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NEW MEMBERS

50-YEAR MEMBERS

THE ALTERNATIVE DISPUTE RESOLUTION COLLECTION
OF THE LIBRARY OF THE ASSOCIATION: A SELECTIVE BIBLIOGRAPHY
by the Committee on Alternative Dispute Resolution
THE ASSOCIATION, ALONG WITH THIRTEEN NEW YORK CITY-AREA LAW
schools and the Union Internationale des Avocats, an international bar
association, celebrated the 50th Anniversary of the Universal Declaration
of Human Rights with a three-day conference from December 10-12. The
Universal Declaration of Human Rights was adopted in 1948 by the then
newly-established United Nations, and remains the principal statement
of human dignity and freedom today.

Senator George J. Mitchell, a major force behind the Northern Ire-
land peace process, delivered the Association’s Alexis C. Coudert Lecture
to keynote the program. Senator Mitchell was also awarded Honorary
Membership in the Association on this occasion. Over the following two
days, prominent officials, judges, human rights activists, attorneys and
scholars gathered at Fordham Law School to participate in various pan-
els. Topics included the historical origins of the Universal Declaration,
contemporary definitions of human rights and their application in diver-
gent cultures, and the interactions among governments, nongovernmen-
tal actors, and individuals.

The conference was made possible by a generous grant from The Reuter
Foundation. Co-sponsors included Brooklyn Law School, Benjamin Cardozo
Law School, Columbia Law School, CUNY Law School, Fordham Law School,
Hofstra Law School, New York Law School, NYU Law School, Pace Law
School, Rutgers Law School (Newark), Rutgers Law School (Camden), Seton
Hall Law School, St. John’s Law School, and the Union Internationale
des Avocats.

ON NOVEMBER 9, THE ASSOCIATION, ALONG WITH THE NEW YORK
City Campaign Finance Board, hosted a day-long conference on cam-
paign finance reform. The goal of the conference was to examine existing
campaign finance reforms at the state and local levels to identify those
reforms that could be usefully imported to the Federal level.

Entitled “From the Ground Up: Local Lessons for National Reform,”
the proceedings, televised on C-SPAN, were highlighted by remarks by
former New York Mayor Edward I. Koch, who signed the law that created
New York City's widely respected Campaign Finance Program in 1988. Closing
remarks were made by U.S. Representative Christopher Shays (R-Conn.),
the main sponsor of recent House legislation that would limit the use of
“soft money” in federal campaigns.

“The timing of this conference is particularly appropriate,” said President
Cooper. “The public's anger at current campaign finance practices is growing.
I hope this conference will stimulate creative thinking on how to curb
the undue influence of money in politics and government.”

“From the Ground Up: Local Lessons for National Reform,” was made
possible in part by grants from the New York Community Trust and the
Joyce Foundation.

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IN DECEMBER, THE ASSOCIATION, IN COLLABORATION WITH THE NEW
York County Lawyers’ Association, announced the creation of a profes-
ionally-staffed Lawyer Assistance Program (LAP) to address the pressing
need for help for New York City attorneys who face alcohol and drug
abuse problems. With the encouragement of Chief Judge Judith S. Kaye
and Presiding Justice Alfred D. Lerner of the Appellate Division, First De-
partment, LAP will be the first of its kind located in New York City.

The program will concentrate on the alcohol and substance abuse-
related needs of New York City lawyers through the provision of interven-
tion, referrals, monitoring, education and peer support of attorneys, and
will reach out to all New York City lawyers, whether or not they are mem-
ers of the either the Association or County Lawyers, who have alcohol
and drug abuse problems.

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Correction: The name of Arthur Schiff was inadvertently omitted from
the roster of the Aeronautics Committee at the conclusion of its “Report
Recent Committee Reports

Art Law
Amicus curiae brief, The People of the State of New York v. The Museum of Modern Art

A Visual Artist’s Guide to Estate Planning

Capital Punishment
Letter to New York Court of Appeals Commenting on Proposed Reduction of Counsel Fees in Capital Cases

Council on Children
Letter Regarding the Federal Adoption and State Families Act (ASFA) Draft New York State Compliance Legislation

Condemnation & Tax Certiorari
An Act to Amend the Real Property Tax Law and the New York City Charter, in Relation to Evidence of Unequal Assessment in a City with a Population of One Million or More

Construction Law
An Act to Amend the State Finance Law, in Relation to Damages for Delay Clauses in Public Contracts

Federal Courts
Proposed Amendments to the Federal Rules of Civil Procedure

International Environmental Law

Council on Judicial Administration
Report on Juror Questioning of Witnesses
Legal Issues Pertaining to Animals
Letter Regarding Petition No. 98P-0151 (Amended) “Petition Requesting Immediate Action Regarding the Introduction of Downed Cattle into the Food Supply”

Patents
Letter Regarding Advance Notice of Proposed Rulemaking Changes to Implement the Patent Business Goals

State Courts of Superior Legislation
Comments on the Proposed Amendments to the CPLR Concerning Depositions in Civil Cases

Questionnaire Evaluating the Success and Level of Usage of the Commercial Division at Supreme Court, New York County

Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at lyuen@abcny.org.
Report of the President

Michael A. Cooper

The following report was presented at the Stated Meeting of the Association of the Bar of the City of New York, held on November 17, 1998.

Anyone seeking to report on the affairs of this Association over a six-month period faces an impossible task of selection, for there is so much and such varied activity occurring continuously within the Association that a report of tolerable length will inevitably omit some activities and individuals deserving of mention. So I will begin with an apology to those committee chairs and members and particularly staff whose contributions to fulfilling the Association’s mission I will not have time to acknowledge publicly. They know, as do I, the importance of their efforts on the Association’s behalf.

I will start the Report with what the Association is doing to serve its 21,000 members and the approximately 50,000 other lawyers who practice in the City of New York. The first service to members on which I will focus represents a new initiative of the Association, one that is long overdue and, in my view, as important as anything we can do for our colleagues at the bar. As you will read in my column in the December issue of 44th Street Notes, we will shortly announce the establishment of a lawyer assistance
program to help those of our brothers and sisters who suffer from alcoholism or substance abuse, afflictions that impair their representation of clients, their family relationships and their physical health and emotional well-being. For many years we have had a dedicated committee of volunteer Association members addressing this subject, but unlike virtually every other major metropolitan bar association (and unlike the New York State Bar Association), we have not had a staff program headed by a trained professional. When I next speak to you at the annual meeting in May 1999, we will have a lawyer assistance program in place, and I hope to be able to tell you that it has been helping many of our colleagues in this city who suffer from these destructive afflictions.

A second membership service, one that we have been providing but are now raising to a new level, is an array of continuing legal education programs. Beginning the first of next year, all attorneys who were admitted to the bar in New York before October 1, 1997, will have to take 24 credit hours of qualified CLE programs every two years. More recently admitted lawyers are already subject to CLE requirements. Our CLE staff, headed by Joyce Adolfsen, has been augmenting the Association’s CLE offerings under the watchful guidance and stimulation of a committee chaired by Justice Leo Milonas. Last week I reviewed some statistics showing that more Association members are attending more programs than in past years. Our goal, simply stated but not that easy to achieve, is to make compliance with the new CLE requirements not only instructive but as painless as possible.

The final membership-directed effort I wish to mention is the Association’s commitment to making our profession more inclusive by increasing both the numbers and the stature of women and minority lawyers. This past spring, we issued a Statement of Goals for Women in the Profession. I witnessed a graphic demonstration of the advances that women lawyers have made when I attended the Rentreé (that is, the annual convocation) of the Paris Bar this past Friday. The first two speakers, the Bâtonnier (or head) of the Paris Bar and the French Minister of Justice, were women, and I was seated two seats away from the titular head of the Bar Council of England and Wales, the leader of all barristers in those two countries, who is also a woman. Although women have not yet attained the goal of true parity with men in the leadership of the profession, I think it is indisputable that women have made greater strides than have racial minorities. While remaining committed to advancement of the former, we must do more to assist the latter to attain full representation within the profession. In 1991 the Association issued a Statement of
Goals on the Recruitment and Retention of Minorities. Seven years later, we will soon issue a restatement of those goals, which will acknowledge the increase in minority recruitment among all minorities but recognize the fact that parallel advances have sadly not been achieved in retention and promotion, particularly among African-American and Latino associates. The achievement of those advances must be a prime priority of the legal profession and of this Association.

I mentioned earlier the contribution Justice Milonas has made to our CLE efforts. That contribution is a vivid, but only one, example of the close ties this Association has with the Federal and State judiciary in New York. Within the past five years Judges Sand and Parker of the United States District Court for the Southern District of New York and New York State Supreme Justice Helen Freedman have served as vice-presidents of the Association. Justice Richard Andrias of the Appellate Division, First Department, and Justice Barry Cozier of the Supreme Court, New York County, are current members of our Executive Committee, as Appellate Division Justice Betty Weinberg Ellerin and Supreme Court Justice Charles Ramos were in recent years. And Judge Michael Sonberg of the Bronx County Criminal Court serves as Secretary of the Association.

Of the seven candidates for the Court of Appeals recommended last week by the Judicial Nominating Commission to fill the vacancy created by Judge Titone's retirement, five (Justices Andrias, Sullivan, Yates, Daniels, and Guy Struve), are members of this Association; one currently sits on our Executive Committee; and two others are or have served as committee chairs. We are currently reviewing the qualifications of those candidates and next week will convey to the Governor our findings as to those qualifications.

We are happy to find suitable occasions to honor distinguished members of the judiciary. One such occasion is the reception we will hold on November 30 to honor Judge Vito Titone on his retirement from the Court of Appeals. Chief Judge Kaye has generously agreed to attend that reception, and I very much hope many of you will as well. Last month, we held a reception for Family Court judges, at which we honored two practitioners in that court by presenting to them the newly created Kathryn A. McDonald Award for Excellence in Service to the Family Court, an award named after one of our members—and a very good friend of mine—who began her career at The Legal Aid Society and eventually became Administrative Judge of the New York City Family Court.

Ever since its founding 128 years ago, the Association of the Bar has been dedicated to preserving and enhancing the integrity and indepen-
PRESIDENT’S REPORT

dence of the bench and the bar. We have taken two landmark steps in that direction during the past six months. First, our Government Ethics committee issued a report observing that the majority of Guardianship ad litem appointments made by two Surrogates in New York City have been to contributors to the Surrogates’ campaigns. The report calls for a system of rotating appointments from among panels of qualified guardianship candidates. While our report focused solely on the appearance of impropriety inevitably created by the appointment of contributors as guardians ad litem, elements of the press in reporting on our recommendations erroneously attributed to the Association a finding that the Surrogates in question had in fact rewarded campaign contributors with guardianship appointments. We made no such finding, and it is unfair of the press to suggest otherwise.

Second, and closely related to the report on the Surrogates’ Court, we have carried forward the Association’s challenge to the phenomenon of “pay-to-play,” successfully calling on the American Bar Association and the New York State Bar Association to condemn the practice and then recommending to the Administrative Board of the New York Courts a rule that would effectively end the practice by disqualifying from government engagements lawyers who had contributed to the campaigns of the officials who decide which outside law firm to retain. In the near future we intend to propose a complementary rule mandating disclosure of lawyer contributions to officials who are in a position to reward those contributors.

This Association has worked closely both here and abroad with other bar associations that share our interests and concerns. The New York State Bar Association is prominent on that list. I am very pleased to report that after several months of intensive discussions with the leadership of the State Bar, the Bylaws Committee of that association has recommended to its membership changes in the procedures established by the Bylaws for selecting members of both the Nominating Committee and the Executive Committee. Those changes will markedly increase the representation of lawyers in the First Judicial District in both of those bodies and thereby markedly increase the opportunities of Manhattan lawyers to achieve leadership positions in the State Bar. The Bylaw amendments will be presented, with the unanimous support of the Executive Committee, to the State Bar membership at the annual meeting next January, and I am confident that the amendments will be overwhelmingly approved. I am gratified that we will be able to bring to a harmonious resolution these discussions, which had the potential of creating a serious rift between the two associations.
Having remarked on some of the Association’s activities at the State level, let me mention some highlights of our activities at the local and national levels and in the international community. Our Committee on Municipal Affairs has monitored closely and publicly commented on the processes and recommendations of the Charter Revision Commission created last spring by Mayor Giuliani. We have also offered suggestions to improve the efficiency and the fairness of the City’s conduct of tort litigation. I believe that most of you are aware that there have been tensions in the Association’s relationship with the Mayor and his advisers. I hope to allay those tensions and to work constructively with the governmental representatives of New York City without abdicating our independence or our responsibility to speak out when we believe the city government has gone astray.

At the national level, our Committee on Federal Legislation issued a thoughtful and comprehensive report on the Independent Counsel Statute. Additionally, I forwarded to all members of the House Judiciary Committee a copy of the Report on the Standard of Impeachable Conduct rendered by the Committee on Federal Legislation during the last Presidential impeachment inquiry. That report, I submit, has withstood the test of time and is as informative and insightful today as it was in 1974. Our Special Commission on Campaign Finance Reform, co-chaired by former presidents Vance, Kaufman and Feerick, has continued to meet and plans, next year, to issue a report, to which we all look forward.

We may be a municipal bar association, but our standing in the international legal community could not be higher, as I learned at the Rentreé in Paris last week. I was seated in the first row, between the President of the American Bar Association and the President of the Law Society of England and Wales. The only other municipal bar presidents accorded similar rank were the Presidents of the Montreal and Québec city bars, who unlike us share some of the legal traditions and the language of the Paris Bar. Last month I was privileged to host a reception for Legal Advisers to UN member nations throughout the world. They had come from the four corners of the earth to convene in New York City. It is both humbling and a source of pride to reflect on the fact that we are the host bar association to the United Nations just as New York City is the host city.

Finally, on this subject, I hope that you have no commitment for the evening of December 10, for we will be celebrating in this meeting hall that evening the Fiftieth Anniversary of the Universal Declaration of Human Rights. George Mitchell, who is universally acclaimed for having played a
PRESIDENT’S REPORT

pivotal role in bringing peace to Northern Ireland, will deliver the keynote address for a three-day conference that we will be cosponsoring to commemorate that anniversary, and we will take the occasion to confer on Senator Mitchell Honorary Membership in this Association.

The last aspect of the Association’s activities that I want to mention this evening is the array of pro bono programs that we sponsor under the umbrella of the Association of the Bar of the City of New York Fund, Inc., known to us simply as “Fund, Inc.” Maria Imperial, who assumed the leadership of those programs this summer, has the reins firmly in hand. As you may know, the funding and availability of pro bono services are topics with which I have been continuously concerned for more than two decades. In this era of dwindling governmental support, I am convinced that this Association has a unique and critical role to play in augmenting the provision of civil legal services to those of our neighbors who cannot afford to retain counsel.

Custom calls on me in concluding these remarks to acknowledge the invaluable work of the Association’s staff, headed by our Executive Director, Barbara Berger Opotowsky, and our General Counsel, Alan Rothstein. If I do not do so, it is not because I value them less than my predecessors did, but because I value them so highly that passing reference to them at the end of a six-month report could not do them justice, which I will try to do on another occasion.

That is my report after six months of exhilarating and exhausting service as Association President. Could we do more and do it better? Surely. Can we take pride in what we do and have done? We can answer that question resoundingly “yes.”
Alternatives to Impeachment: What May Congress Do?

Committee on Federal Legislation

In August 1994, Kenneth W. Starr was named Independent Counsel with authority to investigate allegations concerning President Clinton’s Whitewater real estate investment, which predated his election. In January 1998, the scope of Independent Counsel Starr’s investigations was expanded to include allegations of efforts to conceal a personal and sexual relationship between President Clinton and a former White House intern. On September 9, 1998, Independent Counsel Starr delivered to the House of Representatives a report on his investigation of those allegations. The report contains a lengthy narrative and then sets forth eleven grounds for impeachment, as to all of which the report states “[t]here is substantial and credible information.” On October 8, 1998, the House of Representatives directed its Judiciary Committee to conduct an investigation and to report its recommendation for possible action, including impeachment. That investigation is proceeding as of this writing. On December 9, 1998, members of the Judiciary Committee released working drafts of an impeachment resolution and of a censure resolution.

In one of the rarest and most grave events in the history of the Republic, the United States House of Representatives is now considering the impeachment of a President. These proceedings have arisen from allegations that President Clinton carried on a sexual relationship with a White House intern and that he sought to cover it up by lying in a civil deposition, lying to a grand jury,
tampering with witnesses, and otherwise obstructing justice. Some in Congress have argued that such conduct amounts to “high crimes and misdemeanors” warranting the President’s impeachment. Others take the view that the President’s alleged misconduct, while deserving of condemnation, does not merit his removal from office, and call for some lesser sanction. Still others believe the entire matter to be a contrivance for partisan political advantage that warrants no response whatever.

These events raise two fundamental questions. First, what conduct merits impeachment of a sitting President? Second, may Congress, if it chooses, respond to allegations of Presidential misconduct with some less drastic alternative to impeachment and, upon conviction, removal from office? The Association’s view as to the first issue is set forth in a Watergate-era report of this Committee, “The Law of Presidential Impeachment.” In this report, we address the latter question.

Some advocates of impeachment have argued that any lesser sanction than impeachment and removal from office is unconstitutional or extra-constitutional and that the impeachment power is Congress’s sole means to address Presidential misconduct. Other authorities have concluded that the Constitution is sufficiently flexible to permit congressional responses short of impeachment and that such lesser remedies may best serve the interests of the Nation by providing an official public condemnation of the President—perhaps tied to some tangible penalty—while avoiding the drastic step of removing from office a duly elected President. The Committee on Federal Legislation concludes that Congress may, indeed, constitutionally respond to alleged Presidential misconduct by means other than the impeachment process. Either House of Congress, or both, may pass a resolution condemning or disapproving presidential conduct. (This report will adopt the term “censure” to describe such resolutions generically, although Congress need not use that term.) We believe Con-

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1. See Association of the Bar of the City of New York, Committee on Federal Legislation, The Law of Presidential Impeachment, 29 The Record 154 (1974). There, this Committee opined that “Congress may properly impeach and remove a President only for conduct amounting to a gross breach of trust or serious abuse of power, and only if it would be prepared to take the same action against any President who engaged in comparable conduct in similar circumstances. Although the responsibility for giving content to the constitutional grounds for impeachment is, in our opinion, solely that of Congress, our conclusion is that Congress should exercise these powers subject to a firm sense of constitutional restraint.” Id. at 156. The Committee further opined that “it is fair to conclude that the Framers had in mind [that] only conduct which in some broad fashion injures the interests of the country as a political entity [should] be the basis for impeachment and removal.” Id. at 160-61.
The record of presidential misconduct irrespective of whether such conduct would, in fact, merit impeachment. Such censure, by itself, of course carries only the moral weight of expressed congressional condemnation, however heavy that weight may be.

The Constitution's prohibition against bills of attainder would bar Congress from unilaterally imposing any punitive or other legal consequence. The President may, however, agree to accept some form of additional personal sanction or penalty. Congress may, consistent with its constitutional duties, agree to forbear from, or to terminate, impeachment proceedings in recognition of the President's commitment. Such a "censure plus" outcome would not be subject to judicial review because the Constitution leaves the manner of executing the impeachment power exclusively to Congress. The President's compliance could be enforced, as a practical matter, only by the threat of resumed impeachment proceedings.

We express no opinion about whether such an arrangement would, in a particular instance, be good for the country. It is the sense of the Committee that such judgments cannot be made without consideration of the context in which they are made, and we are in no position to assess the merits of the current impeachment inquiry. There is a further question whether such a "censure plus" arrangement, at any time and under any circumstances, would have detrimental consequences for the separation of powers between Congress and the Presidency that would outweigh the utility of resolving a particular crisis. The Committee embraces multiple views on this question, but is in agreement that there may be no single "correct" answer outside a specific factual context. We would urge that any such arrangement be crafted with an acute sense of constitutional restraint and respect for the principle of the separation of governmental powers.

Section I of this report will examine the text of those provisions of the Constitution that inform this inquiry. Section II will examine the history of congressional censure as it has been applied to past charges of misconduct by Presidents and other civil officers. Section III will elaborate upon the Committee's view that remedies short of impeachment and removal from office are constitutionally permissible.

I. TEXTUAL ANALYSIS

Consideration of the constitutional propriety of proposed congressional actions must take into account three factors. First, what congres-
sional powers or actions does the Constitution expressly authorize? Second, what actions does the Constitution expressly prohibit? Finally, what additional actions might Congress take within these boundaries?

A. The Power of Impeachment

The Constitution provides that the House of Representatives “shall have the sole Power of Impeachment” and that the Senate “shall have the sole Power to try all Impeachments.” The scope of the impeachment power is limited to offenses of “Treason, Bribery, or other high Crimes and Misdemeanors.” Although the House may impeach by a vote of a simple majority, conviction in the Senate requires a two-thirds vote of the members present. The Senate may impose no penalties other than removal from office and disqualification from holding a future office.

B. The Prohibition Against Bills of Attainder

The Constitution provides that “[n]o Bill of Attainder or ex post facto law shall be passed.” As the United States Supreme Court has interpreted this provision, a bill of attainder has three elements: (i) punishment inflicted by a legislative enactment, (ii) against individuals or readily ascertainable members of a group, (iii) without a judicial trial. The key question is whether congressional action inflicts “punishment.”

At its core, an enactment is a bill of attainder if “Congress was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses.” In considering what the Constitution prohibits as legislative punishment, the Supreme Court has rejected a “narrow his-

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2. Art. I, Sec. 2.
3. Art. I, Sec. 3.
4. Art. III, Sec. 4.
5. Art. I, Sec. 3.
torical reading" in favor of a "functional test," under which punishment may consist of deprivation "of any rights, civil or political, previously enjoyed." For example, in addition to deprivation of liberty through incarceration or property through a fine, Congress may not impair an individual's ability to engage in gainful employment. Congress, thus, is not permitted to respond to misconduct of an executive branch officer by imposing individual punishment.

II. THE HISTORICAL USES OF CENSURE

The authority of the Houses of Congress to adopt resolutions for the expression of "facts, principles, and their own opinions and purposes" is as old as Congress itself. That authority has been exercised continuously in innumerable ways. Resolutions may be adopted by the Senate or the House of Representatives individually, by both concurrently, or by both jointly. Each House has used resolutions as a device to state its opinion, not infrequently to condemn policies or individual conduct of

11. Id. at 448. Even where such a deprivation may occur, congressional action does not fail this test if, "viewed in terms of the type and severity of burdens imposed, [the action] reasonably can be said to further nonpunitive legislative purposes." Id. at 475-76 (footnote and citations omitted).
12. See, e.g., Brown, 381 U.S. 437 (invalidating statute barring Communist Party members from serving as officers or employees of a labor union).
13. An additional limitation, directly applicable only to the President, is that his compensation may not be reduced during his elected term. Art. II, Sec. 1.
15. "A concurrent resolution is binding on neither House until agreed to by both, and, since not legislative in nature, is not sent to the President for approval." Id. § 396, H. Doc. No. 104-272 at 190 (citations omitted).
16. A joint resolution "is a bill so far as the processes of the Congress in relation to it are concerned. With the exception of joint resolutions proposing amendments to the Constitution, all these resolutions are sent to the President for approval and have the full force of law." Id. § 397, H. Doc. No. 104-272 at 191 (citations omitted).
which it disapproves. Censure, as a stern rebuke or condemnatory judgment,\textsuperscript{17} is one form such resolutions may take. Such a resolution may or may not adopt a specific phrasing; it might “censure,” “rebuke,” “reprimand,” or “condemn,” using those terms expressly or not at all.\textsuperscript{18}

The use of resolutions to condemn individual misconduct is most formalized in the processes by which each House may discipline its own members. The Constitution grants each House of Congress the authority to discipline its own members.\textsuperscript{19} Although the Senate and House of Representatives each have adopted individual rules governing such procedures, for the sake of brevity we describe here only the procedures in the Senate.\textsuperscript{20}

\textsuperscript{17} See, e.g., Merriam Webster Collegiate Dictionary (10th ed.) ("a judgment involving condemnation[,] the act of blaming or condemning sternly[,] an official reprimand").

\textsuperscript{18} The draft resolution of censure proposed by members of the House Judiciary Committee on December 9, 1998 states:

\begin{quote}
It is the sense of Congress that

On January 20, 1993, William Jefferson Clinton took the oath, prescribed by the Constitution of the United States, faithfully to execute the Office of President; implicit in that oath is the obligation that the President set an example of high moral standards and conduct himself in a manner that fosters respect for the truth; and William Jefferson Clinton has egregiously failed in this obligation, and through his actions has violated the trust of the American people, lessened their esteem for the office of President and dishonored the office which they have entrusted to him.

Be it resolved that:

1. The President made false statements concerning his reprehensible conduct with a subordinate;

2. The President wrongly took steps to delay discovery of the truth;

3. No person is above the law, and the President remains subject to criminal and civil penalties for this conduct;

4. William Jefferson Clinton, the President of the United States, by his conduct has brought upon himself and fully deserves the censure and condemnation of the American people and the Congress; and by his signature on this joint resolution, the President acknowledges this censure.
\end{quote}


\textsuperscript{19} Art. I, Sec. 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.”).

\textsuperscript{20} S. Res. 338, 88th Cong., 2d Sess. (1964) (establishing the Senate Select Committee on Ethics, with the power to investigate allegations of senatorial misconduct); House Rule XLIII, Code of Official Conduct, H. Doc. No. 104-272 at 804-809; see generally Laura Krugman Ray, Discipline Through Delegation: Solving the Problem of Congressional Housecleaning, 55 U. Pitt. L. Rev. 389 (1994); Jack Maskell, Expulsion and Censure Actions Taken by the Full

\textbf{J A N U A R Y / F E B R U A R Y 1 9 9 9 ♦ V O L . 5 4, N O . 1}
In the Senate, “censure” is the term used to describe a formal action adopting by majority vote a resolution conveying disapproval of a Senator’s conduct. A censure resolution does not necessarily entail the loss of any right or privilege.\textsuperscript{21} The word “censure” need not be expressly used in a resolution adopted by the full Senate.\textsuperscript{22} In the cases of Thomas Pickering in 1811 and Benjamin Tappan in 1844, the Senate merely stated its finding that the two Senators had violated the rules of the Senate without using any specific term of disapproval.\textsuperscript{23} Other words used in recent decades have been “denounce,” “condemn,” “reprimand,” and “rebuke.”\textsuperscript{24}

A. Congressional Resolutions Critical of Presidential Policies

It is not unusual for one or both houses of Congress—separately or concurrently—to adopt resolutions that criticize presidential actions or policies. Recent examples abound:

1. The House of Representatives this year expressed its disapproval of President Clinton purportedly utilizing resources of the White House Counsel’s Office for personal legal matters.\textsuperscript{25}
2. The House of Representatives passed a joint resolution last year disapproving the certification by President Clinton, pursuant to section 490(b) of the Foreign Assistance Act, with respect to assistance to Mexico.\textsuperscript{26}
3. The House of Representatives passed a concurrent resolution...
in 1996 criticizing public remarks of President Clinton that the House viewed as conveying an impression that he might pardon James McDougal, Susan McDougal and Jim Guy Tucker.27

Expressions of congressional sentiment or judgment on executive policy or individual actions, including those of the President, are neither without precedent nor even especially uncommon.28

B. Congressional Censure of Presidents

Congressional resolutions of disapproval aimed at a particular executive branch official generally are referred to as “censure” or “rebuke” resolutions. Any condemnatory resolution passed by one or both Houses of Congress has the same effect upon the subject of the resolution—it is neither more nor less than a public expression of legislative sentiment that condemns as wrongful certain conduct of the executive branch official.

On no fewer than four occasions, the object of Congress’s condemnation resolution has been the President himself. On each occasion, this “censure” or equivalent resolution has condemned the President for acts in violation of the United States Constitution.

The most frequently cited “censure” of a President is that of President Andrew Jackson. In 1834, the Senate, then under Whig control, passed a resolution criticizing the President for his role in removing funds from the Second Bank of the United States. Jackson had earlier vetoed the re-chartering of the Bank, and after winning re-election sought to remove all federal deposits from it. The President had no statutory authority, however, to do so; only the Secretary of the Treasury possessed that authority. When Jackson’s Secretary of Treasury William J. Duane refused to remove the deposits, Jackson dismissed him and appointed Roger Brooke Taney as acting secretary. The Whigs, asserting that the President could not remove the secretary because the Treasury was responsible to Congress, introduced a resolution that stated: “Resolved, that the President, in the late Executive proceedings in relation to the public revenue, had assumed

27. The resolution stated that the President “should categorically disavow any intention” of granting such pardons. H. Con. Res. 218, 104th Congress, 2d Sess. (1996).

28. Congress has also included the judiciary as the target of such resolutions. See, e.g., H. Res. 186, 100th Congress, 1st Sess. (1989) (expressing “profound concern” over the Supreme Court’s decision declaring that flag-burning is constitutional); H. Res. 591, 105th Congress, 2d Sess. (1998) (resolution introduced expressing dissatisfaction with Supreme Court’s hiring practices with respect to minority judicial clerks).
upon himself authority and power not conferred by the Constitution and laws, but in derogation of both.”

The resolution passed in the Senate by a vote of 26 to 20.

Although Jacksonian “censure” is often cited, the word “censure” is not found anywhere in the text of the Senate resolution. Nor does the resolution attempt to impose any sanctions or call for any action by the President to remedy his alleged wrongdoing. In January 1837, after Jackson’s Democrats regained control of the Senate from the Whigs, the resolution was “expunged” from the “Senate Journal.”

Similar resolutions, citing the President for committing unconstitutional acts, have been passed on three other occasions.

In 1842, the House of Representatives approved and adopted, by a vote of 100 to 80, a report issued by a select committee that found President John Tyler had abused his constitutional powers. The select committee had been convened to report on President Tyler’s veto of numerous bills passed by the opposition Whig party and after Tyler had pledged to certain congressmen that he would support one particular bill, only to veto it after it was passed by Congress. The select committee’s report charged that Tyler’s numerous vetoes nullified the “whole action of the Legislative authority of this Union,” and that he had further violated his pledge to support one particular bill. The report not only criticized Tyler’s “anomalies of character and conduct rarely seen upon earth,” but further found that Tyler’s vetoes had “deprived the people of self-government” and constituted an “abusive exercise of the constitutional power of the President.” The report found that although Tyler’s actions merited invocation of the impeachment process, impeachment was not recommended because “in the present state of public affairs, [it would] prove abortive.”

30. The House never voted on the resolution.
31. Jackson issued a protest two weeks after his censure. He argued that the censure was unconstitutional because the resolution indicated he had committed a high crime, and if that were true, he asserted, he must be impeached, which is the only way provided in the Constitution for Congress to call the chief executive to account, and which would have given him an opportunity to defend himself in the Senate. The Senate refused to “accept” the protest. III J.D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents, 1789–1897, at 69–93 (1900) (hereinafter Richardson, Compilation of Messages)
32. Woodward, Responses of the Presidents 64.
34. Like Jackson, President Tyler issued a formal protest and argued that the House could not
President James K. Polk, in 1848, was charged with starting a war in violation of the Constitution. The House of Representatives debated a resolution to praise Major General Zachary Taylor for his success in the battle of Buena Vista in the Mexican War. That resolution was adopted, but with an amendment offered by Whig opponents of the war, describing it as “unnecessarily and unconstitutionally begun by the President of the United States.”

In 1864, the Senate passed a resolution that condemned President Abraham Lincoln and Secretary of War Edwin Stanton for alleged unconstitutional actions. The resolution, introduced by Senator Garrett Davis of Kentucky, concerned the agreement of President Lincoln and Secretary Stanton to allow Francis P. Blair, Jr., to hold commissions in the Army while also serving as an elected member of the House of Representatives. The agreement permitted Blair to resign his commission temporarily and thereafter take his seat in the House, with an understanding that he could revoke his resignation and return to the field at any time. The resolution condemned the agreement as one that “was in derogation of the Constitution of the United States and not with the power of the President and the Secretary of War or either of them to make.”

C. Congressional Censure of Other Civil Officers

Congress first considered adopting a condemnatory resolution against executive branch officials during the administration of George Washington. Alexander Hamilton, Washington’s Secretary of the Treasury, had become the focal point in a partisan battle over creation of a national bank. To discredit Hamilton, Representative William Branch Giles intro-
duced nine resolutions in 1793 to condemn Hamilton's alleged improper handling of two congressionally authorized loans. 38 The moneys from the loans, one to pay a foreign debt, the second to pay for domestic operations, were commingled by Hamilton despite Congress's instruction that they be kept separate. Although ultimately defeated, the proposed resolutions to censure Hamilton established a precedent.

Congress has exercised its prerogative to criticize other officers of the executive branch by resolutions of censure. In 1822, during the Monroe administration, the House “censured” Major Christopher Van Deventer, the War Department's Chief Clerk, for awarding a construction contract to his brother-in-law, Elijah Mix, who in turn sold a quarter interest in the contract back to Van Deventer. 39

Since 1822, one or both Houses of Congress has attempted on numerous occasions, with varying degrees of success, to express its disapproval of the actions of executive branch officials. Some examples are:

- In 1849, during the administration of President Zachary Taylor, the House added various legislative amendments that criticized Secretary of the Treasury Meredith and Attorney General Johnson for approving the payment of interest on a loan in which Secretary of War Crawford had a direct interest. In addition to the amendments, the House also approved three separate resolutions that found that the interest award was improper. 40

- In 1859, a House investigation of graft in dispensation of Navy contracts exculpated President James Buchanan's Secretary of Navy, Isaac Toucey. A minority of the investigating committee, however, believed that both Buchanan and Toucey deserved the “reproof” of the House and further recommended censure of Toucey for sanctioning gross favoritism. 41

- During the administration of President Abraham Lincoln, in 1862, the House censured Secretary of War Simon Cameron for


40. Woodward, Responses of the Presidents 77-78; Congressional Globe, 31st Cong., 1st Sess., 1340-1360.

alleged graft and for entrusting public money to his lieutenant, Alexander Cummings, who authorized spending $21,000 of government money on straw hats, linen pantaloons, and the purchase of “army supplies” such as scotch ale and selected herring.  

- President Ulysses S. Grant’s Secretary of Treasury, William A. Richardson, was the subject of a censure resolution brought to the floor of the House in 1874 by Representative Charles Foster of Ohio. Richardson was accused of negligent supervision of an alleged corrupt tax collector, John Sanborn. Richardson resigned, however, and the resolution was never voted upon.

- In 1889, a Senate committee found evidence of neglect of duty and abuse of power by local Department of Interior officials who were personally profiting from rulings made under William F. Vilas, the Secretary of Interior for President Grover Cleveland. The Senate report found that the Secretary was “fully responsible” and “censurable” for his subordinate’s conduct.

- In 1892, during the administration of President Benjamin Harrison, a House committee found that the head of the Bureau of Pensions, Green B. Raum, had prostituted his office for private gain and should be removed.

- In 1924, the Senate passed a resolution calling for the resignation of Calvin Coolidge’s Secretary of the Navy, Edwin Denby, who had allegedly agreed to permit the Secretary of the Interior to take charge of certain oil reserves implicated in the Teapot Dome scandal.

III. Sanctions Involving the Agreement of the President

Because Congress cannot unilaterally impose a substantive penalty upon the President short of impeachment without running afoul of the

43. II Allan Nevins, Hamilton Fish: The Inner History of the Grant Administration 708-709, 714 (1936); Woodward, Responses of the Presidents 130.
Constitution’s bill of attainder proscription, several commentators have advocated a negotiated “settlement” involving the President and Congress that could effectively side-step the bill of attainder problem that would be presented by Congress’s unilateral enactment of such a measure.47 A negotiated agreement, the argument goes, would save the country, not to mention Congress and the President, the burden and expense of a drawn-out inquiry where many would be tarnished but little accomplished.48

Perhaps the most frequently mentioned arrangement involves a “censure plus” agreement.49 The President would agree to apologize publicly for certain alleged acts of misconduct in return for Congress’s passage of a resolution that reprimands, rebukes, or censures the President or otherwise expresses disapproval of his misconduct. To emphasize the severity of the matter, the President might agree to pay a fine, to reimburse the Government for a portion of the costs of the investigation, or to make a suitable donation to a charity. Such an arrangement could be evidenced by a written agreement or, though perhaps unlikely, even be the subject of legislation presented to the President for signature.

There is no precedent for such an agreement. In the absence of some form of escrow arrangement (and perhaps even then), enforcement by the Judiciary of the commitment of either Congress or the President would


48. It might be suggested that such an arrangement would necessarily be forbidden by the constitutional doctrine of the separation of powers. As a constitutional matter, we think this is not true. See Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) (“In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v. Nixon, 418 U.S. 683, 711-12 (1974). Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”)

49. See Ford, supra note 47 (proposing that the President submit to public censure in the Well of the House of Representatives); House Judiciary Committee, Hearing on Impeachment, Dec. 9, 1998, Testimony of William Weld (suggesting, in addition to censure, a detailed written report of findings by the Judiciary Committee, a written acknowledgment by the President, and the President’s agreement to pay a fine).
be unlikely. The Supreme Court has declined to review, as non-justiciable, questions concerning impeachment procedures.\(^50\) It would seem no more likely that the courts would arbitrate a dispute between coordinate branches on an arrangement so closely related to the impeachment power.\(^51\)

It is, no doubt, in no small part due to frustration with these complexities that some commentators conclude that if impeachment is not pursued, Congress should attempt no other remedy.\(^52\)

IV. Conclusions of the Committee

The first question that presents itself is whether Congress is permitted any flexibility in its response to an “impeachable offense.” Some commentators have expressed the view that, if confronted with credible evidence of such an offense, the House of Representatives is compelled to impeach.\(^53\) We believe that view is incorrect, and agree instead with those who suggest that the Constitution’s conferral of the “sole power of impeachment” on the House of Representatives, and the inherent nature of that process, convey a latitude for the exercise of political, as well as constitutional, judgment. If the House of Representatives concludes that a President has engaged in impeachable conduct, it has wide discretion to determine whether it would best serve the national interest to impeach; the Senate likewise has discretion to proceed, or not, with a subsequent trial.\(^54\) The manner in which either House of Congress exercises its discre-


51. In the context of any such arrangement, additional issues arise with respect to potential criminal prosecution of the President following his term in office. Whether Congress could lawfully limit such exposure is beyond the scope of this report.


53. See, e.g., House Judiciary Committee Subcommittee on the Constitution, Hearing on the Background and History of Impeachment, Nov. 9, 1998 (hereinafter History of Impeachment Hearing), Testimony of Stephen B. Presser (“Once [the House of Representatives] determines that impeachable acts have been committed, you have no choice—if the Constitution is to function as the framers understood—you must impeach, leaving the decision on removal to the Senate.”); Quayle, supra note 52.

54. Richard Fallon, Three Questions Deserve Consideration, Boston Globe, Sept. 12, 1998 (“Impeachment is a constitutionally available remedy for presidential abuse of office, but impeaching the president is not a constitutional requirement in every case that fits the definition.”); Laurence R. Tribe, How to Bring Clinton to Justice Without Punishing the Nation,
The arguments against any Congressional action other than impeachment begin with the strict constructionist view that, on all matters, Congress’s powers are and must be limited to those enumerated in the Constitution, and censure of a President is not among them. Other scholars, no less intent to explicate the original intent of the Framers, have reached contrary conclusions. Even some who do not take such an absolute view, however, argue that allowing Congress to censure or otherwise take action against a President without the limits and procedures associated with impeachment would weaken the office of the Presidency. The threat of such action, the argument goes, would give unscrupulous members of Congress an unacceptable degree of leverage to impose their will on the President. Implicit in this argument may be a sense that the framers deliberately chose impeachment as Congress’s only option, and they made impeachment and conviction difficult in order to maintain a balance of power among the three branches of government.

Many who support the idea that Congress may act against a President other than by impeachment note that Congress frequently expresses its views—both approval and disapproval—on all manner of subjects, including the President’s actions and policies. Moreover, the historical record reflects that Congress has several times expressed as a body its disapproval of at least two Presidents and a number of other Executive Branch em-

Boston Globe, Sept. 16, 1998 ("the House is not obligated to bring impeachment proceedings simply because presidential conduct might fit within the class of offenses for which impeachment is constitutionally authorized"); History of Impeachment Hearing, Testimony of Matthew Holden, Jr.; Testimony of Cass R. Sunstein; Testimony of Richard D. Parker; Testimony of William Van Alstyne; Testimony of Arthur M. Schlesinger, Jr.; Testimony of Michael J. Gerhardt; Democratic Roundtable, Remarks of Susan Low Bloch (House of Representatives has discretion whether to pursue impeachment); id., Remarks of Laurence R. Tribe (same).

55. See supra notes 50-51 and accompanying text.
56. See supra notes 52-53.
57. See Isenbergh, supra note 6, at 33-34 ("Impeachment lies for a broad range of crimes and, when the crime aims at the state, removal from office is mandatory upon conviction. When the crime aims elsewhere, removal is also possible, but not mandatory, and other penalties, such as censure, or suspension from office, are available.").
58. Lowell Weicker, Let the Process Go Forward, N.Y. Times, Oct. 6, 1998 ("an open invitation for political mischief to be visited on future Presidents whenever Congress disagrees with their policies").
59. See supra, note 54.
ployees without going as far as impeachment.\textsuperscript{60} The thrust of the argument is that, by making impeachment a limited and procedurally difficult remedy, the Framers did not necessarily mean to limit Congress with respect to other options that would not result in the President's removal.\textsuperscript{61} Indeed, a public expression of disapproval by Congress may well be appropriate in circumstances in which Congress, as the surrogate of the people, believes that removal from office is not warranted or desirable.

The question remains whether the Bill of Attainder Clause is offended by a resolution of censure that finds blameworthiness, but imposes no tangible punishment. There are at least two reasons to believe it would not. First, to the extent the individual target of censure may be said to be punished, the injury is solely to reputation. Although it may be keenly felt, an injury to reputation alone is not one that implicates any liberty or property interest sufficient to invoke the constitutional protection of due process.\textsuperscript{62} Second, of the substantial number of congressional censures of executive branch officers,\textsuperscript{63} none has been invalidated as a bill of attainder. As an expression of opinion, however strongly worded, on the policy or conduct of an executive branch officer, a censure resolution does not violate the Bill of Attainder Clause.

Congress actually constrains the executive branch, at least formally, through its enumerated powers, such as the power to impeach and remove civil officers, to withhold approval of Presidential appointments, and to disapprove treaties.\textsuperscript{64} As the historical examples make clear, expressions of congressional censure alone have quite limited, if any, punitive or even historical significance. The examples of Presidents Jackson and Tyler are illustrative. Other than eliciting written protests, there is little evidence of any direct effect on the executive branch. Indeed, the censure of Jackson was physically struck from the congressional record.

\textsuperscript{60} See supra, Part II.

\textsuperscript{61} Iserbergh, supra note 6, at 39 n.1 ("Censure is a possible outcome of an impeachment trial . . ., but Congress can also express disapproval less formally. Or, censure that the President did not contest could be understood as a form of settlement of impeachment proceedings.").

\textsuperscript{62} Paul v. Davis, 424 U.S. 693, 701-10 (1976).

\textsuperscript{63} See supra, Part II.

\textsuperscript{64} Art. I, Secs.2, 4. Informally, of course, Congress may affect executive policy either through actions threatened as a consequence of continuation of or change in Presidential policy or through negotiations centered on individual legislative measures.
It does not follow that congressional resolutions of censure lack real consequences. Presidents Jackson and Tyler each were sufficiently exercised and, presumably, concerned about popular and political reactions to censure to launch vehement responses. To the extent that presidential power rests upon public acceptance of authority in the “bully pulpit,” public censure by Congress may have lasting effects on policy as well as reputation. The absence of formal legal or constitutional sanctions does not remove from censure its serious potential political consequences.

On the basis of the text of the Constitution and the historical record, the Committee concludes that the adoption by either House of Congress (or both) of a resolution that censures the President is permitted under the Constitution.

The more difficult question arises in connection with what we refer to as “censure plus”: any arrangement by which, in addition to censure, the President assumes some obligation or makes some gesture of atonement. Such actions could take a variety of forms, such as the payment of money to reimburse investigative expenses, payment of money to a charity, or an agreement to do or refrain from doing a particular thing. The Committee believes that any such arrangement requires the agreement of the President to satisfy constitutional concerns. Any effort by Congress to impose a “censure plus” arrangement on the President without his consent would violate the Bill of Attainder clause.

Assuming Presidential agreement, however, it is the view of the Committee that the Constitution does not, as a general matter, preclude such an arrangement. As we have previously opined: “Congress may properly impeach and remove a President only for conduct amounting to a gross breach of trust or serious abuse of power, and only if it would be prepared to take the same action against any President who engaged in comparable conduct in similar circumstances.”65 Therefore, Congress should not use the threat of impeachment proceedings, or the termination of proceedings already begun, to induce the President to agree to, or to comply with the terms of, any “censure plus” arrangement unless there appears to be a reasonable basis to launch an impeachment inquiry.

This is not to say that “censure plus” is acceptable only where impeachment also would be warranted. Circumstances may arise which permit reasonable differences of opinion within Congress as to whether particular allegations of misconduct constitute “high crimes and misdemeanors.” Alternatively, in the course of a Congressional impeachment inquiry, facts

65. The Law of Presidential Impeachment, supra note 1, at 156.
may come to light demonstrating presidential misconduct that, although not rising to the level of an "impeachable offense," reflects a disregard for law, civil liberties, the security of the Republic, or other constitutional values. Under such circumstances, Congress might conclude that such conduct warrants condemnation that hopefully will deter similar presidential misconduct in the future. The Committee believes that the Constitution does not forbid resolution of such crises through a voluntary "censure plus" arrangement in these circumstances.

The nature of the Presidential concession Congress may require as part of a "censure plus" arrangement is another issue. The Committee sees no constitutional prohibition against an agreement by the President to reimburse the government for expenses incurred, or to pay money to a particular fund, or otherwise to redress, in his personal capacity, the fall-out from his actions.

A more difficult question arises where the censure plus arrangement involves agreement by the President to do or refrain from doing some act that would otherwise be within the normal prerogative of the Executive. May Congress require, and the President agree, that the President will sign a particular bill without change? Or nominate or appoint only a particular person or category of persons to federal office? Or command the armed forces to undertake or to discontinue a particular mission?

It is the sense of some on the Committee that such an arrangement could effectively require the President, in order to avoid impeachment, to abdicate the duties of his office and to deprive the Republic of its Chief Executive, thereby offending the Constitution's mandate of the separation of powers. Others on the Committee do not share this concern. They argue that the normal give and take of politics permits Congress to use any of its powers, including the power to appropriate funds and the power to override a veto, to extract Presidential concessions. The threat of impeachment, where it would be merited, is an additional device the Constitution grants to Congress to check the President. They argue that, so long as the Presidential participation in a "censure plus" arrangement is voluntary, separation of powers concerns are not presented. The President, they contend, may always refuse to enter into any censure plus arrangement and invite Congress to impeach if it can.

There is no clear consensus within the Committee as to the resolu-

66. See Federalist No. 77 (concluding his review of the office of the President, its powers, and protections from abuse, Hamilton observes that, in addition to formal limitations, the President always would be subject to the control of Congress).
tion of this theoretical debate. It is our sense, however, that Congress should, as a prudential if not a constitutional matter,67 craft any “censure plus” arrangement with a sense of restraint and respect for the respective roles of the branches of government.

The Committee concludes that the Constitution does not prohibit either the censure of Presidential misconduct or an arrangement between Congress and the President described as “censure plus.” In the absence of constitutional restrictions, the use of these sanctions necessarily is governed only by the judgments of constitutional officials in the exercise of their offices. Censure of a President has been an extraordinary and rare event and should remain so. As the historical record indicates, Congress has censured the President only where it believed that the President’s conduct was an abuse of office in ways that would constitute grounds for impeachment. Far from trivial or toothless, Congress’s censure of a President is an extremely serious measure. It should be reserved for conduct where impeachment is at least debatably a justifiable alternative. Even more so, “censure plus” as a device should be reserved for events unresolvable in any other way short of impeachment.

December 1998

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Strengthening School Leadership and School-Level Accountability

Rethinking Principals’ Rights and Responsibilities After Governance Reform

Committee on Education and the Law

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V. CONCLUSION
I. INTRODUCTION

On December 31, 1996, in an effort to create “a governance structure that fosters leadership and accountability, delineates clear lines of authority, and promotes academic excellence,” Governor Pataki signed the School Governance Reform Act (“the Reform Act”), which substantially altered the powers and responsibilities of various actors in the City School District of the City of New York. Under prior law, governance of the mammoth city school system was divided among the City Board of Education (“Board” or “Board of Education”), the chancellor and thirty-two Community School Boards. The Reform Act enhanced the authority of the
chancellor and limited, if not eliminated, most powers of the community school boards. And in one of its most striking aspects, the Reform Act departed from the prior law by recognizing the principal’s role as “the administrative and instructional leader of the school” and bestowing significant new educational and budgetary powers on the position. In consultation with a statutorily mandated school-based council, the principal is now responsible for all aspects of the “day-to-day operation of the school” and functions as the manager of his or her school.4

This new legislative emphasis on principals’ importance as educational leaders, and the need for greater accountability within the New York City school system, is consistent with other efforts to improve education in New York State. Since first issuing the New Compact for Learning in 1992, the New York State Board of Regents has demonstrated its commitment to higher academic standards by, among other things, mandating the Regents diploma for all students. Research consistently suggests that this goal can only be met with a significant, systemic reform. Researchers posit that site-based management, coupled with strong accountability for decision-making, is essential to transform schools to meet higher standards.5

As a school’s building manager, administrator, and instructional leader, the principal has and will continue to play a key role in that reform process.6 With sufficient levels of educational resources, meaningful autonomy over staff and budget matters, and clear incentives to produce high levels of student achievement, principals can be an important catalyst for academic excellence in the system’s worst schools.7 Without effective principals, however, even those schools with dedicated staff will have difficulty reaching higher state and world class standards.

Since the Reform Act’s passage nearly a year ago, critics have charged that the legislation contains no meaningful mechanisms to hold princi-

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4. N.Y. Educ. Law § 2590-i.


6. Id. See also Manhattan Borough President’s Task Force on Education and Decentralization, People Change Schools, p. 39 (1989) (finding that “the single characteristic that sets effective principals apart is that they do not merely react—they act! They are able to figure out what needs to be done in the face of uncertainty, complexity and information overload”).


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pals responsible for improving school performance and enabling their students to meet higher standards. Although the Reform Act permits the chancellor to intervene in schools demonstrating "persistent educational failure" or malfeasance, it does not establish high performance standards or modify the existing discipline process for principals. By continuing to provide negligible consequences for mediocre performance, these critics maintain, meaningful educational reforms remain stymied.

To better understand the ramifications of the Reform Act, the Committee began in August 1997 to examine the role of principals in New York City’s public schools and consider whether existing laws governing the removal and transfer of principals are sufficient to create meaningful school-level performance and accountability standards. During nearly a year of deliberations, Committee members met with and interviewed school officials, principals, community groups, and labor unions, including the Council of Supervisors and Administrators ("CSA"), the principals’ labor union. Throughout this process, the Committee found that principals perform admirably, if not heroically, in a system plagued by inadequate resources and extraordinary student needs. Given their long hours and low salaries—New York City principals receive significantly less pay than their counterparts in the surrounding suburbs—principals should be honored for their commitment to this city's young people.

Nevertheless, precisely because good principals function as managers within our best schools, the report recommends that the Legislature implement an evaluation system which is better aligned with efforts to treat principals as the "administrative and instructional leader of the school." The Committee recommends that the Legislature, state and local policy makers take the following steps:

- Principals’ role as the managers of their schools should be given greater credence by state and local policy makers. Under the new Governance Law, principals will exercise increased con-
control over their local budgets and oversee the effective development and implementation of school-based councils. Principals should be accorded a greater level of decision-making authority and autonomy to ensure that schools function effectively.

- Consistent with our beliefs that principals should be treated as managers, we also recommend that principals be better compensated, receive greater professional support, and, together with school-based councils, receive greater authority over local staffing and budget decisions.
- The statutory probationary appointment of principals should be a five-year period. During this time, principals may be removed from positions without cause.
- The chancellor and superintendents, in consultation with the school-based councils, should be given the authority to review principals according to performance-based standards in the principal’s annual review. Because these standards include objective and subjective criteria geared to evaluate whether the principal is creating conditions which maximize opportunities for teaching and learning, they should be used as the basis of evaluating the effectiveness of the principal in his or her present position. Most principals are doing a very good job under challenging conditions, and the standards will take these efforts into account.
- Community school district superintendents should be permitted to remove principals who fail to meet standards after two or more consecutive evaluations. The principal must be provided with professional development and support after any unsatisfactory evaluation.
- Principals should be provided with a limited right to contest any termination decision before an independent hearing officer to determine whether there is a substantial basis for the superintendent’s decision. The Chancellor should hear any appeals and serve as the final level of the administrative review process. Principals who are removed from a particular school retain their prior tenured position as assistant principal or teacher.

Strengthening principals’ responsibilities, compensation, and evaluation will not, in and of itself, magically transform our public schools. And of
course, unless state officials act to guarantee that all students have sufficient resources and support to obtain a sound education, it will be difficult, if not impossible, for New York City school children to meet the Regents' higher standards set by the Regents and Chancellor Crew. At the same time, the Committee believes that improved school-level accountability is essential to instill greater public confidence in the existing public education system. This public confidence is a critical part of supporting and strengthening the capacity of every school to educate its students to meet the challenges of the twenty-first century.

DISCUSSION
II. THE 1996 REFORM ACT: PRINCIPALS AS SCHOOL LEADERS

A. Research

Researchers studying effective schools have consistently identified principals and school staff, held accountable for outcomes and operating with sufficient autonomy to implement decisions at the school level, as a central part of school systems' efforts to meet higher academic standards. They note that it is frequently the principals' actions, commitment and leadership that enable a school to function as a coherent whole. With appropriate resources, good principals support teachers and enhance effective teaching practices, develop a coordinated curriculum, and create a school climate that supports high expectations for learning and collegial relationships among administrators and faculty. Good principals promote a staff-wide commitment to continuous improvement and promote the adoption of best practices by staff. Researchers have also found that, in order to be effective, principals need meaningful control over budgeting, staffing, scheduling, curriculum, pedagogy and assessment. Efforts to


10. See, e.g., Dale Findley & Beverly Findley, Effective Schools: The Role of the Principal, 63 Contemporary Education 102-04 (Winter 1992) (explaining how effective principals are at the heart of effective schools); Diana Townsend-Buttensholt, Ten Common Denominators of Effective Schools, 72 Principal 40-42 (Sept. 1992); Samuel Kug, Instructional Leadership: A Constructivist Perspective, 28 Educational Administration Quarterly 430, 432 (1992) ("The important role of the school's chief executive in explicitly framing school goals, purposes, and mission cannot be overestimated").

11. See generally Temporary State Commission on New York City School Governance (The Marchi Commission), Governing for Results: Decentralization with Accountability (1991);
hold principals accountable for factors beyond their control has little impact on school performance. These researchers point to parochial and private school systems, which they maintain are successful, in significant part, because they afford principals' and schools' considerable managerial autonomy.12

The importance of the principal's role in school reform was recently underscored by the Educational Priorities Panel's ("EPP") comprehensive study of ten New York City schools that successfully moved off the state's list of failing schools.13 EPP found that successful principals were "hard driving, entrepreneurial, and charismatic" and "relished playing a strong leadership role in their school."14 The report concluded that "just as good generals pay close attention to their soldiers, it could be said that good principals pay close attention to teachers and see their main job as 'managing' teachers not just instruction in the abstract or handling all the tasks that go with operating a school." These successful principals had the autonomy to respond effectively to budgetary and staffing conditions at the local school, communicated a clear sense of the teaching needed to improve instruction, and worked closely with school staff and parents to build strong planning teams to provide continuing direction for the school.15

Deborah Meier, Can the Odds Be Changed? 11 Educational Policy 194-208 at 198 (June 1997); Deborah Meier, Small Schools, Big Results, 182 American School Board Journal 37 (July 1995). See also Karen Haskin, A Process of Learning: The Principal's Role in Participatory Management (April 1995) (on file at Teachers College, Columbia University) (successful implementation of school-based management begins with effective principal leadership).


13. EPP Report, supra n. 7 at 34 see also Linda Darling-Hammond, Charting Learner-Centered Accountability in New York's Schools (1993).

14. Id. at 8.

15. See, e.g., Educational Priorities Panel, The Fourth "R": Rethinking Remediation in the Elementary Schools, (1989) (finding that Title 1 and PCEN regulations foster paperwork and procedures to ensure that services are limited to eligible students, rather than appropriate autonomy, and do not result in educational achievement).
B. The Reform Act

The implications of this research have not been lost on New York policy makers. Although much of the public fanfare associated with the Reform Act has focused on the consolidation of the chancellor’s powers and transfer of many of the community school boards’ powers for the overall operation of the district\(^{16}\) to the community superintendents,\(^{17}\) the Legislature also recognized the essential role principals play in formulating and implementing meaningful educational reform. The Reform Act provides principals, in consultation with community-based school councils,\(^{18}\) with significant new authority as the “administrative and instructional leader[s] of the school.”\(^{19}\) The principal now has explicit responsibility, pursuant to some limitations, to:

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16. Under the Decentralization Law, each community school board had “all the powers and duties . . . with respect to the control and operation of all pre-kindergarten, nursery, kindergarten, elementary, intermediate and junior high schools and programs in connection therewith in the community district” subject to citywide policies. N.Y. Educ. Law §2590-e (amended 1996). The Reform Act revokes this broad authority of the community school boards and substitutes in its place a more limited power and duty “to establish educational policies and objectives.” N.Y. Educ. Law § 2590-e, as amended. The Reform Act further specifies that “the community boards shall have no executive or administrative powers or functions.” Id. Most of these specific areas of authority originally enumerated in § 2590-e have, under the Reform Act, been abolished or transferred to the community superintendents.

17. The superintendent is vested with the specific powers to appoint and define the duties of principals, teachers and other district employees, select textbooks and other instructional materials, retain council, make minor school repairs, operate cafeteria and restaurant programs for students, and submit operating and capital proposals to the chancellor. N.Y. Educ. Law §§2590-f, 2590-r. The community superintendent is also vested with new authority to retain district fiscal officers to monitor school expenditures, id. at §2590-f.1 (i); intervene with any school which is failing educationally or is in a state of uncontrolled violence, where so authorized by the chancellor, id. at §2590-f.1 (r); and take all necessary steps to ensure the integrity of community district operations, consistent with regulations promulgated by the chancellor and the city board, id. at §2590-f.1(g).

18. Principals must, of course, consult with parents, teachers and other professionals. Id. at §2590-h. The school-based management provisions of §2590-h.15 refer to the Regulations of the Commissioner, 8 N.Y.C.R.R.$100.11, which requires the development of school-based councils, but modify at least two specific aspects of the regulations. First, the Reform Act substitutes for the requirement in the Commissioner’s Regulation that the consultation mechanism include equal numbers of parents and school personnel a requirement for a mechanism which “balances participation by parents with participation by school personnel.” Second, the Reform Act describes the participation of parents and school personnel in terms of “advising” the principal, in comparison to the use of the term “participation” in the Commissioner’s Regulations.

1. promote equal educational opportunity for students in the school;
2. make recommendations on staff selection based on the school’s instructional and facility needs;
3. develop school-based curricula and choose texts from lists approved by the chancellor;
4. enhance teacher and staff development, pupil support services, and to support extended day programs and school reform programs;
5. make minor repairs;
6. purchase certain supplies and equipment; and
7. manage and operate the school building and other facilities.

In addition, the Legislature granted principals significant new powers as set forth in the school-based budgeting and expenditure reporting provisions of § 2590-r. In contrast to the Decentralization Law, the Reform Act places decision-making authority concerning budget priorities at the school level with the principal and the local school council, rather than at the community school district level. Principals are responsible for establishing a “collaborative school-based budgeting process,” which is to “involv[e] parents, teachers, other school personnel and, where appropriate, students,” in assessing the educational impact of particular practices or expenditures and modifying practices, as appropriate, to improve student performance.

While a principal’s power at a school is not absolute, the Legislature
suggested that direct involvement by the chancellor and the community superintendent is to be minimal in schools that meet relevant standards and regulations. A proviso at the beginning of § 2590-f.1, for example, states that the community superintendent’s power is “subject in every case to powers devolved to principals and schools consistent with this article.” Consistent with this shift of power at the community school district level, the Legislature also limited the City Board’s oversight over high schools, stating that it “shall not be construed to require or authorize the day-to-day supervision or the administration of the operation of such schools.”

III. IMPLICATIONS OF THE REFORM ACT FOR PRINCIPAL REMOVAL AND TRANSFER

Although it significantly changed and expanded the role of principals, the Reform Act only minimally addressed the consequences of providing autonomy at the school level. To be sure, the chancellor’s power to intervene in local school or district affairs is no longer ambiguous. Under the Reform Act, the chancellor is charged with promulgating standards that define “persistent educational failure.”

If a district or school falls within this definition, the chancellor may mandate district- and school-level corrective action plans and/or ultimately assume joint or direct control of district and school operations.

What remains unclear under the new law is whether these statutory mechanisms increase the chancellor’s ability to require higher levels of performance or quickly remove poor-performing principals. While the Reform Act indicates that principals may be “removed or transferred by the superintendent or chancellor for persistent educational failure of the school or
other cause," the Legislature did not modify other statutes related to the discipline and removal of principals to reflect this new standard. Meaningful accountability for principals is still circumscribed by the disciplinary process set forth in Education Law § 3020-a. To the extent that the chancellor attempts to demand higher performance of principals, he faces many of the same obstacles as his predecessors.

A. The § 3020-a Process and Principal Tenure

Tenure has a long history in New York State. In an effort to maintain adequate, permanent, and qualified teaching and administrative staffs, the Legislature enacted tenure to protect principals from arbitrary political and personal interference. Once they have been selected according to the process prescribed by the chancellor, appointed by the superintendent, served for an appropriate probationary period, and completed the requirements for tenure, principals cannot be removed or dismissed except according to the procedures described in Educ. Law § 3020-a ("3020-a"). The failure of school districts to follow the appropriate statutory procedures and guidelines can result in an automatic grant of tenure.

27. Id. at § 2590-i(2)(a).


29. Pursuant to the Reform Act, the chancellor has promulgated Chancellor's Regulation C-30, which governs the selection of principals. Once they have been recommended by the C-30 committee, itself composed of representative parents, teachers, and other constituent groups, the superintendent appoints and the chancellor must approve a principal for a contractual probationary period of five years. The superintendent of schools (district superintendent) may dismiss a principal at any time during the probationary period, and the principal has an automatic right of appeal. Pursuant to a 1994 agreement negotiated by Chancellor Ramon Cortines, the Community Superintendent can recommend the completion of probation before the end of the contractual five-year probationary period under certain conditions. See Memorandum from Thomas Ryan to Ramon Cortines (January 14, 1994) (on file with the Committee).

30. From October 13, 1992 until June 30, 1994, principals could opt for binding arbitration in lieu of the 3020-a process pursuant to the collective bargaining agreement. This provision...
Committee discussions with board officials, principals, business lead-
ers and community groups suggest that the process for removing a ten-
ured principal is generally complex, requires extensive documentation,
and can last for several years. Grounds for removal are limited to cause
and include, inter alia, unauthorized absence, neglect of duty, conduct
unbecoming of the position or conduct prejudicial to the good order,
efficiency or discipline of the service. In order to initiate the process, the
community school district must file charges within strict statutory limits
and must comply with extensive charging and notice procedures to bring
an employee up on charges. Once charges have been brought, the prin-
cipal may, together with the district’s representative, select the hearing of-
icers from a designated list. During this extensive process, the prin-
terminated on July 1, 1994. See The Collective Bargaining Agreement between the CSA and
the New York City Board of Education, Article VII, J (5-6). The Legislature has subsequently
prohibited any modification of the 3020—a process through collective bargaining. NY Educ.
Law § 3020. We recommend that the legislature continue to maintain the prohibition on
collective bargaining around disciplinary procedures and standards.

31. N.Y. Educ. Law § 2590-j (7)(b). The statute also permits dismissal for a violation of the by-
laws, rules or regulations of the city board, chancellor, or the community board, or any
substantial cause that renders the employee unfit to perform his obligations properly to the
service. These provisions of the statute are, apparently, rarely invoked.

32. A party or individual cannot bring charges under this section more than three years after
occurrence or discovery of alleged incompetence or misconduct, except where the charge
constitutes a crime. N.Y. Educ. Law § 3020-a(1).

33. After the particular district finds probable cause and proffers charges, the principal must
be notified of the charges. Within five days of receiving the charges, the district determines
whether a probable cause exists to bring a disciplinary proceeding against the principal. If the
district decides there is probable cause, it must notify the principal in a written statement
containing the following information: the charges in detail; the maximum penalty the district
will impose if the principal does not request a hearing, or is found guilty of the charges after
a hearing; and a summary of the principal’s rights under this section. Id. at 2.

34. Within ten days of receiving the charges, the principal must notify the district in writing
whether he or she wants a hearing and, where charges concern pedagogical incompetence or
pedagogical judgment, elect to appear before a single hearing officer or a three member panel.
A single hearing officer will hear all other charges.

35. Id. at (c). The district and the principal select a hearing officer from the list of qualified
hearing officers provided by the Commissioner of Education. A hearing panel consists of the
hearing officer and two persons—one selected by the principal and the other by the district.

36. The purpose of the pre-hearing is to: issue subpoenas, hear and decide all motions, hear

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THE RECORD

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The principal can be suspended, usually with pay, pending a hearing on the charges and a final determination by the hearing officer.\textsuperscript{37} At the hearing, the principal may testify on his or her own behalf, retain counsel, and subpoena and cross examine witnesses in his or her defense.\textsuperscript{38} Within 30 days after the hearing, the hearing officer usually issues a written decision that includes findings on each charge, conclusions of law, and the penalty or other action the district must take to comply with the decision.\textsuperscript{39} The principal or district may appeal the hearing officer’s decision to the State Commissioner of Education no later than 10 days after receiving the decision. The filing of an appeal does not delay the implementation of the hearing officer’s decision.\textsuperscript{40}

The practical impact of the 3020-a process is that very few principals are terminated in the New York City system. According to Board of Education staff, documenting charges of incompetence typically takes between two and three years, followed by the lengthy procedural process prescribed by 3020-a. Moreover, the nature of the principal’s position makes collection of this information for termination difficult. Teachers and assistant principals generally do not complain or document principal’s incompetence because they fear reprisal. Superintendents are unlikely to fully monitor principals’ actions and document them appropriately. As a result, charges are filed in only the most extreme situations of mismanagement or incompetence, and do not function as a meaningful way of holding principals accountable for their actions or the academic performance of their students.

\begin{itemize}
\item \textsuperscript{37} The suspension is with pay except in the following cases: if the principal entered a guilty plea; if the principal has been convicted of a felony crime concerning the sale or possession of a controlled substance or drug paraphernalia; or if the principal is convicted of a felony crime involving the physical or sexual abuse of a minor or student. \textsc{Id.} at 2(b).
\item \textsuperscript{38} \textsc{Id.} at 3(c)(i).
\item \textsuperscript{39} \textsc{Id.} at 4. A penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or instead of these penalties, a hearing officer may impose a remedial action, including but not limited to leaves of absence with or without pay, continuing education and/or study, counseling or medical treatment or any other remedial or combination of remedial actions.
\item \textsuperscript{40} \textsc{Id.} The district implements the decision within 15 days of receiving it. If the hearing officer finds the principal not guilty of the charges, the principal retains position with full pay for any period of suspension without pay. The charges are expunged from the record. \textsc{Id.} at 4(b).
\end{itemize}
schools. In the last two years, the Board of Education has filed charges against only eight principals for incompetence.

Furthermore, some critics have expressed concerns about whether provisions in the Reform Act significantly alter the status quo and increase accountability in any measurable way. Under the Reform Act, charges may be filed against principals for “persistent educational failure,” an extremely low performance standard. The chancellor promulgated regulations defining these words in terms of school performance. Unfortunately, even if the courts accept this expansion of the criteria for removal under 3020-a, Board officials believe that any disciplinary procedure will be delayed by a hearing officer’s attempts to fully interpret regulations promulgated by the chancellor defining “persistent educational failure” and by the difficulty in applying them in an employment context.

B. Past Critiques of the Disciplinary Process

Criticisms of the discipline process are not new. In its 1989 report, the Municipal Affairs Committee of the Association of the Bar of the City of New York concluded that the existing accountability system needed to be overhauled for many of these same reasons. According to the Committee, there was universal agreement among education stakeholders—including among principals themselves—that “the school system does not take adequate measures to ensure principal performance and accountability.” In addition to the procedural defects in the system, the Committee criticized the Education Law’s failure to provide the chancellor and other school system administrators with the authority to make “the final and binding determination as to whether the disciplinary charges have been sustained—and, if so, [determine] the nature of the penalty.” The Committee pointed to the independence of hearing panels as a fundamental part of the problem:

The unparalleled authority of the 3020-a panels reflects a system that is not designed to ensure accountability at any level. If principals are to be held accountable for the success or failure of their schools, the school systems’ administrators must be held directly accountable for the performance of their principals. Without the direct authority to determine the outcome of dis-

42. Id. at 765.
ciplinary proceedings, the goal of principal accountability is significantly undermined.\textsuperscript{43}

The Committee speculated that reform of principal tenure is “fundamental” to any effective accountability system.

In 1991, the Senate Committee on Investigations, Taxation, and Government Operations made similar findings in Disciplining School Principals in New York City. Reviewing the prior operation of the 3020-a process, the Committee reached the “inescapable” conclusion that “the school system’s ability to discipline school principals is, for most practical purposes, dysfunctional. There is little in the system to insure either performance or accountability by principals.” (emphasis in the original) The Committee found that the widespread belief that the selection process for arbitration was not impartial, the right of principals to pay and pension credit during the pendency of the 3020-a process increased administrators’ incentives to delay proceedings, and the extensive scheduling delays inherent in a semijudicial process all undercut 3020-a’s effectiveness. The Committee also noted that, contrary to the provisions of Section 75 of the Civil Service Law, the chancellor did not have authority to make determinations of facts or impose penalties in the disciplinary process.\textsuperscript{44}

The current disciplinary system—particularly the placement of disciplinary authority for principals outside of the school system—remains unchanged. And in fact, the Regents’ new emphasis on higher standards for students and schools makes reform of principal tenure more critical than it was eight years ago. The Regents have, for example, mandated the Regents diploma for all students, a significantly more challenging course of study. With sufficient levels of educational resources, meaningful autonomy over staff and budget matters, and clear incentives to produce high levels of student achievement, principals can be an important catalyst for academic excellence even in a systems’ worst schools. The Committee believes that as expectations are raised for students and the system as a whole, it is critical that they also be raised for principals, the single most important person in the collective life of individual schools. The higher educational goals for students are inconsistent with the “persistent educational failure” standard promulgated under the Reform Act. We conclude that, in light of the cumbersome process for review and re-

\textsuperscript{43.} Id. at 776.

mval of failing principals, this standard undercuts efforts to establish the performance standards necessary to ensure high educational achievement in all schools and that authority to make these determinations must be returned—with appropriate due process protections—to the school system.

C. Principal Transfer

The Reform Act has liberalized the chancellor’s and superintendents’ ability to transfer principals to other schools, but whether this is a significant mechanism to enhance school-level performance is not clear. Prior to 1990, principals had the right to remain in their assigned buildings and could not be transferred involuntarily except through the initiation of charges under Education Law § 3020-a.45 In 1990, then-Chancellor Joseph Fernandez secured the right in contract with the Council of Supervisors and Administrators to transfer principals who were failing in particular schools; this was later codified in statute.46 Pursuant to this agreement, the chancellor is empowered, after first consulting with the appropriate superintendent and parents, to transfer principals without their consent from one assignment to another within a community school district, or, with respect to positions directly under the jurisdiction of the chancellor, within the borough.47 Under this process, however, transfers may only be effectuated after a lengthy procedural process. Once the chancellor determines that a principal is ineffective,48 for example, he or she is required to

46. The Legislature modified the law to provide the chancellor with the power to, “On the chancellor’s own initiative, or at the request of a community superintendent, transfer a principal employed by a community school district pursuant to an agreement with the employee organization representing such principals.” N.Y. Educ. Law § 2590-h(25).
47. Agreement Between the Board of Education of the City School District of the City of New York and the Council of Supervisors and Administrators (May 23, 1990)(on file with the Committee).
48. The criteria adopted by the chancellor to identify a principal for possible transfer are primarily school performance data, including: ranking in the lowest 15% of schools, by school level, based on Failure to meet Chancellor’s Minimum Standards, e.g., standardized reading and math scores, attendance and dropout rates for three consecutive years. Only those standards which a school fails to meet for three consecutive years will be considered in generating the ranked list; and/or a pattern of continuous decline in the school’s performance on two or more Chancellor’s Minimum Standards considering annual data for three years. In addition, principal may be considered for transfer if they meet two or more of the following indicators: 1) ranking in the bottom 15% of the schools, by school level, according to staff attendance rates; 2) ranking in the top 15% of the schools, by school level, according to
send a team into the school to conduct an assessment and evaluate school operations and leadership. Only after the chancellor receives the recommendation can he or she transfer the principal to another school or a professional development center for training. The principal must receive a written notice of the decision and be provided with an opportunity for review and appeal.

The Reform Act continues the process established by the CSA’s collective bargaining agreement with the Board of Education. But the Legislature appears to have expanded the chancellor’s power in this regard and provided a second avenue for the involuntary transfer of poor performing principals. Pursuant to § 2590-h(25)'s amended language, the chancellor may transfer principals for the “persistent education failure of the school.” While the principal may appeal any involuntary transfer provision to the City Board, the community superintendent is entitled to assign an interim-acting principal while the appeal is pending. However, as several education officials and outside advocates have indicated, principal transfer is nothing more than a “dance of the lemons,” where incompetent principals are transferred through the system from one school to another. Transfer perpetuates the lifespan of poorly performing principals, rather than improving the effectiveness of existing principals or meaningfully improving school-level accountability.

IV. RECOMMENDATIONS

Based on the Committee’s foregoing analysis, we recommend the following changes to increase school-level accountability in the present system.

A. Recognize Principals’ Managerial Responsibilities and Provide Them with the Appropriate Compensation, Autonomy and Support

As previously discussed, under the new provisions of the Reform Act,
principals have a more managerial role and enjoy broad authority that extends beyond traditional supervisory concerns posited by the original decentralization law. The Reform Act provided clear, policy-making responsibilities for the principals’ performance in their local schools. As the statutorily-defined educational leader of their schools, principals now have the legal responsibility to structure the overall staff, curriculum and educational operation of their schools. The Legislature’s specific decision to link educational and budgetary authority at the local level, in conjunction with the decision to limit the express statutory authority of community school boards, signals a departure from prior institutional arrangement in the schools.

We believe that State and Local officials should act to ensure that principals are provided with sufficient pay and the authority and autonomy necessary to strengthen their managerial role in schools:

1. Increase Compensation

Principals are one of our most valuable resources in the struggle to radically improve education in New York City. Unfortunately, every year many principals leave New York City to lead suburban schools where pay is higher and the challenges are not nearly as great. According to New York: The State of Learning, an annual report published by the New York State Education Department, New York City administrators’ average salary is $61,779, compared with $82,100 in the surrounding suburbs. This salary gap appears to increase for more experienced administrators. Higher salaries, combined with better educational conditions in many of these high spending districts, create a natural incentive for New York City’s best principals to find employment elsewhere. This loss of capable leadership has a tangible effect on efforts to increase academic performance, particularly in New York City’s poorest performing schools.

The Committee has concluded that as the Regents and the chancellor push for higher standards in New York City, it is essential to provide principals with a salary that reflects the magnitude of their responsibilities and provides incentives to outstanding principals to remain in New York City’s school system and embrace the challenge inherent in improving their schools.

51. New York State Education Department, New York: The State of Learning, A Report to the Governor and the Legislature on the Educational Status of the State’s Schools, 65 Table 4.8 (February 1997).
2. Professional Support

In addition, the Committee recommends that state and city officials ensure that principals receive significant new assistance and support. This support is particularly critical for new principals entering the system and those individuals failing to meet performance standards (discussed below). One particularly promising way of providing support and assistance for principals is to set up a system of non-supervisory support and assistance. In this way, principals can honestly evaluate their performance and improve without the direct involvement of their superintendent. Any system adopted by the Board should provide non-supervisory technical assistance, emotional support, creative ideas, problem-solving or other services principals may require from time to time. We applaud past efforts such as the Board’s efforts to create a doctoral incentive program to attract principals to low-performing schools. Under the program, those qualified administrators who make a commitment to serve in low-performing schools receive a scholarship to pursue their doctorate. These efforts need to be significantly expanded. As we have suggested throughout this report, principals are one of our most valuable resources in the struggle to radically improve education in New York City. As we push for higher standards in New York City, it is essential to provide all principals with assistance to reach these standards.

3. Autonomy

Good schools are not the product of some rigid application of factory principles to schools, but result from the unique collaboration between an effective principal, a dedicated staff, involved parents and motivated students. So long as schools are held accountable for meeting higher standards, we believe that the chancellor should place decision-making as close to the classroom as possible. The ultimate promise of the Reform Act is not the centralization of the administration of the New York City Public School system. Rather, the Act’s promise resides in its implicit recognition of a decentralized system of one thousand empowered principals with sufficient authority and resources to meet standards, and its creation of a strong chancellor and community school superintendents who are able to hold them accountable for educating the 1.1 million students in their charge. It is crucial, at this point, to quickly finish putting the building blocks of that system in place, rather than adopting

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52. This change can only be instituted if the Legislature adopts the Committee’s recommendations concerning the principals’ collective bargaining status. See, p. 38 infra.
piecemeal reforms to slowly implement this goal.

We therefore recommend that the Legislature should require the chancellor to promulgate regulations that give principals and their staffs meaningful authority over their schools. In the interim, the Committee believes that it is incumbent on the chancellor to promulgate such regulations, consistent with the Reform Act, for principals to operate their schools semi-autonomously within the broad standards set by the system. Principals' and teachers' effectiveness as school leaders is dependent on their ability to act collaboratively with their staff and have a significant measure of control over budgeting, staffing, scheduling, curriculum, pedagogy and assessment.

For example, the Committee recommends that the Legislature and the chancellor take steps to ensure that, in a manner consistent with existing collective bargaining agreements, the principal and the staff, with the participation of the local school-based council, have the authority to determine criteria and qualifications for filling prospective vacancies, interview applicants and make hiring decisions. Annual evaluations should be performance-based and involve peers.

Our call for recognition of and expansion of this autonomy has potential ramifications under the Public Employees Fair Employment Act, which governs the relationship between public employees and their employers. Pursuant to the Act, commonly referred to as the Taylor Law, principals have the right to organize and collectively negotiate and enter into written contracts concerning the terms and conditions of their employment. While the law excludes “managerial or confidential” employees from its ambit, the Public Employees Relations Board, the administrative entity charged with overseeing the law's implementation, rejected

53. See generally N.Y. Civ. Serv. Law § 200 et seq. The Act covers public employers in New York State including, but not limited to, the state, counties, cities, towns, villages, and school districts. Id. at § 201.6(a). Public employees covered by the Act include “any person holding a position by appointment or employment in the service of a public employer.” Id. at § 201.7(a).

54. Pursuant to Civ. Serv. Law § 201.7, employees will be designated as managerial only if they are: “persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation of or and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).”
an early attempt\textsuperscript{55} by New York City's Board of Education to challenge the collective bargaining status of principals in 1972.\textsuperscript{56} The Committee has

55. Immediately after the Legislature passed the original Decentralization Law and the passage of these amendments to the Taylor Law, the New York City Board of Education unsuccessfully sought managerial designation for 1,200 elementary, junior high, intermediate, special and senior high school principals. PERB rejected the board's contention that principals formulated policy by setting school objectives, implemented measures to achieve them, engaging in conflict resolution among teachers, students and parents, and put educational theory into effective practice. PERB was equally dismissive of the Board's contention that principals meaningfully participated in the development of collective bargaining contracts, had sufficient authority to exercise independent judgment to affect a change in a government's procedures or methods, and had minimal discretion in making teaching and non-teaching assignments and disciplining personnel. The PERB Board acknowledged that schools might "function more effectively if their principals were denied Taylor law rights," but ultimately concluded that the "public policy arguments of the [Board of Education] and the Community Boards raise political questions that are properly addressed to the Legislature." Board of Education of the City School District of New York, 6 PERB ¶ 4017, 4036 (1973).

56. PERB based its decision on the Taylor Act's legislative history, which suggested that it did not wish to "destroy existing employer-employee negotiating units such as principals or other school administrators...." However, PERB has indicated "[t]his [standard] does not mean that represented principals can never be designated as managerial, but rather that their duties and responsibilities must 'conclusively' demonstrate such status before they will be deprived of substantial Taylor law rights." Board of Education of the City School District of the City of New York, 6 PERB ¶ 4017, 4032 (1973). PERB has, for example, held that an administrator with district-wide responsibilities is managerial so long as the individual administrator has significant discretion to establish policy with little or no oversight. See, e.g. Board of Education of the City School District of the City of New York, 17 PERB ¶ 4033 (1984), (finding district director of curriculum managerial because he established the goals, the priorities, and the objectives of the subjects taught at each grade level and he created, implemented, and supervised an alternate educational program in his district for children with special needs); See also In the Matter of Saugerties Central School District, 17 PERB ¶ 4029 (1984) (school district's director of physical education and athletics was a managerial employee where evidence showed that director had district-wide responsibility in formulating educational policy as exemplified by his development of curriculum for district-wide physical education program); In the Matter of City School District of the City of Newburgh, 16 PERB ¶ 4003 (1983) (district's assistant superintendent for curriculum and instruction was managerial employee on basis of his having district-wide responsibility for district's instructional program). But, these exceptions aside, PERB has been generally reluctant to deem school level officials as managerial for purposes of the law. In Dunkirk City School District, 26 PERB ¶ 4042 (1993), the district attempted to designate principals with "super-administrative positions" as managerial. The principals in question directed the District's Head Start program, served as the district's special projects administrator, and administered the district's special education program. PERB refused to designate the position as managerial because these principals obligations were "highly regulated [and] allowed for little or not independent decision-making." Id., at page 40.
concluded, however, that any discussion of modifications to principals rights under the Taylor Law should await full implementation and review of the new school level accountability process described below.

B. Hold Principals Accountable for Meeting High Performance Standards

The Legislature’s decision in the Reform Act both to establish a low standard—“persistent educational failure”—to evaluate principals and to leave the existing disciplinary process intact, undercuts the educational impact of other changes in the governance of New York City’s public school system. Apart for the cumbersome provisions of the existing 3020-a process, the present law simply does not provide the chancellor or the superintendents with the power to hold principals accountable for their performance. We believe that without this power, the chancellor and superintendents will be unable to effect meaningful and widespread change. In fact, these changes in New York City’s governance system, together with the Regents’ efforts to raise standards, make the need to modify the disciplinary process for administrators even more apparent than when the option was first proposed by the Municipal Affairs Committee of this Association in 1989.

In reaching this conclusion to modify tenure, we in no way wish to impugn the vast majority of principals now working effectively throughout the system. These individuals deserve a salary that is commensurate with their enormous responsibilities within the system, greater opportunities for professional development and support, and greater recognition for their efforts to improve teaching and learning in New York City’s schools. The systemic underfunding of New York City’s public schools, make principals’ jobs vastly more difficult, if not impossible. Reform can only succeed when New York State ultimately creates a finance system that targets resources to our most needy schools, provides sufficient capital to maintain a safe physical environment and fully supports high standards.

At the same time, it is critical for the Legislature to increase school-level accountability and better align governance with the demands for performance created by the new high standards set by the Regents and Chancellor Crew. The Committee believes that this proposition necessarily means changing the way principals are evaluated and retained. Whether due to a mistaken initial evaluation and grant of tenure, a simple change in attitude, or the loss of energy and enthusiasm brought about by the difficulties faced in many New York City schools, some individual principals are not effective. We believe that there is no reason to perpetuate the present system at the cost of maintaining ineffective learning environments for the city’s school children. While it remains important to pro-
tect principals from unfair political interference, the present system provides more protection than is necessary to adequately protect principals' rights. Now, even if the system can remove them from a particular school, principals must be transferred to another building or kept on the payroll.

We therefore propose that the Legislature establish a new disciplinary process, separate from the 3020-a process, for school principals to ensure that they can be held accountable for high performance.\(^\text{57}\) We believe that the Legislature that this new disciplinary process should continue to permit the Board to remove principals for gross malfeasance along the lines developed in the 3020-a process.\(^\text{58}\) But this new process should expand the process of evaluation and permit principals to be removed, with some due process rights, if they fail to meet higher performance standards. We therefore propose the following:

1. Fully Evaluate Candidates for Permanent Placement and Extend the Period for Evaluation of Prospective Candidates for Permanent Positions

   The Municipal Affairs Committee noted in 1989 that the chancellor did not always vigorously protect his or her rights in the then-existing removal process. We fear the same is true today. In the next two years, between 500-600 principals will finish their probationary period and will be evaluated for more permanent placement.\(^\text{59}\) While the magnitude of

\(^{57}\) Only 19 other states provide principals with substantive tenure protection for their administrative positions analogous to New York State's. The majority limit this protection for principals to tenure as a teacher if they are terminated as administrators. School administrators in these states serve in their positions according to contracts that are renewable at the will of local school boards. National Association of Secondary School Principals, "A Legal Memorandum: Administrator Tenure Statutes and Other Legislative Protection of Position" 1 (1990).

\(^{58}\) Of course, the Board of Regents have independent authority to certify teachers and administrators, including principals. Principals are required to be certified as a school administrator and supervisor in order to serve as a principal. 8 N.Y.R.C.R. § 80.4. This certification can be removed where "the individual holding [a] certificate has been convicted of a crime, or has committed an act which raises a reasonable question as to the individual's moral character..." Id. at § 83.1. The regulation suggests that the Regents may remove an individual principal's certification and make him or her legally unqualified to hold a principalship, regardless of any tenure rights the principal may retain.

\(^{59}\) While supporting the modification or removal of tenure, the Public Education Association has called on the chancellor to "make a huge impact on the leadership of city schools by stopping failing principals before they get tenure.... [by making it] clear to his superintendents that their own jobs depend on tough, thorough evaluations of the principals in their districts, and, ultimately, on the performance of their schools." The Public Education Association, "Principals on Probation," PEA Alert Vol. 11, no. 1, p. 4.
this staff turnover is extraordinary, it is incumbent on the chancellor and superintendents to make this review as meaningful and thorough as possible. The chancellor and the community superintendents should meaningfully evaluate candidates and take steps to ensure that only those candidates with exemplary records are retained in their positions. The chancellor and the community school superintendents have the most power to demand accountability at this point in the hiring process—we urge them to use it fully and fairly in appropriate cases.60

In addition, we recommend that the probationary appointment of principals should be legislatively mandated for a five-year period—the probationary period established by the CSA’s collective bargaining agreement with the Board—rather than the current statutory term of three years. This longer period permits superintendents and local school councils to better evaluate principals being considered for more permanent employment. During this time period, probationary principals serve at the will of the superintendent and may be removed after an evaluation. Extensive documentation should be kept by the community district superintendent to ensure that only qualified individuals ultimately maintain their position.

2. Modify Tenure to Permit Community School District Superintendents to Remove Principals for the Failure to Meet High Performance Standards with Appropriate Due Process Protection

The Committee believes that the continuing reliance on the 3020-a process for removing poor-performing principals does not establish the type of accountability process necessary to maximize performance or meet higher standards in the public school system. To accomplish these ends, we recommend that the Legislature establish a new procedure for removal of principals for failure to meet high performance standards. The legislature should create a new section of the Education Law which separately addresses principals. This new “§ 3021” process should apply only to principals, replicate procedures for the immediate dismissal of principals for cause, and create a second ground for dismissal based on annual evaluations now mandated by the Reform Act. This addition should specifically permit school officials to remove principals who fail to meet standards

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60. Several members of the Committee expressed concern over the slow pace of the C-30 process for selecting principals. The superintendent may assign an interim acting principal, a necessary step which sometime further delays the selection process and results in unstable school leadership. The Chancellor has taken steps to speed up selection and hiring of a candidate for the position.
after first conducting at least two annual reviews and finding performance unsatisfactory, offering some level of support to the principal during this period, and providing a limited right to appeal any dismissal in a process where the chancellor has final administrative review.


Under the Reform Act, principals are evaluated annually. The Board, with the consent of the CSA, implemented a set of evaluation criteria developed by McKinsey & Company, an independent consultant, in conjunction with principals, community superintendents and union representatives.\(^{61}\) This model envisions a three-step process whereby the principal, in consultation with the local superintendent, develops goals and objectives based on the school's priorities and performance data from the previous year.\(^{62}\) The areas covered by this process include: instructional leadership, organizational leadership, staff development, student support services, and community relations and communication. Each of these performance areas is defined both in terms of concrete activities and subactivities and clear standards for evaluating the performance of each activity.

We believe that this new process provides the basis for developing meaningful evaluation standards for principals under a new disciplinary process. We propose that the chancellor, in conjunction with superintendents, principals, and school-based councils, review these standards to ensure that they are appropriate for use in a review process. Obviously, any standards implemented by the chancellor must be geared to the performance of students under the principal's charge over a reasonable time frame. Criteria should therefore include criteria to assess the "value added" by the principal to the overall performance of the school, i.e. the progress that the school has made to meet standards under the principal's leadership. Any evaluation should also focus on the factors under the principal's control, such as his or her efforts to support teachers and enhance effective teaching practices, to develop a coordinated curriculum with staff, parents, and community groups, and to create a safe and healthy school climate—the necessary conditions for improved student performance. The

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61. On file with the Committee.

62. Performance data includes attendance data, student achievement information for all students, including special education, limited English proficient students, and high school articulation statistics.
criteria for evaluation should be as objective as possible, but should also include provisions for unexpected contingencies such as budget cuts and/or major changes in student demographics.

In addition, we recommend that any high performance standards promulgated by the chancellor should provide a limited amount of discretion to superintendents and school-based councils regarding the types of criteria used in the evaluation.63 These local criteria, which must be consistent with the chancellor’s standards, would permit individual schools to tailor any evaluation to that school’s needs and philosophy. For example, if a particular school is located near a homeless shelter, has a student high mobility rate based on student demographics (not school quality), has a high number of students with disabilities, or is pioneering a unique educational program, the evaluation standards should recognize the unique challenges. Obviously, the superintendent, principal, and local community should mutually agree to any additional standards supplementing the chancellor’s standards. The evaluation should specifically document the level of additional professional development and support provided to principals having difficulty meeting performance goals and standards, particularly if they have received unsatisfactory reviews in the past.

b. School-Based Councils Should be Consulted in the Evaluation Process

Consistent with existing laws, the superintendent should conduct the evaluation and should be responsible for making a final determination regarding the principal’s employment status. Consistent with other provisions of the Act, the superintendent should be required to solicit comments from the councils during the evaluation process. These comments should be reflected in any final documentation produced as part of the evaluation and included in the principal’s file.64

c. Principals Receiving An Unsatisfactory Rating Must be Provided with Professional Support

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63. We recommend that school-based councils be consulted by the superintendent in the development of a limited number of school specific standards to address local conditions.

64. This proposal differs from the model adopted by the Illinois legislature, where the school-based council has exclusive control over hiring process. Unlike Chicago, the community superintendent and the school-based council share the power for selection and evaluation of principals. See Mary O’Connell, School Reform Chicago Style: How Citizens Organized to Change Public Policy, The Neighborhood Works (1991); Donald Moore, Chicago School Reform: The Nature and Origin of Basic Assumptions, Designs For Change Research And Policy Analysis Series No. 7 (1991).
Professional development is an essential element of reform. We believe that all principals should have access to nonsupervisory technical assistance, emotional support, creative ideas, problem solving or other services on an as needed basis. As we have already suggested this is particularly true for probationary principals and any principal who does not meet the performance standards in the annual evaluation. We recommend that these principals must receive additional support and assistance to meet the evaluation standards for the next school year prior to any decision to dismiss them from a particular position. This assistance must be documented by the Superintendent in the principal’s file after any unsatisfactory rating.

d. Community School Superintendents May Dismiss Principals from Their Position after Two or More Unsatisfactory Evaluations

Ultimately, if the principal receives an unsatisfactory review by the community superintendent for two or more years, he or she may be terminated by the superintendent. It is critical, however, that the decision to terminate or demote a principal be based on a fair assessment of performance, rather than arbitrary and capricious decision making by the community superintendent. Principals should be informed by April 1 that they will not have their position renewed for the next school year. In the dismissal notice, superintendents should include documentation describing in detail how the principal has failed to meet performance standards and describing the specific support provided by the district prior to termination.

e. Principals Have the Right to Appeal the Basis for Any Decision to an Independent Hearing Officer and the Chancellor

In order to ensure that principals are provided with a level of due process appropriate to their role as educational managers in their schools, we recommend that the Legislature modify existing due process procedures for principals as follows: Upon receiving notice that they will not be employed by the community school superintendent, principals should have twenty days to appeal the superintendent’s decision to an impartial hearing officer. During this time-frame, the principal should be permitted to submit additional documentation to demonstrate there is not a substantial basis for the superintendent’s decision. This may include evidence concerning conditions beyond the control of the principal that affected performance and/or the superintendent’s failure to provide professional support and development.
After the timely submission of any additional documentation, the hearing officer should review the evaluation and any additional documentation to determine whether there is a substantial basis for the superintendent’s decision. The hearing officer should render a decision based on the record within 30 days. Either the superintendent or the principal may ultimately appeal the hearing officer’s decision to the chancellor within an additional 15 days. The chancellor should then make the final decision to retain or dismiss the principal within 30 days. If the superintendent’s decision is affirmed by the chancellor, the principal should receive the salary and benefits associated with their reversionary rights to their prior tenured position. Any determination of the chancellor should be final and may be appealed to the Commissioner of Education and the courts. The legislature should mandate that appeals to the chancellor must be resolved by the end of the school year.

Ultimately, principals should not have the right to be transferred to other schools or to receive an administrator’s salary or benefits in the absence of securing a new administrative position. If they are dismissed, principals should be permitted to retain any prior tenure rights as assistant principals or teachers within the system upon becoming a principal. Those principals ultimately deemed unsatisfactory as administrators should be permitted to revert to their prior positions at a salary level commensurate with that position and reapply for a principalship at a later date. Administrators are ensured that they have some measure of job security and an opportunity for continuing service in the school system.

V. CONCLUSION

While it is not a panacea, sound governance reform can empower local school communities to improve teaching and learning in every New York City public school. It is clear that accountable and motivated principals will be better prepared to work with teachers and students to improve the quality of education. The Education Committee believes that improving principals’ compensation, holding them accountable for higher standards, and recognizing their managerial responsibilities can promote academic excellence. It is incumbent on the Legislature to effectuate these changes as part of its Constitutional duty to establish a system of schools where all children are provided with the meaningful opportunity to learn.

65. We assume that all principals have served as teachers prior to accepting an administrative position and thus have tenure.
Principals, like other civil service employees, should have ample due process protections and job security. We believe that this report's recommendations protect against the arbitrary or purely economic dismissals of principals. However, if we are ultimately to create schools that respond to the needs of public school children and their parents, principals, in conjunction with school-based councils, must be given greater autonomy over staff and budget matters and must be held directly responsible for their school's operation and performance. Efforts to improve New York City's public school system should not be hampered by outmoded accountability and compensation structures for principals that fail to provide incentives for high performance and consequences for failure.

November 1998
Committee on Education and the Law

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+Dissents from the report
Contributions to Campaigns of Candidates for Surrogate, and Appointments by Surrogates of Guardians Ad Litem

Committee on Government Ethics

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Exhibit B
Contributions to Campaigns of Candidates for Surrogate, and Appointments by Surrogates of Guardians Ad Litem

Committee on Government Ethics

The Committee on Government Ethics of The Association of the Bar of the City of New York conducted a study of the campaign finances of four Surrogate’s Court judges to determine whether there is a correlation between lawyers’ campaign contributions and guardian ad litem appointments. The Committee found that, in two cases, there is an apparent correlation between campaign contributions and such appointments.

This report provides background information regarding guardian ad litem appointments, describes the Committee’s factual findings, and proposes a number of ways to ensure that appointments of guardians ad litem are not influenced, and do not appear to be influenced, by whether a lawyer contributed to the Surrogate’s election campaign. These proposals include (a) establishing a blind or rotating appointment process; (b) requiring that Surrogate’s Court campaigns make separate disclosure to the Office of Court Administration of contributions received from lawyers; and (c) requiring strict adherence to Ethics Opinion 289 of the New York State Bar Association, which provides that judicial candidates should not accept campaign contributions from lawyers who have cases before the Committee.
I. BACKGROUND

Judges of the Surrogate's Courts in New York City are elected to fourteen-year terms. N.Y. Jud. Law § 12(c). There are currently six Surrogates in New York City. The Committee reviewed the campaign finances and appointment practices of four Surrogates in New York City: Manhattan Surrogate Renee R. Roth, whose term runs from 1997 to 2011; Manhattan Surrogate Eve Preminger, whose term runs from 1990 to 2004; Kings County Surrogate Michael H. Feinberg, whose term runs from 1997 to 2011, and Queens County Surrogate Robert L. Nahman, whose term runs from 1991 to 2005.

The Surrogate's Courts have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings pertaining to administration of estates, guardianship of the property of minors, and "such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law." Id. § 12(d).

Many proceedings in the Surrogate's Courts involve minors or persons under a legal disability or, in the case of a trust or estate, beneficiaries whose identity will not be finally determined until some future date. If proceedings with respect to these matters are to be conclusive upon such persons, they must be legally represented. That representation is the role of the guardian ad litem in a judicial proceeding. N.Y. Surr. Ct. Proc. Act & § 404(3) (duties of a guardian ad litem are to represent and protect the interests of persons under disability or unknown beneficiaries). Thus, the role of guardians ad litem is an important and substantive one, and the quality of their appointments is of substantial concern to the Bar.

The Current Appointment Process

Part 36 of the Rules of the Chief Judge governs the appointments of a guardian ad litem. A guardian ad litem must be an attorney admitted to
practice in New York State, and cannot be a family member or relative of the judge. 22 N.Y.C.R.R. Part 36.1. In addition, no person may receive more than one appointment within a 12-month period for which the compensation is anticipated to be in excess of $5,000, except where the appointing judge determines that unusual circumstances of continuity of representation or familiarity with a case require an appointment for which compensation would exceed that amount. In such event, the judge must set forth in writing the reason for the exception. 22 N.Y.C.R.R. Part 36.1(c).

A guardian ad litem is entitled to receive a reasonable compensation in such proportion as directed by the Court. (SCPA & sect405). Compensation is payable from the estate, from the person under disability or from both, as the court directs.

Part 36.2(a) requires the Chief Administrator of the Courts to review applications from attorneys seeking such appointments and to maintain lists of applicants for appointment for use by the appointing judges. The lists maintained by the Chief Administrator are to contain information that will apprise the appointing judge of the applicant’s background and “may be differentiated by the type of appointment and area of special expertise.” The list of potential appointees maintained by the Chief Administrator includes information regarding degrees, licenses, area of practice or specialization, number and types of prior appointments, and whether or not the attorney has attended any court or bar association-sponsored programs relating to duties of any Part 36 appointee or related topics.

3. In determining the amount of the guardian ad litem’s compensation, several factors are relevant, including the resultant benefit to the estate, time expended, character of the service, complexity of the case and size of the estate. The method of fixing the fee is considered to be similar to the method for fixing counsel fees.

4. Surrogate Preminger has promulgated procedures for appointment of fiduciaries, including guardians ad litem, that call for appointments to be made on a rotating basis from a list she maintains. All attorneys who wish to be appointed as guardians ad litem in matters before Surrogate Preminger must submit an application for appointment. In order to be eligible for appointment an attorney must: 1) be on the list maintained by the Chief Administrator; and 2) agree to accept pro bono assignments relating to Surrogate’s Court matters. According to Surrogate Preminger’s written procedures, when a matter requires designation of a guardian ad litem, Surrogate Preminger selects an attorney from the first ten names in the rotation. In determining which attorney to select, Surrogate Preminger’s procedures indicate that she will consider the requirements of the appointment, the attorney’s experience and qualifications, and the nature of the attorney’s prior appointments (if any). Attorneys designated for appointments (other than pro bono appointments) are then moved to the end of the rotation. The Committee has not endeavored to study the operation of this system in practice, including the quality of the resulting appointments.
CONTRIBUTIONS TO CAMPAIGNS

Part 36.1(a) provides that the Surrogate may make appointments from the list or appoint someone not included on the list if the Surrogate believes that person is more qualified:

. . . The appointing judge may select the appointee from the list of applicants established by the Chief Administrator of the Courts pursuant to section 36.2(a) of this Part. Except for the appointment of court evaluators, should the appointing judge decide that a person or institution not included on the list of applicants is better qualified for appointment in a particular matter, either because of prior experience with the ward or estate, or because of particular expertise necessary to the case, the judge may appoint that person or institution, and in such instance shall place the reasons for such appointment and the qualifications of such appointee on the record. The appointing judge shall be solely responsible for determining the qualifications of any appointee. (emphasis added)

II. THE FINDINGS OF THE COMMITTEE

The Committee found that the campaign financing and appointment practices of Surrogates Roth and Feinberg give rise to at least the appearance that their appointments of guardians ad litem may take into account whether an attorney made a campaign contribution, and not solely the qualifications of the attorney appointed. The Committee also found that the practices of Surrogate Preminger do not give rise to this appearance. The findings regarding Surrogate Preminger are affected by the fact that the candidate herself contributed 77% of the total funds that her campaign received, thus obviating the need to raise money from those who would seek appointments from the candidate once she was elected. Finally, Surrogate Nahman, who did not face a primary election, but was nominated by the Democratic Party after the winner of the primary withdrew from the race, raised and spent less than $1,000 on his campaign. As a result, his campaign was not required to file itemized campaign finance disclosure statements with the Board of Elections.

The Committee's analysis focused on two numerical calculations. First, the Committee determined the percentage of appointments the Surrogate made to campaign contributors once fund-raising began. If a high percentage of appointments were given to campaign contributors,

5. Surrogate Preminger’s campaign committee raised $599,589, of which $463,310 was provided by the candidate herself.
there is at least an appearance that appointments were influenced by the appointees’ contributions or the possibility of receiving such contributions, and not the best interests of those to be represented by the appointee.

With respect to Surrogates Roth and Preminger, the Committee also calculated the percentage of the total campaign funds raised that were contributed by lawyers who later received appointments and, in the case of Surrogate Roth, lawyers who had received appointments during her first term in office. (This analysis was not done for Surrogate Feinberg, because he has been on the bench a relatively short time and therefore has not yet made enough appointments for such an analysis to be meaningful.) If a campaign was heavily reliant on contributions from appointees, it gives rise to the appearance of a quid pro quo. On the other hand, a campaign that did not rely substantially on contributions from appointees might have little incentive to make appointments on the basis of a contribution. This analysis is complicated by the fact that many Surrogate’s Court practitioners may contribute to the campaign of a highly qualified but impecunious candidate because of the candidate’s merits and without the expectation or purpose of increasing the chances of receiving a guardian ad litem appointment. That fact, does not, however, eliminate the appearance of favoritism created by an appointment to a lawyer who has made a campaign contribution.

A. Surrogate Roth

• From the time Surrogate Roth’s campaign committee began fund-raising on December 20, 1995 through February 24, 1998, 66% of her appointments went to individual campaign contributors or individuals who work for law firms that made campaign contributions.6

• 38% of the funds received by her campaign committee were contributed by attorneys who received appointments or attorneys who work for law firms that received appointments.

B. Surrogate Preminger

• Through November 9, 1997, 9% of Surrogate Preminger’s appointments went to campaign contributors.

6. The analysis does not include contributions made by those who are closely associated with the appointee, e.g., other members of the law firm with which the appointee is affiliated and immediate family members of the appointee. If the Committee were able to identify these relationships and include contributions from those closely associated with an appointee, the percentage might well be much higher. The unavailability of such information underscores the need for more detailed reporting, as we recommend below.
C. Surrogate Feinberg

- Through February 6, 1998, 54% of Surrogate Feinberg’s appointments went to campaign contributors or individuals who work for law firms that made campaign contributions.

Press Reports

In addition to the findings of the Committee, the press has reported that Surrogates in Brooklyn and Queens have made appointments based on political connections and campaign contributions rather than merit. Those reports may well be erroneous in whole or in part. The number of such reports nevertheless highlights the importance of assuring that appointments are not, and do not appear to be, influenced by contributions.

III. PROPOSALS

The Committee has identified a number of possible ways to reduce the appearance and/or actuality of a quid pro quo between contributions and guardian ad litem appointments. These proposals include the following:

a. eliminating the discretion of Surrogates in making guardian ad litem appointments and instituting a blind or rotating appointment process;

b. establishing a detailed reporting system for campaign contributions and fund-raising by lawyers; and

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7. As noted on page 4, because of the relatively short period of time that Surrogate Feinberg has been on the bench, there is insufficient data as to the percentage of total fund-raising attributable to lawyers appointed as guardians ad litem by the Surrogate.

c. strictly enforcing New York State Bar Association Ethics Opinion 289 (1973), which states that a candidate for a trial court should not knowingly accept campaign contributions from lawyers who have cases before the candidate and that no lawyer should contribute to the campaign of any candidate for a trial court before which the lawyer has a pending case.

There is always a potential conflict of interest when a lawyer contributing to a judge's campaign represents an interest before a judge. However, the potential for conflict is increased when the judge, and not the client, selects the lawyer who is to serve as a party's representative. This appointment power presents an opportunity for patronage. This report focuses on the potential problem inherent in the Surrogate's appointment power. A blind or rotating appointment process described below directly addresses this potential problem, but requires careful management by the Office of Court Administration to avoid inappropriate and/or inefficient appointments. The proposals regarding disclosure of campaign contributions and enforcement of the New York State Bar Association Ethics Opinion 289 (1923) will also assist in reducing the instances of real or apparent impropriety when a lawyer makes a contribution to a candidate for Surrogate.

A. Blind or Rotating Appointment Process

One way to prevent favoritism or unfairness and the perception of impropriety would be to establish a rotation or blind system for appointments of guardians ad litem. Under such a system, appointments would be made in rotation from the list of those eligible for such appointments. Surrogates are not now required to make an appointment from the list maintained by the Chief Administrator and may deviate from the list if they determine that making an appointment from the list would be inappropriate in a specific case.

However, if a blind rotation system is to be adopted for guardian ad litem appointments under which the Surrogate did not have discretion in choosing the attorneys for appointment, a mechanism must be devised to deal with the fact that not all attorneys are qualified to administer a

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9. In addition to appointing a contributor as guardian ad litem, other forms of favorable treatment could include awarding higher compensation for the appointment, moving a case more expeditiously or making advantageous procedural rulings.

10. See proposed rule annexed as Exhibit A.
particular estate or represent a person under disability. For example, administration of certain estates requires expertise in a particular area of law such as tax or intellectual property. Different categories of applicants would need to be designated; an impartial, reliable and accountable screening procedure to certify attorneys for appointment would have to be developed; and the quality of the representation would have to be closely monitored by the Chief Administrator. Under Part 36.2, the Chief Administrator already has the authority to maintain lists of applicants available for guardian ad litem appointments “differentiated by type of appointment and area of special expertise.” The Committee believes that in no event should Surrogates be involved in determining who is placed on which list of attorneys eligible for appointments.

B. Disclosure of Campaign Contributions and Loans by Lawyers

The public can review basic campaign finance information of candi-

11. While the criminal courts Assigned Counsel Plan might arguably serve as a possible model for such a system, there are some distinguishing factors and the quality of representation afforded by 18-B assigned counsel has been criticized from time to time. Article 18-B of the County Law requires each County to establish a program to furnish representation for indigent defendants in criminal proceedings. This program, known as the Assigned Counsel Plan, includes standards for the selection, designation, performance and professional conduct of individual panel plan attorneys.

In the First Department, there are five different Panels:

- Trial Court Panel
- Felony Panel
- Homicide Panel
- Parole Revocation Panel
- Appeals Panel

In the Appellate Division, Second Judicial Department, a Central Screening Committee maintained by the county bar associations reviews the applications and recommends qualified attorneys to be added to the Panels. The recommendations are forwarded to the Administrator for review and approval. The Appellate Division then designates the panels from attorneys recommended by the Screening Committee and the Administrator.

An Advisory Committee establishes eligibility requirements for selection to each panel. All members of 18-B panels must complete an extensive application and questionnaire about their history, experience and proficiency in criminal law. Requirements include references from colleagues, adversaries, and (for appellate work) judges.

All assignments must be made from the panel list in the order of the next available attorney on the list. The Administrator is required to maintain records to monitor compliance with this requirement.
dates for Surrogate (or any other elected judicial official) through inspection of disclosure forms that must be filed with the New York City Board of Elections ("BOE"). However, because of the potential for conflicts of interest when lawyers make campaign contributions to candidates for Surrogate,\textsuperscript{12} the Committee believes that separate and more comprehensive disclosure should be filed with the Office of Court Administration ("OCA").\textsuperscript{13} The proposed rule (annexed as Exhibit B) regarding disclosure provides as follows:

- A campaign that accepts contributions from lawyers must disclose those contributions separately to the OCA. The disclosure must include the name of the contributor, the date and amount of the contribution, any prior contributions made, and the employer of the contributor.

- A campaign that receives loans from lawyers must disclose to the OCA the name of the lender, the date and amount of the loan, and prior loans or contributions made by the same contributor to the same candidate, and the employer of the lender.

- A campaign must disclose the identity of lawyers who solicit contributions on behalf of the campaign.

- Reporting periods and filing deadlines are concurrent with the periods and deadlines for filings with the BOE, as provided in New York Election Law, Sections 14-110(1)-(2), except for the two weeks immediately preceding the election, during which contributions or loans from lawyers of $500 or more must be disclosed within 24 hours.

- To establish compliance, a campaign that has not made sufficient disclosure would have to show that it made a good faith effort to obtain the required information.

\textsuperscript{12} Although this report focuses on judicial candidates for Surrogate, the Committee believes that the proposed disclosure requirements would be appropriate for all candidates for judicial office.

\textsuperscript{13} This recommendation does not contemplate requiring the OCA to enforce compliance with the disclosure rule. We anticipate that the potential for review by the press and a candidate’s opponent should assure compliance with the disclosure rule. If it does not, sterner measures may be necessary.
Each of these provisions is discussed in greater detail below:

a. Disclosure of contributions from lawyers

State election law requires campaign committees to file with the BOE the name and address of the contributor, and the date and amount of the contribution (and the total of any previous contributions made by the contributor). N.Y. Elec. Law & sect 14-104. However, the forms do not elicit employer information or the occupation of the contributor. As a result, the public has no way of knowing whether a particular contributor is a lawyer or the identity of the law firm with which the contributor is affiliated. The Committee believes that the identity of the contributors, employer and occupation is an important aspect of disclosure for all contributors, but it is especially important in the case of lawyers and law firms because of the authority a Surrogate has to “reward” a lawyer (or a lawyer’s firm) with an appointment and because of the possibility that a matter before the Surrogate will receive favorable treatment based on a lawyer’s contribution. We note that the New York City Campaign Finance Board requires candidates participating in the City’s Campaign Finance program to disclose this kind of information, and computerizes the information for easy public access.

Making this information easily accessible serves a number of important purposes. Firstly, it is a deterrent to any quid pro quo arrangement. If the press and public have easy access to contribution information, judges are more likely to adhere to the highest ethical standards. Secondly, the data that would be disclosed under the proposed Rule will help voters form an educated opinion about the candidate. Some voters may look favorably on candidates who do not accept contributions from lawyers, perceiving that that candidate would not “owe favors” to those contributing lawyers. Finally, if our recommendation for a blind appointment process is adopted, disclosure will allow for effective monitoring of compliance with the Rule.

b. Disclosure of loans

Like a contribution, a loan to a political committee that, for instance, assists the campaign in getting off to a fast start, or provides funds at a critical moment, can have the effect of giving the lender undue influence over the candidate. Moreover, a committee could receive an infusion of funds from a lawyer prior to the election and disclose it as a loan with the BOE even though the lender forgives the loan after the election, effectively making the transaction a contribution. Accordingly, without a re-
requirement that loans be reported, the public would not be aware of an infusion of funds from a lawyer that may end up being a large contribution. The rule, of course, also provides for disclosure when the campaign pays back the loan. Loans are therefore included in the definition of “Political Contribution.”

c. Disclosure of solicitors
By being responsible for the campaign receiving funds, lawyers who solicit contributions on behalf of a campaign for Surrogate can exercise undue influence over the candidate in the same way that a contributor can. Therefore, the proposed rule provides for disclosure of the name and employer of the solicitor, and the date and amount of money the lawyer solicited for the campaign, as well as any previous amounts that the lawyer solicited. This rule, also, is derived from the requirements of the New York City Campaign Finance Board for those who “bundle” (i.e., solicit and deliver) contributions.

d. When data must be disclosed
To ease the administrative burdens that will be placed on campaigns, the rule provides that the reporting periods and the deadlines for filing should be the same as under State law. N.Y. Elec. Law & sect14-110 subd. (1) and (2). However, the last filings before the primary and general elections cover periods that end two weeks before the election day. Eventually, data concerning subsequent contributions is required to be disclosed under State law, but not until after the election. The Committee agrees with the New York City Campaign Finance Board that it is important for voters to have access to information about contributions and loans that are received in the two weeks prior to the election. Due to the administrative burden that this disclosure may impose on campaigns, the proposed Rule requires this disclosure only for contributions and loans received of $500 or more. After election day, routine disclosure deadlines pursuant to State law resume.

e. Good faith exemption
Campaigns are required to make a good faith effort to obtain and disclose information as required by the rule. At a minimum, efforts should be made to elicit occupation information with all fund-raising mailings, calling or sending follow-up letters to contributors who have not fully disclosed such information. Campaigns are advised to keep records evidencing these efforts.
C. Strict Adherence to and Enforcement of Ethics Opinion 289 (1973)

New York State Bar Association Ethics Opinion 289 (1973) establishes campaign guidelines for judicial candidates. The guidelines state that a candidate for a trial court should not knowingly accept contributions from lawyers who have cases before the candidate and that no lawyer should contribute to the campaign of a candidate for a trial court before whom the lawyer has a pending case. The relevant text is excerpted below:

3. Solicitation of Lawyers. Contributions may be solicited and accepted from lawyers (including lawyers having cases before, or which may come before, the candidate), provided that the solicitation makes no reference, direct or indirect, to any particular pending or potential litigation. Because lawyers may be “better able than laymen to appraise accurately the qualifications of candidates for judicial office,” it would not be appropriate, given the safeguards (nondisclosure of the donors’ identity and limitation on amount of contribution) contained in the following guidelines, to prohibit solicitation of lawyers who may appear before the candidate. However, contributions should not knowingly be accepted on behalf of a candidate for a trial court from lawyers who then have cases before the candidate. Moreover, no lawyer should contribute to the campaign of a candidate for a trial court before whom the lawyer has a pending case.14 (emphasis added)

This Association of the Bar’s Uniform Judicial Questionnaire asks judicial candidates if they have adhered to these guidelines: “Do you subscribe, and have you adhered, to the campaign guidelines established for judicial candidates by the New York State Bar Association (Published in the New York State Bar Association Journal; Committee on Professional Ethics Opinion No. 289, dated April 27, 1973)? The questionnaire adds: “If you answered this question in the negative, please explain.”

The Committee is of the view that because many cases in Surrogate’s Court are uncontested and involve purely administrative matters, the term “pending case” as used in the opinion as applied to a campaign for Surrogate should be interpreted to mean a contested matter or a matter which the attorney reasonably believes will be contested. The guidelines could

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14. The guidelines provide that “a lawyer should not be considered to be involved in litigation pending before a judge if his firm is so involved but he has not personally participated and does not expect to participate personally in the litigation in any material way.”
be enforced by requiring candidates to return any contribution that is not accompanied by a form on which the donor has checked off a declaration that they have complied with NYS 289 (1973).

If compliance with NYS 289 (1973) were monitored closely and the guidelines were strictly enforced, it would reduce the appearance or actuality of conflicts of interest in the Surrogate's Court.

**IV. THE POWER OF THE NEW YORK STATE ADMINISTRATIVE BOARD TO ADOPT THE PROPOSED RULE**

The New York State Administrative Board of the Courts has the power to adopt the proposed Rule regarding disclosure of campaign contributions, annexed as Exhibit B.

Illustrative of the New York State Administrative Board's ability to reach the conduct of attorneys outside of the courtroom is the manner in which new standards of conduct were enacted regarding the practice of law by matrimonial lawyers. The Chief Administrative Judge of the Courts adopted a new Part 136 of the Rules of the Chief Administrator relating to mandatory “Fee Arbitration in Matrimonial Cases” upon consultation with and approval of the Administrative Board of the Courts. The adopted provisions gave clients in matrimonial actions a right to arbitrate fee disputes under the Rule's framework. Although these provisions regulated out of court conduct, their impact on the ethical standards and the public perception of the profession clearly justified regulation by the New York State Administrative Board of the Courts. Similarly, regulation of the manner in which lawyers and their firms contribute and solicit political contributions while simultaneously seeking appointments from those officials raises equally important issues of proper conduct and public perception which justify promulgation of the proposed rule by the Administrative Board.

Complementary authority to address the proposed rule also rests in the hands of the Appellate Divisions pursuant to &sect 90(2) of the New York Judiciary Law. A court rule incorporating the proposal would bring the proscribed conduct within the definition of “professional misconduct” that forms a basis for discipline under &sect 90(2).

**CONCLUSION**

The Committee believes that these proposals would reduce the appearance and/or actuality of a quid pro quo between contributions and guardian ad litem appointments.
In a different but somewhat related context, this Committee has recommended a two-year ban on acceptance of public finance-related legal work by lawyers who make contributions to public officers or candidates for public offices who retain lawyers for such work. We have considered applying this approach, by means of a ban of some duration on acceptance of guardianships ad litem by lawyers who have contributed more than a de minimis sum to the campaign of the Surrogate making the appointment.

The Committee has concluded that if the reforms proposed by this report are adopted, such a ban should not be necessary. It may be appropriate to consider such a ban if the reforms we have proposed in this report are not adopted, or are adopted but prove insufficient. The appearance of “pay-to-play” by lawyers in making campaign contributions is extremely harmful to the integrity of the profession, whether it is done to secure public finance engagements or guardianships ad litem. We believe that the reforms proposed by this report are tailored to the Surrogate’s Court issues and urge their adoption.

July 1998
Committee on Government Ethics

Joel Berger, Chair

Christopher D. Berner
Susan B. Braver
Ivo G. Caytas
Patricia J. Clarke*
Robert Conrad
George B. Daniels
William A. Delano
Peter M. Dwoskin
Laurel W. Eisner
Francis M. Fryscak
Leo Glickman*
Marcia J. Goffin+

Frank P. Grad
Jeff G. Hammel
William Josephson
Peter J. Kiernan
Paul J. Lightfoot
Eileen D. Millett
Gideon A. Moor
Richard Rifkin
Robert Rodriguez
Gene Russianoff
Kirsten E. Rutnik
Edward C. Wallace

* Subcommittee
+ Abstains
Parts 36 of the Rules of the Chief Judge should be amended to read as follows:

Text that is underlined should be added to the rules
[Text that is in brackets should be deleted from the rules]

Sect 36.1 Appointments

(a) All appointments of guardians, guardians ad litem, court evaluators, attorneys for alleged incapacitated persons (under Article 81 of the Mental Hygiene Law), receivers, persons designated to perform services for a receiver and referees shall be made by the judge authorized by law to make the appointment upon evaluation by that judge of the qualifications of candidates for appointment. The appointing judge [may] shall select as the appointee the next available applicant from the list of applicants established by the Chief Administrator of the courts pursuant to section 36.2(a) of this Part.

* * *

Sect 36.2 Lists of Available Applicants

(a) The Chief Administrator of the Courts shall provide for the application by persons and institutions seeking appointment as guardians, guardians ad litem, court evaluators, attorneys for alleged incapacitated person, receivers, persons designated to perform services for the receiver, and referees. The Chief Administrator shall assemble such applications and shall maintain and make available for use by the appointing judge lists of applicants for appointment.

(b) The lists maintained by the Chief Administrator shall contain such information as will enable the appointing judge to be apprised of the background of the applicants set forth therein. The lists may be maintained by court, county, judicial district, judicial department or combination thereof, and [may] shall be differentiated by type of appointment and area of special expertise.
The Chief Administrative Judge of the Courts, upon consultation with and approval of the Administrative Board of the courts, adopts the following Rule applicable to candidates who run for the office of Surrogate.

1. Purpose and Intent
The purpose and intent of this Rule is to ensure that high standards of professional integrity are maintained, to assist in preventing the appearance and/or the actuality of corrupt practices being exercised by Surrogate by promoting easy access to certain campaign finance information, and to provide information that will assist the voting public in forming an educated opinion about the potential conflicts of interest that are created when a candidate for Surrogate receives Political Contributions from lawyers, law firms and political action committees controlled by lawyers and law firms.

2. Definitions
“Political Contribution” shall mean any gift, subscription, loan, advance, or deposit of money made, directly or indirectly, to a candidate for Surrogate.

“Political Solicitation” shall mean a solicitation directed to any person or entity resulting in a Political Contribution to a candidate for Surrogate.

3. Disclosure of contributions and loans made to, and solicitations made on behalf of, campaigns for Surrogate’s Court judge by lawyers

(a) Public disclosure of all Political Contributions made to, and Political Solicitations made on behalf of, political committees of campaigns for Surrogate by lawyers, law firms and political action committees controlled by law firms or lawyers must be made to the Office of Court Administration in a complete and timely manner, as described in &sect 3(b) and (c) below.

(b) Contents of the public disclosure

(i) Political contributions received from individual lawyers. For each political contribution received from a lawyer, the lawyer's com-
complete name, residential address and employer, and the amount and the date the political contribution was received must be disclosed.

(ii) Political contribution received from law firms. For each political contribution received from a law firm, the law firm’s complete name and address, and the amount and the date the political contribution was received must be disclosed.

(iii) Political Contributions received from political action committees controlled by law firms or lawyers. For each political contribution received from a political action committee, the committee’s full name and address, the complete name and address of the law firm or lawyer that controls the committee, and the amount and the date the political contribution was received must be disclosed.

(iv) Political Solicitations made on behalf of the campaign. The same information about solicitors must be disclosed as if the solicitor was a contributor except that the amount and date of each political solicitation shall not be separately detailed. Rather, the amount the solicitor obtained through solicitations during a particular reporting period shall be aggregated and disclosed as one sum.

(v) Returned Political Contributions. Except under the circumstances described in §3(b)(vi), when a campaign returns a political contribution, it shall disclose the complete name and address of the contributor, the date the political contribution was returned, and the amount being returned. In the case of a lawyer’s political contribution being returned, the lawyer’s employer shall also be disclosed.

(vi) Exception to reporting a political contribution or political solicitation. If a campaign returns a Political Contribution because the contributor or solicitor who solicited the Political Contribution is a lawyer, law firm, or political action committee controlled by a lawyer or law firm within five business days of ascertaining this information, the political contribution or political solicitation need not be separately disclosed to the Office of Court Administration.

(vii) Good faith exemption from liability. Campaigns must make a good faith effort to disclose all the information required by this
Rule. A campaign that fails to disclose the information required by this Rule will not be liable under the Rule if it makes a good faith effort to obtain and disclose the information. Good faith may be demonstrated by requesting the required information on contribution cards, in mailings, or by telephone. Campaigns should keep records evidencing their good faith efforts.

(c) Filing dates and reporting periods.

(i) Filing dates. The public disclosure described in §3(b) above must be made by the same dates for campaign finance public disclosure as required by N.Y. Elec. Law & sect 14-108 subd. (1) and (2).

(ii) Reporting periods. Except as provided in §3(c)(iii), all reporting periods for this Rule shall be concurrent with campaign finance public disclosure reporting periods as provided in N.Y. Elec. Law & sect 14-108.

(iii) Special pre-election public disclosure. Public disclosure of contributions and loans of $500 or greater, and solicitations that lead to contributions of $500 or greater, must be made on a daily basis during the 14 days prior to each election for which the candidate is on the ballot. The disclosure must be received by the Office of Court Administration within 24 hours of the contribution, loan or solicitation being made. All other contributions, loans and solicitations must be disclosed by the first deadline after the election as described in N.Y. Elec. Law & sect 14-110 subd. (1). During these 14 days, if a campaign receives multiple contributions from a single source aggregating $500 or more, then the contribution that causes the total to equal or exceed $500 must be disclosed, and the previous amount contributed during these 14 days must be disclosed. Thereafter, all subsequent contributions from that single source must be disclosed pursuant to this provision.

Application

This Rule shall apply to any Political Contribution made to or Political Solicitation made on behalf of a campaign for Surrogate on or after ____________., 1998.
Formal Opinion No. 1998-1

Attorney Employing Disbarred or Suspended Attorney to Work in Law Office; Aiding Unauthorized Practice of Law

Committee on Professional and Judicial Ethics

**TOPIC:** Attorney employing disbarred or suspended attorney to work in law office; aiding unauthorized practice of law.

**DIGEST:** Attorney may not aid non-lawyer, including disbarred or suspended attorney, in unauthorized practice of law. It is improper for lawyer or law firm to employ disbarred or suspended attorney in any capacity related to practice of law. What acts constitute unauthorized practice is a question of law for Appellate Division.

**CODE:** DR3-101(A); DR1-102(A)(4); EC3-6.

**QUESTION**
Under what circumstances, if any, may an attorney in good standing employ a disbarred or suspended attorney to work in a law office?

**OPINION**
An attorney in good standing is contemplating hiring a disbarred

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lawyer to work in her law office, and is concerned that his activities might result in her violation of the disciplinary rules. She asks what work, if any, it is permissible for him to perform in a law office.

This question poses issues of both ethics and law, ultimately involving the application of DR3-101(A): “A lawyer shall not aid a non-lawyer in the unauthorized practice of law.” See Matter of Mason, 208 A.D.2d 1, 621 N.Y.S.2d 582 (1st Dep’t 1995) (attorney violated “DR3-101 [aiding a nonlawyer in the unauthorized practice of law]”). See also, DR1-102(A)(4): “A lawyer or law firm shall not: ... Engage in conduct that is prejudicial to the administration of justice....” And see, Annotation, “Disciplinary Action Against Attorney for Aiding or Assisting Another Person in Unauthorized Practice of Law,” 41 A.L.R.4th 361 (1985).

Matter of Rosenbluth, 36 A.D.2d 383, 320 N.Y.S.2d 839 (1st Dep’t 1971), observes that “[a] suspended or disbarred attorney holds approximately the same status as one who has never been admitted....” This holding is consonant with Judiciary Law §486, which makes it a misdemeanor for any disbarred or suspended attorney to do “any act forbidden by the provisions of this article to be done by any person not regularly admitted to practice law in the courts of record of this state....” Another part of the same article, Judiciary Law §478, makes it unlawful for anyone not duly licensed and admitted in New York to practice or appear in court other than pro se or to act in any manner that would give the impression he is an attorney.

Consistently with these statutes, in Matter of Gajewski, 217 A.D.2d 90, 634 N.Y.S.2d 704 (1st Dep’t 1995), an attorney was disciplined for allowing a disbarred attorney to affix her name to affirmations included in court papers; and in Matter of Riely, 101 A.D.2d 351, 475 N.Y.S.2d 473 (2d Dep’t 1984), an attorney was punished for “aiding a suspended attorney in the unauthorized practice of law.” See also, Matter of Mainiere, 274 A.D. 17, 80 N.Y.S.2d 31 (1st Dep’t 1948): “Any member of the bar who lends assistance to a disbarred attorney which enables the latter to keep up the appearance of continuing professional standing subjects himself to discipline.” Indeed, in Matter of Takvorian, 240 A.D. 95, 670 N.Y.S.2d 211(2d Dep’t 1998), the court held that even inadvertently aiding a non-lawyer in the practice of law can warrant professional discipline.

Judiciary Law §90(2) requires the Appellate Division to insert in every order of suspension or disbarment that the attorney must “thereafter ... desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee.” Additionally, the order must specifically “forbid ... [t]he appearance as an attorney ... before any court, judge,
By §§603.13(a), 691.10(a), 806.9(a) and 1022.26(a) of the Rules of the Appellate Division, all four Departments also explicitly require disbarred, suspended and resigned attorneys to comply fully with Judiciary Law §§478 and 486, as well as §§479 and 484. The Rules of the First (§603.13) and Second (§691.10) Departments contain additional language requiring such attorneys to “comply fully and completely with the letter and spirit” of the statutes “relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.”

In order to opine whether a lawyer would violate DR3-101 and DR1-102 by aiding a non-lawyer—including a disbarred or suspended attorney—in “the unauthorized practice of law,” it is first necessary to determine whether the disbarred attorney’s contemplated conduct would constitute “unauthorized practice.” See, generally, Annotation, “Nature of Legal Services or Law-Related Services Which May be Performed for Others by Disbarred or Suspended Attorneys,” 87 A.L.R.3d 279 (1978). At least two of our sister bar associations have already dealt with these issues at some length.

In Opinion #92-15, the Committee on Professional Ethics of the Bar Association of Nassau County considered the question of whether an attorney in good standing may employ a disbarred attorney, in the capacity of a paralegal, to handle document drafting, research and organization of files. The Nassau County Opinion noted that notwithstanding Judiciary Law §§478, 486 and 90(2) and DR3-101(A), EC3-6 contemplates that it is permissible for lawyers to “delegate[] tasks to clerks, secretaries and other lay persons” acting under the attorneys’ supervision.

The Committee went on, however, to cite ABA Opinion 1434, unpublished Opinion 7 of the ABA Ethics Committee, and Opinion 666 of the New York County Lawyers’ Association for the proposition that “the statutory and code provisions ... impliedly place greater restrictions upon the ability of a disbarred lawyer from earning a living by use of his or her training and talent and experience than are encountered by non-lawyers generally.” According to the Nassau County Opinion, however, the determination of what paralegals may do is more properly a matter of law beyond the purview of an ethics committee.

N.Y. County 666 (1985) is not as deferential, holding that an attor-
ney may not employ a disbarred lawyer as a law clerk whose functions would include the conduct of pre-trial depositions and the attendance at real estate closings on behalf of the inquiring attorney. The New York County Opinion adhered to the view that “it is clear that the employment by a lawyer or law firm of a disbarred lawyer, in any capacity related to the practice of law is improper.... The danger that an unsuspecting member of the public or even other lawyers may be misled as to the status of a disbarred lawyer who is employed by a law firm is too grave to ignore.” The Committee added, however, that it expressed “no opinion as to whether a disbarred lawyer may be employed in some other capacity such as a process server, messenger, secretary, investigator, etc.”

While concurring in the Nassau County Bar Association’s general view that what constitutes the unauthorized practice of law is itself a question of law and thus beyond this Committee’s jurisdiction, we also agree with the conclusion of the New York County Lawyers’ Association that it is clearly impermissible for an attorney to employ a disbarred lawyer to conduct depositions or attend closings on the attorney’s behalf. We would add, moreover, that the employment of a disbarred lawyer is fraught with ethical peril even with respect to activities that nonlawyers may properly engage in. Courts may reasonably scrutinize such activities and conclude that their performance by a disbarred lawyer poses greater risk to the public than their performance by a nonlawyer.

Indeed, in Matter of Parker 241 A.D.2d 208, 670 N.Y.S.2d 414 (1st Dep’t 1998), the Appellate Division recently held that an attorney had “certainly” violated DR3-101(A) by aiding a non-lawyer in the practice of law “by allowing ... a resigned attorney ... to prepare a contract of sale and appear on the seller’s behalf in order to postpone a foreclosure sale.” Noting that “[w]e are certainly loath to have attorneys improperly delegating their responsibilities as attorneys to non-lawyers and, depending on the circumstances of each case, severe penalties are warranted,” the First Department cited with approval the hearing panel’s analysis of the relevant issues:

In sustaining Charge One, the Panel found that, by authorizing Butler, a resigned attorney, to negotiate, draft and finalize Mrs. Hunter’s contract of sale and affidavit on Oct. 22, 1994, and to appear on her behalf and negotiate and execute the forbearance agreement on Oct. 24, 1994, respondent aided a non-lawyer in the unauthorized practice of law in violation of DR3-101(A). It noted the proliferation of the use of legal assis-
tants in the last two decades and found generally that the appropriate use of legal assistants facilitates the delivery of legal services at reasonable cost in fulfillment of the obligation of lawyers to make legal counsel available to the public. Recognizing that there is no clear cut definition of the unauthorized “practice of law” and the nature and scope of activities appropriately permissible to legal assistants, the Panel found, nevertheless, that “it is clear that delegation of tasks to legal assistants cannot substitute for the personal availability of the lawyer’s experience and judgment to the client.” While surmising that respondent may have been influenced by Butler’s experience as a former lawyer and not doubting that respondent believed he was acting in good faith and appropriately, the Panel did not think that a reasonable lawyer under the circumstances would have been justified in the level of delegation which occurred, even if the ultimate advice would not have been different, and found that respondent “crossed the line between appropriate reliance on an assistant and abdication to a non-lawyer of the lawyer’s responsibility to the client.”

Guidance as to other activities that have been determined to constitute “unauthorized practice” can be found in prior opinions of the Appellate Division. These would include the following:


Matter of Caracas, 171 A.D.2d 358, 576 N.Y.S.2d 293 (2d Dep’t 1991): Attorney disciplined who “allowed an employee,” not admitted anywhere as an attorney, “to consult with a client and to prepare legal papers for the client,” who “was unaware ... that the employee was not admitted to the practice of law.”

Matter of Mason, supra: Attorney “improperly facilitated the practice of law” by allowing non-lawyer to try Housing Court case and another non-lawyer to draft court complaints.

Matter of Mainiere, supra: Attorney disciplined for permitting use of name as counsel in litigation in which disbarred attorney was interested, thereby enabling disbarred attorney to maintain appearance of being engaged in legal practice.

Matter of Nadelweiss, 260 A.D. 89, 20 N.Y.S.2d 773 (1st Dep’t 1940):

1. One lower-court opinion is also cited.
Attorney disciplined for aiding his uncle, in whose law office he was employed, in permitting a disbarred attorney to hold himself out as the uncle and practice under the latter’s name.

*Matter of Lerner*, 270 A.D. 602, 61 N.Y.S.2d 661 (1st Dep’t 1946): Attorney disciplined for allowing disbarred attorney to use office, to hold himself out as entitled to practice law, to interview witnesses and, in certain particular cases, to practice law, and for allowing another disbarred attorney to use his office and his facsimile signature stamp.

*Matter of Sutherland*, 252 A.D. 620, 300 N.Y.S. 667 (1st Dep’t 1937): Attorney disciplined who “permitted and requested” disbarred attorney “to perform the duties of a law clerk on numerous occasions.”

*Matter of Olitt*, 145 A.D.2d 273, 538 N.Y.S.2d 537 (1st Dep’t), cert. denied, 493 U.S. 937, 110 S. Ct. 333, 107 L. Ed. 2d 322 (1989): Suspended attorney may not serve as “house counsel” for company in which he has controlling interest, appear in court for brokerage firm while filing papers in his name, draft contracts for brokerage house, or appear in arbitration proceedings before stock exchange allegedly pro se on behalf of company in which he has interest.


*Matter of Abbott*, 175 A.D.2d 396, 572 N.Y.S.2d 467 (3d Dep’t 1991): Suspended attorney may not “maintain an office ... giving at least the appearance of a law office,” with the building directory and office door designating him as an attorney; may not use letterhead and envelopes designating him an attorney; may not continue to represent clients or attempt to do so; and may not continue to hold clients’ funds in escrow.

*Matter of Koffler*, 236 A.D. 240, 258 N.Y.S. 611 (1st Dep’t 1932): Disbarred attorney held in contempt for representing to trial court that he was an attorney entitled to practice, examining witnesses in case, and testifying as an expert in case while identifying himself as an attorney without revealing disbarment.

*Matter of Markowitz*, 28 A.D.2d 262, 284 N.Y.S.2d 463 (1st Dep’t 1967): Suspended attorney may not represent “sellers, as clients, in two real estate or purchase and sale transactions.”

*Proopis v. Equitable Life Assur. Soc. of the U.S.*, 183 Misc. 378, 48 N.Y.S.2d 50 (Kings Sup. Ct. 1944): Disbarred attorney may not “associate himself with counsel in an examination before trial or any other legal proceeding in which he actively participates in planning and executing the progress...
of the litigation” by his “presence ... so that he may assist and take part in a legal proceeding” as an “actuarial expert” “by giving advice to counsel as the facts, upon which he is an expert, are developed.”

Matter of Israel, 230 A.D.2d 293, 655 N.Y.S.2d 538 (1st Dep’t 1997): Suspended attorney disbarred for “continuing to represent clients and practice law.”

Matter of Ratafia, 268 A.D. 987, 51 N.Y.S.2d 558 (2d Dep’t 1944): Disbarred attorney may not serve as senior law clerk in State Labor Department, examining and preparing contested cases for hearings before referees, disposing of applications for adjournments, initiating investigations, and issuing subpoenas.

Matter of Katz, 35 A.D.2d 159, 315 N.Y.S.2d 97 (1st Dep’t 1970): Suspended attorney may not be employed by a City Marshal, a public official whose work is closely allied with courts and judicial proceedings and whose duties include enforcing court orders.


On the other hand, in Matter of Rosenbluth, supra, a divided court held it permissible for a disbarred attorney to run a calendar watching service. According to the First Department majority, citing various Opinions of the A.B.A. and this Association, among the other “law related activities” that suspended or disbarred attorneys “have been permitted to engage in” are: aiding an attorney in preparing a law book (in which event disbarred lawyer’s name may be used); soliciting lawyers for process serving business to be turned over to a process serving firm; and acting as an investigator or adjuster for an insurance company.

The Court of Appeals has analyzed these issues in Matter of Rowe, 80 N.Y.2d 366, 590 N.Y.S.2d 179, 604 N.E.2d 728 (1992). In discussing the right of a suspended lawyer to publish “a law-related article” on the right to refuse treatment, the court confined “[t]he practice of law” to “the rendering of legal advice and opinions to particular clients” and held the article permissible as an exercise of the First Amendment because it “sought

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2. This case is cited approvingly in N.Y. County 666 for the proposition: “Certain it is that our law rigidly excludes those who have been disbarred from the slightest participation in the work of a lawyer or of his office, to which employment, as a layman, there could not be the slightest objection, were it not for the fact of disbarment.”

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only to present the state of the law to any reader interested in the subject and “neither rendered advice to a particular person nor was intended to respond to known needs and circumstances of a larger group.” The Court of Appeals cited Matter of Rosenbluth, supra, approvingly for the proposition that the Appellate Division in Rowe had “improperly prohibit[ed] him from engaging in endeavors which he could have undertaken had he never been admitted to the Bar in the first place....” The Court of Appeals also held that the suspended attorney could properly use “the letters J.D. following his name,” as “[t]he letters identified him as one who had successfully completed a law school curriculum, not as a member of the Bar licensed to practice law.”

Citing the Second Department’s order in Matter of Wolfram,3 Nass. Co. 92-15 suggested that an adjudication of the question of what a disbarred or suspended attorney may do in a specific instance might be obtained by motion in the Appellate Division. While Rosenbluth won relief in precisely that fashion to enable him to run a calendar watching service, it is noteworthy that, without elucidation, the Second Department denied Wolfram’s motion to allow him “to be employed in a law office as a paralegal, law clerk or legal research assistant.” It is worth repeating that N.Y. County 666 declined to opine on whether a disbarred lawyer might properly be employed by a law firm as a process server, messenger, secretary or investigator; and we concur that only the Appellate Division, on proper application, can decide such an issue or, for that matter, whether there are circumstances in which a disbarred attorney might be able to act as a paralegal while “desist[ing] and refrain[ing] from the practice of law in any form.”

CONCLUSION

It is clearly improper for a lawyer or law firm to employ a disbarred or suspended attorney in any capacity related to the practice of law. What acts constitute the unauthorized practice of law is a question of law for the Appellate Division.

December 1998

3. The correct citation of the order is 11/27/89 N.Y.L.J. 6.
Formal Opinion No. 1998-2

Law Firm Internet Websites, Law Firm-Sponsored Internet Discussion Area; Provision of Law-Related Services Over the Internet; Communication by Unencrypted E-Mail

Committee on Professional and Judicial Ethics

**TOPIC:** Law Firm Internet Websites; Law Firm-Sponsored Internet Discussion Area; Provision of Law-Related Services Over the Internet; Communication by Unencrypted E-Mail

**DIGEST:** A law firm should maintain a copy of its website for at least one year, but need not file a copy with the Departmental Disciplinary Committee. A law firm that establishes a discussion area on its website should exercise caution and vigilance to avoid the establishment of an attorney-client relationship and impermissible advertising or solicitation. A law firm may not pay a fee to an Internet service provider calculated by reference to fees earned by the law firm from the provision of on-line services. A law firm may not post a form for a new customer to request a trademark or copyright search, but may do so for existing clients. A law firm need
not encrypt all e-mail communications containing confidential client information, but should advise its clients and prospective clients communicating with the firm by e-mail that security of communications over the Internet is not as secure as other forms of communications.

**CODE:** DR 2-101(D), (F), (H), (I); DR 2-104(A), (C), (E); Canon 4; Canon 6; EC 2-5.

**QUESTIONS**

1. Does DR 2-101(F) require that a law firm that establishes a website (a) retain a copy of the website for one year, and (b) file a copy with the Departmental Disciplinary Committee for the appropriate judicial department?

2. May a law firm host a listserv-type discussion area on legal subjects?

3. May a law firm pay its Internet service provider for each instance the firm earns a fee from use of its on-line services?

4. May a law firm post a form on its website for new or existing customers to order trademark or copyright searches?

5. May a law firm send confidential client communications by unencrypted Internet e-mail?

**OPINION**

The inquiring law firm ("Law Firm"), which concentrates its practice in the area of intellectual property, is in the process of developing a website that would provide (a) information concerning the firm, as well as general information concerning patent, trademark and copyright law; and (b) certain on-line services, such as trademark searches/interpretations, and applications for trademarks and copyrights, which could be requested by filling out an on-line form. Not only existing clients but also potential new clients are the intended audience for these services. Fees for all services and "appropriate disclaimers" would be clearly laid out. Payment would be accepted via credit card or through the Virtual Bank (an electronic payment system designed for the web).

Among other things, Law Firm specifically inquires whether it would be permissible to pay a fee to the Internet service provider that would be maintaining the website for each instance that Law Firm earns a fee from those on-line services.
Law Firm may also establish a listserv-type discussion area on the subject of general intellectual property and legal issues. Presumably, a reference or link to this discussion area would appear on Law Firm’s website.

PUBLICITY AND ADVERTISING

A law firm website that seeks to interest existing or potential clients in retaining the firm constitutes “advertising” and “other publicity” within the meaning of DR 2-101. Indeed, an appropriately designed web page would appear well suited to “educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel.” DR 2-101(D). Nor, except as noted below, does compliance with DR 2-101 appear to raise any particular difficulties when applied to a website.

PRESERVATION OF ADVERTISING MATERIALS

Law Firm expresses uncertainty as to compliance with the preservation and filing requirements of DR 2-101(F) in regard to a website. DR 2-101(F) provides as follows:

F. If the advertisement is broadcast, it shall be recorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than one year following such transmission. All advertisements of legal services that are mailed, or are distributed other than by radio, television, directory, newspaper, magazine or other periodical, by a lawyer or law firm with an office for the practice of law in this state, shall also be subject to the following provisions:

1. A copy of each advertisement shall be recorded at the time of its

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2. DR 2-101(D) provides in full as follows:

   Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in subdivision © of this section that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.
initial mailing or distribution be filed with the Depart-
mental Disciplinary Committee of the appropriate judi-
cial department.

2. Such advertisement shall contain no reference to the
fact of filing.

3. If such advertisement is directed to a predetermined ad-
dress, a list, containing the names and addressees of all
persons to whom the advertisement is being or will there-
after be mailed or distributed, shall be retained by the law-
ner or law firm for a period of not less than one year fol-
lowing the last date of mailing or distribution.

4. The advertisements filed pursuant to this subdivision
shall be open to public inspection.

5. The requirements of this subdivision shall not apply to
such professional cards or other announcements the dis-
tribution of which is authorized by DR 2-102(A).

With respect to filing of advertisements the rule thus appears to di-
vide advertising into two categories: advertising that is in a form that is
not generally or widely available, such as direct-mail solicitations, must
be filed with the Departmental Disciplinary Committee, while advertise-
ments in media that are generally available—“radio, television, directory,
newspaper, magazine or other periodical”—need not be filed. Where those
advertisements are distributed in broadcast media, which are not the sub-
ject of an easily available permanent record, there is also a requirement
that the lawyer retain a copy for one year.

DR 2-101(F) was promulgated prior to the explosion of the web as a
communications medium. The Committee believes that the rule should
be applied to this new medium in accordance with the rule’s purposes.
While it is possible to read the rule strictly to require that a lawyer’s
website be filed with the Departmental Disciplinary Committee of the
appropriate judicial department, we do not believe that such a reading
comports with the intent or policy of the rule. It does not appear to be
the policy of the rule to require filing of generally available advertising,
and such a filing requirement could be a substantial burden in view of
the ease and frequency with which websites can be amended. Rather,
in the Committee’s opinion, globally accessible, yet individually-ac-
websites are most like broadcast advertisements for purposes of DR 2-101(F), in that they are generally available to anyone with equipment to receive or access them, but can be evanescent and are not widely available in a permanent record. We conclude that lawyer's websites advertising their legal services should be treated like broadcast advertising for purposes of the filing requirement so that no filing should be required by DR 2-101(F). Accord N.Y. State 709 (1998). Cf. N.Y. County 721 (1997) (listing of attorney's name and address on Internet website is a form of directory that need not be filed).

Likewise by analogy to the broadcast provisions of the rule, we believe the Law Firm must retain, for a period of not less than one year, a copy of its website pages, including a copy, for the requisite period, of each version as changes are introduced. Given the rapidly changing technology in this area, the manner of preservation is flexible, as long as it permits review of the contents, including multi-media effects, of the website. For example, preservation may be in the form of a standalone mirror of the website software and files, or in a completely different format, such as a video tape of a demonstration of the website. (If there are no multi-media effects on the website, preservation by simple hard-copy printout would be sufficient for this purpose.)

We do not believe that Law Firm need retain copies of the contents of outside sites linked to its web page. Links to outside sites should, of course, clearly indicate to the web browser that they are not maintained by Law Firm.

INTERNET DISCUSSION AREA

As noted above, Law Firm is considering establishing a listserv-type discussion area. An Internet listserv group or "mail exploder" discussion area basically consists of a list of e-mail addresses maintained such that a single posting (e.g., an e-mail letter, or the text of an article), sent via e-mail to the listserv group, is forwarded, or "exploded," to all of the subscribers of the group. Subscribers may post a response or comment to the group as a whole, or, as is also common, solely to the initial poster for a side discussion. Listserv groups also commonly provide certain archiving,
digesting and key-word searching of postings. In order to subscribe (or unsubscribe) from a listserv group, an individual e-mails the listserv group administrator. Subscription may be automatic upon request, or discretionary with the administrator. Further, depending on the time and inclination of the administrator, a listserv group may be moderated—in which case the administrator reads each proposed posting and subjectively determines whether its content and tone are appropriate for the group, rejecting those deemed unsuitable. In an unmoderated listserv group, responses directed to the group are automatically posted. Because Law Firm has not determined exactly what type of listserv group it would like to operate, we offer only the following general observations as to how the Code of Professional Responsibility may apply to a listserv group.

In general, a discussion area would be most immediately regulated by paragraphs A, C and E of DR 2-104, which provide as follows:

A. A lawyer who has given unsolicited advice to an individual to obtain counsel or take legal action shall not accept employment resulting from that advice, in violation of any statute or court rule.

C. A lawyer may accept employment which results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

E. Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

Ethical Consideration 2-5 is also pertinent to an Internet discussion area:

A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for non-lawyers should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

The dynamics of written legal discussions on the Internet are differ-
ent from those of oral public discussion, in part because the written word is generally given more weight, and may benefit from longer retention and study, than the oral word. Accordingly, if Law Firm does establish a discussion area, substantial caution and vigilance are advised.

Law Firm has noted that “if specific legal advice is sought, we will indicate that this requires establishment of an attorney-client relationship which cannot be carried out through the use of a web page.” While this Committee does not opine on matters of law, we note that this disclaimer may not necessarily serve to shield Law Firm from a claim that an attorney-client relationship was in fact established by reason of specific on-line communications. Caution—particularly given the multi-jurisdictional reach of the Internet—is again advised in this area. See, e.g., Ethics, Malpractice Concerns Cloud E-Mail, On-Line Advice, 11 ABA/BNA Laws. Man. Prof. Conduct 3 (1996). It might be argued that almost any question and answer may in fact constitute legal advice, even if the questioner does not appear to be seeking “specific” legal advice.

Law Firm must be also be cautious that the discussion area not develop into what may be perceived as advertising, cf. N.Y. State 625 (1992) (“A message delivered to the caller of a 900 number constitutes an advertisement if it invites the caller to seek additional services from the lawyer who prepared the message. Such an invitation may be expressed or implied, such as by providing the office telephone number of the lawyer.”), or as an impermissible solicitation.5 We do not believe that the mere hosting of a listserv discussion area by Law Firm conducted in the spirit of EC 2-5 and DR 2-104(C), necessarily implies that the discussion area constitutes an advertisement.

Furthermore, we do not believe that a private communication by Law Firm, as discussion group moderator, to a subscriber who appears to be in need of individual legal advice that he or she should consult an attorney would necessarily transform the entire listserv discussion area into an advertisement, even if the communication was accompanied by informa-

5. Both DR 2-104(A) and DR 2-103(A) prohibit solicitation in violation of any statute or court rule. Section 479 of the New York Judiciary Law, which is thus incorporated by reference in both sections of the Code, states that it is “unlawful for any person . . . to solicit . . . either directly or indirectly legal business.” We are aware that ethical and legal restrictions on solicitation by lawyers have been changing in response to evolving notions of constitutional protection for commercial speech. See, e.g., Peel v. Illinois Attorney Registration and Disciplinary Comm’n, 496 U.S. 91 (1990); Shapero v. Kentucky Bar Ass’n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The present constitutional parameters of §479 are legal questions beyond the Committee’s competence.
tion that would permit the subscriber to contact Law Firm itself. In our opinion, such a communication is analogous to an attorney handing out his card to inquiring persons after a speaking engagement.

However, in communicating that the subscriber appears to be in need of individual legal advice Law Firm should stress that the subscriber ought to consult an attorney, not necessarily Law Firm.

PROVISION OF TRADEMARK SERVICES

Law Firm also proposes to offer services via its website, including trademark and copyright searches. These are services that, in practice, are performed both by intellectual property law firms and by specialized, non-legal, trademark and patent search companies. The New York Code of Professional Responsibility does not contain a provision analogous to Model Rule 5.7 which covers “Responsibilities Regarding Law-related Services.” However, the New York Code of Professional Responsibility has been interpreted in a manner generally consistent with Rule 5.7. See, e.g., N.Y. State 662 (1996):

This Committee has recognized that there are a number of services that can be performed appropriately by both lawyers and nonlawyers. See, e.g., N.Y. State 557 (1984)(tax return prepara-

6. Law Firm is not proposing to set up an independent trademark and patent search company, the establishment of which would be guided by the principles enunciated in a number of opinions over the last two decades, including, e.g., N.Y. State 647 (1993) (attorney/bail bond agent); N.Y. State 636 (1992) (marketing of legal forms by an independent company); N.Y. State 536 (1981) (law practice and financial planning corporation); N.Y. State 493 (1978) (law practice and real estate brokerage business conducted from same office).

7. Model Rule 5.7 provides as follows:

Responsibilities Regarding Law-related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.
Consistent with the foregoing, the Committee has concluded that if an individual accesses Law Firm's website and requests a trademark search, satisfaction of the request would constitute the provision of legal services. In other words, a de facto attorney-client relationship would be established. That relationship, however, would trigger the full panoply of disciplinary rules including the provisions governing the protection of client confidences and secrets, conflicts of interest, fee schedules and the recently adopted conflict check provisions of NYCRR 1200.24. Accordingly, while a non-legal search firm may be free to post a webpage input form for a customer to request a trademark search, Law Firm may not post such a page because Law Firm would not be able to conduct the inquiries needed prior to the establishment of an attorney-client relationship. On the other hand, we see no objection to use of an on-line form by an established client of Law Firm to request a trademark search provided that Law Firm is able to conduct the necessary conflict of interest checks.

Finally, we note that DR 3-102, “Dividing Fees with a Non-Lawyer,” would preclude the Law Firm from paying any fee to its Internet service provider based on fees earned by Law Firm from the provision of on-line legal services.

SECURITY OF COMMUNICATIONS

Based on our present knowledge, we do not believe that communications over the Internet are so insecure as to prohibit an attorney from conducting any legal business whatsoever over it. See N.Y. State 709 (1998); District of Columbia 281 (1998) (although some “early” opinions expressed

8. For example, subsections H and I of DR 2-101 basically provide that a lawyer will be bound by published fee information for a period of not less than 30 days from publication. Insofar as we view publication of a website as a form of continuous publication, a lawyer desiring to change fee schedules would have to give at least 30 days’ notice of the forthcoming change in fee structure to comply with this provision.

9. Since Law Firm has indicated that it does not intend to initiate a lawyer-client relationship over the web, we do not address what type of communications, if any, would be necessary and sufficient for that purpose.
view that unencrypted e-mail violated confidentiality rules, the “prevailing view, which this Committee adopts, is that electronic transmission is in most instances an acceptable form of conveying client confidences even where the lawyer does not obtain specific client consent”). We note that the New York Civil Practice Law and Rules was amended in July to provide explicitly that privileged communications will not lose their privileged character simply because they were communicated “by electronic means.” CPLR § 4547. That does not resolve the ethical question, but is further evidence of a growing consensus that e-mail is a reasonably secure means of communications. Accordingly, the Committee has concluded that a lawyer in most cases is not precluded from making available an unencrypted on-line form for existing clients to request the provision of legal services of the nature discussed here.

As with cellular and cordless telephones, however, it would be advisable for Law Firm to advise its clients and prospective clients that the security of communications over the Internet is not equal to that of other forms of communication that are generally accepted as secure, such as the U.S. Mail, express delivery companies, or the telephone. Cf. N.Y. City 1994-11 (“lawyers should be circumspect...when using cellular or cordless telephones, or other similar means of communication, to discuss client matters, and should avoid, to the maximum reasonable extent, any revelation of client confidences or secrets”). This technologically developing area has attracted the attention of “professional snoopers [who] can exploit ‘sniffer’ software and powerful search engines to find messages of interest.” Confidentiality—Electronic Communications—Practice Guide, ABA/BNA Laws. Man. Prof. Conduct 55:401, 409 (1996). Different levels of security—on the Internet as well as off the Internet—would seem to be appropriate for matters of differing sensitivity. But we do not believe that a blanket prohibition on the use of e-mail for client communications is either necessary or appropriate.

**CONCLUSION**

Subject to the limitations expressed in the foregoing opinion, the Committee answers question 1(a) in the affirmative and 1(b) in the negative; question 2 in the affirmative; question 3 in the negative; question 4 in the affirmative for existing clients but not for new ones; and question 5 in the affirmative.

December 1998
Committee on Professional and Judicial Ethics

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On Tuesday evening, October 27th, the House of the Association was, as is typical, abuzz with activity. Meetings of the Membership Committee, Housing Court Public Service Projects and Council on Public Service were in progress. Hundreds gathered in the Meeting Hall for Part Two of a symposium, "Representing Buyers and Sellers of Residential Property." And in the Stimson Room, Harvard Law School Professor Andrew Kaufman delivered a talk about his book, Cardozo (Harvard University Press), published in May 1998—a mere 41 years after he began it. While pleased that so many lawyers were honing their real estate skills that evening, I was for a moment disappointed that more of the bar had not turned out to hear the fruits of four decades of research on a giant of American jurisprudence. That feeling passed quickly, however, both because it was a delight to hear Professor Kaufman speak about his wonderful book and because the audience, though relatively small, was fully engaged. I left the House of the Association with the feeling, the hope, that it was just a matter of time before word got out, so that even busy practitioners would be reading and enjoying this book.

Endlessly knowledgeable about his subject, Professor Kaufman, following his remarks, patiently answered question af-
ter question though, by now, surely he has heard them all. I was especially pleased with his answer to my question: Did your interest in Cardozo ever flag during the two-score years you worked on this book? Professor Kaufman confirmed what the book evidences: that this project interested him to the very last. There did come a point during the extraordinary evening of October 27 when the good Professor answered one question, "Read the book." I am tempted to take a page from Professor Kaufman's book (there are, after all, 701 of them) and end this essay right now simply by saying, "I loved this book. Read it—and read my extensive review of it in the March 1999 issue of the Harvard Law Review."

Having been invited to write a review for TheRecord, however, I feel I owe the members of the Association a somewhat fuller account of the merits of Professor Kaufman's opus.

You should know at the outset that this is most definitely not beach reading. It's a very serious undertaking: Five-hundred-seventy-eight pages of text, 143 pages of footnotes—the most comprehensive biography ever of Benjamin Cardozo, himself a very serious person. It takes a committed reader to get through the book, but the rewards are tremendous, especially for New York City lawyers. The great Cardozo—worldwide symbol of judicial excellence—is, after all, one of our own. A lifelong Manhattanite, a long time Upper West Sider, Cardozo was a Columbia College graduate, Columbia Law School attendee and then a New York City commercial practitioner for 23 years.

Never before have I read so much about Cardozo the Lawyer—his caseload, his litigation style, his working habits. His solid reputation at the bar served as the springboard for his astonishingly rapid rise through the ranks of the judiciary. After only five weeks on the trial bench, Cardozo was designated as an additional Judge of the Court of Appeals by then-Governor Glynn (at the urging of the Judges of the Court themselves) to help deal with case backlogs. For the next 18 years, Cardozo served as a Judge, and then Chief Judge, of the Eagle Street tribunal. Only with great reluctance did he trade Albany for Washington, after President Hoover tapped him in 1932 to succeed Oliver Wendell Holmes on the bench of the United States Supreme Court.

Just tracing Cardozo's New York City footsteps with Professor Kaufman as your guide is pleasurable. You are bound to find a good deal of common ground with the great jurist. Indeed, the questioning of Professor Kaufman on the evening of October 27th included a discussion of Cardozo's use of the Library even though he was not a member of the City Bar. (The City Bar had spearheaded the movement forcing the resignation of Benjamin Cardozo's father, Albert, from the bench, on charges of corruption, and it is understandable that Benjamin himself chose not to join. He did, however, accept Honorary Membership in 1928.) The Stimson Room consensus seemed to be that Cardozo, often seen browsing among the stacks and retrieving his own books, had Library privileges as a tenant of the Bar
Cardozo, it seems, was somewhat vain about his appearance; he relished the praise of others. He was not ahead of his time in terms of his views of women and minorities. But he was undeniably devoted to the law—to the reasoned resolution of individual cases as well as to the broader evolution of legal doctrines to suit emerging realities. Through his decisions on both the New York State Court of Appeals and the United States Supreme Court, his extrajudicial writings (including, most notably, The Nature of the Judicial Process) and his work as a founding member of the American Law Institute, Cardozo, perhaps as much as any legal mind of this century, helped to shape the legal landscape that surrounds us to this day.

What made him such a great judge? Was it an accident of history—a matter of being on the right court at the right time? Was it his devotion to learning and the law (to the exclusion of many other worldly pursuits)? Was it Cardozo's sterling character? His glorious prose? By providing a wealth of detail about every aspect of Cardozo's life and work, Cardozo convinces the reader that this judge's reputation for excellence is well deserved—and worthy of study and discussion by the post-modern legal community. In short, to quote Professor Kaufman, “Read the book.”

Judith S. Kaye is Chief Judge of the New York Court of Appeals.
New Members
As of January 1999

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### NEW MEMBERS

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### JUDICIAL

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### SUBURBAN

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### NONRESIDENT

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<td>Nicholas E. Tishler</td>
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### LAW SCHOOL GRADUATE

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50-Year Members

We would like to honor the following individuals who have recently completed their fiftieth year as members of the Association.

Frank F. Jestrab
Eugene H. Nickerson
Joseph Morse
Walter Feldesman
William E. Jackson
William T. Matthews
A Selective Bibliography

The Alternative Dispute Resolution Collection of the Library of the Association

The Committee on Alternative Dispute Resolution*

There is a growing interest in alternative dispute resolution ("ADR") as private parties, governmental bodies and courts increasingly utilize mediation, summary jury trial, early neutral evaluation, and other ADR processes, and as attorneys become involved as advocates, participants, and practitioners.

The Library of the Association of the Bar of the City of New York has one of the most comprehensive collections of ADR materials in the City of New York. The Committee on Alternative Dispute Resolution has compiled an annotated bibliography of these materials with the hope that those interested in this dynamic field will find this a helpful guide. The Library's ADR collection continues to grow; consult a librarian for materials not included in this Bibliography.

* COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

Roger M. Deitz, Chair; Paul D. Sarkozi*, Secretary; Kenneth L. Andrichik; Laurie Berke-Weiss; Adam J. Berner*; Peter Bierstock;† Susan B. Braver; Fred Brown; Judy Cohen; Camille

This wide-ranging report on improving the civil justice system includes one chapter (15 pages) that discusses the ABA's role in promoting ADR, ABA-adopted ADR Resolutions and the recommendations of the President's Council on Competitiveness.


  In-depth analysis and description of the ADR programs in each of the 94 federal district courts, including specification of the type of program, case types to the program applies, entry requirements, authorizations to use, and all other procedural aspects of the available process in each court.


  The ABA Standing Committee on Dispute Resolution's summary of ADR opportunities for judges such as summary jury trial, supervised settlement conferences, court-annexed compulsory arbitration, and early neutral evaluation.


  A basic brochure on ADR designed to answer common questions asked by lawyers and judges, such as What is ADR?; What role is there for lawyers in ADR?; Do people compromise their legal rights when ADR is used?; and How are ADR agreements enforced?
BIBLIOGRAPHY

• Alternative Dispute Resolution: An ADR Primer for Judges, American Bar Association, Standing Committee on Dispute Resolution (Washington, DC: American Bar Association, Standing Committee on Dispute Resolution, 1989).

This companion pamphlet to the ABA's basic brochure focuses specifically on questions frequently asked by judges about ADR. Such questions include: What is the relationship between ADR and the courts?; Under what authority do judges refer cases to ADR?; and What ADR processes will help reduce court backlog?

• Alternative Dispute Resolution: Bane or Boon to Attorneys?, Larry Ray, editor (Washington, DC: American Bar Association, Special Committee on Alternate Means of Dispute Resolution, 1982).

The proceedings of a 1981 panel at the ABA annual meeting with a focus on community disputes and an examination of objections to ADR on the basis of compromised confidentiality.


An overview of various ADR processes and court-annexed ADR with some discussion of legal and ethical issues relating to negotiation, mediation and arbitration.


This hearing report consists of statements concerning ADR developments in various federal and state judicial districts.


This hornbook, which offers numerous case citations and cross-references to the West Key-number system, describes the law and common procedures concerning a broad range of dispute resolution methods; provides numerous forms helpful for the ADR practitioner; and offers chapters devoted to disputes in the areas of securities, construction, insurance, intellectual property, labor and employment, and health care.

• The Alternative Newsletter, James Boskey, editor (Newark, NJ: Seton Hall Law School).

Includes listings of new publications, ADR activities, law school based ADR programs and other information of interest to law professors and others in the ADR field.
• Alternatives to the High Costs of Litigation, CPR Institute for Dispute Resolution (New York, NY: Law & Business, Inc., 1983-).

Monthly news journal reporting on ADR developments in the corporate and law firm sectors along with major national developments in courts, case law, ADR theory and practice. Particular emphasis is placed on non-binding ADR processes, including mediation and other facilitated negotiation tools.


Rules for mediation and arbitration of lawyer-to-lawyer disputes with a discussion of the procedure, selection of neutrals, confidentiality, immunity, compensation and ethics.


A cooperative project of the American Bar Association and the National Association of Attorneys General, this volume consists of a series of articles on alternative dispute resolution in Attorneys General’s offices and specific types of mediation (e.g., environmental cases, nursing home disputes, lemon laws). Also included are a list of resources and a bibliography.

• Barriers to Conflict Resolution, Kenneth Arrow et al., editors (New York, N.Y.:W.W. Norton & Co., 1995).

Detailed analysis of the range of barriers to successful negotiation including strategic or tactical barriers arising from the goal of maximizing gain in negotiation, psychological barriers, and structural or organizational barriers such as political considerations, principal/agent authority and bureaucratic issues. Considers the mediator’s role in eliminating barriers.


Promotes the use of negotiated consensus building as a means for citizens to resolve disputes and advance the public good. The author suggests that the long-term savings of such a tool ultimately outweigh the substantial initial costs.

• Building ADR into the Corporate Law Department: ADR Systems Design,
Catherine Cronin-Harris with Mark Haller and Kevin Kreb (New York, NY: CPR Institute for Dispute Resolution, 1997).

Provides a blueprint for corporations interested in developing a systematic program of ADR use to address corporate disputes ranging from consumer to employment to corporate litigation. By synthesizing the practices of 23 leading companies that have fully-developed ADR programs, the volume provides a step-by-step guide to system design while offering options that are effective in various corporate cultures.


A synthesis of the seminal changes wrought at law firms that have emphasized ADR use and details the particular tools and practices that have fostered such use in various firm settings.


A comprehensive sourcebook and guide providing a modern approach to operating a family law office, discussing the issues confronting today's family law practitioner. The author provides a general introduction to mediation and discussion of various models and themes in the field of mediation, and includes practical steps to establish and market a family mediation practice, as well as an overall resource of information for potential practitioners or attorneys with clients in mediation.


A collection of 1) articles on legal issues arising in mediation and arbitration, specifically dealing with disclosure, confidentiality and immunity; 2) sample policies and forms; 3) legal opinions on confidentiality; and 4) briefs and motions on confidentiality.


The report of proceedings to consider H.R. 4541, a bill to authorize assistance to promote the peaceful resolution of conflicts in Africa, stresses the recent ravages of wars in Africa, the long tradition of mediation on that continent, and the funding of non-governmental organizations engaged in mediation outreach efforts.
ALTERNATIVE DISPUTE RESOLUTION

  Materials (descriptive brochure, agreement to mediate, etc.) developed by the Committee on Cooperatives and Condominiums to implement a pro bono project designed to resolve disputes between shareholders and boards.

• Court and Community: Partners in Justice, the Multi-Door Experience, Prudence B. Kestner, editor (Washington, DC: American Bar Association, Standing Committee on Dispute Resolution, 1991).
  An overview of the different procedures and uses of the multi-door courthouse.

• Dispute Resolution, Stephen B. Goldberg, Eric D. Green, Frank E.A. Sander (Boston, MA: Little, Brown, 1985).
  A textbook for basic courses in dispute resolution which covers basic processes and selected applications and includes commentary and simulated exercises on negotiation, mediation and mini-trial.

• Dispute Resolution: a 60-Minute Primer, Alternative Dispute Resolution Committee, American Bar Association Young Lawyers Division (Chicago, IL: American Bar Association, 1994).
  A seven-page pamphlet that describes the types of cases appropriate for ADR and offers summary descriptions of arbitration, mediation, med-arb, mini-trials, and summary jury trials.

  A directory of programs, activities, committees and bar leaders in the field of dispute resolution.

• Dispute Resolution Magazine, ABA Section of Dispute Resolution (Chicago, IL: American Bar Association, 1994-).
  Quarterly periodical that offers several articles devoted to a particular theme (often the ADR topic addressed at the ABA Section on Dispute Resolution’s quarterly meeting), as well as reports about recent ADR cases, articles and events.

• Dispute Resolution Program Directory, American Bar Association (Washington, DC: American Bar Association, Special Committee on Resolution of Minor Disputes of the Public Services Activities Division, 1980-).
BIBLIOGRAPHY

A directory of staff contacts, types of cases handled, procedures, budgets, and fees of ADR programs with a focus on family and community-oriented programs.


A three-page questionnaire designed to elicit the arbitration and mediation experience of those in the construction industry.


A compilation of articles presented at the 1990 Wingspread Conference addressing training and the state of the art of dispute resolution. The articles were written by dispute resolution professionals including practitioners and members of administering agencies, neutral organizations, and the academic community.


Standards of mediation practice presented by ABA Task Force in 1984, containing preamble, standards and commentary.


A collection of some of the classic articles in the field of divorce mediation with specific focus on various law and mediation journals and magazines from 1976-1985, as well as various ethical and professional regulatory opinions and articles from that time.

• A Drafter’s Guide to Alternative Dispute Resolution, Bruce E. Meyerson and Corinne Cooper, editors (Chicago, IL: American Bar Association, Business Section, Committee on Dispute Resolution, 1991).

An overview of ADR procedures and a practical guide for business and corporate attorneys seeking to take advantage of ADR and avoid litigation.

A series of conference papers presented at the “National Conference on Emerging ADR Issues in the State and Federal Courts” focusing on the trends in issues in judicial ADR.


  A series of papers presented at conference proceedings covering the court system, conflict resolution, mediation, training and experience of the mediator and arbitrator, and a discussion of relevant workshops and seminars.


  A compendium of proposed federal statutes and resolutions introduced in the 100th Congress that either directly call for the use of alternative dispute resolution mechanisms, or suggest legal, governmental and judicial reforms in furtherance of such procedures.


  An introductory book on family mediation which is accessible, anecdotal, and specific about what family mediation can do and how it works.

- Fussing About the Forum: Categories and Definitions in Dispute Resolution as Stakes in a Professional Competition About the “Rules of the Game”, Yves Dezalay and Bryant Garth (Chicago, IL: American Bar Foundation, 1995).

  A working paper on professional competition and the process of defining and redefining the categories and institutions of business disputes.


  This book offers strategies for negotiating with people who are angry, unreasonable, deceitful or stubborn.


  A workbook of materials designed to help prepare for negotiation pursuant to the multi-element approach offered in Getting to YES.
  Written for a general audience, this book offers a practical seven-element approach for reaching mutually acceptable agreements in many diverse contexts.

  This sequel to Getting To YES examines the elements of a successful relationship. The book focuses on establishing and maintaining a relationship where the individuals can get what they need, and proposes a method of problem solving whether the relationship is long or short term.

  An annual student-edited journal on dispute resolution including scholarly articles, case comments, legislative development and book reviews. Of particular interest is Leonard Riskin’s “Understanding Mediator’s Orientations, Strategies and Techniques: A Guide for the Perplexed,” 1 Harv. Negotiation L. Rev. 7 (1997), a seminal article exploring the differences between evaluative and facilitative mediators by identifying the types of topics, focus and mode of questioning each uses through a four-quadrant grid.

  The classic treatise on labor arbitration since 1952. Provides discussion and caselaw citation on the full range of arbitration topics including the legal status of arbitration, arbitration procedures, and the use of substantive rules of law.

  A brief pamphlet introducing various dispute resolution processes, outlining ADR advantages and disadvantages, and directing individuals on how to find an ADR process or provider.

  The former president of the American Arbitration Association pro-
vides how-to advice on the use of negotiation and private settlement alternatives to resolve controversies without reliance on the court system. This practical guide presents techniques used by professional negotiators as well as illustrations on settling disputes in common contexts such as family, partnership, and fee disputes.

  A discussion of how to plan, draft, and negotiate ADR procedures in international commercial agreements, with an appendix of forms.

  A draft handbook designed to stimulate trained mediators as to new ways to move international conflict forward to resolution.

- Journal of Dispute Resolution, Center for the Study of Dispute Resolution, School of Law, University of Missouri-Columbia (University of Missouri-Columbia, 1988-).
  A scholarly periodical of articles and notes regarding arbitration, mediation, and negotiation in public and private sectors.

  A compilation of essays on the skills and practical tools needed for successful settlement of family law disputes. The book is divided into several parts, focusing on negotiating style, preparing the client for settlement, opposing counsel, settlement through mediation, and ethics, and provides a bibliography of resources for the lawyer and client.

  In the context of both public and private sector labor relations, the Committee’s Report explores the effect on the outcome of a mediation when information gained by the mediator in the course of mediation is required to be disclosed; reports results of questionnaire; discusses arguments for and against compulsory disclosure, even when parties consent; and recommends language for an “immunity” for mediators.
BIBLIOGRAPHY


  This small, “legal almanac” explores the litigation process, examining ADR methods currently available and substantive areas in which they are used; explains the role of individuals who participate in ADR procedures, as well as applicable rules and guidelines; contains an appendix with sample documents, applicable statutes, a glossary of terms, checklist for initiating arbitration, directory of American Arbitration Association offices throughout the U.S. as well as international arbitration agencies, and AAA procedures for oral hearings.


  This compendium includes citations and sample texts of state laws; substantive areas in which ADR is used in each state; cross-reference charts of ADR laws by subject matter; statewide initiatives; federal legislation; and an overview of legal issues concerning ADR.


  Pamphlet describes AAA library collection, including periodicals, books and treatises; conference proceedings; state, federal, and foreign arbitration statutes; documents of international and intergovernmental bodies; arbitration rules and related documents of trade associations, chambers of commerce and arbitral institutions in U.S. and abroad; sample arbitration clauses; international conventions and agreements regarding arbitration, mediation, and conciliation; research fees, copy services, addresses and phone numbers of AAA offices throughout the U.S.


  An analysis of the negotiation process, both in general and as specific to management, including discussions of creating and claiming value, alternatives to agreement, power in bargaining, and negotiating in hierarchies and through agents.


  Presents a detailed explanation of the mediation process, including the important aspect of the mediator’s role in facilitating party nego-
tion. Special emphasis is placed on overcoming the impediments to settlement that often arise between parties including process, psychological and merits disagreements. The use of decision analysis in mediation is fully treated and special chapters explore the use of mediation in employment, environmental and product liability settings.

  Provides an historical discussion of the evolution of mediation, a description of various mediation styles, and a practical analysis of the use of mediation in a variety of conflict situations.

  Pamphlet describes mediation, its relation to the law, advantages and process; advises consumers on preparing for a mediation; discusses the various forms of mediation (e.g., face-to-face, shuttle) and when mediation is appropriate; and provides information on choosing a mediator. The pamphlet also includes a bibliography which lists names of dispute resolution organizations.

  Despite the local title, this book offers a broad perspective on mediation skills and effective mediation advocacy. In a deceptively simple step-by-step format, the author succinctly presents the phases of mediation in a thorough fashion, along with the skills needed for effective mediation advocacy. The book highlights preparation tasks from selecting the right cases for the process, to selecting the mediators, to preparing the client and preparing for the sessions, to wrapping-up the agreement.

- Mediation in the Justice System, Maria R. Volpe, editor (Washington, DC: American Bar Association, Special Committee on Dispute Resolution, Public Services Division, 1983).
  Conference proceedings on the evolving nature of mediation in the judicial system, with a focus on the resolution of community disputes.

Compiled after a meeting, in August 1984, of some 50 educators in Craigsville, Massachusetts, who shared experiences (1) using mediation as problem-solving methodology vis-a-vis students, teachers, administrators and parents and (2) compiling elementary and secondary education curricula including mediation as a problem-solving tool. There is also a directory of programs in sixteen (16) states, including New York, New Jersey, and Pennsylvania, as well as a bibliography.

  A text for lawyers discussing tactical, legal and ethical issues related to the use of mediation.

  Provides an in-depth account of how the mediation process works in resolving conflict in a variety of contexts including family, labor/management, landlord/tenant, and home/school.

  A description of the private, non-mandatory, court-endorsed Medical Malpractice Mediation Pilot Project.

  This procedural manual, which was developed by the CPR Technology Committee, covers protocols, model agreements, and binding, non-binding, adjudicative and advisory procedures.

  Model multi-step ADR clauses designed for parties with equal bargaining power. The clauses begin with negotiation, include mediation and end with arbitration.

  A practical guide to setting up and conducting environmental mediation with case examples and sample mediated agreements.

An international journal providing articles on the theory, analysis and practice of negotiation and dispute resolution, as well as a section on news and newly published books in the dispute resolution field.


A report based on six case studies using mediated negotiation to resolve local disputes. The booklet also discusses the appropriateness and costs of using this approach and includes selected readings on the topic.

• Ohio State Journal on Dispute Resolution, Ohio State University College of Law (Columbus, OH: Ohio State University College of Law, 1985-).

Quarterly law review devoted to the exploration of theory and practice of dispute resolution processes with a national focus. Articles focus on cutting-edge theory involved in non-binding dispute resolution processes. An annual bibliography of ADR articles is published in a separate volume.

• Options for All Ages: Family Dispute Resolution, Velitta F. Prather, editor (Washington, DC: American Bar Association, Standing Committee on Dispute Resolution, Division for Public Services, Governmental Affairs and Public Services Group, 1990).

A compilation of papers presented at the March 1990 “Family Dispute Resolution: Options for All Ages” conference on the use of ADR to resolve all types of family disputes including parent-child, adoption, divorce and bioethical issues involving older Americans. The pamphlet provides an overview of state legislative efforts and empirical studies on the effectiveness of divorce mediation.


The second research report of the Children’s Aid Society on the Persons In Need of Supervision (“PINS”) Mediation Project.


This working paper examines decisions about whether to pursue claims in the formal dispute resolution system and the choice between the various alternative dispute resolution procedures.

The proceedings of six 1983 panels which focused on the future of mediation, problem solving through mediation, resources for the future, mediation’s relationship to the justice system and the professional mediator.


A working paper which describes the current state of knowledge of procedural justice and the trends that will likely shape theory and research in this area.


An examination of the process and growth of mediation with mediation rules and bibliography and a discussion of the certified public mediator as a new profession.

• The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition, Robert A. Baruch Bush and Joe Folger (San Francisco, CA: Jossey-Bass, 1994).

Discusses the transformative potential of mediation, suggesting that mediation goes beyond problem solving to provide opportunities for interpersonal growth through empowerment and recognition.


A code of conduct recommended by the Association for ADR of matrimonial cases in the courts.


A working paper which discusses “privatized justice”, methods of evaluating privatization and its implications.


A step-by-step examination of the process of public sector mediation.
including an analysis of mediators and their role in public conflict.


Experts in dispute resolution, public health, nursing, medicine and health care management discuss the use of negotiation and conflict resolution techniques in a wide range of health care settings. The authors provide stories animating the concepts and give practical suggestions for the use of dispute resolution tools in managed care systems.


An empirical study in four geographically diverse federal districts of litigators’ views about judicial intervention to encourage settlement with an analysis of judicial styles and the perceived limits of active intervention.


This practice manual for handling tort claims explains how to determine the merits of a case, identify parties and issues, assemble a presentation for trial or for settlement negotiation and obtain a recovery for the client.


A discussion focusing on dispute resolution in the collective bargaining process, including dispute resolution procedures, mediation techniques, grievance mediation, mediation in the health care industry and preventive mediation.


An examination of a mediation program instituted in Michigan to reduce court backlog by encouraging settlement.


Profiles twelve professional mediators in an effort to show the techniques they have used to achieve successful results.