

THE RECORD



OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

SUMMER 2002

VOL. 57, NO. 3

LAW UNDER SIEGE
THE STRUGGLE
TO PROSECUTE
HUMAN RIGHTS
ABUSES IN
INDONESIA

THE RECORD

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Of Note

THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS Association offices and committees for 2002-2003.

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Carol Liebman

Joan B. Lobis

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Donald S. Bernstein

Elizabeth D. Moore

Susan Porter

*

THE NOMINATING COMMITTEE FOR 2002-2003 CONSISTS OF: STEPHEN Lloyd Barrett, Jill A. Chaifetz, Nicole A. Gordon, Beryl R. Jones, John S. Kiernan, Laura Taylor Swain, and Mary Jo White. The Executive Committee has elected Laurie Berke-Weiss Chair and Barry M. Kamins Secretary of the Executive Committee for 2002-2003.

✱

THE THIRTEENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED to honor attorneys who provide outstanding civil legal assistance to New York's poor. Jack B. Weinstein, United States District Judge for the Eastern District of New York, presented the awards at a reception on May 7 at the Association.

This year's recipients are: Matthew Chachère, Staff Attorney, Northern Manhattan Improvement Corporation; Marshall Green, Attorney in Charge, Bronx Neighborhood Office, The Legal Aid Society; Lisa Pearlstein, Staff Attorney, Brooklyn Legal Services Corporation A; Cynthia Schneider, Director, HIV Project, South Brooklyn Legal Services; and Jill Zuccardy, Director, Child Protection Project, Sanctuary for Families.

The awards, endowed by a contribution from the Horace W. Goldsmith Foundation, are administered by the Special Committee on the Legal Services Awards (John Kiernan, Chair).

✱

THE 2002 BOTEIN AWARDS, A WELL-MERITED RECOGNITION OF MEMBERS of the personnel attached to the courts of the First Judicial Department, were presented at the Association on March 25, 2001.

The Awards, dedicated to the memory of Bernard Botein, former President of the Association, and Presiding Justice of the First Department, have been presented annually since 1976 to pay tribute to court personnel in the First Department who have made outstanding contributions to the administration of the courts.

This year's recipients are: Noel D. Adler, Esq., Director of the Division of Information Technology for the Unified Court System; Colleen Bolger, Principal Court Clerk, Supreme Court, Criminal Branch, New York County; Major Raymond Diaz, Commanding Officer, Supreme Court, Civil Branch, Bronx County; Daniel J. McDevitt, Senior Administrative Assistant, Appellate Division, First Department; and Frank Pollina, County Clerk Specialist, Supreme Court, Civil Branch, New York County.

The awards, made possible by a grant from the Ruth and Seymour Klein Foundation, Inc., are sponsored by the Special Committee on the Botein Awards (Hon. Milton L. Williams, Chair).

✱

THE ELEVENTH ANNUAL PRESENTATION OF THE HENRY L. STIMSON MEDAL to outstanding Assistant United States Attorneys in the Southern District

and in the Eastern District of New York, was held on June 10 at the Association. Chief Judge Edward R. Korman of the Eastern District of New York made welcoming remarks and Association President E. Leo Milonas presented the medals, which are awarded each year to two outstanding Assistant United States Attorneys in both the Southern and Eastern Districts of New York.

This year's recipients are: Linda A. Lacewell and Charles P. Kelly of the Eastern District, and David N. Kelley and Neil M. Corwin of the Southern District.

The Stimson Medal, made possible by the firm of Pillsbury Winthrop, honors Mr. Stimson, who served as United States Attorney for the Southern District from 1906-1909 during a career of distinguished public service.

The awards are sponsored by the Committee on the Stimson Medal (Mark R. Hellerer, Chair) and the Committee on Federal Courts (Thomas H. Moreland, Chair).

*

FEDERAL JUDGE NINA GERSHON OF THE EASTERN DISTRICT OF NEW YORK presented the Association's annual Municipal Affairs Awards on June 17. The Awards are given to lawyers from the New York City Law Department who have demonstrated outstanding performance. This year's recipients are: Lisa Black, General Litigation Division; Lisa Grumet, General Litigation Division; Matthew Maiorana, Special Litigation Unit, Tort Division; Alexandra Pinilla, Tort Division; and Eric Proshansky, Affirmative Litigation Division.

The awards are sponsored by the Committee on New York City Affairs (Frances Milberg, Chair).

*

THREE OUTSTANDING MINORITY STUDENTS AT NEW YORK AREA LAW schools have been awarded Thurgood Marshall Fellowships for the 2002-2003 academic year. These students will have the opportunity to work with the Association to advance the goals of civil rights and equal justice. Fellowships were awarded to: Andrea Anderson of Brooklyn Law School, Sarah Lazare of CUNY Law School and Rebecca Velez of Fordham University School of Law.

Ms. Velez will assist the City Bar Fund's Robert B. McKay Community Outreach Law Program. Ms. Lazare will direct her work toward issues facing the Association's Civil Rights Committee and Ms. Anderson will work with the City Bar Fund's SHIELD Program.

The fellowships are funded by the Orison S. Marden Lecture Fund and are open to second and third year minority law students from New York area law schools. Fellows were nominated by their schools and selected by the Association's Committee on the Thurgood Marshall Fellowship Program (Daniel C. Richman, Chair).

✱

THE FOLLOWING NEW COMMITTEE CHAIRS HAVE RECENTLY BEEN APPOINTED for terms beginning September 1, 2002:

Marc R. Abrams (Bankruptcy and Corporate Reorganization); Liberty Aldrich (Task Force on Domestic Violence); Henry T. Berger (Election Law); Eric Brettschneider (Council on Children); Toby M.J. Butterfield (State Courts of Superior Jurisdiction); Julie Y. Chen (Sports Law); Miles P. Fischer (Military Affairs and Justice); Barbara S. Gillers (Professional and Judicial Ethics); Martha Golar (Health Law); Paul Matthew Hellegers (Civil Court); Rufus Edwin Jarman, Jr. (International Trade); Donald G. Kempf (Enhance Diversity in the Profession); Jeffrey L. Kirchmeier (Capital Punishment); Nancy F. Lang (Co-chair, Talent Outreach Project); Deborah A. Lashley (Juvenile Justice); Heidi A. Lawson (Insurance Law); Leslie G. Leach (Encourage Judicial Service); William Jay Lippman (Real Property Law); Richard Maltz (Professional Responsibility); Theodore V.H. Mayer (Product Liability); Israella F. Mayeri (Co-chair, Talent Outreach Project); Harold A. Mayerson (Matrimonial Law); Eileen D. Millett (Environmental Law); Daniel R. Murdock (Judicial Administration); Francis J. Murphy (Legal History); Jennie R. O'Hara (Young Lawyers); Steven M. Ratner (Small Law Firm Management); Guy A. Reiss (Foreign and Comparative Law); Nelson S. Roman (Minorities in the Courts); Laura Melissa Schachter (Recruitment and Retention of Lawyers); Frederic Paul Schneider (Children and the Law); David A. Schulz (Communications and Media Law); Jane Wallison Stein (Project Finance); Erica H. Steinberger (Mergers, Acquisitions and Corporate Control Contests); and Lisa M. Stenson (Books At the Bar).

Recent Committee Reports

AIDS

Letter Urging the Rejection of S.6155, an Act that Provides Duty Disability Retirement for Certain Employees of Governmental Entities Performing Peace Officer Services in the City of New York

Antitrust and Trade Regulation

Comments on the Green Paper on the Review of Council Regulation (EEC) No 4064/89

Arbitration

Letter to Representative Ann Womer Benjamin re: H.R. 343—Revised Uniform Arbitration Act

Bankruptcy and Corporate Reorganization

Making the Test for Unfair Discrimination More “Fair:” A Proposal

Capital Punishment

Testimony Before the New York City Council Committee on Fire and Criminal Justice Services

Criminal Courts

Letter to Judge Carey re: NYSIS Number in Criminal Court Proceedings

Council on Criminal Justice

Letter to Chauncey Parker, NYS Commissioner of Criminal Justice Services
Re: Reform of the Rockefeller Drug Laws

Letter to Assembly Speaker Silver Re: Reform of the Rockefeller Drug Laws

Education and the Law

Letter to Governor Pataki, Senator Bruno, and Speaker Silver regarding Mayoral Control and Accountability Over the New York City School System

Election Law

Comments on Rules Proposed by the Campaign Finance Board

Legislative Memoranda Supporting NYC Board of Elections Recommended Revisions in the New York State Election Law—Proposals 02-01, 02-02, and 02-10

Estate & Gift Taxation

New York State Tax Relief for Victims of 9/11 Terrorist Attack

Letter to the CISG Advisory Committee Commenting on MCC-Marble Ceramic Center v. Ceramica Nuova d'Agostino

Government Ethics

Letter to Governor Pataki, Senator Bruno and Speaker Silver Regarding Expanding Disclosure of Lobbying to Include Executive Branch

Health Law

Amicus Brief: State of Oregon v. United States Drug Enforcement Administration, Opposing the Ashcroft Directive with Regard to Euthanasia in Oregon

Letter to Robert Doyle re: the Department of Labor's Regulation Governing Employee Health Benefits Claims

Immigration and Nationality Law

Letter to the INS re: Requiring Change of Status From B-1 or M-1 Nonimmigrant Prior to Pursuing a Course of Study

Letter to the INS re: Proposed Rule for Limiting the Period of Admissions for B Nonimmigrant Aliens

Letter to Charles Adkins-Blanch urging that the proposed rule to revise the structure of the Board of Immigration Appeals (BIA) not be adopted

Inter-American Affairs

Report on Buenos Aires Conference on Pro Bono and Access to Justice

Council on International Affairs/International Law/United Nations

Letter to President George W. Bush re: the Sixtieth Ratification of the Rome Statute of the International Criminal Court

International Human Rights

Letter to the United States Senate re: Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women

Letter to Dr. John Reid, Secretary of State, British Northern Ireland Office
re: the Murder of Patrick Finucane

Council on Judicial Administration

Letter on Raising Court Fees to Fund the New York Institute for Cultural
Education

Letter to Assembly Speaker Silver re: A4937-A re: Disapproval of Changing
Method of Selection of Family Court Judges from Appointment to Elec-
tion

Comments on the Report of the Commission on Fiduciary Appointments

Legal Issues Pertaining to Animals

Letter to Governor Pataki Re: S.04786-C. An Act to Amend the Environ-
mental Conservation Law in Relation to Small Lead Fishing Sinkers

Non-Profit Organizations

Proposed Rules and Regulations for Registration of Charitable Trustees in
New York State Pursuant to Article 8 of the EPTL and Article 7-A of the
Executive Law

Pro Bono and Legal Services

Statement by the Executive Committee and Report by the Pro Bono and
Legal Services Committee re: Reinstatement of Legal Services Funding in
NYC Budget

Professional and Judicial Ethics

Formal Opinion 2002-1: Client Confidentiality and the Intention to Commit
a Crime

Formal Opinion 2002-2: Duty to Pay Interest on Client Funds Deposited
in an Interest-bearing Account

Formal Opinion 2002-03: The “No-Contact Rule” and Advising a Client
in Connection With Communications Conceived or Initiated by the Cli-
ent With a Represented Party

Professional Responsibility

Statement Regarding the United States Department of Justice Final Rule
Allowing “Eavesdropping” on Lawyer/Client Conversations

The Collateral Estoppel Effect of Sanctions

Securities Regulation

Comments on Release No. 33-8089, Proposed Rule: Acceleration of Periodic Filing Dates and Disclosure Concerning Website Access to Reports

Social Welfare Law

Letters to Mayor Bloomberg and City Council Speaker Miller re: Intro 38 "The Equal Access to Health and Human Services Law"

Trusts, Estates and Surrogate's Courts

Report on an Act to Amend the Estates, Powers and Trusts Law, in Relation to the Reformation and Modification of Wills and Trusts

Copies of any of the above reports are available to members by calling (212) 382-6624, or by e-mail, at khuggins@abcny.org.

Farewell Address

Annual Meeting of the Association

Evan A. Davis

The Annual Meeting of the Association was held on May 21, 2002.

The past year has been a hard year for the Association just as it has been a hard year for the people of the City of New York. The challenges following the September 11 terrorist attack have dominated the year, but like the people of our City, I feel we have met those challenges well.

One initial task was to assist our colleagues who were affected by the tragedy. We immediately opened our facilities to displaced lawyers who needed a place to work or meet. I know first hand how generously the lawyers of New York extended assistance to one another because several firms inconvenienced themselves significantly to provide temporary quarters to lawyers from my firm when we were displaced from our offices across the street from the World Trade Center.

Very soon after September 11 it became clear that affected families, individuals and small business had legal needs in many areas. To address this multiplicity of needs, we worked with legal services, other bar associations and probono.net to develop a new model for free legal assistance. Pro bono lawyers were trained to serve as facilitators to inventory the legal needs of those seeking help and either to provide the needed service or arrange for it to be provided by legal services organizations or members of the private bar with special expertise.

We have trained over 3,000 lawyers who have assisted about 1,000 families and 500 small businesses. Recently we learned that the American

Bar Association will be awarding its principal public service award, the Harrison Tweed Award, to the City Bar on account of our September 11 legal assistance program.

We also have worked to preserve the proper balance between freedom and security in the aftermath of September 11. As is usual, we worked through our committees. For example, our Committee on Military Affairs and Justice issued a thorough report highly critical of the President's order providing for military tribunals to try terrorists who are not citizens.

We convinced the ABA House of Delegates to adopt our position on military tribunals over the opposition of the Bush Administration personally conveyed to the House by Solicitor General Theodore Olsen.

The regulations subsequently issued by the Department of Defense meet some of our procedural objections but do not address the separation-of-powers need for certiorari appeal to an Article III court. They also do not limit the broad sweep of the President's order. Thus military tribunals, and the related subject of indefinite detention, which our Immigration and Nationality Law Committee has vigorously condemned, deserve our continuing vigilance.

It was also necessary that we take care following September 11 to help preserve the standing of New York City as a, if not *the*, legal capital of the world. Closely related to the City's legal standing is its standing as the globe's financial capital. The September 11 attack was intended to threaten that financial capital standing and it is obviously important for a host of reasons that that intention not be fulfilled.

In general, an important role for the Association of the Bar is to project the influence of the New York City Bar internationally, a role that distinguishes us from many other bar associations. In this way we help to maintain the City's special standing that benefits even those lawyers who do not practice internationally. Also, we seek in our international work to advance the rule of law internationally and thereby contribute, albeit in a modest way, to the international progress of democracy, justice and security.

With these goals in mind, well before September 11 we had invited the leaders of city bars in key world cities to a summit meeting at the Association. Following September 11 it was more important than ever that this summit meeting take place. With a great deal of help from many members and staff of our wonderful Association, the summit meeting was held on schedule in early November with delegations from 15 world city bars in attendance. Most delegations were led by the Bar President. The conference was a great success and will be repeated next year in Paris.

The City Bar's international outreach supports democracy, human rights and international legal and political institutions as well as the improvement of international commercial practice. For example, our involvement with the legal profession in South Africa has been to create a Visiting Lawyers Program that will assist South Africa in its democratic transformation by building the commercial skills of talented lawyers of color.

We have created two task forces in response to major events. One of these task forces is related to September 11—a task force on the rebuilding of downtown Manhattan. This task force, chaired by Steve Kass, is providing legal help to those responsible for the rebuilding and playing a useful role in facilitating coordination. The second task force, chaired by former Delaware Chancellor William Allen, will study and report on policy issues raised by the Enron debacle.

I would like to discuss briefly what progress we have made on the four goals I mentioned in my inaugural address two years ago.

The first goal was to improve the way we serve our members and in the process to increase our membership. Our membership is up by about 5 percent, but there is still some room for further improvement.

The second goal was to continue the Association's leadership in promoting diversity in the profession and on the bench. For women in the profession, entry level hiring is reasonably consistent with law school demographics, but promotion does not reasonably reflect that entry level hiring. Entry level hiring of lawyers of color has improved but not as much as law school demographics and, as with women, promotion remains a serious problem. African-Americans fare particularly badly even though African-American college students have the highest level of preference for a legal career as compared to Asian and Latino students.

We have this year launched a major revision of the Association's diversity goals. The current goals are out of date in view of recent changes in law school demographics for lawyers of color. We intend to unify the separate goal statements into one that covers all the categories for which the National Association for Law Placement collects data. Thus for the first time sexual orientation and disability will be covered in a detailed goals statement.

Another goal, again reflecting traditional Association priorities, was access to justice.

I have come to realize that access to justice has three prongs. The first prong is the courts. If the courts are not able to resolve disputes within a reasonable time, at a reasonable cost, and without bias or favoritism, access to the court will not result in access to justice. Thus, anyone inter-

ested in access to justice also has to be interested in judicial administration. For example, our current work to restructure the courts from a nine-tier system into a three-tier system is definitely an access to justice effort.

The second prong of access to justice is legal services. Here the continuing problem is the level of government funding. I am proud of the vigor with which the Association has beat the drum for a fee increase for lawyers assigned to represent indigent defendants and for funding for institutional providers. I also want to congratulate the New York County Lawyers for their success in the litigation they brought to increase assigned counsel fees.

The third prong of access to justice is pro bono. In 1999 and 2000 the pro bono numbers in New York held up while they apparently declined in other cities. I expect a big increase in the numbers for 2001 and 2002 due in part to the Bar's response to September 11.

We need to sustain that higher level of commitment for the long term. To that end we have established the City Bar Pro Bono Society that recognized members who in a calendar year contribute more than 100 hours of pro bono service. The Society already has nearly 500 members.

The final goal that I mentioned in my inaugural address two years ago was reform of the law making process in Albany. Here I am sorry to have to report that we have lost ground. The three-men-in-a-room system has become even more entrenched with massive lump sum budget appropriations divided up by the Governor, the Majority Leader of the Senate and the Speaker of the Assembly after the adoption of the budget.

We lobbied hard and successfully to get the Congress to adopt campaign finance reform, but Albany, where the abuses are much more extreme than on the federal level, shows no sign of moving on this issue. The result is that money plays a big role in deciding how the laws are written.

Putting aside this note of regret, it is now my very great pleasure to introduce Leo Milonas to give his Inaugural Address. As I have said to all who will listen, Leo is a perfect choice to be your next President. He is a person of impeccable judgment but even more important a person who gets things done. And on top of all that he is a really nice guy. It is my great pleasure to at this point hand over the keys to my office to Leo Milonas. Congratulations Mr. President!

Inaugural Address
**Annual Meeting
of the Association**

E. Leo Milonas

Thank you Evan for that introduction and thanks for taking me under your wing and helping to prepare me for the challenges which lie ahead, and a big thank you from all the members of the Association for your leadership of this Association which has been nothing less than spectacular.

One would expect that the members of a 22,000 person Association would feel little connection to each other, or with the Association. But Evan, through your e-mails, your challenging, reform-minded articles in our newsletter, your visibility and eloquence at committee meetings and Association events, you have kept us connected and involved. You have been the common thread that has pulled us together.

Evan, on behalf of all of us thank you for a job very very well done indeed.

The former presidents of this Association have all independently told me the same thing—that this is the greatest job that they have ever had. That's good, but they have also told me that in two years I will be hung in the other room, and for the rest of my days I will be called what all the other former presidents are now called—a “former living.”

For this current living, this moment represents the highlight of my professional career, which has been somewhat different from that of my predecessors. I began my legal career working for a small law firm, became a solo practitioner, and then became a small law firm partner. I served 27 years in the judiciary where I sat in the Criminal Court, Supreme Court, the Appellate Division and served in various administrative positions including Chief Administrative Judge, and now I am a member of Pillsbury Winthrop, a large national law firm. Having spent my life in different roles in the practice of law and in the judiciary, I bring a view from the inside of all of them to my new role. So I stand here as a representative of many segments of our profession, interested in the welfare of each of them, and therefore the welfare of the whole.

For bestowing upon me the highest honor that a lawyer can have, entrusting me with the Presidency of the greatest Association of the Bar, you have my heartfelt and enduring gratitude.

Many Association members have asked me what will be my priorities as President.

The reasons for the creation of this Association, and our mission today have not changed. They fall into two basic areas: Our courts (the improvement of the quality and delivery of justice) and our profession (the ideals to which we should aspire and our responsibilities to our clients and the community). My priorities are about our courts and our profession and there are four I will address this evening: the work of our committees, court reform, the solo and small practitioner and professionalism.

Evan has stated this has been a hard year for the Association, yet it was our finest hour. In response to September 11th, the outpouring of pro bono service by our members and the thousands of walk-in volunteers from the bar at large was unprecedented. All gave of their time, their skills and their hearts, without reservation.

Although September 11th will never be behind us and will always be a part of our lives and ever linger in our fears, my first priority will be to try to capture and hold on to that extraordinary spirit of volunteerism which this tragedy has elicited, and to concentrate this energy on what we do the best, the work of our committees. The great reputation of this Association and our most important contribution to the bar and the public is based upon this work, which is respected for its intellect, depth and fairness. Because our Committees speak with the voice of their distinguished members, and speak for this Association, their efforts carry weight and make a difference.

For example, recently the report of the Civil Rights Committee on

the New York City Human Rights Commission caused the new chair of the Commission to announce she would implement several of the committee's recommendations for fundamental changes in the priorities of the Commission and the Commission will now emphasize enforcement as we recommended. Many of the positions of the recent report on Military Tribunals by the Committee on Military Affairs and Justice were adopted by the American Bar Association and moved the ABA to action, and the resulting regulations of the Department of Defense which had threatened basic civil rights were changed and softened.

I have learned why my predecessors the "former livings" call this the greatest job. I have already met with many committee chairs from Aeronautics to Zoning. To work with leading experts as they ponder a wide array of important issues is an exciting experience. I look forward to working closely with our Committees; their work will be on my front burner. This Association will support and promote their efforts as we urge them to continue to push the edges of the envelope.

As many of you know this Association was formed in 1870 by leading lawyers of the time, to confront judicial corruption and the scandals of Boss Tweed. For the right price, judges in different jurisdictions would stay each other's orders, resulting in a complete breakdown of the courts. The mission of this Association at its inception was to reform the courts and improve the quality of Justice; and although today's legal climate is dramatically different that it was in 1870, that is still our mission.

As a former judge and court administrator, I have seen many important improvements in the delivery of justice. What has been accomplished is remarkable because there is a limit to what Chief Judge Kaye and Chief Administrative Judge Lippman can do with their leadership and administrative powers. Adequate funding for legal services and indigent defense, restructuring the State's court system, improving the judicial selection process and other key reforms, basic reforms which this Association has been pursuing for years, require action by the legislature and the Governor.

Year after year court, good government and bar association pleas for reform are ignored or politely considered and set aside. Whatever changes have occurred have come in small increments and with great effort.

Past frustration should not deter us or lessen our resolve. We must stay the course. Fundamental changes in our justice system are much needed. We have to find different and more effective ways to influence Albany. While we should continue our traditional bar association role we must also mobilize other voices that Albany will not be able to ignore. This is my second priority.

For example, the great success of the Commercial Divisions of the Supreme Court demonstrated that when it is relevant to their interests, the business community is very responsive and supportive of court improvements. A strong case can be made to corporations that the court reforms we propose are good for their interests. In addition, the reforms are good for their employees which also helps businesses. Building on the success and reputation of the Commercial Division, we should enlist the support of the business community for court reform.

In addition, many inside corporate counsel are members of our Association. They have the ears of corporate executives and are effective advocates. Sadly, the overall scope of in-house counsel participation in our affairs is relatively small. We have to find new ways to encourage them to take more prominent roles in our Association. Court reform should be one of them.

In the next few weeks I shall reach out to members of this Association, many of whom are here tonight, in order to bring about a dialogue among business leaders, court officials, and our members to help to enlist the support of business leaders for court reform.

Due to financial constraints, the Association had to slow its efforts to build our Small Law Firm Center. Although we have added a number of important services for our small firm practitioners, we have not implemented the full scope of the Center as conceived. This service is important. Two-thirds of all lawyers in New York State are sole practitioners or in firms of 5 or less, 80 percent are in firms of 10 lawyers or less, and small firm practitioners are the largest component of this Association's membership.

My third priority is to expand our service for members of smaller firms and for the solo practitioners. I believe that these services will attract new members and add to the diversity of the Association.

The Center as envisioned will provide solo and small firm practitioners with many of the benefits that are enjoyed by those in large firms. It will offer the opportunity to network with similarly situated colleagues and will help to alleviate the isolation sometimes felt by those who practice alone or with small firms.

Small firm practitioners are the mainstream of the practice of law and provide the majority of our public with legal services. They provide an invaluable service not only to the community but to larger firms and they should be supported and encouraged to participate in the activities of our house.

There are many other concerns and issues that I believe are of impor-

tance to our profession and this Association. The fact that some problems cannot be readily resolved is not reason to avoid them. The status of our profession and professionalism is one of them, and it is my fourth priority.

The Association has created a task force chaired by NYU Law Professor and former Delaware Chancellor William Allen to study and report on policy issues raised by the Enron debacle. Chief Judge Kaye created the New York State Institute on Professionalism in the law, which is examining professionalism starting with law school.

With today's Enron and Anderson headlines, the evolving model of mega law firms, and the growing number of "take no prisoners" litigators there is no question that it is time for a balanced and honest assessment of our profession. The very nature of our profession is at issue. In the view of many, the big business model is overtaking the large law firms and professionalism is at risk. Their bottom line may be improving but at what cost? Our young lawyers are the most vulnerable. Many of our young attorneys feel they are viewed as billable hour manufacturers rather than talented and imaginative lawyers. We reward more hours as the benchmark for success, with bonuses. Most recent law school graduates are prisoners of school debt and so they have fewer options. In the past, when the opportunity arose—for example, the expansion of investment banking and the dot.com boom—they left the profession in droves. Young attorneys have told me they would gladly give up income for a more balanced life. But this trade-off is not compatible with billable hour business goals which add to partner compensation.

I look forward to the work of the Allen task force and Judge Kaye's Institute on Professionalism as they examine and address the core problems of our profession. Their recommendations will be debated and will have a significant impact on our profession. Our Association is eager to assist in the debate. I shall soon be meeting with our Professional Responsibility, our Professional Discipline and our Professional and Judicial Ethics Committees to help define their proper role in exploring the status of our profession. But in the meantime, we shall open our doors and welcome the young members of our profession to come in and share their concerns, to bring their perspective to the table and to join in the dialogue. We shall encourage their membership and invite and enlarge their participation in the life of our committees. We shall host forums, receptions and meetings so young attorneys can network with each other and have a place at the table to help to charter the course of their profession.

Down the hall over the doors of the Tweed Room is the famous quote from Harrison Tweed, the 34th President of this Association from 1945-1948.

I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with, than most other varieties of mankind.

With the amendment of mankind to humankind, a very agreeable quote. But that's not the entire statement. What most don't know is what immediately follows, the rest of the statement, and I quote:

Their greatest fault is that they organize bar Associations. Bar Associations, instead of breeding courage, breed timidity. They acquire an introspective point of view—there is a turning inward instead of an outgiving. They tend to gratify their members rather than to do something for the community.

I should like to see this Association engage more wholeheartedly, and perhaps even a little dangerously, in things which concern the public good and are—and this is important—things of which lawyers possess special knowledge.

If Harrison Tweed were here tonight he would be beaming with pride. We are the realization of Tweed's dream—an Association of 22,000 diverse members—representing all parts of our profession and community, with 180 committees involved in and confronting the issues and problems which face our profession and community.

This Association does not shrink from controversy, nor is it intimidated by anyone. We are about the public good and we have proven—dramatically and emphatically—that our community can rely upon us.

So Harrison Tweed and I thank you for making this Association what it is and I thank you for giving me a turn at the “best job.” And like Tweed, I am so looking forward to working with you—playing with you, drinking with you (you know the rest)—in the next two years.

Finally, I want to say thank you to the different partners in my life, old and new. To my newest partners, Barbara Opotowsky and Alan Rothstein, thanks for breaking me in and steering me in the right direction. To quote the last lines from the movie “Casablanca,” “This is the beginning of a beautiful friendship.”

Thanks to my Pillsbury Winthrop partners for supporting my acceptance of the Presidency, and for supporting this important pro bono commitment.

Thanks to Chief Judge Kaye. In fact, there is so much to thank her for on behalf of our profession, our courts and for myself, I don't know

how to begin and I would probably never end. Judith, thanks for everything.

Thanks to my daughters Alexandra and Olivia for their love and support. They fortunately inherited their mother's intelligence, wisdom, charm, and beauty, and from me learned the important things in life—how to drive a gear shift car and how to do laundry.

And finally, thanks to you, Helen, nothing I achieved would have occurred without you and without you whatever I achieved would have no meaning.

Statement Regarding the United States Department of Justice Final Rule Allowing “Eavesdropping” on Lawyer/Client Conversations

*The Committee
on Professional Responsibility*

The Association of the Bar supports the Department of Justice in its patriotic and zealous efforts to combat and prevent terrorism. Consistent with our duties under the Constitution and the Lawyer’s Code of Professional Responsibility, the Bar also seeks to advise the Department of Justice and other agencies of the potential impacts of their efforts on the rights of citizens and others and upon the legal process. Recently, in its report on the newly created military tribunals, the Association’s Committee on Military Affairs and Justice commented on certain constitutional problems in the Order establishing such tribunals. The Association’s Committee on Professional Responsibility now wishes to add its thoughts on the rule issued October 30, 2001, without prior comment, that allows the United States Attorney General to authorize eavesdropping on attorney/client communications upon a finding of “reasonable suspicion” of “terrorism.”

The American Bar Association, in a statement by President Robert E. Hirshon on November 9, 2001, stated that it was "deeply troubled" by the Rule and that "prior judicial approval and the establishment of probable cause—the standard embodied in the Fourth Amendment—and not 'reasonable suspicion,' are required if the government's surveillance is to be consistent with the Constitution." The Committee on Professional Responsibility would add to that statement the concern that in eliminating the attorney/client privilege the Rule strikes at the core of our adversarial system of justice and may force an attorney to violate the Code of Professional Responsibility.

Essential to our system of justice is the attorney/client privilege, which is part of maintaining the fairness inherent in our adversarial system. The privilege is such a touchstone of the legal system that lawyers have an ethical obligation under the Code to maintain the privilege and are even cautioned about the use of cell phones, cordless phones and internet e-mail so as not to allow the possibility of inadvertent interception of privileged communications and the resultant loss of the privilege.

Under the Rule, upon the Attorney General's finding of "reasonable suspicion," a lawyer and a client may be notified that nothing they say will be private. This means that the client will never have the ability to speak privately and confidentially with their counsel. Given the lawyer's duty to preserve the privilege and not to speak if he or she can not do so, this can have the effect of denying the client any counsel at all. Such an invasion of the lawyer/client privilege undermines the adversarial nature of the legal process. The Rule's provision for separate monitors within the Department of Justice, apart from the prosecutors, does not remove the chilling effect such monitoring would have on conversations between a lawyer and a client. In cases of organized crime and the war on drugs, where an attorney was suspected of being a co-conspirator in or a conduit for further illegal acts by a client, warrants satisfying the probable cause standard have been obtained by prosecutors. As stated by the ABA, this should be the standard in the war on terrorism.

The Committee believes that, even in the war on terrorism, the basic principles on which our system of justice is balanced ought not to be tampered with. It is a fundamental premise of our system of justice that all persons, regardless of the crime or their circumstances, have access to legal counsel, be able to speak with their lawyer confidentially and be able to participate in the adversarial truth-seeking process. Any incursion on these premises must be done under the aegis of a neutral and detached magistrate and based upon probable cause. The requirement of a judicial

finding of probable cause should not be replaced with an executive finding of reasonable suspicion in allowing the attorney/client privilege to be breached. Under the Rule as currently in force, lawyers may be forced to violate the Code of Professional Responsibility if they attempt to render to their clients their constitutional right to the effective assistance of counsel, and clients may be denied the right to an attorney if the attorney is forced by the Code not to speak.

March 2002

The Committee on Professional Responsibility

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It Is Time to Enforce the Law: A Report on Fulfilling the Promise of the New York City Human Rights Law

The Committee on Civil Rights

This report was issued in December 2001, and was designed to inform, and provide policy recommendations to, the Bloomberg Administration, which was then about to take office.

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It Is Time to Enforce the Law: A Report on Fulfilling the Promise of the New York City Human Rights Law

The Committee on Civil Rights

I. INTRODUCTION

The existence both of individual instances of discrimination in housing, employment, and public accommodations, and of entrenched patterns of such discrimination, remain major problems in New York City and its surrounding metropolitan area. Data released this year, for example, demonstrate that New York and its environs have one of the highest levels of housing segregation in the country.¹ Nationally, a glass ceiling on the

1. In a recent study of the top 50 metropolitan areas by researchers at the State University of New York at Albany, only Detroit and Milwaukee had higher segregation indices for black and white children than did New York (*New York Times*, May 6, 2001). When the City Council passed comprehensive revisions to strengthen the City's Human Rights Law in 1991 it was, among other things, seeking to address "the City's race relations problem" by "attacking entrenched patterns of segregation, discrimination, and bigotry." Report of the City Council Committee on General Welfare, p. 2. When questioned, the Affirmative Litigation Division of the City's Law Department agreed that systemic discrimination remains a major problem in New York City (Meeting between representatives of the Affirmative Litigation Division and of the Committee, May 12, 2000).

advancement of women remains firmly in place. A survey of Fortune 500 companies last year found that the “leadership pipeline” of “line officers” (*i.e.*, “those positions with profit-and-loss or direct client responsibility”) consisted overwhelmingly of men. Only 7.3 percent of those positions were held by women.²

Looking to see why more progress has not been made, the Committee has embarked on an effort to examine the discrimination-fighting efforts of the many enforcement agencies that have authority to prevent and remedy discrimination in New York City. This report focuses on the efforts of the City’s Commission on Human Rights and its Law Department, the two agencies vested by the City’s Human Rights Law with authority in this area.³

The Committee has found that neither the Commission nor the Law Department has adequately performed its job of preventing and remedying discrimination. A variety of reasons are detailed in the pages that follow, including the crippling of the Commission by budget cuts that leave it today with only 24 percent of the City-funded staff that it had ten years ago. One lesson stands out: it is impossible to prevent and remedy discrimination effectively unless the tools employed in the effort include a sustained commitment to confront discrimination as a law enforcement problem as serious as any other. This is not to suggest that educational and other efforts to modify discriminatory attitudes are unimportant. Nor is this to suggest that efforts to mediate disputes cannot be useful. To the contrary, both education and mediation can help, respectively, to prevent and resolve instances of discrimination. Nevertheless, a credible threat that the law is going to be enforced is essential to creating a deterrent that actually contributes to modifying behavior.

Understanding the need to create a deterrent is no different from what is expected in other areas of law enforcement. No one, for example,

2. “2000 Catalyst Census of Women Corporate Officers and Top Earners,” Catalyst, www.catalystwomen.org/press/factsheets/fastoote00.html.

3. Entities on the state level with anti-discrimination authority include the Division on Human Rights, and the Attorney General’s Office. Federally, there are even more entities with this responsibility, including the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, the Civil Rights Division of the Justice Department, the United States Attorney’s Office for the Southern and Eastern Districts of New York, and the Office of Civil Rights in various federal agencies including Education and Health and Human Services. The Committee hopes that this report is only the first installment in a continuing series concerning the operations of each and all of these agencies, with follow-up reports done to assess changes in practices and efficacy over time.

would assert that the reductions in “quality-of-life” offenses that have been achieved in the last several years could have been achieved by exhortation alone. No one would assert that entrenched patterns of illegal behavior could be exposed and resolved merely by relying on individuals deciding to step forward. Certainly the City did not do so in reforming the trash hauling or concrete industries, or the City’s fish markets. Unless discrimination is recognized as especially harmful to the City’s social fabric, and as a major limitation on the quality of life of its victims, a double-standard will endure: serious attention and resources given to deploy enforcement solutions to most “law and order” matters; scant attention or resources given to deploy enforcement solutions to violations of discrimination law.

The Committee realizes that the City’s resources are stretched very thin in the aftermath of September 11th. Nevertheless, a City where discrimination is tolerated is a City that can never be truly united. The need for vigorous law enforcement in the anti-discrimination field can be achieved with a relatively modest infusion of resources (measured in the tens of millions over four years, not the tens of billions as with other priorities). Whether discrimination arises out of anger over the events of September 11th, or reflects other, longstanding strains of bigotry, the City must see to it that the fight against discrimination is waged effectively.

II. NEW YORK CITY COMMISSION ON HUMAN RIGHTS

A. Role of the Agency

The New York City Commission on Human Rights is given the power to “eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate...” Administrative Code of the City of New York (“Admin. Code”) §8-101.⁴ In 1991, comprehensive amendments were passed to strengthen the law. Local Law 39 of 1991. These amendments included a variety of provisions stronger than those that were contained (or are even

4. In November, 2001, voters approved a referendum that gave the Commission status as a Charter agency (new Charter Chapter 40). The referendum reaffirmed that it is the public policy of the City to “promote equal opportunity and freedom from unlawful discrimination” through the provisions of the Human Rights Law, and the report in support of the proposal by Charter Commission staff asserted that “incorporating into the Charter the fundamental idea that the well-being of the City of New York depends on the elimination of bias, prejudice, unlawful discrimination, and bigotry from the civic life of the City will be of great symbolic value.” Staff Report to the Members of the Charter Revision Commission, July 27, 2001, p. 51.

now contained) in federal law. Among these are the scope of reasonable accommodation and other disability protections; the scope of vicarious liability for acts of employees and agents; the circumstances under which punitive damages are imposed; the imposition of individual liability for one's own discriminatory acts; the allocation of burdens in disparate impact cases; the scope of public accommodations coverage; and a limitation on housing units excluded from coverage under the statute.

Importantly, there were also a series of changes that represented a reconceptualization of the agency from one which still had roots in the voluntarist efforts made in the 1950s and early 1960s, to one that was a modern law enforcement agency. This new view recognized that: (a) discrimination had become more subtle; (b) the agency could not merely offer a carrot to discriminators, but needed to wield a stick; and (c) handling discrimination cases was no longer a matter of bringing together two contesting individuals, but rather a complex field of litigation with an experienced bar dedicated to defending those accused of discrimination.⁵

The shift to a serious law enforcement focus was made plain in the legislative history of the 1991 amendments:

There is still much work to be done to help us achieve the goal of a truly open city. We have learned over the years that change will not come without resistance; that the struggle for civil rights must be constantly renewed; and that the struggle for the rights of one group is indivisible from the struggle for the rights of all other groups. The new human rights bill gives us the legal tools

5. See *Matter of 119-121 East 97th Street Corp. v. NYC Commission on Human Rights*, 220 A.D.2d 79, 88, 642 N.Y.S.2d 638, 644 (1st Dept. 1996) ("The legislative history of the amendments to the Administrative Code... indicates that they were intended to strengthen and expand the enforcement mechanisms of the law so the Commission could prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate"). These amendments included the statutory recognition of the Commission's prosecutorial bureau as the party to every complaint, the presumed existence of motion practice in Commission proceedings, and the ability to compel discovery. Admin. Code §8-117. They included provisions requiring covered entities to maintain records, and sanctions for non-compliance with discovery orders. Admin. Code §8-118. They included the requirement that respondents promptly submit a verified answer containing their affirmative defenses. Admin. Code §8-111. Civil penalties were made available for the first time, Admin. Code §8-126, and penalties for violating Commission orders were also imposed. Admin. Code §8-124. Notably, the drafters of the amendments recognized that not all cases would be the proper subjects for mediation, but insisted that all conciliation agreements be embodied in an order of the Commission, the violation of which would subject the offending party to penalties. Admin. Code §8-115.

we need today to continue the fight. I'm counting on the Commission and the Law Department to use these tools to make sure that meritorious claims of discrimination are promptly and vigorously prosecuted.⁶

B. Findings and Observations

The Committee had the opportunity to meet with the Commission's leadership,⁷ review publically available City budget and management reports, and to analyze data provided to the Committee by the Commission pursuant to a Freedom of Information Law request. This data included all cases in Fiscal Year 2000 (FY00) which were disposed of by no probable cause determination, administrative closure, withdrawal, or withdrawal with benefits. It also included all cases in FY98-FY00 where a probable cause determination was made, where a referral to hearing was made, where a decision was rendered by the commission, or where a conciliation agreement was entered into. Drawing on these activities, the Committee has determined the following.

1. The Commission is underfunded and understaffed. The Commission, like other anti-discrimination agencies, has never been adequately funded, but the problem has grown much more acute over the last several years. In FY91, there were 152 City-funded employees agency-wide. That number was reduced to 142 in FY92, and to 130 in FY93.⁸ By FY00, the number of City-funded employees budgeted had been slashed to 37, and was slated to decrease to 36 this year (even before the announcement of the Mayor's recently-imposed budget cuts for almost all City agencies).⁹ In percentage terms, then, the agency-wide cut in City-funded employees from FY91 to FY01 has so far been 76 percent. The impact on enforcement potential has been predictably disastrous: at the end of June, 2001, the Commission's

6. Remarks of the Mayor at Public Hearing on Local Law, June 18, 1991, p. 5.

7. A meeting was held on May 4, 2000. References in this report to statements, positions, or beliefs of the Commission are derived from statements of Commission representatives at that meeting, unless otherwise specified. References in this report to statements, positions or beliefs of the Law Department are derived from statements of representatives of its Affirmative Litigation Division made at a meeting with a Committee representative on May 12, 2000, unless otherwise specified.

8. Mayor's Management Report, September, 1992, p. 466; Mayor's Management Report, September, 1993, p. 508.

9. Mayor's Management Report, October 2001, Indicators Volume, p. 197; "Mayor Freezes \$1 billion in Spending," New York Times, October 10, 2001, p. D1; "Mayor Submits \$766 Million In Cuts to Balance City Budget," New York Times, December 4, 2001, p. D4.

Law Enforcement Bureau was down to seven investigators and four staff attorneys actually on staff.¹⁰ Caseload has risen from 3,165 cases open as of July 1, 1999; to 3,500 open as of July 1, 2000; and to 3,925 open as of July 1, 2001.¹¹ At this rate of increase, the Commission would have 5,445 cases open by July 1, 2005, more than 10 times the number of investigations it completed this last fiscal year. All this with the need for initiatives against systemic discrimination not even accounted for. It is clear that, at this level of funding, a comprehensive effort to prevent and remedy discrimination is altogether impossible.

2. *Most of the Commission's current activity does not involve penalizing discriminators and compensating victims of discrimination.* In analyzing data provided by the Commission in response to a Freedom of Information Law request, the Committee counted a total of 562 cases as having been closed in FY00. 85 of these represented cases where the complainant withdrew the complaint without receiving any benefit, 15.1 percent of the total. An additional 122 cases were closed not because of any investigative finding, but rather because the agency could no longer locate the complainant. These "failures to locate" closures represented 21.7 percent of all case closures during FY00. Another 78 cases were closed for other reasons of "administrative convenience" (including closures made at a complainant's request, closures for failure of a complainant to cooperate, and cases where further prosecution was deemed not to be in the public interest). This group represented another 13.9 percent of cases closed. Thus, taken together, withdrawals without benefits, failures to locate, and other administrative convenience dismissals represented just over half—50.7 percent—of all cases closed in FY00.

In addition to the foregoing cases, another 170 were closed with a finding of no probable cause (30.2%). Assuming for the sake of argument that the cases were ones where sufficient evidence did not in fact exist to justify a finding of probable cause,¹² it becomes clear that the overwhelming portion of the Commission's law enforcement effort does not focus on cases where discrimination has actually occurred (i.e., its activity is not "high yield"). Indeed, for every 10 no probable cause determinations, the Commission's current caseload yields only approximately one probable cause determination.

3. *The Commission does not have a strategy to prevent and eliminate discrimination*

10. Mayor's Management Report, October 2001, Indicators Volume, p. 197.

11. *Id.*

12. See cautionary discussion at pages 251-252, *infra*.

a. Identifying the scope of the problem. Fundamental to the development of a strategy to fight a problem is the gathering of information sufficient to determine its scope. The Commission is forthright in stating it has not done so; indeed, the Commission characterizes this as an “imponderable.” The Commission relies only on the number of complaints that have been filed with it to measure the scope of discrimination, and has no plans to develop other measurement tools. The inadequacies of this approach should be evident. The number of filings relates not simply to an absolute level of discrimination existing in the City, but is shaped by how many people are aware of their rights, how many people are aware of the existence of the Commission as a forum, and how people view the efficacy of the Commission as a forum. Each of these factors can be influenced by the Commission.¹³ Perhaps most importantly, it is an error to believe that an examination of formal complaints of discrimination by individuals alone could ever provide a full picture of the scope of the problem. Some occurrences of discrimination can only be ferreted out were the Commission to utilize its authority to initiate undercover investigations on its own. For example, when an African-American New Yorker goes to a real estate broker, that individual has no way of himself knowing whether the broker has steered him away from available apartments in highly white areas, and towards available apartments in areas that are predominantly African-American.¹⁴ By contrast, a testing program, in which two investigators or “testers” who are similarly situated except for race are sent to the broker to seek comparable rentals, would allow the Commission to determine whether there were race-based disparities in terms of which apartments the broker was showing to which tester. Likewise, an individual might feel it futile or even dangerous to seek an apartment in a highly segregated neighborhood, but proactive investigation and prosecution of exclusionary practices would make clear both to discriminators and to those discriminated against that such practices were no longer being tolerated.

b. Combating the problem. In terms of preventing and remedying discrimination, any serious anti-crime effort must create a deterrent. For a deterrent to be effective, a law enforcement agency must create a reason-

13. It is thus revealing of the Commission’s view of itself as a passive or reactive entity that it states, “The number of cases filed each year is not within the Commission’s control.” Mayor’s Management Report, October, 2001, Summary Volume, p. 537.

14. The Affirmative Litigation Division of the Law Department agrees that systemic discrimination is often invisible to its victims.

able risk to a potential violator that its activities will be detected. It must then make clear that those whose unlawful activities are detected will be prosecuted quickly, and will be forced to pay a heavy price. Recognizing limitations on resources, any law enforcement agency must create incentives for targets of prosecution to resolve cases quickly and fairly. The only way to create such incentives is for there to be increasingly more dire consequences for the failure of a discriminator to do so. None of these elements is in place.

4. *The Commission mistakenly believes that “mediation” can be an agency focus independent of litigation.* The Commission frankly states that its focus is on mediation, not litigation.¹⁵ The idea that mediation can function properly on a stand-alone basis is a strategy that is contrary to all experience in litigation generally and prosecution specifically. As all civil litigators know well, a party thinks of the potential costs and benefits of settling a case in relation to the potential costs and benefits of not settling a case. If there are no costs to failing to settle, it is unlikely that the party will put a fair and reasonable settlement proposal on the table, and it is especially unlikely that the party will put such a settlement proposal on the table early in the process. No prosecutor would expect to achieve high levels of plea bargains—let alone plea bargains at an early stage—if the system were not designed to place the defendant at increasing risk the longer that defendant delayed agreeing to terms. Litigation and mediation must therefore be seen as intimately interrelated. A focus on litigation does not detract from mediation, but rather enhances the effectiveness of mediation. In turn, effective mediations resolve individual problems, create a deterrent (if publicized), and free up resources to litigate the remaining cases forcefully.

5. *The risk of a discriminator’s conduct being detected is minimal, especially because the Commission only engages in the most limited effort to initiate investigations on its own.* There are two ways that discriminatory conduct can be detected: individual complainants can bring specific instances to the Commission’s attention, and the Commission can seek to initiate investigations and prosecutions on its own. As discussed above (see page 240), the Commission’s focus on individual matters has been “low yield” for actual instances of discrimination. In contrast, efforts initiated by a law enforcement agency itself have a much greater chance of having an impact on discrimination because the agency can target a particular problem,

15. “The Commission continues to focus its efforts on resolving cases through mediation and settlement.” Mayor’s Management Report, February, 2000, Indicators Volume, p. 203, note “h.”

identify potential wrongdoers, and use tools (census data, testing, etc.) not available to individual complainants.

The 1991 amendments to the City's Human Rights Law were very much concerned about dealing with patterns of discrimination. The amendments confirmed the Commission's authority to initiate investigations of pattern and practice cases, Admin. Code §8-105(4)(b), and gave the Commission new authority to require recordkeeping by subjects of such investigations, Admin. Code §8-105(6). The amendments also noted that new authority being granted to the City's Law Department to fight systemic discrimination (see discussion at pages 263-264, *infra*) was designed to supplement the Commission's efforts in this regard. Admin. Code §8-401.

The Commission does not disagree with the premise that agency-initiated complaints can be effective, but cites lack of staffing as the reason for failure to engage in this type of activity except in the most limited way. Consideration needs to be given, however, to the proposition that agency-initiated complaints are at least as important in times of fiscal crisis as they are at other times. Most of the Commission's current effort (fully 80 percent) is expended on administrative closures, withdrawals without benefits, and "no probable cause" determinations. In contrast, a recent testing program of the Fair Housing Council of Greater Washington which was checking for the existence of race discrimination in rental housing yielded discrimination in 51 percent of tests conducted in Maryland, and 56% of tests conducted in Virginia.¹⁶ In contrast to the generally more limited impact of an individually brought case, a single investigation into a pattern and practice of discrimination can provide relief to hundreds or thousands.¹⁷ Moreover, an agency can initiate matters requiring affirma-

16. "The Fair Housing Index: An Audit of Race & National Origin Discrimination in the Greater Washington Rental Housing Market," The Fair Housing Council of Greater Washington (1997). The Mayor has recognized the utility of proactive testing in some contexts. In 1999, in the wake of the actor Danny Glover having being passed up by taxi drivers, he announced a testing program to determine the scope of race-based refusals to serve passengers. "Probably we should have done it 3 years ago, 5 years ago," the Mayor said, "but also it would have been done 7 years ago, and 8 years ago, and 10 years ago, and 12 years ago, and 15 years ago. So, you can keep using that excuse forever. This is a good time to do it. It got a great deal of attention because it involved a person of great notoriety." He announced the intention to take away the cabs of violators: "What we're trying to do," the mayor said, "is intensify [previous efforts] dramatically in order to make the point." "Cabbies Who Bypass Blacks Will Lose Cars, Giuliani Says," *New York Times*, November 11, 1999, p. A1.

17. For example, an Equal Employment Opportunity Commission investigation of a pattern of harassment of women at Ford Motor Company resulted in a settlement that included a fund to pay nearly \$8 million in damages to up to 900 victims, an additional \$10 million for anti-

tive relief that would not be initiated by the private bar because the anticipated monetary damages involved in such a case are low.

6. *The Commission's "first-in, first-out" system means that few if any cases will be prosecuted quickly.* Except for the rare case, the Commission maintains a system of working on the oldest cases in its system. There are many drawbacks to this approach. Because of the perennial backlog of cases, this means that each new matter must go to the back of the line. By definition, significant waits are virtually guaranteed. For example, of the cases that were closed by "no probable cause" (NPC) determination in FY00, 53 (30.1% of the total) had been filed three years or more before they were closed. Only 11 cases that were closed by NPC determination in FY00 had been filed in FY00 (6.3% of the total).¹⁸

Breaking the cycle of "first-in, first out" was something that had been contemplated by the 1991 amendments to the City's Human Rights Law. A requirement of prompt completion of investigations was set forth for the first time, but only for cases to be filed on and after September 1, 1991. Admin. Code §8-109(g). The idea was to force the agency to concentrate its resources on newly arriving matters, so as to prevent those new matters from becoming old.

The importance of looking at cases quickly cannot be overstated, and was one of the reasons that the 1991 amendments imposed a new requirement that respondents submit verified answers to complaints within 30 days. Admin. Code 8-111(a).¹⁹ For the person who has been discriminated against, justice delayed is in fact justice denied. Imagine the uproar if a victim of a crime or a fraud went to the police or the F.B.I. or the S.E.C. and was told, "Perhaps we'll begin to get to work on this matter in a year or so." Without early case assessment, the Commission loses the ability to

discrimination training of Ford staff, and a commitment to have 30% of supervisory positions at the plants where the harassment occurred held by women within three years of the settlement. "U.S. and Ford Settle Harassment Case," *New York Times*, September 8, 1999, p. A14.

18. More positively, half of the NPC determinations occurred no more than 568 days (approximately 19 months) after the case had been filed. Likewise, more than half of those complainants who withdrew their complaints in consideration of having received some benefit did so less than a year after having filed a complaint. What is clear, however, is that there are large groups of cases where nothing has happened for longer periods of time. Most notably, the time from filing to disposition of the cases closed for administrative convenience, looking at the middle two quartiles (25th to 75th percentile), averaged 1901 days (5 years and 2 months); the median was 2191 days (fully six years).

19. Prior to the 1991 amendments, the submission of an answer was optional.

focus on getting quick results in the minority of filings in which it appears that the complainant has actually been discriminated against, and loses the opportunity to find some witnesses, let alone interview witnesses when memories are fresh. Critically, the Commission loses its ability to use its power to seek preliminary injunctive relief. The granting of expanded powers in this area was another innovation of the 1991 amendments—authority was given to seek preliminary relief in employment and public accommodations cases in addition to the preexisting authority to do so in housing cases, Admin. Code §8-122—but the Commission has not used this power. Finally, the “first-in, first-out” approach dramatically reduces the risk to each new respondent that any action will be taken against it in a timely fashion, and encourages a sense amongst respondents that cooperation is not necessary.

7. *Discriminators know that the Commission virtually never takes a case to trial.* Most areas of law do not have a high percentage of cases that go to trial; anti-discrimination law is no exception. But, as in many areas of law, the willingness of the litigator to go to trial has a major impact on how that litigator’s adversary assesses the risks for her client. Without the threat that a case may be taken to trial, that adversary will be less likely to agree to a reasonable settlement, and, more generally, those covered by the provisions of the law are less likely to believe that violations carry serious consequences. For the four-year period from FY98 through FY01, the Commission rendered final decisions after trial in only five cases, well below one-half of one percent of all dispositions in that period. The last decision was published in January, 1999.²⁰

8. *Discriminators are not forced to pay a heavy price.* In court proceedings, it is routine for the monetary value of settlements in anti-discrimination cases to run to the tens-of-thousands of dollars, and it is not uncommon for the monetary value to run into the hundreds-of-thousands

20. Of these five trials, two resulted in dismissals. A reasonable accommodation in housing violation resulted in an order awarding \$15,000 in compensatory damages, and monitoring of the respondent’s practices. No civil penalty was awarded. Commission on Human Rights ex rel. Raymond v. 325 Cooperative, Inc., 1999 WL 152526 (N.Y.C.Com.Hum.Rts.) A second housing discrimination case resulted in an order requiring monitoring, awarding \$70,000 in compensatory damages to three complainants, but, again, not imposing any civil penalty. Torres et. al. v. Prince Management Corp., 1997 WL 1051932 (N.Y.C.Com.Hum.Rts.). A race-based denial of admission to a public accommodation resulted in an order awarding \$5,000 in compensatory damages, and assessing \$5,000 in civil penalties. Commission on Human Rights and Southgate v. United African Movement and Maddox, 1997 WL 1052037 (N.Y.C.Com.Hum.Rts.). Depending on circumstance, civil penalties up to \$100,000 may be assessed against discriminators. See discussion at pages 246-247, *infra*.

of dollars. By contrast, the monetary results achieved by the Commission for complainants are almost uniformly low.

Of 189 cases that were conciliated in FY98-00, the median value was \$2,000. The mean value of the cases comprising the middle two quartiles (25-75 percentile range) was \$2,172. A full 77% of the conciliated cases were settled for \$5,000 or less, and 91% were settled for \$10,000 or less. It is clear that respondents have understood the Commission's message that the agency's focus is on mediation, divorced from any threat of litigation.

Monetary relief for complainants, of course, is not the only measure of success. Other considerations include whether other penalties are imposed, whether affirmative, non-monetary relief is achieved, whether other methods of creating disincentives against delay are incorporated, and whether results are publicized to enhance deterrent effect and to encourage those who have been wronged to come forward.

9. The Commission has not been utilizing its authority to impose civil penalties against discriminators either to punish violators, deter future violations, or to encourage reasonable cooperation from respondents soon after a case is filed. Prior to the 1991 amendments, the City Human Rights Law had no provision for the imposition of civil penalties for cases that were brought administratively. The 1991 amendments permitted civil penalties of up to \$50,000 to be imposed on a discriminator to vindicate the public interest, and up to \$100,000 where the conduct was willful, wanton, or malicious. Administrative Code §8-126 (i.e., civil penalties up to \$50,000 can be imposed even in the absence of any showing of willfulness, wantonness, or maliciousness). The existence of these penalties was seen as crucial to recognizing the seriousness of the harm that acts of discrimination impose on the City. Commenting on the situation that existed prior to the passage of the 1991 amendments, then-Mayor Dinkins pointed out the incongruity in that fact that, "[Y]ou can be fined if you litter or double-park, but not if you discriminate."²¹ The hope was that, "As cases begin to be prosecuted under the new law...the existence of these penalties will exert a strong deterrent effect against acts of bias."²²

A deterrent effect can be created both against the wrongdoer (who learns first hand that the cost of discriminating is higher than expected), and against potential discriminators (if the Commission were to publicize the imposition of civil penalties). Unfortunately, no such deterrent has been created. A review of all of the cases in which a settlement agree-

21. Remarks of the Mayor at Public Hearing on Local Laws, June 18, 1991, p. 3.

22. *Id.*

ment was reached in the three year period encompassing FY98 through FY00 shows that of 189 conciliation agreements “So Ordered” by the Commission, none provided for the payment of civil penalties. In the three recent findings of discrimination after trial, no civil penalties were assessed in two cases, and a civil penalty of only \$5,000 was assessed in the third case (*see, supra*, page 243, note 20).

10. Providing affirmative relief. The City Human Rights Law contemplates that a broad range of non-monetary relief is needed to remedy discrimination and prevent future acts of discrimination. An order of the Commission after trial: “*shall* require the respondent to take such affirmative action as, in the judgement of the commission, will effectuate the purposes of this chapter...” Admin. Code §8-122(a), emphasis supplied. In some of its cases, the Commission does achieve affirmative relief in conciliation agreements. Most notably, out of a total of 189 conciliation agreements in a three-year period, 15 required a covered entity to make reasonable accommodation for a complainant’s disability.²³ Pursuant to 13 conciliation agreements, respondents were obliged to undergo anti-discrimination training or to amend their policies to include or supplement anti-discrimination provisions. Provisions that provide relief beyond that available to a single complainant leverage the Commission’s resources, promote the agency’s overall mission, and need to be insisted upon wherever appropriate. Unfortunately, while there were 14 conciliation agreements that required a means by which to determine whether a specific provision of a conciliation agreement had been performed, there were none that required the respondent to have its compliance with the City’s Human Rights Law monitored on an ongoing basis.

11. There are no disincentives in place to foil attempts to delay the pro-

23. Unfortunately, only two of these agreements provided for monetary relief for the complainant. Likewise, in FY00, there were 11 cases withdrawn with the benefit of a reasonable accommodation, none of which provided for monetary compensation to the complainant. None of the conciliations or withdrawals provided for civil penalties. It is, of course, essential that an agency recognize the importance of various forms of non-monetary relief, and the Commission is to be commended for having achieved reasonable accommodations for the individuals involved in these cases. The countervailing consideration, however, is that the entities that precipitated complaints by not having fulfilled their legal obligations in the first place are merely being required to do what they were supposed to do in the first place. In other words, however well-intentioned the focus on getting non-monetary relief is, there is little incentive created among housing providers at large to agree to changes informally asked for by tenants because the consequences of refusal are so limited. One way to balance interests would be to permit “zero-dollar” settlements early in the process, but in the cases reviewed, some had been pending for years before a settlement was reached.

cess. Though the Commission has extensive authority to deal with attempts to delay production of information, it tends not to utilize this authority (for example, it does not avail itself of its authority pursuant to Admin. Code §8-105(5)(a) to subpoena witnesses and documents).²⁴ Perhaps most strikingly, the Commission does not utilize the model provided by the criminal justice system. In that context, defendants are routinely offered a better plea deal at the beginning of the process than would be available to them later in the process. The strategy is not very subtle, but is effective in gaining plea agreements at an early stage. The Commission, by contrast, will agree to settlements that impose non-disclosure agreements on complainants,²⁵ regardless of whether the settlement is reached six months or six years after filing, and regardless of whether the settlement is reached before or after a probable cause determination has been made. Likewise, it never insists on the imposition of civil penalties, regardless of the posture of the case, or how much time has elapsed.

12. The Commission engages in only the most minimal publicity about its anti-discrimination efforts. In every area of law enforcement, the goal is to maximize deterrence, detection, and quick resolution. Deterrence can, of course, be achieved directly—when a wrongdoer sees that there is a penalty for its conduct. More often, deterrence is achieved indirectly—provided that potential wrongdoers learn that there is a risk of a penalty being imposed for certain proscribed conduct. Detection is maximized when victims of crime believe there is a reasonable probability that they will be vindicated if they bring their problem to the attention of law enforcement authorities. Quick resolution is maximized when accused wrongdoers understand that the entity that is prosecuting them has the wherewithal to follow through.

In all of these circumstances, publicity about results plays a crucial role. Publicity can not only serve as one aspect of direct deterrence, it is essential if potential wrongdoers are to believe that there is a risk of detection and punishment. More victims of discrimination will come forward if they learn that other victims have been vindicated. And the more that those accused of discrimination understand that there is agency follow through, the more likely it is that they will seek to settle early on.²⁶

24. Among the agency's other powers is the authority to compel discovery at the pre-hearing stage. Admin. Code §8-117.

25. Provisions imposing confidentiality on complainants were ubiquitous in the conciliation agreements entered into from FY98 to FY00.

26. The validity of this last point is, of course, contingent on the publicized results being ones that convey the message that the costs of discrimination are substantial, not de minimus.

The Commission engages in only limited publicity. Indeed, even in the most recent Mayor's Management Report, the "Highlights and Achievements" section for "Law Enforcement" contains no mention of any substantive results.²⁷

13. *The Commission has failed to bring cases that specifically illustrate the ways in which City law is more protective of civil rights than is state or federal law.* Local Law 39 of 1991 was designed to "put the city's law at the forefront of human rights laws."²⁸ Among the many ways it did so were by including provisions that: hold individuals liable for their own discriminatory acts, Admin. Code §8-107(1)(a); hold employers strictly liable for employment discrimination committed by their managers and supervisors, Admin. Code §8-107(13)(b)(1), and extensively liable for co-worker harassment, Admin. Code §§8-107(13)(b)(2), 8-107(13)(b)(3); dramatically curtailed the previously-existing two-family owner-occupied exemption from the housing discrimination provisions, Admin. Code §8-107(5)(a)(4)(1); imposed an obligation to provide reasonable accommodation not only where a covered entity knows about a disability but also where the covered entity should know about the disability, Admin. Code §8-107(15)(a); and expanded public accommodations coverage to all providers of services to the public, including all schools, Admin. Code §8-102(9).

Among other amendments to the City's Human Rights Law, disparate impact provisions stronger than those in federal law were put in place, Admin. Code §8-107(17); employment discrimination on the basis of marital status was prohibited, Admin. Code §8-107(1)(a); and discrimination on the basis of age in the context of public accommodations was newly prohibited, Admin. Code §8-107(4).

One would have expected extensive litigation by the Commission to develop a body of Commission caselaw in each of these areas. Doing so

27. See Mayor's Management Report, October 2001, Summary Volume, pp. 537-38.

28. Report of the Committee on General Welfare, p. 12. This Committee Report also recited the liberal construction provisions of City Law, Admin. Code §8-130, and stated that: "It is imperative that restrictive interpretations of state or federal liberal construction provisions are not imposed upon City Law." Committee Report at p. 13. Referring to this Report, the Mayor stated before signing the bill that, "It is the intention of the Council that judges interpreting the City's Human Rights Law are not to be bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed." Remarks of the Mayor at Publ.2 Hearing on Local Law, June 18, 1991, p. 2. See *Burger v. Litton Indus., Inc.*, 1996 WL 421449. at *19 (S.D.N.Y. Apr. 25, 1996) report adopted, 1996 WL 609421 (S.D.N.Y. Oct. 22, 1996) ("the 'legislative history' of the NYCHRL makes clear that it is to be even more liberally construed than the federal and state anti-discrimination laws").

would have delineated the scope and reach of these provisions, and provided guidance to litigators and judges in the federal and state courts. In fact, no such caselaw has been developed.

14. The Commission does not rely sufficiently on trained legal staff. Unlike the State Division of Human Rights, the Commission has recognized (at least in principle) the fact that the investigatory process is a legal process, that it is not sensible to wait until non-attorney investigators have completed an investigation to bring legal analysis and resources to bear, and that determinations as to probable cause and no probable cause must be made by attorneys. As such, the Commission has a “team system” whereby attorneys and investigators are linked in a group headed by a supervising attorney.

Nevertheless, the Commission personnel on the front line of seeking and assessing information are “Human Rights Specialists.” Those with experience considered relevant need not have a college degree (although one is preferred); none is required to have more than a college degree, let alone any level of legal training.²⁹ A recent vacancy for a Human Rights Specialist offered a starting salary of \$35,582.³⁰ These are the people who have primary responsibility for getting information from respondents represented by some of the most prominent law firms in the City. The mismatch is unmistakable.

The entire framework of anti-discrimination caselaw is built on the premises that discrimination is difficult to detect by direct evidence, that those accused will often put forward a pretextual reason for their conduct, and that the alleged victim of discrimination has access to less information about what happened and why than does the alleged discriminator. All of this means that the most sophisticated judgments must be brought to bear both in assembling and assessing a record prior to dismissing a case. It is certainly less expensive to have non-lawyers perform this task, but most would agree that, in general, the task would be better performed by an organization that had attorneys perform and/or direct these tasks, or at least had non-lawyers with extensive legal training performing these tasks under close attorney direction. Indeed, the Securities and Exchange Commission, which has its own complex area of law to enforce, relies only on attorneys and accountants to conduct investigations (assisted, of course, by paralegals).

29. Some Human Rights Specialists on the Commission’s staff do in fact have legal training. What is at issue is the question of how the Commission can best achieve staffing appropriate to the complexity of the tasks before it.

30. Citywide Job Vacancy Notice, July 24, 2001.

15. *The Commission does not have its own administrative law judges.* Commission cases are currently heard before administrative law judges (“ALJs”) of the City’s Office of Administrative Trials and Hearings (“OATH”). While individual OATH judges may be experienced in handling complex discrimination cases, OATH’s typical workload consists of summary proceedings. In FY01, of 2,239 cases received for adjudication, there were 1904 personnel cases, 100 license cases, five regulatory cases, 191 real estate and land-use cases, 27 contract cases, and 12 discrimination cases.³¹ In other words, the discrimination cases received accounted for approximately one-half of one percent of the total.

16. *The scope of Commission investigations is generally limited, and is not governed by uniform standards.* When an investigation concludes that there is no probable cause to credit the allegations of a complaint, a written determination to that effect is served on both complainant and respondent. In examining the FY00 no probable cause determinations, it was clear that many did not specify the investigative steps that were taken, and many others left it unclear as to whether a conclusion was compelled by evidence gathered by interviewing a witness, or by relying on a position statement submitted by a respondent’s lawyer.

Most of the investigations were quite limited in scope (most of the determinations themselves were no more than two pages long). It is certainly true that some claims of discrimination can easily be discounted by a review of evidence provided by the accused. The Committee’s review of the Commission’s no probable cause determinations leaves no doubt that there is a substantial number of cases that fall within this category. There are, however, many cases of discrimination that are subtle, and which require a searching inquiry into the purported justification that has been advanced by a respondent to explain its conduct. The Commission’s current leadership does not dispute the possibility that some cases could be complex. In general, however, bearing in mind the limited resources with which the agency is working, it believes that limited investigations, with limited discovery, are an appropriate match for the simple fact patterns it believes are presented in most of the matters filed with the agency.

Many law enforcement entities have an investigations manual that sets forth the basic procedures that should be followed. Among these might be the need to rely on evidence, not lawyer statements; the need to gather both written documentation and oral testimony in a form that could be utilized at trial if necessary; and the importance of interviewing witnesses

31. Mayor’s Management Report, October 2001, Summary Volume, p. 513.

separately to reduce the possibility of different witnesses tailoring their stories to conform to one another. The Commission does not maintain this type of investigations manual.

17. The Commission has neither sufficient data tracking in place nor the appropriate measures to gauge its performance. The Mayor's Management Report publishes only the most minimal information regarding the Commission's enforcement efforts. Annual information is presented on total caseload at the beginning and end of the fiscal year, the number of complaints filed, the number of investigations completed, the number of cases closed by attorneys, and the numbers of cases referred to OATH ALJs. No data is provided regarding the qualitative results of cases, the number of probable cause determinations, the number of trials conducted, or the time it takes for investigations or prosecutions to be conducted.³² No analysis is done internally to assess the meaning of case filings and dispositions (i.e., looking at complainant's protected class status, the context in which the discrimination was alleged to have occurred, and the result of the complaint).

C. Recommendations

As a new mayor takes on the responsibility of trying to create and maintain unity in New York City, paeans to the beauty of diversity will not be enough. A real commitment to equality requires both an understanding of the nature of the problem, a strategy to combat the problem, and a commitment to providing the resources necessary to wage the fight.

1. The new administration must promptly restore the calamitous budget cuts of the last 10 years. Reducing the Commission to the staffing levels that now exist was the quiet and polite equivalent of eliminating the agency altogether. A first step must be restoration to FY91 levels (152 City-funded employees), although doing so would not ultimately be sufficient because the agency was already underfunded 10 years ago. To put the funding issue in perspective, this is not a question of enormous new outlays of money on the scope of reconstruction of Lower Manhattan, or tax

32. The Commission states that it does not track the time it takes to complete its tasks, information the Committee was able to derive from a review of the individual case determinations provided pursuant to its Freedom of Information Law request. Likewise, the Committee's review of documents provided by the Commission established that, in FY98-FY00, there were 57 probable cause determinations. This contrasts with a total of 2,263 cases that the Commission reported in Mayor's Management Reports to be closed for all reasons (no probable cause, administrative closure, withdrawals, and conciliation agreements) in the same period. In other words, there was one probable cause determination for every 39 cases that were closed on other bases.

abate­ments, other law enforcement expenditures, or virtually any other City service. It is a question of whether the new administration believes that anti-discrimination enforcement is worth raising annual expenditures to a level by the end of its first term equivalent to a nickel per week for each New Yorker. A nickel a week should not be too much. Many times this amount can be raised through reasonable efforts to improve procedure across all City programs.

2. *The new administration must recognize that discrimination remains widespread, that it is a serious problem, and that it deserves a serious law enforcement response.* It is never easy to acknowledge unpleasant realities, but the ugly truth is that discrimination remains an everyday experience that has a real impact on the quality of life of many New Yorkers—whether it's the knowledge of an African-American family that it is futile to even think of moving to the neighborhood which that family thinks has the best public school because that family knows the neighborhood remains exclusionary; whether it's the frustration of a woman who wants to participate in the rebuilding of New York but finds that many of the construction trades remain closed to her; or whether it's restrictions on a man with a disability who finds that shops, theaters, doctors' offices and other public accommodations remain physically inaccessible to him. A new administration must adopt a "zero tolerance" policy in respect to discrimination, a policy whereby it commits to create the capability by which it can be on the alert for, and prosecute vigorously, discrimination that stains the City during its watch.

3. *The new administration must recognize the importance of establishing a "credible threat of litigation" strategy.* In most areas of law enforcement, the pendulum swings between an approach that is "all stick," and one that is a balance of "carrot-and-stick." Only in the discrimination area is the typical approach one of "all carrot." This last approach has not had an impact on reducing or remedying discrimination, and there is no reason to expect that it will. People and organizations—both before litigation and during litigation—act not only on the basis of deeply held moral beliefs, but on a very practical assessment of what the likely consequences are of their conduct. If the anti-discrimination laws are to be more than pretty words, people must know that violations will in fact be promptly and vigorously prosecuted.

4. *The new administration must recognize the need to have an ongoing systemic litigation program.* As used here, the term "systemic discrimination" is intended to have two meanings. One is the identification and prosecution of covered entities who engage in a pattern-and-practice of

discrimination. This might be the employer who still limits the hiring of gays and lesbians in highly visible positions out of an antiquated and biased view that such hiring would “hurt its image.” It might be the restaurateur who is happy to hire Latinos to work in the kitchen, but not to be waiters. The other meaning of “systemic discrimination” is that type of discrimination which suffuses an industry or a neighborhood. Thus, even though the owner of a two-family owner-occupied house is only discriminating in respect to one rental unit, the systemic nature of the problem is revealed by the fact that hundreds of his neighbors are doing the same thing.

Both types of these Commission-initiated investigations and prosecutions represent the best opportunity to detect and deter the greatest amount of discriminatory conduct. In contrast to the “low yield” found in connection with current individual filings,³³ such Commission-initiated matters hold the prospect of being “high yield” in detecting and deterring—and remedying—systemic discrimination. Funding of the agency will obviously have to be increased before such efforts are staffed robustly. But even if it takes a period of years to achieve a fully adequate level of funding for the agency, there should be, given the potential rewards, a significant effort put into Commission-initiated investigations and prosecutions beginning immediately.

There is, of course, an understandable concern about the plight of individual complainants, and whether a greater focus on systemic matters would hurt the agency’s ability to handle those individual complaints. But the reality is that only major staffing and structural improvements can effect any meaningful change in that situation (*see* Recommendation 1, *supra*, pages 252-253, and Recommendation 5, *infra*, pages 255-257). In the context of a backlog of cases that now nears 4,000 and which, without additional funding, will be nearly 5,500 by mid-2005, it is clear that deploying some staff to Commission-initiated matters would have only a marginal impact on the scope of the backlog, but a real impact on whether the Commission begins to confront entrenched discrimination.

In developing a plan to identify and attack systemic discrimination, the new administration should proceed with the following principles in mind. First, it is important to maximize the pressure brought to bear against a pillar of entrenched discrimination so that the agency’s enforcement

33. See discussion, *supra*, page 240, of the 80.9 percent of FY00 case closures that were withdrawals without benefit, failures to locate, miscellaneous administrative convenience dismissals, and no probable cause determinations)

efforts will begin to have an impact (both directly and in terms of secondary deterrent effect). Given resource limitations, this means that the agency will need to select only a few areas on which to focus. Second, the effect of a series of small cases bearing on the same problem should not be underestimated. These cases can be brought quickly, and can drive home the message that there is an ongoing enforcement effort that potential discriminators need to worry about. Third, it is crucial that all results of systemic enforcement be widely publicized: doing so creates a multiplier effect of deterrence beyond that achieved against the individual wrongdoer.

A first-stage goal for the Commission, consistent with the foregoing, should be to conduct enough testing of residential discrimination to be able to represent to the public that somewhere in the City testing is being conducted every day of the year.

Finally, the City should use its authority to enlist the cooperation of other City agencies in helping to carry out the Commission's functions. Admin. Code §8-106. For example, all building owners receive regular mailings from the City. The Commission should arrange for a mailing to put owners on actual notice of their obligation to make reasonable accommodations for tenants with disabilities who they know or should know need such accommodation. Admin. Code §8-107(15)(a), and then should follow-up to see whether owners are meeting their obligations.

5. The new administration must make tough choices to break the cycle of endless backlog and delay. For even the most civil-rights-friendly administration, it will take time to get new staff hired and trained, and the City's budget crisis is real and cannot be ignored. In the meantime, the Commission's case backlog will continue to grow substantially. The new administration must face the reality that, for hundreds and thousands of claimants (and a like number of those accused), their right to a prompt determination has already been lost. The only question is whether this process will be replicated endlessly by deploying too few staff to keep up with new cases. Pretending to be able to handle both old and new cases is not simply a disservice to a fixed number of individuals (all of whom retain the right to take the cause of action into court—and be awarded attorney's fees if they prevail), but works to disable an agency from effectively performing any aspect of its mission.

Every consideration regarding the goals of preventing and remedying discrimination counsels a program of triage which would allow the Commission to focus its resources as quickly as possible on new matters that come in and on developing systemic investigations and prosecutions, and which, once having done so, would require the Commission to concen-

trate on prompt and effective prosecutions of cases with merit. If covered entities know that there is a substantial chance that illegal activities will be detected and prosecuted to the fullest extent of the law, there will not only be a substantial increase in deterrence, but those cases with merit that are pursued by the Commission will likely settle more quickly and on better terms. In other words, litigation and mediation will be integrated: the threat of litigation encouraging more, better, and earlier settlements; the availability of mediation clearing the way for the Commission to get to trial on those cases where it is important to do so.

Legislation should be passed to create a period of 18 months during which the Commission would exercise the equivalent of prosecutorial discretion and only pursue new individual filings where the agency's initial assessment of a complaint suggests that the case has importance due to its merit or to a public need that would be served by proceeding with the case. During this period, all other newly-filed cases would be administratively closed as matters over which the Commission "declines to exercise jurisdiction." To insure that a careful and serious initial assessment of each case is made, the task of intake and initial case review must be performed by attorneys highly experienced in anti-discrimination matters.

Any person whose case is closed on the basis of the Commission declining to exercise jurisdiction would preserve intact the right to commence an action in Court under the provisions of Chapter 5 of the City's Human Rights Law. It is true that many such persons will not be able to secure an attorney and will shy away from commencing an action pro se; nevertheless, this proposed period of restricted investigations is the only realistic way to give the Commission a breather to hire and train necessary staff, begin its systemic investigation program, and begin the process of rapid response to highly meritorious matters needing emergency intervention.

For those older cases still pending six months after the passage of such legislation, complainants would be given the opportunity to present their case to an Administrative Law Judge on their own (unless the Commission's Enforcement Bureau chooses to intervene), without there having been a determination of probable cause.

After the 18-month emergency period, the Commission needs to be permitted a version of limited prosecutorial discretion on an ongoing basis. It is universally agreed that a substantial percentage of complaints filed with discrimination agencies do not have merit, yet doing even superficial investigations of these complaints has taken a tremendous portion of agency efforts. The Commission should be permitted to dismiss as a matter of agency discretion—without making a finding as to probable

cause and without prejudice to the complainant's right to proceed in court—up to one in four of each fiscal year's filings as matters the Commission declines to investigate further.³⁴ Proceeding in this way would save valuable agency time, and permit more of the agency's focus to be on matters where it appears that discrimination has actually occurred. Capping the percentage of cases that can be dismissed in this way serves as protection against the risk that the "declines to investigate" closure could become a means by which the agency came to dismiss all but a handful of cases.

As with the 18-month emergency period, the "declines to investigate" procedure requires that intake and initial case assessment be done by attorneys highly experienced in assessing discrimination matters. For the ongoing "declines to investigate" procedure, this dismissal option should only be available for three months after filing, and only in those cases where respondents have answered and have not obstructed the Commission's requests for evidence. In this way, the possibility of a meritorious case being dismissed will be reduced, complainants will quickly know where they stand, and respondents will have an incentive to cooperate with the agency.

6. The new administration must realize that ongoing triage is essential. The goal of the agency must be to identify cases where discrimination can be prevented and remedied, and then to maximize the percentage of agency resources spent on those cases. Many complainants may have grievances—including legitimate grievances—that do not reflect the occurrence of discrimination. The Commission cannot be a forum for the resolution of these non-discrimination grievances; it needs to be a forum restricted to getting the most extensive and most effective relief against actual discriminators. As such, cases with merit must be prioritized at every stage of the Commission process.

7. The new administration must make certain that the Commission fully utilizes the power to seek preliminary injunctive relief. It is one thing (an important thing) to compensate victims of discrimination monetarily; it is at least as important to try to undo the effects of discriminatory acts. Thus, in cases where the evidence is strong and it is possible to secure an apartment or a job for an individual, or where it is important to have a selection process judicially or administratively supervised so that it is no longer tainted by discrimination, the Commission ought to be using its

34. Having reviewed the FY00 no probable cause determinations, the Committee believes that a substantial number of those determinations were made in cases that had, at best, barely colorable allegations of discrimination.

powers to seek injunctive relief to prevent respondents from doing things that would tend “to render ineffectual relief that could be ordered by the Commission after a hearing...” Admin. Code §8-122.

8. The new administration must develop an integrative approach to litigation and mediation focused on maximizing both deterrence and remedy. An integrative approach is the best way to leverage the Commission’s resources, and requires several elements.

a. Focus on cases with merit. The first element of this approach must be a focus on those cases where the Commission believes discrimination has occurred; that is, those cases where Commission action can cause actual discrimination to be remedied, and future discrimination, both by the particular wrongdoer and by others, to be deterred.

b. Insist on relief that carries out the Commission’s mission. The second element must be a demonstration to respondents and potential respondents that each case will be quickly, vigorously, and relentlessly litigated through trial unless terms truly consistent with the Commission’s mission to effectuate the purposes of the City’s Human Rights Law are achieved. Thus, affirmative relief such as training and changes in a respondent’s policy must become the rule rather than the exception before the Commission agrees to settle a case. Ongoing monitoring of respondent practices should be incorporated into agreements where the Commission believes either that an egregious violation has occurred, or where there is a risk of a continued pattern of violations.

c. Utilize the power to impose civil penalties. The third element must be a willingness to insist on civil penalties in a substantial proportion of cases. This is consistent with the statutory intent. Civil penalties as set forth in the City’s Human Rights Law are not limited to cases where a respondent has acted willfully, wantonly, or maliciously; instead, penalties may be imposed for any discriminatory act to “vindicate the public interest.” Admin. Code §8-126(a).

d. Value discrimination damages appropriately. The fourth element must be a determination to break out of the pattern of almost uniformly low-dollar settlements. The Commission must examine results that victims of discrimination achieve in terms of compensatory damages in other forums, and not undervalue discrimination injuries. This is particularly important in view of the at least implicit pressure placed on complainants by a provision in the City’s Human Rights Law that permits complaints to be dismissed (with the right to commence an action in court) if a complainant is “unwilling to accept a reasonable proposed conciliation agreement.” Admin. Code §8-113(a)(4). As long as the Commission is

handling a case where it is clear that the complaining witness has been discriminated against, it has the obligation to advocate for damages that in fact compensate for the injury that has been suffered.

e. Maximize deterrence and remedy by publicizing results. The fifth element must be extensive publicity about the results that the Commission achieves—via trial or settlement—in its cases. No enforcement agency is ever able to reach every case and potential case in its jurisdiction; its efforts are most effectively leveraged, and deterrence maximized, where people have a sense that wrongdoers are being caught and punished. Further deterrence will be achieved through the desire of covered entities to avoid engaging in conduct that, when detected, will be publicized. As an initial goal, the Commission should be able to report on such an achievement once each week.

f. Reward early settlements; discourage recalcitrance. The sixth element must be a recognition that it is important to the process to encourage respondents to cooperate and try to resolve matters quickly if possible. Though the provision in the statute dealing with refusal to accept reasonable conciliation agreements only sanctions complainants, Commission procedures could level the playing field. For example, the Commission could establish a policy of having a case-by-case determination of whether to insist on civil penalties if a case is being settled prior to a probable cause determination, but an absolute policy of insisting on civil penalties in cases settled after probable cause determinations. Likewise, while the Commission should never bind itself to confidentiality agreements, it could permit complainants and respondents to enter into limited disclosure agreements prior to probable cause determinations, but not agree to settlements with such terms after probable cause determinations. As long as the Commission is prepared to hold to its policy, and try those cases where respondents are not reasonable, the imposition of such policies can reasonably be expected to lead to quicker and better settlements.

g. Assure respondents that the Commission's process is fair and is limited to uncovering discrimination. This seventh and final element is as important as any of the others. The Commission must assure respondents and potential respondents—both in word and deed—that its interest is in fighting discrimination, not in being a clearinghouse for the resolution of miscellaneous employment and housing disputes. Laws against discrimination are precious inheritances that took great struggle to achieve and take great struggle to maintain. They should never be wielded as a club to coerce an agreement from a respondent who has not committed an unlawful discriminatory practice.

9. *The new administration must see that the Commission becomes a forceful advocate for the City's Human Rights Law itself.* As an institutional prosecutor, the Commission is uniquely well suited to identify the ways in which provisions of the City's Human Rights Law need to be vindicated, and to find cases which would serve as appropriate vehicles to do so. As discussed earlier (see discussion at pages 249-250), there are several areas that call for this approach, including the circumstances under which the City Human Rights Law provides for greater vicarious liability for employers than state or federal law, the scope of reasonable accommodations in housing (the costs of which are, in contrast to federal law, the responsibility of the housing provider), and a variety of disparate impact claims. In these cases, achieving a "good settlement" may not be the most important interest; rather, getting a judgment vindicating the principles of law at question may be the predominant interest, and should be pursued.

10. *The new administration must recognize that many discrimination cases are complex, and require a great deal of investigatory, prosecutorial, and adjudicatory expertise.* The fact that discrimination generally does not announce itself openly, and, indeed, is often wrapped in elaborate and well-crafted disguise means that, as the Commission restores staff, it must shift its balance of personnel more towards highly trained attorneys and away from those without extensive legal training. This must be done not only for the purpose of prosecuting cases, but for the purpose of conducting and overseeing investigations of cases. The Commission, like many other enforcement agencies such the U.S. Department of Housing and Urban Development, should have its own administrative law judges. Judges who are exposed on an ongoing basis only to discrimination cases will be able to maximize their expertise in the area. Moreover, it is important for the Commission to signal that discrimination litigation represents a specialized area which should not be lumped together with matters generally suitable for summary proceedings. Finally, the Commission should recognize that many cases will need extensive discovery, should not be resistant to forging ahead with such discovery when necessary, and should budget for the costs associated with such discovery.

11. *The new administration must see that the Commission develops standards for investigations.* There are myriad issues that arise in the conduct and documentation of an investigation. While the specific inquiries that need to be made vary from case-to-case, the Commission should set out minimum standards, so that an evidentiary record capable of being used at trial is developed to the maximum extent possible. Such standards,

inter alia, would include standardized methods for recording data, would enjoin staff from treating position statements from counsel as the equivalent of evidence, would limit the circumstances in which witnesses could be interviewed as a group, would make certain that interviews for the purpose of gathering evidence are kept separate and distinct from meetings designed to determine whether a case could be conciliated, and would require that “no probable cause” determinations set forth with specificity the sources and substance of all information developed in the investigation.

12. The new administration must see that the Commission’s performance measures are redesigned to focus on the extent to which discrimination is prevented and remedied, not how many cases are processed through its system. Performance measures need to look at substantive results. This means, first of all, tracking and reporting on monetary relief, affirmative relief, and civil penalties awarded or negotiated each year. It means setting goals for the volume and success of enforcement actions, and then analyzing why or why not such goals have been met.³⁵ It means tracking and reporting the time it takes to handle cases.³⁶ It means developing measures of how the incidence of discrimination in New York changes over time. In short, it means imagining performance from the point of view of the Commission’s mission to prevent and remedy discrimination.

13. The new administration must see that the Commission develops alliances to leverage its resources. Even with increased staffing, the Commission’s resources will not be adequate to deal fully with discrimination in New York City. The Commission needs to try to coordinate its efforts with other enforcement agencies. At the very least, it should be developing a joint case tracking project with other agencies serving the New York City area (such as EEOC, HUD, and the State Division) so that trends can be discerned in terms both of protected class and context of discrimination,

35. This is not to suggest that a particular number of probable cause determinations, or trials conducted, is the equivalent of success in the agency’s mission. It would help no one, and would drain agency resources, were probable cause to be found where it did not actually exist, or if a non-meritorious case were taken to trial. On the other hand, if very few determinations of probable cause are being made, and very few cases being taken to trial, it is essential to know this and to ask why. Likewise, if a prosecutor’s office is losing a substantial percentage of its trials, it is reasonable to ask if it is selecting its cases well enough; if that office is not losing any of its cases, it is reasonable to ask if it is overly cautious.

36. This measure will be especially important if the Committee’s recommendations regarding breaking the cycle of “first-in, first out” are adopted. Once new cases begin to flow into the Commission, it will be crucial to see that they are all being handled expeditiously.

and so that repeated allegations against a particular covered entity or within a particular industry can be looked at more systematically.

In addition, the Commission needs to brainstorm with the private anti-discrimination bar; and it needs to utilize capabilities of other City departments (such as demographic data generated by the Department of City Planning). The commission needs to encourage academic institutions to conduct research to track the incidence of discrimination in New York; it needs to encourage these institutions and others to think of ways to lower the level of inhibition people feel in seeking non-traditional employment or in considering a move to a largely segregated neighborhood. If the Commission were to see, for example, that virtually no race discrimination cases in employment are receiving probable cause determinations (as would have been the case if FY00 cases had been reviewed in this fashion), it should reach out to community and advocacy organizations that deal with this issue to assess whether better ways can be developed to address the problem.

Finally, the Commission should seek to supplement the resources it has available to investigate and prosecute cases by seeking pro bono assistance from law firms in the City, and by offering clinical experience to law students under the supervision of law school faculty.

14. The new administration needs to begin a program of outreach to the public to inform people of their rights, and how the Commission can vindicate those rights. The need for outreach cannot be disputed in principle; the problem, of course, is engaging in outreach and then not being able to deliver services. Nevertheless, once the Commission has gotten its restaffing well underway, it is important to begin to test this process. The test might be outreach within a limited geographical area, or outreach in connection with a particular expression of discrimination. This type of program would not only help the people who are contacted, it would give the Commission a better sense of how much discrimination exists out in the City just waiting for a means by which it can be remedied.

15. The new administration needs to budget for the Commission with the anticipation that it will be handling a greater number of complaints. As the Commission becomes more effective, it will become a forum to which more and more people will turn. It is difficult to judge where precisely a new equilibrium of staffing and workload will be reached. It is safe to say, however, that, over the next several years, substantial staff increases will be needed to accommodate both the existence of a functioning program of systemic investigations and prosecutions, and an increase in complaints needed actually to be investigated each year from 1,000 to

1,500.³⁷ Some of these increased costs will be recouped by the civil penalties that the City will recover; the remainder will have to represent the City's commitment to being a single, united town.

III. THE LAW DEPARTMENT

A. Role of the Agency

Unlike the Commission on Human Rights, the Law Department has no obligation to investigate individual complaints of discrimination. Instead, the Law Department was given two crucial responsibilities that complement the Commission's responsibilities. First, the Law Department was given exclusive responsibility for developing and prosecuting cases of systemic discrimination in court. Admin. Code §8-401 et seq. The City Council took this action recognizing that: "Systemic discrimination or a discriminatory pattern or practice is often hard to combat because of the difficulties entailed in accumulating evidence. This type of discrimination is particularly injurious because it is not simply an isolated incident but a repeated act founded upon a discriminatory policy, method of operating, or institutionalized procedure."³⁸ The legislative declaration that created an express statutory procedure for these systemic prosecutions noted that among the injuries to the City arising from systemic discrimination were the social and moral consequences of such discrimination. The Council found that "systemic discrimination polarizes the city's communities, demoralizes its inhabitants and creates disrespect for the law, thereby frustrating the city's efforts to foster mutual respect and tolerance among its inhabitants and to promote a safe and secure environment." Admin. Code §8-401.

The Law Department was specifically given its own authority (*i.e.*, separate from that of the Commission) to initiate investigations, and was given subpoena power to aid it in gathering evidence in such investigations. Admin. Code §8-403. Penalties for pattern and practice violations included civil penalties up to \$250,000, punitive damages, compensatory damages, and affirmative relief. Admin. Code §8-404.

The second role contemplated for the Law Department was as an advocate for the full and proper development of the provisions of the City's

37. This presumes a doubling of complaint filings from approximately 1,000 per year to a total of 2,000 per year, and the proposed ability of the Commission to decline to prosecute 25 percent (500) of those cases.

38. Report of City Council Committee on General Welfare, p. 9.

Human Rights Law. When, as part of the comprehensive 1991 amendments to the Human Rights Law, the council created a private right of action by which individuals charging discrimination could bypass the administrative complaint process and go into court, Admin. Code §8-502, the council required each such plaintiff to serve a copy of his or her complaint on both the City Commission and the Law Department. Admin. Code §8-502(c). This provision was designed both to keep both agencies apprised of discriminatory claims or patterns that either or both might want to investigate, and to give the Law Department an opportunity to intervene in matters where the proper interpretation of the City's Human Rights Law is at issue. The Law Department successfully did just that in *Bracker v. Cohen*, 204 A.D.2d 115, 612 N.Y.S.2d 113 (1st Dept. 1994), the case which confirmed the City's right to have created a private right of action for Human Rights Law claims.

B. Findings and Observations

The Committee had the opportunity to meet with representatives of the Law Department's Affirmative Litigation Division, and to review publically available City budget and management reports. Drawing on these activities, the Committee has determined the following.

1. *The Law Department has failed to carry out its role to investigate and prosecute cases of pattern and practice discrimination.* Representatives of the Law Department's Affirmative Litigation Division do assert that they are interested in bringing these types of claims, and some staff members were already experienced in handling anti-discrimination matters even prior to the creation of the pattern and practice provisions of Admin. Code §8-401 et seq. These representatives agreed that aggressive enforcement is obviously an important deterrent to violations of the Human Rights Law and that systemic discrimination is often invisible to its victims. Despite this, and despite the fact that the Law Department is given independent investigatory authority to investigate these claims, Admin. Code §8-403, the Law Department has not brought any of these claims in court.

Of the Law Department's more than 600 attorneys, not a single one has as his or her primary job responsibility the investigation or prosecution of these claims.³⁹ The Law Department's position is that it relies on the City Commission to develop information, and that such information has not been forthcoming. Thus, it says, it has been looking for other sources (for the last 10 years).

39. The Affirmative Litigation Division employs approximately 22 attorneys.

The Law Department states that it does not have its own investigatory resources, but is able to get assistance from other agencies when needed.

2. *The Law Department has failed to carry out its role as an advocate for the full and proper development of the Human Rights Law.* The Law Department, despite an asserted interest in doing so, has not in recent years intervened to fight for strong and effective interpretations of the City's Human Rights Law. Just this year, for example, in a landmark case dealing with the interpretation of sexual orientation, disparate impact, and marital status provisions of the Human Rights Law, *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 730 N.Y.S.2d 15 (2001), the State Attorney General's Office thought that the issues raised were important enough to intervene; the Law Department elected not to.

3. *The Law Department may be inhibited from performing its role as an advocate for the City's Human Rights Law by the fact that its primary role is as defender of the City, including its defender in actions charging discrimination.* At the time that the comprehensive 1991 revisions to the Human Rights Law were passed, there were concerns about whether "issue conflict" would create problems for the Law Department in performing its two roles. Indeed, the Council, although giving the Law Department the role it had sought at the time of human rights investigator, prosecutor, and advocate, directed that the Corporation Counsel and chairperson of the Commission issue a report to the Council within 12 months, relating, *inter alia*, to effective enforcement of the Human Rights Law and to the prevention of any potential conflicts of interest. Local Law 39 of 1991, para. 3(b).

While other governmental law offices have successfully balanced affirmative litigation and defense functions, these concerns are nevertheless easily understood. For example, from the point of view of effective law enforcement and deterrence, the Law Department would want an expansive interpretation of the provisions of the statute dealing with an employer's liability for co-worker harassment (Admin. Code §8-107(13)(b)(3)). From the point of view of the lawyer for City agencies charged with not having taking reasonable steps to prevent co-worker harassment, the Law Department would want a narrow interpretation of the same provision.

This problem was illustrated this past Spring. The Law Department argued, and a federal judge agreed, that the City's Human Rights Law did not intend for punitive damages to be available in actions against the City. *Katt v. City of New York*, 151 F. Supp. 2d 313 (S.D.N.Y. 2001). This result "helped" the City insofar as insulating itself from such damages. On the other hand, an agency that was fully committed to advocating

for a robust interpretation of the City's Human Rights Law may well have brought to the Court's attention relevant aspects of the Law's legislative history that strongly suggest that the City Council had in fact intended to make the City subject to punitive damages.⁴⁰

C. Recommendations

1. *The new administration needs to reexamine the appropriateness of having the Law Department vested with its current authority in relation to discrimination matters.* Given the potential "issue conflict" described above, serious consideration should be given to reassigning the anti-discrimination functions of the Law Department. If the measures proposed to revitalize the Commission on Human Rights were adopted, the centralization of all of the enforcement functions of the Human Rights law within that agency would be efficient and effective.

2. *The new administration must honor the promise of the systemic litigation and intervention provisions of the Human Rights Law, and assign staff and establish goals accordingly.* Regardless of whether these functions remain with the Law Department, or are transferred to the Commission on Human Rights, a serious commitment to their performance remains essential. As

40. Most notably, an advocate for the City Human Rights Law would likely have discussed the ways in which a predecessor version of proposed legislation did and did not differ from the version ultimately adopted. For example, the court held that there was an insufficient basis upon which to conclude that the City intended to subject itself to punitive damages. In fact, Section 8-502(a) of the City Human Rights Law as adopted as part of the 1991 amendments is identical to that proposed by the predecessor bill (Intro. 1266 of 1989) except for two changes directly on point: (a) the exclusion of city agencies from exposure to the private right of action was eliminated; and (b) rather than the general recitation of the availability of "damages" contained in the predecessor bill, Local Law 39 of 1991 explicitly and affirmatively permitted any aggrieved person to have an action for "damages, including punitive damages..." Local Law 39 of 1991, Section 8-502(a) (emphasis supplied). The most reasonable interpretation of these changes is that the Council knew that it was exposing the City and its agencies to the private right of action and that the inclusion of explicit punitive damages language was designed to remove any doubt about the availability of such damages against any and all defendants. The alternative explanation is to assume that the Council removed the exclusion, added punitive damages without limitation as to defendant, but was somehow unaware that the punitive damages would apply to City defendants. Similarly, the Court reasoned that the City's common law immunity from punitive damages was intended to be preserved because the damages provision was prefaced by the phrase "Except as otherwise provided by law..." In fact, that phrase was contained in the private-right-of-action section of the predecessor legislation, the very proposal that had completely excluded the City from exposure to the private right of action. An advocate would have argued that it cannot be inferred that the Council intended to import a safe harbor of common law municipal immunity when the language being held over was from a bill that had specifically excluded the City from any exposure.

an interim step, assigning six of the Law Department's more than 600 attorneys (*i.e.*, less than one percent of the total) to work on these matters would begin the process of undoing the damage of years of inaction. Investigative assistants would need to be hired either from within the Law Department, or in cooperation with other City agencies.

One easy method by which to identify areas of systemic discrimination is to contract with existing not-for-profit Fair Housing and Fair Employment groups that have the ability to conduct testing, and then to direct testing to be performed in areas of concern (*e.g.*, locations of intense residential or occupational segregation).

A systemic investigations and prosecutions unit should be directed to develop immediately goals for bringing systemic actions and to intervening to defend the proper construction of the Human Rights Law, and should establish performance measures which, like those proposed for the Commission, would focus on how the unit's work was preventing and remedying discrimination.

IV. CONCLUSION

There is widespread agreement that divisions exist in the City which must be healed. Part of that healing process will be a matter of exhortation, inclusion, education, and mediation. But words will ring hollow if not accompanied by strong action to fulfill the promise of the City's Human Rights Law. Laws against discrimination must be treated with the same seriousness—and be seen as being treated with the same seriousness—as other laws. To do so, the City must refocus on a mission of preventing and remedying discrimination, take the initiative to investigate and root out systemic manifestations of bias, deter acts of discrimination by creating a credible threat that the law will be enforced vigorously and effectively, advocate against cramped judicial interpretations of the City's Human Rights Law, and provide a reasonable level of resources with which to do the job.

December 2001

The Committee on Civil Rights****

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Report on Privacy

The Committee on Information Technology Law

This paper examines current and proposed statutory approaches in the United States, at the federal and state level, to restricting the use and disclosure of personal consumer information and addresses issues confronting legislative efforts in light of increasing public pressure for action. The first section provides a general background for the discussion. The second section discusses the pros and cons of a general federal privacy statute in lieu of the current framework of special purpose statutes. The third section addresses the pros and cons of preemption of state privacy legislation by federal privacy law. In the final section, the paper discusses the implications for practitioners to consider in devising a proactive privacy compliance program for their clients.

I. BACKGROUND

Privacy has become an important political and legal issue in the United States today, with actions being taken on the federal and state level to address consumer concerns about exposure of their personal information to the prying eyes of businesses and government, facilitated by the technology of the Internet. There is no doubt that the overriding public concern with security, in the wake of the horrific events of September 11th and the continuing war on terrorism, has eclipsed the focus on privacy issues. Indeed, these events have led to an expansion of surveillance au-

thority for federal law enforcement agencies. But even in response to such exigent circumstances, Congress did not accede to everything that the Bush Administration sought and there has been significant disagreement with some of the Administration's perceived erosions of civil liberties. Moreover, Congress and the states show no signs of giving up efforts to regulate more comprehensively information privacy in the private sector. Roughly one hundred privacy bills already have been introduced in this session of Congress.

Concern for privacy is not new. Privacy legislation dates back to the 1970s with the passage of the Fair Credit Reporting Act. The recent focus on privacy is largely attributable to the rapid growth of the Internet and other information technologies. Never before has the access to, and the aggregation and dissemination of, personal information been so pervasive. Technologies have greatly streamlined the tracking and collection of data. Improved access to information has allowed for the exploitation of systematic tracking and profiling of individual activities.

Development of Technology

The Internet is the most visible medium for such gathering of data, and is receiving the most public attention. Personal information (such as one's name, address, telephone number, credit card number, employer, age, income, or interests) provided by a user when, for example, purchasing a product online, completing an online questionnaire or form or becoming a member of a web site community, is considered at risk of being stolen or exploited. Furthermore, use of information obtained by businesses through the surreptitious tracking of the actions of Internet users (such as web sites viewed, information requested, searches entered into search engines or products purchased or downloaded) represents a significant concern to many because these technologies may enable collection of user information without the user's knowledge, much less her informed consent.

Indeed, technologies originally developed to improve the efficiency of the Internet, and to make the experience of navigating the World Wide Web much more user friendly, have had unintended consequences. For example, cookies—small files placed by a web site's computer on a user's hard drive containing a user ID and tracking information—were originally developed to allow repeat visits to a site without requiring the user to repeat a whole series of identifying click steps just to obtain simple use of the site. While this technology enables web sites to "remember" visitors and extend more "hospitality" to repeat visitors, the technology may

also deprive an Internet user of anonymity. Reportedly, some companies exploited the marketing potential of the World Wide Web by exposing a user's information to tracking by businesses with whom the user never initiated contact. Cookies placed on linked sites and "web bugs" hidden on Web pages by marketing companies serving multiple clients could allow tracking of a user's use of the Internet, perhaps without the knowledge of the user.

Thus, looked at in one way, technology helped to turn the Internet into a commercially viable and cost-effective mechanism for user-friendly on-line transactions. Looked at differently, particularly as the technology has evolved, that very technology has enabled potentially intrusive tracking of user preferences and the gathering, storing, filtering, mining and redistributing of information about individuals on a broad scale. While some counter-measures may block or remove cookies and those counter-measures can be expected to become easier to use and more effective as consumer demand for such tools increases, misuse of personal information about particular individuals is not something that technology alone can solve.¹

Obtaining information and tracking individuals' habits on the Internet illustrate the capabilities of new data-gathering technologies. Collection of vast amounts of information is taking place in many other ways as well, such as via credit card and ATM transactions, travel reservations, telephone and cellular usage, GPS locating technologies, use of store 'club cards,' EZPass type systems, and wireless data communications, to name a few. All of these data can then be processed or "mined" in various ways through the use of sophisticated software to produce individual profiles of increasing complexity and granularity.

Privacy Policy Considerations

Increased sales by means of more effective marketing is the most cited justification for data tracking and aggregation. Commercial tracking, compiling, aggregating, profiling and selling of individually identifiable information is an important industry in its own right that facilitates commerce by enabling marketers to target sales materials to suitable audiences. Advocates of these marketing techniques say that consumers like and want

1. "Now retailers want to know what their customers are buying no matter how they shop—via the web, the telephone or in person—and vendors are responding with more sophisticated software that allows a retailer's operating system and customer service reps constant access to customer behavior across all channels." Peter Lucas, *What Shoppers Want*, *Internet Retailer*, March 2001 at 42.

advertising focused on their individualized interests (rather than, for example, receiving bulk advertisements of no interest to them), and that focused marketing increases sales and consumer satisfaction. Opponents say the potential misuse of information about individuals outweighs the benefits.

Target marketing has been around for years. However, the efficiency and ubiquity of new technologies, from the Internet especially, have created more cause for vocal concern. Some perceive these practices as a technological invasion of personal privacy. One of the confusions in the debates has been over the privacy of particular bits of information. Commentators have not reconciled the long tradition of publishing names, addresses and telephone numbers in telephone books with contrary calls for keeping residential information confidential. The Constitution was adopted when most Americans lived in ways that allowed their neighbors to know a great deal about them, and there has been a long tradition in the United States permitting people to speak truthfully about their neighbors. However, the Internet has awakened many people to the fact that information about them is collected and distributed without their knowledge or consent to commercial users of that information who use the information to offer things for sale. This new realization, combined with the uncertainty arising out of new technology and the globalization of life generally, has led to a public outcry that has prompted some lawmakers to propose bills addressing the subject from different angles.

The heightened interest in privacy in recent years has stirred scholarly debate as to the source of a right of privacy, which Congress has recognized.² It is often said that there is no fundamental right of privacy under U.S. jurisprudence.³ Instead, the 'right' to privacy as considered in

2. See generally, *An Examination of Existing Federal Statutes Addressing Information Privacy*, Hearing before the Subcomm. on Commerce, Trade and Consumer Protection of the Comm. on Energy and Commerce, 107th Cong., April 3, 2001; *How Do Businesses Use Customer Information: Is the Consumer Protected?*, Hearing before the Subcomm. on Commerce, Trade and Consumer Protection of the Comm. on Energy and Commerce, 107th Cong., March 1, 2001; *Information Privacy: Industry Best Practices and Technological Solutions*, Hearing before the Subcomm. on Commerce, Trade and Consumer Protection of the Comm. on Energy and Commerce, 107th Cong., June 21, 2001; *The EU Data Protection Directive: Implications for the U.S. Privacy Debate*, Hearing before the Subcomm. on Commerce, Trade and Consumer Protection of the Comm. on Energy and Commerce, 107th Cong., March 8, 2001; Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence: A Comment on Professor Volokh's Contribution* 52 *Stan. L. Rev.*, 1559 (2000).

3. There has been much discourse over time as to the whether the Constitution provides a substantive right of privacy through the Bill of Rights and the Fourteenth Amendment. The

this paper is an emerging right that largely developed over the course of the twentieth century. One of the earliest writings advocating protection of certain privacy interests was *The Right to Privacy*, 4 Harvard L.R. 193 (1890), in which Samuel D. Warren and Louis D. Brandeis wrote “That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been necessary from time to time to define anew the exact nature and extent of such protection.” Later, in his well-known dissenting opinion in *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928), Justice Brandeis stated, “The right to be left alone – the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” See also *Katz v. U.S.*, 389 U.S. 347, 350 (1967) (adopting principles of the Brandeis dissent in essentially overturning the majority opinion of *Olmstead*). Principles of privacy, in terms of a tort against another, were eventually outlined by Professor William Prosser in his famous article entitled *Privacy*, 48 Cal. L. Rev. 383-423 (1960) and in the Restatement (Second) of Torts at §§652A-652I (1977).⁴

From this rather loose foundation has emerged a complex scheme of federal and state statutes and regulations that offer American citizens legal protection for certain privacy interests under certain conditions. While the historic focus of privacy protections has been against governmental intrusions, federal legislation since the 1970s has addressed privacy protection of information collected by the private sector within discrete areas. For example, concern for the use of personal credit data being amassed by the burgeoning credit reporting industry led to passage of the Fair Credit Reporting Act (“FRCA”) in 1970. The Cable Communications Privacy Act (“CCPA”) was enacted in 1984 to address a perceived need in the relatively new cable television industry to restrict cable operators’ disclosure of account information of their subscribers. The Video Privacy Pro-

Supreme Court has used this theory in upholding certain so-called fundamental rights of privacy as between the individual and the government. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973). It has also been suggested that privacy is a basic human right: “No one shall be subjected to arbitrary interference with his privacy.” United Nations Universal Declaration of Human Rights, Art. 12.

4. Note that while businesses do not have a “right” of privacy, they are generally entitled to protect the privacy of their confidential information under a theory of property rights (i.e., trade secrets). See Restatement (Third) Unfair Competition § 43 (1995). There is, however, no equivalent recognized property right in personal information in the United States.

tection Act (“VPPA”), enacted in 1988, restricts a video store’s disclosure of its customer’s video rental and sales records, and is intended to protect commercial or public dissemination of one’s personal viewing habits. The recent Gramm-Leach-Bliley Act (“GLBA”) requires that financial institutions adequately inform customers of the collection, use and disclosure of their financial information. The recently approved regulations under the Health Insurance Portability and Accountability Act (“HIPAA”) impose strict requirements on the use and disclosure of medical information. The Children’s Online Privacy Protection Act (“COPPA”) requires web site operators to obtain parental permission before collecting information from children under the age of thirteen.⁵

5. Federal legislation dealing specifically with privacy issues includes the following:

- Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681 *et seq.* (2001).
- Privacy Act of 1974, 5 U.S.C. § 552a (2001).
- Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2001).
- Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401, *et seq.* (2001).
- Postal Service, privacy in sealed letters, 18 U.S.C. § 1702; 39 U.S.C. § 3623 (2001).
- Wire And Electronic Communications Interception and Interception Of Oral Communications, 18 U.S.C. § 2510 *et seq.* (2001).
- Privacy in Radio Communications, 47 U.S.C. § 605 (2001).
- Privacy Protection Act of 1980, 42 U.S.C. § 2000 (2001).
- Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (2001).
- Electronic Communications Privacy Act of 1986, 18 U.S.C. § 1367 (2001).
- Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2001).
- Stored Wire And Electronic Communications (e-mail) and Transactional Records Access, 18 U.S.C. § 2702(a) (2001).
- Banks And Banking-Right To Financial Privacy, 12 U.S.C. § 3401 (2001).
- Drivers Privacy Protection Act of 1994, 18 U.S.C. § 2721 (2001).
- Standards for Privacy of Individually Identifiable Health Information: Final Rule, 45 C.F.R. Parts 160 and 164, issued by the Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 300gg (2001).
- Communications Act of 1934, as amended by Telecommunications Act of 1996, 47 U.S.C. § 222 (2001).
- Children’s Online Privacy Protection Act of 1998, 5 U.S.C. § 6501, *et seq.* (2001).
- Financial Modernization Act (Gramm-Leach-Bliley) of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (2001).

Unlike recent laws enacted abroad, particularly in member nations of the European Union, there is no omnibus U.S. federal legislation that restricts the across-the-board disclosure of data based on the personal nature of that data.⁶ Instead, U.S. laws restrict the disclosure of information based on its context. At the state level, there are also laws addressing privacy issues in varying contexts and to various degrees of stringency.⁷

This context-based approach has yielded some seemingly irreconcilable, and perhaps, undesirable results. For example, there is presently uncertainty as to whether cable operators providing high speed Internet access through cable modems are regulated under the Cable Communications Privacy Act or the Electronic Communications Privacy Act. Since these statutes have differing, and incompatible standards governing disclosure of certain personal data, these inconsistent laws cannot be easily reconciled. Moreover, while the VPPA restricts the disclosure of video rental and sales records, it does not restrict the disclosure by the same retailer of other records, such as magazine sales and sales of other retail items, nor is it clear whether the statute would restrict new digital media technologies of the same video content (*i.e.*, streaming video over the Internet).

II. PROS AND CONS OF GENERAL FEDERAL STATUTE REGARDING PRIVACY IN PLACE OF A SERIES OF SPECIAL-PURPOSE FEDERAL STATUTES

This Section will focus on legislative approaches to the protection of privacy of individually identifiable personal information at the federal level. As the model for analyzing the potential benefits and costs of a general federal statute versus more narrowly targeted special purpose legislation of the type that exists today, we use the Federal Trade Commission's

6. See EU Data Privacy Directive, Council Directive 95/46/EC of 24 October 1995. In 1995, the EU passed a Data Protection Directive aimed at protecting personal information and harmonizing privacy laws among the member states. Pursuant to the Directive, all member states must either adopt privacy legislation or revise existing laws. The Directive establishes rules to ensure that personal data may be transferred only to those countries outside the EU that provide an "adequate" level of protection. The European Commission recently ruled that Canada's Personal Information Protection and Electronic Document Act meets the EU Directive's standards for the protection of personal data. Because the European Commission does not consider privacy protection in the United States to be adequate, U.S. companies must sign on to the Department of Commerce's "safe harbor" (which mandates rigorous privacy standards) before such companies may transfer information from the EU without risking liability.

7. See, e.g., N.Y.C.P.L.R. § 4509 (privacy in library records).

(“Commission”) recommendation to Congress in its Year 2000 report outlining the elements of a broad new federal privacy statute. Although the Commission’s new Chairman, Timothy J. Muris—over the objections of two fellow commissioners—has since indicated that he did not believe that such a comprehensive statute was necessary and that he preferred more vigorous enforcement of existing laws, the Commission’s model for broad federal legislation is still worth examining since, as of the early 2002 date of this paper, sentiment in Congress remains for such an approach. As the privacy of individually identifiable personal information collected on the Internet has gained more political traction in Washington as a broad-based consumer protection issue, there remains some bipartisan support in Congress for more extensive privacy legislative protections. However, there is no strong consensus in Congress that a comprehensive privacy bill is required now, much less as to the details of what it would look like.

Movement on devising a comprehensive federal policy on privacy has been delayed by competing visions of how best to proceed. To date, outside of the industry-specific statutes cited above, federal policy toward privacy of individually identifiable information in the private sector has relied most heavily on industry self-regulation. This has been true even as the amount of individually identifiable personal information collected by businesses, and then distributed more widely without informed consumer consent, has burgeoned along with the growth of the Internet and e-commerce. Although some argue that industry self-regulation has proved inadequate, others say the evidence of abuse of personally identifiable information is insufficient to overcome worries of over-regulating high-growth sectors of the economy. Congress and the present Administration have not reached a consensus on whether there should be a federal law that generally establishes for consumers a general right to be notified of how their personal information will be collected, used, shared and secured and as to how much control an individual has over the use and distribution of information identifying the individual, and describing certain personal attributes or habits of that individual, once such information is placed into the stream of commerce.

For years, the Federal Trade Commission studied the issue but was content in its annual recommendations to Congress to rely on existing enforcement powers and industry self-regulation. In a major departure from the status quo in its Year 2000 annual report to Congress on privacy, the Commission for the first time recommended a new comprehensive statute to protect the privacy of all personal identifying information col-

lected online from all visitors to what the Commission calls “consumer-oriented commercial Web sites.” (*Privacy Online: Fair Information Practices in the Electronic Marketplace, Federal Trade Commission, May 2000, referred to herein as “Commission 2000 Report”*).

The Commission 2000 Report concluded, based on a detailed survey of web sites, that self-regulation was inadequate and that consumer confidence in conducting business on the Internet would be enhanced by government-mandated protections against misuse of their personal information. (*Commission 2000 Report at 2, 20, and 35*). In economic terms, the Commission identified a “market failure” problem requiring a regulatory solution, in that the marketplace alone may actually provide incentives to firms to do precisely the opposite of what would be socially beneficial. Individual firms may well benefit from broad internal and external distribution of consumer personal information collected in the online arena at the expense of the consumer because the broad networking effects of the Internet enhance the marketing value of such information far above the “relatively low cost of such information collection and use” (*Commission 2000 Report at 33*).

The Commission’s recommended solution was a statutory framework of basic procedural protections with a centralized regulatory authority to issue implementing rules and to provide an enforcement mechanism. While the Commission itself would no longer advocate this solution, the statutory framework that it had recommended may nevertheless serve as a common denominator for members of Congress seeking to achieve a consensus for a new, comprehensive privacy law.

Federal legislation modeled after the Commission 2000 Report recommendation would tend to converge on four key elements of protection, which elements are similar to those found in the privacy and data protection regulations of other jurisdictions (such as the European Union Data Protection Directive, adopted in 1995, and the Canadian Personal Information Protection and Electronic Documents Act, enacted in April 2000), and which the Commission regarded as universally applicable to the vast majority of web sites engaged in e-commerce.

Notice—“Web sites would be required to provide consumers clear and conspicuous notice of their information practices, including what information they collect, how they collect it (e.g., directly or through non-obvious means such as cookies), how they use it, how they provide Choice, Access, and Security to consumers, whether they disclose the information collected to

other entities, and whether other entities are collecting information through the site.” (*Commission 2000 Report at 36*).

Choice—the right of consumers to decide how their personal identifying information is used beyond the reason it was originally provided. “Such choice would encompass both internal secondary uses (such as marketing back to consumers) and external secondary uses (such as disclosing data to other entities).” (*Commission 2000 Report at 36*).

Access—the right of consumers to obtain “reasonable access” to the information a Web site collects about them and to have a “reasonable opportunity” to review such information and correct errors. (*Commission 2000 Report at 37*).

Security—the obligation of web sites to “take reasonable steps to protect the security of the information they collect from consumers.” (*Commission 2000 Report at 37*).

The Commission provided little more detail than this, recommending that the legislation be drafted in general terms and that “the definitions of fair information practices set forth in the statute should be broad enough to provide flexibility to the implementing agency in promulgating its rules or regulations.” (*Commission 2000 Report at 37*). There is also no recommendation that the federal legislation pre-empt more restrictive state law. The federal statute would serve as a minimum baseline for privacy protection, not as a limitation on additional privacy-related obligations imposed by a state legislature.

Various of the bills now pending before Congress contain these core elements, although some go even further in providing for “opt-in” rather than “opt-out” so that a user’s personal information cannot be shared with third parties unless the user gives his or her affirmative express consent.⁸ Others have stronger federal preemption provisions.⁹ What follows in this section is a discussion of the key benefits and disadvantages of a

8. “Opt-in” means the user must provide explicit consent before his or her information may be collected or disclosed; “opt-out” means that the user’s information may be used or disclosed unless the user specifically chooses to reject that possibility.

9. See, e.g., Consumers Right to Financial Privacy Act, H.R. 2720, 107th Cong. (2001); National Consumer Privacy Act, H.R. 2730, 107th Cong. (2001); Privacy Act of 2001, S. 1055, 107th Cong. (2001); Medical Information Protection and Research Enhancement Act of 2001, H.R. 1215, 107th Cong. (2001).

general purpose federal privacy statute. Section III will address the issue of federal preemption of state privacy laws.

Benefits of General Federal Statute

Boost Consumer Confidence. Currently, some consumers simply do not trust businesses to do the right thing regarding privacy protection. A general federal statute codifying a consistent set of principles governing consumer control over the collection, use and disclosure of personal information would help clarify the rules of the game for all participants in the online marketplace. Information flows like air throughout our economy, but sector-specific statutes leave large gaps in consumer protection with inconsistencies in the types of information that are covered, how rights are defined and what remedies are available. For consumers, a consistent rule and enforcement mechanism would mean that, regardless of the types of individually identifiable personal information that they give or that is collected about them, they will feel more secure about how their information is protected as it flows among and between entities. This, as indicated by the Commission's survey data, would foster consumer confidence in doing business online.

Simplify Business Compliance. With a patchwork of rules, businesses must monitor the types of information they collect, mark such information in some manner and then apply different standards to different types of information as it flows throughout their organizations. With one set of rules, business would be able to structure their information collection and use policies in a uniform manner and would be able to build their networks and systems in one way that would ensure compliance. This benefit will be diluted, however, if the federal statute does not pre-empt differing state privacy legislation.

Provide Flexible Standards. The sectoral approach is a cumbersome way to address a broad problem. A statute embodying general principles, and accompanied by a flexible process of implementation and enforcement, is likely to be more readily adaptable to the rapid pace of technical and economic change than is a patchwork of sector-specific laws, each developed at a given point of time in the context of trying to resolve a particular political problem with more narrowly affected interests in mind.

Simplify and Enhance Oversight and Enforcement. The implementation and enforcement of sectoral laws is dispersed among diverse agencies with many other responsibilities besides privacy protection. Even as to the implementation of one such statute, for example—the Gramm-Leach-Bliley Act—multiple agencies are involved in promulgating rules for compliance,

including the Federal Trade Commission which issued its own rules separate from the joint rules issued by other agencies with jurisdiction over various financial institutions. (Compare, *Privacy of Consumer Financial Information*, 65 Fed. Reg. 35162 (2000) (Joint Privacy Rules) with *Privacy of Consumer Financial Information*, 65 Fed. Reg. 33646 (2000) (Federal Trade Commission Privacy Rules). A single agency, focused on overseeing privacy protection under a coherent legislative mandate, may be in a better position to educate the public on its rights, lobby for the necessary tools to enforce the policy and encourage businesses to adopt best practices with a carrot and a stick. Even if it is an existing agency with other responsibilities such as the Commission, it can still centralize the implementing authority that is currently dispersed.

More Favorable Treatment Under Foreign Privacy Laws. A general federal privacy statute containing elements similar to various foreign privacy laws may make it easier for U.S. firms to do business in those countries where personal data of individuals living in those countries is collected, stored and distributed as part of those firms' business operations. As mentioned in the background section, the EU does not consider the United States to currently have adequate privacy protections, putting multinational firms that handle European customer and employee data at risk of fines and disruption of business if they do not comply with the more stringent EU requirements. Some companies have taken advantage of the safe harbor agreement negotiated between the EU and the United States so that they can continue to operate in Europe and move data in or out of EU countries without fear of having their European operations shut down. Whether this will prove to be a fully workable solution remains to be seen. As other countries implement and enforce their own privacy laws, multinational companies doing business in those countries may face additional risks if comparable safe harbor agreements are not reached. A comprehensive federal privacy statute with effective regulatory oversight and enforcement powers may help to allay the concerns of these foreign jurisdictions as to whether their citizens' data will be adequately protected.

Disadvantages of General Federal Statute

Free Speech Concerns. There is no sound constitutional basis for broad governmental limitations on collecting and disseminating truthful information about others, some critics of the Commission's plans say. The right to speak truthfully about others is a constitutionally protected First Amendment right, many believe. As commercial speech, dissemination of such information may be subject to the intermediate scrutiny level of

court review and is not an absolute right. Surreptitious collection, use and disclosure of individually identifiable personal information also raise legitimate policy concerns. Unless statutory restrictions on such use and dissemination are narrowly tailored to achieve a specific and important governmental purpose, however, there may be a basis for a constitutional challenge to a broad federal privacy statute as discussed further below.

Distorting How Firms Collect Information. The Commission's recommendation for a general statute to cover online information privacy leaves many unanswered questions. The threshold question is whether, as a matter of policy, it makes sense to limit the protection to online collection.¹⁰ The Commission makes a persuasive argument that the characteristics inherent to online commerce present the most significant threat to information privacy. As indicated earlier, the use of cookies and other emerging technologies permit the collection of individually identifiable personal information without the consent or even the knowledge of consumers. Additionally, online technology permits assembly of little bits of data (e.g. mouse clicks, sites visited) into a meaningful pattern of personal information (buying and browsing patterns) in a manner usually not practical for offline collection. Exempting offline collection, however, may have the perverse effect of discouraging some firms from taking full advantage of the efficiencies of the Internet to avoid information protection rules. Such an exemption would also have the potential of placing a competitive burden on e-commerce vis-à-vis offline commerce that could stunt its growth. Not only is that competitive burden a potential economic problem, but also it includes an element of unfairness, in that if a major retailer can collect information about a customer who shops in person, it seems unfair that the retailer's competitor cannot collect the same sort of information about a person who shops online. Perhaps for this reason the Commission Chairman has more recently stated that privacy policies posted on web sites are presumed to cover all of a company's uses of personal information (online and offline) unless the policy states otherwise.¹¹

Over Inclusive Solution. Traditional American governmental intervention in the economy usually depends on widespread acknowledgement of

10. Of course, many existing privacy requirements address both online and offline privacy issues, with the greatest impact on offline commerce.

11. See Federal Trade Commission, *Protecting Consumers' Privacy: 2002 and Beyond: Remarks of FTC Chairman, Timothy J. Muris, at the Privacy 2001 Conference, Cleveland, Ohio* (October 4, 2001), available at http://www.ftc.gov/speches/muris/privisp1002.htm#N_35.

particular abuses. American government has tended to avoid burdens on the economy until real harm is generally acknowledged. Moreover, Americans have traditionally adopted new technology first, and imposed governmental restrictions on it after it has become clear what particular wrongs are associated with that technology. The fact is that a “one size fits all” approach may be unworkable and unnecessarily burdensome, because not all personal information or types of transactions are worthy of the same protection. With sector-specific statutes, on the other hand, the most sensitive kinds of individually identifiable personal information are already protected in the manner deemed most suitable to the special purposes being served.

Also, there are fundamental policy questions that need to be addressed, which may not lend themselves to a single answer for all types of individually identifiable personal information or transactions. These include: (a) whether there should be criminal or merely civil penalties for violations, (b) whether there should be a private right of action and, if so, the remedies available, and (c) what powers the regulatory agency should have, such as the power to require registrations of firms’ privacy policies, investigation and auditing powers, and the range of sanctions it may impose for violations of its rules.

Burdens of a New Bureaucracy. A general statute is likely to leave very broad discretion to the regulatory agency, necessitating the creation of a large new bureaucracy and extending lengthy rule-making and adjudication processes to parts of the economy that have been able to grow precisely because they have been left alone to adjust quickly to ever changing market forces. In addition, this broad regulatory discretion may lead to constitutional problems down the road if the agency were to go too far in its regulation of information dissemination. This danger was illustrated in a recent decision of the U.S. Court of Appeals for the Tenth Circuit, which struck down certain regulations of the Federal Communications Commission implementing the Customer Proprietary Network Information (“CPNI”) privacy requirements of the Telecommunications Act of 1996. The Court held that the FCC’s “opt-in” rule, requiring carriers to notify a customer of its rights regarding the protection of its individually identifiable CPNI and to then obtain express customer approval before a carrier may use such CPNI to market services outside the customer’s existing service relationship with that carrier, unduly restricted the commercial speech of the carriers and thereby violated the carriers’ free speech rights under the First Amendment. *U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000). The court concluded that

the FCC failed to adequately consider the constitutional implications of its CPNI regulations and failed to justify its choice to adopt an opt-in regime rather than a more narrowly tailored solution such as the opt-out option.

The Commission's 2000 Report did not provide a cost/benefit assessment of the impact of its legislative recommendation on the online economy as a whole—a point raised by Chairman Muris in explaining his decision not to support new privacy legislation at this time.¹² Indeed, as pointed out in a dissenting opinion to the Commission 2000 Report (Dissenting Statement of Commissioner Orson Swindle at 3, fn. 4), experience with regulatory implementation of the privacy provisions of the Gramm-Leach-Bliley Act indicates the substantial time necessary for even relatively sophisticated financial institutions to establish the new policies, procedures and systems necessary to comply with the regulatory requirements. More generally, it has been estimated that the industry cost of developing and implementing customized software to track compliance with various of the privacy legislative proposals could run into the billions of dollars.¹³

Again, the Tenth Circuit's decision in *U.S. West v. FCC*, *supra*, is instructive on how a court may ultimately assess a regulatory decision on privacy, acting under broad delegation from Congress. The government, the Tenth Circuit stated, "must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." *Id.* at 1234-35.

In applying such principles to this situation, the Commission has not explained why an appropriate accredited industry standards body such as ANSI, of the type that deals routinely with safety issues and other significant consumer concerns, would not be competent to promulgate best practice standards to cover privacy protection for most web sites. Such an organization could be assisted by the government, with funding to promote consumer education, and the government could also publish lists of sites that follow or do not follow the standards to enable consumers to make informed choices. Moreover, the Commission's survey of industry

12. See *id.*

13. Margaret Johnston, *Could Privacy Proposals Bankrupt Some Sites?*, IDG News Service, May 14, 2001.

practices as of 2000 was, like any survey, a snapshot of one moment in time. It does not take into account of what results could be produced by appropriate incentives, such as the decision by government procurement agencies to favor firms complying with the industry privacy standards.

Stifling Innovation and Economic Growth—Some web sites may rely heavily on the freedom to use and distribute the personal information they receive for marketing purposes to offset the costs of providing innovative services which consumers have indicated that they value. Without such freedom, firms cannot as effectively take advantage of one of the Internet's most unique capabilities—the ability to target-advertise. They may then decide that it is easier to withdraw valuable services from all consumers rather than set up elaborate processes to ascertain individual consumer privacy preferences. Innovation and economic efficiencies in the allocation of goods and services to consumers may suffer as a result.

Advertisers and marketers have experience that shows that targeted marketing campaigns in fact successfully induce sales. Advertisers generally believe that better marketing would more effectively and efficiently solicit business from those who are likely to be interested while avoiding wasted effort on those less likely to be interested. Critics of a new general privacy statute and associated regulatory regime have argued that more limits on collection of information, or artificial barriers to collection of such information, will seriously hurt the economy.

III. PROS AND CONS OF FEDERAL PRIVACY LAW EXPRESSLY PREEMPTING ALL STATE PRIVACY LEGISLATION

States have traditionally been leaders in consumer protection, and this includes laws that protect privacy. States have generally addressed consumer privacy when regulating specific industries, such as banking, sometimes passing broader laws concerning specific forms of information, such as health information. Even then, however, legislatures tend to tailor laws to address what a specific business may do with information they have, rather than issue sweeping edicts about the use of some information by all parties concerned. This is not to say, however, that more activist states might not consider a broad privacy statute of their own.

If comprehensive privacy legislation is not enacted at the federal level, one or more states may attempt to fill the vacuum in the interest of protecting their own consumers and are, in fact, required to do this for the insurance industry under the Gramm-Leach-Bliley Act. Even if the federal government weighs in with its own national privacy laws of general ap-

plication, a significant issue is whether the federal standards should supersede those of the states. More and more businesses operate across state lines, yet state officials still claim the right to speak for their own citizens' concerns even if there is a variance with federal policy, as evidenced in another policy arena by the current split between a number of states and the U.S. Department of Justice in connection with the proper disposition of the Microsoft antitrust case.

Preemption—Constitutional Issues

Whether federal privacy law should preempt conflicting state legislation is a public policy question, and is discussed in those terms below. At the outset, however, there is an issue as to whether the Tenth Amendment to the U.S. Constitution presents a roadblock to possible federal preemption in this context. The Constitution confers certain enumerated powers upon Congress. *U.S. Const. Art. I*. Under the states rights principles embodied in the Tenth Amendment, to the extent that the Constitution does not divest the states of certain powers, the states retain them. This could imply that Congress may not preempt the states from exercising their retained power to regulate privacy of information in their respective jurisdictions. It is not likely, however, that a successful constitutional challenge could be mounted against the authority of Congress under the Commerce Clause and Supremacy Clause to pass legislation regulating the disclosure of information into the stream of commerce, even if it preempts contrary state law on the same subject.

The Supreme Court recently upheld the constitutionality of federal legislation preventing a state from knowingly disclosing "personal information" about any individual obtained "in connection with a motor vehicle record" (the "Driver's Privacy Protection Act of 1994" or "DPPA"), 18 U.S.C. §§ 2721-2725). *Reno v. Condon*, 528 U.S. 141 (2000). The DPPA was amended in 1999 to replace an "opt-out" choice with an "opt-in" requirement under which the states must obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations, and other purposes. The State of South Carolina on Tenth Amendment grounds had challenged the DPPA, which conflicted with its own state statute permitting the disclosure of such personal information.

The Court rejected South Carolina's argument that the DPPA violated the Tenth Amendment and distinguished its own prior cases that had found a Tenth Amendment violation where Congress had effectively compelled the States to enact or enforce a federal regulatory program. In

this case, the Court found that Congress had the power under the Commerce Clause to regulate the States as the owners of databases since Congress has the power to regulate the sale or release of personal identifying information in interstate commerce. It necessarily follows that if Congress can directly regulate a State's dissemination of such information, even where conflicting with the State's own laws on the same subject, Congress can preempt state laws governing private entities' disclosure of information into or affecting interstate commerce without violating the Tenth Amendment.

In short, if Congress decides to preempt the privacy issue with sweeping federal legislation, it is probably not constitutionally precluded from doing so.

Preemption—Public Policy Issues

Irrespective of Congress' constitutional authority, political pressures will likely prevent Congress from completely occupying the privacy field with comprehensive legislation to the exclusion of the states. A federal floor of protection is a real possibility—i.e., no state would be allowed to bypass the federal restrictions with less restrictive privacy requirements covering the same subject matter. It is much more problematic, however, that Congress would preempt a state from moving even further along the privacy vector than Congress' floor, with more restrictive privacy requirements.

While certain industries might well benefit from a uniform nationwide privacy policy and would welcome complete federal preemption, consumers might not fare as well. After sketching out two industry case studies of privacy regulation at the state level that illustrate the issues involved in specific contexts, there follows a general discussion of the benefits and disadvantages of federal preemption of state laws in the privacy arena.

Case Study: Insurance

Insurance is an industry traditionally regulated by the states, including with respect to privacy protection.

In the 19th century, insurance companies were chartered by state legislatures or incorporated under state law. States began to form insurance departments in the 1850s, and by 1871 the National Association of Insurance Commissioners ("NAIC") had been formed. For many years, there was considerable debate about whether insurance should be regulated by the states or the federal government. In 1945, Congress passed the McCarran-Ferguson Act, which resolved the issue by declaring that regulation and

taxation of insurance were the province of the states, and that the anti-trust laws should be construed to apply to insurance companies only to the extent that they were not regulated by the state.

Of course, there are some federal laws which impact the insurance industry, including the American Disabilities Act (“ADA”), FCRA and HIPAA, as well as the Gramm-Leach-Bliley Act.

Most states have state insurance departments, headed by a commissioner, which license insurers, issue regulations, and monitor the industry. The NAIC has tried, with some success, to achieve uniformity in state insurance regulation. The 1982 NAIC Model Insurance Information Privacy Protection Act, adopted by many states, obliges insurers to obtain customer permission (the opt-in requirement) before disclosing personal information, as did the Health Information Privacy Model Act of 1998, although there are exceptions for nearly all traditional insurance business functions.

Under the GLBA, federal regulators such as the Federal Trade Commission (“FTC”), the Securities Exchange Commission (“SEC”), the Federal Deposit Insurance Corporation (“FDIC”), the Comptroller of the Currency and the Federal Reserve, among others, are charged with implementing the privacy provisions of Title V. States insurance departments must also implement regulations to carry out Title V’s provisions to apply to insurance companies. What level of privacy restrictions states should create has become a very contentious issue.

In September of 2000, the NAIC issued a model privacy law to provide guidance for states to satisfy GLBA, attempting to create a uniform standard. The model law matched GLBA in requiring insurers to provide customers with descriptions of their privacy policies, to give the opportunity to opt-out of the sharing of their nonpublic personal information with third parties, and does not restrict affiliate-sharing.

The NAIC model law also included health information. Insurers possess a great deal of health information which could be shared with other companies in the event of mergers anticipated by GLBA. The law therefore requires that insurers provide notice and opt-in consent to consumers before they disclose any protected health information to any other entity, including affiliates. In this respect, the NAIC subjected itself to accusations that it has gone beyond GLBA which does not cover health information. In addition, by creating a dual standard for financial and health information, the NAIC would create different, and higher, standards than exist under GLBA. The NAIC disputes the former criticism, and to the latter the NAIC responds that GLBA contemplates more protective

state laws, “because insurance is regulated by the states, logic dictates that the state insurance regulators—not the federal banking or securities regulators—are the appropriate parties to issue such regulations.”¹⁴ In addition, the NAIC was criticized for covering health information in view of the fact that the federal government, through the Department of Health and Human Services (“HHS”), was close to issuing national health privacy rules.¹⁵ The NAIC did include a provision exempting any insurer in compliance with the federal health information privacy rules.

Given that GLBA was written to eliminate barriers between banks, insurers and other institutions, state privacy laws could potentially interfere with these ventures. Bankers and insurers were both concerned by the NAIC draft, although most objections involved the health provisions.

Any law without preemption is likely to invite states to enact different and probably stronger restrictions on business.¹⁶ In November of 2000, New York became the first state to issue insurance GLBA regulations which, like the NAIC model, went beyond GLBA. Customers have the right generally to opt-out of having their information shared with third parties, and “opt-in” is required for health information. New York was influential in creating the model rule, and is considered by many a bellwether state in this respect.¹⁷

Vermont and New Mexico both have opt-in provisions for financial information. Vermont’s Department of Banking, Insurance, Securities, and Health Care Administration recently enacted rules imposing an “opt-in” regime, requiring financial institutions operating in the state to obtain the specific consent of their customers before they are able to share their customers’ personal financial information with nonaffiliated third parties.¹⁸ In New Mexico, the state insurance department also recently adopted privacy regulations establishing an “opt-in” regime.¹⁹

In addition, the New Mexico authorities broadened the rules to cover third-party liability claimants and worker’s compensation claimants.²⁰ In-

14. Katherine Sebelius, Kansas Commission of Insurance, Vice President, NAIC, Testimony on behalf of the National Association of Insurance Commissioners before the National Conference of Insurance Legislators (September 28, 2000).

15. In fact, HHS has now done so, under the Bush Administration.

16. Sixteen states have adopted the NAIC model law.

17. Privacy of Consumer Financial and Health Information, Reg. 169, 11 N.Y.C.R.R. 420 (2000).

18. See Vt. Code R. IH-2001-01 (2001).

19. See N.M. Admin. Code R. Ann. Ins. § 3001.01 et seq. (2001).

20. *Id.*

dustry groups claim that this violates the scope of GLBA, which applies only to “goods or services for personal, family or household purposes.” Industry groups have lobbied several state legislatures to influence state privacy legislation based on an objective of nationwide uniformity.

New Mexico and Vermont demonstrate that the attempt to create uniformity among the 50 states is a difficult if not impossible endeavor. Small states are in a particularly interesting position; do nationwide insurers adopt their standards, use two standards or stop doing business in such states? A further question is raised when a large state changes its rules. Last year California came very close to passing a law which would have required all financial institutions to move to opt-in. Bankers across the country realized that this would probably mean a nationwide change in policy. But should California in fact be in a position to, in effect, set the standard for everyone?

Case Study: Health

Until recently, there was no federal law that regulated the privacy of health information. Rather, the states were responsible for guaranteeing, if they chose to do so, the privacy or confidentiality of personal health information. States have answered this call through the years in a variety of ways. It is rare for a state to have a comprehensive statute regarding health privacy. Instead, states have numerous statutes touching on the issue, through laws that regulate the entities that use information. Some laws also regulate the way certain information can be used across industry lines.

With respect to state laws in this area, there are few comprehensive statutes, and even those laws generally do not provide uniformity as different standards are established for different entities. State laws provide standards for the privacy of health and medical care records for insurers, hospitals, physicians, HMOs, clearinghouses, state agencies, schools, and others. States also make distinctions based on the type of information being protected. These laws limit disclosure of information regarding AIDS, sexually transmitted diseases, mental illness, cancer, and genetic markers.

It is often difficult to keep track of all the laws in a state that regulate health privacy. Florida, for instance, has more than 60 different laws that address health privacy. Some states have passed laws regulating how information may be used by doctors and hospitals, but these may not cover information use by insurers or HMOs. This is in part a reflection of the changing nature of health care. Some states assume an ethical duty of confidentiality, while others do not. Many guarantee a right of access to

medical records—but even this right depends on who is the holder of the information. Some have mandatory reporting laws, and all have some variation of penalties for violations.

State health privacy laws are an uneven patchwork that can be confusing even within a single state. Nationwide, they present businesses with varying requirements for compliance and residents with sometimes radically different levels of protection. With the emergence of both health care and privacy as national issues, Congress might have been expected to bring some order to this situation by legislating a single national standard that preempted state law in the area where health care and privacy intersect. Perhaps unnerved by the failure of the more ambitious Clinton Administration initiative to federalize the regulation of the delivery of health care, however, Congress has not done so. It passed HIPAA 1996 but did not preempt more restrictive federal or state laws. Congress required that, if it did not pass a health privacy law by August of 1999, the HHS Secretary would issue regulations in 2000.

HHS issued the regulations in December of 2000. Despite some initial hesitation, the new regulations were not blocked by the new Bush Administration after it had the opportunity to review them.²¹ While the HIPAA regulations are sweeping, they provide only a floor, and not ceiling, for health information privacy. They apply to all health information, regardless of its form of transmission, and to insurers, health care providers, health plans, clearinghouses, physicians, laboratories and pharmacies, among others. The regulations also affect entities that use health information, such as marketers. Individuals must be provided with access and notice, and give consent to uses of their information. Covered entities are required to use or disclose the minimum amount of information necessary to accomplish the purpose for which the disclosure was made when using or granting access to personal health information.

As a practical matter, it may be virtually impossible for Congress and HHS to do more than set a minimum uniform standard. State health privacy law is so interspersed in many laws governing the delivery of health services and other matters involving the safety and welfare of their citizens—traditionally a matter for state and local regulation—that it would be difficult to determine exactly what would be preempted. Elements of

21. See HHS Security and Privacy: Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164 (2002). Apparently on further reflection, in March 2002 the Bush Administration proposed that portions of those regulations dealing with patient consent be revised to remove the consent requirement where doctors and hospitals seek to use or disclose the patient's medical information for the purpose of treatment or reimbursement.

state health privacy laws are found in insurance codes, probate codes and codes of civil procedure. There are also public health laws addressing such topics as child immunizations, laboratory testing, and the licensure of professionals that may have implications for privacy. Other areas that may incorporate health privacy topics include workers compensation laws, automobile insurance laws, and laws regulating state agencies and institutions.

Benefits of Total Preemption

National Uniformity Eases Compliance and Reduces Entry Barriers—Lack of national uniformity makes compliance difficult for businesses that operate in many states. Every state attorney general is free to pursue particular remedies reflecting the parochial state interests of her state, leading to more litigation and less certainty as to the applicable rules. If a federal law only provided a minimum level of protection but still allowed for additional state-imposed restrictions, companies might still have to make adjustments state-by-state where policies may conflict with each other or with federal policy, a burden which could be heavy for all companies and particularly hard on companies seeking to enter a market.

Even a single transaction may create jurisdictional problems. For example, in regulating the privacy of insurance information obtained from people who live in one state and are treated in another, is the governing law where the policy is written, where the patient lives or where the care is provided? Ordinary principles of conflicts of laws can help resolve such issues after the fact but will not help businesses planning their compliance procedures unless they are willing to spend the money and resources necessary to comply with every, or the most rigorous, statute. However, as seen above in the insurance case, this problem can be dealt with in part by the states themselves through a uniform model code, much like the Uniform Commercial Code has done for certain commercial transactions.

Prevents the State(s) With the Most Restrictive Privacy Rules From Dictating National Policy by Default—Businesses seeking to reach customers across state lines would necessarily have to accommodate to the most rigorous set of state rules, a dynamic which effectively gives such states a veto over other states that have chosen a more business-friendly path. This potentially elevates one or a few states to the position of preempting the privacy laws of all other states, except for the most local type of e-commerce.

Protects Important Related Federal Policies From Being Diluted—A coherent national privacy policy that emerges from the crucible of give and take among all affected constituencies has implications for the success of other federal policies such as controls on export of encryption technolo-

gies, free trade and maintaining global competitiveness. It also allows U.S. negotiators to speak with a single voice when dealing with the European Union or other foreign governmental entities on appropriate privacy regulations governing multinational companies.

Disadvantages of Total Preemption

Prevents Development of More Innovative Solutions From Multiple Sources of Ideas—The states have often served as the laboratories for changes in public policy to address evolving political and social needs. A “one size fits all” mandate, emanating from a centralized bureaucracy in Washington, will stifle such experimentation. By presuming that there is only one right answer to the problem, such preemption would leave no opportunity to benchmark different state approaches against each other to determine the most cost-effective approach. This age-old concern could be partially addressed if federal privacy legislation only set minimum requirements and left states room to respond to their own citizens’ potential desire for more privacy protection at the state level.

Interferes with Collateral Areas that are Traditionally the Subject of State Regulation—As discussed above in the case study of the health industry, privacy policy cannot be easily divorced from a myriad of other state laws and regulations pertaining to matters that are traditionally the subject of state regulation. Without necessarily intending to do so, if Congress were to totally preempt the regulation of privacy, it might upset a balance of policy tradeoffs cutting across a number of areas that more closely satisfy the political will of a particular state’s citizenry. Preemption would prevent the legislators of each state from being able to fully respond to their respective citizens’ varying priorities, and being held accountable for the results, where privacy concerns intersect with other policy objectives.

Dilutes Effective Law Enforcement—Federal and state enforcement agencies have often complemented each other’s activities in areas subject to dual regulation, such as the enforcement of antitrust and unfair trade laws. Far from working at cross purposes, dual enforcement can achieve economies through sharing of data and leads and can help prevent a violation from falling between the cracks. This would be lost if there were sole control at the federal level.

IV. PRIVACY COMPLIANCE

Privacy of personal consumer information on the Internet will remain a pre-eminent consumer protection issue of this decade, and legal

protections and remedies will be amplified, even if slowed for a time by the current focus on preventing terrorism. The legal landscape may look more or less like that set out below over the next several years, but one thing is for certain—privacy of the handling of personal consumer information online will be subject to more rigorous regulation.

The Federal Trade Commission could serve as the focal point for consumer protection of personal information under existing federal laws and may receive additional enforcement powers if a comprehensive federal privacy statute is enacted. In the event that such a statute does emerge from Congress—more likely in the next session than the current one if any such law is enacted at all—the statute can be expected at minimum to contain notice and consumer choice requirements for treatment of their personal information collected from consumers using the Internet. Consensus may be difficult to achieve on the contentious issue of whether consumers should be able to control the use of their information through requiring their affirmative consent to additional uses or disclosure by the on-line firm collecting the information (the opt-in position favored by consumer advocates) or whether such use will be permitted by default unless a consumer notifies the firm not to do so (the opt-out procedure preferred by the business community). As discussed earlier, broad opt-in requirements may raise commercial free speech issues. On the other hand, opt-out requires vigilant consumer follow-up to overcome normal inertia and, therefore, may not be particularly effective. We may well see a hybrid solution similar to the approach discussed above with regard to the New York regulations and some foreign privacy laws—a general opt-out procedure for most information and transactions, with more rigorous opt-in requirements for more sensitive personal information.

State action is not likely to be preempted and thus states will continue to play an active role in privacy enforcement, with the more activist states trying to expand the use of opt-in requirements beyond the federal scope. We can also expect more attention by the plaintiff's bar to private litigation on behalf of classes of aggrieved consumers.

In light of increasing governmental involvement in privacy protection, we encourage lawyers, particularly those involved with online commerce, to be pro-active and take appropriate steps to devise and implement privacy policies for their client's web sites, as many have already done.

Practitioners would be well-advised to establish a compliance program to help guide and monitor the privacy policies that their clients may adopt and post on web sites or follow in their own operations. Inter-

ested parties will include customers, who want to know how the data they provide will be used, business interests who want to maximize marketing opportunities, and managers and shareholders who risk liability for misuse of data. Consideration should also be given to the position of consumer advocacy organizations and law enforcement agencies. Practitioners may wish to consider at least the following questions in connection with implementation of such a compliance program:

1. Stated Privacy Policy—Does the company have a stated privacy policy that clearly articulates what information is to be protected and how such information is to be collected, used, and distributed in compliance with applicable law? Does such a policy take account of offline as well as online use?

2. Security and Operational Controls—Do the company's security systems (including the company's computer and business operations systems) in practice ensure data confidentiality and are the systems and business practices consistent with the company's legal obligations? Is confidential data locked up and not accessible physically or electronically by persons not authorized to view data? Do system protocols secure databases and the web site from internal and external hackers as well as from commercial espionage? Has the company established physical plant and system protocols that protect the privacy obligations the company has taken on and do these systems allow for the segregating of data subject to various obligations?

In this connection, the practitioner may wish to review any technology or system security audits performed by the company's chief privacy officer, accountant, operations staff or security officer. This may include an on-going assessment of the company's (a) data collection procedures, (b) technical safeguards concerning data collection and transmission, (c) system protocols for determining, *inter alia*, origin of the consumer information, age of the consumer information, industry and regulatory requirements concerning the data collected and source of the data to the extent it is not provided by the entity, (d) means of segregating data not owned by the entity or not collected in compliance with applicable law and (e) actions, reports and memos of a chief privacy officer especially related to incidence reports concerning system problems and potential hacking attacks.

3. Tailored Policies—Do special regulatory, statutory or other legal restrictions apply to the industry in which the client oper-

ates, such as fiduciary duties of banks, patient data privacy for hospitals and mail order or telemarketing laws, and do such rules vary by state? What privacy policies were in effect when particular items of data were collected and does the company segregate data subject to various policies or subject to differing regulatory schemes?

4. Opt-out/Opt-in—For particular transactions or types of data, does a client need affirmative consents or opt-ins of persons in connection with additional uses or distribution of certain types of collected data or need to advise consumers of how to change a previously made privacy election?

5. Contracts—Are there appropriate contractual provisions in agreements with service providers, marketing partners and others who have access to or use of the client's individually identifiable information to protect the privacy of such information where necessary?

6. Law Enforcement Activity—Has there been recent law enforcement activity by the Commission, state attorney generals or both involving issues germane to the client's business? If so, what was the nature of judgments or settlements obtained and what is the status of ongoing litigation?

CONCLUSION

This paper has examined alternative approaches to federal legislation regulating the privacy of consumers' individually identifiable personal information, particularly in response to public concern over the capabilities of the Internet and other technologies in collecting, storing, mining and redistributing such information without the informed consent of the consumer. We have also considered the role of the states in this arena and whether the states should be preempted by comprehensive federal legislation. We leave it to the reader to decide what policy outcome makes the most sense. However, we have no doubt that government regulation of the handling of individually identifiable consumer information, at least to the extent collected online by the private sector, will increase during the next several years and that practitioners would be well-advised to help their clients to be fully prepared.

May 2002

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* The Committee wishes to acknowledge the contributions of its members of the past two years to this report. Therefore, full Committee listings for 2000-2001 and 2001-2002 are listed.

The Collateral Estoppel Effect of Sanctions

The Committee on Professional Responsibility

INTRODUCTION

In New York, unlike in most other states, an attorney who has been sanctioned by a judge may be precluded, by the doctrine of collateral estoppel, from litigating the underlying merits of his conduct at a subsequent disciplinary proceeding. For example, a lawyer sanctioned for submitting frivolous papers may find himself subject to automatic discipline, above and beyond the underlying financial sanctions imposed by the court. While the issuance of a sanction usually results in no more than a private admonition of the offending lawyer, one Appellate Division, Third Department case illustrates that, taken to its logical extreme, a lawyer may be disbarred—based on the findings of individual judges made in the course of imposing sanctions—without an opportunity to show in the disciplinary proceeding that his underlying conduct did not violate the disciplinary rules.

The Third Department employed the doctrine of collateral estoppel in a disciplinary proceeding to preclude attorney-respondent Andrew Capoccia from relitigating the merits of numerous instances in which he had been sanctioned pursuant to 22 NYCRR part 130 for asserting frivolous and/or meritless defenses on behalf of clients in consumer collection disputes. *Matter of Capoccia*, 272 A.D. 2d 838, 709 N.Y.S.2d 640 (3rd Dep't 2000).

Because of the vagaries of court-imposed sanctions, this Committee

believes that attorneys who have been sanctioned not be collaterally estopped from challenging the merits of the underlying sanction at a subsequent disciplinary proceeding. This report reviews the doctrine of collateral estoppel and the few decisions in which courts have discussed its application in disciplinary proceedings in New York. The article analyzes the Capoccia decision and discusses the costs and benefits of applying preclusive effect to judge-imposed sanctions on attorneys.

The Doctrine of Collateral Estoppel

The New York Court of Appeals has articulated the requirements for the application of collateral estoppel: (1) there must be an identity of issue which has necessarily been decided in a prior action and is decisive of the present proceeding and (2) there must have been a full and fair opportunity to contest the determination now said to be controlling. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588 (1985). In a prior case, the Court outlined factors that are relevant in deciding whether a party has had a full and fair opportunity to litigate:

. . . the size of the claim, the forum of the prior litigation, . . . the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation.

Schwartz v. Public Administrator, 24 N.Y.2d 65, 72, 298 N.Y.S.2d 955 (1969); see also *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331-32 (1979).

In disciplinary proceedings, American courts have typically limited the use of collateral estoppel to determinations made in criminal and foreign disciplinary proceedings. Brickman L. and Bibona, J., "Collateral Estoppel As a Basis For Attorney Discipline: The Next Step," 5 Geo. J. Legal Ethics 1 (1991). Not surprisingly, a lawyer's criminal conviction serves as conclusive proof in a disciplinary proceeding of the facts of the crime. *E.g.*, *Matter of Levy*, 37 N.Y.2d 279, 372 N.Y.S.2d 41 (1975). Similarly, states typically honor foreign states' disciplinary determinations and treat as conclusive the foreign disciplinary body's findings of fact. See J. Geo. J. Legal Ethics at 7; *Matter of Slater*, 156 A.D. 2d 89, 90, 554 N.Y.S.2d 11 (1st Dep't 1990). Indeed, the rules of the various appellate divisions in New York expressly provide for application of collateral estoppel in disciplinary proceedings based upon (a) conviction of a crime, *e.g.*, 22 NYCRR § 603.12 (c), and (b) disciplinary orders of a foreign jurisdiction. *E.g.*, 22 NYCRR § 603.3(c).

While the appellate division rules are limited to criminal convictions and determinations of foreign disciplinary proceedings, some appellate divisions, principally the First Department, have also given collateral estoppel effect to civil findings. New York is in the significant minority in this regard. According to the Brickman & Bibona article, "few reported cases address the issue of granting preclusive effect to prior civil tribunals' factual determinations in subsequent disciplinary hearings. Most cases that do address the issue reject the notion, citing as reasons exclusive regulatory authority, foreseeability and disparate burdens of proof between proceedings." 5 Geo. J. Legal Ethics at 7-8.

Where New York courts have given civil determinations preclusive effect, the attorney has typically, but not always, been a party to the prior civil litigation. See *Matter of Morrissey*, 217 A.D.2d 74, 634 N.Y.S.2d 51 (1st Dep't 1995) (granting preclusive effect to findings of federal court in fraud related actions brought by client against attorney); *Matter of Sylvor*, 225 A.D.2d 87, 648 N.Y.S.2d 440 (1st Dep't 1996) (granting preclusive effect to findings of federal court that attorney had engaged in securities fraud and common law fraud); *Matter of Yao*, 231 A.D.2d 346, 661 N.Y.S.2d 199 (1st Dep't 1997) (granting preclusive effect to state court finding that attorney's suit against former client was extortionate); *Matter of Babigian*, 247 A.D.2d 817, 669 N.Y.S.2d 686 (3rd Dep't 1998) (granting preclusive effect to federal courts' findings that attorney's lawsuits against Chief Judge Rehnquist and over 60 other parties were frivolous); but see *Matter of Kramer*, 235 A.D.2d 87, 664 N.Y.S.2d 1 (1st Dep't 1997) (granting preclusive effect to federal court's findings that, inter alia, attorney willfully made false statements on behalf of client and filed an appeal without the client's consent).

The leading case discussing whether findings in previous civil actions should be given preclusive effect in subsequent disciplinary proceedings is *Matter of Cohn*, M-5696 (1st Dep't, Feb. 1983), an unpublished opinion. There, disciplinary proceedings had been instituted based upon two civil findings against attorney Roy Cohn. First, during a contested will proceeding, a probate court in Florida found that Cohn abused the trust of a client by arranging for the client to unwittingly sign a codicil naming Cohn as a trustee in the client's estate. Second, during a contempt proceeding, a federal court in New York found that Cohn violated an order requiring him to hold certain client monies in escrow by himself using those monies for his personal benefit. In subsequent disciplinary proceedings against Cohn, the First Department stated that it saw "no reason why the application of collateral estoppel to disciplinary proceedings

should be limited” to criminal convictions and foreign disciplinary proceedings. *Id.* at p. 3. On the specific facts of that case, however, the court declined to apply collateral estoppel but ordered that it would “conserv[e] the resources of courts and litigants by using the prior testimony and record as evidence.” *Id.* at 15.

The opinion in *Cohn* has been repeatedly cited by the appellate divisions in granting collateral estoppel effect in disciplinary proceedings to civil findings against attorneys. The inquiry is typically straightforward. For example, as in *Cohn*, where the underlying charges involve moral turpitude, such as when an attorney is being sued for securities fraud or embezzlement, the attorney cannot reasonably claim that subsequent disciplinary proceedings were not foreseeable. Also, where the attorney is named as a party in the underlying civil action, he or she will typically have the opportunity to put on a case, cross-examine witnesses and otherwise have the protections that would be available in a disciplinary proceeding. Finally, the standards are the same in civil actions and in New York disciplinary proceedings: fair preponderance of the evidence. *E.g. Matter of Capoccia*, 59 N.Y.2d 549, 466 N.Y.S.2d 268 (1983).

The Appellate Division, Third Department broke new ground in 2000 in granting court “frivolous conduct” *sanctions* collateral estoppel effect in an attorney disciplinary proceeding.

The Capoccia Matter

Andrew Capoccia had, for years, been at the center of controversy. During the course of the 1990s he was sanctioned by New York Supreme Court justices repeatedly (with no apparent deterrent effect) for using boilerplate answers and counterclaims in his defense of clients sued for failure to pay their credit card bills. Specifically, Capoccia or his law firm had been sanctioned in the following instances pursuant to 22 NYCRR Section 130-1.1(c): on nine occasions he had been found to have continued to assert a position that was without basis in law and which could not have been supported by a reasonable argument for an extension, modification or reversal of existing law; on seven occasions he had been found to have engaged in conduct primarily to delay or prolong the resolution of litigation; and on three occasions he had been found to have submitted false papers and/or asserted false statements.

The disciplinary committee instituted proceedings against Capoccia and moved for an order precluding him from relitigating these various findings that he had violated the rules concerning frivolous conduct. The appellate division granted the motion, refusing Capoccia’s requests

to call witnesses and submit evidence to show he had a good faith basis in advancing the various defenses and counterclaims. The court then went about determining whether violations of the rules in 22 NYCRR Section 130-1.1(c) constituted *per se* violations of the Code of Professional Responsibility. It concluded, based on what it called Capoccia's "repeated, frivolous and sanctionable conduct," that he had:

engaged in conduct prejudicial to the administration of justice (DR 1-102 [A][5]), engaged in conduct that adversely reflects on his fitness to practice law (DR 1-102 [A][B]), asserted positions, conducted defenses and took other action on behalf of clients when he knew, or when it was obvious, that such action would serve merely to harass another (DR 7-102 [A][1]), and that he knowingly advanced a claim or defense that was unwarranted under existing law which could not be supported by a good-faith argument for an extension, modification or reversal of existing law (DR 7-102 [A][2]). . . Moreover, given the findings that respondent filed false and/or misleading papers, we find that the petition also establishes conduct involving dishonesty, fraud, deceit or misrepresentation (DR 1-102 [A][4]).

Capoccia, slip opinion at 15 (citations omitted).

Thereafter, the court disbarred Capoccia on the basis of the charges it had sustained by reason of collateral estoppel. *Matter of Capoccia*, 275 A.D. 2d 804, 712 N.Y.S.2d 699 (3rd Dep't, 2000).¹

1. As mitigation evidence in the disbarment proceedings, Capoccia offered copies of 154 trial court decisions involving instances he claimed courts accepted his defenses and counterclaims. The court noted that, "[a]lthough a few of the submitted decisions found merit to certain arguments propounded by respondent on behalf of some clients, the vast majority, at best, merely show that respondent has been successful in requiring creditors to adhere to the procedural and evidentiary mandate for summary judgment." *Capoccia*, 712 N.Y.S.2d at 701. Finding that Capoccia "already had an opportunity to contest [the merits of his conduct] before the lower courts which sanctioned or warned him," the Third Department refused to permit litigation of whether his conduct violated the disciplinary rules. *Id.* This aspect of the Appellate Division's opinion is somewhat troublesome. See *Parks v. Leahey & Johnson*, 81 N.Y.2d 161, 597 N.Y.S.2d 278 (1993) (sanctions not appropriate where attorney makes legal argument that is not directly foreclosed by statute or controlling authority). See also DR 7-101(a) (an attorney has an ethical duty of "zealous" representation); DR 7-102(a)(2) (an attorney may not advance an "unwarranted" claim unless "it can be supported by a good faith argument for an extension, modification, or reversal of existing law") Automatic discipline for sanctioned arguments that are not expressly the subject of controlling authority might very well chill lawyers from advancing a novel argument or an argument that challenges the correctness of prevailing legal authority.

**Attorneys Should Not Be Subject To Automatic Discipline
Based Upon A Judge's Sanctions**

This Committee feels that court-imposed sanctions should not lead to further automatic discipline. The Committee believes there are special dangers in granting preclusive effects to findings made by courts in the course of imposing sanctions (none of which, unfortunately, were meaningfully addressed by the Third Department in the Capoccia decision). For this reason, the Committee disapproves the application of collateral estoppel to preclude a sanctioned attorney from litigating the merits of his or her conduct in a subsequent disciplinary proceeding. The following factors guide the Committee's position:

First, there are "troublesome aspects" inherent in imposing sanctions, especially when the trial court "may act as accuser, fact finder and sentencing judge, not subject to restrictions of a procedural code." *Mackler Productions, Inc. v. Cohen*, 146 F.3d 126, 128 (2nd Cir. 1998). In this respect, a judge imposing sanctions is not required to grant the offending lawyer the procedural opportunities available to a defendant in a normal civil action. The New York rules governing frivolous conduct do not provide a procedure for the imposition of sanctions. Instead, the rules leave it up to the individual judge's discretion:

An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonably opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

22 NYCRR § 130-1.1(d). Thus, sanctions may be ordered under Rule 130-1.1 purely on the basis of motion papers and without any formal hearing. *See, e.g., Greenwood Trust Co. v. Mason*, 277 A.D.2d 740, 715 N.Y.S.2d 553 (3rd Dep't 2000) (sanctions against Capoccia affirmed). If the attorney has not had a full and fair opportunity to litigate the merits of the sanction, he or she should not be precluded from challenging those merits in a subsequent disciplinary proceeding. *Schwartz*, 24 N.Y.2d at 69, *Kaufman*, 65 N.Y.2d at 449.

Second, the sanction may not have been necessary to the underlying judgment. Collateral estoppel traditionally only attaches to determinations that were *necessary* to support the judgment entered in the first action. *E.g. Wright, Miller & Cooper, Federal Practice & Procedure* § 4221; see also *Menna v. Joy*, 86 A.D.2d 138, 449 N.Y.S.2d 48 (1st Dep't 1982) (find-

ings of fact not essential to determination of earlier proceedings not binding in later proceeding). This is because a tribunal may not take sufficient care in determining an issue that did not affect the result, even though the parties vigorously litigated the issue. *Id.* Where a court imposes a sanction on counsel in the course of ruling against counsel's client on a particular issue, the sanction may well be superfluous to the court's order. Thus, for example, a finding that plaintiff failed to state a claim is a necessary element of a dismissal of a complaint. But an additional finding that plaintiff's counsel had no basis in law in advancing the claim in the first place might not be a necessary element in the dismissal of the complaint. Collateral estoppel should not be applied where the sanction was not necessary to the judgment in the underlying action.

Third, there may be a substantial issue as to foreseeability. This factor examines whether the subsequent litigation was foreseeable so that the defendant had every incentive to defend the action vigorously. While a lawyer who is charged with a crime or who is named as a defendant in a civil suit alleging securities fraud should reasonably expect disciplinary consequences if he is found guilty or liable, it may be more difficult to say whether counsel sanctioned pursuant to 22 NYCRR § 130 (or the corresponding Federal Rule of Civil Procedure 11) should expect disciplinary proceedings as a consequence, and should expect that she will be unable to relitigate whether her conduct was frivolous. *Capoccia*, for example, did not personally submit papers, call witnesses, or testify in his own defense in many of the underlying cases in which he was eventually sanctioned. In most cases the sanctions amounted to a few thousand dollars, and in two cases subject to the Appellate Division's opinion, he was merely warned not to engage in particular frivolous misconduct. One wonders whether he realized such sanctions or warnings would eventually result in automatic discipline against him. Indeed, *Capoccia* appears to be the first reported case addressing the issue. Collateral estoppel should not be applied in a disciplinary proceeding where the disciplinary charges were not foreseeable.

A further consideration arguing against the application of collateral estoppel to court-imposed sanctions is the wide-ranging objectives of the courts that impose the sanctions. It is commonly known that in many instances, certain judges will impose a modest financial sanction against attorneys for relatively minor transgressions such as habitual lateness, rudeness, or isolated dilatory conduct. The issuance of sanctions in these circumstances is plainly designed to deter attorneys from engaging in minor misconduct so that overburdened courts with crowded dockets can move

their cases more efficiently. These sanctions are not, however, intended to permanently blemish an attorney's permanent disciplinary record. Accordingly, it seems self-evident judges will become more reticent in imposing mild sanctions for less serious misconduct if they come to understand that their sanctions could automatically result in discipline of the offending attorney. As a result, a common and useful tool employed by judges to control their courtrooms will be used more sparingly and with less effect.

The Third Department's decision in *Capoccia* does not meaningfully address the concerns outlined above.

The Practical Effect of Sanctions

Because of the apparent threat that disciplinary proceedings could result from provoking the ire of even one judge, we sought anecdotal information from past and present staff attorneys for the First Department Disciplinary Committee (the "DC") about the practical consequences of a sanction. The DC attorneys informally report that, indeed, disciplinary proceedings are routinely based on sanctions. The DC may hear of the sanctions either directly from the judge or from reports in the legal press. Upon being informed of a sanction, the DC will make a determination about whether the underlying conduct merits discipline. They report that the usual case where the DC determines to proceed involves conduct much more serious than filing frivolous motion papers in violation of Rule 130. In any event, the attorney typically accepts a letter of admonition without challenging the merits of the underlying conduct.

CONCLUSION

The Committee believes that a sanctioned attorney should not be precluded from litigating the merits of the sanction at a subsequent disciplinary proceeding. Because of the special dangers inherent in a court's sanctioning authority, and the procedural rights ordinarily afforded an attorney in a disciplinary proceeding, the Committee feels that court-imposed sanctions should not be granted preclusive effect in disciplinary proceedings absent extraordinary circumstances.

I agree with the Committee's conclusion that sanctions determinations should not be accorded collateral estoppel effect, except in extraordinary cases, which is presently the practice in New York. I respectfully disagree with the Committee's discussion and analysis of the Cohn and Capoccia cases, as well as its analysis of the problems posed by the application of collateral estoppel to sanctions findings, and note that increasing the standard of proof in disciplinary proceedings to "clear and convincing" evidence would vitiate the concerns articulated in this report.

—Sarah D. McShea

The Committee on Professional Responsibility

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*Dissents, *see* p. 305

Law Under Siege: The Struggle to Prosecute Human Rights Abuses in Aceh, Indonesia

*The Committee on
International Human Rights*¹

INTRODUCTION

Indonesia is at a crossroads today as it emerges from the shadow of thirty-two years of authoritarian rule under President Suharto and a string of ineffectual successors. The country is struggling to come to terms with its violent past while simultaneously grappling with the enormous social, political and economic upheaval which accompanied this sudden trans-

1. The mission was led by Judge Robert W. Sweet of the United States District Court for the Southern District of New York. The other members of the mission were New York City attorneys Deborah L. Cornwall and Peter W. Tomlinson. We spent ten days in Indonesia in February 2001 and traveled to Jakarta, Medan, and Banda Aceh. In Indonesia, we met with government ministers and officials, military officers, police investigators, the head of Indonesia's National Commission on Human Rights, NGO leaders, legal aid attorneys, attorneys in private practice, human rights activists, family members and colleagues of a murdered human rights activist, and academics. We also met with several Indonesians in New York after our return, including additional family members of a murdered human rights activist and the witness to an execution-style shooting of human rights workers in Aceh. Some persons we met with asked us not to disclose their identities, and we have honored their requests by omitting any reference to them in the Report. We are grateful to everyone who met with us for generously sharing their time. We thank the Open Society Institute for providing the funding which made this mission possible. We are also indebted to Sidney Jones and Joseph Saunders of Human Rights Watch and the staff of the United States embassy in Jakarta for their invaluable assistance in planning this mission. Without their guidance and help, this mission would never have gotten off the ground. We issue this Report in the hopes of calling attention to the human rights crisis in Aceh and to give some recommendations to Indonesia as it tries to come to terms with past human rights violations and put an end to ongoing rights abuses.

formation to democracy. It is a time of great hope for Indonesia and its nascent democracy, but it also a time of great despair as a long record of human rights abuses continues.

Nowhere is Indonesia's human rights problem thornier than in the country's restive provinces, which have for years dueled with the Jakarta-based central government for greater autonomy, and in some cases, independence. This decades-long struggle has created a legacy of gross human rights violations committed by the Indonesian military, the police, and separatist rebels fighting for independence. Human rights defenders and lawyers committed to the rule of law have been caught in the middle. The continued persecution and attacks on human rights defenders in the post-Suharto era highlights the reality that the ostensible transition to democracy did not mark the end of serious human rights abuses in Indonesia. Indeed, the fall of Suharto was only the first step in what will be a long and difficult journey.

It was against this backdrop that the Committee on International Human Rights sponsored a mission to Indonesia in February 2001 to examine threats and attacks against human rights defenders and lawyers in the Aceh region. The genesis of the mission was the September 2000 murder of Acehnese human rights lawyer Jafar Siddiq Hamzah, a correspondent of the Committee known to many of our members when he lived in New York. The Committee also chose to focus on Aceh because the international press has devoted scant attention to the crisis there and instead has focused on issues such as Indonesia's economic restructuring and events in East Timor.

We arrived in Indonesia expecting to grapple with serious and difficult questions about how to ensure transparent investigations into decades of human rights violations and strengthen the rule of law in the hopes of stemming the tide of official abuses. Nothing, however, could have prepared us for the magnitude of the crisis which greeted us upon our arrival. Indonesia is currently in the throes of a remarkable transformation from an authoritarian society to a democratic one. Institutions which we take for granted in the United States—such as a functioning court system to oversee civil lawsuits and criminal justice—are now being built from scratch or rebuilt after years of corruption and neglect. This process of legal regeneration is complicated by significant economic stratification in Indonesian society, the brunt of which is borne by the majority of its 220 million people after years of recession. Nonetheless, despite the overwhelming challenges facing Indonesia, we found some cause for cautious optimism.

The political situation in Indonesia has changed substantially in the

months since we returned, as the country continues to move towards democracy. The most recent development in the country's remarkable and often unpredictable odyssey was the ouster of President Wahid and the installation of Megawati Sukarnoputri as president in July 2001. Megawati, the daughter of modern Indonesia's founding father Sukarno, has assumed the presidency at a crucial juncture in Indonesia's development and will face many difficult challenges in balancing the rule of law with the current political policy against separatist and referendum movements. In order to tackle these difficult problems, the Megawati administration must distinguish between the peaceful expression of political views in secessionist regions and the use of violence to pursue independence. The Megawati administration's approach to these core issues in Aceh and other similar regions will either set Indonesia firmly on the path to democracy or risk entrenching it as a repressive regime.

Part I of this Report summarizes the relevant history of Aceh-Jakarta relations as background to Part II, which describes the three case studies we focused on during the mission. Each of these cases highlights serious structural hindrances to investigating and prosecuting official human rights abuses in Aceh. In Part III, we recommend various institutional reforms to address the problems posed by the case studies and to strengthen the rule of law in Aceh.

Background

It is impossible to understand the crisis in Aceh today without some basic knowledge of the region's geography and complex history. Aceh is a resource-rich region of Indonesia located on the northern tip of the island of Sumatra, about one thousand miles from the Indonesian capital city of Jakarta. Roughly 4.3 million people live in Aceh today, the majority of whom are devout Muslims. The history of modern Aceh starts with the arrival of Dutch colonists in 1873. The Dutch met substantial resistance to their colonization efforts and fought against bands of armed Acehnese for the next 30 years. Even after that war was over, uprisings against the Dutch colonial powers in Aceh continued through World War II. In 1949, Aceh became part of the newly independent Republic of Indonesia and thus subject to its 1945 Constitution.²

Tensions between the Acehnese and the Indonesian central govern-

2. Geoffrey Robinson, *Rawan is as Rawan Does: The Origins of Disorder in New Order Aceh*, 66 *Indonesia* (Oct. 1998). Appendix A to the Report is a bibliography of all the articles, reports, statutes, and other documents cited herein. It also includes other reference materials concerning Aceh and Indonesia to which we refer readers interested in learning more about Aceh.

ment arose almost immediately and have persisted ever since. The first rebellion in Aceh ignited in 1953 when Aceh's governor joined other regional leaders in Indonesia in a campaign to establish an Indonesian Islamic state. A ten-year armed struggle known as the Darul Islam rebellion ensued and finally ended in a negotiated resolution in 1962. As part of this settlement, Aceh was designated as a special region of Indonesia with token autonomy in religion and education. A second rebellion broke out in 1976 when a rebel group, Gerakan Aceh Merdeka (Free Aceh Movement, known by its Indonesian acronym GAM), declared Aceh independent. The Indonesian government sent in the military to put down the rebellion and by 1982 had succeeded in crushing it and capturing or killing most of the rebel group's leaders.³

Violence erupted again in 1989 with armed attacks on Indonesian military and police installations in Aceh. The Indonesian government again responded by sending in thousands of troops to quell the uprising. In 1990, the Indonesian government declared Aceh to be a military operations area, or "Daerah Operasi Militer" ("DOM"). By 1993, the Indonesian government had largely succeeded in forcing the rebels into retreat. Sporadic fighting continued over the next seven years, and Aceh remained designated a DOM until August 1998. The Indonesian government also relied on the national police in its struggles against GAM rebels in Aceh. During the eight years of the DOM in Aceh, the Indonesian military (long known by its Indonesian acronym ABRI and renamed TNI in 1999 after a restructuring under former President Habibie) and the Indonesian police committed widespread human rights abuses, including murder, rape, and arbitrary detention of Acehnese civilians. GAM was also responsible for numerous human rights violations during the DOM. Thousands of civilians were killed during the eight years of the DOM, and thousands more were injured, raped, and detained. Amnesty International estimates that 2,000 Acehnese civilians were unlawfully killed between 1989 and 1993 alone and that at least 1,000 Acehnese were arbitrarily detained during the same period.⁴

Almost fifty years of friction between Aceh and Jakarta can be traced two familiar themes: money and power. Acehnese activists have complained for years about the Indonesian government's role in local matters. At the heart of the dispute is the long-brewing complaint of many Acehnese

3. *Id.*

4. *Shock Therapy: Restoring Order in Aceh*, Amnesty International (AI Index: ASA 21/07/93), July 1993.

that Jakarta takes a disproportionate share of the revenues from Aceh's huge oil and natural gas deposits. Although these economic issues in many ways are the genesis of the separatist movement in Aceh, the biggest catalyst for the increased violence in the last two years has been the failure of the post-Suharto governments to investigate and prosecute the gross human rights abuses that occurred during the DOM.⁵

The overthrow of Suharto in May 1998 prompted some hope for a peaceful resolution of the long-running conflict in Aceh. The initial overtures of the new Indonesian government boded well. On August 7, 1998, General Wiranto, then ABRI's high-profile commander, apologized for the conduct of ABRI soldiers in Aceh during the DOM, announced the end of the DOM in Aceh, and promised the withdrawal of thousands of troops from the region.⁶ There were also signs that the new government would permit thorough investigations into past human rights abuses, an important priority to many Acehnese. For example, in August 1998, Baharuddin Lopa, then the head of Indonesia's National Commission of Human Rights and later the Attorney General in the last days of the Wahid administration, led a fact-finding mission to Aceh which discovered mass graves.⁷ At the same time, greater freedom of the press in post-Suharto Indonesia meant that new, detailed information about the atrocities committed during the DOM in Aceh came to light and received national and international media attention.

The optimism for a peaceful resolution of the conflict in Aceh proved short-lived. The post-Suharto government quickly faltered on its promises of thorough investigations into human rights abuses by the military and police for fear of angering the powerful military leaders and was also slow to grant Aceh and other similar regions greater autonomy. There was another brief ray of hope for Aceh in May 2000 when the Center for Humanitarian Dialogue, a Swiss NGO, negotiated a cease fire—known as the “humanitarian pause”—between GAM and the Indonesian government. The pause remained in effect periodically until February 2001, but it was increasingly violated by both sides and is now officially defunct.

5. Indonesia, *The War in Aceh*, Human Rights Watch Report at 7, Aug. 2001 (Vol. 13, No. 4(C)).

6. U.S. Department of State, *Indonesia Country Report on Human Rights Practices for 1998*, available at http://www.state.gov/www/global/human_rights/1998_hrp_report/indonesi.html.

7. *Aceh Atrocities Boost People's Demand for Autonomy*, *Jakarta Post*, Sept. 1, 1998. Another mass grave was discovered in February of 2000. See *Aceh's Horror Continues as Mass Grave Discovered*, *Jakarta Post*, Feb. 21, 2000.

The Center for Humanitarian Dialogue has continued to facilitate peace talks between GAM and the Indonesian government, but these talks have failed to yield an effective cease-fire or peaceful resolution of the conflict in Aceh.⁸ The peace talks came to halt in July 2001, and, shortly thereafter, the Indonesian police arrested six GAM negotiators despite guarantees for their security provided by the Indonesian government.⁹ In late August 2001, all but one of the GAM negotiators were released under stringent conditions that put a damper on future negotiations.¹⁰

Several other developments in post-Suharto Indonesia have had lasting effects on the current state of affairs in Aceh. First, thousands of GAM rebels returned to Aceh from abroad because they believed they could operate more freely with the Suharto government no longer in power. Second, President Habibie's January 1999 announcement that Indonesia would permit East Timor to hold a referendum on its future political status immediately transformed the Acehnese independence movement, and a new, broad-based, student-led movement for a referendum on Acehnese independence was born. Finally, the post-Suharto governments' failures to address past abuses in Aceh in a meaningful, transparent manner increased the popularity of both GAM and the referendum movement.

In late 1998 and 1999, GAM increased its operations and gained control of additional territory in Aceh. The Indonesian government sent in more troops, and tensions continued to escalate towards DOM-era levels. During this time, the number of human rights abuses committed by both GAM and the Indonesian military increased substantially. At the same time, the non-violent student referendum movement was gaining steam. In November 1999, the Information Centre for a Referendum in Aceh (known by its Indonesian acronym SIRA), a pro-referendum student group, organized a rally in Aceh's capital, Banda Aceh, which drew hundreds of thousands of supporters. On August 17, 2000, Indonesia's national day, SIRA held a much smaller rally, again calling for a U.N.-sponsored referendum on Aceh's political future. A second mass pro-referendum rally was scheduled November 2000 in the capital, Banda Aceh, but authorities moved violently and successfully to prevent Acehnese civilians from reaching the city. Human rights organizations estimate that between 20 and 100 people

8. At Least 49 Dead Amid Raging Violence in Indonesia's Aceh, *Agence France Presse*, July 1, 2001.

9. Indonesian Police Arrest 6 GAM Negotiators, 7 Others, *Japan Economic Newswire*, July 20, 2001; GAM Negotiators to be Charged with Rebellion, *Serambi Indonesia*, 21 July 2001.

10. Government Sends High-Powered Team to Aceh, *Jakarta Post*, Aug. 21, 2001.

were shot and killed by authorities in the two days preceding the November rally. According to eyewitnesses interviewed by human rights organizations, TNI soldiers shot civilians in Aceh in an effort to prevent people from traveling to the capital to take part in the pro-referendum rally.¹¹ Around the same time, the Indonesian police detained Mohammed Nazar, the twenty-seven-year-old leader of SIRA, and charged him with the crime of “spreading hate” against the government, a common Suharto-era charge, for his role in the August 2000 rally.

Meanwhile, the abuses against Acehese human rights defenders continued. In August 2000, Jafar Siddiq Hamzah, the head of the International Forum for Aceh and a leading Acehese human rights activist, disappeared in Medan, a city in North Sumatra near the Acehese border. A month later, his body was found in the countryside outside of Medan.¹² On September 16, 2000, Professor Safwan Idris, a professor of education at the Ar-Raniry State Institute of Islamic Studies in Banda Aceh, answered a knock at his door and was shot and killed.¹³ In December 2000, four volunteers for the Rehabilitation Action for Torture Victims in Aceh (RATA), an NGO funded by the Danish government, were stopped by armed men in Aceh, kidnapped, and beaten before the attackers shot three of them execution-style. The fourth volunteer escaped and identified the perpetrators. The police arrested eight people, including four civilian military informants and four TNI soldiers. The four civilians mysteriously “escaped” from detention and disappeared in March 2001.¹⁴

Conditions in Aceh continued to deteriorate after we returned to the United States. In March 2001, the Indonesian government increased the military presence in Aceh and publicly discussed the possibility of instituting a “limited security operation” there after ExxonMobil shut down its enormous Arun natural gas operations because it could not guarantee the safety of its personnel in the unstable region.¹⁵ Before long, this latest crackdown quietly escalated from a “limited security operation” to a “Se-

11. Briefing on the Current Human Rights Situation in Indonesia, Amnesty International, Jan. 31, 2001, available at <http://web.amnesty.org/ai.nsf/print/ASA210062001>.

12. See *Acehese Pay Homage to Slain Activist*, *Jakarta Post*, Sept. 8, 2000.

13. See Burton Bollag, *In Indonesian Unrest, a Rector Searches for Middle Ground and is Murdered*, *The Chronicle of Higher Education*, July 13, 2001.

14. *Indonesia: Escape of Suspected NGO Killers*, Human Rights Watch Press Release (Mar. 28, 2001).

15. Neela Banerjee, *Lawsuit Says Exxon Aided Rights Abuses*, *New York Times*, June 21, 2001, at A1; Wayne Arnold, *Exxon Mobil, in Fear, Exits Indonesian Gas Fields*, *New York Times*, at C1. Exxon ultimately resumed its operations in the Arun natural gas field on July 13,

curity and Law Enforcement Operation.”¹⁶ The TNI has reported that 298 persons were killed in Aceh between March 12 and April 12, 2001 alone—including 33 members of the military, 36 police officials, and 229 civilians or members of GAM.¹⁷ Approximately one thousand people are estimated to have been killed in Aceh during the first seven months of this year.¹⁸ Among the victims of the latest crackdown were a religious leader involved in monitoring the “peace-through-dialogue agreement” between GAM and the government, and a lawyer who worked for the Human Rights Coalition of Aceh.¹⁹

Tensions in Aceh increased during the summer of 2001 as police effected a number of high-profile arrests. In July 2001, two volunteers for the non-governmental organization Kontras (the Commission for the Disappeared and Victims of Violence), who had been investigating the disappearances of several Acehnese activists, were themselves arrested and briefly detained in Aceh.²⁰ Shortly after the arrest, a Kontras spokesperson

2001. See *ExxonMobil Oil to Resume Its Operation Friday*, *Jakarta Post*, July 12, 2001. The decision to resume these operations comes after the International Labor Rights Fund filed a suit in the United States District Court for the District of Columbia charging ExxonMobil with “complicity in human rights abuses committed by state security forces that protect [the Arun field].” Banerjee, *supra* at A1. The suit asserts causes of action including the Alien Tort Claims Act, the Torture Victims Protection Act, international human rights law, and the statutory and common tort law of the District of Columbia. ExxonMobil issued a statement denying the allegations in the lawsuit soon after the complaint was filed. See *Petroleum Giant Exxon-Mobil Denies Rights Abuses in Indonesian Aceh*, *Deutsche Presse-Agentur*, June 22, 2001. Given the lucrative market for natural resources such as oil and liquid natural gas, the Aceh operations of ExxonMobil and other multinational companies are a crucial factor underlying Aceh’s tensions with Jakarta. We raise this as an important issue but note that it is beyond the scope of this Report.

16. *Military Operation in Aceh Gets a New Name*, TAPOL (the Indonesia Human Rights Campaign), Mar. 30, 2001 (quoting Indonesian defense minister Mahfud M.D. as saying that “the name [of the Aceh operation] has changed but the content is still the same”).

17. *Aceh Violence Kills 298 in Thirty Days*, *Indonesian Observer*, Apr. 26, 2001.

18. See *Indonesia Pres Favors Force to End Conflicts-Activists*, *Associated Press*, July 24, 2001 (“Nearly 1,000 people have been killed this year alone.”); *Two Killed in Indonesia’s Restive Aceh*, *Agence France Presse*, July 24, 2001 (“More than 1,000 people, mostly civilians, have been killed in the province since the start of the year.”); *Arun to Resume Gas Production Later This Month*, *Jakarta Post*, June 19, 2001 (“This year alone, hundreds have been killed in Aceh, most of the victims civilians.”).

19. *Indonesia: More Murders of Human Rights Monitors in Aceh*, *Human Rights Watch*, Mar. 29, 2001.

20. *Aceh Violence Reported by Indonesian Media*, *British Broadcasting Corporation*, July 19, 2001.

issued a statement that it believed these individuals were arrested because they were carrying the findings of their investigation.²¹ In July 2001, the police arrested at least seven human rights activists and lawyers and a local journalist.²²

The chaotic national leadership struggles which have consumed so much attention since 1998 have further complicated Jakarta's approach to Aceh. Suharto protégé B.J. Habibie assumed the presidency after the long-time dictator was forced to resign in May 1998. President Abdurrahman Wahid (known colloquially by Indonesians as "Gus Dur") succeeded Habibie and became the first democratically elected president of Indonesia in 2000. The Wahid administration was as chaotic as the Habibie administration had been short-lived. A cloud of scandal surrounded President Wahid through much of his tenure, stemming largely from news reports alleging Wahid did not properly account for his use of certain gifts and state funds (the Attorney General's office later cleared him of any personal wrongdoing). The legislature, considering these alleged financial improprieties and viewing Wahid as ineffectual as a national leader, initiated and pursued impeachment proceedings. On July 23, 2001, the Indonesian legislature formally stripped Wahid of the presidency and elected Vice-President Megawati Sukarnoputri in his place.²³ The constitutional removal of Wahid and election of Megawati was the most peaceful transition of power in Indonesia's young history as a democracy.²⁴ This process would likely not have proceeded so smoothly without the active support of the military, which refused to enforce President Wahid's desperate decree to impose a state of emergency on the eve of his ouster in what one observer termed "an act of insubordination that underscored [its] political power."²⁵

Unsurprisingly, the succession of three different presidents in as many years has meant that Indonesia has had no consistent political and eco-

21. *Id.*

22. Slobodan Lekic, *21 Killed in Separatist Violence in Indonesia's Aceh Province*, Associated Press, July 21, 2001. In August 2001, there were reports that TNI arrested "scores of Acehese activists" in a "no-holds barred campaign against separatism in Aceh." Vaudine England, *Military Rounds Up Aceh Student Activists*, South China Morning Post, Aug. 6, 2001.

23. *Wahid Wants Human Rights Monitoring*, New York Times, Aug. 2, 2001.

24. Seth Mydans, *Indonesia Gets a New Leader; Ex-Chief Balks*, New York Times, July 24, 2001.

25. *Id.* See also Sidney Jones, *For Indonesia, A Sea of Troubles*, New York Times, July 27, 2001 at A21 (noting that in the weeks before Megawati became president, "military commanders all but ignored Mr. Wahid and pressed ahead with a counterinsurgency offensive that has resulted in numerous executions and disappearances [in Aceh]").

conomic approach to the crises in Aceh and other restive regions. This void has enabled the powerful military to continue its campaign of using armed troops to crush separatist movements in Aceh and other regions without regard to the panoply of individual rights enshrined in both domestic and binding international law.

Numerous observers have expressed concern that the Megawati administration will be even more aggressive in using military force to crush separatist movements in places such as Aceh because many Indonesians view her as being closely allied with the military.²⁶ For example, Asmara Nababan, the Secretary-General of the independent National Human Rights Commission, Komnas-HAM, has expressed serious concern that, given Megawati's election, "the police will now handle demonstrations with repressive measures."²⁷ The late August 2001 announcement of a new military offensive in Aceh to stop the separatist fighters confirmed these fears. On August 26, 2001, the Coordinating Minister for Political and Security Affairs announced the new offensive and stated "No country solves its armed movement problems with a dialogue." Nonetheless, the minister said that the government would continue negotiations with GAM.²⁸

Notwithstanding these early indicators of a renewed military offensive in Aceh, President Megawati has made some important overtures in her first days in office. In her first state of the nation address in August 2001, she apologized for past human rights violations in Aceh and other separatist regions and promised to remedy the situation through "fundamental corrections."²⁹ President Megawati supported the release of GAM

26. Seth Mydans, *As Indonesia Redefines Itself, So Does Its Military*, *New York Times*, July 29, 2001 at 3 (characterizing Megawati as "a friend of the military [who] does not share the reformist ideals of her predecessor, Mr. Wahid"). See also Seth Mydans, *Indonesia's Daughter of Destiny*, July 24, 2001 (Megawati "is expected to allow the armed forces to crack down hard on separatist movements"). Wahid himself has suggested that Megawati is merely a TNI "puppet" who will allow the military's domestic role to become yet more entrenched. Seth Mydans, *As Indonesia Redefines Itself, So Does Its Military*, *New York Times*, July 29, 2001 at 3.

27. Asmara Nababan Warns of More Repression from the Police, *Tempo*, Aug. 4, 2001; see also Police Will Crack Down Hard on Demonstrators, *Tempo*, Aug. 3, 2001. GAM leaders recently accused Megawati of ordering a new offensive in Aceh just days after she was inaugurated. See *Indonesia Pres Favors Force To End Conflicts-Activists*, *Associated Press*, July 24, 2001; *Aceh Rebels Accuse Indonesia Press of Military Crackdown*, *Associated Press*, July 31, 2001 (reprinted in *Joyo Indonesian News*).

28. *Military Operations Planned in Troubled Aceh*, *Jakarta Post*, Aug. 26, 2001.

29. *Megawati to Keep Indonesia United, Extends Olive Branch to Separatists*, *Agence France Presse*, Aug. 16, 2001.

negotiators arrested in July 2001 and made a brief visit to Aceh on September 8, 2001.³⁰ At the same time, she has repeatedly emphasized the importance of the “territorial integrity” of Indonesia and stressed that she would never support the secession of Aceh or any other regions.³¹

In August 2001, President Megawati signed a bill granting Aceh some measure of economic and political autonomy. Under this law, the central government is required to return 70 percent of Aceh’s oil and gas revenues to the region for eight years, after which the amount to be returned to Aceh will be subject to review.³² The legislation also provides for Aceh to have its own political infrastructure with direct elections for the provincial governor for the first time. This elected governor will also have to approve the selection of the senior Indonesian police officer assigned to Aceh.³³ The bill also provides for an independent judicial system to be administered under Islamic law. Aceh will also have its own flag and state emblem, and Acehnese will become the official state language along with Indonesian.³⁴

The Jakarta government did not consult Acehnese leaders in drafting this bill and the vigor with which it will be implemented is uncertain. In recent years, the problem in Aceh has become more than an economic issue and the Megawati government needs to work closely with Acehnese leaders to develop a comprehensive plan to resolve the crisis and to address the economic concerns and the gross human rights violations that have occurred in Aceh in the last decade. Any plan which does not contain these two components is, in our view, destined to fail.

The peaceful transition of national power brings new promise for a negotiated resolution in Aceh and other regions. The Megawati administration has a unique opportunity to break new ground by making it clear that Jakarta will seek a political and economic solution to the problems in Aceh and other regions and will shelve the military solution which has been a complete failure for so many years. Striving to achieve three core changes in the new administration would open a new chapter of justice to the nationalist-separatist struggle in regions such as Aceh. First, the goodwill President Megawati has with the military could be used to establish civilian control over the TNI, which has operated with impunity for

30. Megawati Plans to Hold Dialog With the Acehnese, *Jakarta Post*, Aug. 16, 2001.

31. *Ibid.*

32. Aceh Leaders Fly in for Autonomy Law, *Agence France Presse*, Aug. 14, 2001.

33. *Ibid.*

34. See Weekly Comments on Aceh Autonomy Bill, *Tempo*, Apr. 3, 2000.

too long. Second, the administration must bring an end to the military's aggressive, indiscriminate campaign to crush even peaceful actions supporting independence. Third, the Megawati administration should confirm its commitment to the rule of law by strengthening objective institutions of justice and actively prosecuting past human rights abuses by the military, the police, and others. These seismic changes will not be easy to implement, particularly given the host of other critical problems facing Indonesia, including, most notably, a continuing economic crisis. Nevertheless, these fundamental transformations are integral to Indonesia's continued progression towards full-fledged democracy and economic recovery.

II. CASE STUDIES

A. Jafar Siddiq Hamzah

Jafar founded the International Forum for Aceh in New York in 1998 to gain international attention and support for Aceh. He also played a role in setting up the Support Committee for Human Rights in Aceh while he was in the United States. In New York, Jafar enrolled in the New School University to study political science. Jafar was a tireless promoter of a non-violent resolution of the conflict in Aceh and worked to get all sides of the conflict to stop the cycle of violence. While he was in New York, Jafar met with the Committee and numerous human rights organizations to try to draw attention to the widespread human rights violations in Aceh.

Before coming to New York, Jafar practiced law as a defense lawyer at Indonesian Legal Aid (LBH) in Medan and played an important role in documenting human rights abuses. As Jafar continued to speak out on human rights issues and to challenge TNI about its role in human rights abuses in Aceh, he and his family received more and more threats. By 1996, Jafar was sufficiently concerned about these threats that he and his wife fled to New York.

After four years in New York, Jafar returned to Indonesia in the summer of 2000 to open an Acehese branch office of the International Forum for Aceh and to help launch an English-Acehnese newspaper. Jafar continued to document ongoing human rights abuses there until August 5, 2000, when he disappeared in broad daylight from a busy street in Medan. On September 3, 2000, five bodies were discovered in the countryside near Kabanjahe, about fifty miles outside of Medan. All five had been stabbed, and their hands and feet were bound at the time they were

killed.³⁵ Jafar's family identified one of the five bodies as his. The other four bodies have never been identified. Although the police released the body to Jafar's family, they are still awaiting certain medical records relating to surgery Jafar had in New York before the autopsy report will formally identify the body as Jafar's. In accordance with its standard policy, the police have not released the autopsy report of the body identified as Jafar's, despite repeated pleas from Jafar's family members, human rights activists, and even a U.S. congressman. Members of Jafar's family related disturbing accounts of someone removing Jafar's teeth while his body was in police custody. Although the police have denied that any teeth were removed from Jafar's body, their refusal to release the autopsy report has only fueled speculation about whether Jafar's teeth were removed in an attempt to frustrate identification.

Jafar's murder has received widespread international press coverage, and groups from around the world have called on Indonesia to conduct a thorough, transparent investigation into his murder.³⁶ These calls, moreover, have not been limited to the private sphere. Congressman Joseph Crowley of New York has introduced a resolution in the U.S. Congress demanding a complete investigation into Jafar's death.³⁷ Many observers have expressed frustration that it has now been over one year since Jafar was killed and no suspects have been identified or arrested.

One of the goals of our mission was to gain an understanding of the status of the investigation into Jafar's murder and to emphasize that the Committee and the Association are very concerned about Jafar's murder and are following the investigation closely. To this end, we discussed the status of the investigation and the facts surrounding Jafar's murder with the police officers and detectives in Medan responsible for investigating it, several of Jafar's family members, friends and colleagues who saw him in his final hours, and government officials in Jakarta.

Before we arrived in Indonesia, we had the impression from the me-

35. Richard C. Paddock, *A Native Son's Bid to Help End Abuses in Aceh Takes Deadly Turn*, *Los Angeles Times*, Sept. 17, 2000, at A3.

36. See, e.g., *Aceh NGOs Urge Government to Locate IFA Chief*, *Jakarta Post*, Aug. 10, 2000 (noting that such calls have been made by Forum Peduli HAM, Human Rights Watch and the International Forum on Aceh); *Amnesty International News*, Amnesty International, Jan. 1, 2001, available at <http://web.amnesty.org/ai.nsf/print/NWS210012001?OpenDocument> (discussing Jafar's disappearance, and renewing its demand that "effective systems of accountability be set up"); *TAPOL Calls on Komnas-HAM to Investigate Jafar's Murder*, *East Timor Action Network*, available at <http://www.etan.org/news/2000b/jafar3.htm#tapol4>.

37. H. Res. 580 (Sept. 18, 2000).

dia coverage that the police were not seriously pursuing the investigation into Jafar's murder. Once we arrived, however, we learned that the situation was more complicated than press reports indicated. We were encouraged by our meeting with the police officers and investigators working on Jafar's case and found that they appeared genuinely concerned and interested in cracking the case. We recognize that they have a very difficult case on their hands. No witnesses have come forward who saw Jafar abducted on the Medan street where he was last seen. Similarly, no witnesses who saw his body being dumped in the countryside outside of Medan have come forward. The lack of any witnesses and evidence would make it difficult for any investigation to get off the ground.

Nonetheless, one logical place to start the investigation would be to identify the other four bodies found with Jafar's body and determine whether there is a connection between Jafar and the other victims. The police and the coroner's office, however, have been unable to identify the other four bodies. This is not uncommon in Indonesia as many people disappear every year, and many Indonesians do not have dental or other medical records which are used to identify corpses in the United States. As the investigators acknowledged to us, it is likely that the four bodies found with Jafar's body are Acehese men who have disappeared over the last few years. The fact that hundreds, if not thousands, of Acehese have disappeared over the last 10 years makes it difficult to match these bodies with the names of missing persons in Aceh. Given the turmoil and violence that affects everyday life in Aceh, trying to solve missing persons reports is not high on the police in Aceh's list. Murder investigations like Jafar's would be aided if there was a centralized database of persons reported missing in Aceh. The police should work with NGOs like KONTRAS which are trying to develop a complete list of persons reported as missing in Aceh. This list could be used in trying to identify bodies such as the four bodies found along with Jafar's, and the identification of these bodies could be a real break in the investigation into Jafar's murder.

The only real evidence in Jafar's case is circumstantial: the manner in which Jafar was killed and his body found. Over the last decade, the Indonesian military has been connected to many killings in which the victims' hands and feet were bound with rope. This *modus operandi* is well documented in Indonesia, and the police investigating Jafar's case readily acknowledged that the fact that Jafar's feet and hands were bound at the time of his death might point to military involvement. This is not real evidence and cannot solve Jafar's murder, but it does underscore how

complicated it will be to solve. We urge the police to press their efforts to investigate Jafar's murder.

We are also concerned about the lack of communication between the police and Jafar's family, friends, and others interested in the progress of the investigation. This phenomenon is common throughout Indonesia and is in part based on the legacy of distrust that many Indonesian, and Acehese in particular, harbor toward the police. We believe that a more open approach by the police in dealing with the family and friends of victims is important. First, it will actually help the police investigations if there are lines of communication between persons who may have relevant knowledge and the those investigating the crime. Second, it will increase both civilian confidence in the police and police resolve to investigate the crime at issue. For example, in Jafar's case, many observers have been suspicious of the autopsy report and the police's refusal to release it to Jafar's family and the media. Although we understand that the Indonesian police do not traditionally release records such as autopsy reports when there is an ongoing investigation, we think the police would be well advised to be more open and release the autopsy report to Jafar's family and consider releasing the report to other interested parties such as human rights organizations, especially in light of the troubling allegations that the teeth may have been removed from Jafar's body while it was in official custody.

B. The RATA Killings

The December 2000 execution-style killings of three RATA fieldworkers in Aceh were extreme even for Aceh. These volunteers for the neutral, Danish-funded NGO worked to counsel and rehabilitate victims who were tortured during the years of conflict in Aceh. On December 6, 2000, four RATA fieldworkers were stopped on a rural road in Aceh and abducted by a group of fifteen men. The four volunteers were interrogated, beaten with rifle butts, taken to two different military command posts, tied up, and then three of them were shot. One of the four fieldworkers, Nazaruddin, managed to escape before he was shot and identified his captors to the police. Nazaruddin identified the man who orchestrated the kidnapping and killing of his co-workers as a well-known local "cuak," or a civilian informer for the military.³⁸

Based on Nazaruddin's identification, this civilian military informer

38. Dan Murphy, *In Rebel Aceh, Neutral Isn't Safe*, *Christian Science Monitor*, Jan. 24, 2001, at 6.

was arrested along with three other civilian informers for the military and four military personnel. One of the military personnel arrested was a major identified in the press as the section chief for military intelligence for a district command in Aceh.³⁹ Nazaruddin has since fled Aceh for the United States out of fear for his safety.⁴⁰

After the eight defendants were arrested, the Banda Aceh police referred the case to the High Court in Aceh for prosecution in a joint military/civilian court called a "koneksitas" court. Around the same time, the independent Indonesia Human Rights Commission, Komnas-HAM, suggested that the defendants be tried in a human rights court which was to be established in Medan. The situation changed in March 2001 when the four "cuak" defendants escaped from a jail in Medan where they were being held pending trial.⁴¹ As of this writing, none has been apprehended. Skeptical observers have noted that this is not the first time suspects being held for human rights crimes against civilians have "disappeared." The case has lingered in a state of uncertainty since the four civilian defendants escaped from jail. Although the police have completed their investigation, no trial date has been set for the four defendants in custody, and the case has come to a standstill amid uncertainty over whether the defendants will be tried in a human rights court, a "koneksitas" court, or any court at all.

The RATA case is an exceptional case by Indonesian standards because four suspects are in custody, and there is an eyewitness implicating them in the crime. Historically, even survivors of human rights abuses have been reluctant to identify the culprit to the authorities because they feared retribution. These unusual facts make this an important test case for Indonesia and present an opportunity for it to prove that it has the capability, resources, and determination to bring those responsible for human rights abuses to justice. We are very concerned that the RATA case has become mired in the uncertainty over which court the defendants should be tried in. We urge the Indonesian government to take decisive action to permit the trial to proceed in a human rights court and expedite matters so that at least the four defendants in custody are tried no later than June

39. Indonesia: Widespread Violence Reported in Aceh amid Debate over Autonomy Bill, British Broadcasting Corporation, Mar. 1, 2001 ("[T]he senior intelligence officer in 011 Military Provincial Command referred to as Major JP was one of the accused of the killing of four RATA . . . workers in North Aceh on 6 December . . .").

40. Dan Murphy, *In Rebel Aceh, Neutral Isn't Safe*, Christian Science Monitor, Jan. 24, 2001 (noting that Nazaruddin had been "smuggled out of Indonesia to the U.S.").

41. *Voices from Below the Ground*, Jakarta Post, June 28, 2001; *Suspected Killers of Aceh Rights Activists Escape*, Japan Economic Newswire, Mar. 29, 2001.

1, 2002. The Indonesian government must also step up its efforts to locate the four defendants who escaped from custody and bring them to trial.

The RATA case highlights several persistent impediments to the effective investigation and prosecution of human rights abuses in Aceh. First, that the eyewitness was compelled to flee Indonesia out of fear for his personal safety speaks volumes about the problems Indonesia faces in prosecuting human rights violations. Based on our conversations with police investigators and others, we learned that witnesses with key information about human rights violations are usually too frightened to report what they saw or know to the authorities out of fear for their own safety and the safety of their families and friends. For example, Jafar disappeared from a busy Medan street in broad daylight, yet no witnesses have come forward. This culture of fear stifles the authorities' ability to investigate crimes and stalls many important investigations.

Many observers have suggested that Indonesia implement some type of witness protection to guarantee the safety of any witnesses who come forward with knowledge or evidence in cases involving human rights abuses. We endorse the development of a witness protection program in Indonesia and consider it an essential component for the successful investigation and prosecution of past human rights violations. As long as citizens are reluctant to come forward with evidence in human rights cases, it will be difficult or impossible to prosecute these cases. We recognize that creating a witness protection program will not erase overnight years of mistrust of the police and that it will take a long time to build the Indonesian people's confidence in the police. Therefore, it will be important to create an effective witness protection program which is viewed as trustworthy by the Indonesian people. One option worth consideration is setting up a witness protection program through Komnas-HAM or an organization other than the police.

C. The Prosecution and Conviction of Mohammed Nazar

One of the most disturbing developments with respect to human rights in Aceh is the arrest, prosecution, and conviction of Mohammed Nazar, the leader of SIRA. SIRA is student-led organization which supports a referendum on the future political status of Aceh. Although its message has evolved from advocating a referendum to more directly supporting independence for Aceh, SIRA is a non-violent organization and is not associated with GAM. Nazar organized a huge rally in Banda Aceh in November 1999 to gather supporters of the referendum. On August 17, 2000, he participated in a smaller event again calling for a referendum on

the political future of Aceh. The August 17, 2000 demonstration was orderly and peaceful. The most controversial thing that happened was when demonstrators raised the United Nations flag in place of the Indonesian flag on the holiday marking the anniversary of Indonesia's independence.

Buoyed by the success of the first rally, Nazar organized a second pro-independence rally in November 2000 in Banda Aceh. This time the military intervened, and violence erupted and prevented tens of thousands of demonstrators from attending the rally. According to accounts of eyewitnesses recorded by human rights organizations, the military fired on convoys of Acehnese headed to Banda Aceh to prevent them from reaching the rally.⁴² At least 30 people were killed, and hundreds were injured across Aceh in these shootings. In the months following the shootings of Acehnese headed to the November rally, SIRA leaders have reported ongoing harassment by the police, including repeated raids on the organization's offices, the confiscation of pro-referendum materials, and the detention and forced interrogation of SIRA activists and civilians who took part in an opinion poll on the referendum.

On November 20, 2000, Nazar was arrested and interrogated for his role in organizing pro-referendum protests. Nazar was held in police custody until January 10, 2001, when he was transferred to the prosecutor's custody. On January 17, the police forwarded a dossier to the Banda Aceh district court recommending that Nazar be charged with "hate-spreading" in connection with posters and banners carried at the August rally, and Nazar was transferred to the custody of the district court at Keuda Prison in Banda Aceh.⁴³ We met with Nazar at the Keuda Prison on February 14 while he was awaiting trial on the charges.

The charges against Nazar were based on Articles 154, 155 and 160 of the Indonesian Criminal Code. Article 154 of the Indonesian Criminal Code renders the offense of "expressing hatred of the Indonesian government" punishable by up to seven years in prison. Article 155 criminalizes the expression of hatred of the Indonesian government in writing or other material forms and makes it punishable by up to four and a half years. Lastly, Article 160 outlaws "inciting others to commit acts of violence against public authority" and carries a six-year maximum penalty. These three vague criminal laws date back to Dutch colonial times, and Articles

42. See Briefing on the Current Human Rights Situation in Indonesia, Amnesty International, Sept. 2001, available at <http://web.amnesty.org/ai.nsf/print/ASA210062001?OpenDocument>; Indonesia Warns It May Impose Emergency in Aceh, Deutsche Presse-Agentur, Nov. 22, 2000.

43. Trial of SIRA Activist Adjourned, Jakarta Post, Feb. 22, 2001.

154 and 155 clearly conflict with the right to free speech guaranteed by Article 428 of the 1945 Indonesian Constitution.

The Suharto government often invoked Articles 154 and 155 to target and silence its political enemies.⁴⁴ With the fall of the Suharto government and the installation of a government which labelled itself “reformist,” most observers assumed that there would not be any more prosecutions under these arcane statutes. Unfortunately, President Wahid’s government resurrected statutes and used these to prosecute and imprison its political opponents. In addition to Mohammed Nazar, prosecutors have also charged several activists from Papua New Guinea with hate-spreading under the same laws.⁴⁵

While we were in Indonesia in February, there was a great deal of debate about where Mohammed Nazar’s trial would take place. We closely followed this debate and were involved in discussions with government ministers, Nazar’s attorneys, and others about the location of his trial. The district court and prosecutor in Banda Aceh initially planned to hold Nazar’s trial in Banda Aceh beginning on February 3. On January 29, the Ministry of Justice and Human Rights in Jakarta signed a decree transferring the trial to the district court in Medan. The Justice Minister publicly stated that the unstable security situation in Banda Aceh and the limited number of judges in Banda Aceh⁴⁶ required the transfer of venue. The Supreme Court approved the transfer, and the dossier on Nazar’s case was handed over to the district court in Medan on February 2.

44. See Briefing on the Current Human Rights Situation in Indonesia, Amnesty International, Sept. 2001, available at <http://web.amnesty.org/ai.nsf/print/ASA210062001?OpenDocument> (“[Articles 154 and 155] were widely used to imprison and intimidate political opponents during the 32 years between 1966 and 1998 when President Suharto governed Indonesia.”); Prisoners of Conscience, Jakarta Post, Dec. 7, 2000 (“The[] arrests [of Nazar and others] bore all the hallmarks of the Suharto regime. They were charged with crimes supposedly committed sometime ago. Police invoked either the subversion law—Suharto’s favorite tool to suppress dissidents—or an article in the Criminal Code pertaining to the spread of hatred against the government, a tool dating back to the Dutch colonial regime.”); Indonesia Told to Free Aceh Activist, Jakarta Post, Nov. 23, 2000 (“Inherited from the Dutch colonial administration, . . . articles [154 and 155] were used by the Suharto government to quell free speech forums critical of Suharto and to discourage pro-independence activities in East Timor. Human rights lawyers and activists had expected that in a democratic Indonesia, these articles would be repealed.”).

45. See Briefing on the Current Human Rights Situation in Indonesia, Amnesty International, Sept. , 2001, available at <http://web.amnesty.org/ai.nsf/print/ASA210062001?OpenDocument>; Prisoners of Conscience, Jakarta Post, Dec. 7, 2000.

46. As discussed *supra*, Committee members unsuccessfully attempted to meet with judges in Banda Aceh. Many had fled due to the ongoing conflict and pressure from both GAM and the government, and we were told that the only remaining judge in the region was in hiding.

Nazar and his attorneys expressed concern for Nazar's safety in Medan and cited the murders of other prominent Acehnese in Medan, including Jafar and congressman Tengku Nashiruddin Daud. They publicly opposed the move, contending that it was politically motivated and was not based on security concerns.⁴⁷ Representatives from the Aceh provincial legislative council also publicly rejected the transfer of Nazar's trial. Students in Banda Aceh rallied in opposition to the transfer of the trial to Medan. Nazar's attorneys and representatives of the Indonesian Legal Aid Institute and Human Rights Association (PBHI) formally requested that Nazar's trial be moved back to Banda Aceh.⁴⁸

When we met with them on February 14, 2001, Nazar and his attorneys had just received confirmation from the Supreme Court that the trial would take place in Medan due to security concerns, and planned to file an appeal. In a meeting with the Ministry of Justice and Human Rights two days later, we expressed concern for Nazar's safety if the trial were held in Medan. Although minimizing any threat to Nazar in Medan, Justice Ministry officials told us that they planned to recommend that the trial take place on Sabang, an island off the coast of Aceh.⁴⁹ This was viewed as a compromise solution which would keep the trial in a venue near the site of Nazar's alleged offense while posing fewer security risks due to its relative inaccessibility.

The situation became even more peculiar. Notwithstanding the suggestion that the trial would be held in Sabang, the trial commenced in Medan on February 21, 2001. Only the defense lawyers showed up in court. Nazar was not present because he had not been transferred from jail in Aceh, and the prosecutors were also absent, apparently due to uncertainty about whether the trial had been moved to Sabang. The presiding judge adjourned the trial.⁵⁰ Several days later, the Ministry of Justice and Human Rights notified Nazar and his lawyers that his trial would be transferred to the Banda Aceh District Court after all and be heard by the same panel of judges that had been assigned to hear the case in Medan.

The trial started on March 12, 2001 in Banda Aceh. During the trial,

47. *SIRA Activist Wants to be Tried in Aceh*, *Jakarta Post*, Feb. 1, 2001 ("I think the change of venue is some kind of conspiracy to worsen the situation in Aceh ... So, we reject it," Abdurrahman Yacob, Nazar's lawyer, said.).

48. *Id.*

49. See also *Gov't Says SIRA Chief Trial in Sabang*, *Jakarta Post*, Feb. 16, 2001.

50. *BBC Summary of World Broadcasts: Media Report Latest Developments in Aceh*, *British Broadcasting Corporation*, Feb. 23, 2001.

Nazar's lawyers contended that the use of the Suharto-era laws against him was illegal and constituted nothing more than a political act intended to stifle freedom of expression on the part of those in favor of Acehese independence.⁵¹ After several days of testimony, Nazar was found guilty of violating Articles 154 and 155 of the Criminal Code for showing hostile intentions toward the state. The court sentenced him to 10 months in prison.⁵² Presiding judge Farida Hanoum stated that the prosecution had "legitimately and convincingly" proven Nazar guilty of disseminating information and displaying banners that referred to the Indonesian government as "neo-colonialist," called upon the "Acehese people" to boycott Indonesia's national independence day and to "work together toward peace and a resolution of the Acehese conflict." Judge Hanoum stated for the court that in so doing, Nazar "tilted toward sowing enmity and hatred against, and insulting the government of Indonesia."⁵³

In the wake of the verdict in Nazar's case, the head of Komnas-HAM, Indonesian legal scholars, human rights activists, and the Indonesian media are calling on the legislature to repeal these provisions of the Criminal Code provisions as inconsistent with the free expression of ideas in a democratic society.⁵⁴ We join the chorus of those calling for the repeal of these outdated and repressive statutes and urge the new Megawati administration to make this a priority. In our view, Mohammed Nazar is a political prisoner.⁵⁵

III. INDONESIAN INSTITUTIONS: EXISTING MODELS AND RECOMMENDATIONS FOR REFORM

A variety of new and reformed institutions for dealing with past and ongoing human rights violations has emerged in the years since the fall of Suharto. In other words, there is an existing legal infrastructure on which the country can build. Section III of the Report addresses these

51. *Nazar Verdict Criticized as Politically Motivated*, Jakarta Post, Mar. 30, 2001.

52. *Id.*

53. *Prisoner of Conscience*, Jakarta Post, March 30, 2001.

54. See *Nazar Verdict Criticized as Politically Motivated*, Jakarta Post, Mar. 30, 2001; *Indonesia Told to Free Aceh Activist*, Jakarta Post, Nov. 23, 2000.

55. Despite the overwhelming criticism of its handling of the Nazar case, the Indonesian government continues to use these antiquated statutes to target its enemies. In August 2001, Faisal Saifuddin, SIRA's Jakarta branch chief, was arrested and charged with violating Sections 154 and 155 for his role in planning pro-referendum rallies in Jakarta in November 2000. See *Police Detain SIRA Activist for Inciting Hatred*, Jakarta Post, Aug. 4, 2001.

new and developing institutions available in Indonesia today to confront both past and ongoing human rights violations.

A. Existing Law

Any institutional change will take place against an existing backdrop of domestic and international law. Preliminarily, and perhaps most fundamentally, it is important to understand the Indonesian national ideology that is enshrined in the Constitution, or Pancasila.⁵⁶ Pancasila is really an amalgam of five socio-legal principles that dictates the course of Indonesian life. Specifically, Pancasila dictates the righteousness of (1) the belief in one God, (2) humanity that is just and civilized, (3) the unity of Indonesia, (4) democracy guided by the wisdom of representative deliberation, and (5) social justice for all Indonesians.⁵⁷ Given the national consensus that Pancasila must continue to serve as the state ideology, any legal reform will be circumscribed by these principles.

Indonesia's original 1945 constitution establishes a civil law system which, in the criminal context, features investigative panels of judges rather than the adversarial criminal proceedings employed in the United States. Indonesian judicial institutions are weak, especially as compared with their American counterparts. For example, the Indonesian Supreme Court lacks the ability to review the constitutionality of legislation.⁵⁸

Internationally, Indonesia is a state party to the Convention Against Torture and Other Cruel and Inhuman Treatment (the "Convention").⁵⁹ Under this agreement, signatories pledge to institute "effective measures to prevent torture"⁶⁰ and to refrain from justifying acts of torture because

56. Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [Constitution] preamble.

57. *Id.*

58. Paul H. Brietzke & Thomas A. Timberg, *An Economic Reform Agenda for Indonesia?*, 31 *Law & Pol'y Int'l Bus.* 1, 22 n.44 (1999) (noting the lack of judicial review power on the part of the Indonesian Supreme Court, and discussing normative considerations surrounding this power).

59. G.A. Res. 39/46, Annex, 39 U.N. GAOR, 12th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

60. Under the Convention, "torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." *Id.* at art. 1.

of “political instability or public emergency.”⁶¹ Under the strict language of the agreement, then, these promises are truly inalienable.

Additionally, although Indonesia is not technically a state party to the International Covenant on Civil and Political Rights (the “ICCPR”),⁶² Amnesty International reports that its “National Action Plan commits the government to the ratification of . . . [the ICCPR].”⁶³ The ICCPR guarantees individuals the enforceable rights to life,⁶⁴ freedom from arbitrary arrest and detention,⁶⁵ liberty and security of person,⁶⁶ and freedom from torture and inhuman or degrading treatment.⁶⁷ Parties to the ICCPR have also agreed that the fundamental rights pertaining to life, torture and inhuman treatment may not be suspended (are “non-derogable”) even in times of civil emergency.⁶⁸ Finally, every state party to the ICCPR agrees to provide “an effective legal remedy,” including “competent judicial, administrative or legislative authorities, or . . . any other competent authority provided for by the legal system of the State,” and that such remedies shall be enforced.⁶⁹

The most fundamental institutional challenge for Indonesia is how to investigate and prosecute members of the police and military suspected of committing human rights abuses under the rubric of this existing legal framework. During the Suharto era, the military had a free reign to commit abuses because, aside from the lack of political will to arrest and prosecute them, military officers and soldiers could not be tried for crimes against civilians in Indonesian criminal courts. Instead, they were tried in military courts before military judges. During the three years since fall of the Suharto government, the military’s longstanding impunity has started to erode, as a variety of institutional options for investigating and prosecuting human rights abuses has proliferated.

61. *Id.* at art. 2.

62. S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 (1978). It should be noted, however, that the CAT explicitly refers to the ICCPR in its preamble.

63. Amnesty International, *Indonesia: An Audit of Human Rights Reform*, Jan. 3, 1999, available at <http://www.web.amnesty.org/ai.nsf/index/ASA210121999>.

64. ICCPR at art. 6, ¶ 1.

65. *Id.* at art. 9.

66. *Id.*

67. *Id.* at art. 7.

68. *Id.* at art. 4, ¶ 2.

69. *Id.* at art. 2, ¶ 3.

B. Law Enforcement and Investigation

1. Separation of the Military and the Police

One of the major developments in post-Suharto Indonesia has been the separation of the police and the military. Throughout the Suharto era, the police operated as part of the powerful military. It was not a partnership of equals, as evidenced by the fact that the military could investigate alleged human rights abuses by the police but the police could not investigate any alleged wrongdoing involving the military. The close relationship has denied Indonesia an independent civilian police force and fueled the sense of impunity enjoyed by both the police and military.

In 1999, the Indonesian parliament passed legislation providing for the separation of the 175,000 member police force from the 275,000 member military.⁷⁰ Although the police have formal responsibility for internal security, they still remain under the supervision of the Minister of Defense (now a civilian) and have no jurisdiction to investigate criminal cases involving TNI members. Neither body is as yet fully accountable to the civilian authorities.⁷¹ Nonetheless, the separation of the military and the police is a positive first step in the development of an independent, accountable civilian police force in Indonesia.

2. Structural Reform of the Police

The development of an effective, civilian police force is an important goal for Indonesia in the coming years. Indonesia must overcome two hurdles to accomplish this goal, one historical and one structural. Historically, the Indonesian police have had a dismal human rights record, endemic corruption, and a long and close association with the military. This tarnished history has alienated millions of Indonesians and is particularly acute in places like Aceh where many residents associate the In-

70. United States Dept. of State, *Indonesia: Country Report on Human Rights Practices 2000*, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/index.cfm?docid=707> (discussing "the formal separation of the police from the armed forces in 1999"); ABRI to Submit Revised Bill on National Safety to House, *Jakarta Post*, Feb. 13, 1999 ("Widespread criticism preceded the decision to separate the National Police from ABRI. Military and political observers argued the National Police should not be included in the combat armed forces because its main tasks were to enforce the law and maintain security and order in society.").

71. For a thoughtful, detailed analysis of the role of the military and how it can be reformed in a democratic Indonesia, readers are referred to a report written by lecturers in the Social and Political Sciences Departments at the University of Indonesia and Gadjah Mada University which was submitted to the MPR in its 1999 General Session, *The Civil Supremacy Paradigm: A Blueprint for Reforming the Position and Role of the Military on the Road to Democracy in Indonesia*, October 8, 1999.

Indonesian police with years of violence during military operations in the region. It will take years to heal these wounds, but an important part of this healing process will be the investigation and prosecution of past human rights abuses, including crimes by police and military personnel.⁷²

The very structure of the police force exacerbates the distrust between the police and the citizens they are supposed to protect. The Indonesian police are a national police force administered out of Jakarta and were, for years, under the control of the military. As discussed above, the separation of the police and the military is an important and promising development, but that solves only half of the problem. The remainder of the problem involves the centralized nature of the police force. In particular, the centralized police command in Jakarta assigns and regularly rotates police officers—from low-level street officers to high-ranking commanders—all over the country. As a result, the police in a region like Aceh come from across the Indonesian archipelago to serve in Aceh for a few years. They then might be transferred thousands of miles away to another corner of Indonesia. Under this system, the police in any particular province, region or city are transplants; they are not members of the local community and live as outsiders amongst each other.

This system creates many problems. First, the assignment of police at the federal level to different parts of Indonesia complicates communication and cultural understanding between the police and the local residents. It also means that the police responsible for protecting the community are not members of that community and are in fact completely isolated from it. The lack of a living wage, combined with the lack of organic ties between police and the communities they are assigned to serve, contributes to an environment in which corruption thrives. Given the tumultuous history of police-community relations, the legacy of mistrust is unlikely to change until police are first assigned to communities rather than being reassigned across the archipelago. This simple reform is a crucial first step toward building the trust that has made community policing so effective in cities around the United States.⁷³ Changing the

72. We refer readers interested in the issue of police reform to an excellent report by the International Crisis Group. See *Indonesia: National Police Reform*, International Crisis Group, Feb. 20, 2001.

73. According to the U.S. Department of Justice website:

Community policing is a policing philosophy that promotes and supports organizational strategies to address the causes and reduce the fear of crime and social disorder through problem solving tactics and community-police partnerships. A fundamental shift from traditional, reactive policing, community policing stresses the prevention

public perception of police from perpetrators to protectors is a crucial long-term endeavor.

We recommend the institution of an independent body in Aceh to monitor police abuses under a model such as New York's Civilian Complaint Review Board (the "CCRB"). The CCRB is an independent, non-police city agency comprised of trained professionals with the authority to investigate allegations of police misconduct filed by members of the public against New York City police officers. The CCRB receives, investigates, makes findings, and recommends discipline to the Police Commissioner on complaints alleging Force, Abuse of Authority, Discourtesy and Offensive Language.⁷⁴

As with the other institutions discussed in this Report, the key to the success of such a body will be in providing for a smooth transition between investigation and prosecution. Indonesia can also learn from the CCRB's shortcomings. For example, many observers have noted that the CCRB substantiates allegations of police misconduct only infrequently, and is institutionally unable to translate penetrating, incisive fact-find-

of crime before it occurs. Community policing is an integral part of combating crime and improving the quality of life in the nation's cities, towns and rural areas. Core components of community policing include partnering with the community; problem solving; and transforming policing agencies to support and empower frontline officers, decentralize command and encourage innovative problem solving. United States Dept. of Justice Office of Community Oriented Policing Services, Definition of Community Policing, available at <http://www.cops.usdoj.gov/gen/history/definition.htm>.

This pragmatic means of addressing issues of public safety has proved both popular and effective in the United States, and has occupied increasingly more prominent roles in the crime-fighting arsenals of police departments here. As the Department of Justice puts it:

This approach has been gaining popularity in law enforcement circles for many years, and the passage of comprehensive anti-crime legislation and the creation of the [Dept. of Justice's] Office of Community Oriented Policing Services (COPS) in 1994 resulted in the adoption of the concept by over 12,000 police departments and agencies of all sizes and the hiring and training of thousands of new community officers and law enforcement support personnel.

Press Release, United States Dept. of Justice Office of Community Oriented Policing Services, Mayors, Police Chiefs Turn Spotlight on Success of Community Policing (July 18, 2001), available at http://www.usdoj.gov/cops/news_info/press_releases/pr_7_18_01b.htm.

74. The NYC Civilian Complaint Review Board, Homepage, available at <http://www.nyc.gov/html/ccrb/home.html>. For an interesting, detached discussion of the need for, operations, and shortcomings of the Board, see Human Rights Watch, New York: Civilian Complaint Review Board, June 1998, available at http://www.hrw.org/reports98/police/uspo1015.htm#P2659_686432.

ing into disciplinary action.⁷⁵ As with Indonesia's other law enforcement institutions, any CCRB-type police regulating organization must have the means and authority to carry out its mandate if it is to be effective.

3. Police Human Rights Training

We met with several international police groups involved in providing human rights training to the Indonesian police.⁷⁶ One program targets sympathetic officers for training, pays them a small stipend to attend human rights classes, and then sends them back to their respective districts to pass on the humanitarian training to subordinates. Coordinators of this program are cautiously optimistic that it has the potential for success, both because it addresses the economic component of the policing question⁷⁷ and because it attempts to create an organic, self-perpetuating training process. One notable indication of the program's success is that police officials who were not initially invited to participate in it have asked to join. Another program seeks to assist in the transition from military to police practices by emphasizing concepts such as community policing. On behalf of the United States, Ambassador Robert Gelbard has publicly offered to sponsor nationwide training to deal with civil disturbances such as rioting, terrorism, bomb threats, and negotiation.⁷⁸ Until the Indonesian government embarks upon wholesale structural reform and training of the police, we commend these international efforts to assist the police in their transition from military supervision.

We also met with police officials and discussed the importance of human rights training for all officers, and the officials we met were generally receptive. We considered the human rights training pilot projects for police officers to be a bright spot in Indonesia's struggle to improve its human rights records, although their ad hoc nature is not conducive to

75. See New York: Civilian Complaint Review Board, Human Rights Watch, June 1998, available at http://www.hrw.org/reports98/police/uspol1015.htm#P2659_686432 ("The system of oversight breaks down most notably at the discipline stage. . . . Outside police-abuse experts have expressed concern that the internal police department procedures have all but guaranteed that even cases sustained by the CCRB do not lead to adequate discipline, or any at all.").

76. As these sources agreed to meet with us on the condition of anonymity, we have identified neither them nor the particulars of their training programs in this Report.

77. International observers we met with noted that members of neither the police nor the military earn a living wage and often resort to corruption or extortion in the communities where they are posted in order to feed their families.

78. U.S. Ambassador Offers Training for Aceh Police, *Jakarta Post*, Apr. 5, 2001.

widespread reform. We support more human rights training and suggest that it be provided to new police recruits before they start as well as to members of the police force already on the job.

4. Increased Role for Komnas-HAM

President Suharto established the National Commission on Human Rights (Komnas-HAM) in 1993 and appointed 25 commissioners from a broad spectrum of political backgrounds.⁷⁹ Initially, Komnas-HAM's responsibility was limited to monitoring and reporting on human rights abuses in Indonesia. In 1999, President Habibie signed new human rights legislation which increased the power of Komnas-HAM.⁸⁰ Under this law, Komnas-HAM has unprecedented powers to investigate human rights violations by civilians, the military, and the police. As part of its investigative role, it was given the power to subpoena witnesses, including victims, suspects, and others with relevant knowledge. It was also given the power to search homes with court approval and to visit the crime scenes. However, Komnas-HAM is still limited to investigative work and has no authority to prosecute anyone based on its findings. Instead, Komnas-HAM can only refer a case to appropriate authorities, usually the police or the military police (if it involves military personnel) for reinvestigation, and, perhaps, prosecution.

Komnas-HAM has conducted some highly effective and important investigations into human rights abuses in Indonesia, including in Aceh. In August 1998, Komnas-HAM led a fact-finding mission in Aceh which uncovered some of the first mass graves containing victims of the Indonesia military's campaign to crush the rebellion in Aceh. In this mission, Komnas-HAM documented 781 violent deaths, 163 disappearances, 368 cases of torture, and 102 rapes in Aceh between 1989 and 1998.⁸¹ In September 1999, Komnas-HAM formed a Commission of Inquiry into Human Rights Violations in East Timor. The Commission's January 31, 2000 report was very critical of the Indonesian military and concluded that "gross violations of fundamental human rights had been carried out in a planned, systematic, and large-scale way" and that the human rights violations occurred because TNI had failed to "guarantee security."⁸²

79. Presidential Decree No. 50/1993 established the Komisi Nasional Untuk Hak Asasi Manusia (Komnas-HAM).

80. Indonesian Law No. 39/1999.

81. Trauma With The Indonesian Armed Forces (ABRI), *CatraNews*, Sept. 12, 1998 (detailing the findings of Komnas-HAM).

82. Indonesia: Impunity Versus Accountability for Gross Human Rights Violations, *International Crisis Group*, Feb. 2, 2001, at 7-8.

Komnas-HAM has been highly successful and has made valuable contributions to the investigation of past human rights abuses and the protection of civilians in Indonesia. As a result of its work during the waning years of the Suharto regime and the brief Habibie and Wahid administrations, Komnas-HAM became one of the most respected institutions in Indonesia. The organization has been fortunate to have a string of strong, effective leaders, including former commissioners Marzuki Darusman (who was Attorney General at the time of our visit) and Baharuddin Lopa (since deceased but who succeeded Darusman as Attorney General) and Asmara Nababan, the commissioner at the time of our visit, all of whom have worked diligently for the cause of human rights in Indonesia.

We laud the good work performed by Komnas-HAM and recommend that the government take steps to ensure the continued vitality of Komnas-HAM and implement several changes to augment Komnas-HAM's powers and role in investigating and prosecuting human rights abuses. First and foremost, the Indonesian government must ensure that qualified individuals genuinely committed to the protection of human rights and the prosecution of past human rights abuses continue to be appointed to Komnas-HAM. The composition of Komnas-HAM has become more critical as Komnas-HAM assumes a greater role in the investigation and prosecution of human rights abuses. Recently, there have been signs that the appointment of commissioners to Komnas-HAM is becoming increasingly politicized, and there is a real risk that Komnas-HAM's sterling reputation and credentials as an institution dedicated to investigating human rights abuses and protecting human rights in Indonesia will be jeopardized. The appointment of individuals dedicated to the promotion and protection of human rights—including respected members of domestic NGOs with experience in human rights work—is essential to the survival of Komnas-HAM as an effective institution that needs to play a central role in Indonesia's long struggle to come to terms with past human rights abuses and prevent future human rights abuses.

Second, Komnas-HAM is seriously underfunded, a fact which is immediately apparent from its spartan headquarters in Jakarta (which stand in stark contrast to every police and military installation we visited). Komnas-HAM only has about 50 employees to handle an enormous caseload in a country of 220 million people. We recommend that the Indonesian legislature substantially increase Komnas-HAM's budget so that the commission can better handle its investigations. With additional funding, Komnas-HAM can hire more investigators, open more field offices around Indonesia, and purchase the latest technology to facilitate its investigations.

Third, Komnas-HAM must have more authority to take a case from the investigation phase through to prosecution. Prosecutions languish under the current system, in which Komnas-HAM must turn its investigative findings to state officials for “reinvestigation” or follow-up. Initial investigators—who likely performed important work and have an understanding of the case—are cut out of any further proceedings. This system is inefficient and squanders the initial investigative work performed by Komnas-HAM as cases become more difficult to prove as time passes during the duplicative investigation (if any is ever in fact pursued). One obvious solution would be to give Komnas-HAM the power to prosecute human rights violations and the funding to retain professionals to prosecute human rights cases on behalf of Komnas-HAM. At the very least, we recommend that Komnas-HAM be authorized to refer cases directly for prosecution and to continue as the primary investigative body involved in the case once the case moves from the investigative phase on to prosecution. The human rights law enacted in November 2000 makes a step in the right direction by increasing Komnas-HAM’s role in cases tried before the human rights courts.⁸³ We believe a similar increased role for Komnas-HAM in human rights violations prosecuted in other types of courts is warranted. In our view, Komnas-HAM could also play an important and positive role in helping investigate cases like Jafar’s and the RATA killings where investigations and possible prosecutions by local authorities lack credibility in the eyes of many Indonesians.

C. Prosecutions of Human Rights Crimes

1. Military Courts

In the years since the fall of the Suharto government, there have been several notable prosecutions against military personnel in the military courts. One of these prosecutions was in Aceh and arose from a confrontation between TNI soldiers and Acehese activists in December 1998 when suspected GAM members in East Aceh intercepted a bus carrying TNI soldiers returning from a holiday in Medan. Several TNI soldiers died in the ensuing conflict. The TNI retaliated by raiding villages from which the suspected attackers had come and detained dozens of young men in a temporary detention center in Lhokseumawe. In January 1999, a TNI major launched an attack on the prison to avenge the killing of his men, and four of the Acehese prisoners were killed. Prosecutors filed assault charges against the major and four other soldiers for their role in the attack on

⁸³. See discussion *infra*.

the prison.⁸⁴ After being tried and convicted in a closed proceeding before a military court, the major received a six-year sentence, and the four soldiers received sentences ranging from 2 to 3 years.⁸⁵

Although many Indonesians complained that the charges brought against these defendants were not serious enough and that the sentences were too lenient, the fact that a major and four soldiers were convicted of crimes and sentenced to prison in a proceeding in a military court was a remarkable development in Indonesia. Still, it is critical that the military not retain the sole authority to investigate and prosecute military personnel accused of committing crimes against civilians. Most Indonesians have little faith that the military police conduct serious investigations into human rights abuses allegedly committed by its own officers and soldiers. Moreover, when the military personnel have been prosecuted for murder or other crimes against civilians, the defendants were usually very low-level military personnel, and the sentences meted out were viewed as very light.⁸⁶ Finally, closed-door military court proceedings lack the transparency that is integral to the public perception of justice.

84. It is worth emphasizing that suspects and defendants accused of perpetrating human rights abuses also have rights under both Indonesian and international law, and it would be a perverse situation to trample on their human rights in the name of prosecuting other human rights violations. The protection of the rights of these defendants and suspects is haphazard in practice, and in any case is beyond the scope of our Report. However, we do note that we heard disturbing reports that suspects in Indonesian criminal cases are often detained for extended periods of time without being charged and with no notice to their attorneys or even to their families.

85. *Indonesia: Impunity Versus Accountability for Gross Human Rights Violations*, International Crisis Group Asia Report No. 12, Feb. 2, 2001, at 4 (citing *Kompas*, Jan. 31, 1999).

86. Another well-known prosecution in the military courts was the August 1998 prosecution of two police officers for their role in ordering troops to fire on student protesters at Trisakti University in Jakarta in May 1998 as part of the riots which led to the overthrow of President Suharto. Four students were killed. One police officer received a 10-month sentence, and the other received a 4-month sentence. Although prosecutors initially announced others would be tried including a lieutenant colonel, prosecutors never filed any other charges. See *Indonesia: Impunity Versus Accountability for Gross Human Rights Violations*, International Crisis Group Asia Report No. 12, Feb. 2, 2001, at 3 (citing *Panji Masyarakat*, Mar. 31, 1999).

In April 1999, a military court convicted 11 members from AERI's elite Kopassus unit of kidnapping nine anti-Suharto activists in the months before Suharto fell. The TNI soldiers were sentenced to between 1 and 2 years in prison. Many Indonesians viewed this prosecution with skepticism because the defendants were only charged with nine counts of kidnapping even though 23 activists had been kidnapped, one of whom had been found dead and thirteen of whom are still missing. See *id.*; *Relatives of Missing Activists Sue Wiranto*, *Jakarta Post*, Aug. 16, 1999; Interview with Kontras representative Soni Setyana in Jakarta, February 13, 2001.

2. Creation of Koneksitas Courts

One of the more notable institutional developments in post-Suharto Indonesia has been the increasing use of a type of court known as the “koneksitas” court (“PengadilanKoneksitas”). Koneksitas courts have jurisdiction to hear cases in which military personnel are accused of committing crimes against civilians. A panel comprised of both military and civilian judges presides over each koneksitas court. With the increased use of the koneksitas courts, prosecutors can now bring criminal charges against military personnel for crimes committed against civilians in courts other than the military court.⁸⁷

In July 1999, the first koneksitas court was set up in Aceh for the prosecution of the July 1999 murder of Teuku Bantaqiah. Bantaqiah was well-known Acehnese independence activist and religious teacher. TNI soldiers shot and killed Bantaqiah and 56 of his followers in a village in West Aceh. The soldiers claimed they were responding to an attack. The case was tried before a koneksitas court in April and May 2000, and 23 soldiers and 1 civilian were convicted of murder. The koneksitas court sentenced the defendants to between 8 and 10 years in prison.⁸⁸

As compared to the prior record of total unaccountability, the establishment of koneksitas courts is a positive development and the conviction of 24 defendants in the Bantaqiah killings is a good start. Yet as many domestic and international NGOs have argued, the koneksitas courts effectively function as military tribunals and serve to protect military perpetrators at the expense of justice for non-military victims. Senior TNI officers still operate with impunity, and koneksitas courts have only been used to prosecute lower-level TNI soldiers. For example, in the Bantaqiah case, the commanding officer, Lieutenant Colonel Sudjono, disappeared before the trial and has never surfaced. This is not the first time senior officers suspected of human rights abuses have disappeared before charges could be brought. The highest-ranking officer convicted in the Bantaqiah trial was a captain, and most of the defendants were NCOs. To the extent koneksitas courts continue to be used in Indonesia for the prosecution of human rights abuses, we encourage the prosecutors to bring all responsible persons—including senior officers—to trial. At the same time, we urge lawmakers to explore the development of alternative institutions in

87. Indonesian Law 35/1999 (establishing koneksitas courts and amending Law 14/1970 on Judicial Authority).

88. Indonesian Military and Civilian Get Jail Sentences, *United Press International*, May 17, 2000.

which to try military offenders consistent with international standards of impartiality and independence.

3. Human Rights Courts

In November 2000, the Indonesian parliament passed groundbreaking human rights legislation which permits the government to set up two types of human rights tribunals (“pengadilan HAM”) to try gross violations of human rights. First, the law provided for the creation of four human rights courts in Indonesia for the prosecution of gross violations of human rights (defined to include genocide and crimes against humanity) which occur after the enactment of the law.⁸⁹ The law provides for human rights courts to be set up in four Indonesian cities, Jakarta, Medan, Surabaya, and Makassar. Under this legislation, Komnas-HAM was given the sole authority to conduct the preliminary investigation in these cases and submit its report to the Attorney General. The Attorney General’s office is then responsible for prosecuting the case before the human rights court. The president appoints members of these human rights courts based on the recommendation of the president of the Supreme Court. Unfortunately, no human rights courts had been established as of this writing. Although the RATA case is essentially ready to be tried, the human rights court in Medan has not been set up, and the case remains dormant.

The new human rights law also provided for a second type of court, ad hoc human rights tribunals for the prosecution of human rights abuses which occurred before the enactment of the law. This retroactivity issue was hotly debated in the Indonesian legislature when it considered the human rights law, and the legislation which eventually passed contained the provision permitting the establishment of ad hoc human rights tribunals. Around the same time that the Indonesian parliament passed the new human rights law, it also passed a constitutional amendment intended to enshrine certain inalienable human rights. This amendment provided that “the right not to be prosecuted on the basis of a retroactive law [is] a human right[] that cannot be diminished under any circumstances.” The conflict between this amendment and the retroactivity provision of the provision in the new human rights law raises interesting statutory, constitutional, and legal issues which need to be sorted out by the Indonesian courts. Some Indonesian lawyers fear that, even though

89. Indonesian Law No. 26/2000. The law defined genocide to include “any action intended to destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group” and crimes against humanity as “actions perpetrated as part of a broad or systematic direct attack on civilians.”

prohibition of crimes such as genocide and crimes against humanity has long been recognized under international law as binding on all nations, the anti-retroactivity amendment will guarantee that the worst perpetrators from the Suharto regime may never be brought to justice.⁹⁰

In addition to the controversy surrounding the retroactivity amendment, the procedural steps required to establish ad hoc human rights courts are another stumbling block. On April 23, 2001, President Wahid, following a recommendation by the Indonesian parliament, issued a presidential decree authorizing the establishment of ad hoc human rights courts for the 1984 Tanjung Priok case in which TNI troops shot and killed Muslim protesters in Jakarta's port and for human rights violations in East Timor which occurred after August 30, 1999, the date of the independence referendum.⁹¹ The narrow mandate for the East Timor prosecutions was widely criticized, and President Megawati, in one of her first official acts, issued a revised decree which expanded the scope of the ad hoc court's mandate to include two massacres in April 1999.⁹² Although this revised decree expanded the scope of the crimes that could be prosecuted in the ad hoc human rights court, it still limits the prosecution to a few specific cases, a constraint which will make it difficult for the prosecutors to establish a systematic or widespread pattern of gross human rights violations as required under the new human rights law.

We support the use of human rights courts for the prosecution of serious human rights violations. If properly funded and staffed with judges and attorneys trained in both domestic and international human rights law, such courts could not only be a mechanism for justice in individual cases but serve as a model for corruption-free, independent institutions that could be emulated in a reformed national judicial system. The current system set up by the November 2000 human rights law has inherent procedural flaws. The human rights tribunals can only be effective if they

90. We flag the issues inherent in the retroactivity debate for our readers but note that this question is beyond the scope of our Report. For an excellent discussion of the retroactivity analysis, we refer interested readers to the International Crisis Group's February 2, 2001 report entitled *Indonesia: Impunity Versus Accountability for Gross Human Rights Violations*.

91. *Indonesia Encouraged to Pursue Human Rights Prosecutions*, Sydney Morning Herald, Apr. 30, 2001. It is worth noting that many observers were hoping that the tribunal's mission would be broader in scope, i.e. to handle prosecutions for all those responsible for human rights violations in East Timor in the months preceding the referendum, not only the violence that followed it. See *id.* (noting this as a concern of the Australian government).

92. Presidential Decree No. 96/2001: *Australia Welcomes Megawati Decision on Ad Hoc Court*, Antara (The Indonesian National News Agency), August 7, 2001.

are established in the first place, and the process of establishing these courts has been slow. An ad hoc human rights court to prosecute past human rights violation requires a vote of the national legislature and a presidential decree. And the establishment of permanent human rights courts requires similar action by the president. Experience has proved that these procedural requirements have rendered justice dependent on the vagaries of politics. We recommend that the Indonesian government act with dispatch to establish the four permanent human rights courts and ad hoc human rights courts to prosecute the individuals responsible for gross human rights violations in Aceh during the last decade.

4. Truth and Reconciliation Commission

The human rights legislation passed in November 2000 also stated that future legislation would be enacted to establish a truth and reconciliation commission. The drafters of the law acknowledged that the court system could not resolve all gross human rights violations and provided for an alternative forum in the form of a truth and reconciliation commission. In March 2001, President Wahid proposed the establishment of a truth and reconciliation commission pursuant to the human rights law.⁹³

The concept of a truth and reconciliation commission is worth pursuing in Indonesia. Although the truth and reconciliation commission is not a replacement for courts of law to preside over prosecutions of human rights violations, such a forum can serve a useful purpose in helping Indonesia come to terms with its violent past, following the success of truth commissions in other countries.⁹⁴ The Indonesian people must de-

93. President Wants a Commission on National Reconciliation, *Jakarta Post*, Mar. 22, 2001.

94. Such bodies have been established in several countries from around the globe, with varying degrees of success. South Africa, for example, features a Truth and Reconciliation Commission the official purpose of which is "to bring about unity and reconciliation by providing for the investigation and full disclosure of gross violations of human rights committed in the past." Explanatory Memorandum to the Parliamentary Bill [on the Establishment of a Truth and Reconciliation Commission], available at <http://www.truth.org.za/legal/bill.htm>. The Commission consists of "11 to 17 impartial and fit and proper persons" who are organized into three distinct committees: "The first is responsible for documenting the nature and cause(s) of human rights violations in South Africa; the second is charged with "consider[ing] applications for amnesty for acts associated with a political objective and to grant amnesty Y;" and the third addresses victims' applications for reparations. ¶ To accomplish these functions, the Commission may "carry[] out . . . investigations and local inspections, hold[] hearings, . . . appoint . . . researchers, . . . subpoena any person to give evidence or produce documents or other items required and . . . inquire into any matter with a view to promote national unity and reconciliation." ¶ Moreover, "[p]ersons appearing before or subpoenaed

cide for themselves how to balance the desire to learn the truth about state human rights violations and the desire to bring perpetrators to justice. Recent drafts of the bill contain an amnesty provision based on the South African model. In our view, a truth and reconciliation commission with the power to grant amnesty is not likely to be successful unless there is a genuine threat of prosecution for those who do not come forward. Given Indonesia's weak justice system, a truth and reconciliation commission with amnesty powers seems destined to fail.

5. Possible International Tribunal

Many human rights activists have advocated the establishment of an international tribunal for the prosecution of those responsible for human rights abuses in East Timor, Aceh, and elsewhere in Indonesia.⁹⁵ The response of the Indonesia government has been "Give us a chance to confront these problems first." Initially, the human rights community accepted the Indonesian government's suggestion and agreed to wait for Indonesia to try to address these abuses itself. The initial actions of the Wahid government were encouraging, including the passage of the landmark human rights law in November 2000, yet these encouraging developments were increasingly overshadowed by serious ongoing human rights abuses. The murder of Jafar, the RATA killings, the events in East Timor surrounding the referendum, and the prosecution of Mohammed Nazar all raised doubts about the Indonesian government's pledge to investigate past human rights abuses and to pursue serious military reform.

We think the preferable solution for Indonesia would be to have

by the Commission or any of its Committees are obliged to answer any questions put to them, whether or not the answer may be incriminating or expose them to liability" *Id.* The threat of criminal prosecution serves as an incentive for perpetrators to testify in the hopes of gaining amnesty.

Several other countries, including Guatemala, Chile and Argentina, have experimented with similar commissions. Indeed, the experiences and institutions of these nations provided the model for the South African Commission. See Kate Tuttle, *Truth and Reconciliation Commission*, *Africana*, available at http://www.africana.com/Articles/tt_481.htm.

95. See Michael Richardson, *UN Inquiry Will Urge Tribunal on East Timor; Jurists' Panel Wants An International Body To Try Rights Cases*, *International Herald Tribune*, Jan. 31, 2000, at p.1 ("An international human rights tribunal underscores the gravity of the crimes and the systematic way they were committed," the UN human rights chief for East Timor, Sidney Jones, said Sunday in Dili"); see also *Letter from United Nations Secretary General Kofi Annan to the United Nations Security Council*, UN Doc S/2000/59, Jan. 31, 2000 (recommending the formation of a tribunal to address gross human rights violations in East Timor).

Indonesian prosecutors, judges, and citizens handle the investigation and prosecution of human rights abuses. Certainly such a domestic tribunal could not be criticized as the mere product of “outside agitation.” Like many other observers, we are weary of the ongoing human rights abuses and the lackluster record of the post-Suharto governments in investigating and prosecuting past human rights abuses. The establishment of international tribunals is a last resort which should be seriously considered only if the Indonesian government remains unable or unwilling to take the hard medicine necessary to stop the ongoing human rights abuses and to launch transparent investigations into past abuses. It is too early to gauge the new Megawati administration’s human rights agenda, but we are concerned that time is running out for Indonesia to confront its human rights problems without any international involvement.

6. United Nations Special Representative for Human Rights Defenders

The United Nations Special Representative for Human Rights Defenders and other United Nations human rights officials have played an important role in investigating and highlighting grave human rights around the world and can make valuable contributions to the current situation in Aceh. We urge the new Megawati administration to invite the United Nations Special Representative for Human Rights Defenders to Aceh and extend similar invitations to other appropriate United Nations Rapporteurs such as those responsible for investigating summary execution and torture.

D. Indonesian Institutions That Can Play a Role in the Protection of Human Rights

1. Reform of the Judiciary and Corrupt Practice of Law

The absence of an impartial and independently functioning judiciary compromises the quality of justice in Indonesia, and is in our view a serious barrier to addressing the worst human rights abuses. Almost every person we met with identified widespread corruption as a pervasive aspect of the judicial system. For example, a presidential panel set up to investigate corruption in the judiciary reported that several Supreme Court justices have been involved in bribery.⁹⁶ When the government attempted to prosecute these cases, the South Jakarta District Court ruled that the team had no such authority.⁹⁷ As a means of combating this entrenched practice, Presi-

96. Special Court to Try Graft Cases, *Jakarta Post*, Feb. 22, 2001.

97. *Id.*

dent Wahid in February 2001 approved the establishment of a special court to try graft cases. The court will be comprised of ad hoc judges and prosecutors and operate under a new government regulation to bypass existing legal loopholes that allow corrupt practices to continue.

In addition to increasing the salaries of judges (and police) as a means of reducing the economic incentive toward graft, we have three specific recommendations. First, reform must begin with legal education. A national program of legal ethics at the training level may instill in future practitioners the concept of law as a noble profession, and set up norms for addressing ethical quandaries. Second, we recommend the establishment of independent bar associations with the authority to regulate the practice of law and to sanction attorneys who violate its ethical rules. We view an effective and organized bar as crucial to the implementation of many of the reforms suggested in this Report relating to the legal system, the role of the police and the military in Indonesian society, the prosecution of past human rights abuses, and the prevention of future human rights abuses. The establishment of independent and self-regulating bar associations in Indonesia is a top priority which merits outside funding and support. We had lengthy discussions with both Indonesian and international attorneys practicing in Indonesia about this proposal and are pleased to report the birth of an international legal partnership aimed at developing standards for the creation of an independent Indonesian bar.

We are equally pleased to cite the work of the newly-instituted National Law Commission of the Republic of Indonesia as exemplary of the potential for internal institutions to positively affect Indonesia's legal norms and culture. The Commission articulates its primary objective as being "[t]o form a national legal system to uphold the supremacy of law and human rights based on justice and truth by studying legal problems and preparing a plan for reform in the field of law objectively involving elements of society."⁹⁸ The establishment of such objective, internal bodies is an indispensable precursor to the establishment of a legal regime that is capable of adequately protecting human rights in Indonesia.

Finally, we believe that Indonesia must guarantee the security of the country's judges in order to have a functioning judicial system. The judicial system in Aceh is in a state of crisis because all of the judges have fled or are in hiding. We sought to meet with judges in Banda Aceh but learned that the one judge remaining in Aceh was in hiding. The recent murder

98. National Law Commission of the Republic of Indonesia, *Law Reform Programs and Action Plans*, Aug. 2000, at 1.

of Indonesian Supreme Court Justice Syafiuddin Kartasasmita is particularly disturbing and illustrates the danger of fatal retribution for honest judicial decision-making. Kartasasmita was a member of a panel of the high court that in September 2000 sentenced Hutomo "Tommy" Mandala Putra, the son of former President Suharto, to eighteen months in prison.⁹⁹ Kartasasmita was also known for his resolve in pursuing investigations into human rights abuses perpetrated by TNI officials in East Timor.¹⁰⁰ In late July of 2001, four armed assailants shot and killed Kartasasmita on a Jakarta street, while he was en route to his office.¹⁰¹ As long as judges are forced into hiding and at risk of being killed, Indonesia's court system will remain in a state of crisis. We urge the Indonesian government to take steps that will guarantee the safety of its judges forthwith. No institutional changes can be effective without experienced, skilled judges to shepherd them.

2. Birth of a Free Press

The emergence of a free press in post-Suharto Indonesia has had a major impact on the human rights situation. The Suharto government exercised tight control over the media in its years in power, and scores of human rights abuses received little or no press coverage in Indonesia. Since the overthrow of Suharto in May 1998, an active free press has flourished in Indonesia. Newspapers, television and other media outlets have devoted widespread coverage to human rights abuses, including the discovery of mass graves in Aceh, the RATA killings, Jafar's disappearance and murder, the events in East Timor, and other human rights violations.¹⁰²

Despite the remarkable strides since May 1998, there are still signifi-

99. Supreme Court Delays Verdict in Lawsuit Against Golkar Party, *Agence France Presse*, July 30, 2001.

100. Justice Benjamin Replaces Murdered Syafiuddin, *Jakarta Post*, July 31, 2001.

101. *Id.*; see also Supreme Court Delays Verdict in Lawsuit Against Golkar Party, *Agence France Presse*, July 30, 2001.

102. See, e.g., Hery Haryanto Azumi, *Politics of Stigmatization to Eliminate Critical Movements*, *Jakarta Post*, July 14, 2001; *Aceh's Horror Continues as Mass Grave Discovered*, *Jakarta Post*, Feb. 21, 2000 ("The government has yet to provide a concrete solution to the problem despite continued boasting from President Abdurrahman Wahid that the violence will end within the next few months."); *Government Ignores Acehese 'Referendum Calls'*, *Jakarta Post*, Sept. 7, 2000; *Antara (The Indonesian National News Agency)*, *UN Condemns Killing of Humanitarian Workers in Aceh*, December 12, 2000; *Commitment to Human Rights and Reform Sought*, *Jakarta Post*, Sept. 24, 1998.

cant barriers to press freedom in Indonesia. Members of the press report experiencing continued threats and harassment by the military, particularly in troubled regions like Aceh and Irian Jaya. For example, in May 2001, there were reports that Indonesian military troops assaulted an Acehnese journalist traveling with journalists for the Australian magazine *The Age* in East Aceh.¹⁰³ Two other journalists were assaulted and their equipment seized by the military in Aceh on the same day.¹⁰⁴ GAM has also displayed hostility to the press. In August 2001, for example, the largest Acehnese daily newspaper was forced to shut down because of threats from GAM. We condemn these threats and attacks on Indonesian journalists and emphasize our concern that journalists be able to work freely and report on human rights issues without fear for their safety.

The government's ban on foreign journalists traveling to Aceh further insulates the region from serious scrutiny. The government claims the ban is necessary for safety reasons, but the effect of the ban is to preclude the international press from reporting on events in Aceh. We strongly urge the government to lift the ban and again permit foreign journalists and other independent observers to travel to Aceh.¹⁰⁵

In our view, the Indonesian press has an important responsibility and a key role to play in helping the country come to terms with its past human rights abuses. Tough, investigative journalists willing to challenge the government and unafraid to prod prosecutors and the government to press charges when the evidence warrants it are essential. We encourage the Indonesian press to be vigilant in its efforts to demand the full investigation and prosecution of past human rights abuses and to engage in constructive dialogue about how to achieve structural reform.

3. Non-Governmental Organizations

The number of Indonesian NGOs dedicated to protecting human rights

103. Troops Beat Up Aceh Journalist, *The Age*, May 15, 2001.

104. Troops Beat Up Three Journalists in Aceh, *Jakarta Post*, May 14, 2001 (reporting assault on Murizal Hamzah, editor of *Media Kutaraja* weekly, in East Aceh, as well as assaults on RCTI television journalist Umar H.N. and *Fakta* magazine writer Abbas Gani in North Aceh). Also in the summer of 2001, GAM soldiers held three crew members for a television station hostage for several weeks. *Press Freedom in Aceh in Danger*, *Jakarta Post*, Aug. 20, 2001.

105. One recent report has suggested that TNI has considered allowing international observers to accompany army and police units during the offensive in Aceh. See TNI Considering Int'l Observers in Aceh, *The Indonesian Observer*, May 19, 2001. However, no such action has yet been taken.

and advocating impartial investigations into human rights violations has increased dramatically in the last 10 years. One example is Kontras, which was formed in March 1998 by a coalition of 12 pro-democracy NGO's and has been on the forefront of publicizing and investigating the disappearances of pro-democracy activists around the archipelago.¹⁰⁶

Kontras and other Indonesian NGOs such as Koalisi HAM, LBH, PBHI and FP HAM are committed to playing an important role in documenting human rights abuses and collecting evidence for use in prosecutions of human rights defenders. The crisis confronting Indonesian NGO's today is the lack of sufficient funds to handle the enormous tasks they have undertaken. The paucity of funds means these NGO's are understaffed and that the staff they do have is not well enough trained in the basic procedures for gathering credible and admissible evidence of human rights violations and in taking detailed witness statements. Moreover, these organizations do not have the necessary equipment (including items as basic as computers, word-processing software, cameras and even printer paper) or sufficient office space. Although it is easy to flag the lack of funding as a problem facing the Indonesian NGOs, it is more difficult to solve the problem. We encourage international governments and foundations with ties to Indonesia to provide funding to Indonesian NGOs as a means of strengthening and stabilizing its civil society.

The Indonesian NGO community works together on a number of human rights issues, and an informal network of information sharing has started to take root. We think this informal network could be strengthened and that the Indonesian NGO movement could develop a more efficient and strong network to achieve their goals. One existing model for networking and resource sharing is the Publicity and International Relations Division (PIRD) at the Indonesian Legal Aid Foundation (YLBHI).¹⁰⁷ PIRD's mission is to coordinate the activities of Indonesian NGO's and to facilitate communication both within that group and with the international community. Currently funded through USAID, PIRD also has an educational component, sponsoring courses in human rights, English, and media relations for Indonesian NGO members. This type of program is particularly important given the limited resources available to Indonesian NGOs.

106. See *Police Top Human Rights Abuses*, Reports Kontras, Jakarta Post, Dec. 10, 2000; see also *About Kontras ND*, available at <http://www.desaparecidos.org/kontras/about/>.

107. Delegation member Deborah Cornwall played a role in conceiving and seeking funding for PIRD while volunteering at YLBHI and KONTRAS in the summer of 1998.

IV. CONCLUSION

In sum, Indonesia is at an especially precarious juncture in the road to becoming a full-fledged democratic society. Nowhere is the country's commitment to democracy and justice more challenged than in Aceh, where a peaceful civilian-led movement for independence has emerged at the same time that armed rebels continue to use force to push independence demands. Quelling armed attacks while respecting the rights of peaceful expression is one of the most delicate tasks a nation can undertake. Too often the Indonesian government and military have treated their political adversaries and peaceful human rights activists as enemies of the state along with violent rebel groups. Forging ahead toward democracy will require the new administration to recognize and honor the fundamental distinction between the respect for peaceful expression of political views and advocacy for the protection of human rights on one hand, and apprehending and prosecuting those who engage in the armed pursuit of secession on the other.

This delicate balance is within Indonesia's grasp despite the ongoing abuses, tragedies, and violations highlighted in this Report, but will not be achieved without a fundamental reexamination of the country's political, military, and legal institutions, assisted and encouraged by international governments and NGOs. We urge the Indonesian government to take the following decisive steps to help the country come to terms with past human rights violations and prevent future violations.

1. Establish an independent, organic, civilian police force and transform the military from an economic and political powerhouse which dominates the country to a civilian-controlled national defense force;
2. Establish the four permanent human rights courts provided for in the November 2000 human rights law;
3. Expedite the trial of the four defendants in custody in the RATA case so that the trial starts no later than June 1, 2002 and increase efforts to apprehend the four defendants who escaped from custody;
4. Establish more ad hoc human rights courts for the prosecution of past human rights abuses and expand the scope of the ad hoc human rights court set up for abuses by Indonesian military personnel in Tanjung Priok and East Timor;
5. Increase the funding and responsibilities of Komnas-HAM

and ensure that individuals genuinely committed to the promotion and protection of human rights continue to be appointed to Komnas-HAM;

6. Repeal the repressive and outdated Articles 154, 155 and 160 of the Indonesian Criminal Code; and

7. Ratify the International Covenant on Civil and Political Rights.

We urge the U.S. and other governments, NGOs, and lawyers from around the world to take the following steps to help Indonesia in its struggle:

1. Encourage the development of a strong independent bar with an increased role in combating corruption in the legal system and regulating the ethical practice of law;

2. Encourage periodic and transparent independent reviews of the integrity of the Indonesian courts and of the effectiveness of human rights and law enforcement;

3. Make trained personnel available to assist Indonesian institutions of justice on a consistent and long-term basis;

4. Provide funding and encourage official governmental recognition of, and respect for, indigenous Indonesian human rights organizations that are working through legal channels.

As attorneys concerned with justice during this extraordinary period in Indonesia's history, we respectfully offer our support in this endeavor.

December 2001

The Committee on International Human Rights

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Peter W. Tomlinson, *Secretary**

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Barbara Fortson	Peter Laurence Zwiebach
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* Member of the Committee's February 2001 mission to Indonesia. The Honorable Robert W. Sweet, a member of the Committee in 2000-2001, led the Committee's mission to Indonesia.

Formal Opinion 2002-01

Client Confidentiality and the Intention to Commit a Crime

*The Committee on
Professional and Judicial Ethics*

TOPIC: Disclosure of client confidences and secrets; scope of the exception concerning the client's "intention to commit a crime."

DIGEST: Disclosure of client confidences or secrets is permitted under DR 4-101(C)(3) [22 N.Y.C.R.R. § 1200.19] only where (i) conduct necessary to satisfy all elements of the crime has not been completed and the client has not consulted the attorney to defend the client against criminal charges relating to that conduct and (ii) the lawyer has a reasonable basis for believing that her client intends to commit a crime.

CODE: DR 4-101

QUESTION: When may a lawyer who believes her client may have an intention to commit a crime disclose client confidences and secrets in order to prevent the crime?

OPINION

Much has been written on a lawyer's duty of confidentiality and the

discretion to disclose a client's intention to commit a crime. But little guidance exists concerning two important issues that must be considered before any disclosure of client confidences is made. While it is pellucid that only a "future crime," not a completed one, can trigger disclosure, whether a client's commission of a "continuing crime" can itself constitute the intention to commit a future crime is uncharted territory. In this same vein, few authorities have considered the requisite level of certainty the lawyer must have obtained concerning his client's intention to commit a crime before the lawyer's discretion to disclose is triggered.

The Committee addresses these two important areas in the following factual context. A lawyer receives a visit from a prospective client who is accused of stealing a car and who seeks the lawyer's representation in defending against criminal charges relating to the theft. From previous notoriety, the lawyer is aware that the prospective client has been linked publicly to a group associated with organized criminal activity. During the meeting the client tells the lawyer that the car is parked in a heated garage at the client's house, and that the client does not intend to dispose of the car in any way. However, when the lawyer raises the issue of a retainer, the client responds that he intends to pay the retainer in cash, but will need a few days to raise the money. From the conversation, it appears that the client is unemployed and has no visible legitimate means of support. As a result of the foregoing, the lawyer strongly suspects that the client intends to pay the retainer from the proceeds of some other, as yet uncommitted, criminal act, possibly the sale of the admittedly stolen car. The lawyer ponders whether she may ethically provide the authorities with her client's whereabouts and identity, the fact that the client has stolen a car and retains possession of the stolen vehicle, and her concern that the client intends to commit another crime.

**The Information Concerning the Client Is a "Confidence"
and/or a "Secret"**

As a threshold matter, we have no doubt that the information the lawyer has learned about the client is protected as a "confidence" or a "secret." DR 4-101(B) [22 N.Y.C.R.R. § 1200.19] prohibits an attorney from revealing a confidence or secret of a client except under narrowly limited circumstances. For these purposes, a "confidence" is any information protected by the attorney-client privilege, and a "secret" covers a much broader field, encompassing any other "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental

to the client.” DR 4-101(A) [22 N.Y.C.R.R. § 1200.19].¹ To constitute a secret, it is not necessary that the lawyer learn the information directly from the client. All that is required is that the information was gained in the course of the professional relationship. N.Y. State 742 (2001). Thus, a lawyer’s confidentiality obligations under the Code apply to “substantially all information gained in the professional relationship.” N.Y. City 1997-2; *accord* N.Y. City 1994-10; N.Y. State 528 (1981).²

Here, the information that the lawyer seeks to reveal to the authorities is confidential information communicated to the lawyer by the client in the context of the attorney-client relationship for purposes of obtaining the lawyer’s legal advice concerning the completed theft, and is, therefore, protected by the attorney-client privilege. As such, it is a “confidence” under the Code. The nature of this information, which was acquired in the professional relationship, pertaining as it does to the client’s past criminal conduct, also renders it a “secret” under the Code, as disclosure of this information to the authorities “would be likely to be detrimental to the client” for obvious reasons.

A lawyer may not disclose a confidence or secret of a client unless an exception to the confidentiality rule applies. The only conceivable exception that might apply here is DR 4-101(C)(3), which allows, but does not require, a lawyer to reveal her client’s intention to commit a crime and any facts necessary to prevent commission of that crime. This exception is “strictly construed . . . and is applied only when a client is planning to commit a crime in the future or is continuing an ongoing criminal scheme.” N.Y. City 1994-10; *accord* N.Y. City 1994-8 (concluding that if a client’s criminal fraud “dealt entirely with past conduct, the inquirer would not be permitted to reveal it”).

**Does the Client’s Knowing Possession of Stolen Property
Constitute the Intention to Commit a Crime?**

The client’s knowing possession of stolen property is a criminal violation in New York. N.Y. Penal Code § 165.45 *et seq.* However, the criminal act of knowingly possessing stolen property can only provide the basis for voluntary disclosure of client confidences under DR 4-101(C)(3) if its

1. We note that DR 4-101 does not distinguish between current and former clients.

2. The Committee does not conclude, one way or the other, based on the facts presented, that an attorney-client relationship was formed. Nevertheless, where a client discloses facts to a lawyer with a view toward retaining the lawyer, and the lawyer consents to the communication, the obligation to protect confidences and secrets may attach. See N.Y. City 2001-1.

continuing nature constitutes an intention to commit a future crime. We conclude that in the circumstances presented here, the client's knowing possession of the stolen car cannot ethically provide the basis for disclosure to the authorities.

Generally, a continuing crime is defined as "one which, though committed in the past, has ramifications or effects that continue into the future." Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 Case Wes. Res. 177, 244 (1986) (quoting Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L. Rev. 332, 363 (1976)). However, as Professor Wolfram observes:

By a process of what sometimes seems to be legislative whimsey, some criminal acts that have occurred in the past are given an indefinitely contemporaneous aspect by the criminal law. Theft, for example, becomes possession of stolen property, or escape becomes the offense of remaining a fugitive.

Wolfram, § 12.6.5. Indeed, a literal application of the common definition of a continuing crime "would seem to obliterate any distinction between past and future conduct," Moore, 36 Case Wes. Res. at 244, allowing attorneys to disclose the criminal conduct of their clients without any restraint.

Legal scholars considering the question of what should constitute a "continuing crime," such that it manifests an intention to commit a future crime have proposed several limitations to this definition to better accomplish the aims of both the client confidentiality provisions in the Code and of protecting innocent victims of a client's criminal conduct. Some scholars focus on the timing of the conduct involved, suggesting that "the mere continuation of the harmful effects of an otherwise completed client wrong does not appear to call for ethical analysis separate from wholly past conduct." Moore, 36 Case W. Res. at 244.

Others have focused less on the timing of the conduct itself than on the client's purpose in disclosing confidences and secrets to the lawyer. Under this view:

The application of the crime or fraud exception is not a function of when the conduct took place, or that it related to a future crime or fraud, but rather why the conversation occurred. The notion that the exception applies to consultations in which

aid is sought in furtherance of a “future” crime or fraud is simply a way, albeit an unfortunate one, of making the point that a client may as a general proposition safely admit past criminal or fraudulent acts in order to obtain representation. In other words, a person charged with a crime can admit guilt to the attorney in the course of defense preparation without fear that an attorney will be able to reveal the information. The temporal criterion means little more than this.

Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1117 (1985). Thus, as Professor Wolfram writes, “where the offense is factually indistinguishable—aside from its temporal continuation—from a past offense about which the client has consulted a lawyer, it seems the much better result to extend the primacy of the confidentiality principle here as much as in the case of any past occurrence.” Wolfram, § 12.6.5.

Still other scholars take the more extreme view that disclosure of any continuing crime violates the lawyer’s duty of confidentiality because it necessarily requires the disclosure of past crimes, a prohibited disclosure under the Code. See Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 Fordham Urb. L. J. 11, 18 (1985).

The Committee concludes that whether a “continuing crime” constitutes the intention to commit a future crime hinges on the purpose for which the client consults the lawyer and, therefore, the context in which the lawyer learns of the client’s crime. Where a client has consulted a lawyer to defend the client against the consequences of completed criminal conduct, even where the effects of that conduct may be of a “continuing” character and be considered a “continuing crime,” the client’s right to counsel, which is at the core of our adversary system, is implicated.

Given that [the client] can no longer avoid these consequences by altering [her] conduct, [the client] appears to be in need of and, indeed, deserving of, greater protection than a client who is contemplating future harmful conduct.

Moore, 36 Case W. Res. at 239. We conclude that an attorney may not disclose client confidences and secrets relating to a client’s completed criminal act even though the effects may be continuing where that criminal act is the very subject on which the client is consulting the attorney and the client’s completed conduct has satisfied all elements of the crime, *i.e.* where

the continuing offense is “factually indistinguishable from a past offense” aside from temporal continuation. Wolfram § 12.6.5. In reaching this conclusion, we also recognize, however, that it is not dictated by the language of DR 4-101(C), and that we are reaching a balance between the competing interests of clients to confidentiality and of society to be protected from future crimes. In this context, our view that client confidentiality outweighs that need for the prevention of criminal activity in the context of a completed past crime with continuing effects must be qualified. We conclude a different balance, and outcome, exists for emergencies which involve the prevention of imminent serious bodily injury or death. In these situations, which the Committee anticipates will be rarely encountered, client confidentiality must yield to the lawyer’s decision to protect human life.³

The Committee concludes that the client’s knowing possession of stolen property in the circumstances presented here does not manifest an intention to commit a crime such that it would authorize disclosure of the client’s confidences pursuant to DR 4-101(C)(3). The client sought the counsel of the lawyer specifically with respect to the client’s completed criminal conduct. Furthermore, all the active conduct required to commit the client’s crime has been completed, as the client has already committed the car theft and possesses the stolen vehicle. Aside from the owner’s deprivation of the use of the car for another day, there is no additional harm arising from the client’s crime, and no new victim. Although the client’s continued knowing possession of stolen property violates criminal laws, at least for purposes of client confidentiality under the Code, we cannot conclude that this fact constitutes the intention to commit a future crime that would make disclosure of the client’s confidences and secrets ethically permissible.

**Does the Lawyer Possess the Requisite Knowledge
that the Client Intends to Commit a Future Crime?**

We turn to the issue of whether the lawyer may disclose the client’s suspected intention to commit a future separate crime in order to pay the lawyer’s retainer.⁴ Some authorities have concluded that because DR 4-

3. This “emergency” exception would not apply here because the client’s possession of stolen property does not present any imminent danger of bodily harm to anyone.

4. We do not address the purely legal question of whether the lawyer’s acceptance of the fruits of criminal conduct for payment of her fee violates money laundering or other statutes, as questions of law are beyond the jurisdiction of this Committee. The Committee notes, however, that to the extent such conduct violates the law, it is also unethical. DR 7-102(A)(8) [22 N.Y.C.R.R. § 1200.33].

101(C)(3) does not specify the level of knowledge required by the attorney with respect to the client's intention to commit a crime, disclosure is permitted whenever the attorney subjectively believes that the client has such an intention, regardless of whether the lawyer's belief is reasonable. *See, e.g.*, Simon at 317 ("If the lawyer believes, from all the information available, that the client intends to commit a crime, then the lawyer has discretion to disclose."); *see also* Mass. 79-1 (stating that DR 4-101(C)(3) "does not state how certain the lawyer must be of the client's intention before breaking the confidence") (cited in N.Y. State 562 (1984)).

We conclude that the Code requires that a lawyer must have a reasonable belief that her client intends to commit a crime before disclosure of that intention and facts necessary to prevent the crime is permitted. The mere fact that the Code does not prescribe a level of certainty required on the part of the lawyer before disclosing a client's alleged intention to commit a crime does not mean that a lawyer has unfettered discretion to make disclosure wherever the lawyer suspects that the client may commit a crime, no matter how unreasonable that suspicion. *See* N.Y. County 712 (1996) ("a lawyer may not make disclosure under DR 4-101(C)(3) . . . based only on the prediction that the client will lie on the witness stand.").

In N.Y. City 81-81, this Committee considered whether a lawyer has a duty to inquire into a client's source of funds for a series of transactions in which the client uses "large sums" of cash. We concluded that even though DR 7-102(A)(7), the applicable rule in those circumstances, contained a requirement of actual knowledge by the lawyer that her client's conduct is illegal or fraudulent,⁵ the lawyer could not turn a blind eye toward her client's suspected illegal behavior:

[W]e do not believe that the Code intends to encourage attorneys to be unduly naive or disregard the obvious. There are some circumstances in which an attorney may be aware of facts which fall short of actual knowledge but which still impose on him an obligation to make inquiry to determine whether his client is engaged in unlawful conduct. A lawyer may not purposely close his eyes to what he perceives to be circumstances indicative of illegal or fraudulent conduct by a client. Such selective blindness may be a disservice to the client and, in some cases, has led to disciplinary proceedings against the attorney.

5. DR 7-102(A)(7) [22 N.Y.C.R.R. § 1200.33] provides, in pertinent part, that a lawyer shall not "counsel or assist the client in conduct the lawyer knows to be illegal or fraudulent." (Emphasis added).

N.Y. City 81-81. Likewise, an attorney need not turn a blind eye to circumstances that would lead a reasonable person to believe that a client intends to commit a crime even though the lawyer does not “know” that this is the client’s intent. If a lawyer reasonably concludes after due inquiry that the client has the intention to commit a future crime, then the lawyer is permitted, but not required, to make disclosure to the appropriate authorities to prevent the crime. Once the threshold of reasonable belief of the client’s intention to commit a crime is surmounted, in determining whether to make permissive disclosure, the lawyer should consider a number of factors, including “the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime [and] the circumstances under which the lawyer acquired the information of the client’s intent.” EC 4-7.

Our conclusion is fortified by the confidentiality provision of the ABA Model Rules, which allows a lawyer to disclose client confidences “to prevent the client from committing a criminal act that the lawyer *believes* is likely to result in imminent death or substantial bodily harm. “ABA Model Rule 1.6(h)(i) (emphasis added). The comment to this Rule provides that the lawyer may make disclosure to prevent harm she “reasonably believes is intended by the client” because “it is very difficult for a lawyer to ‘know’ when such a heinous purpose will actually be carried out . . .” Similarly, the *Restatement (Third) of the Law Governing Lawyers* allows a lawyer to “use or disclose client confidential information when the lawyer *reasonably believes* that its use or disclosure is necessary to prevent a crime or fraud” in certain circumstances. *Id.* § 67 (emphasis added); see also *id.* § 66 (permitting disclosure of client confidential information when the lawyer “*reasonably believes* that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person” (emphasis added)). The *Restatement* also makes clear that “a client’s subjective state of mind[] may be difficult to ascertain” and therefore “the lawyer must make a reasonable effort to determine the relevant facts” before making any disclosure. *Restatement*, § 67, comment h.

In the inquiry presented here, the lawyer possesses a suspicion that the client has an intention to commit another crime based on the client’s intention to pay the lawyer’s fees in cash and the absence of any obvious means of support for the client. Although these facts standing alone may be insufficient to warrant a reasonable belief that the client intends to

commit a crime, we conclude that if the lawyer learns of facts supporting reasonable belief that the client intends to commit a future crime, she may choose to make disclosure under the rule to prevent the crime.

CONCLUSION

The lawyer's duty of confidentiality is "the bedrock of the adversary system. Without a duty of confidentiality, a lawyer would become an agent of the state or of the opposing party." Simon at 289. Accordingly, we conclude that DR 4-101(C)(3) does not permit disclosure of a client's confidences and secrets based on the client's "continuing crime" where the client has already completed conduct which satisfies all elements of the crime and has sought to engage the lawyer to defend the client against the criminal charges relating to that conduct. We also conclude that a lawyer may not ethically disclose client confidential information based upon her mere suspicion that a client intends to commit a future crime, but that she must have a reasonable basis for believing that the client intends to commit a crime before she is permitted to make disclosure.

March 2002

Formal Opinion 2002-02

Duty to Pay Interest on Client Funds Deposited in an Interest-Bearing Account

*The Committee on
Professional and Judicial Ethics*

TOPIC: Duty to pay interest on client funds deposited in an interest-bearing account where retainer agreement does not require attorney to pay interest to client.

DIGEST: Where a lawyer has placed client funds in an interest-bearing escrow account, and the lawyer's retainer agreement does not address whether the lawyer must pay interest on client funds to the client, the lawyer must pay any interest earned on the funds to the client. If the lawyer cannot locate the client, the lawyer should deposit the client's funds with the Lawyers' Fund for Client Protection.

CODE: DR 9-102

QUESTION: If a lawyer has deposited client escrow funds in an interest-bearing account, and the retainer

agreement does not address the lawyer's duty to pay interest to the client on such funds, may the lawyer retain the interest earned on these deposits?

OPINION

A lawyer has submitted an inquiry indicating that she has several Client Fund Accounts in JP Morgan Chase that involved cases that have been closed. The funds were escrowed in connection with the purchase and sale of real estate. The moneys remaining in escrow represent interest earned prior to the closing of the transaction. The real estate contracts did not require funds to be placed in interest bearing accounts, and her engagements with the clients are silent on the issue. The aggregate dollar amount of the interest is around \$3,000. The interest arises from approximately sixteen separate client transactions, dating back up to ten years. Some of the former clients may be difficult to locate. She has asked for guidance as to how to dispose of the interest residue.

DR 9-102(A) [22 N.Y.C.R.R. § 1200.46] strictly prohibits commingling of client funds with the funds of a fiduciary, and DR 9-102(B)(2) requires that a lawyer in possession of funds belonging to another, incident to her practice of law, maintain those funds in special bank accounts. These rules, taken together with general trust principals, mandate that interest on separated client funds belongs to the client. *See* N.Y. State 582 (1987) ("it is ethically improper for a lawyer to receive interest earned on funds held in an escrow account as compensation for serving as the escrow agent," citing N.Y. State 532 (1981)); N.Y. State 554 (1983) ("where a lawyer holds a sum for a client which is sufficient to earn interest, the lawyer has a fiduciary obligation to invest that sum, and an ethical obligation to notify the client of receipt of the funds, and any interest thereon, maintain adequate records to and make prompt payment of both principal and interest" (citations omitted)); N.Y. State 90 (1968) (lawyer's duty as to escrowed funds is "to treat the funds in all respects as the client's property and if any income is realized on the funds, it would, of course, belong to the client"); Nassau County 84-2 (1984) (attorney may not retain interest earned on funds during escrow); N.Y. City 81-68 (1981) ("[s]ince the funds deposited in the lawyer's trust account are, by definition, client's funds, it follows that any interest earned on those funds belongs to the client"); N.Y. City 79-48 (1980) ("in the absence of an explicit agreement, any income realized on the client's funds by an attorney-escrow agent belongs to the client"); *see also* N.Y. State 570 (1985) (the client is entitled to interest on funds deposited into escrow even where they are not strictly client's funds).

Although some opinions have suggested in dictum that “it might be permissible for an attorney subject to the client’s consent to retain interest on client funds which are to be promptly and routinely disbursed,” *e.g.*, N.Y. State 532 (1981), this possible exception to the stringent requirements of DR 9-102 would apply, if at all, only to situations where the lawyer had obtained express consent to retain the interest and the amount of interest was so small as to be *de minimus*. N.Y. State 582 (1987); N.Y. City 81-68 (1981). Neither of these conditions exists on the facts presented. In any case, the better practice in those situations where the amount of interest will be negligible and the funds must be promptly and routinely disbursed is to use an IOLA account. N.Y. State 554 (1983) (where the funds are held for a short period of time and the amount of interest is expected to be nominal, the funds may be deposited into an IOLA account and the interest paid to tax-exempt organizations for the support of legal services or other purposes as defined by the legislature). “The decision as to which funds may be appropriately placed in the IOLA program is left to the discretion of the lawyer to whom the funds are entrusted.” *Id.* A client may also agree to donate interest to a charity of the client’s choice. N.Y. City 84-15 (1981).

Thus, on the facts provided, any interest on the funds belongs to the clients and should be paid to them, if they may be located.

If a lawyer cannot locate a client or another person who is owed funds from the attorney trust account, the lawyer is required to seek a judicial order to fix the lawyer’s fees and disbursements, and to deposit the missing client’s share with the Lawyers’ Fund for Client Protection. DR 9-102(F) [22 N.Y.C.R.R. § 1200.46(f)].¹ Forms for such an application are available online at the website for the Lawyers’ Fund for Client Protection, <http://www.nylawfund.org/pubs/misspl.htm>.

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1. Because DR 9-102(F) requires that monies owed to missing clients be deposited with the Lawyers’ Fund for Client Protection, the lawyers may not exercise discretion to deposit funds in an IOLA account under the circumstances presented here.

Formal Opinion 2002-03

The “No-Contact Rule”
and Advising a Client in
Connection with Com-
munications Conceived
or Initiated by the Client
with a Represented Party

*The Committee on
Professional and Judicial Ethics*

TOPIC: The “no-contact rule” and advising a client in connection with communications conceived or initiated by the client with a represented party.

DIGEST: This Committee concludes that where the client conceives the idea to communicate with a represented party, DR 7-104 does not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient. N.Y. City 1991-2 is withdrawn.

CODE PROVISIONS: DR 7-104 [22 NYCRR § 1200.35], EC 7-18

QUESTION: Where a client conceives the idea of communicating directly with an adverse party who is known to be represented by counsel, may the attorney advise the client about the substance of the communication?

OPINION

Circumstances abound in both litigation and transactional contexts in which it is advisable—and even crucial—for a client to communicate directly with her counterpart. The need for such direct contact often arises to cement a settlement or break a negotiating logjam, to name just two common situations. To that end, the client might well expect to rely especially heavily on her lawyer's advice as she contemplates entering the fray personally. But in N.Y. City 1991-2, this Committee interpreted DR 7-104 in a manner that deprives the client of her lawyer's advice when the client may require that assistance most urgently.

Specifically, this Committee opined in N.Y. City 1991-2 that: (1) a lawyer may not encourage or "cause" a client to communicate with a represented party, without the consent of opposing counsel or legal authorization; and (2) even in situations when the client independently decides to contact a represented party, the lawyer should advise the client that, without opposing counsel's consent, the lawyer cannot assist or advise the client in these communications.

In July 1999, DR 7-104 was amended to provide a safe harbor for a lawyer who suggests that a client communicate with a represented party:

Notwithstanding the prohibitions of DR7-104[1200.35](A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

DR 7-104(B). EC 7-18 further provides that a lawyer may advise his or her client to communicate directly with a represented person, "including by drafting papers for the client to present to the represented person," so long as the attorney gives "reasonable advance notice" that such communications will be taking place. EC 7-18 defines "reasonable advance notice" as "notice provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented person's lawyer has an opportunity to advise his or her own client with respect to the

client-to-client communications before they take place.” See Roy Simon, *The 1999 Amendments to the Ethical Considerations in New York’s Code of Professional Responsibility*, 29 Hofstra L. Rev. 265, 274 (Fall 2000) (describing “reasonable advance notice” as a “flexible concept” that requires at least ample time for the “opposing lawyer to get in touch with her client”).

In light of these recent amendments to DR 7-104(b) and EC 7-18, we now revisit the remainder of N.Y. City 1991-2.¹

DISCUSSION

The “No-Contact” Rule and DR 7-104

DR 7-104(A)(1) of the Code establishes a “no-contact” rule for counsel: During the course of the representation of a client a lawyer shall not:

Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The “no-contact” rule is traceable to an 1836 legal treatise that instructs: “I will never enter into any conversation with my opponent’s client, relative to his claim or defense, except with the consent, and in the presence of his counsel.” John Leubsdorf, *Communicating with Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests*, 127 U. Pa. L. Rev. 683, 710 n. 6 (Jan. 1979) (quoting 2 D. Hoffman, *A Course of Legal Study Addressed to Students and the Profession Generally* 771 (2d ed. Baltimore 1836) (1st ed. Baltimore 1817)).

It gained widespread acceptance in 1908 through the American Bar Association’s Canons of Professional Ethics, which prohibited a lawyer from communicating with a represented party: A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. (quoted in ABA Formal Opinion 95-396, *Communications with Represented Persons*

1. Because the safe harbor created by DR 7-104(B) protects a communication by a lawyer’s client with a represented party when the communication is initiated by a lawyer, a fortiori, the safe harbor protects a communication with a represented party conceived of by the lawyer’s client. As we discuss below, however, where the client initiates the communication, the advance notice provision of DR 7-104 (B) need not be followed.

(July 28, 1995)). The no-contact rule was carried forward into the 1970 Code of Professional Responsibility.

Among the purposes underlying the “no-contact” rule are the protection of clients against overreaching by opposing counsel and the preservation of the attorney-client relationship. “[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.” ABA Formal Opinion 396 (1995); *see also Niesig v. Team I*, 76 N.Y.2d 363, 370, 559 N.Y.S.2d 493, 496 (1990) (“By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.”); Charles W. Wolfram, *Modern Legal Ethics*, § 11.6.2, at 611 (1986) (“The prohibition is founded upon the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised party”); EC 7-18 (“The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.”).

The linchpin of N.Y. City 1991-2 was the conclusion that the lawyer’s client is included within DR7-104’s prohibition against a lawyer’s causing “another” to communicate with a represented party. From this premise, this Committee concluded that a lawyer cannot “assist, direct or otherwise participate in such communication” by her client with an adverse party who is represented by counsel even when the client conceives the idea of communicating with her adversary. Beyond this, the Committee held that “a lawyer who learns that a *client has initiated* settlement negotiations with the adverse party may not, thereafter, advise the client how to proceed with those negotiations” *See* N.Y. City 1991-2 (emphasis added)

To be sure, a lawyer may not use an intermediary to achieve indirectly what the Code prohibits the lawyer from achieving directly. *See* DR 1-102(A) (“A lawyer or law firm shall not . . . [c]ircumvent a Disciplinary Rule through actions of another.”). And the Committee was certainly correct to be concerned with a lawyer using her own client as an instrumentality to circumvent opposing counsel. In reaching this conclusion, the Committee’s opinion was supported by all relevant Bar Association opinions at that time, as well as the interpretations of both this Association and the New York State Bar Association of DR 7-104. After all, DR 7-104 explicitly mandates this concern by prohibiting a lawyer from “caus[ing]

another to communicate” with a represented party, and there is no exclusion from this prohibition for the lawyer’s client. But, by interpreting DR7-104 to create a blanket prohibition against the lawyer providing any assistance to her client, even when the client conceives or initiates the communication—a situation that by no means involves a lawyer in “causing” another to communicate—this Committee misconstrued DR 7-104 and thereby ignored the overarching reason why the lawyer has been engaged—to render legal advice to the client.

Lawyers May Advise Clients Concerning the Substance of Communications Conceived or Initiated by Clients with Represented Parties

Not surprisingly, N.Y. City 1991-2 provoked a flood of scholarly criticism. “[This] interpretation [of DR 7-104(A)(1)] stands the no-contact rule on its head. The purpose of the rule is to protect lawyers’ agency relationships with their respective clients, and to prevent clients from being overreached by opposing lawyers.”² Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, § 38.2 (2002); *Restatement (Third) of the Law Governing Lawyers* § 99C, comment (k) (2000) (“... the anti-contact rule does not prohibit a lawyer from advising the lawyer’s own client concerning the client’s communication with a represented nonclient . . . Prohibiting such advice would unduly restrict the client’s autonomy, the client’s interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer.”); James G. Sweeney, *Attorneys’ Arrogance: Warning Unheeded*, N.Y.L.J., June 17, 1991, p.2, col. 3 (“To deny or deter the client from the opportunity of entering into the gauging process of what value is to him in a particular dispute by denying him an opportunity to sit at the bargaining table with his adversary works against the very fundamental idea of the self and of human autonomy.”) *See also* John Leubsdorf, *Communicating With Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests*, 127 U. Pa. L. Rev. 683, 697 (Jan. 1979) (“An extension of the [no-contact] rule to communications between clients is hard to reconcile with its ostensible purposes. Whatever dangers flow from the confrontation of professional guile with lay innocence are absent when two nonlawyers communicate . . . Perhaps we have again come across the desire to keep disputes safely in the control of lawyers.”)

We believe that the overly broad construction of DR 7-104 in N.Y.

2. Webster’s Ninth New Collegiate Dictionary defines the word “cause” to mean “to bring about an event or result” or “to effect by command, authority or force.”

City 1991-2 is at odds with modern authority. Under the Model Rules of Professional Conduct, which replaced the Model Code in the majority of states, a lawyer is permitted to advise a client to speak directly to a represented party. See Model Rule 4.2. Indeed, in 1983 the ABA House of Delegates considered and rejected a proposed amendment by the New York State Bar Association that would have restored the language “or cause another to communicate” to Model Rule 4.2. Opponents of the amendment successfully “objected to a possible interpretation of the amendment that would prevent lawyers from advising principals to speak directly with their counterparts. The Rule was not intended to prohibit such advice.” Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 148-49 (1987); accord ABA Formal Opinion 362 (1992).

The thrust of N.Y. City 1991-2 also is directly contrary to the Ethics 2000 Commission’s Commentary to Model Rule 4.2 that states: “Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” Ethics 2000—February 2002 Report, Rule 4.2, Comment 2, available at www.abanet.org/cpr/e2k-202_111_85.doc.

In this same vein, Section 99 of the Restatement of the Law Governing Lawyers explicitly permits a lawyer to assist or advise a client concerning communications with a represented party. See *Restatement (Third) of the Law Governing Lawyers* § 99(2) (2000) (“[the no-contact rule] does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer’s client with a represented nonclient.”).

On its face, we find nothing in DR 7-104(a) that would permit, much less compel, a severe limitation on a client’s right to obtain legal advice to assist the client in communicating with her counterpart to achieve a lawful objective. On the contrary, there is a strong public policy in favor of resolving disputes that is undermined by an overly expansive interpretation of DR 7-104(a).

In reaching the conclusion that a lawyer was ethically prohibited under DR 7-104 from “endorsing or encouraging” direct client-to-client communications or advising a client about the substance of communications with a represented party even where the client, not the lawyer, first raised or proposed the contact, New York City 1991-2 adopted an overly broad definition of the term “cause”: We conclude that “caus[ing] another to communicate with a party” in this context includes not just using the client as an agent for or in place of the lawyer for making the

communication (i.e., where the lawyer directs, supervises or plans the substance of the communication), but also the act of suggesting or recommending to the client that he or she engage in such communication, even though the lawyer has no further involvement in or knowledge of the substance of the communication that subsequently takes place, or the endorsement or encouragement of such a course of action, even when it is first raised or proposed by the client. From this broad definition, the Committee concluded “[a] lawyer who learns that a client has initiated settlement negotiations with the adverse party may not, thereafter, advise the client as to how to proceed with those negotiations. . .”

Given the modern authority referred to above, we conclude that a narrower definition of the term “cause” contained in DR7-104 is more appropriate, one akin to the definition found in the dictionary, which would apply where the lawyer prompts or initiates a client’s direct contact with an adversary. It does not extend to the endorsement or encouragement of a communication “first raised by a client” and does not preclude the lawyer from advising the client on the content of communications conceived of or initiated by the client.

In light of the foregoing, we are constrained to withdraw N.Y. City 1991-2. In doing so, the Committee is mindful of the possibility that some lawyers may seek to overreach, even when the client conceives the idea to contact a represented party. Accordingly, the Committee adopts the Restatement’s salutary view that in advising a client in connection with such communications, the lawyer may not “assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.” Restatement § 99 Comment (k). In this connection, we interpret “overreach[ing] the nonclient” to prohibit the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient, an aspect of N.Y.C. 1991-2 with which we agree (prohibiting a lawyer who learns that a client has initiated settlement discussions with adverse party from assisting the client in “in any other manner that would constitute using the client as a vehicle for communicating with the represented party, absent notice to and consent from opposing counsel”).

Conclusion N.Y. City 1991-2 is withdrawn. This Committee concludes that where the client conceives the idea to communicate with a represented party, DR 7-104 does not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client

inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.

May 2002

The Committee on Professional and Judicial Ethics

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