabilities, etc., that if appropriately addressed, may help resolve classroom misbehavior.³⁷⁴

2. Restorative Justice Practices as Intervention

In addition to the school wide prevention models discussed above, school districts may also implement restorative justice practices at the intervention point in lieu of suspending students. These restorative justice practices could when appropriate replace the use of suspensions as a means of addressing disciplinary matters. Many of the intervention models outlined below include positive, constructive forms of discipline as the ultimate outcome, such as writing apology letters, performing community service, and staying after school for extra help. These models allow for creative consequences as well. For example, if a student has had issues with cell phone use, perhaps one of the “disciplinary” outcomes for him/her is to turn in their cell phone at the main office each day for the duration of the school day. Another example would be if a student breaks the dress code by wearing a hat, perhaps the student would be remanded to

³⁷⁴ Jacquelyn Greene & Olivia Allen, *Disrupting School-Justice Pathways for Youth with Behavioral Health Needs*, NAT’L CTR. FOR MENTAL HEALTH AND JUV. JUST. (2017), https://www.ncmhjj.com/wp-content/uploads/2017/10/NCJFCJ_SJP_ResponderModel_Final.pdf.

write an essay or report on the safety risks of wearing hats in schools rather than being sent to in-school suspension for the day.

One intervention model that may be used by school districts is Student Court, also known as Teen Court or Peer Court. Student courts are school based intervention programs that utilize trained students to conduct peer led sentencing hearings in place of traditional school-based interventions. This model allows the student who has been charged with behavioral misconduct the opportunity to tell their side of the story. The accuser can also provide their perspective on what happened. After listening to aggravating and mitigating circumstances, student volunteers deliberate on a fair and appropriate consequence for the action. Sentences are meant to be constructive and ultimately reconnect students with their school and student body. This model uses the power of positive peer pressure. It has been long understood that students respond to their peers in a more positive way than they do to adults in authority.³⁷⁵

Another intervention model often used by school districts is Youth Court. Like Student Courts, Youth Courts are peer-led diversion programs. They are an alternative to traditional court-based intervention for incidents that rise to the level of a chargeable offense, and typically include law enforcement and judicial involvement. The Youth Court model can be adapted to be used within the school setting. This restorative justice practice may be used to address issues that go beyond student code of conduct issues, such as possession of drugs, alcohol or weapons on school property. Key tenants to Youth Courts are accountability (acknowledging wrongdoing), restorative justice (incorporating victims and restoring balance after a crime has been committed), and giving young people second chances (everyone makes mistakes – one bad decision should not define a youth forever). When given the opportunity to acknowledge wrongdoing and explain him/herself to their peers, young people learn more from their mistakes and are less likely to repeat those behaviors in the future. According to a 2016 study conducted in Los Angeles County Teen Court, youth who participated in Teen Court were less likely to repeat offend than those who went through formal probation.³⁷⁶ Furthermore, Youth Courts give young people a sense of ownership and control. Involvement fosters a sense of community since teens relate to each other more than they do to adults. Taking that a step further, it builds positive connections between the offender and the community through the completion of community service and other pro-social activities. Student volunteers benefit from civic education and involvement, often garnering lifelong skills, such as public speaking, critical thinking, and communication. Because Youth Courts rely on student volunteers, they are an

³⁷⁵ Michael Lynch & Dante Cicchetti, *Children's Relationships with Adults and Peers: An Examination of Elementary and Junior High School Students*, 35 J. SCH. PSYCHOL. 81, 81-99 (1997); see also Sarah D. Sparks, *Teenagers are Wired for Peer Approval*, 32 EDUC. WEEK 8, 8 (2013) (citing Dustin Albert et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114, 114-20 (2013)).

³⁷⁶ Lauren N. Gase et al., *The Impact of Two Los Angeles County Teen Courts on Youth Recidivism: Comparing Two Informal Probation Programs*, 12 J. EXPERIMENTAL CRIMINOLOGY 105, 105-26 (2016).

economically viable option for many communities. Another benefit to the implementation of Youth Courts as an alternative to traditional courts is the flexibility and adaptation of each court to fit its community's specific needs. There are a variety of styles of Youth Courts that can be used: peer jury, youth judge, tribunal, and adult judge. This menu of options allows programs to evaluate what will work best in their unique circumstances and setting. When young people are engaged, listened to, and held accountable, especially by their peers, they are much more likely to learn a positive lesson from their mistakes when compared to those who are disciplined/sanctioned in more traditional ways. The benefits of Youth Court intervention/diversion programs are immeasurable due to the far-reaching effects they have on the young offenders, the volunteers, mentors, and the community at large.

Individual youth courts are typically the creation of local communities, which develop and operate youth court programs.³⁷⁷ For example, in 1984 the "Tarrytown Youth Court Program" was established in that village as an alternative to formal family court adjudication of certain offenses committed by minors.³⁷⁸ The program was administered by the village police department. If a youth court does not already exist within the community of a particular school district, a school district may be able to contract with a youth court nearby. Alternatively, multiple school districts may be able to pull together resources to establish a youth court for use by multiple districts.

A third intervention model school districts may consider using is Restorative Conferencing. Restorative conferencing emphasizes the harm done by an offense and works to rebuild or restore the relationship through positive actions. Conference programs are similar to victim-offender reconciliation/mediation programs in that they involve the victim and offender in an extended conversation about the offense and its consequences. However, conferencing may also include the participation of families, community support groups, police, social welfare officials and attorneys. Conference programs demonstrate to the offender that many people care for him/her. All parties arrive at and agree to a plan for reparation, which increases commitment to it as a just resolution. Conferencing is used only when the offender admits guilt. It is not used to determine guilt or innocence.

A fourth intervention model to be considered by school districts is Circles. Circles involve conflict resolution based on Native American principles that emphasize restoring harm and balance through a circular conversation. Participants include the person who committed the harm, the person who was harmed, and members of the community, which can include the student body. Circles hold young people responsible

³⁷⁷ Margaret Fisher, *Youth Courts: Young People Delivering Justice*, AMERICAN BAR ASSOCIATION, (March 2002) at 8, available at <https://www.ncjrs.gov/pdffiles1/ojdp/196944.pdf>.

³⁷⁸ 1984 N.Y. Op. Att'y Gen. (Inf.) 87, Op. No. 84-12 (Feb. 22, 1984).

for their actions while working to rebuild positive connections using mutually helpful actions.

Lastly, another intervention model school districts may use instead of student suspension is a model known as **Accountability Boards**. Accountability Boards include a panel of adults who preside over a hearing during which the offender can explain their side of the story. The panel may ask questions of the offender and explore root causes or problems that may have contributed to the behavior. The panel then comes up with a set of recommendations based on restorative principles that will hold the offender accountable but also ultimately help address the underlying problem. For example, if a young person having problems with drug use appears before an Accountability Board, the board may impose a drug and alcohol screening and/or treatment as part of their recommendation.

V. Detailed Recommendation: Amend N.Y. Education Law § 3214 to Include Restorative Justice

Based upon the foregoing research, this Task Force makes the following recommendations to help reduce the disproportionality among students and school suspensions, and to help improve the School to Prison Pipeline.

This Task Force recommends that restorative justice be added to N.Y. Education Law Section 3214 as an available alternative approach to school discipline. Gradually, this approach may eventually replace exclusionary discipline policies (e.g., suspensions and expulsions) with diversion programs (e.g., student court, circles, mediation) that keep students in school. This plan will only be effective if it is well received by school administrators, which means that funding, training, follow through resources, and data collection and reporting must be put in place. Education Law Section 3214 should be modified to allow for restorative justice alternatives to be implemented in New York schools. We recognize that the complete elimination of suspensions and expulsions of students is not feasible. However, we would recommend that those disciplinary options be reserved under limited circumstances.

While the Task Force has been preparing this paper on the School to Prison Pipeline, the Commissioner of Education has adopted an emergency regulation to include out of school suspensions data in determining which schools should be posted on “needs improvement” lists by the State Education Department.³⁷⁹ These regulations, which are set to be approved in final form in February 2019 by the Board of Regents, underscores that the New York State Education Department understands that the suspension of students is an issue that needs to be resolved.³⁸⁰

³⁷⁹ See 8 NYCRR §§ 100.2, 100.21

³⁸⁰ *Id.*

The New York Assembly has attempted to modify the provisions of Education Law 2801 and 3214 to include restorative justice practices. However, both the Assembly and the Senate have been unsuccessful in their efforts to date.³⁸¹ Upon review of the proposed bills of the Assembly, it refers to the premise that restorative justice practices MUST be used prior to suspensions, essentially eliminating any out of classroom discipline. Furthermore, such proposed bills include a standard for discipline in certain situations in which classroom removal or suspension is basically prohibited including but not limited to tardiness, unexcused absences from class or school, leaving school without permission, violation of school dress code, and lack of identification upon request of school personnel. The proposed law also sets forth a maximum of a twenty-day suspension, except as specified under law (e.g. bringing a firearm to school).

While the Task Force understands the need for wider use of restorative justice practices, it is also aware of the good faith efforts of most all school administrators in the administration of school discipline. It is the opinion of the Task Force that the above noted Assembly and Senate proposed bills would impose untenable burdens on school district administrators when issuing disciplinary penalties. While the Task Force commends the Assembly for understanding and appreciating the grave concerns of the School to Prison Pipeline, it cannot mandate school districts to use restorative justice practices in situations where a suspension or a removal of a student may be appropriate and necessary. Rather, the Task Force recommends modifying Section 3214 to endorse greater school district use of restorative justice practices as an alternative to the suspension of students.

As noted previously, several school districts have already begun to introduce the use of restorative justice practices. This Task Force has attached, in Appendix C of this Report, two example codes of conduct from certain school districts which currently include the use of restorative justice practices. These school districts should be commended for their forward thinking in an attempt to help reverse the School to Prison Pipeline.

Despite the fact that school districts do not need legislative authority to implement restorative justice practices, it is well known that school districts are creatures of statute – i.e., municipal corporations. Furthermore, the fact that the use of restorative justice practices are not expressly defined in Education Law Section 3214 gives school districts concern that restorative justice practices are not an option in lieu of discipline for code of conduct violations.

This Task Force is of the opinion that the endorsement by the State Legislature of the statutory amendment to Section 3214 of the Education Law to include the use restorative justice practices in lieu of suspending students will highlight and underscore

³⁸¹ N.Y. Assem. 3873, 240th Leg. Session, Reg. Session (N.Y. 2017).

the success of these school based strategies. It will further support restorative justice efforts that will lead to these students who have been charged with code of conduct violations to remain in the classroom where they belong and where they have the best chance to avoid the "School to Prison Pipeline." This Task Force's grave concern regarding long term suspensions is that students who are already susceptible to bad influences, whether drugs, alcohol, violence or other behaviors, will be more susceptible to these influences without being able to attend class while serving a suspension. This is how the School to Prison Pipeline begins, and is the premise for this Task Force's recommendation to include the use of restorative justice practices in Education Law Section 3214 for student discipline proceedings. This Task Force believes that the School to Prison Pipeline can be alleviated, if not reversed, by our proposed modification to Education Law Section 3214, which provides additional protections to students during the disciplinary phase by incorporating the permissive use of restorative justice practices if such use is justified. This Task Force's suggested modification to Education Law Section 3214 is attached hereto as Appendix A.

By providing principals and superintendents with statutorily endorsed alternative measures such as restorative justice practices, it will help alleviate the loss of our students to the lifelong negative vagaries of the School to Prison Pipeline.

Ideally, the implementation of restorative justice practices would eventually take the place of suspensions and expulsions for most disciplinary cases.

We are mindful that the recommendations of this report may be viewed as the imposition of yet another State mandate on our already taxed school district resources. The current State of New York Tax Cap Legislation severely hinders the ability of financially hard pressed school districts to innovate. Hence, the State of New York must allocate sufficient funding to those school districts that embrace restorative justice techniques. When compared to the expenditure of limited tax dollars arising from prosecution and incarceration of unfortunate youth who find themselves on the "other" end of the School Prison Pipeline the investment reaps incalculable benefits.

In the meantime, consideration should be given to the creation of State funded training programs, teaching personnel how to guide, support, and help navigate the accused student through the disciplinary process.

The Task Force is cognizant that its recommendation focusing on a modification of the New York statute is simply a start to reform student disciplinary proceedings. However, such statutory enactments will underscore the State's recognition of the severe societal concerns with the existing structure of student discipline in our public schools. It will bring expanded interest and public comment on the use of restorative justice and hopefully it will spur increased allocation of already scarce dollars to support this effort to keep students in an educational setting and to reverse the School

to Prison Pipeline. With these proposed modest modifications recommended by the New York State Bar Association, existing efforts to ameliorate a difficult result from the “pipeline” will be endorsed and expanded across our State.

VI. Conclusion

The School to Prison Pipeline has been and will continue to be a serious problem in New York due to the rigidity of Education Law §3214. School Districts across New York State have been issuing suspensions in accordance with Education Law §3214 in a disparate manner towards minorities and students with disabilities. As a result, these populations have been forced out of the educational setting and in an environment where they are succumbing to negative societal influences. This pipeline will continue to grow if everyone sits idly by. By amending Education Law §3214 to allow and endorse existing efforts by school districts to include restorative justice practices in the administration of discipline for student code of conduct violations, this Task Force believes an important first step will have been taken to cure this problem.

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE
CONFERENCE CALL MEETING
NOVEMBER 9, 2018**

Members Participating: Mark A. Berman, Matthew R. Coseo, Norman P. Effman, Margaret J. Finerty, Michael L. Fox, Sharon Stern Gerstman, Taa R. Grays, Henry M. Greenberg, Richard M. Gutierrez, Drew Jaglom, Scott M. Karson, Sherry Levin Wallach, Peter H. Levy, Richard C. Lewis, Michael Miller, Steven E. Millon, Aimee L. Richter, Robert T. Schofield, IV, Rona G. Shamoon, Carol A. Sigmond, David H. Tennant,.

Mr. Miller presided as President of the Association.

1. Report and recommendations of Committee on Communications and Publications. Prof. Fox reported that the Association's sections had requested three modifications to the report that had been presented to the Executive Committee at its November 2, 2018 meeting: sections that have previously sold advertising in their publications be able to retain future advertising revenue; for publications with a co-publisher, the agreement of the co-publisher be obtained prior to selling advertising; and all advertisers be subject to approval of the section in whose publication advertising is to be placed. Prof. Fox advised that the committee accepted these modifications. After discussion, a motion was adopted to approve the report and recommendations.
2. Adjournment. There being no further business to come before the Executive Committee, the meeting was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE
CONFERENCE CALL MEETING
NOVEMBER 19, 2018**

Members Participating: Mark A. Berman, Earamichia Brown, Norman P. Effman, Margaret J. Finerty, Michael L. Fox, Sharon Stern Gerstman, Henry M. Greenberg, Richard M. Gutierrez, Drew Jaglom, Scott M. Karson, Sherry Levin Wallach, Peter H. Levy, Richard C. Lewis, Michael Miller, Steven E. Millon, William T. Russell, Jr., Robert T. Schofield, IV, Rona G. Shamoon, Carol A. Sigmond, Tucker C. Stanclift, David H. Tennant, Jean Marie Westlake.

Guests: John H. Gross, David P. Miranda, Sandra Rivera (President's Rapid Response Advisory Group)

Mr. Miller presided as President of the Association.

1. Mr. Miller advised that he had scheduled this meeting to discuss possible responses that might be taken in the event that the Acting Attorney General were to dismiss Special Counsel Robert S. Mueller III to impede or terminate his investigation. The committee reviewed actions taken by the Association in response to the dismissal of Special Counsel Archibald Cox in 1973. It was agreed that the Association President should make appropriate statements as necessary to support the rule of law.
2. Adjournment. There being no further business to come before the Executive Committee, the meeting was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
BAR CENTER, ALBANY, NEW YORK
NOVEMBER 2, 2018**

Present: Karina E. Alomar, Jonathan B. Behrins, Mark A. Berman, Matthew R. Coseo, Norman P. Effman, Margaret J. Finerty, Michael L. Fox, Sharon Stern Gerstman, Sarah E. Gold, Evan M. Goldberg, Taa R. Grays (via conference call), Henry M. Greenberg, Richard M. Gutierrez, Erica M. Hines, Drew Jaglom, Scott M. Karson, Sherry Levin Wallach, Peter H. Levy, Michael Miller, Steven E. Millon, Aimee L. Richter, William T. Russell (via conference call), Robert T. Schofield, IV, Rona G. Shamon, Carol A. Sigmond, Tucker C. Stanclift, David H. Tennant, Jean Marie Westlake.

Guests: James M. Barnes, T. Andrew Brown, Linda Gehron, Hilary F. Jochmans, Hon. Barry Kamins, Thomas J. Maroney, David P. Miranda, Ryan Michael Mott, Sandra Rivera, Samantha Segal, David M. Schraver, Stephen P. Younger, Richard K. Zuckerman.

Mr. Miller presided over the meeting as President of the Association.

1. Approval of minutes of meetings. The minutes of the June 14-15, 2018 meeting and the July 10 and August 17, 2018 telephone conference were approved as distributed.
2. Consent calendar:
 - a. Bylaws of Women in Law Section.

The consent calendar, consisting of the above item, was approved by voice vote.

3. Report of Treasurer. In his capacity as Treasurer, Mr. Karson reported that through September 30, 2018, the Association's total revenue was \$19.7 million, an increase of approximately \$334,000 from the previous year, and total expenses were \$17 million, a decrease of approximately \$746,000 over 2017. Mr. Karson also provided a report on the status of the long-term reserve investments. The report was received with thanks.
4. Report of Working Group on Judiciary Law §470. David M. Schraver, chair of the Working Group, reviewed the Working Group's report which recommends that Judiciary Law §470, which requires non-resident New York attorneys to maintain a physical office in New York, be repealed. The report will be presented for debate and vote at the January 2019 House meeting. The report was received with thanks.
5. Report of Committee on Standards of Attorney Conduct. David M. Schraver, a member of the Committee on Standards of Attorney Conduct, reviewed proposed amendments to the Rules of Professional Conduct relating to conflicts of interest and tribunals. The proposals will be presented to the House for debate and vote at the January 2019 meeting. The report was received with thanks.

6. Report of Task Force on Mass Shootings and Assault Weapons. In her capacity as co-chair of the Task Force, Ms. Finerty, together with co-chair David M. Schraver, reviewed the Task Force's work to date in developing a report that will recommend ways to reduce mass shootings while protecting Second Amendment rights. The report was received with thanks.
7. Report and recommendations of Commercial and Federal Litigation Section. Stephen P. Younger, past chair of the Section, together with Section member Ryan Michael Mott, outlined the Section's proposed Guidelines for Obtaining Cross-Border Evidence. The International Section has been asked to review the report and it will be scheduled for a vote at the January 2019 Executive Committee meeting. The report was received with thanks.
8. Report and recommendations of Committee on Children and the Law. Samantha Segal, a member of the Committee, reviewed the recommendations of the committee with respect to the administration of child welfare as related to the care and safety of children and youth in the foster care system. After discussion, a motion was adopted to approve the report and recommendations.
9. Report of staff leadership. Pamela McDevitt, Executive Director, together with Jason Nagel, Managing Director of IT and Adam Rossi, Director of Marketing, reviewed membership initiatives, marketing campaigns, digital advertising, and a planned update of the management information system which has been in use since 1998. The report was received with thanks.
10. Report and recommendations of Committee on Communications and Publications. In his capacity as chair of the committee, Mr. Fox, together with Ms. Gold, presented a report with respect to section publications, making recommendations with respect to best practices, content marketing and social media strategies, electronic memberships, and advertising and subscription revenue. After discussion, a motion to approve the report subject to review by the Sections Caucus failed, and a motion to table the report for one week to allow additional time for review was approved.
11. Report of Committee on Continuing Legal Education. James R. Barnes, chair of the Committee on Continuing Legal Education, together with Senior Director Katherine Suchocki, provided an update on the Association's continuing legal education program, including revenue and expenses and new policies and initiatives. They reported that there will be a single New York City location for CLE programs in 2019. The report was received with thanks.
12. Report and recommendations of Finance Committee re proposed 2019 income and expense budget. T. Andrew Brown, chair of the Finance Committee, reviewed the proposed budget for 2019, which projects income of \$23,006,890, expenses of \$23,006,588, and a projected surplus of \$302. After discussion, a motion was adopted to endorse the proposed budget for favorable action by the House.

13. Report of President. Mr. Miller highlighted the items contained in his written report, a copy of which is appended to these minutes.
14. *Reports of Vice Presidents and Executive Committee liaisons.* Messrs. Behrins, Jaglom, Levy and Scofield, Ms. Hines, Ms. Sigmond, and Ms. Shamoan reported on the activities of sections and committees for which they serve as Executive Committee liaisons. Messrs. Coseo, Effman and Schofield reported on local bar activities in their respective district which they serve as Vice President.
15. Report of Committee on Membership. Thomas J. Maroney, chair of the Membership Committee, reviewed the committee's work with respect to membership and marketing, noting that membership dues collection had reached 98% of the projected 2018 budget. The report was received with thanks.
16. Report on legislative matters. Sandra Rivera, chair of the Committee on State Legislative Policy, Ms. Rivera provided a preview of the 2019 legislative session. Hilary F. Jochmans, chair of the Committee on Federal Legislative Priorities, updated the Executive Committee on federal legislative activities. The reports were received with thanks.
17. Report and recommendations of Steering Committee on Legislative Priorities.
 - a. Committee on State Legislative Policy. Sandra Rivera, chair of the Committee on State Legislative Policy, reported on the committee's recommendations of the following items for inclusion on the list of the Association's state legislative priorities: integrity of New York's justice system; reform statutory power of attorney; right to discovery in criminal justice matters; increase compensation for lawyers providing mandated representation; enhance consumer protection for dealings with online providers of legal documents; and support for the legal profession.

After discussion, a motion was adopted to approve these items as the Association's 2019 state legislative priorities.
 - b. Committee on Federal Legislative Priorities. Hilary F. Jochmans, chair of the Committee on Federal Legislative Priorities, presented the committee's recommendations of the following items for inclusion on the list of the Association's 2018 federal legislative priorities: integrity of the justice system; support for the Legal Services Corporation; support criminal justice reform; support for legislation to address immigration representation; support for states' authority to regulate the tort system; sealing records of criminal convictions; and support for the legal profession.

After discussion, a motion was adopted to approve these items as the Association's 2019 federal legislative priorities.

18. Report and recommendations of Local and State Government Law Section. Richard K. Zuckerman, chair of the section, outlined the section’s proposed Model Pro Bono Policy for Attorney Employees of Local Governments and Local Government Agencies. After discussion, a motion was adopted to endorse the policy for favorable action by the House.
19. Report and recommendations of Committee on Mandated Representation. Linda Gehron, a member of the Committee on Mandated Representation, presented the committee’s report recommending an amendment to the Standards for Mandated Representation to provide for the pre-petition representation of parents in child welfare cases modifying the current provision mandating representations at the “early stages” of a Family Court proceeding. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House
20. Report of Task Force on Wrongful Convictions. Hon. Barry Kamins, co-chair of the Task Force, reviewed the Task Force’s work to date in updating the report approved by the House in 2009 and new developments to reduce wrongful convictions. He reported that the Task Force plans to present its report with recommendations on an informational basis at the January 2019 meeting with debate and vote to follow in April 2019. The report was received with thanks.
21. Report and recommendations of the Committee on Bylaws. IN his capacity as chair of the Bylaws Committee, Mr. Schofield presented the Committee’s proposals to amend the Bylaws to remove the requirement that candidates for member-at-large of the Executive Committee be “members of the House of Delegates or section or committee chairpersons” at the time of selection or within three years preceding selection and replace it with a requirement that candidates be “Active members of the Association.” After discussion, a motion was adopted to recommend subscription to the proposed amendments by the House.
22. Report of Nominating Committee. David P. Miranda, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2019-2020 Association year: President-Elect: Scott M. Karson, Melville; Secretary: Sherry Levin Wallach, White Plains; Treasurer: Domenick Napoletano, Brooklyn; Vice Presidents: 1st District – Diana S. Sen, New York City and Carol A. Sigmond, New York City; 2nd District – Aimee L. Richter, Brooklyn; 3rd District – Robert T. Schofield, IV, Albany; 4th District – Marne Onderdonk, Saratoga Springs; 5th District – Jean Marie Westlake, East Syracuse; 6th District – Richard C. Lewis, Binghamton; 7th District – David H. Tennant, Rochester; 8th District – Norman P. Effman, Warsaw; 9th District – Mark T. Starkman, New Windsor; 10th District – Donna England, Centereach; 11th District – Karina E. Alomar, Ridgewood; 12th District – Michael AS. Marinaccio, White Plains; 13th District – Jonathan B. Behrins, Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2019: Richard M. Gutierrez (Diversity Seat), Forest Hills; Margaret J. Finerty, New York City and William T. Russell, Jr., New York City Nominated as Section Member-at-Large was Andre R. Jaglom, New York City. Nominated as Young Lawyer Member-at-Large was John P.

Christopher, Glen Head. The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2019-2021 term: Claire P. Gutekunst, Yonkers; Seymour W. James, Jr., New York City; Scott M. Karson, Melville; Bernice K. Leber, New York City; and Michael Miller, New York City. The report was received with thanks.

23. New Business. Mr. Miller reminded the members that the Annual Meeting will be held January 14-19, 2019, a week earlier than usual. The President's Summit will take place on Wednesday, January 16, and will cover three topics. Mr. Greenberg advised the members that he, together with staff and others, is reviewing possible changes to events at the 2020 Annual Meeting.
24. Date and place of next meeting.
Thursday, January 17, 2019
Hilton Midtown New York, New York City
25. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary