STATEMENT OF

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TO THE

COMMISSION ON STATEWIDE ATTORNEY DISCIPLINE

CONCERNING POTENTIAL IMPROVEMENTS TO THE
EXISTING SYSTEM OF ATTORNEY DISCIPLINE

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Members of the Commission:

Thank you for the opportunity to comment on Chief Judge Jonathan Lippman's mandate that you consider (A) whether a statewide attorney disciplinary system is more desirable than the current four-part system of committees maintained by the Appellate Divisions, (B) whether more public disclosure of developing disciplinary proceedings is needed and (C) how the process can be expedited.

I hope my comments, which are not intended as an exhaustive analysis of the current system and all options for revision, are at least stimulating and useful to your deliberations.

Is a Statewide System More Desirable than the Current System?

In a word, yes. I believe a statewide attorney disciplinary system is more desirable than the disjointed one we currently have.

New York is the only state in the nation with a multi-part system for disciplining attorneys.[1] In many ways, the current system resembles the disparate manner in which judges throughout the state were disciplined before there was a Commission on Judicial Conduct. While no system is perfect – including the judicial disciplinary system that I represent – there are significant advantages to a unitary approach. I would urge you to recommend a similar system for attorney discipline, even though, quite obviously, a system with jurisdiction over 3,500 judges may pose fewer design problems than one designed to oversee 166,000 lawyers.[2] By reflecting on some notable differences in the way the four departments deal with attorney disciplinary matters now, and contrasting the current system with the single-tiered judicial disciplinary system, you may come to regard the latter as a model for the former.

Some Differences Among the Four Departments

While each Department enforces the same Rules of Professional Conduct for attorneys, each has its own operational rules and practices, which may result not only in unnecessary confusion for respondents and lawyers who practice across jurisdictions, but also in disparate outcomes. For example:

- In the First Department, a lawyer who is suspended for failure to cooperate with the disciplinary committee, and who does not apply for reinstatement within six months, may be disbarred without further proceedings.[3] In the Second, Third and Fourth, no such rule seems to apply.

- In the First and Second Departments, upon re-registering every two years, lawyers must certify that they are in compliance with the rules regarding escrow funds.[4] In the Third and Fourth, they do not.

- Some departments – the Third, for example – permit oral argument before the court before imposing discipline. Others do not.

- Some courts – the First Department, for example – permit counsel of the grievance committee to recommend sanction. Others do not.

- The First and Second Departments have special rules governing courtroom decorum, which the Third and Fourth do not.[5]

- The First and Second Departments have audit rules permitting the random examination of financial records required to be maintained by attorneys within their jurisdictions.[6] The Third and Fourth do not.

- The four departments have various but not uniform confidential dispositions available to them. For example, while all grievance committees may issue an admonition, a confidential caution may be issued in the Second, Third or Fourth Departments, but not in the First.[7] Apparently unique to the Third Department, a "letter of education" may be issued.[8]

You have heard from some witnesses about disparate punishments imposed for the same conduct, *e.g.* that lawyers who steal from clients are more likely to be disbarred by some courts and censured or suspended by others. Sometimes, the prevailing practice within a court may change, depending on the makeup of the membership at any given time.

There may be explanations but no obvious rationale for so eclectic a system within the same state.

Comparative Example of the Judicial Conduct Commission[9]

Prior to the establishment of the Commission on Judicial Conduct in its current form in 1978, the jurisdiction to discipline judges was divided among the four Appellate Divisions for lower-court judges and an *ad hoc* Court on the Judiciary empaneled by the Chief Judge on a case-by-case basis to hear cases against higher-court judges.[10] There was no dedicated staff or common procedure to receive, investigate and prosecute misconduct complaints. The Court on the Judiciary did not even have an address.[11] The result was very few investigations or disciplines, and very much public dissatisfaction. Two constitutional amendments, the latter effective April 1, 1978, consolidated judicial ethics enforcement within the Commission, phased out the adjudicative role of the five

courts and made the Commission's public disciplines directly reviewable by the Court of Appeals.[12]

The ethics code applied in all judicial disciplinary matters – the Rules Governing Judicial Conduct – is promulgated by the Chief Administrator of the Courts on approval of the Court of Appeals. It is applicable without exception to all judges wherever situated throughout the state.

Pursuant to statute, the 11-member Commission promulgated operating procedures based on the State Administrative Procedures Act and adopted management policies applicable to any and all complaints throughout the state.[13] With approximately 1,300 courts and 3,500 judges spread over 62 counties, it was necessary for the Commission to establish offices in New York City, Albany and Rochester, each overseen by a Deputy Administrator who supervises that office's investigations and trials. A fourth Deputy coordinates the agency's litigation. All Deputies report to the agency's Administrator and Counsel, who serves at the Commission's pleasure and *inter alia* is responsible not only for managing the agency's overall operations[14] but also for insuring consistency in the staff's application of procedures and substantive recommendations. The Commission itself, not the Administrator of staff, decides whether to investigate a complaint, initiate formal disciplinary charges against a judge and render disciplinary determinations, and makes all other dispositions.

Even with turnover among Commission members,[15] the system has been remarkably stable. Since its inception as a temporary agency in 1975, the Commission has had only two Administrators – my predecessor Gerald Stern and I. The structure we have had in place all these years could be easily replicated in a statewide lawyer disciplinary system.

Some Proposals Pertinent to a Statewide Disciplinary System

- For uniformity and consistency in staff presentations, the various regional offices currently in operation – eight in all – should remain in place, each managed by a chief counsel and overseen/coordinated by a statewide disciplinary counsel to be appointed by the Administrative Board of the Courts, which appropriate to this task is composed of the four Presiding Justices of the Appellate Division and the Chief Judge.

- For uniformity in procedural matters, I would urge the Administrative Board to appoint a task force to write one set of operating rules applicable to all attorney grievance offices in all disciplinary matters.

- For uniformity in substantive matters, I would urge the four Departments to supplement their own rules with a common set of supplements to the Rules of

Professional Conduct, such as the First and Second Departments now have regarding decorum in the courtroom.

- To enhance the prospects for consistent disciplinary decisions, I would recommend authorizing the Court of Appeals to review on its own motion any sanctions imposed or declined by the Appellate Division. I would not expect the Court to exercise this authority often. However, as with any other substantive area of the law where there are significant differences between or among the Departments, there is an important role for the Court of Appeals to play in resolving disparities. (Similarly, the Judicial Conduct Commission has recommended such legislation as to its own decisions, believing that the Court should be the final authority on matters of judicial integrity, even if the adverse party does not appeal.)

Is More Public Exposure to the Disciplinary Process Needed?

In a word, yes. In many respects, public appreciation and understanding of the disciplinary process would be significantly enhanced by certain changes in current practice.

For example, the grievance committee websites of the four Departments look different and present information in different ways and to varying degrees. Two of the four link to disciplinary decisions, but only as far back as 2010 in the First Department and 2011 in the Fourth. (In comparison, the Judicial Conduct website has every disciplinary decision rendered dating to its inception, and links to trial and appellate cases in which important procedural issues were decided.) I understand there was discussion at previous hearings of this commission as to whether prosecutorial misconduct is vigorously investigated and, where appropriate, punished. Whatever the truth may be, information about it is lacking, because there is no index of cases on any grievance committee website that categorizes complaints received and action taken. (In comparison, the Judicial Conduct website *inter alia* has a complete index of cases, describing the nature of the misconduct and identifying the court and county of every disciplined respondent.) More useful public information could easily be disseminated on the existing websites with a little effort.

In 1997, encouraged by then Chief Judge Judith Kaye and then Chief Administrative Judge Jonathan Lippman, legislation was introduced to make public the disciplinary hearings of the Judicial Conduct Commission and the grievance committees, at the point that formal disciplinary charges were preferred against a respondent judge or attorney.[16] Similar bills have been introduced in succeeding Legislatures, although they have not advanced. The Judicial Conduct Commission has consistently supported such legislation since its creation.[17] It is our view that opening the process at the point of formal charges would educate and reassure the public, serve as a potent deterrent to

ethical misbehavior, and result in a wiser exercise of power by prosecuting entities now subject to public scrutiny.[18]

Expediting the Disciplinary Process

The formal judicial and attorney disciplinary processes provide significant due process guarantees to respondents, and fulfilling such obligations often takes time. No one would seriously recommend abridging such guarantees in the name of speedy results: *e.g.* notice of charges, notice of hearing, pre-hearing discovery consistent with *Rosario* and *Brady*, fair opportunity to defend and present mitigation.

Yet a formal disciplinary hearing and all that it entails – *e.g.* examining and cross-examining witnesses, transcript production, post-hearing briefs, a referee's report, deliberation over sanction and referral of the record to the Appellate Division for disposition – is not necessarily the only way to achieve a fair result. The Judicial Conduct Commission, both by rule and practice, has a very effective procedure that, if emulated by the grievance committees, would significantly expedite their cases and reduce their dockets.

The Commission's Administrator and a respondent-judge may enter into and present to the Commission an Agreed Statement of Facts, stipulating to the record and jointly recommending a disposition.[19] In the large majority of Commission cases, where the misconduct is not so egregious as to warrant removal from office, it is not unusual for the respondent judge to acknowledge the allegations and stipulate to a caution, admonition or censure. The Commission is limited to accepting or rejecting the stipulation *in toto*.[20] If accepted, the Commission will render a determination based on the stipulated facts; if rejected, the matter will be directed to a referee for a hearing.[21] A hearing and post-hearing procedures can range from nine months to a year – straining the resources of both the Commission and the respondent, and keeping the aggrieved and public waiting for justice. Where no real dispute as to facts and sanction exists, an Agreed Statement provides an alternative and expeditious path to a just result.

Another situation that often vexes the grievance committees and causes significant delays is the problem of lawyers who do not notify the Office of Court Administration when they change addresses. Such notification is mandatory within 30 days of the move,[22] yet all grievance committees too often discover that when they attempt to serve interrogatories or other demands on respondent attorneys, such attorneys are not where their official records say they should be. Grievance committee counsel have told me anecdotally of innumerable lengthy delays in investigating complaints and imposing discipline caused by their inability to effect proper service on elusive lawyers. To remedy this needless impediment, I suggest this commission consider alternatives, such as designating the Secretary of State as a co-repository of attorney registrations and

a designated recipient of service, similar to the role that office plays for service on corporations.

Perhaps the most significant factor inhibiting the more prompt disposition of complaints is the lack of resources appropriate to the task faced by all the grievance committees. Overall staffing levels are down from a decade ago.[23] While all agencies of government have endured financial retrenchments in the last several years – including the Judicial Conduct Commission – we must appreciate that there is a price to be paid for not adequately funding ethics enforcement entities. Eventually exonerated respondents remain under a cloud of suspicion longer than is fair, and culpable respondents remain unpunished longer than appropriate. In either case, professional and public confidence in the disciplinary process suffers.

Conclusion

A license to practice law is both a privilege and a public trust. The system of regulating those who practice law is a high responsibility. It would well serve the bar, reflect well on the courts that oversee the bar, and enhance public confidence in both the fairness and effectiveness of the disciplinary system, for there to be a uniform set of practices, procedures and applicable rights throughout New York State. It makes little sense for a grievance arising in Brooklyn to be handled differently than one in Manhattan, or one arising in Rockland to be treated differently than in Dutchess or Onondaga counties, simply because they are in different departments. We are one state, with a unified court system and a unitary system of judicial ethics enforcement that should serve as an appropriate model for the handling of complaints against attorneys.

[1] Source: American Bar Association: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_directory_disciplinary_agencies_online_092014.authcheckdam.pdf

[2] Source: American Bar Association, as of 2013: http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_lawyer_by_state.authcheckdam.pdf

[3] 22 NYCRR 603.4(g).

[4] 22 NYCRR 603.15(d), 619.12(d).

[5] 22 NYCRR 604; 22 NYCRR 700.

[6] 22 NYCRR 603.15(a), 691.12(a).

[7] 22 NYCRR 605.5, 691.6, 806.4(c)(ii), 1022.19(d)(2)(v).

[8] 22 NYCRR 806.4(c)(iv).

[9] The Commission is composed of 11 members who serve renewable four-year terms. The Governor appoints four, the Chief Judge appoints three, and the four leaders of the Legislature each appoint one. Const Art 6 §22(b). The members elect their own chair and appoint an Administrator who serves at their pleasure. Jud L §41(2), (7).

[10] In its 27-year history prior to the creation of the Judicial Conduct Commission as a temporary agency in 1975, the Court on the Judiciary was convened only seven times. Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, Pace Law Review Vol 7 No 2, p 297 (Winter 1987).

[11] *Ibid.*

[12] Const Art 6 §22; Jud L §48.

[13] Jud L §42(5).

[14] Jud L §41(7).

[15] 62 members since 1975. http://cjc.ny.gov/General.Information/Gen.Info.Pages/mandate&history.htm

[16] S-4264, 1997-98 Regular Sessions, April 8, 1997.

[17] Until April 1978, formal disciplinary proceedings initiated by the Commission were public, as they are in 35 other states, but the Legislature amended the law to make them confidential. 2006 Ann Rep 22-23 (Com on Jud Conduct).

[18] 2015 Ann Rep 19-20 (Com on Jud Conduct).

[19] Jud L 44(5); Policy 3.5 (http://cjc.ny.gov/Legal.Authorities/NYSCJC.PolicyManual.June2015.pdf.)

[20] Policy 3.5 (http://cjc.ny.gov/Legal.Authorities/NYSCJC.PolicyManual.June2015.pdf.)

[21] *Ibid.*

[22] 22 NYCRR 118.1(e)(7), (f)

[23] 2003 Ann Rep Appx C, D, 2013 Ann Rep Appx C, D (Departmental Disciplinary Com, 1st Dept).