Statement of Position on Multidisciplinary Practice

Report on Judicial Conduct

New York City as a Major Institutional Litigant

ALSO
Orison S. Marden Memorial Lecture
E. NORMAN VEASEY

Proposed “Class Action Fairness Act”
Contents

OF NOTE 567

ORISON S. MARDEN MEMORIAL LECTURE:
OUR INSTITUTIONAL RESOLVE TO REFORM THE ETHICS
AND PROFESSIONALISM OF THE BAR—WHOM ARE WE
by Hon. E. Norman Veasey 571

STATEMENT OF POSITION ON MULTIDISCIPLINARY PRACTICE
by the Executive Committee 585

REPORT OF THE AD HOC COMMITTEE ON JUDICIAL CONDUCT
by the Ad Hoc Committee on Judicial Conduct 598

THE PROPOSED “CLASS ACTION FAIRNESS ACT”
by the Committee on Federal Courts 637

THE CITY OF NEW YORK AS A MAJOR INSTITUTIONAL LITIGANT:
A FOLLOW-UP ON THE PRICE WATERHOUSE STUDY
by the Council on Judicial Administration 645

A PROPOSAL TO EXPAND THE USE OF THE COMPULSORY
ARBITRATION PROGRAM IN THE CIVIL COURT OF THE CITY
OF NEW YORK
by the Committee on the Civil Court 670

NEW MEMBERS 681

POLITICAL ASYLUM IN THE UNITED STATES:
A SELECTIVE BIBLIOGRAPHY
by Ronald I. Mirvis 688
Of Note

IN AUGUST, THE ASSOCIATION URGED THE NEW YORK CITY CHARTER Revision Commission to step back from its current schedule for placing proposals on the ballot this November and instead commence a much longer process focused on public participation and maintaining a balance of power.

The Commission was appointed in late June by Mayor Rudolph Guiliani. In testimony presented by the Committee on New York City Affairs, the Association maintained that “a process initiated, staffed by, and exclusively reflective of the executive branch may well be likely to produce proposals that attempt to shift the existing balance of power away from the legislature.”

Specifically, the Association is concerned about the balance of power between the Mayor and the City Council. In addressing the Commission’s preliminary recommendations, the testimony focused on attempts to weaken the Council’s budget and land use powers. According to the testimony, “the budget proposals...do not improve upon the strong fiscal controls imposed upon the City by the State under the Fiscal Emergency Act.” Rather, “they...reduce the ability of the City Council to act as an independent force in the adoption and administration of the City’s budget.” In addition, “the land use proposals...eliminate public participation through the City Council in areas where local concerns have been particularly heightened.”

The Association also expressed serious concerns with the makeup of the Commission and called for all Commission activities to be conducted in an open and public manner.

IN JULY, OVER 300 WOMEN ATTENDED “WHAT IT’S (REALLY) LIKE TO Practice Law in NYC as a Woman,” held at the Association. The program, co-sponsored by the Committee on Women in the Profession, (Susan Kohlmann, Chair) and the Committee on Law Student Perspectives (Jennifer Mone, Chair), and held in conjunction with the New York Women’s Bar Association’s Committee to Advance Women in the Profession, fea-
tured a panel of women attorneys from diverse practice areas who discussed their careers and offered practical advice to women law students contemplating a legal career in New York City.

IN AUGUST, THE ASSOCIATION HOSTED A RECEPTION FOR THE 53 PARTICIPATING students in the 1999 Thurgood Marshall Summer Law Internship Program. Association President Michael A. Cooper made welcoming remarks, and Alfreida B. Kenny addressed the students, encouraging them to “dream” and to pursue higher education and careers. The program provides paying summer jobs for students—all of whom have shown an interest in the law—in a variety of legal environments such as law firms, corporate law departments and law schools. The program is sponsored by the Thurgood Marshall Summer Law Internship Program, (Vaughn Buffalo, Chair).

THE ASSOCIATION’S COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE with disabilities has published the second edition of The Rights of People with Disabilities. The comprehensive guide contains pertinent information for individuals with disabilities regarding their legal rights under federal, New York State and New York City law, and how to enforce those rights. “The first edition was such an overwhelmingly successful and useful publication, that we felt compelled to update the information and reissue it,” said Committee Chair Kleo J. King. “We are working with various organizations and advocacy groups to get the publication into the hands of those that need it most.”

Copies can be obtained for $10 from the Association by calling 212-382-6658 or through the Association’s website: www.abcny.org.
Recent Committee Reports

**Alternative Dispute Resolution**
A Selective Bibliography of the Alternative Dispute Resolution Collection of the Association
Letter Supporting Legislation to Create Managed Care Ombudsprogram

**Antitrust and Trade Regulation**
Letter Regarding Modifications to Hart-Scott-Rodino Merger Review Process

**Banking Law**
Report Re: S.3553, an Act to Amend the Banking Law, in Relation to the Establishment and Operation of Community Development and Low Income Credit Unions
Report Re: S.3554, an Act to Amend the Banking Law, in Relation to the Voluntary and Involuntary Liquidation of Investment Companies and Other Banking Organizations
Report Re: S.3555, an Act to Amend the Banking Law to Remove Certain Prohibitions Against the Investment of Proprietary Funds by Savings Banks and Savings and Loan Associations

**Bankruptcy and Corporate Reorganization**
Report on S.4218/A.6641, an Act to Amend Section 489 of the Judiciary Law, in Relation to the Purchase, Assignment or Other Transfer of Claims for Valuable Consideration

**Children and the Law**
Letter Re: Uniform Child Custody Jurisdiction and Enforcement Act (S.4138-A)

**Civil Court**
A Proposal to Expand the Use of the Compulsory Arbitration Program in the Civil Court of the City of New York
Letter to Recommend that the Monetary Jurisdictional Limit of the Small Claims Part of the Civil Court Be Increased from $3,000 to $5,000

**Consumer Affairs**
Report on an Act to Amend the General Business Law, in Relation to extending the time for Termination of Membership in a Private Club

**Corrections**
Letter to Governor in Support of the Restoration of Funds for the Continuance of Prisoner’s Legal Services of New York in the State Budget
Letter on Senate Bill 5823 Regarding Prisoner Litigation Reform

**Education and the Law**
Letter Regarding S.5112/A.8655 on State Building Aid Securitization for New York City School Facilities

**Energy**
Report on Legislative and NRC Rule Change to Facilitate the Transfer of Nuclear Power Plants
Environmental Law
Proposal by The Association of the Bar to Require the Use of Recycled Paper for All Court Filings

Letter to ABA Regarding the Proposed Brownfields Resolution

Executive
Statement of Position on Multidisciplinary Practice

Federal Courts
Testimony on the Interstate Class Action Jurisdiction Act of 1999

Future of CUNY
Amicus Brief, Gomes, Ma, A! & Cooper v. the Board of Trustees of the City University of New York

International Human Rights
Chaos or Control: Human Rights Enforcement After the Pinochet Decision

Mental Health Law
Report Commenting on Human Subject Research Involving Protected Classes

Comments on Involuntary Outpatient Care

Report Re: S.2505, an Act to Amend the Public Authorities Law, in Relation to Establishing a Half Fare Rate Program Within the Metropolitan Transportation Authority for Persons with Serious Mental Illness

New York City Affairs
Letter Regarding 1999 Charter Revision Commission

Testimony Before the 1999 Charter Revision Commission

President
Letter Commenting on the Recommendations of the Mayor's Task Force on Police/Community Relations

President/ Pro Bono and Legal Services
Letter Regarding Funding for Civil Legal Services Programs

Trusts, Estates and Surrogate's Courts
Report Re: S.3401/A7759/OCA 99-2, an Act to Amend the Surrogate's Court Procedure Act, in Relation to Allocation of the Expenses of Attesting Witness Examination and Document Discovery

Report Re: A.2892, an Act to Amend the Estates, Powers and Trusts Law, in Relation to Recognizing the Legal Rights of Children After Death to Inherit

Report Re: A.3761, an Act to Amend the Estates, Powers and Trusts Law, in Relation to Enacting the Transfer-on-Death Security Registration Act

Copies of any of the above reports are available to members by calling (212) 382-6658.
Orison S. Marden Memorial Lecture

Our Institutional Resolve to Reform the Ethics and Professionalism of the Bar—Whom Are We Protecting? The Lawyer? The Client? The Public?


Hon. E. Norman Veasey

Courts and bar leaders across the nation have been wringing their hands for years about the state of the profession. In 1906, Roscoe Pound despaired of the state of the profession. There has been a recent spate of books on the subject. Ambassador Sol Linowitz’ Betrayed Profession, Dean Tony Kronman’s The Lost Lawyer, and Mary Ann Glendon’s A Nation Under Lawyers, come to mind.

The American Bar Association, the Conference of Chief Justices, the American Inns of Court and others have done great work recently to instill principles of professionalism and to give the public more trust and confidence in the Bench and Bar.

I would like to outline tonight two major steps that are now underway. I think both are important developments. First is the Conference of

Let me first introduce briefly the subject of Ethics 2000, and then I’ll return to it in more detail—after I will try to put that effort in more comprehensive perspective.

ETHICS 2000

Ethics 2000 is the shorthand for the ABA Commission on the Evaluation of the Rules of Professional Conduct. The work of the Commission has been going on since the Summer of 1997. It has been—and is—a work in progress—a moving target that should come to rest when we submit our report in mid-to-late 2000 to the House of Delegates, but not before we have ample input! Our Commission is working feverishly to meet that schedule. It is difficult, given the broad scope of our mission and the complexity and controversy involved at many levels.

It is, I submit, an intellectual and scholarly endeavor as well as a practical and political one. Most important is the fact that it is a very open process—the most open process of its kind that I have seen. Now, let me step back and briefly answer these four basic questions about Ethics 2000:

• What?
• Why?
• Who? and
• When?

What is Ethics 2000? It is an ABA Commission authorized by the Board of Governors and funded by the House. Its members were appointed in the spring of 1997 by President Phil Anderson and his two predecessors as President, Lee Cooper and Jerry Shestak. Its purpose is to:

• Make a comprehensive study and evaluation of the Model Rules and Ethical issues;
• Conduct research, surveys and hearings; and
• Formulate recommendations for action.

Why are we doing this?

• The Model Rules were adopted by the House in 1983 after a six-year process.
• They have been amended by the House about 30 times in the past fifteen-plus years of their existence.
• 39 states have adopted some version and most have departed, to some degree, from the Model Rules.

• The American Law Institute has essentially completed the Restatement of the Law Governing Lawyers after an open process extending over a long period resulting in a modern approach to lawyer ethics.

• There is some dissonance within the Model Rules and Comment and there is some dissonance evident when the Model Rules are compared with state variations, the ALI Restatement, modern practice and future anticipated developments.

Who is doing this? The Commission has 13 voting members:
1) Norm Veasey, Chief Justice of Delaware, Chair
2) Larry Fox, a practitioner from Philadelphia
3) Al Harvey, a practitioner from Memphis
4) Geoff Hazard, a professor from University of Pennsylvania Law School and former director of the ALI
5) Pat Higgenbotham, a circuit judge of the U.S. Court of Appeals for the Fifth Circuit in Dallas
6) Loeber Landau, a practitioner from New York
7) Margaret Love, a former member of the Department of Justice from Washington, DC
8) Susan Martyn, a professor from the University of Toledo Law School
9) David McLaughlin, a public member, former president of Dartmouth College and former president of the Aspen Institute, from New London, New Hampshire
10) Dick Mulroy, a corporate general counsel of MONY, Inc. in New York
11) Lucian Pera, a practitioner from Memphis
12) Henry Ramsay, former Superior Court Judge, Alameda County, California
13) Laurie Zelon, a practitioner from Los Angeles

Seth Rosner of New York is the liaison to the ABA Board of Governors
Becky Stretch of Chicago is counsel to the Commission
Professor Nancy Moore of Boston University is the Chief Reporter
Professor Carl Pierce of the University of Tennessee and Professor Tom Morgan of Brigham Young University are Reporters to the Commission.

The Commission also has a large Advisory Council of over 200 people and organizations. The Advisory Council receives drafts and minutes. A number attend and participate in the open Commission meetings. The Commission also works closely with the ABA Standing Committee on Ethics as it continues its ongoing work. We have about 5 or 6 meetings per year, plus subcommittee meetings by phone or listserv. It is a great Commission. We are diverse, not all of one mind, but I think the Commission has great chemistry.

WHEN?
The Commission’s work will proceed along three separate tracks simultaneously. With respect to each track, as the Commission’s review of individual rules is completed, the draft rules are being widely circulated for comment with an ample comment period. We also hope to receive input from state and local bars and ABA sections and other entities. This will all take time, but by mid-to-late 2000, we will submit our report to the House of Delegates. Then more “vetting” will take place. I doubt if there will be a House vote before 2001.

NATIONAL ACTION PLAN
I know that my principal mission tonight is to discuss the Ethics 2000 process and to seek your ideas about that process and some specific ethics policy directions. But I would like to provide some context for that discussion by mentioning briefly the National Action Plan of the Conference of Chief Justices and some other current and relevant developments.

Earlier this year, the Conference unanimously approved a bold and comprehensive Plan on Lawyer Conduct and Professionalism. It is truly an “Action Plan” because it is directed to state supreme courts for their consideration and implementation. Because the National Action Plan comes from the Conference of Chief Justices of all the states, the District of Columbia and the U.S. territories, it is authoritative and (I hope) will not sit on a shelf. I am asking each of my colleagues in the Conference to let me know what they are doing toward implementation.

The Plan is multidimensional across key subject areas that include: education (law school curricula, admission requirements, bridging the gap programs and CLE); leadership (including the role of courts and the bar);
mentoring and lawyer assistance; effective lawyer regulation; strengthening the trial judge’s role to deal with incivility and other cancers in litigation; strengthening alternate dispute resolution as the norm; public outreach; and a number of other dimensions. The report itself is long—73 single-spaced pages (not counting appendices). The Executive Summary contains a succinct sketch of over 100 specific action items for consideration.

The National Action Plan is the outgrowth of a broad-based process that included a Working Group of over 30 distinguished lawyers and judges around the nation. The Working Group was divided into six sub-committees, with an Executive Committee consisting of the chairs of the subcommittee. Chief Judge Kaye of New York was a key subcommittee chair. She brought her considerable talents to the table with substantive and practical recommendations of immense value. Some of the ideas in the November 1995 Report to the Chief Judge from the New York Committee on the Profession and the Courts influenced the development of the National Action Plan.

We all know that the rules of ethics are what a lawyer must do or must not do on pain of the disciplinary process. Professionalism is a higher calling—it is what a lawyer should do to achieve excellence, to reflect credit on the bar and to avoid bad practices that could lead to disciplinary problems.

One major problem recognized by the New York Report, for example, is the increase in the number of solo practitioners who come out of law school with massive student loan debts and then plunge into serving the public without appreciation for the pitfalls of practice as they scratch for clients. New lawyers in a good firm have built-in mentors. Most new solos do not. The bar needs to step up to that problem, and I believe the City Bar is doing so.

Part of the problem, of course, is that there are too many lawyers. There isn’t anything we can do about that fact. We simply must manage the glut of lawyers more effectively.

This thought about there being too many lawyers is not new. In 1770, long before there was even a United States, the King of England, His Majesty George the Third, wanted a census of all the people in the colonies. Grafton County, New Hampshire, is one of the counties of the colonies. Dartmouth College, where I was to matriculate 180 years later, is in that county and had just opened in 1769. So, the county clerk of Grafton County made his 1770 census report to King George. This report reads,

Your Royal Majesty: Grafton County, New Hampshire, consists of 1,012 square miles. It contains 6,489 souls, most of whom are engaged in agriculture, but included in that number are 69
wheelwrights, 8 doctors, 29 blacksmiths, 87 preachers, 20 slaves and 90 students at the new college. There is not one lawyer, for which fact we take no personal credit but thank an Almighty and Merciful God.

Let me give you just a few of the over 100 “bullet points” that are summarized in the Executive Summary of the National Action Plan:

Each state’s appellate court of highest jurisdiction should encourage and support the development and implementation of a high-quality, comprehensive CLE program . . . that:

* * *

• Encourages CLE components on legal practice and office management skills, including office management technology; and

• Teaches methods to prevent and avoid malpractice and unethically unprofessional conduct and the consequences of failing to prevent and avoid such conduct.

Lawyers should be provided with programs to assist in the compliance with ethical rules of conduct. State bar programs should:

• Establish an Ethics Hotline;

• Provide access to advisory opinions on the Web or a compact disc (CD).

Lawyers need a forum to confront their mental health and substance abuse problems. The Bar should:

• Establish intervention systems for disabilities and impairments other than substance abuse or expand existing LAPs to cover non-chemical dependency impairments;

• Provide career counseling for lawyers in transition.

Judicial leadership should support the development and implementation of programs that address the practical needs of lawyers immediately after admission to the Bar. Effective programs for newly admitted lawyers:

• Mandate a course for new admittees that covers the fundamentals of law practice.

Judicial leadership should promote mentoring programs for both new and established lawyers.

• Provide directories of lawyers who can respond to questions in different practice areas;
• Provide networking opportunities for solo and small firm lawyers; and

• Provide technology for exchange of information.

In preparing law students for legal practice, law schools should provide students with the fundamental principles of professionalism and basic skills for legal practice.

The subject areas tested on the bar examination for admittance to the state bar should reflect a focus on fundamental competence by new lawyers.

Law schools should assist bar admissions agencies by providing complete and accurate information about the character and fitness of law students who apply for bar admission.

Bar admissions procedures should be designed to reveal instances of poor character and fitness. If appropriate, bar applicants may be admitted on a conditional basis.

* * *

To prevent unprofessional or abusive litigation tactics in the courtroom, the court and judges should:

• Encourage consistent enforcement of procedural and evidentiary rules;

• Adopt court rules that promote lawyer cooperation in resolving disputes over frivolous filings, discovery, and other pretrial matters;

• Encourage judicial referrals to the disciplinary system;

• Educate trial judges about the necessary relationship between judicial involvement in pretrial management and effective enforcement of pretrial orders;

• Encourage increased judicial supervision of pretrial case management activities; and

• Establish clear expectations about lawyer conduct at the very first opportunity.

Yet, it is not only in litigation that lack of professionalism exists and must be addressed. Transactional practice of all sizes and kinds must be conducted professionally. The bench and bar must focus on both the litigation and nonlitigation settings.

These “bullet points” are only the “tip of the iceberg.” I encourage bar leaders to work with the courts in giving serious consideration to prompt implementation of at least some of the core recommendations of the Action Plan.
There are three other relevant dimensions that should be observed before returning to Ethics 2000:

(1) Federal Court Rules relating to lawyer conduct;
(2) Congressional activity governing lawyer conduct; and
(3) The multidisciplinary movement.

FIRST, THE FEDERAL RULES

Today there is a hodge-podge of federal district court local rules. There are 94 federal district courts—each with its rules (some track the state rules; others do not).

I have the honor to be a member of the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference. The Standing Committee is studying:

a) Dynamic conformity to state ethics rules;
b) Dynamic conformity with some core federal rules (e.g., a revised Rule 4.2).

SECOND, CONGRESSIONAL ACTIVITY

In 1994 Attorney General Reno promulgated a regulation purporting to preempt state supreme court ethics enforcement against prosecutors regarding contacts with represented persons (Model Rule 4.2). This regulation followed the infamous Thornburgh Memorandum to like effect in the ‘80s. The Conference of Chief Justices objected strenuously to the Reno resolution, but tried to negotiate a new Rule 4.2 with the Attorney General, which resulted in a December 1997 Discussion Draft that was circulated for comment, but no action was taken by the Conference or any of its members on the Discussion Draft. It was widely panned.

Last year the Eighth Circuit, in the McDonnel-Douglas case, declared the Attorney General’s regulation invalid because she had no authority to regulate lawyer ethics or to preempt state supreme courts. The Conference of Chief Justices had filed an amicus curiae brief in the Eighth Circuit case and we were pleased that the Court’s decision agreed with our position.

Meanwhile, Congress last October approved the so-called “McDade Bill” as part of the Omnibus Appropriations Bill. The McDade Bill (effective April 19, 1999) requires federal prosecutors to be bound by state ethics rules, thus codifying the McDonnel-Douglas case (and more).

Senator Hatch introduced Senate Bill 250 on January 19, 1999. That would effectively preempt state supreme courts and ethics authorities in
regulating federal prosecutors and permit the Attorney General to adopt her own regulations.

THIRD, MULTIDISCIPLINARY PRACTICE

I just want to mention that state supreme courts and Ethics 2000 are aware of the developing phenomenon of law practice arising out of the expansion of accounting firms into a “full service” mode that includes legal services. There is a Multidisciplinary Commission of the ABA working on this phenomenon. It is an essential backdrop to the work of Ethics 2000 in fashioning new rules, and it is relevant to the implementation of the National Action Plan.

SOME SPECIFICS OF THE WORK OF ETHICS 2000

Now back to Ethics 2000.

The Commission has decided to concentrate its efforts along the following lines:

• An operating principle that it would follow a presumptive rule of making no change unless it is substantively necessary;

• We are not inclined to make wholesale changes to the Model Rules, but we are interested in addressing emerging issues;

• We have decided not to include a “best practice” section, but to confine our work to drafting rules of professional conduct and comment to those rules.

But policy decisions on tough questions in modern practice must be made, and clarity of expression is key.

“Track 1” consists of rules presently being addressed by the Commission: 1.1, 1.4, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 2.2, 3.3, 3.4, 4.2, and 8.4, as well as the proposed definition of “informed consent” in 1.4. I’ll return to 1.6, 1.7, 1.8 and 4.2.

“Track 2” consists of other rules identified as most in need of fixing. Some of these are already being addressed by the Commission:

1. New rule on duties to prospective clients;

2. Rule 1.2: The rule presently gives insufficient guidance to lawyers regarding the proper allocation of decision-making authority between lawyer and client and may be contrary to case law to the extent it suggests a lawyer has the legal authority to override the client’s instructions as to all mean-based decisions;
3. Rule 3.3: The Commission should consider deleting paragraph (a)(2) and inserting language making it clear that a lawyer must take reasonable measures to correct material misstatements in depositions or elsewhere in the court record. The treatment of client perjury should be reexamined in light of case developments. The definition of what constitutes assisting a fraud should be clarified;

4. Rule 1.14: The rule gives insufficient guidance to lawyers representing clients suffering under a disability, including children;

5. Rule 1.15: The rule should give additional guidance on the handling of advanced fees and the handling of property following the termination of a representation;

6. Rule 3.4. The Commission should consider addressing the problem of a lawyer wrongfully obtaining privileged information, including a comment on the problem of the misdirected fax. It should also consider inserting a discussion concerning handling the fruits and instrumentalities of a crime;

7. New rule covering systems for law practice (accounting, conflict checks, docket-management);

8. New rule on discipline of law firms;

9. Rule 1.5: The Commission should consider requiring written fee agreements and should reexamine the fee division requirement. It should also reexamine the reasonableness factors in light of new methods of billing, and the comment should address the reasonableness of non-refundable retainer agreements. Somewhere, either in this rule or elsewhere, the Commission should consider addressing proper billing (e.g., billing for overtime, word-processing or copying).

10. Rule 1.13: Paragraph (c) should be changed to permit disclosure as permitted by new Rule 1.6. The Commission should consider requiring the lawyer to report serious misdeeds to the corporate board in paragraph (b) and should consider whether this rule gives appropriate advice to government lawyers;

11. Rule 3.5(b): At least one U.S. District Court has held paragraph (b) to be unconstitutional as applied to post-trial communications with jurors;

13. Preamble/Scope: The Commission should review the extent to which the rules are applied outside the context of lawyer discipline and consider whether to revise the statements in the Preamble/Scope that address this issue.

“Track 3” consists of subject areas that are increasingly important to the future of law practice and implicate multiple rules. The Commission has identified seven topics and combined them into four groups:

1) ADR and Mass Torts: We will consider the following issues:

- ADR: a possible new rule on a lawyer serving as a dispute-resolution neutral, rules governing the lawyer representing a client in ADR and special conflict rules on concurrent and successive mediation/representation;
- Mass Torts: This area involves ethical considerations in class actions, aggregate settlements and lawyer referrals.

2) Technology and Access to Legal Services:

- Technology issues include: Client-law firm networking; internet advice, internet advertising, missent fax, encrypting (duty, if any) for confidentiality, screens, electronic access to client files, and a review of Rules 7.1 - 7.3;
- Access to Legal Services issues include: hot lines, internet advice, “unbundling” of legal services, non-lawyer activity and regulation, pro se help services, document preparation, research firms, lawyer relationships with intermediary organizations, advertising use of the internet, and a review of Rules 1.2(c), 5.3., and 5.5;
- Employed lawyers issues include: adequacy of existing rules, independence of lawyers, unauthorized practice, termination, organizational discipline, and a review of Rules 2, 5.1-5.2, 5.5.

3) Special concerns of solo and small firm practitioners.

4) Interstate and International Practice and Multidisciplinary Practice (MDP):

- Interstate and International Practice issues include: national law practice v. state regulation, choice of law, alliances between law firms (international and domestic), specialization and a review of Rules 5.5 and 8.5;
Multidisciplinary Practice (MDP) issues include: fee-sharing with nonlawyers, partnerships with nonlawyers, advertising, internet advice, and a review of Rules 5.4 and 5.7.

* * *

Now, back to some of the rules on which we have taken some definitive, but tentative, votes and as to which we are seeking comprehensive public comment. These rules primarily relate to the areas of confidentiality and conflicts.

The principal rule relating to confidentiality is Model Rule 1.6. The present Model Rule provides, in essence, that the lawyer shall not reveal information relating to the representation of the client unless the client consents after consultation. There are presently two basic, narrow exceptions whereby the lawyer may reveal client information: (1) to prevent the client from committing a criminal act the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense in a controversy between the lawyer and the client or a defense in a criminal case in which the client is involved.

The major policy changes proposed by our revision are as follows:

- Including a former client as well as a present client;
- Requiring "informed consent" as defined in a new Rule 1.4;
- Permitting disclosure: (i) to prevent reasonably certain (as distinct from "imminent" in the present rule) death or substantial bodily harm (not necessarily limited to the lawyer's conduct); (ii) to prevent the client from committing a crime or fraud that is likely to result in substantial financial injury to another, and in furtherance of which the client has used the lawyer's services; (iii) to rectify or mitigate such financial injury; (iv) to secure legal advice about the lawyer's compliance with the rules of ethics; and (v) to establish a claim or defense, etc. in the same language as the present rule.

The principal rule relating to conflicts is Model Rule 1.7. The present Model Rule prohibits representation of a client if the representation is directly adverse to another client or the new representation would materially limit the ongoing representation unless the lawyer believes the representation will not be adversely affected and the client consents after consultation.
The major policy changes proposed by our revision are as follows:

- We define a conflict of interest to mean: (i) a representation that is directly adverse; or (ii) there is a significant risk that one representation will be materially limited by the other representation (including a duty to a former client);

- We would permit exceptions to the conflict if there is informed consent (as defined in new Rule 1.4) in writing and (i) the lawyer reasonably believes he or she is able to provide competent and diligent representation to each client; (ii) the representation is not prohibited by law, and (iii) the representation does not involve the assertion of a claim by one client against the other in the same litigation.

The Comments to the new Rule 1.7 also provide some relief such as permitting advance waiver of conflicts under certain circumstances; permitting withdrawal from one but not both representations in case of certain unforeseen developments (such as a change of corporate control) and providing a more practical way than presently exists in the handling of positional conflicts.

We also ask for your comments and careful consideration of eleven newly-drafted specific conflict rules in new Rule 1.8, including business transactions with clients, third party payment, sex with clients, etc. New Rule 1.9 deals with the former client (and proposed new Rule 1.18 will deal with the prospective client). Rule 1.10 revises the imputation rules but does not permit screening except in very limited circumstances not involving lateral moves by lawyers or major/minor contemporaneous representation of adverse parties by different lawyers in big, multi-office law firms.

Rule 4.2 has taken on a life of its own. The ABA Standing Committee on Ethics and Ethics 2000 are negotiating with the Department of Justice. So that rule is very much up in the air.

We will revisit all those rules after we receive full public comment and before we take final (or nearly final) votes in the Commission.

CONCLUSION

In May of this year in Washington there will be a National Conference on Trust and Confidence in the Judicial System. That Conference will focus on many issues going beyond lawyer ethics and professionalism. But those components of our system are key. We are colleagues together
in building trust and confidence in the profession—and it is a profession. We need to be certain lawyers run their practices in a businesslike manner.

But the practice of law is not a business with only the mores of the marketplace as a guide. The implementation of the National Action Plan and the policy choices we make on ethics rules involve our claiming the moral high ground. We must be guided by the best interests of the clients and the public interest. To be sure, we need to be fair to lawyers and the rules we write must not only be fair—they must be clear. We need your help. Indeed, we need all the help we can get to achieve these goals.

Ethics 2000 will present a complete package (I hope) to the House of Delegates in about a year and one-half. Part of that package will be a revised version of the current preamble to the model rules. But I hope we will never abandon some of the concepts embodied in the current preamble. For example:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

***

In the nature of law practice however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living.

***

Ultimate authority over the legal profession is vested largely in the courts.

***

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.

At the end of the day, I hope we will strengthen these concepts and really mean what we say—practice what we preach.

Thank you for the great honor of speaking to you tonight.
Statement of Position on Multidisciplinary Practice

The Executive Committee

INTRODUCTION

Over the past year, several entities within The Association of the Bar of the City of New York ("the Association") have undertaken extensive studies of multidisciplinary practice ("MDP"): first, the Association’s Committee on Professional Responsibility (John B. Harris, Chair); second, the Task Force on Multidisciplinary Practice of the Association’s Council on International Affairs (Donald H. Rivkin, Chair); and, third, a special subcommittee of the Executive Committee (consisting of Vice Presidents Michael B. Gerrard and Steven B. Rosenfeld, and Frances Milberg).

On June 8, 1999, the Commission on Multidisciplinary Practice of the American Bar Association ("ABA") released its recommendations in the form of a proposed resolution for consideration by the ABA House of Delegates. The New York County Lawyers’ Association Board of Directors on June 14, 1999, adopted a resolution recommending that lawyers be permitted to practice in an MDP organization only if, inter alia, the lawyers retain “full control” (including two-thirds ownership and vote). On June 26, the New York State Bar Association House of Delegates called for further study and expressed “concern[ ] that changing existing legal and ethical rules to permit lawyers to practice law in MDPs will adversely and
EXECUTIVE

irreparably affect the independence and other fundamental principles of the legal profession."

After considering the divergent views that have been expressed both within and outside this Association, and having paid particularly close attention to the concerns that have been raised about the impact that MDP would or might have on the public and on the legal profession, the Association’s Executive Committee sets forth the Association position on MDP in this statement.

Any examination of MDP should address three questions: (1) Can MDP benefit consumers of legal services? (2) What forms of organization should MDP take, and what controls should apply? (3) How compatible are the rules and values of the legal profession with those of the other professions that might be involved in MDP? We will address each of these questions in turn. That discussion will be followed by our conclusion that MDPs may offer substantial benefits to consumers of legal services and should be permitted under certain defined conditions, but that under no circumstances should an MDP be allowed to provide audit and legal services to the same client.

First, however, we wish to comment on the process to be followed in considering this subject. We understand that in August 1999 the ABA House of Delegates will debate the proposed ABA Resolution, which embodies 15 principles recommended by the ABA’s Commission on Multidisciplinary Practice. Our comments are limited to this Resolution and, to a lesser extent, the Commission’s report, and do not address the language prepared by its Reporter for possible amendments to the Model Rules of Professional Conduct. Only after basic principles are established would it be appropriate, in our view, to focus on the intricacies of revising the disciplinary rules and applicable court rules, as well as drafting any enabling legislation that may be required.

In view of the momentous nature of the subject matter and the complexity of the Commission’s recommendations, we believe that the recommendations should be debated at the August 1999 ABA Annual Meeting but no vote taken. State and local bar associations and other interested parties should then have sufficient additional time to consider and comment on the recommendations. At the end of this period the ABA

1. The State Bar resolution also “oppose[d] any changes in existing regulations prohibiting attorneys from practicing law in MDPs, in the absence of a sufficient demonstration that such changes are in the best interest of clients and society, and do not undermine or dilute the integrity of the delivery of legal services by the legal profession.”
Commission could consider making amendments or supplements to its report and recommendations, and a fully-vetted document could be voted upon at the ABA’s midyear meeting in Dallas in February 2000 (or thereafter, if additional time for comment and revision is deemed desirable).

CAN MDP BENEFIT CONSUMERS OF LEGAL SERVICES?

The ABA Commission’s Report concluded (at 1) after “extensive reflection and analysis,” including sixty hours of public hearings, that “there is an interest by clients in the option to select and use lawyers who deliver legal services as part of a multi-disciplinary practice.”2 At the same time, the Report acknowledged that “detailed empirical data is not available” (id.)—and we are not aware of any data (as contrasted with self-serving statements) that purports to show whether consumers of legal services would benefit from MDPs. We believe a definitive answer would come only after multidisciplinary services are offered and clients declare, by their choice of practitioners, whether these services are superior to more traditional forms of delivery of legal services.

Nevertheless, even in the absence of empirical data we believe that at least some forms of MDP could benefit consumers of legal services in a variety of contexts beyond the corporate lawyer/accountant model that has dominated the discussion of MDP to date. There are many situations presented in today’s world that are so multifaceted that clients might be well served by teams drawn from multiple professions. Many such combinations come to mind: patent lawyers and engineers; environmental lawyers and geologists or biologists; ERISA, divorce or trusts and estates lawyers and actuaries; construction lawyers and architects; criminal or family lawyers and psychologists or social workers; elder lawyers and financial advisors or gerontologists—the list could undoubtedly be lengthened.

Accordingly, we believe that a wide variety of clients could potentially benefit from at least some forms of MDP. Indeed, in several professional settings, MDPs have been in existence for some time. The juvenile and civil units of many legal services providers employ social workers. Governments and corporations often employ lawyers and other professionals under the same roof within the same unit. These organizations have discovered a lesson that is more broadly applicable—that coordina-

2. The ABA Commission heard views generally supportive of MDP (at least in concept) from such diverse consumers of legal services as the American Corporate Counsel Association and the American Association of Retired Persons.
tion, teamwork and fully-considered strategic planning are often fostered when professionals from different disciplines work within one service organization for the same clients.

The converse is also apparent. We are aware of numerous instances where clients have been led astray by nonlegal professionals who did not have ready access to legal advice and did not suggest that their clients obtain such advice. Just as not every doctor’s visit leads to a prolonged hospitalization, not every legal question will require hundreds of hours of research and the preparation of lengthy memoranda. Brief professional consultations may suffice, but clients face barriers (real or perceived) in finding and retaining lawyers or other professionals with the right types of expertise. Clients of many non-legal firms would benefit if those firms had, under the same roof, skilled and experienced lawyers who were available for consultation on legal questions. Indeed, more than a little litigation involves resolving problems that might have been prevented if the right professional team had been consulted or involved in the underlying situation in the first place.

MDP means that lawyers and members of at least one other profession practice together. It does not necessarily mean that they have chosen any particular form of organization in which to conduct that practice. Recognizing the benefits to clients of MDP does not necessarily mean that any particular form of organization is best; indeed, different substantive areas and kinds of clients may well make different kinds of affiliations appropriate. However, we believe that the conditions set forth in the Proposed ABA Resolution for a partnership, professional corporation, or other entity that includes lawyers and non-lawyers are all appropriate and necessary, with the exception as to auditing discussed below.

WHAT FORMS OF ORGANIZATION SHOULD MDP TAKE, AND WHAT CONTROLS SHOULD APPLY?

The ABA Commission listed several different forms the MDP might take, ranging from informal affiliations to full integration. This formulation was helpful, but the diversity of the legal profession is likely to defeat any effort to adopt a single preferred approach. Corporate tax lawyers, plaintiffs’ environmental lawyers, and children’s rights lawyers are all members of the same profession, but they inhabit altogether different professional settings, with little overlap in clients, issues, and types of non-legal expertise required. In fashioning appropriate relationships with other professionals, one size will not fit all.
Thus, rather than attempting to dictate a particular form of organization, we believe the focus should be upon preserving the core values of the legal profession while (subject to that constraint) affording flexibility that would allow improved client service.

It may well be that further exploration will lead to the conclusion that some changes to the lawyers’ codes of ethics are warranted. Most prominent among these likely changes are to allow fee-splitting in certain defined circumstances and to allow lawyers to become partners with non-lawyers in firms and provide legal advice to clients of those firms, rather than only to the firm itself (as house counsel ostensibly do).

At least three essential conditions must be met before this Association would conclude that MDP can be accommodated with the basic ethical principles of the legal profession:

1. The core ethical values of the legal profession must not be eroded, particularly:
   a. independence of judgment and decision-making;
   b. loyalty to one’s client and its concomitant, avoidance of conflicts of interest;
   c. preservation of a client’s confidences and secrets;
   d. competence;
   e. avoiding improper solicitation; and
   f. maintaining the independence and integrity of the judicial system and a commitment (i) to provide pro bono legal services to those unable to pay, and (ii) to improve the legal system.

2. Individuals who are not lawyers may not render legal advice or otherwise provide legal services, nor should they control, influence or seek to control or influence the professional judgments of lawyers.

3. Clients must give informed written consent prior to receiving representation or service from an MDP, after full disclosure of the conflicts, confidentiality and other ethical issues and risks presented by the MDP format.

The principles embodied in 1(f) above—“maintaining the independence and integrity of the judicial system and a commitment (i) to provide pro bono legal services to those unable to pay, and (ii) to improve the
legal system”—have historically been of particular importance to this Association. While we do not pretend that lawyers are unique as a profession in pledging a commitment to the public good, their unique relationship to our society’s law-making and law-enforcement institutions places upon lawyers a special obligation to improve the legal system and to increase its accessibility to the poor. Lawyers practicing in MDPs must be particularly sensitive to resisting pressures from their non-lawyer colleagues to subordinate this obligation to the pressures of the bottom line—and any new professional standards governing MDPs should provide ample ammunition for such resistance. The Resolution proposed by the ABA Commission expressly and appropriately addresses this concern.3

Avoidance of conflicts of interest must receive special attention in the MDP setting. At a minimum, as the ABA Commission proposes, engagements which involve legal services must be subjected to existing conflict-of-interest rules, extended to all clients of the MDP, including those who do not receive legal services.4 We also believe that non-lawyers working jointly with lawyers on client legal matters must expressly undertake to maintain the same degree of confidentiality as their lawyer colleagues, (unless otherwise required by law—see n.10, infra) and that the MDP must adopt and enforce procedures assuring the maintenance of such confidentiality.5 In this connection, we are not at all convinced of the efficacy of “screens” to solve conflicts of interest or to prevent unnecessary disclosure of client confidences to non-lawyers in the MDP.6 The fact that law

---

3. The Resolution would require all MDPs to file with the highest court with authority to regulate the legal profession, in each jurisdiction in which it is engaged in provision of legal services, an undertaking that, inter alia, “it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This undertaking should acknowledge that lawyers in an MDP have the same special obligation to render voluntary pro bono publico legal service as lawyers practicing solo or in law firms.”

4. The Association is thus in agreement with the ABA Commission, whose proposed Resolution puts it well: “In connection with the delivery of legal services, all clients of an MDP should be treated as the lawyer’s clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.”

5. This requirement appears to be embraced within Principle 14(D) recommended by the ABA Commission.

6. The ABA Commission suggests that lawyers should take special care to ensure that the non-lawyers in an MDP understand the obligation to maintain confidentiality of information, and that “it may be necessary for an MDP to implement special procedures to protect confidential information such as building firewalls in the firm’s computer information system, restricting
firms have used ad hoc screening devices to address certain conflicts, such as those involving lawyers who were formerly in government service, does not mean that “screens” are acceptable as a permanent, firm-wide solution to these problems.

Moreover, even a faithfully-observed rule requiring non-lawyers working in MDPs to agree, apart from the audit context, to preserve client confidences would provide no assurances that courts will be willing to extend the existing attorney-client and work product privileges to cover information disclosed to such non-lawyers. Indeed, recent court decisions suggest that many judges are increasingly hostile to efforts to expand either privilege. Thus, while clients can be given contractual commitments that non-lawyers in MDPs will not voluntarily disclose confidential communications, they cannot be assured that disclosure of such communications will not be judicially compelled.

The foregoing concerns suggest that before undertaking representation of a client, the lawyer in an MDP should determine that the representation comports with the disciplinary rules, and should obtain from the client written consent to such representation after full written disclosure to the client of at least the following: (i) that professional services will be provided to the client both by lawyers and by non-lawyers who are not independently bound to observe the same ethical code of conduct as lawyers; (ii) that only lawyers will provide legal advice or other legal services; (iii) all existing actual conflicts and reasonably foreseeable potential conflicts which may arise from any activities of the organization, whether or not they involve the professional services of lawyers; and (iv) that lawyers are ethically obligated to, and will, maintain the confidentiality of information imparted to them in confidence for the purpose of obtaining legal representation or advice, and that non-lawyers in the organization providing services to the client have undertaken to maintain the same confidentiality, but that there can be no assurance that information disclosed to non-lawyers will be considered by the courts to be protected from disclosure under privileges applicable to lawyers.7

In view of the second condition listed above, we believe that one or more lawyers must have exclusive authority over the rendering of legal advice or

---

7. This requirement of disclosure is embodied, in a more generalized way, in Paragraph 9 of the Proposed ABA Resolution.
other legal services.\(^8\) This point cannot be overemphasized. On the other hand, requiring that the entire organization be controlled and managed by lawyers would unduly restrict the fostering of MDP.

The Proposed ABA Resolution subjects entities “not controlled by lawyers” to special strictures. The term “control” denotes an amorphous concept that the ABA Commission leaves undefined. Precedents regarding “control” under provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 could provide assistance in this regard. However, we disagree with the underlying premise that MDPs that are controlled by lawyers and those that are not should be regulated differently. We believe that all MDPs—whether or not they are “controlled” by lawyers—(i) should certify that the lawyers within them maintain the ability to exercise independent judgment on behalf of their clients and (ii) should meet the other requirements of the certification required by the proposed ABA Resolution.

To the extent that revised rules allow lawyers to practice in MDPs subject to certain conditions, the enforceability of those conditions is important. The principal means of enforcing both existing ethical rules and those revised to accommodate MDPs would no doubt be disciplinary action against the lawyers in the MDP. New York State has adopted a salutary rule (DR 1-104(A), (C)) that subjects law firms to discipline for certain kinds of misconduct by individual attorneys; we think such a rule should be considered by other states, and we believe that any MDP organization should agree to be treated as a “law firm” for purposes of this rule (and thus subject to disciplinary sanctions applicable to law firms). Any MDP which agrees to be treated as a “law firm” could in most cases be well disciplined by imposition of sanctions similar to those that may be imposed on lawyers ranging from admonition to withdrawal of the privilege of providing legal services. The array of possible sanctions might be expanded to include fines and forfeiture of fees.\(^9\) Lawyers and non-lawyers in an MDP

---

8. The Proposed ABA Resolution addresses this issue in Paragraph 6, which states: “A lawyer acting in accordance with a non-lawyer supervisor’s resolution of a question of professional duty should not thereby be excused from failing to observe the rules of professional conduct.” We are uneasy with this formulation, because we do not believe that a lawyer may ethically permit a non-lawyer to resolve any “question of professional duty” of the lawyer. Accordingly, we propose that “matters of administration or organization” be substituted for “a question of professional duty.”

9. Paragraphs 14 and 15 of the Proposed ABA Resolution, as elaborated in the Reporter’s Notes (at 9 and n.67), take a similar position. Legislation may well be required to allow courts to discipline multidisciplinary firms (as opposed to the lawyers who work in them); this would be a question of state law.
that fails to comply with ethical and legal standards, and the MDP itself, may also be liable to clients for malpractice or breach of contract—at the very least, for breach of the representations and undertakings described above. In addition, as noted below, other professions have their own disciplinary rules and practices, which would potentially be enforceable in an MDP context. Accordingly, such rules and practices, and the legal basis for their enforcement, should be examined to ensure that they provide a context assuring an MDP's compliance with the applicable legal rules. It is likely that states will need to adopt statutes to ensure that comprehensive discipline against MDPs and their non-lawyer members is available.

The Proposed ABA Resolution suggests that the court systems of the various states should further ensure the compliance of MDPs with applicable ethical rules by auditing the certifications that are filed by MDPs. We disagree with this suggestion. We are persuaded that such audits would overtax the resources of the court systems, even if MDPs had to pay certification fees, and that the audits would raise difficulties of administration and judgment that would outweigh their possible benefits. The courts would, of course, retain the authority to impose discipline upon lawyers and MDPs whom they found to have filed false certifications or to have otherwise violated applicable rules. However, self-certification and self-policing are more workable than widespread auditing and fit well within the traditions of our profession.

Thorough examinations of each state's disciplinary rules will also be necessary. Among the disciplinary rules in New York that are implicated by MDP are 3-102(A) (prohibition against fee-splitting); 3-103(A) (prohibition against forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law); 5-107(A) (requiring client consent to a lawyer's accepting compensation from one other than the client); 5-107(B) (prohibition against subordinating a lawyer's professional judgment to the direction of a non-lawyer); and 5-107(C)(1) (prohibition against a lawyer practicing in a for-profit professional corporation or association in which a non-lawyer owns any interest). DR 5-107(B) goes to the heart of a lawyer's professional obligations and must not be weakened in any way; there may be room for modifying the other enumerated rules after careful examination.

HOW COMPATIBLE ARE THE RULES AND VALUES OF THE LEGAL PROFESSION WITH THOSE OF THE OTHER PROFESSIONS THAT MIGHT BE INVOLVED IN MDP?

One misleading thread runs, if only by implication, through some of
the writings attacking MDP: that ours is the only profession with a code of ethics, a method of enforcing that code, and a long and honorable tradition of client and public service. In fact, virtually every other profession (at least those with which MDP relationships are likely) has its own code, disciplinary system, and traditions. Deceptive advertising, self-dealing, and practicing beyond one's competence are widely condemned; integrity, public service, and continuing education are widely encouraged, if not required. We have examined many of these codes and found them to resemble the lawyers' codes in many respects.

Further study and comparison of other professions' codes with our own, which we would urge, may reveal additional points of conflict, but, so far, the only irreconcilable difference we have identified is the confidentiality obligations of lawyers (DR 4-101, 7-102(B)) vs. the public disclosure obligations of auditors. Because of that difference, we believe that legal and auditing services cannot be provided to the same clients by one firm.

The ABA Commission's Report does not confront the attorney-auditor conflict as squarely as it should. True, the Commission "recommends no changes be made to the lawyer's obligation to protect confidential client information," and the proposed Resolution "specifically recommends several safeguards to assure that a nonlawyer who works with, or assists, a lawyer in the delivery of legal services will act in a manner consistent with the lawyer's professional obligations" (Report at 3). But the Report's only recognition of the auditor-lawyer dilemma is in endnote No. 3, which

10. There may also be a serious question raised where non-lawyer professionals in an MDP (such as social workers, physicians and mental health professionals) have an affirmative obligation to report suspected child abuse or maltreatment under N.Y. Social Services L. § 413, while a lawyer may be precluded under the confidentiality provisions of DR 4-101 from such disclosure. See Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Opinion No. 1997-2, March 1997 (serious question as to whether attorneys employed by social service agencies must report suspected child abuse to the authorities, even if the lawyer represents the child and the child does not consent to disclosure); see also N.Y. Public Health L. § 2803-d (various non-lawyer professionals are obligated to report abuse in residential health care facilities); N.Y. St. Dep't of Environmental Conservation, In the Matter of Middleton, Kontokosta Associates and Donald J. Middleton, Jr., Op. of Commissioner (Dec. 31, 1998), 1998 WL 939495 (duty of professionals who observe spilled oil to file immediate report with State under 6 N.Y.C.R.R. § 613.8).

11. Vigilance must be exercised to ensure that this prescription is not evaded by placing the auditing function in an organization that is nominally, but not in reality, separate from the organization providing tax, consulting and legal services.
acknowledges that the Securities and Exchange Commission’s auditor independence rules specifically hold the roles of auditor and attorney under the federal securities laws to be incompatible. This Association believes that those roles are always intrinsically incompatible, and that any regime permitting MDPs should make clear that the same MDP may not provide both legal and audit services to the same clients.

Leaving aside the auditor-lawyer incompatibility, we believe that efforts should be focused on attempting to harmonize the ethical codes of the different pertinent professions. This is not an effort that can or should be attempted by lawyers alone. Instead, we recommend that the ABA convene a working group of representatives of the legal profession and the other professions—e.g., accountants, engineers, architects—to foster mutual understanding among these professions and ours, identify any conflicts that cannot be reconciled, and try to reconcile those that can. (Precedent for such an effort can be found in the discussions between the legal and accounting professions in the 1970s that gave rise to the protocol governing what lawyers may reasonably be asked to say in response to auditors’ inquiries.) Representatives of consumers of legal services might also be included in this group. A first step might be to organize a program (perhaps with the co-sponsorship of other professional societies) at which leading authorities on the ethical codes of each profession might compare and contrast those codes. 12

The point of this exercise will not be to try to arrive at the lowest common denominator. Rather, the purpose will be to allow the legal profession to shed the adversarial nature of some of the discussion of MDP, and instead adopt a more informed view of the codes and mores of each of the various professions with which lawyers may wish to associate themselves. It may be that there are some professions (in addition to auditors) with such serious incompatibilities that only arms-length relationships are appropriate, but we think it likely that most, if not all, of the pertinent professions will be found to have important similarities and only isolated (albeit perhaps critical) differences between their ethical guidelines and our own. We would not, however, condone MDPs with professions that are not subject to licensing, regulation, and a code of conduct.

12. In making these suggestions, we would go further than the New York State Bar Association House of Delegates resolution, which calls for further studies “Within the Association,” rejecting the proposal by the State Bar’s Special Committee that such studies be undertaken “both within and outside the Association.”
CONCLUSION

There is no denying that lawyers working for MDPs will face challenges. The conflict problems that daily face law firms, particularly the larger firms with many clients, are likely to be more prevalent in MDPs and will require close attention. Ways will have to be found to encourage pro bono service and activities to improve the legal system by lawyers in MDPs (a problem faced already by many government and in-house corporate attorneys and by a distressingly large and growing number of lawyers in private practice). Many of the concerns raised by opponents of MDPs are real. But in the end, the economic and technological forces that are leading to more applications of MDP will only increase, not abate. We believe the legal profession should find constructive ways to adapt to these forces, while preserving our highest traditions, rather than trying vainly to deny these forces or to hold them back.

Thus, we believe that MDPs should be permitted, but only under a regime that requires MDPs to respect and preserve the core values of the legal profession—indepdendence of judgment, loyalty to the client, preservation of confidences, competence, avoiding improper solicitation, and support for pro bono legal services and improving the legal system. To make sure that such a regime is properly designed, we believe that these issues should be fully discussed at the 1999 ABA Annual Meeting and voted upon at a subsequent meeting. We also call upon the ABA to open a dialogue between our profession and other professions potentially embraced within the MDP concept.

July 1999
# Multidisciplinary Practice

## The Executive Committee

Carol Sherman, Chair  
Barry A. Cozier, Secretary

<table>
<thead>
<tr>
<th>Name</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard T. Andrias</td>
<td>Gregory P. N. Joseph</td>
</tr>
<tr>
<td>Peter Bienstock</td>
<td>*Daniel F. Kolb</td>
</tr>
<tr>
<td>Laurie Berke-Weiss</td>
<td>Roger J. Maldonado</td>
</tr>
<tr>
<td>Jane E. Booth</td>
<td>Frances Milberg</td>
</tr>
<tr>
<td>Daniel J. Capra</td>
<td>Kathy Hellenbrand Rocklen</td>
</tr>
<tr>
<td>Richard Cashman</td>
<td>Sidney S. Rosdeitcher</td>
</tr>
<tr>
<td>Michael A. Cooper</td>
<td>Fern Schar</td>
</tr>
<tr>
<td>William J. Dean</td>
<td>Michael R. Sonberg</td>
</tr>
<tr>
<td>L. Priscilla Hall</td>
<td>Robert F. Van Lierop</td>
</tr>
<tr>
<td>Michael Iovenko</td>
<td>Mary Marsh Zulack</td>
</tr>
</tbody>
</table>

*Did not participate in deliberations

This report was drafted by Michael B. Gerrard, Frances Milberg and Steven B. Rosenfeld
Report of the Ad Hoc Committee on Judicial Conduct

INTRODUCTION

In September, 1996, the Association’s Executive Committee created the Ad Hoc Committee on Judicial Conduct. The Committee was formed in response to growing concerns about the criticism of judges in both the state and federal courts and the absence of any comprehensive study of the nature and effectiveness of existing mechanisms for discipline of judicial officers. The Association's President, Michael A. Cardozo, recognized that if the Association were to have an effective voice in responding to excessive attacks that were prominent in the media against judicial officers, the Association likewise had to assure the public that actionable instances of judicial misconduct were being addressed.¹

Although there were several committees of this Association whose jurisdiction included matters relating to judicial officers,² there was no committee with a designated charge to study and report upon the methods for judicial discipline. Indeed, many of the existing committees had fairly busy agendas with numerous issues that made the kind of study envisioned by the President unrealistic. To fill this void and to address a growing concern about a little-known mechanism, the Ad Hoc Committee on Judicial Conduct was formed.

¹. Charge to the Ad Hoc Committee on Judicial Conduct, attached as Exhibit A to this Report.
². For example, there are committees which consider the qualifications of judicial nominees, and the Council on Judicial Administration acts as an “ombudsman” for judicial matters, including issues of judicial ethics.
The Committee's work has centered around three goals: first, to evaluate and report upon the effectiveness of the State Commission on Judicial Conduct (which is charged with the statutory obligation of hearing and reporting on charges of misconduct against state judicial officers); second, to consider and report upon the effectiveness of the Federal judicial misconduct system (which was first established by Congress in 1980) to hear charges of misconduct against federal judges and magistrates; and third, to make recommendations to improve the mechanisms for addressing judicial misconduct.

The Committee's verdict is a decidedly mixed message. As the Committee proceeded with its work, it concluded that there are significant shortfalls in both the state and federal systems, but that such shortfalls are not easily remedied by changing either of the judicial discipline structures. The state system provides a worthwhile structure for the most egregious cases of judicial misconduct, but it has been criticized regarding the uniformity of its work and selectivity of its cases to prosecute, the cumbersome nature of its operations, and the perception of non-responsiveness by complainants, who do not receive a substantive reply to their complaints. The federal system faces inherent limitations from Article III of the United States Constitution and thus cannot insure significant redress of judicial misconduct not rising to the level of an impeachable offense. Under the circumstances, the Committee has concluded that the best remedy for problems with the mechanisms for judicial discipline is twofold: first, an expanded and formalized role of the bar associations to process and pursue complaints against judicial officers, and second, suggestions for continuing education of judicial officers to deal with issues of courtroom demeanor and temperament. These recommendations are discussed at length in the final section of this report.

To place the Committee's conclusions in perspective, it is useful to understand the peculiar characteristics and problems of each of the judicial discipline systems. After describing the Committee's methodology, we consider the state and federal systems in detail in sections below.

THE COMMITTEE'S METHODOLOGY

After several organizational meetings and the review of relevant materials to familiarize the Committee members with the respective judicial structures, the Committee formulated its plan of work. With respect to the State Commission on Judicial Conduct, the Committee reviewed extensive materials regarding the history and performance of the State Com-
mission and then interviewed at length its Chief Counsel and Chairman. Research was done to review case law regarding the Commission’s work, as well as to consider what comparable procedures were followed in other states. The Committee also decided to conduct a public hearing to solicit comments regarding the Commission’s performance. In preparation for the hearing, Committee members conducted further interviews of former Commission members, attorneys who had practiced before the Commission, individuals who had served as referees at Commission hearings, and invited the submission of written statements from interested observers. In May, 1997, the Committee held a day-long public hearing at which individuals appeared to make statements and to respond to questions from Committee members. The Committee thereafter reviewed and considered at length the several written submissions that were tendered in connection with the hearing.

The Committee also designed a written survey for state judicial officers seeking comments with regard to experiences with the State Commission and views about its work, as well as soliciting questions regarding ethics issues for the judiciary. With the financial assistance of members of the Committee, this questionnaire was reproduced and mailed to approximately 3000 judicial officers throughout New York State. Judicial officers were invited to submit their responses on a confidential, anonymous basis. The Committee received approximately 500 written responses and those responses are summarized in Exhibit C to this Report.

With regard to the federal disciplinary structure, the Committee studied at length the available literature describing the creation of the federal structure and the litigation that has taken place regarding the federal

3. Initially, the Ad Hoc Committee’s jurisdiction included a charge to consider whether changes to the Code of Judicial Ethics were appropriate. However, a comprehensive review of the Code, together with recommendations, was made to the Association by the Council on Judicial Administration in 1996. In addition, the most significant issue for further consideration in the Code, namely, the ability of judges to respond to public criticism regarding the handling of specific cases, has been the subject of analysis by a subcommittee of the Council during the last year. Consequently, the Ad Hoc Committee concluded that no purpose would be served by a duplication of the Council’s work.

4. The Committee notes that the majority of responses it received came from judicial officers outside the New York Metropolitan area. This fact, together with other characteristics, creates a profile of respondents that is not necessarily representative of judges in the courts of New York City, where this Association’s activities are primarily focused. Nonetheless, we believe that the information in the responses allows for some worthwhile generalizations that are useful in measuring the performance of the State Commission. Consequently, these conclusions are set forth in Exhibit C.
system. A subcommittee also interviewed the Chief Judge of the United States Court of Appeals for the Second Circuit, the Chief Judge of the Southern District and the Chief Judge of the Eastern District. In addition, extensive interviews were conducted of the various officials in the Circuit Executive’s office who are charged with the specific responsibility of conducting the investigation into charges against federal judicial officers once those charges are referred by the Chief Judge for inquiry. The Committee also solicited information from members of the Association regarding their experiences with the federal system. No responses were received, which may suggest that no one knows about the system or, if known, may have elected not to utilize the procedure.

THE STATE COMMISSION ON JUDICIAL CONDUCT

A. Background

The Commission on Judicial Conduct was established in 1976 and 1977 by Constitutional amendment in response to a need for an independent, non-partisan body to review allegations of judicial misconduct. Prior to the Commission, disciplinary proceedings6 for judges were conducted by bodies of other judges, and lacked standardized rules and procedures.7 The Commission’s members include judges, attorneys and lay people; the Commission has a permanent staff with codified policies. The creation of the Commission put New York in line with its sister states, the majority of which had established similar bodies in the 1960s and early 1970s.8 Since its creation in 1974, 110 judges have been removed from office, over 400 judges have been publicly disciplined, over 700 judges have been confidentially cautioned, and 200 judges and justices voluntarily resigned during the investigation phase, prior to a final determination.9

5. See 44th Street Notes, Vol. 12 No. 2 (Feb. 1997) at p. 4.
6. Disciplinary proceedings should be distinguished from the rarely used procedures of impeachment pursuant to N.Y. Const. Art. 6 § 24 and legislative removal pursuant to N.Y. Const. Art. 6 § 23. See “Judicial Accountability and Judicial Independence: The Judge Lorin Duckman Case Should Not Be Referred To The State Senate,” 51 The Record 629 (October 1996) (hereinafter “Judicial Accountability”) (explaining the origins and development of the various methods for removing judges).
7. See “Judicial Accountability” for a detailed history of the Commission’s predecessor, the Court on the Judiciary.
9. Annexed as Exhibit B to this Report is a table summarizing statistics for the Commission’s
Article 6, section 22 of the New York State Constitution charges the Commission with the task of “receiv[ing], initiat[ing], investigat[ing] and hear[ing] complaints with respect to the conduct, qualifications, fitness to perform or performance of any judge or justice of the unified court system.” N.Y. Const. Art. 6, § 22. Approximately 3,000 judges and justices are within the Commission’s jurisdiction, from part-time town and village justices to the judges of the Court of Appeals.

Today’s Commission is an eleven member body expressly designed to be non-partisan and independent. Four members are from the judiciary, two members are lay individuals (that is, neither lawyers nor judges), one member is a lawyer who is not a judge, and the remaining four members are from backgrounds other than the judiciary. N.Y. Const. Art. 6, § 22(b). The Chief Judge of the Court of Appeals appoints three members, the Governor appoints four members, and the Legislature appoints four members, with the majority and minority leaders of the Senate and Assembly appointing one Commissioner each. N.Y. Const. Art. 6, § 22(b). In addition, the Commissioners have staggered four year terms.

The Commission derives its authority from Article 6, section 22 of the New York State Constitution. The Commission’s disciplinary power is invoked once “cause” is found; the Constitution defines cause as “including, but not limited to, misconduct in office, persistent failure to perform duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice.” In determining whether “cause” exists, the Commission also looks to the Code of Judicial Conduct and Rules Governing Judicial Conduct of the Chief Administrator of the Courts (22 N.Y.C.R.R. Part 100) (the “Rules”). The determination of “cause” and the appropriate sanction are separate inquiries.

In addition to the Rules governing judicial conduct, there are the written opinions of the Advisory Committee on Judicial Ethics. The Advisory Committee on Judicial Ethics, which was formally established in November 1988, issues confidential written advisory opinions to state judges and justices on “issues related to ethical conduct or proper execution of judicial duties or possible conflicts between private interests and official duties.” Judiciary Law § 212(2)(l); 22 N.Y.C.R.R. Part 101 (McKinney’s 1998).

10. The composition of the Commission in place today was adopted on November 8, 1977. See “Judicial Accountability” for the composition and procedures of the Temporary Commission on Judicial Conduct and the first Commission on Judicial Conduct.
The Judiciary Law provides that a judge who follows the Advisory Committee's written findings or recommendations will be “presumed” to have acted properly if the Commission subsequently investigates the judge's conduct. The Advisory Committee, which is part of the Office of Court Administration, publishes its opinions, deleting names and identifying information, and distributes them to all sitting judges and justices, as well as to various law libraries. (The opinions may also be retrieved through Westlaw.) There are approximately twenty judicial members of the Advisory Committee, which meets between six and eight times each year. Our survey revealed that a high percentage of judges read the opinions issued by the Committee and find its work helpful. Given the response, it is regrettable that the Advisory Committee only may issue written opinions and does not have an ethics “hotline” for judges who need more immediate guidance or advice.

Article 2-A of the New York State Judiciary Law provides the framework for receiving complaints, initiating investigations, conducting hearings and dismissing complaints. The Commission's operating procedures, which the Judiciary Law empowers the Commission to establish on its own, are published at 22 N.Y.C.R.R. Part 7000. All complaints must be in writing and signed by the complainant. If a complaint lacks merit on its face, or if the matter is outside the Commission's jurisdiction, the Commission may dismiss the complaint, giving what is essentially a form notice to the complainant. This review is done by the permanent staff of the Commission. If a complaint is not dismissed out of hand, the staff requests the Commission to authorize an investigation. The staff may also request the Commission to authorize an investigation sua sponte, with an “administrator's complaint.” The staff of the Commission cannot undertake an investigation on its own without Commission authorization; however, as a practical matter the staff may engage in some limited preliminary investigation to determine whether to seek authorization from the Commission.

As part of its investigation, the Commission may request a written response from the judge, or his or her appearance. At this and all stages, the judge has the right to be represented by counsel. After the completion of the investigation, the Commission may dismiss the complaint. Together with the dismissal, the Commission may issue a letter of dismissal and caution to the judge which “contain[s] confidential suggestions and recommendations.” § 7000.3.11

---

11. The letter of dismissal and caution is the only non-public disciplinary action the Commis-
If a complaint is not dismissed, a formal written complaint is filed. The judge then has a period of time in which to answer the complaint. At this point, either side may move for “summary determination,” or together they may submit an agreed statement of facts. Otherwise, a referee is appointed by the Commission11 to conduct a hearing and report his or her findings. The Judiciary Law provides that all hearings are private, unless the judge makes a written request for an open hearing. After the conclusion of a hearing, the Commission makes a determination on the merits as to whether there is “cause” for discipline based upon the referee’s report and briefs filed by both sides. During this part of the process there is no communication between the Commission staff involved in prosecuting the case and the Commissioners. At the time of the hearing, there is also an opportunity for both the judge and the Commission staff to present arguments regarding appropriate sanctions.

After the hearing, the Commission either dismisses the formal written complaint (at which time a letter of dismissal and caution may be issued) or imposes a sanction. The possible disciplinary actions that the Commission may take are public actions, set forth under Article 6, section 22 of the Constitution. They are: admonishment, censure and removal. Once the Commission makes a determination, it is transmitted to the Chief Judge of the Court of Appeals, who in turn informs the judge. The judge has an opportunity within 30 days after receiving notice to request that the Court of Appeals review the Commission’s determination.12

In 1996, the Commission received 1,490 new complaints to add to a pending docket of 187 cases from the preceding year. Of the total, 1,298 complaints were dismissed on first review, 89 were dismissed after investigation and/or hearing, 41 resulted in a Dismissal and Caution, 25 judges resigned, 29 cases were closed (e.g., upon vacancy of office for reasons other than resignation) and 23 resulted in actions, which include determina-

---

11. When the word “Commission” is used unmodified, it refers to the entire organization. “Commission members” or “members” refers to those individuals appointed to the Commission by the Governor, the Chief Judge and the leaders of the Senate and the Assembly. “Commission staff” or “staff” refers to the legal staff of the Commission. It is also interesting to note that the Administrator of the Commission, Gerald Stern, is appointed by the Commission members.

12. A more detailed description of the Commission’s procedures is set forth immediately below.
tions of admonition, censure and removal from office by the Commis-

sion. See Table in Exhibit C.

B. Overview of the Work of the Commission

The Complaint

Each complaint filed with the Commission is first read by the staff. A
copy of every complaint is then given to each Commission member, ac-
accompanied by a summary prepared by the Commission staff with a re-
commendation. By a vote of a majority of the Commission members (there
is no statutory quorum at this point in the proceedings) one of three
actions is taken:

• Referral to another body, such as the Office of Court Admin-

istration;

• Dismissal;

• Authorization for the Commission staff to investigate the

complaint.

When an investigation is authorized, the Commission members may
specify that the investigation be limited, i.e., that the Commission staff
may only write a letter to the target judge. As the investigation ensues,
the Commission staff provides the Commission members with progress
reports. Communication between staff and members is very fluid during
this process. The members are permitted input as to how the investiga-
tion should progress. The investigation may include interviewing witnesses
and reading court files. At a very early stage of the investigation, the staff
can recommend to the members that the complaint be dismissed. If this
occurs, the judge is never made aware that a complaint was filed.

In the more extensive investigations, as a matter of policy the proce-
dure includes obtaining information from the judge. This may be done
in one of two ways: 1) the staff, on its own, may send a letter to the judge
requesting a written response to the allegations; or 2) the judge may be
asked to appear and answer questions and give testimony under oath. In
order for the staff to request the judge to testify, it must receive authoriza-
tion from the Commission. Specifically, a majority of the members is needed
for the staff to receive formal testimony. In addition, a Commission member
must be present at the time of questioning. When a judge is asked to
appear, the judge receives a copy of the complaint.

When the staff has concluded its investigation, it reports findings to
the members and make one of three recommendations:
A judge will not be cautioned, however, unless the judge has acknowledged misconduct. This is true at every stage where a letter of dismissal and caution may be issued.

Formal Charges
In order to proceed to formal charges, and for all decisions by the Commission members subsequent to formal charges, there must be a quorum of 8 members and a concurrence of 6 out of 8. (See Judiciary Law § 41(6).) The Commission members may authorize the staff, through its clerk, who is independent of the staff, to prepare and serve formal charges. Once formal charges are brought, the staff and the members cannot have contact with each other about the case. After formal charges are served, one of four things may occur:

- judge denies charges;
- judge admits charges;
- judge doesn’t respond;
- judge and Commission staff prepare agreed statements of facts and possibly a recommendation as to sanctions.

Denial of charges
If the judge denies the charges, a hearing is conducted. The clerk, having received the judge’s denial, requests the Commission members to appoint a referee. The referee conducts the hearing, receives briefs from both sides and issues a report which includes findings of fact and conclusions of law. The referee does not make any recommendations as to sanctions. The report then goes to the Commission members. The Commission members have the opportunity to read the report and hear from the staff and the judge. The members then issue findings of fact and conclusions of law, and either dismiss the complaint, dismiss and caution, or impose a sanction on the judge. The members may only dismiss and caution if they find that the judge has admitted misconduct.

13. The Clerk of the Commission is appointed by the Commission members. The clerk receives all papers and acts as a go-between for the staff and members.
Admission of charges

If the judge admits the charges, but denies misconduct, the staff may make a motion for a summary determination by the members. Upon granting the motion, the Commission will then decide either to dismiss, dismiss with caution or sanction.

No response

If the judge does not respond, that is considered a further act of misconduct. The staff may then move for summary determination that the allegations in the formal charges be deemed admitted. The judge may oppose the staff’s motion and (belatedly) answer the charges. If the Commission members deny summary determination, the matter goes to hearing or the parties agree upon a statement of facts. If summary determination is granted, the Commission members then make a determination to dismiss, dismiss with caution or sanction.

Agreed statement of facts

The judge and the Commission staff can come to an agreed statement of facts. This may also include an agreed recommended sanction. The Commission members may accept or reject the agreed statement in its entirety. If rejected, the judge and staff may try to come to another agreement or a hearing may be held. If accepted, the Commission turns to the issue of sanctions and may dismiss, dismiss with caution or sanction.

C. Operation and Evaluation of Performance

1. Results of Hearing Submissions

The written submissions received by the Committee in connection with the public hearing covered a broad range of issues.

Some of the submissions were prepared by people who had filed complaints with the Commission which were dismissed out-of-hand. A common theme of these submissions was the frustration experienced by the complainants upon receiving form letters from the Commission that provided them with no meaningful explanations as to why their complaints had been dismissed.

Presentations were made by the following, among others:

Henry T. Berger, the Chair of the Commission, provided the Committee with a memorandum discussing the Commission’s budget, the need for legislation to provide for public hearings, Mr. Berger’s views of proposed legislation known as S.4264, the need for a constitutional amendment to authorize temporary suspension of judges for reasons in addition...
to those presently set forth in the New York Constitution, and the need for a constitutional amendment to provide for suspension from office as a disciplinary sanction.

Elena Ruth Sassower, the Coordinator of the Center for Judicial Accountability, Inc., as well as other members of that organization, presented submissions which were highly critical of the Commission on a host of grounds.

Richard Godosky, an attorney who has had substantial experience representing judges before the Commission, addressed several procedural issues in both his written and oral presentations, including what he characterized as the Commission’s “ad hoc rules relating to the procedures involved with respect to the manner in which determinations are made.”

Robert M. Kaufman, an attorney who is President of the American Judicature Society, submitted a paper in which he discussed his views of the Commission from the perspective of having sat as a referee for the Commission on three occasions.

Victor A. Kovner, a former member of the Commission, presented a memorandum discussing sanctions reform, the underfunding of the Commission, and his views on S.4264.

Thomas F. Liotti, an attorney, submitted a memorandum in which he praised the professionalism displayed by the Commission’s staff in the handling of a complaint which he filed with the Commission.

On the whole, the written submissions were very informative and provided a valuable supplement to the oral presentations at the hearing.

2. Summary of Responses to Questionnaire

As indicated earlier, the Committee requested New York State judicial officers to participate on an anonymous basis in a system-wide questionnaire to collect information on the Commission. The results of that questionnaire are discussed in detail in Exhibit C to this Report.

In the Spring of 1997, over 500 New York State judges responded to a written survey prepared by the Ad Hoc Committee on Judicial Conduct on their experiences with, and attitudes and opinions about, the Commission. Among the major results are the following:

- Respondents believe that the outcome of Commission proceedings are generally satisfactory, and 85% believe the hearings on the Commission’s formal charges against judges should be private and confidential. Only 72% of respondents believe
they have an adequate understanding of the Commission’s purposes and procedures, and less than 15% believe the public has an adequate understanding of the Commission.

• However, almost one-half of the respondents described at least one aspect of the Commission’s procedures as being “unfair,” and almost one-quarter characterized the behavior of Commission members or staff toward the subjects of proceedings as “discourteous, insensitive or unprofessional.”

• In addition, half of the respondents believe the Commission’s investigation practices and proceedings need improvement. Areas most mentioned as needing improvement include procedural rules, including guarantees of basic due process and an assumption of innocence, a separation of the investigation, prosecution and judicial functions of the Commission, a more thorough and open fact-finding and investigation process to insure that only unbiased and substantiated charges are brought, full disclosure and prompt notification of charges and findings, and a reduction in the time needed to complete each stage of the process.

• Almost half the respondents believe the range of sanctions available to the Commission should be expanded to include, for example, private admonitions, fines, probation or suspensions.

• 20% of respondents do not find adequate guidance in the Judicial Canons on extra-judicial activities, and over 40% believe the current limitations on extra-judicial activities are too restrictive. In addition, over 10% of respondents do not believe the present rules on ex parte communication are appropriate. These respondents are more likely to be part-time Town and Village Justices. 80% of respondents believe judges should be required to report judicial misconduct to an appropriate professional agency.

D. Commentary on the Commission and Proposals for Change

1. Possible modification to authority of the Commission

On various occasions, including the 1987 legislative hearings concerning the Commission, Gerald Stern, Administrator and Counsel to the Commission, has stated that the Commission does not have the author-
ity to commence an investigation proactively, i.e., in the absence of a complaint. Some case law seems to support Gerald Stern's assertion that the Commission's authority is so limited. However, Article 6, Section 22 of the NY State Constitution and Judiciary Law §44(1) states that the Commission "shall receive, initiate, investigate and hear complaints..." (emphasis added).

If the Commission does not, in fact, have the authority to be proactive, the Committee is of the view that the Commission should be granted limited power to initiate investigations. Lawyers are reluctant to file complaints against judges. Therefore, the complaints that are filed with the Commission do not reveal a complete picture of the day-to-day problems that exist in our courtrooms. Although the Committee does not take the position that the Commission should be given unbridled leeway to delve into judicial affairs, we do believe that it should have the authority to conduct circumspect investigations in the absence of a formal complaint. Thus, for example, if the Commission has learned through reliable information that misconduct may have occurred, it should be empowered to take investigatory steps, such as reviewing hearing transcripts and making random courtroom observations.

2. Budget of the Commission

Over the last several years up to 1997, the Commission's budget has been maintained at zero growth or actually cut.14 The plain effect of these budgetary constraints has been to undercut seriously the Commission's ability to perform optimally under the existing structure. Interviews with the Chief Counsel and with the Chairman have convinced the Committee that the budget morass seriously impedes the Commission's work.15 For example, until very recently, the Commission Staff has been cut to just one full time investigator, and there were no allowances for even modest travel so often necessary to investigate a complaint.

14. From 1990-91 through 1996-97, the Commission's budget decreased by 15%. The 1996-97 budget represented a 7% increase over the previous year, making this a marked change from prior current history. 19 Judicial Conduct Reporter at 5 (Summer/Fall 1997, #s 2-3 (hereinafter "JCR").

15. In somewhat incongruous fashion, the Chairman stated at the Committee's public hearing that the Commission was "doing its job" within the parameters of the existing budget. We recognize the dilemma of the Chairman in responding to the question: to have answered in the negative would have constituted criticism of his own Commission's work, one which he does not embrace; however, to claim that the Commission is working at full capacity defies any reasonable analysis of what the public should expect from the Commission structure.
No public oversight group can be expected to perform its job in the absence of adequate funding, and the Commission is no exception. A properly funded office is necessary if the Commission and its professional staff are to be able to mount any sustained oversight work and to ferret out and investigate instances of judicial misconduct. In the present funding crisis, the Commission can do little more than to deal with matters that are brought before it with significant detail already amassed or to monitor those egregious instances where local judicial officers have failed to file required reports or to forward funds collected. Numerous potential situations of improper judicial conduct are thus left uninvestigated and unprocessed. Since our Committee began its work, the State Legislature partially rectified this situation with appropriations to the Commission in 1997. However, given the fluidity of the budget process, the Committee urges the Governor and the State Legislature to insure in a permanent fashion that adequate funds for the Commission’s work are budgeted annually.\textsuperscript{16}


During the last legislative session, there was pending before the State Legislature proposed legislation that would make significant changes in certain aspects of the Commission’s procedures. These proposals are contained in S.4264, introduced by State Senator Lack.\textsuperscript{17}

The most significant of the changes in the Lack Bill is the provision to require that all hearings before the Commission are conducted as public hearings, a proposal that parallels the same modification for disciplinary proceedings against lawyers. The Association, in prior public statements, has endorsed the concept of public hearings from the time a formal complaint is issued by the Commission. Under the Association’s Rules, this Committee is bound by that position. We note, however, that were the matter open for new discussion, the Committee would reach a somewhat different conclusion; namely, to have a public hearing conducted only when the Staff seeks removal of the judicial officer rather than some other penalty.

\textsuperscript{16} To make this point most forcefully, we note the comparison between New York, with 3,500 judicial officers, and California, with half as many judicial officers, 1,554. The California Commission’s budget in each of 1995 and 1996 was virtually double New York’s budget, despite the fact that the State had half as many judicial officers under the Commission’s jurisdiction. 19 JCR at 4 (Table).

\textsuperscript{17} It is anticipated that similar legislation will be introduced by Senator Lack in the current term.
A second proposed change in the Lack Bill is to impose a standard of “clear and convincing evidence” to impose discipline, rather than the existing “preponderance of the evidence” standard. The Committee, on balance, opposes the suggested change. There seems to be little justification proffered for making the proceedings more stringent, other than an implicit desire to limit the circumstances where judicial officers can be disciplined. The price of such a change in standard would be substantial in the public perception that judges were being “protected” by the legislature. This would be a dubious achievement since the Committee did not find evidence of charges brought against judicial officers where the absence of a more rigorous standard resulted in an unfair or inequitable result.

4. Sanctions Reform

Although not the subject of current legislation, several other areas of possible reform came to the Committee's attention during its work. These largely have to do with the matter of available sanctions and raise the question whether the Commission's arsenal of remedies should be expanded. One suggestion relates to the question whether a letter of dismissal and caution should continue to remain confidential and non-public. One critic pointed out that the absence of public information on such matters is a significant limitation of the public oversight of judicial conduct and that the public has a right to know. The difficulty with this position is that it overlooks the usefulness to the Commission of such a remedy. A significant number of cases brought to the Commission end with a letter of dismissal and caution. Such a remedy is also an effective device for resolution of charges in appropriate cases because it serves as a clear warning to the judicial officer and often achieves a prompt disposition of the charges. The Committee believes, on balance, that the usefulness of such a private sanction outweighs the considerations in favor of making all discipline public.

A second major area of suggested change is expansion of the spectrum of available remedies, for example to include fines or some lesser suspension that would fill the existing void between censure and removal. The Committee believes that this is not a fruitful area for change. For the most part, there presently exist sufficient options for the Commission to assure flexibility in its disposition of matters. In the Committee's view,
most infractions by judicial officers that are proven can be grouped into one of two categories: either a formal reprimand and censure, or removal. It is hard to conceive of circumstances that would warrant a punitive suspension for some period of time, but not formal removal. And, in the case of suspension, a myriad of troubling issues are presented: for example, what would be the training required for the judge's return to office and how would this return be handled as a matter of public perception? Likewise, how would litigants and attorneys perceive justice before a judicial officer who had been suspended and now was reinstated? Similarly, the imposition of fines would not create a meaningful remedy that would be useful in the case of discipline of judicial officers.

5. Other Recommendations

Although not the subject of current pending legislation, there are various other recommendations with respect to the State judicial conduct disciplinary mechanism that the Committee has evaluated. Some of these proposals have been the suggestions of other public interest groups, and others have been discussed by various public commentators.

First, critics of the State Commission often call for the establishment of some kind of oversight process. The nature or form of such oversight never has been carefully articulated, but presumably the options range from review of all actions of the Commission, including those of non-prosecution, to hearings before committees of the State Legislature to assess the work of the Commission. The Committee believes that such oversight function is neither necessary nor productive. The Commission's annual report of its activities provides a sufficient benchmark to judge what the Commission has done during the past year. Moreover, we believe that the expense of any oversight function significantly outweighs its probable benefit and that the funds would be better expended to supplement the Commission's investigative budget.

Second, the Commission's staff has urged that, in appropriate cases, it should be given the power to seek interim removal of judicial officers. We agree with the staff's proposal for a provision that would allow removal of judicial officers in cases of egregious misconduct upon an adequate evidentiary showing to a reviewing court. For example, where there is compelling evidence that a judicial officer has accepted corrupt payments, that officer ought not be permitted to continue to serve in office pending disposition of charges, provided that the quality of proof is sufficient to convince a reviewing court of the probability that the judicial officer will be removed at the conclusion of formal hearings.
Third, concerned judicial officers have urged that the system should include some facility for reimbursement of a judge's defense costs in cases where charges ultimately are dismissed. The Committee recognizes the hardship often visited on a judicial officer to incur the expense of defense costs, a hardship which sometimes results in the formation of a bar group organized to raise a “defense fund” for the judicial officer. Such fundraising, while not inappropriate as an ethical matter, surely creates issues of public perception that can endanger confidence in the judiciary. In this instance, the federal analogue provides useful guidance. The statute provides a right for reimbursement in cases where the judicial officer is cleared of any wrongdoing. We believe that the New York State Legislature would be well-advised to adopt a similar procedure for the state system.

Fourth, the suggestion has been made that the Commission should offer more specific explanations for dismissal of charges or helpful communications with complainants to explain the outcome of the proceedings or investigation. We agree that these are desirable objectives that should be encouraged. In our public hearing, the Committee noted that the absence of suitable explanation to complainants often was the source of the impression that charges were being “swept under the rug” or ignored. Recognizing that confidentiality requirements may limit extensive explanations and that some complainants never will be satisfied with anything short of formal and full accusatory procedures, we nonetheless believe that a simple and straightforward explanation of why charges have not been brought, or of the procedures followed by the Commission, would be a beneficial improvement in the Commission’s practice. Again, to the extent that this proposal has financial implications, we believe that budgetary dollars would be well spent on such educational and clarifying information.

Fifth, early on in the Committee’s work the Association’s President remarked about the unduly slow pace with which one well-publicized judicial conduct matter was proceeding. This prompted consideration as to whether there should be procedural reforms to expedite investigations and disciplinary proceedings. As in the case of so many other areas of reform, there is an interrelationship between the issue and other proposed changes. For example, the extended period of investigation and hearing exacerbates the criticism of the need to publicize the charges against judges and the countervailing consideration of the uncertainty created over the integrity of the judicial process when judges serve while defending their conduct against charges. The simple answer is that the delay in such proceedings is inexcusable and intolerable. The Committee believes
that strict and meaningful deadlines should be imposed at each stage of the proceedings and that deviations from these standards ought not to be lightly permitted. This includes requests for delays by judicial respondents that ought not to be tolerated to assure that proceedings are completed expeditiously. Here, we deal in the strongest of public interests and promptness is an objective that must be assured by the process.

6. Education of the Judiciary—
Meetings and workshops for judges on judicial ethics

In our discussions the Committee noted that a major area of concern revolves around judicial temperament and demeanor. The Committee recognizes that service on the bench imposes high-pressure demands on judges and that this may contribute to tension between the bench and the bar. Often, a difficult situation may be capable of being defused with patience and creativity. More senior judges have practical experiences that would prove helpful to new judges as they adapt to the responsibilities of the judiciary. To this end, the Committee believes that seminars and workshops provide an essential tool toward educating new judges on judicial ethics and sensitizing them to issues involving temperament. We believe that existing programs should be expanded and employed as an essential part of judicial training.

THE FEDERAL DISCIPLINE SYSTEM
A. Background

Under Article III of the United States Constitution, federal judges are nominated by the President, confirmed by the Senate, and hold office “during good behavior.” This essentially provides for life appointment. Article III judges can only be removed from office following impeachment by the House of Representatives and conviction by the Senate. Since 1789, only thirteen federal judges have been impeached by the House. Only seven of these judges were removed from office after conviction by the Senate. Four judges were acquitted by the Senate; two resigned after impeachment by the House but before conviction by the Senate. See generally Van Tassel, Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992, 142 U. of Pa. L.Rev. 333, 336-37 & n.14 (1993). Between 1918 and 1993, at least twenty-two other Article III judges resigned or retired from the bench “under the color of impropriety.” Id. at 366.

In 1973, for the first time in American history, a sitting federal judge
was convicted of a crime and sent to prison, resigning from the bench only after all appeals were exhausted. Id. at 337. Since 1980, five sitting federal judges were indicted for federal crimes; four were convicted and one was acquitted. One of the convicted judges then resigned from the bench; three convicted judges refused to resign, but were removed following impeachment by the House and conviction by the Senate; the one acquitted judge was nevertheless impeached by the House and removed from office after conviction by the Senate. Id. at 337-38. See also Burbank & Plager, Forward: The Law of Federal Judicial Discipline and the Lessons of Social Science, 142 U. of Pa. L.Rev. 1, 3-4 (1993).

Life tenure of federal judges provided by Article III has long been viewed as a bulwark of judicial independence, in theory freeing the federal judiciary from local and political pressures. This Article III protection is also an impediment to any effective disciplinary system for federal judges. In the face of Article III, congressional and judicial power to impose disciplinary sanctions (short of impeachment) is limited. Informal processes to deal with problem judges were often thought sufficient, but “the successes of those processes remained largely anonymous, while the failures remained on the bench.” Burbank & Plager supra, at 2.

In 1980, in the face of concern that the federal judiciary could not keep its own house in order, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (the “1980 Act”), codified at 28 U.S.C. § 372(c), which was intended to help the judiciary deal with problems of misconduct or disability not requiring impeachment. The statute was subsequently amended into its present form in 1988 and 1990.

The 1990 amendment also created the National Commission on Judicial Discipline and Removal (the “Commission”). The Commission studied problems concerning federal judicial discipline, caused research to be undertaken under its auspices, and issued its report with findings, conclusions and recommendations on August 2, 1993. The Commission engaged a number of scholars as consultants to conduct legal, historical and social science research. The work of these consultants, along with a Forward by two Commission members (Burbank and Plager), is published at 142 U. of Pa. L.Rev. 1 (1993), providing a rich background for the issues considered by our committee.

In reviewing these voluminous materials and considering our own observations and findings, it remains apparent that existing procedures for dealing with complaints about judicial misconduct still do not adequately resolve the problems facing litigants and lawyers practicing in
the federal courts. Quite telling in light of our own observations, Burbank and Plager write that:

These sources persuaded the Commission that fear of retaliation prevents some lawyers and litigants, particularly repeat players, from filing complaints under the 1980 Act. Moreover, the surveys demonstrated that there is a disturbing level of ignorance about the Act among virtually every group surveyed. These findings led the Commission to recommend that additional steps be taken to educate lawyers, judges, court personnel, and members of the public about the 1980 Act, and that mechanisms be established to assist in presenting serious complaints to chief judges without fear of retaliation. Burbank & Plager supra, at 18-19.

We can only echo the Commission’s 1993 conclusions—there remains a disturbing level of ignorance about the Act and the disciplinary procedures it creates; lawyers fearing retaliation still refrain from presenting meritorious complaints; and mechanisms need to be established to assist in presenting serious complaints. As discussed in the Recommendation section of this Report, we believe the Association can play an important role in dealing with these problems.

B. Section 372

The 1980 Act largely assigns to the chief judge of each circuit court the power and responsibility to control the federal judicial disciplinary process. Section 372(c)(1) provides, in pertinent part:

Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleges that such judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

The clerk of the court is then required to transmit the complaint to the chief judge of the circuit. The chief judge, after reviewing the complaint, may by written order stating the reasons, dismiss the complaint or conclude the proceeding if corrective action has been taken or is no longer
necessary because of intervening events. The complaint shall be dismissed if it is “not in conformity” with statutory grounds, “directly related to the merits of a decision or procedural ruling,” or “frivolous.” § 372(c)(3)(A). If the complaint is not dismissed, the chief judge shall appoint himself and an equal number of circuit and district judges to a special committee to investigate the facts and allegations in the complaint. § 372(c)(4)(A). The special committee must then provide written notice to the complainant and the judge whose conduct is the subject of the complaint, and “shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit.” § 372(c)(5). Upon receiving the report, the judicial council may conduct any additional investigation it considers necessary. The judicial council shall then “take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit,” §372(c)(6)(B), including (1) certifying the disability of a judge, (2) requesting that any judge appointed to hold office during good behavior voluntarily retire, (3) ordering that “on a temporary basis for a time certain,” no further cases be assigned to the judge, (4) private censure or reprimand, (5) public censure or reprimand, (6) “such other action as it considers appropriate under the circumstances,” except that under no circumstances can the judicial council remove from office any judge appointed to hold office during good behavior, or (7) dismissing the complaint.

C. Application of the Section 372(c) Procedures

While § 372(c) sets out the basic procedures for federal judicial disciplinary complaints and proceedings relating to complaints, the circuits retain substantial flexibility in how they administer the statute. In addition to the statute, the Special Committee of the Conference of Chief Judges of the U.S. Courts of Appeal has promulgated Illustrative Rules Governing Complaints of Judicial Misconduct and Disability. The Commission had research undertaken to determine whether the 1980 Act works as intended in dealing with complaints of judicial misconduct or disability and whether there is sufficient information available to permit meaningful oversight of the process. The results of the research are reported in Barr & Willging, Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980, 142 U. of Pa. L.Rev. 25 (1993). The authors studied 2,389 judicial misconduct complaints filed between 1980 and June 1992. Among their findings were the following:
attorneys filed 6% of the complaints
litigants and non-litigants filed the remaining 94% of the complaints
in the Second Circuit, 9% of the complaints were filed by attorneys
complaints by attorneys were more likely to lead to corrective actions or special committees
77% of attorney complaints resulted in dismissals by chief judges
95% of non-attorney complaints resulted in dismissals by chief judges
of 151 “arguably meritorious” complaints reviewed by the authors, they characterized the types of complaints as follows:

- 51—abuse of judicial power
- 28—prejudice/bias
- 24—undue decisional delay
- 12—bribery or corruption
- 10—demeanor

The practice among the circuits differs regarding who, if anyone, assists the chief judge in initially evaluating judicial misconduct complaints. In the Second Circuit the practice has been for the Chief Judge to delegate initial review and a preliminary investigation of complaints about judicial misconduct to the Circuit Executive and Assistant Circuit Executive. Following this initial review, all complaints are forwarded to the Chief Judge for action pursuant to § 372(c)(3)(a). Copies of all orders signed by the Chief Judge are publicly available in the Court of Appeals Clerk’s Office.

Barr and Willging also report that “95% of all complaints for which data are available result in dismissal under § 372(c)(3)(A), that is, dismissal because the complaint is either not in conformity with the Act, merits-related, or frivolous.” Barr & Willging, supra, at 55. The most common ground for dismissal is merits-relatedness. Id. A complaint that a judge reached an incorrect decision, no matter how wrong the decision may have been, is not a proper subject for a complaint of judicial miscon-
Complaints about undue decisional delay are also quite common. As reported by Barr and Willging, "a complaint of delay is dismissed as merits-related unless it complains of a habitual pattern of delay in several cases. The complainant is generally told that mandamus is the available remedy for allegations of delay falling short of this standard. Few complainants in fact allege a habitual pattern of delay." Barr & Willging, supra, at 70. As explained below, our own work has shown that lawyers and litigants in the Second Circuit frequently have concerns about decisional delay, which more often than not is never raised in a formal complaint, largely because of fear of reprisal.

D. Corrective Actions

The Act provides that a chief judge may conclude proceedings on a judicial misconduct complaint on a finding that "appropriate corrective action has been taken." § 372(c)(3)(B). Based on a survey of present and former chief judges, Barr and Willging concluded that this power is frequently used by chief judges, who view this power as an effective forward-looking tool in educating and rehabilitating judges. See generally Barr & Willging supra, at 92-111. Often times the corrective action does not benefit the complainants, but it could help the judge avoid similar problems in the future. Id. at 97. The authors report that problems of undue delay, judicial demeanor and intemperate remarks are typical subjects for corrective actions through discussions between the chief judge and the offending judge. Id. at 97-98. In light of the recurring concerns raised with our committee about these specific issues—undue delay, judicial demeanor and intemperate remarks—we have questions whether complaints are being dealt with effectively when such judicial misconduct complaints are concluded because of corrective actions. If the problems thereafter persist, lawyers and litigants are further discouraged from raising valid complaints because of a sense that nothing will be done about it.

E. Informal Actions Taken by Chief Judges and Judicial Councils

Chief judges have expressed a strong preference to deal with judicial misconduct problems informally rather than through the formal complaint procedure.

In every circuit, chief judges reported informally addressing and resolving serious allegations of judicial disability or patterns of
Chief judges who were surveyed rated informal actions by chief circuit judges as the most frequently used, followed in order by informal actions by chief district judges, informal actions by peer judges, and judicial actions (such as mandamus and judicial review). Formal procedures under § 372(c) ranked fifth. Id. at 132.

Barr and Willging also surveyed chief judges about the sources for informal complaints. Barr and Willging report:

In addition to the informal complaints from attorneys that are filtered through the circuit executive’s office, all of the chief judges and former chief judges interviewed reported that they received informal information directly from lawyers or from the U.S. Attorney’s office. Most chief judges recognized, as one put it, that “it’s very difficult for a practicing lawyer to file a complaint [because] they’re in constant practice before the judge.” .... Contact with the bar is crucial because “the bar knows the most about misconduct; there must be some way to tap into that knowledge.” Id. at 134.

Our committee’s work has likewise led us to conclude that the bar—and, particularly, this Association—can and should be a crucial source of information for the chief judge concerning complaints about judicial misconduct. Except in the most serious cases of criminal or impeachable conduct, the major objective is to improve judicial performance and remedy inappropriate behavior. If this can best be achieved through informal complaints presented by the bar, that approach should be given a chance to work. If in particular cases informal complaints are unavailing, formal complaints under § 372(c) can be filed by the bar, assuming that issues of confidentiality can be dealt with adequately.

Barr and Willging also summarize recommendations made by chief judges they interviewed as part of their research. Under the heading “Informal Actions—Sources of Informal Complaints,” they quote comments from chief judges that:

I wish there were a vehicle by which lawyers could better air
their grievances, without concern or fear of retaliation. Perhaps bar associations can help with this. They could be a conduit by which to do it. Lawyers go to bar committees, and the committee as a whole files the complaint. This would keep the individual lawyer confidential [unless the factual circumstances of the complaint are sufficient to reveal the lawyer's identity to the judge, as may often by the case].

Maybe there ought to be more efforts at bar meetings to explain that this procedure exists. Lawyers ought to know how informal it can be, they can just call the chief judge or clerk if they want. Barr & Willging supra, at 191.

In making their own recommendations for change, Barr and Willging propose that "Bar groups should be encouraged to serve as filters and conduits for serious complaints." Id. at 193.

As explained below, we propose that the Association act as just such a filter for complaints.

**F. Experience in the Second Circuit**

As mentioned in the introduction to this report, a subcommittee interviewed the Chief Judges of the Second Circuit and the Southern and Eastern Districts of New York, and officials in the Circuit Executive's office. All of those interviewed were helpful in explaining the system used for handling judicial misconduct complaints in the Second Circuit.

All complaints are filed with the Second Circuit Clerk. The Circuit's Chief Judge has delegated responsibility for the initial review of complaints to the Circuit Executive's office. While the number of complaints has fluctuated from year to year, filings currently approximate one each week. Approximately 80-95% of complaints are filed by dissatisfied litigants rather than by lawyers. The Clerk's office sends a copy of the complaint to the judge against whom the complaint is made. If the complaint is made against a district judge, the Clerk also sends a copy to the chief judge of the district court in which the judge sits.

The Circuit Executive's office initially undertakes a "paper inquiry," obtaining whatever files, records or transcripts are necessary, sometimes ordering hearing transcripts, or listening to tape recordings of proceedings. The Circuit Executive's office is not permitted to resolve any factual disputes. The Chief Judge decides whether the conduct complained of falls within § 372.

Few complaints survive the statutory review by the Chief Judge (following the initial review by the Circuit Executive's office). Most com-
plaints are disposed of with a final public order dismissing the complaint. The order usually includes a detailed description of the allegations and the name of the complainant, but not the name of the judge. These orders are on file in the Second Circuit Clerk’s office. The most common basis for a dismissal is that the complaint is “merits related.” If the issues raised by the complaint can be made the subject of appellate review (either by appeal or mandamus), the complaint is usually deemed merits related.

If the Chief Judge concludes that the complaint should not be dismissed, or that corrective action has not been taken, the Chief Judge then appoints a committee, pursuant to 28 U.S.C. § 372 (c)(4)(A), consisting of himself and an equal number of circuit and district judges. While the statute provides that counsel may be appointed to represent the committee, that authority has not been used in this Circuit. Counsel may represent the judge against whom a complaint has been filed, and the judge may be reimbursed for counsel fees. The Second Circuit has had only three committees appointed since § 372 was adopted, and only one committee has been appointed in the last five years.

Numerous complaints are filed about delays in deciding pending motions. The Circuit Executive’s office checks statistics to determine whether the particular judge is behind in his or her calendar. Delay in the specific case alone is not a proper basis for a misconduct complaint, as it can be reviewed by mandamus; therefore, it is deemed merits related. A pattern of delay is, however, a proper subject for a judicial misconduct complaint. Possible remedies if judges do not move their calendars are limited be-

19. When a mandamus petition based on delay is received by the Clerk’s office, the district court judge’s clerk is contacted about the reason for delay. This contact often results in a decision of the pending motion. If the matter is not decided promptly, mandamus may be denied without prejudice to renewal in 30 or 60 days, signaling that the district court should decide the matter quickly.

20. The Chief Judge has asked each chief district judge in the Circuit to submit a plan to deal with any backlog of undecided motions. Every six months the Administrative Office of the Courts publishes statistics for each federal district judge of the number of motions pending more than six months. For district judges with large numbers of motions pending more than six months, the Chief Judge of the Circuit asks the chief judge of the district court to work out a specific plan with the district judge to reduce the number of pending motions, offering additional law clerk assistance if necessary. Some judges have adopted individual rules providing that a motion should not be “filed” until all briefing has been completed; this prevents the clock from commencing in measuring the time a motion has been pending. Because the practice among judges differs in this regard, comparative statistics among judges, even on the same court, must be viewed with caution.
cause of Article III protection, but may include removing a judge “from the wheel” in assignment of new cases.21

Our interviews revealed that few misconduct complaints are filed by lawyers concerning abusive conduct by judges. Indeed, the chief judges expressed surprise that so few complaints of this type are filed in light of frequent informal accounts they have heard about abusive conduct. The chief judges acknowledged what our Committee has heard from practicing lawyers—lawyers are concerned about how judges will react to complaints about abusive conduct relating to them or even their colleagues. Many lawyers are afraid of retaliation. Each of the three chief judges and officials in the Circuit Executive’s office said that more active participation of the organized bar would be helpful in educating the bar about existing procedures concerning judicial misconduct complaints and in bringing complaints about judicial misconduct to the attention of the chief judges. Additionally, they all agreed that the organized bar should create a mechanism for collecting complaints and presenting them to the court, particularly when there are recurring complaints showing a pattern of abusive conduct by judges.

The chief judges also agreed that informal procedures for dealing with allegations of abusive judicial conduct can be more effective in changing judicial behavior than formal complaints under § 372. When a pattern of abusive conduct is called to their attention, the chief judges will often counsel the judge in question.22 In this fashion, chief judges have in the past dealt with issues such as alcoholism and insensitivity to gender. Fewer fairness or due process concerns arise if informal procedures (not involving the filing of formal complaints under § 372) are followed that include bringing facts concerning patterns of alleged judicial misconduct to the attention of the chief judges, without revealing the identity of the complainants.

Another recurring theme in our interviews with the chief judges was the need for additional training for judges concerning appropriate judicial demeanor. New judges attend “judges’ school,” but little time is spent

21. Pursuant to 28 U.S.C. § 332 (d)(1), each judicial council “shall make all necessary and appropriate orders for the effective and expeditious administration of justice within the circuit.” It remains an open question whether a circuit counsel can use this power to remove cases from a judge’s docket.

22. As one chief judge put it, it is better to “talk turkey to a judge, with the threat of formal discipline” if corrective action is not taken. If no improvement occurs, then a formal complaint should be initiated.
dealing with judicial demeanor. After such initial training, sitting judges receive no further formal training for dealing with problems of abusive judicial conduct, often brought on by the pressures of heavy dockets, and sometimes ill-tempered litigants and lawyers. All sitting judges would benefit from periodic professional training concerning judicial temperament and demeanor, perhaps during the annual Circuit Judicial Conference, particularly during years when judges alone attend.

The Committee’s review of existing scholarly research and our study of applicable procedures in the Second Circuit demonstrate serious shortcomings in dealing with judicial misconduct complaints concerning federal judges, magistrate judges and bankruptcy judges. The scholarly literature and the chief judges of our local federal courts support suggestions for active participation in the process by organized bar committees. As set forth below, the Committee joins in this recommendation.

RECOMMENDATION FOR STANDING BAR COMMITTEE

The Committee’s study reveals a fundamental weakness in the judicial discipline system: the most important sources of complaints against judges, the trial lawyers who appear before them, are unlikely to pursue grievances. This reluctance is unfortunate, if understandable. In both the federal and state systems, lawyers who were interviewed, as well as the publicly available information and the Committee’s own collective experience, make clear that attorneys fear retribution for filing complaints; here, we refer not only to retribution by a particular judge, but also by judicial colleagues who may come to the aid of a beleaguered fellow jurist. The operative concept in this concern is “fear” based upon “perceived adverse consequences;” it is vital to note that whether or not the perception exaggerates the actual risk of reporting, the perception is real, pervasive and disabling.

Both the federal and the state system require the attorney to make a signed charge against the judge. The process itself then is time-consuming, uncertain and cumbersome. In the state system, the process of investigation, filing of charges, hearings before a referee, followed by consideration by the Commission and ultimate appeals to the Court of Appeals, takes far too long. And, in the federal system, there can be no serious punishment of the judicial officer because of the restraints of Article III even if the charges are sustained. These considerations also are likely to inform an attorney’s reluctance to file charges against a judge.

The Committee therefore concludes that we will never have a mean-
ingful and reliable system to collect, evaluate and prosecute complaints against judicial officers, as long as that system is dependent in some significant way on attributed lawyer reporting. We believe that this situation creates a critical void that can and should be filled by the Bar Associations, working to create a flexible mechanism for members to file complaints on a confidential basis without disclosure of identity of the complainant to the judicial officer and then to assert the Bar's collective influence, where appropriate, through counseling and pressure on the affected judges.

In making this recommendation, it is not our intention to make the Bar Associations adversaries of the judges. Likewise, we do not intend by our recommendation to suggest that the problem of judicial misconduct is chronic or widespread. However, as noted in the President's charge to this Committee, if the organized Bar is to provide vigorous defense to judges wrongly accused, then it must also do the utmost to assure that legitimate complaints are investigated and handled in an effective manner.

The Committee has discussed at length a type of mechanism to be implemented by the Association for the receipt of complaints from members about judicial conduct. Although we have worked out a basic structure for the mechanism, there remain issues that require further analysis prior to full implementation. The program described below, therefore, is an interim and experimental suggestion, subject to further analysis and refinement, which the Committee proposes to explore in the coming Association year. With this caveat, the Committee makes the following proposal:

1. The Executive Committee should establish a Judicial Complaint Review Committee (“JCRC”). The JCRC shall be empowered to invite and receive, under rules that the JCRC shall determine, written complaints regarding the conduct of specific judges from members of the Bar. Such complaints shall not deal with the substantive handling of cases or rulings by a particular judge, but shall be specifically related to matters of demeanor, to alleged violations of the Code of Judicial Conduct, to serious delay in rendering decisions, and other issues that do not deal with the merits of any specific matter. Such complaints must be signed and documented, but the identity of the specific complainant shall remain confidential and be treated accordingly by the JCRC.

2. The primary jurisdiction of the JCRC shall be to consider complaints that reflect a pattern of inappropriate behavior by a judicial officer, as opposed to isolated instances of inappropriate decorum or con-
duct. Such pattern may, however, be suggested by, or developed from, a single complaint. The JCRC shall be authorized to decide upon and conduct such inquiry as its members deem reasonable and appropriate based upon the severity of the particular complaint and/or the extent to which it suggests a possible pattern of inappropriate conduct. There may be specific instances of serious misconduct (e.g., without limiting the class of such case instances, a specific complaint going to the integrity of the judicial officer), which, although not necessarily reflective of a pattern, are of such fundamental concern as to warrant consideration by the JCRC.

3. The JCRC’s inquiry may include, among other steps, informal interviews, review of transcripts and court documents, research into other situations involving the same judge, and visits to the courtroom of the judge in question. The JCRC shall be permitted, but not required, to seek out a response from the affected Judge, provided that such inquiry shall not reveal the identity of the complainant without the complainant’s prior permission. Among other situations, the JCRC may determine to seek out a response from the affected Judge where the response may help to resolve ambiguous factual circumstances or where the response may be a useful communication to help the affected Judge recognize and deal with a problem.

4. The JCRC’s inquiry shall be completed as quickly as reasonably practicable after commencement of its substantive review of a complaint, in recognition of the fact that one of the criticisms leveled against the formal judicial discipline structure is the amount of time that is required for the process to be completed.

5. The JCRC shall be permitted (but not required) to refer the complainant to a local bar association to consider the complaint if, in the JCRC’s judgment, such referral is appropriate or useful.

6. Upon the conclusion of its investigation or completion of its consideration of the complaint the JCRC shall determine its course of action. If the JCRC determines that such action is appropriate, it shall contact the Chief Judge, or Supervising Judge, in the Court in which the affected Judge sits, and apprise the Chief Judge of the JCRC’s investigation and its findings. Such contact may include a recommendation from the JCRC for appropriate action to be taken with respect to the Judge. The JCRC shall consult with the Association’s President regarding any such contact with a Presiding Judge as a result of its investigation.

7. In particular cases as it deems appropriate, the JCRC may request consideration by the President of a specific complaint and the JCRC’s findings, to seek his or her advice or assistance in dealing with a situation requiring the full force and authority of the Association. If the President
believes that such action is warranted, he or she shall refer the JCRC’s findings as a formal complaint to the applicable regulatory body for the judicial system involved, or issue a public report of the JCRC’s investigation and conclusions. Any such public report shall not identify the particular complainant, without the prior permission of the complainant.

8. Recognizing that there is a significantly smaller number of judges in the Federal System and that this size enhances the opportunity to implement the foregoing recommendation on an experimental basis, the suggested procedure should first be implemented in the Federal System (other than the local bar association referral proposed in paragraph 5) and the results considered by the Committee prior to considering further implementation of this recommendation in the State system. This function of the JCRC shall be publicized as quickly as possible to Association members in advance of this implementation.

9. The Association President shall consider the results of operation of the JCRC, together with any proposed modifications of the workings of the JCRC made by the Ad Hoc Committee on Judicial Conduct. At that time, the President, in consultation with the Executive Committee, shall decide whether to modify or expand the jurisdiction of the JCRC.

10. In its continuing work, the Ad Hoc Committee on Judicial Conduct shall consider and attempt to recommend additional programs of instruction for judicial officers to deal with issues of courtroom demeanor and temperament. To the extent possible, the Committee shall seek to consult with supervisory judges in the State and Federal System with regard to such additional programs.

March 1999

The Association’s Executive Committee has approved issuance of the foregoing Report and implementation, on a pilot basis in the United States Court of Appeals for the Second Circuit and the United States District Courts for the Southern and Eastern Districts of New York, of the Report’s recommendation that a committee be established to receive from members of the Bar and to evaluate complaints regarding alleged misconduct by individual Judges. The committee will report to the Chief Judge of the court in which the affected Judge sits the committee’s findings if the committee determines that the affected Judge has engaged in serious misconduct.
In the last several months our system of justice has witnessed repeated attacks on the judiciary. These attacks have come from politicians, the media, and even the public at large. In each case the attacks have referred to the alleged lack of regulation of a judge’s conduct. In response, the organized bar has come to the defense of judicial officers, particularly where the attacks were directed at results, as distinguished from criticisms grounded in alleged judicial misconduct or inappropriate activities. The organized bar’s reactions have been proper, measured and a fair recognition that in our system of laws the judiciary is left without spokespersons or means to defend. It is consistent with the highest standards of our profession that lawyers have come to the aid and assistance of judges, and defend their independence.

These episodes, however, also have had another salient effect. They have reminded the organized bar of its responsibility to analyze the system by which our judges are selected, the mechanism for consideration of legitimate grievances against judicial officers, and the code of conduct by which judges are expected to conduct their high office. Clearly, as officers of the court, the organized bar cannot turn its back on legitimate criticisms of our system and its principal officers any more than it can fairly ignore the misdirected political attacks aimed at judges. If we are to be able defenders and spokespersons, we must show that we have carefully evaluated our system and its regulation of judicial officers, making appropriate recommendations or criticism as may be in order.

The topic of judicial conduct, broadly defined, has never been the separate jurisdiction of any of the committees of this Association. As President, I believe that there never has been a more appropriate time when such a concentrated study and report should be undertaken. Accordingly, I believe there should be a Committee on Judicial Conduct. The Committee’s charge is to consider, analyze and report upon any topics which in its considered judgment bear on the broad question of judicial ethics, service as judicial officer, the standard of conduct for judges and the procedures and mechanisms in place (or desirable) to entertain review of a judge’s conduct.1 I would expect that the Committee will par-

---

1. Day to day administrative issues involving judicial conduct—such as how to deal promptly with a judge who is not performing (e.g., moving him/her to a different part of privately or publicly speaking out against him/her)—will remain in the jurisdiction of the relevant court committees and councils.
ticularly focus on the work of the New York State Commission on Judicial Conduct to report whether that body has achieved, or is likely to achieve, its stated objectives. It is also my expectation that the Committee will consider and report upon the various coded of Judicial Conduct, codes that too often go without commentary or decision in our profession. Are there changes or clarifications that should be made to these codes? Are there adequate mechanisms to assure that judges themselves are able to obtain advice and counseling when they are confronted with issues relating to their own ethics, or that of their brothers or sisters? These important issues, among others, command our attention and our consideration. I ask that this Committee hear and report on such matters with utmost speed and to provide such recommendations for change as it deems appropriate.

Michael A. Cardozo
President, The Association of the Bar of the City of New York.
## EXHIBIT B

**ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975**

<table>
<thead>
<tr>
<th>Subject of Complaint</th>
<th>Dismissed on first review</th>
<th>Status of Investigated Complaints</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Pending</td>
<td>Dismissed</td>
</tr>
<tr>
<td>Incorrect Ruling</td>
<td></td>
<td>8123</td>
<td>8123</td>
</tr>
<tr>
<td>Non-Judges</td>
<td></td>
<td>2257</td>
<td>2257</td>
</tr>
<tr>
<td>Demeanor</td>
<td></td>
<td>1624</td>
<td>52</td>
</tr>
<tr>
<td>Delays</td>
<td></td>
<td>783</td>
<td>7</td>
</tr>
<tr>
<td>Conflict of Interest</td>
<td></td>
<td>356</td>
<td>18</td>
</tr>
<tr>
<td>Bias</td>
<td></td>
<td>1053</td>
<td>8</td>
</tr>
<tr>
<td>Corruption</td>
<td></td>
<td>227</td>
<td>5</td>
</tr>
<tr>
<td>Intoxication</td>
<td></td>
<td>33</td>
<td>3</td>
</tr>
<tr>
<td>Disability/Qualifications</td>
<td></td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>Political Activity</td>
<td></td>
<td>165</td>
<td>12</td>
</tr>
<tr>
<td>Finances/Records/Training</td>
<td></td>
<td>160</td>
<td>9</td>
</tr>
<tr>
<td>Ticket-Fixing</td>
<td></td>
<td>20</td>
<td>3</td>
</tr>
<tr>
<td>Assertion of Influence</td>
<td></td>
<td>108</td>
<td>8</td>
</tr>
<tr>
<td>Violation of Rights</td>
<td></td>
<td>1256</td>
<td>40</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td></td>
<td>628</td>
<td>7</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td></td>
<td>16,833</td>
<td>172</td>
</tr>
</tbody>
</table>

* Matters are “closed” upon vacancy of office for reasons other than resignation. "Action" includes determination of admonition, censure and removal from office by the Commission since its inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by the temporary and former commissions on judicial conduct operating from 1975 to 1978.
In March 1997, the Ad Hoc Committee on Judicial Conduct, Association of the Bar of the City of New York, mailed a questionnaire to all presiding Judges and Justices in New York State. The Committee received 507 valid returns, for an overall response rate of 17%.

Using the responses to questions 1 through 5, the respondents were exhaustively classified as follows:

Subject (30%)—The respondent indicated that he/she had been the subject of a judicial complaint. These respondents may have additionally indicated they had been a witness before the Commission, had participated in a Commission investigation or hearing, or knew other judges who had been the subject of a complaint.

Other Contact (7%)—The respondent indicated he/she had been a witness before the Commission, had participated in a Commission investigation or hearing, or knew other judges who had been the subject of a complaint, but had never knowingly been the subject of a complaint.

Know Judges (40%)—The respondent indicated he/she knew other judges who had been the subject of a complaint, but had never had been a witness before the Commission, participated in a Commission investigation or hearing, or knowingly been the subject of a complaint.

No Contact (23%)—The respondent indicated he/she had never had direct contact with the Commission and did not know other judges who had been the subject of a complaint.

Each questionnaire was also categorized by the location and court in which the respondent sits. Almost two-thirds (66%) of the respondents sit in Town or Village courts. While these judges represent two-thirds of all respondents who had been the subject of an investigation by the Commission, they also represent four-fifths of the judges who had no contact with the Commission.

Only 77% of respondents indicated the location of the court in which they sit. Of those who did report, 9% sit in New York City, 12% sit in the other counties of Metropolitan New York City, and 56% sit in the other counties of the State.

FINDINGS

1. Perceptions of the Commission
   a. Commission Procedures

   In response to the question, “Do you believe that the Commission offers a fair and impartial forum for the investigation of judicial con-
duct?" 25% of all respondents said “No”. Almost one-half (47%) of judges who had been the subject of a complaint were negative, compared with 16% of all other respondents.

However, when combined with the question, “What do you think of the Commission’s procedures?” 50% of all respondents described one or more aspects of the process as “unfair.” Judges who had been the subject of a complaint or had been otherwise directly involved in an investigation were twice as likely to express negative opinions as were respondents who only knew of judges who had been the subject of a complaint.

b. Treatment by the Commission

Almost one-quarter (23%) of all respondents described the behavior of the Commission or staff members towards either themselves, or judges who were the subject of an investigation, as “discourteous, insensitive and unprofessional.” Seven percent of all respondents thought the Commission treated judges as “criminals.” Judges who had been the subject of an investigation were three times as likely to express such beliefs as were all other respondents.

Almost one in five judges (17%) who had been the subject of an investigation described their treatment by Commission or staff members as basically “unfair.”

c. Need for Improvement

One of two (50%) of all respondents believe the Commission’s investigations or proceedings need improvement. However, eight in ten judges (78%) who have been the subject of Commission proceedings believe such changes are needed. More than one-third of all respondents did not answer this question.

The areas mentioned most often are the following:

30% indicated a need for improvement in procedural rules after an investigation results in a hearing, including the guarantee of basic due process for the subjects of investigations and a procedure predicated on a basic presumption of innocence.

30% indicated a need for improvement in the operation and composition of the Commission, including a separation of the investigation, prosecution and judicial functions.

25% indicated a need for improvement in the investigative function of the Commission, including a more thorough and open fact-finding and investigation process to insure that only unbiased and substantiated charges are brought.
14% indicated the time to complete each stage of the Commission’s functions needs to be reduced.

11% indicated a need for full disclosure and prompt notification of charges and findings.

8% felt the financial costs to judges to defend themselves should be eliminated or significantly reduced.

Only 5% specifically mentioned a need to improve the treatment of judges by the Commission and staff members.

d. Outcome of Proceedings

Despite expressed concerns regarding procedures and treatment by the Commission, the more directly involved a respondent has been with an action before the Commission, the more likely the judge is to believe that the outcome of these proceedings was fair or satisfactory.

2. Understanding of the Commission’s purpose and procedures

Only 72% of respondents indicate they have an adequate understanding of the Commission’s purposes and procedures. Understanding is greatest for those judges who have had a direct involvement in Commission activities.

Only 14% of respondents indicate they believe the general public has an adequate understanding of the Commission.

3. Public or Private Proceedings

Regardless of the respondent’s experience with the Commission, the majority of judges (85%) believe the hearings on the Commission’s formal charges against judges should be private and confidential. One in four respondents either indicated that hearings should be public or did not respond.

4. Sanctions

Almost half (48%) of respondents believe the range of sanctions available to the Commission should be expanded to include, for example, private admonitions, fines, probation or suspensions. The more directly involved a respondent has been with an action before the Commission, the less likely the judge is to believe that the range of potential sanctions should be expanded.

5. Advisory Committee on Judicial Ethics

Most respondents (84%) are familiar with the Advisory Committee
on Judicial Ethics, and 93% of those who are familiar with the Committee indicated they review the Committee's opinions when they are issued.

One in three respondents (35%) has requested an opinion from the Advisory Committee on Judicial Ethics; judges involved with the Commission in a capacity other than as the subject of a complaint are most likely to have requested an opinion from the Committee (59%).

Of those judges requesting an opinion, one in ten (12%) indicated the Committee was not helpful.

6. The Judicial Canons

Almost three-quarters of respondents (73%) have had occasion to consult either Canon 5 of the Code of Judicial Conduct or Section 100.4 of the Rules of the Chief Administrator regarding permitted extra-judicial activities.

Two in ten (21%) of these judges did not find sufficient guidance in the existing rules. Judges who have had more direct contact with the Commission are 10% less likely to have found sufficient guidance in these rules.

Four in ten (44%) respondents believe the current limitations on extra-judicial activities are too restrictive.

Eight in ten (81%) respondents believe judges should be prohibited from commenting publicly on pending or impending proceedings, as provided in Section 110.3(B)(8) of the Rules of the Chief Administrator and Canon 3(A)(6) of the Code of Judicial Conduct. Judges who have had a more direct involvement with the Commission are 10% less likely to support this restriction.

Regardless of the respondent's experience with the Commission, the majority of judges (90%) believe the present rules on disqualification and refusal, as described in Section 100.3(E) of the Rules of the Chief Administrator and Canon 3(C) of the Code of Judicial Conduct, provide sufficient guidance for determining whether to hear a particular matter.

12% of respondents do not believe the present rules on ex parte communication, as described in Section 100.3(B)(6) of the Rules of the Chief Administrator and Canon 3(A)(4) of the Code of Judicial Conduct, are appropriate. Judges who have been the subject of a judicial complaint are least likely to believe the rules are appropriate.

Disagreement with the present rules on disqualification, refusal and ex parte communications is most often expressed by Town and Village Justices.

20% of respondents disagreed that judges should be required to report judicial misconduct to an appropriate professional agency, as speci-
Ad Hoc Committee on Judicial Conduct

Robert J. Jossen, Chair
Sonia Mikolic-Torreira, Secretary
Nicole Jacoby (Secretary, 1997)

Steven Lloyd Barrett*  Robin J. Marsico
Laura E. Drager*  Colleen McMahon*
Martin Glenn  Sarah Diane McShea
Cory Greenberg  David Rosenberg
Harry W. Lipman  Lawrence J. Zweifach

* The judicial members of the Committee abstained from voting upon the Recommendation Section of this Report.
The Proposed
“Class Action Fairness Act”

The Committee on Federal Courts

A. THE PROPOSED LEGISLATION
Legislation expanding federal court jurisdiction over class actions was introduced in both houses of the United States Congress last term and has been reintroduced in the Senate this year in similar form. The Senate legislation, entitled the “Class Action Fairness Act,” would extend United States district courts’ original jurisdiction under 28 U.S.C. § 1332 to include any class action where any named or putative plaintiff class member and any defendant are citizens of different states. The Act eliminates an amount in controversy requirement for any class action that meets this minimal diversity requirement. To ensure the federalization of these class actions, the Act also permits any plaintiff class member or any defendant, without any co-party’s consent, to remove to federal court any putative class action that is filed in state court and meets the minimal diversity requirement.

This Report addresses this proposed legislation. The Report bases its analysis on S. 353, which in all material respects is identical to H.R. 3789 as reported out of the House Judiciary Committee August 5, 1998. As set forth below, the Committee opposes this legislation because (1) the need for such legislation has not been demonstrated, and (2) it will not achieve the goals it attempts to achieve.

B. THE BURDEN TO ESTABLISH A NEED
FOR THE LEGISLATION HAS NOT BEEN MET
Precluding states from hearing a substantial proportion of class actions, the Act would work a vast shift in the federal-state balance. Before
Congress undertakes such a radical reordering of the boundaries of federal and state responsibility, the proponents of the takeover must show a compelling need to disturb the current balance. The proponents of the proposed legislation have not met and cannot meet their burden to show a need—much less a compelling need—to disturb the balance between federal and state courts' jurisdiction over class actions.

1. Applying Rigorous Standards to Avoid Abuses

Proponents of the Act assert that state courts are not rigorous in applying proper class action standards in adjudicating class actions and have created an “explosion” of unwarranted, frivolous class actions that lead to abusive settlements. H.R. Rep. No. 702, 105th Cong., 2d Sess. at 6 (1998). No empirical evidence has been offered to support these assertions. At the hearings on H.R. 3789, only two studies concerning the growth in class actions were cited. These studies focused only on an increase in the filings of class actions, not on their propriety or merit.

The Congressional Budget Office, admittedly on “highly uncertain” bases, estimated that H.R. 3789 would lead to “at least a few hundred additional cases” in the federal courts. H.R. Rep. No. 702 at 11. Based on class action practitioners' experiences, the Committee believes more than a few hundred cases may fall within the legislation’s scope. Yet such estimates do raise a significant question as to any claimed “explosion.” Id. at 6. On the other hand, if the proposal would siphon onto the federal courts' calendars the claimed “explosion” of complex cases each year, such an impact bodes ill for the federal courts' caseload.

Second, no empirical or other substantiation, aside from anecdotes, has been offered supporting the proposition that state courts are more lenient than their federal counterparts in adjudicating class actions. Even if this proposition were true, it would be a classic problem that principles of federalism would dictate is for the states to address. If states are not curbing abusive litigation, of any form, in their courts, the states, as a practical as well as a constitutional matter, are in the best position to effect the proper control and necessary improvements.

In any event, other than anecdotal testimony, the sole support before Congress for the claim of leniency was a study analyzing Alabama state courts' “conditional” class certifications. The Alabama Supreme Court, however, sounded what has been termed the “Death Knell” of conditional certifications in Alabama, issuing a series of writs of mandamus in December 1997 to vacate conditional class certifications. Both Ex Parte State Mutual Ins. Co., 715 So. 2d 207 (Ala. 1997), and Ex Parte American Bankers
Life Assur. Co., 715 So. 2d 186 (Ala. 1997), for example, required notice and a full opportunity to be heard before class certification and strictly applied the same certification criteria as in Federal Rule of Civil Procedure 23. If anything, these examples illustrate how state courts can and do deal with any perceived abuses.

The study presented to Congress on the problem addressed by the Alabama Supreme Court also must be viewed with skepticism. A Committee member was involved in one of the cases cited. Lewis v. Exxon Corp., No. 96-140 (Sumter Co.). The study, by Dr. John Hendricks, presents this case as involving a class certification that did not give the defendant a full opportunity to be heard. Although the court did grant provisional certification before the record was complete, the court granted final certification only after a fuller evidentiary record had been developed, including discovery, expert testimony, and complete briefing and argument. The defendant had a full opportunity to oppose the certification. In fact, the Alabama Supreme Court decertified this action, holding that Alabama courts may not certify multistate deceptive practice suits because Alabama’s deceptive practices statute does not permit class certification. Ex Parte Exxon Corporation, 725 So. 2d 930 (Ala. 1998).

Beyond the Alabama examples, the experience of class action practitioners, including Committee members representing both plaintiffs and defendants, shows that any greater leniency toward class certifications in the state courts in the past has subsided. Various decisions, both federal and state, have tightened class action criteria significantly in the state courts. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Small v. Lorillard Tobacco Co., 252 A.D.2d 1 (1st Dep’t 1998); Carroll v. Celco Partnership, 313 N.J. Super. 488 (App. Div. 1998). In fact the Act’s proponents have not demonstrated that abusive class settlements are a function of state rather than federal court supervision. Recent settlements cited to exemplify asserted abuse were approved by federal, not state, courts. Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998); In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig., 55 F.3d 768 (3d Cir. 1995); In re Ford Motor Co. Bronco II Products Liability Litig., 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995).

2. Ability to Address Laws and Claimants from Other States

Other claims by the legislation’s proponents are equally suspect. They have contended that state courts are “ill equipped” to address laws and claimants from outside their states. H.R. Rep. No. 702 at 1. Again, no support has been provided for this contention. State courts routinely must and do deal with issues raised by multistate parties and the applicability of other states’
laws. Nor has any showing been made that federal courts are better able than state courts to apply the laws of states outside the court’s jurisdiction.

Had such a problem in the state courts been shown, the problem would not be limited to class actions, but would involve any number of cases with multistate claimants and laws. To urge that in any of these situations the federal courts should take over is to set troubling precedent for federal takeover of any problem in the state courts or at least any problem with any multistate dimensions.

3. Ability to Address Overlapping or Competing Actions in Other States

Similarly, the Act’s proponents have contended that state courts are powerless to consolidate overlapping or “competing” class actions in different jurisdictions. While state courts cannot consolidate actions in different jurisdictions, state courts are not powerless to deal with overlapping or competing actions outside their jurisdictions. State courts may and do stay actions before them pending a determination in another jurisdiction, just as federal courts do. Again, no evidence has demonstrated that this approach has proved insufficient.

4. Summary

In short, the proponents of disturbing the boundaries of federal and state courts' jurisdiction bear the burden of showing a compelling need for the proposed change. The proponents of the proposed changes in class action jurisdiction have not met this burden. They have failed to establish the necessity for the legislation, much less a sufficient necessity to overcome the presumption in favor of maintaining the current federal-state balance.

C. THE LEGISLATION POSES FEDERALISM CONCERNS

In both design and effect, the Act’s reallocation to the federal courts of adjudicatory authority over inherently state disputes compromises the basic principles underlying our federal system of dual sovereignty, in which two governmental structures operate uninhibited by each other. E.g., Printz v. United States, 521 U.S. 898, 934 (1997). Class actions, in particular, often raise novel legal issues requiring the application of state law to new situations. To the extent class actions are a forum where state law is developed, the Act displaces state courts from their traditional and pivotal role as the primary expositors of state law. Federal courts, respecting our system of dual sovereignty, are less likely to construe, extend, or expand state law in
any new way, finding it the domain of state courts to decide issues of first impression under state law. For this reason, and due to a concentration on federal issues, federal courts may not have occasion to acquire the same competence and effectiveness as state courts in developing areas of state law. The federalization of class actions envisioned by the Act thus may frustrate the development of state law.

Second, the Act impedes states' ability to devise and offer their citizens an important mechanism for vindicating their rights under state laws. While states would retain the authority to create rights under state laws, they would lose an important means for enforcing those rights and implementing those laws through the courts.

Emblematic of this problem are the Act’s remand provisions. The remand provisions require that when a federal court denies class certification and therefore loses jurisdiction, the state court to which the case is remanded is foreclosed from certifying the action as a class action, even if the federal and state certification rules differ, and the state rules permit certification. Where a case is remanded federal law also would govern the tolling of the statute of limitations for any claims, including claims based on state law. The Act thus would rewrite state rules and bar both class actions and claims barred by federal rules.

This direct regulation of procedural rules by which state courts adjudicate disputes, including disputes where both laws and parties from the home state predominate, raises basic federalism concerns in light of “the importance of state control of state judicial procedure.” Howlett v. Rose, 496 U.S. 356, 372 (1990) (quoting H. Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954)). See also Johnson v. Fankell, 520 U.S. 911, 916 (1997). Under the Act, a federal statute would regulate state judicial procedures by dictating requirements for state-based class actions and limitations periods for state law claims. It would forbid states from applying their class action procedures and substitute federal procedural rules for state rules. These fundamental federalism concerns raised by the Act’s radical reordering of federal-state adjudicatory authority militate strongly against the legislation’s enactment.

D. THE LEGISLATION WILL NOT ACHIEVE THE GOALS IT SEEKS TO ACHIEVE AND WILL, INSTEAD, EFFECT AN UNWARRANTED DEPRIVATION OF STATES’ ABILITY TO ADJUDICATE STATE-BASED DISPUTES

Even the proponents of upsetting the federal-state balance recognize that federalism, at minimum, requires retention of state court jurisdis-
tion over state-based class actions. As is readily apparent, however, application of the minimum diversity principle in the class action context creates federal jurisdiction of limitless bounds. For example, if even one of thousands of plaintiff class members should move to another state, even if that class member resided in the state where the claim arose when it arose, the action qualifies for federal jurisdiction. Thus the proposal's central premise of minimal diversity insulates no class action, however uniquely suited to state court adjudication, from federal jurisdiction.

The attempts to carve out escape hatches from federal jurisdiction for state-based class actions fail to produce effective categorizations of state-based actions. S. 353 lists categories of cases where the federal court "may in its discretion" abstain from exercising jurisdiction: where (1) the aggregate damages claimed by class members are less than $1 million, (2) the aggregate size of the class is less than 100, or (3) the primary defendants are state entities or officials.

The first two categories, whatever numerical limits might be designated, exemplify the artificiality of attempting to define by a rigid numerical standard the class actions that belong in state court. Furthermore, as numerical estimates are far more difficult and imprecise in the aggregate than for individual plaintiffs, the numerical standards encourage litigants to manipulate their actions into or out of the discretionary exemptions. The third category, cases that all may in fact belong in state court, are still dependent on the federal court's undefined discretion as to whether they may be litigated in state court.

S. 353 lists a fourth category of cases where the federal court "should" abstain from exercising jurisdiction: where a "substantial majority" of class members and the "primary" defendants are citizens of the same state, and the claims are governed "primarily" by that state's laws. This provision would promote endless satellite litigation concerning these terms' interpretation and application, all before ever reaching the merits. Being only precatory, the provision again ultimately operates subject to the federal court's discretion.

None of these provisions definitively leaves to the state court those cases uniquely suited to state court adjudication. None of the provisions does anything to preserve state court adjudication of, for example, state residents' claims that a plant situated in their state, but owned by a company located or incorporated in another state, violated the state's safety, health, or environmental laws. The proposed provisions do nothing to prevent actions against state agencies or officials in their official capacity...
from proceeding in federal court, where the Eleventh Amendment would bar monetary relief based on either federal or state law.

Each of the Act’s failed attempts to define state-based class actions reveals that it is impossible to draw a clean line around those types of actions. Because minimal diversity is the driving principle, nothing prevents the relocation of one class member (or one defendant seeking to defeat state court jurisdiction, for that matter) from making a class action a candidate for federal jurisdiction. The proposals inevitably permit federal takeover of any kind of class action as long as any out-of-state dimension may be found, no matter how state-based the action may be when viewed as a whole. In failing to define an effective state court carve-out, the proposals in turn fail to define effectively those class actions the proponents want specifically to target for federal jurisdiction. Hence the legislation fails to address its stated objectives, however valid or invalid.

Other features of the proposed legislation illustrate the disruptions it would inflict on both the state and the federal courts. Any proposal that permits, even if it does not require, federal jurisdiction over any class action upsets state court adjudications simply by virtue of its removal provisions. These provisions allow any party to an action, within a specific time after receiving notice of the action, to remove to federal court any action that could have been brought there originally. In a class action, a class member may not receive notice until the eve of settlement. Under the Act, at the eleventh hour, after a state court has nursed a class action all the way to disposition, a party still may suddenly divert the action to federal court. The unilateral ability of any class member to redirect the litigation also undermines the overarching concept in class actions, that the class representatives represent the class and dictate how the action is to proceed.

In sum, the proposed legislation does not and cannot accurately distinguish between intrastate and interstate class actions. The impractical effects on both the federal and the state judiciaries, in addition to the implications for the deeply rooted balance between them, are evident.

E. CONCLUSION

For each of the reasons discussed above, Congress should not enact the proposed “Class Action Fairness Act.”

May 1999
Committee on Federal Courts

Guy Miller Struve, Chair
Ola N. Rech, Secretary

Stuart E. Abrams  Allan Arffa  Jacob Aschkenasy  Joseph T. Baio  Lucy Billings*
Evan R. Chesler  Brian M. Cogan  Edward Copeland  Matthew Diller  William K. Dodds
Mark C.M. Fang  Ira M. Feinberg  David Friedman  R. Peyton Gibson  Gregory Horowitz
Daniel M. Isaacs  James W. Johnson  Theodore H. Katz  Daniel J. Kramer  Steven C. Krane
Robert J. Lack  Kim J. Landsman  Seth Lesser*  Lewis J. Liman  Carl Loewenson
Robert W. Mullen  Sean O’Brien  Cheryl L. Pollak  Tracey Salmon Smith  Sharon Schneider
Jay G. Strum  Mary Kay Vyskocil  Robert A. Wallner  Lillian S. Weigert  Natalie R. Williams*
Joseph P. Zammit

*primary authors of the Report
The City of New York as a Major Institutional Litigant: A Follow-up on the Price Waterhouse Study

The Council on Judicial Administration

This is the fourth report of the Council on Judicial Administration of the Association of the Bar of the City of New York discussing the recent efforts of the City of New York to address and reduce the current backlog of tort cases pending against the City and its agencies.

1. In April, 1998, the Council issued two reports on the subject, The City of New York As A Major Institutional Litigant: The Need for Greater Cooperation Between City Agencies and Their Attorneys (in which we recommended that the Mayor issue “forthwith” an Executive Order or other appropriate directive assigning personal responsibility to a senior legal officer of every City agency for that agency’s prompt compliance with discovery requests in pending litigations); and The City of New York As A Major Institutional Litigant: The Price Waterhouse Study (in which we urged that the City release Price Waterhouse’s evaluation and report on the City’s claims processing and litigation functions). As will be discussed in this report, the recommended agency directive has not been issued, and there is still no accountability at the agencies. The Price Waterhouse Report, “The City of New York Claims Processing and Claims Litigation Study”, was finally made public in September, 1998.

In May, 1998, the Counsel issued: The City of New York As A Major Institutional Litigant: A
AN OVERVIEW OF THE PROBLEM

There are between 16,000 and 17,000 notices of claim filed annually with the City. Historically, only a small number of these claims (about 600 per year) have been settled pre-suit. An additional 6,000-7,000 are never prosecuted. There are currently about 62,000 tort cases against the City and its agencies pending in the court system, a number of which are more than ten years old. Between 1994 and 1998, inclusive, the average annual number of new cases against the City was 10,961; average annual dispositions were only 7,084. Although the average number of cases actually disposed of in fiscal 1998 was almost 1,500 greater than in the prior year, those dispositions were still significantly below the average number of new cases introduced into the system each year. Unless the City drastically alters its case disposition rate or settles significantly more claims prior to the commencement of lawsuits, within the next ten years the backlog of pending cases against the City is projected to increase to 110,000 cases. By any standard, the problem is serious.

Administrative judges are rightly concerned about the growing number of City tort cases and their impact on an already severely taxed court system. As contrasted with non-City cases, of which only 16% are over Standards and Goals, 39% of the tort cases instituted against the City fail to meet this temporal standard. In an attempt to dispose of these City cases post-note of issue, the Office of Court Administration has recently

Neutral Evaluation Program for Post-Note of Issue Cases (in which we urged the Corporation Counsel and Comptroller to participate in a pilot ADR project for post-note of issue City tort cases). To date, the City has done nothing to implement this recommendation.

In preparing the current report, the Council interviewed several administrative judges and judges experienced in the operation of City Parts; the Corporation Counsel of the City of New York and a number of his senior executives including those directly responsible for the operation of the Corporation Counsel’s Tort Division; and the Deputy Controller for Claims and Contracts, the First Deputy Comptroller and several other representatives of the Comptroller’s Office. Not only were the City’s management personnel extremely cooperative, but they also impressed us with their dedication, creativity and hard work.

2. Unless otherwise noted, all statistical information contained in this report was provided by the City’s Tort Division or the Comptroller’s office, either in interviews or through documentation.


4. New York State Unified Court System’s Comprehensive Civil Justice Program (1999). The Standards and Goals guidelines generally require that disclosure be completed and a Note of Issue filed within 12 months of the filing of a request for judicial intervention on a “standard” civil case and within 15 months of such filing in a “complex” case. Once a Note of Issue is filed, the guidelines provide for disposition of the case within 15 months.
proposed the creation, in one location, of several court parts to handle all trial-ready tort cases in which the City is a defendant. 5 Initially, a single Citywide court part will be established in Manhattan to conference the oldest trial-ready City cases pending in the five counties. If a case cannot be settled, it will be sent back to the county of origin and jury selection will begin immediately. If this proposal is actually implemented, there may eventually be one or more additional Citywide parts in Manhattan where trial-ready tort cases against the City, irrespective of county of original venue, will be conferenced. If this is accomplished, existing City Parts in the individual counties may handle only pre-note-of-issue proceedings in City cases. 6

The Office of Court Administration anticipates that, if implemented, this attempt to consolidate all post-note-of-issue cases against the City in a single county, before judges who will uniformly apply the same operating procedures, will help reduce the inventory of trial-ready cases. However, this proposal does not address the disposition of claims and cases at their earlier stages, which is where the more significant backlog exists. Indeed, a substantial reduction in pre-note cases should necessarily result, over time, in a related decrease in post-note cases. As will be discussed below, in order for there to be any meaningful reduction in this inventory of pre-note-of-issue cases, all principals, not only the courts, and the offices of the City’s Corporation Counsel and Comptroller, but also the Mayor and the senior managers of the City’s agencies—must work together, in good faith, to implement procedures directed towards resolving the problem.

Some progress has already been made. The Corporation Counsel’s Tort Division, and the Comptroller’s Bureau of Law and Adjustment (“BLA”)—which under the New York City Charter is responsible for the settlement process 7—have recently made significant strides in implementing an early resolution procedure for certain less serious tort claims against the City. However, a necessary prerequisite to any successful settlement process is the early investigation and evaluation of claims, irrespective of their size.

5 Id.

6 Id. The proposal does not exclude the possibility of these cases being returned to their county of origin for trial by any available justice. Indeed, this may be required by statute. See CPLR 504(3) which provides, in relevant part, that all causes of action against the City are to be tried in the county within the city in which they arose.

7 Chapter 5, section 93(i), of the City Charter empowers the Office of the Comptroller to investigate, adjust and settle all claims in favor of or against the City.
In the case of claims made against the City, this means (among other things) that City agencies must, at a minimum, be prepared to provide information and documents to BLA and the Tort Division quickly and efficiently and to make knowledgeable witnesses available for interviews and depositions as and when required. Further, BLA and the Tort Division must have adequate staffing and funding to permit them to conduct their investigations and do whatever else is necessary to allow claims and cases to be evaluated—and, it is hoped, settled—in their earliest stages. Unfortunately, none of this has yet been done.

In analyzing the City's response to this litigation crisis, it is easy to assume—not without some justification—that there is a tendency among elected officials and their appointees to defer any hard decisions involving major capital expenditures until a later date and another administration. To the extent that this political inertia is a contributory factor in the City's failure to launch an all-out attack on the current inventory of tort cases, it jeopardizes the long-term financial health of the community. In fiscal years ending June 30, 1993 and 1994, the City paid $236.2 million and $289.2 million, respectively, to claimants; by 1997, this figure had risen to $322 million and, by 1998, it had increased by almost 20% to $380 million. Price Waterhouse projects that if no new action is taken to address current trends, these annual payouts will increase by $275 million in another year, and by almost $600 million in ten years. As of June 30, 1993 and June 30, 1994, pending claims against the City exceeded $343 billion and $286 billion respectively—and that figure is probably much higher today. While it is difficult to predict the actual cost of those claims, the City has estimated its future liability, predicated on those claims, at $2.6 billion.

It is unlikely that our judicial system, as presently constituted, will be able to handle this growing inventory of City tort cases and still provide all litigants with "speedy" justice. Unless this problem is addressed rationally and with expedition, not only will it become increasingly difficult to obtain a judicial resolution of tort cases against the City within any
rational time frame, but the growing volume of those pending cases will eventually reduce the availability of judicial resources to other litigants.

Both the judicial and the executive branches have had a tendency to allow City cases to wend their way through the litigation process at a pace preferred by the defendants, without the same insistence that the City adhere to the same Standards and Goals that apply to other litigants—and, at least in theory, to the City itself.

This tendency for City tort cases to proceed on a much slower track than is the norm is not inexplicable. Merely by the volume of cases pending against it, the City is a unique defendant. Through its various agencies, particularly the Police Department, the Department of Transportation and the Department of Education, the City is perhaps accused of responsibility for a greater number of non-wartime personal injuries than any other entity in the world. Since the City has a direct or indirect involvement in almost every aspect of the lives of its residents and its visitors, an arguable nexus almost invariably exists between many types of bodily injury or property damage and an act or omission of a City agency or employee. Even where the City's potential legal liability is remote—and sometimes even where it is non-existent—plaintiffs' lawyers tend to view the City as the "deep pocket" of last resort. As a result, in many instances, the only limitations on a claimant's ability to join the City as a party defendant are the imagination and good faith of plaintiff's counsel.

Some judges have become openly sympathetic to the constant plaint of the City's lawyers that they are unable to move cases at the same pace as non-City litigants because the Tort Division is underfunded and understaffed. There is also an implicit recognition on the part of many judges that City cases must be allowed to move more slowly than other lawsuits, and that both Standards and Goals and the discovery deadlines imposed on other litigants are inapplicable to City cases, because the City's lawyers, acting in good faith, are just unable to obtain the same degree of cooperation from their clients (the City agencies) as can the private Bar from its clients. City agencies seem unwilling or unable to supply documents, or to produce witnesses, within the same time frames as other parties to a lawsuit. This is only partially excused by the fact that, because of the high volume of cases against it, the City (and its agencies) bears a greater discovery burden than does the typical tort defendant.

Nor should it be forgotten, in analyzing whether the courts should treat the City as "just another litigant," that, unlike any other defendant, the City makes direct use of the taxpayers' dollars to settle cases and
satisfy judgments. At least in theory, money not expended for these purposes could be used for the betterment of all taxpayers. It is for this reason that many courts are unwilling, for example, to take defaults or impose other financial sanctions against the City for non-compliance with discovery orders, believing that the ultimate effect of any such sanction would be to place still another financial burden upon the taxpayer. While this analysis may have some logic, it must also be recognized that such an attitude does not encourage the City (and its agencies) to comply with discovery requests and disclosure orders.

As recently as two years ago, the City failed to comply with over 50% of state court orders directing it to provide discovery within a specified time frame. In other words, despite numerous judicial determinations that there was no merit to the City’s excuses for non-compliance with legitimate CPLR discovery requests, the City, in the majority of cases, continued to fail to comply with its legal obligations. As one experienced and knowledgeable jurist told us, the City’s compliance with discovery demands tends to come “when the guillotine is about to fall,” following “motion after motion to compel.” The inevitable consequence of this procrastination has been to delay the completion of discovery in City tort cases. As noted earlier, there have been few, if any, sanctions imposed for this failure to comply with judicial directives. Unfortunately, this means that there is no pressure on City agencies to remedy this dilatoriness. Even when its lawyers have requested compliance with discovery requests on a timely basis (and its lawyers are not always prompt in seeking such agency cooperation), the agencies seem to realize that there is no compelling reason for them to work harder, or more expeditiously, or with greater efficiency, in order to comply with these requests. And so, they do not.

For whatever the reason, the Mayor and his appointees have them-

12. Most businesses consider litigation expenses to be an operating cost which is passed on to the consumer, just as insurance premiums reflect all of a carrier’s costs in conducting its business.
13. Corporation Counsel of the City of New York, “Summary of City’s Proposal for Efficient Litigation of Pre-Note Cases” (undated); conversations with Office of Corporation Counsel.
14. Most of the approximately 16,000 motions handled annually by the Tort Division are discovery motions resulting from the City’s failure to comply with discovery requests.
15. To compel compliance with Standards and Goals alone will not affect the total volume of pending City tort cases; it will merely transfer cases from the pre-note-of-issue stage to the post-note stage. However, a related result would be to force the City to investigate cases earlier—both as to liability and damages—and, as will be discussed below, this is a necessary prerequisite to knowledgeable settlement discussions.
selves chosen to join in this path of least resistance, and have failed to enact procedures to mandate agency cooperation in lawsuits in which the defendant agencies seemingly perceive themselves to be disinterested parties. Despite Price Waterhouse's urgings, such cooperation from the City agencies remains wanting; despite the earlier recommendation of this Council, the Office of the Mayor has yet to take any meaningful steps to motivate City agencies to accept their responsibilities in this regard. There is still no agency accountability, and, despite recent efforts by the Tort Division and BLA, there is still no reason to believe that this major impediment to the reasonably rapid preparation of City tort cases for trial will soon be eliminated.

THE PRICE WATERHOUSE REPORT

In 1996, the Corporation Counsel of the City of New York and the Comptroller's Office jointly sought outside help in addressing the mounting crises of City tort cases and their ever-growing inventory. Price Waterhouse LLP (now PricewaterhouseCoopers, LLP) was retained, at a taxpayer cost in excess of $900,000.00, to evaluate the City's claims processing and litigation functions and to identify ways in which the City can be more cost-effective in its defense of claims and litigation.

Price Waterhouse concluded that the City's tort inventory is best managed through greater settlement efforts during the early stages of a claim/lawsuit. To succeed in such efforts, the City must make an initial investment, in year one, of approximately $50 million. However, Price Waterhouse's cost model demonstrated that this investment would be rapidly offset by positive savings in reduced settlements. Indeed, from a cash-flow perspective, Price Waterhouse believes that the City should turn the corner soon after year one. In a worst case scenario, this initial investment would be fully recouped after year three; in a best case scenario, recoupment would take place within year one. The cumulative savings, in today's dollars, from adopting Price Waterhouse's recommendations

---

16. Price Waterhouse Report, p. 2. Given the historical reluctance of governmental bodies to concede that their performance is lacking in any respect, the mere fact that Price Waterhouse was retained for this purpose invites two reactions: first, the retaining agencies deserve kudos merely for acknowledging that they need outside help; and, second, the problem must indeed be severe for the City to spend nearly $1 million in order to obtain outside expert advice.

would exceed $300 million (in today’s dollars) by year ten. By year twenty-five, the City will have avoided more than $600 million (in today’s dollars) in settlement costs relating only to its four primary claim categories: roadway, sidewalk, police action and schools.18 These savings alone would seem to be a persuasive incentive for implementing Price Waterhouse’s recommendations.

Although Price Waterhouse made over one hundred individual recommendations, this report will focus on that consultant’s “key recommendations” (all of which were given a high priority).19 We will then consider whether the City’s responses to those recommendations are sufficiently energetic and complete to suggest a meaningful effort to reduce the backlog.

In reading the following analysis, it should be kept in mind that Price Waterhouse stressed, in its Report, that its recommendations are interdependent, particularly those identified as high priority; neglecting one recommendation could negate the effectiveness of other recommendations.20

1. Increase staffing to reduce workloads21

It became apparent to Price Waterhouse from the outset of its Study that both BLA and the Tort Division had a high workload and a scarcity of staffing resources.22 At the conclusion of the Study, Price Waterhouse identified the need for approximately 230 additional staff to be spread between the Tort Division and BLA to handle claims and cases.23 If adopted, these increases would bring the City’s complement within the range of Price Waterhouse’s benchmark entities, although, in Price Waterhouse’s

18. Price Waterhouse’s cost benefit analysis is premised on three key assumptions: (1) by settling claims early, the overall cost over the life of a category of claims will be reduced; (2) based on the many initiatives the City will employ, more cases will close administratively; and (3) due to investments in staffing and outsourcing arrangements, among other things, the City will realize savings from process efficiencies and claim/case inventory reduction.

19. The final Price Waterhouse Report which has been released by the City only contains a Summary of Recommendations. Presumably, Price Waterhouse also delivered to the City a detailed discussion of those recommendations, but any such documents have not been provided.


21. Id. at p. 7.

22. Id. at p. 3.

23. Id. at p. 7
view, even with the recommended increase caseloads would remain comparatively high. 24

The City's attorneys handle many more cases than the other institutional litigants considered as a benchmark by Price Waterhouse. In the Tort Division, there were 485 personal injury and property damage cases pending per attorney. The six municipalities studied by Price Waterhouse 25 had a median case load that was at least 12 times lower, at 39 cases of all types, per attorney. The number of new suits per attorney per year for the City was 94, whereas, in the median group, it was only 17. However, both groups closed at much the same rate, about 13-15 cases per year per attorney. 26 Therefore, although the City has a much higher flow of new cases, it does not dispose of them any more quickly than its peers in other cities. These statistics support the conclusion that the historical growth in the inventory of City tort cases has not been because of any lack of effort by its attorneys but, rather, is the direct result of understaffing. 27

During the same period, the number of pending personal injury and property damage claims per BLA staff member was 383 while the median for all claims in those other cities was 119. On the other hand, the City only closed 119 personal injury and property damage claims per claims examiner, while the group median closed 138 claims of all kinds. 28 To the extent that these naked statistics are revealing, it might be argued that, despite being understaffed, BLA's settlement effort could have been more strenuous. There is, however, another possibility: because each BLA examiner's

24. Id. As part of its work, Price Waterhouse undertook a benchmarking study to gather data from private sector insurance organizations and from other municipalities with similar types of tort claims and cases. Id. at pp. 73-97.

25. Fort Worth, Texas; Long Beach, California; Pittsburgh, Pennsylvania; San Antonio, Texas; San Diego, California; and San Francisco, California were the six cities that responded to a Price Waterhouse questionnaire. Price Waterhouse Report, p. 94.

26. Id. at p. 96.

27. The City had 1.33 tort attorneys per 100,000 citizens, while the group median was .57 attorneys for all claims. Nonetheless, Price Waterhouse concluded that, based on workload, it was clear that the City had an insufficient number of attorneys. Price Waterhouse Report, p. 97.

28. Price Waterhouse Report, p. 95. The City had 1.11 claims examiners per 100,000 citizens for personal injury and property damage claims, while the group median for all claims was .41 examiners. However, the City and the group median were fairly comparable in the ratio between the number of claims examiners per attorney: .83 examiners per attorney for the City, .70 for the group. Id. at p. 97.
The caseload burden was three times that of the median group, that workload may well have diluted the efforts that the typical BLA examiner could devote towards settling any particular case.

Price Waterhouse seems to have adopted the latter view. It concluded that, in addition to the Tort Division, BLA was also significantly understaffed. According to Price Waterhouse, the additional cost of adding 230 more staff to these departments would be de minimis when compared to the City’s annual payouts in resolving lawsuits by settlement or judgments. Staffing costs would only be increased by less than 5% of those annual payouts and, assuming that Price Waterhouse’s projections are on target, these costs would be readily recouped from the lower average payouts that would result from a more intensified early settlement strategy. 29

2. Claims examiners and attorneys should be organized in functional teams to increase specialization 30

Price Waterhouse recommended that both the Tort Division and BLA should organize their staffs in functional teams that will permit specialization in various categories of claims and cases. This form of claim/case management would help insure that all claims and cases receive the appropriate degree of investigation and analysis. Price Waterhouse recognized that, because of their traditionally high workload and understaffing, neither the Tort Division nor BLA is currently able to adopt a purely vertical system in which individual claims examiners and attorneys have oversight responsibility for all aspects of a claim or case. 31 Without a significant increase in staff in both departments, different tasks in the same matter will continue to be assigned to different individuals. In the past, this task-oriented process has meant that the City frequently lost the history of a claim or case; staff often duplicated work previously completed by colleagues; and there was no one with oversight responsibility for the entire claim or case. 32

29. Id. at p. 8.
30. Id.
31. Id. at p. 6.
32. Id. As will be discussed below, lack of oversight responsibility was not caused solely by the absence of vertical assignments. A primary cause for the failure of City agencies to comply with discovery requests and court directives is the inexplicable (unless explained by political expediency) unwillingness of the City’s managers to assign oversight responsibility to anyone—much less an appropriate individual—in those agencies.
3. Reduce costs through better work-up of claims and early settlement at lower average values.\textsuperscript{33}

Because of its under-staffing, the City typically did not always inspect accident scenes or conduct physical examinations as part of the claims processing function.\textsuperscript{34} This made it difficult, if not impossible, for the City to prioritize cases for settlement.

For similar reasons, the City was unable to pursue fraud and third-party claims.\textsuperscript{35} Price Waterhouse's "conservative" estimate is that there is suspected fraud in 10\% of all claims against the City. If a dedicated Fraud Team identified even 20\% of these expected fraudulent claims, savings to the City in payout avoidance would be over $11 million.\textsuperscript{36}

In addition, claims covered by insurance were not always recognized as such since City agencies routinely failed to uncover the existence of such coverage on a timely basis.\textsuperscript{37} As a result, an undetermined percentage of meritless claims were contributing to the City's case inventory, and, ultimately, were unjustifiably receiving settlement dollars. According to Price Waterhouse, by allocating responsibility for these investigations to third-party vendors (under favorable financial arrangements), the City could expect to reduce its average payouts and increase investigation of fraud and subrogation opportunities.\textsuperscript{38}

Historically, the strategy of the Tort Division and BLA had been to defer settling cases and claims with merit until the eve of trial.\textsuperscript{39} In part, this has been caused by the City's inability to conduct proper investigations in the early stages. This absence of investigation, in turn, has prevented a proper evaluation of cases until after discovery has been completed, thereby further contributing to the pre-note-of-issue inventory.\textsuperscript{40}

\textsuperscript{33} Price Waterhouse Report, p. 8.
\textsuperscript{34} Id. at p. 5.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at p. 54, Explanatory Note to Line 13. More importantly, by not pursuing fraudulent claims, the City implicitly encourages the continuation of this illegal practice.
\textsuperscript{37} Price Waterhouse Report, p. 5.
\textsuperscript{38} Id. at p. 8.
\textsuperscript{39} Id. p. 5.
\textsuperscript{40} See id. There has also been a cultural reluctance, particularly at BLA, to pay substantial sums, in advance of a "drop dead" date, to what has been perceived as the "enemy", i.e., to people claiming that they were wronged by City acts or omissions, irrespective of the merits of these claims. There have been some indications that this cultural antipathy to making substantial settlement offers at early stages of cases and claims is disappearing.
Although the eight insurance companies studied by Price Waterhouse had among them a wide variance in the percentage of claims that resulted in the filing of a suit (running from a high of 46.5% to a low of 4%), the median percentage of such claims was 17.5%. The estimated percentage of City claims that resulted in the filing of a lawsuit was over five times higher—98%. Viewed another way, the insurers studied by Price Waterhouse settled, on the average, 82.5% of their claims pre-suit. The City, by contrast, has only disposed of 2% of the claims made against it pre-suit.42

As Price Waterhouse concluded, the City's settlement strategy has not been fiscally productive. To the contrary, its deferral approach towards settlement has resulted in increased costs to the City measured in higher payouts and increased administrative expenditures associated with carrying claims and preparing cases for trial.43 Since such an operating philosophy necessarily delays any reduction in case inventory, most frequently until after the cases are scheduled for trial, it was also responsible for the excessive caseload carried by the Tort Division's attorneys. As a consequence, these lawyers often found it difficult to prepare adequately for court appearances, settlement conferences and trials.44 This, in turn, means that, in many instances, cases were not being properly evaluated, for there was neither the available personnel nor time to take thorough depositions or to follow up on discovery. Presumably, as a result, cases were either being settled for too much money, or were being forced to trial because, based on the City's available—albeit incomplete—investigations and its cultural reluctance to pay significant sums, those cases were traditionally undervalued.

As noted, in the private sector, insurance companies typically settle the majority of their cases early in order to achieve lower average costs.45 In such situations, for example, while the cost of investigations would remain constant, there would be supplemental savings in legal and other

42. Id. at p. 91. Pre-suit settlements tend to be lower since claimants gain the benefit of early payment. Disposition of cases in the claim stage also saves the legal and related costs involved in defending a lawsuit.
43. Id. at p. 5.
44. Id.
45. Id.
trial preparation costs. According to the Price Waterhouse Report, insurance companies provide a proven model which the City should not ignore. Not only would a concerted effort to resolve claims and lawsuits in their early stages save the taxpayers money in the long run, but it would also begin to reduce the City’s inventory of tort cases before additional funds and efforts were expended in preparing them for trial.

Accordingly, Price Waterhouse recommended that, effective with the fiscal year beginning July 1, 1998 (i.e., last year), the City should budget an additional $25,000,000.00 for increased early settlement and approximately $25,000,000.00 to improve staffing, investigative ability and operating procedures. Based on the cost-benefit analysis that Price Waterhouse conducted, it concluded that, while an early settlement philosophy would result in an initial net cash outlay in the early years, the cumulative benefit of settling cases early would catch up within four years because those cases will have been closed.

4. Increase agency involvement in claims defense and prevention

Price Waterhouse believes that a soft charge-back process should be used to incentivize City agencies to take affirmative steps to improve procedures and correct situations that give rise to claims (i.e., risk management) and, once a claim has been made or a case filed, to cooperate with the Tort Division and BLA in the discovery process. Disposition costs are currently paid out of the City’s general fund. As a consequence, agencies whose operations give rise to claims have no motivation to make changes to operating procedures or to correct situations that should be a part of any organization’s risk management program. In addition, the agencies

---

46. Id. at p. 73.
47. Id. at p. 8. $18.2 million of this sum was to be allocated to staffing; $3.45 million to outsourced investigations and medical exams, and $3 million to systems. Id. at p. 59. However, by year five, total staffing expenditures were projected to decrease by $2 million to reflect the decreased caseload. Price Waterhouse believed that this reduction in personnel could be achieved through natural attrition. Id. at p. 55.
48. Id. at p. 8. The City’s annual budget is in the range of $30 billion.
50. Id.
51. Id. at p. 6. Price Waterhouse reported that nearly every insurance company participant in its survey reported a formal structured approach to providing feedback, both to policyholders and carrier representatives, on significant avoidable claims. In Price Waterhouse’s view, it is imperative that the City do likewise. BLA and the Tort Division should work closely with agency personnel on risk management efforts. Id. at p. 87.
have no incentive to prioritize requests from both BLA and the Tort Division for key documents or witnesses required in litigations.\textsuperscript{52} That such production might be required because of a CPLR deadline or a court order has been of no apparent concern to the agencies. Under Price Waterhouse’s recommendations, some portion of the costs involved in disposing of claims arising because corrective measures had not been taken after adequate notice, and costs of defending successful motions to compel discovery (presumably, including sanctions), would be charged against the budgets of the defaulting agency. In short, as did this Council in its April, 1998 report, Price Waterhouse recognizes that agencies must be made accountable for any failure to cooperate in the defense of lawsuits.

THE CITY’S RESPONSE TO PRICE WATERHOUSE’S RECOMMENDATIONS

The Price Waterhouse study seems to have been largely accepted, on an operational level, by managers of the Tort Division and by BLA. However, Price Waterhouse’s recommendations regarding staffing, funding and policy—all of which require mayoral initiative and perhaps City Council implementation—appear not to have found ready acceptance. Thus, as will be discussed below, both the Tort Division and BLA have implemented procedures aimed at resolving smaller claims and cases at the earliest possible time, even without additional funding and staffing. While this is not to be scoffed at—these efforts seem to have resulted in greater and earlier dispositions of a number of less serious claims and cases—it would be naive to think this limited, one-pronged attack alone will make a significant dent in the City’s growing claim and case inventory.\textsuperscript{53} This problem will not be resolved without significant budgetary and staffing increases and without making City agencies directly accountable for their conduct and obligations.

A. BLA

There have been no increases in BLA’s staffing; its budget has been increased, but only by $2 million—with the possibility that this increase will be doubled in the next fiscal year.

BLA is responsible for settling all claims against the City.\textsuperscript{54} As BLA

\textsuperscript{52} Id. at p. 6.
\textsuperscript{53} See id. at p. 3.
\textsuperscript{54} The City’s annual budget provides for funds to settle these cases. Representatives of the Tort Division have told us that this limitation on available settlement monies does not, as a practical matter, affect case dispositions.
interprets this mandate, a representative of BLA must attend all settlement conferences. This perceived requirement creates significant scheduling problems for both the courts and the City. It necessitates two City representatives—a lawyer and a claims examiner—attending each settlement conference where, generally, only one should be required. For years, insurance companies have delegated settlement authority to their trial attorneys at pre-trial conferences called for that purpose, while maintaining only telephone contact with the claims department.\textsuperscript{55} In light of the severe staffing shortage in both BLA and the Tort Division, the City might be better served in its efforts to reduce its backlog of tort cases if BLA followed this practice and delegated authority to Tort Division attorneys (or at least Tort Division managers) to settle cases within certain fixed limits, with instructions to contact the BLA claims examiner if greater authority were needed in order to dispose of a case.\textsuperscript{56}

On the other hand, in the last four years, BLA has made strides in addressing the overall caseload problem. In 1994, there were over 1,000 active claims per examiner; BLA has decreased this number to less than 400 claims per claims examiner, again without adding any personnel. To accomplish this, BLA has reassigned existing personnel to a newly created pre-litigation division whose purpose is to settle claims at the hearing stage.\textsuperscript{57} BLA has recently begun to retain outside lawyers to conduct hearings under section 50(h) of the General Municipal Law, and is in the process of contracting with third parties to investigate accident scenes and interview witnesses, and with doctors for the physical examinations of claimants in appropriate cases.

While hearings are not conducted in every case, BLA tries to do so wherever the claimant is represented by an attorney. In the last year, it conducted about 2,000 hearings in “serious” personal injury cases and over 6,000 such hearings in total. As previously noted, on an annualized basis, BLA receives about 16,000-17,000 notices of claim. Thus, even with this new emphasis, hearings are only being conducted for less than 40 percent of all claims.\textsuperscript{58} We do not know what percentage of accident scenes

\textsuperscript{55} See Price Waterhouse Report, p. 89.
\textsuperscript{56} See id. at p. 41, Recommendation 7.1.
\textsuperscript{57} At the time of the Price Waterhouse Report, of the more than $40 million spent annually on BLA and the Tort Division, only about 15% was devoted to BLA activities during the claim stage. Id. at p. 7.
\textsuperscript{58} We recognize that many of these claims may be insignificant. We do not have enough information to determine whether a policy of insisting on hearings even for minor claims
will be investigated by these contract investigators, or what percentage of personal injury claims will now result in medical exams. As previously noted, Price Waterhouse believed that it would cost $3.45 million to do this pre-trial investigation adequately. We do not know what portion of BLA's $2 million budget increase is being used for this purpose, but certainly not all of it. Presumably, with current funding and staffing, there will be only relatively few investigations and physicals. Under Price Waterhouse's scenario, there would be 7,500 outsourced investigations annually and, during the same time period, 3,000 outsourced medical exams.59

BLA has also replaced three paralegal lines with newly hired attorneys who have been assigned to bulk up BLA's Early Intervention Unit ("EIU"). The principal purpose of EIU is to settle cases within the first 60-90 days after they have been placed in suit. Where EIU previously had only two full-time employees, as a result of reassignments, it now has seven attorneys. The ensuing improvement in early case dispositions has been significant. Formed in 1994, EIU had settled, on the average, 650 cases annually in its first two years. In 1996, 925 cases were settled; in 1997, the number had increased to 1,144 cases; and last year, 1,524 cases were settled by EIU, a 33% increase over the prior year. However, most of the cases settled by EIU are small, typically involving only property damage or nuisance claims. Price Waterhouse would expand the role of EIU to all cases.60

According to the September 23, 1998 Joint Press Release, BLA has also created an early settlement unit to focus on Board of Education claims. In fiscal 1998, that unit settled 119 claims, pre-suit, at an average cost of $6,947, compared to a projected cost of $27,124, thereby reaffirming the benefits of early settlement.61 The long-term savings on these settlements were stated to be $1.6 million, and expected savings in fiscal 1999 were projected to be $4 million, again validating Price Waterhouse's recommendations. A similar program has been instituted with respect to trip-and-fall sidewalk cases, with like results.

Some judges have suggested to us that BLA's renewed efforts to settle smaller cases soon after their commencement has not been applied to the

---

60. Id. at p. 13, Recommendation 1.10.
61. It is unclear whether these settled cases are included in the above EIU statistics.
more serious cases pre-note of issue. In part, this may be because BLA does not have the financial and personnel resources needed to obtain data sufficient to allow an early evaluation of the worth of these cases. As previously mentioned, it may also be that BLA has not yet fully accepted the fact that there are also significant cost benefits to be gained from the early resolution of these more serious cases; and that BLA is still adhering to its previously ingrained approach of opposing early settlements of these lawsuits as a matter of principle.

In partial conformity with Price Waterhouse's recommendations, BLA has created a fraud unit to train all claims examiners to identify spurious claims, which will then be referred to the Department of Investigation and the appropriate District Attorney for investigation and possible prosecution. However, the inability of BLA to adequately investigate all claims, and to take physical examinations in all potentially serious personal injury cases, will continue to be an invitation to some miscreants to maintain their fraudulent practices.

In August 1994, BLA began the implementation of an electronic imaging program ("OAISIS") to enable the rapid transmission of its files to the Law Department. Once a lawsuit starts, these files are now electronically delivered to the workstation of an attorney in the Tort Division who works on the case. In this manner, through interdepartment cooperation, the fruits of BLA's labors are made instantaneously available to litigation counsel. Unfortunately, the same is not true with regard to the records and files of most City agencies.

Currently, the Board of Education appears to be the sole exception. Unlike its sister agencies, the Board has also installed OAISIS. Thus, the Board can now automatically transfer its records to BLA once a notice of claim is filed. However, the Board of Education is only responsible for about 8% of claims against the City.

As noted, the other City agencies have not yet attained this level of

---

62. September 23, 1998 Joint Press Release. Price Waterhouse would apparently further expand this fraud investigation program. Price Waterhouse Report, p. 22, Recommendation 8.1. It also would have the Tort Division staffed with personnel who would be dedicated to a specific pro-active defense strategy with regard to possible fraud. Id., p. 13, Recommendation 1.9. To the best of our information, the Tort Division has not yet adopted this recommendation.

63. A side effect of BLA's optical imaging system is that it enables BLA to determine which successful claimants owe the City money. This permitted BLA to collect $3.4 million in fiscal 1998 which, presumably, it was not even equipped to identify readily in prior years. See September 23, 1998 Joint Press Release.
cooperation with BLA or the Tort Division, and we have seen no evidence that they anticipate doing so. Whether the cause of this failure to use modern technology in the litigation process is budgetary, cultural or a combination of both, is unclear. Whatever the cause, however, there is a substantial need for this type of record retrieval and re-delivery program in those City agencies that are most frequently involved with tort claims or litigation.

BLA believes that the expansion of its Early Implementation Program with the Board of Education to other agencies would require more claims examiners. Assuming that this assessment is accurate—and it is consistent with the Price Waterhouse recommendations—the expansion of the Program to other agencies (particularly the Police Department and Department of Transportation, which are responsible for about 50% of all tort claims filed against the City) would undoubtedly reduce the number of City employees involved in the retrieval process, and would be a major step in providing BLA with much of the information necessary for the evaluation of cases at the claims stage. It thus appears clear that the expansion of OAISIS would facilitate the early disposition of many of these claims. \(^{64}\)

In the past, the City has apparently incurred defense costs in—and paid money to resolve—many cases that were actually covered by insurance, either directly or through subrogation. The failure to determine the existence of such coverage can again be placed at the feet of the respective agencies who, for cultural or other reasons, have not been quick to cooperate with BLA even in this area. \(^{65}\) As a result of this inertia, the City has lost the benefits of insurance in innumerable cases and, as an arguable result, has wasted significant taxpayer dollars in defending and resolving cases for which that responsibility belongs to others.

Under its program with the Board of Education, BLA is now in a position to determine, electronically, whether there is insurance for any given claim and then to cause appropriate action to be taken. We are unaware of any similar mechanism in place with other City agencies.

**B. The Tort Division**

Although there has also been no authorization for the Tort Division to hire additional staff, it did convert twenty-one law student slots into

---

\(^{64}\) See, e.g., Price Waterhouse Report, p. 16, Recommendation 2.8; p. 17, Recommendation 3.7.

\(^{65}\) See id. at p. 6.
attorney slots, and it has filled these slots with new lawyers, bringing the total number of attorneys in the Division to 189.\textsuperscript{66} Representatives of the Tort Division report that this reorganization alone has increased productivity by about 33%.

In addition, a full-time attorney has been assigned to the Tort Division’s Management Information Systems department, with another attorney soon to follow. The Tort Division is now using its computers to prepare, in a matter of minutes, most form motion papers that in the past took hours to complete. It is expected that this innovation will substantially reduce the City’s numerous defaults in motion practice.

Eight attorneys have been promoted to the position of manager, and they are now supervising attorneys in their various tasks. Depositions that had previously not been taken until at least nine months after being noticed are now taking place within three or four months in most boroughs and within six months in Brooklyn.

Despite this strengthening of supervisory functions, the Tort Division does not plan to verticalize case assignments (although vertical units do exist in other divisions of the Corporation Counsel’s Office, which handle medical malpractice, lead and asbestos cases and major litigations). The managers of the Tort Division agree with Price Waterhouse that the assignment of cases to attorneys for all purposes would be unmanageable given the current large number of pending City cases. Despite its drawbacks, we are sympathetic to task assignments with respect to these smaller cases. (75\% of the Tort Division’s caseload involves lawsuits with amounts in controversy of $25,000.00 or less, and 80\% of the caseload involves matters involving $50,000.00 or less.\textsuperscript{67}) Nonetheless, using different lawyers for each step of the discovery process is terribly inefficient and necessarily allows the possibility that important information will not be known by lawyers who were not responsible for obtaining it in the first instance. No sophisticated private client would pay legal fees incurred for the duplicative work that results whenever a new lawyer has to review a file with which she or he is unfamiliar, merely to be prepared to take the next deposition or to oppose the next motion. Moreover, such an assignment process is often an invitation to malpractice. On the other hand, to divide the pending backlog of City cases among the current number of

---

\textsuperscript{66} New York Law Journal, February 9, 1999, p. 1. The source of funding to pay the ensuing increased compensation and benefits is unclear.

\textsuperscript{67} Since there are over 60,000 pending cases, there are about 12,000 that involve over $50,000.
lawyers in the Tort Division would be to give to each an unmanageable caseload. As Price Waterhouse recognized, before these cases can be properly managed on a vertical system, the number of cases per lawyer in that Division will have to be reduced, either through the addition of more lawyers or a significant improvement in early case settlements, or a combination of these two factors.

It may well be that, in the interim, a hybrid assignment process is the appropriate solution. For example, the more serious cases (i.e., those in which the potential liability appears to exceed $100,000) could be assigned at the pleading or preliminary conference stage to an experienced lawyer, with expertise in the relevant area of law, who would have overall responsibility for that case and who would supervise the motion practice and discovery efforts of less senior attorneys who would also be assigned to the case. Depending on their availability and the complexity of each case on which he or she is working, these less senior attorneys could either be given certain specific tasks to perform, or they could be made part of the “case team” for the life of the lawsuit. As total case inventory decreases or more staff is added to the Division, these ad hoc case teams could be transformed into identifiable litigation teams, each with specific fields of expertise, to work together as a unit in preparing and trying a number of cases of like subject matter that are assigned to that team.68 This is not unlike the way many cases are managed at major law firms.

The other, less serious cases could continue to be assigned by task, but always with an eye towards the lawyers’ workloads and the reduction of inventory. Over time, even these less serious cases should be assigned to a single lawyer, who would then bear full responsibility for their defense. Of course, when required, lawyers with available time could be assigned to assist the team leader or individual lawyer bearing ultimate responsibility for a case, but with the additional task of keeping that lead lawyer advised (in writing) of the results of their individual labors.

In connection with its newly adopted philosophy of settling cases at an early stage of the litigation, the Tort Division, together with BLA, is participating in pre-note-of-issue City Settlement Parts. Any party to the lawsuit may place a case on this calendar. The City has been successful in settling about half of the cases so calendared. During the current year, the City expects to conference about one thousand cases in these Parts, as contrasted to about seven hundred and fifty cases last year. Most of the cases resolved in these settlement Parts are in the $20-25,000 range, with

68. See also, Price Waterhouse Report, p. 30.
injuries that are not permanent. While this new incentive is certainly welcomed, it should also be understood that the early settlement of 500 cases a year, in pre-note-of-issue calendar Parts, represents a disposition of but 5 percent of each year’s new caseload.

In the City’s 1998 fiscal year, the Tort Division and BLA had settled almost 6,400 cases; and total dispositions reached 8,767, also a new high. Based on these statistics, the Tort Division anticipates that it will soon be disposing of almost as many lawsuits each year as are entering the system annually. While this may not reduce the inventory of pending cases, it would certainly be a positive step, but it requires that the 1998 disposition rate continue to increase into the future. At the present time, we do not know whether fiscal 1998 (which also saw a drop in new cases to 9,500, from over 10,900 in each of the prior four years) is the beginning of a new trend or merely an aberration.69 Indeed, any optimism should be tempered by the City’s concession that one reason for a reduction in backlog was the assignment of judges to focus on clearing out old cases.70 More importantly, however, even if the Tort Division’s projections are accurate, without additional incentives, the current unacceptable inventory of 62,000 pending tort cases will remain basically constant.

The Tort Division has taken some action to reduce the City’s history of defaults on discovery requests. Now, when documents are received from agencies, they go directly to a paralegal for production, rather than being sent directly to the file, as had been done in the past.71 However, there is no procedure in effect to require agencies to initiate document production whenever a potential lawsuit arises. For example, only recently has the Department of Transportation begun giving BLA online access to its complaint system. Previously, in order to determine whether the City had received prior notice of a claim, BLA would have to write DOT requesting each complaint. Even today, in order to obtain access to a DOT accident report in response to a claim, BLA must make a written request to that agency.

Nor do the agencies have a common approach to the handling of documents. Some agencies funnel all requests for production through the

---

69. The Tort Division reports that, with greater staffing, it could dispose of even more cases through dispositive motion practice.


71. The City has a ratio of .25 paraprofessionals per attorney, which is also the approximate group median for those insurance companies participating in the Price Waterhouse Study. See Price Waterhouse Report, p. 93.
same person while, at other agencies, it will depend on where the documents are kept, or other factors. The Police Department, for example, has a decentralized record-keeping system. In some instances, the only place relevant records may be located is in a precinct house, and it is not always readily apparent which records are unavailable from headquarters or at which precinct they are being kept. Since keeping records is pointless without ready access to them, the record-keeping function of all agencies should be reviewed and (where necessary) revised. The goal should be a centralized system, ideally permitting electronic retrieval through the same optical system now used by BLA and the Tort Division.

The Tort Division is not totally without fault with regard to the City’s delay in responding to discovery requests. Perhaps because of staffing limitations, the Tort Division does not normally request agencies to send documents to it until the preliminary conference stage of the lawsuit. Thus, as a practical matter, the Tort Division generally ignores discovery requests that are made prior to a preliminary conference—despite contrary provisions of the CPLR. To further compound the problem, City agencies typically comply with these Tort Division requests only about 40% of the time. Moreover, once the Tort Division makes a request of an agency, there is no fixed procedure for following up on that request prior to the Tort Division being served with a motion to compel discovery.

There is no justification for the Tort Division not requesting relevant documents until after the preliminary conference and then not producing those documents, on a best case scenario, until the deposition of the first City witness. The Tort Division’s lawyers know which documents are relevant to their cases, as do the lawyers in the agency/client legal departments. By the time of the preliminary conference, these documents should have been identified, and the agencies should already be in the process of collecting and forwarding them to the Tort Division. The current practice of unending delay in responding to legitimate discovery requests contributes to the growing inventory of City tort cases and is plainly unacceptable.

While the City’s recurrent failure to honor its discovery obligations is better understood when considered in the context of the problems its lawyers have in collecting relevant documentation from agency clients early in a lawsuit, not even the City should be entitled, as a matter of policy, to simply ignore CPLR requirements. Although the Tort Division is meeting with court administrators in an attempt to persuade them to defer production of City documents until after the preliminary conference, it is difficult to rationalize such preferential treatment, at least un-
less and until City agencies unequivocally accept the responsibility of responding to such discovery requests within a reasonable time after the preliminary conference is held and then demonstrate that they will routinely produce the requested discovery in conformity with that obligation—just like any other litigant.

Although the Comptroller's office is apparently in favor of imposing a soft-charge back incentive on City agencies, the City has rejected this concept ostensibly because it would only serve to reduce the agency's budget (assuming non-compliance) and that might result in the agency providing less service to the citizenry. In its September 23, 1998 Joint Press Release, the City announced that, in response to the Price Waterhouse recommendation, the Mayor would issue a directive to agencies to assign Deputy Commissioners the responsibility for ensuring that appropriate litigation support is provided to the Corporation Counsel. This has not been done and there is no evidence that even this first step towards agency accountability is still on the Mayor's agenda.

The only apparent action that the City has undertaken to remedy agency non-compliance is to institute periodic meetings with legal representatives of the Police Department aimed at persuading that agency—but, as of yet, no others—of the merits of "partnering" with the Tort Division in defending cases against the City. Although it is not the sole culprit, the Police Department is probably the agency most unresponsive to BLA and the Tort Division's requests for cooperation—even though this lack of cooperation invariably results in violations of both the CPLR and court orders.\textsuperscript{72} The Corporation Counsel's office apparently believes that these efforts at personal persuasion—which have apparently been on-going for several months, still without success—will ultimately cause the Police Department to reverse years of inertia and promptly begin working with the Tort Division and BLA in the discovery process. Should this unlikely event actually occur, the City believes it will then be able to instill its concept of "partnering" in other City agencies. As far as we can dis-

\textsuperscript{72} In September, 1998, in James v. City of New York, 97 Civ. 9159 (S.D.N.Y.), District Court Judge John S. Martin ordered the City to pay $19,811.90 in sanctions for what he termed the "utter disdain" displayed by the Police and Correction Departments for their discovery obligations in a police brutality case. According to the New York Law Journal of September 30, 1998, Judge Martin denounced the failure of Police and Correction officials to remedy or explain their delays. The Judge noted that their "cavalier attitude" toward discovery demands was systemic and rooted in a belief that "obtaining information responsive to civil discovery demands is of the lowest priority, and court orders relating to such matters may be treated with contempt."}
cern, the City has no realistic timetable within which to measure the success of its “partnership” proselytization efforts. Nor has it adequately explained why these efforts are currently restricted to a single City agency.

Even if the City’s optimism proves to be justified, it has offered no justification for not imposing the required accountability on all agencies through standard management delegation techniques. Moreover, if agencies do not voluntarily accept this City’s concept of “partnering”, there seems to be no other agenda yet in place to resolve the repeated failure of the agencies to either co-operate in discovery requests or to implement a meaningful risk management program.

CONCLUSION

The current volume and increasing number of City tort cases is a problem that cannot be ignored. On its face, the Price Waterhouse Report makes a persuasive case. Particularly after the City expended almost $1 million to obtain this advice, Price Waterhouse’s recommendations deserve better treatment than the City has apparently afforded them. If there are serious flaws in Price Waterhouse’s statistics or logic, the City should make them known. Otherwise, it should proceed to implement these recommendations.

May 1999
Council on Judicial Administration

Robert L. Haig, Chair
Sarah Layfield Reid, Secretary

Paul H. Aloe  Lenore Gittis  Richard Lee Price
John L. Amabile**  Thomas H. Golden  Porfirio F. Ramirez, Jr.
Richard T. Andrias  Erika D. Gorrin  William C. Rand
Steven J. Antonoff  Salvatore J. Graziano  Claudia E. Ray
Jacob Aschkenasy  James W. Harbison, Jr.  Roy L. Reardon
Robert E. Bailey  Alexander W. Hunter, Jr.  Anne Reiner
Paris R. Baldacci  Debra A. James  Steven A. Reiss
Celia Goldwag Barenholtz  Robert Jossen  Rosalyn Heather Richter
Helaine M. Barnett  Barry M. Kamins  Eric Reider
Gary S. Brown  Beth L. Kaufman  Stephen G. Rinehart
Nancy A. Brown  Norman C. Kleinberg  David Rosenberg
Dierdre A. Burgman  Marilyn C. Kunstler  David E. Ross
Austin V. Campriello  Deborah E. Lans  Jay G. Safer
Roy H. Carlin  Craig Leen  Shira A. Scheindlin
P. Kevin Castel  Robert J. Levinsohn  Stella Schindler
Ellen M. Coin  Robert P. LoBue  Edward T. Schorr
Brendan M. Connell, Jr.  Mitchell A. Lowenthal  Marcia Lynn Sells
Melanie L. Cyganowski  Jerianne E. Mancini  Steven B. Shapiro
William M. Dallas, Jr.  Frank Maas  Jacqueline W. Silberman
George B. Daniels  Maria Milin  George Bundy Smith
Julia R. Davis  Jonathan W. Miller  Debra B. Steinberg*
Charles E. Dorkey, III  Charles G. Moerdler  Andrew W. Stern
Joan L. Ellenbogen  David M. Morris  Guy Miller Struve
Linda A. Fairstein  Brian J. Noonan  Eric A. Tirschwell
Gerald J. Fields  Marilyn G. Ordovery  Paul A. Tumblen
John E. Finnegan*  Steven R. Paradise  Mark Walfish
Steven G. Foesta  Sheryl L. Parker  Eric D. Welsh
Amanda J. Gallagher  Jane W. Parker  Aviva O. Wertheimer
Paula Galowitz  Gerald G. Paul*  John S. Willems
John L. Gardiner  Ann T. Pfau  Ronald P. Younkins

* Members of Subcommittee on Institutional Litigants

** Principal author of this report
A Proposal to Expand the Use of the Compulsory Arbitration Program in the Civil Court of the City of New York

The Committee on the Civil Court

1. INTRODUCTION

The Committee on the Civil Court of the Association of the Bar of the City of New York conducted an investigation as to whether the compulsory arbitration program currently in use in New York County should be expanded to Kings and Bronx Counties to help alleviate the extremely heavy trial calendars and protracted delays in getting cases to trial there.

In New York County, the length of time it currently takes from the filing of a notice of trial or pro se answer to the date the case is placed on the trial calendar averages no more than 30 days, with the actual date of trial usually followed by a matter of weeks.1 In Queens, a case can commence at trial in five to seven weeks, depending on the type of case.2 In

---

1. The statistical tracking of cases in New York County does not include information that shows the actual length of time involved. Conversations with Myles McKenna, Deputy Chief Clerk, New York City Civil Court, April and May 1999.

2. As stated by personnel in the office of Queens County Administrative Judge Jeremy Weinstein, May 1999. However, although the Court is prepared to begin a trial within this timeframe, litigants often request further adjournments for conferencing or discovery issues. Queens
sharp contrast, in Brooklyn, at present there is a nearly two-year wait for new cases to be calendared due in large part to an enormous backlog of CPLR 325-d cases.\textsuperscript{3} In the Bronx, due to the volume, there is a 15 month wait.\textsuperscript{4} The gross disparity in the length of time in which a case moves to trial in Brooklyn and the Bronx, as compared to Queens and Manhattan, is most unfair to the litigants in those boroughs and certainly under-mines the concept of swift justice.

The Committee believes that the compulsory arbitration program could assist in relieving the crush of calendared cases, and reduce at least some of the extremely lengthy delay experienced in Brooklyn and the Bronx. Moreover, this could be done without additional appropriations for the program. We therefore recommend that the compulsory arbitration program, conceived originally as a way to alleviate some of the burden on the trial parts of Civil Courts in New York State, and in use widely throughout New York State, be instituted in both Kings and Bronx Counties, as well as continued in New York County.

2. AUTHORITY FOR COMPULSORY ARBITRATION PROGRAM

The program currently in place in New York County is authorized under Part 28 of the Rules of the Chief Judge, 22 NYCRR § 28.1, et seq., entitled “Alternative Method of Dispute Resolution by Arbitration.” That Rule allows the Chief Administrator to establish in any trial court in any

tracks cases in three categories: cases that involve matters over $10,000, with both sides represented, have on average a wait of seven weeks; cases involving less than $10,000, with both sides represented, have a five-week wait; and cases involving pro se claimants have a six week wait.

3. CPLR 325-d cases are those cases removed from Supreme Court to Civil Court for trial when it appears that the amount of damages sustained may be less than $25,000, and where Civil Court would have had jurisdiction but for the amount of damages demanded. According to Kings County Administrative Judge Richard Rivera, Brooklyn received about 4,000 CPLR 325-d cases in 1997 and 4,215 such cases in 1998. Apparently, in the first five months of 1999 alone, consistent with past years, Brooklyn received over 2,000 CPLR 325-d cases from Supreme Court. The administration there has given priority to clearing up the existing backlog of cases, has completed almost all cases older than 1997, and is now aggressively pushing the completion of the 1997-1998 cases. Regrettably, however, current cases have up to a twoyear wait.

4. Administrative Judge Laura Douglas, appearing before the Civil Court Committee on March 15, 1999. According to personnel in the office of Judge Douglas, although it takes approximately four weeks for a case to be placed on the trial calendar (conversation of May 27, 1999), the actual wait until trial is approximately 15 months.
county an arbitration program for all civil actions (except those commenced in small claims parts and not subsequently transferred to a regular part of court) that are noticed for trial. In New York City, the program applies to all cases where recovery sought for each cause of action is $10,000 or less. In the rest of the State, the maximum is $6,000. Id. § 28.2[b].

All actions subject to arbitration are placed on a separate calendar known as the arbitration calendar, in the order of the filing of the note of issue, notice of trial, or stipulation of submission. Where a defendant is in default, the plaintiff may seek a default judgment pursuant to CPLR 3215 Id. § 28.2[c]. The statute allows for a pretrial calendar hearing of actions pending on the arbitration calendar. If an action is not settled or dismissed, or judgment by default is not directed at the hearing, it then goes to arbitration Id. § 28.2[d]. The rules allow for two methods of arbitration, a Panel method, using attorneys who have been approved for this work (§ 28.4 et seq.), and the use of Judicial Hearing Officers (§ 28.16). 5

The program allows a whole category of cases, i.e., those in which the recovery sought is under a certain amount designated by the Chief Judge, to be handled without the time and expense of an actual trial. Cases are only referred to trial parts if one of the parties chooses to seek a trial de novo after an arbitration decision. The assumption is that most cases subject to this program will be disposed of by arbitration quickly and inexpensively, without the need for further court proceedings. In fact, this has proved to be the case, as will be discussed below.

3. HISTORY OF THE COMPULSORY ARBITRATION PROGRAM

In 1970, the New York State Legislature empowered the Administrative Board of the Judicial Conference to institute a three-year pilot plan

5. As set forth in Rules of the Chief Judge, § 28.16:

(a) An arbitration under this part may be heard and determined by a judicial hearing officer instead of a panel of arbitrators, without regard for whether the arbitration otherwise would be triable before a single arbitrator or a panel of arbitrators. The judicial hearing officer shall be assigned by the commissioner, with the approval of the appropriate administrative judge, to hear and determine such proceedings as shall be assigned by the commissioner. When a judicial hearing officer presides over an arbitration, the procedures followed shall be as set forth in the provisions of this part.

(b) Judicial hearing officers serving as arbitrators pursuant to this part shall receive compensation as provided in section 122.8 of the rules of the Chief Administrator. A location in which a hearing of the arbitration is held shall be deemed a “facility designated for court appearances” within the meaning of that section.
for compulsory arbitration of claims involving demands of less than $3,000. Modeled on a successful program in Philadelphia, the program was first implemented in New York State in the City Court of Rochester in 1970. It was monitored for its impact upon court calendars and took into consideration the views of the attorney arbitrators, plaintiffs’ attorneys, defendants’ attorneys, litigants, court clerks, court administrators and judges involved.6 The program was found to be an “unqualified success” in Rochester and was then expanded to the Civil Court of Bronx County, effective May 17, 1971.7 In addition, the maximum amount in issue was increased to $4,000. In March 1972, the program was expanded to the City Court of Binghamton and, in June 1973, to the courts in Schenectady County.8 In all counties, the program was assessed as “most successful.”9

In October 1979, with courts throughout New York State experiencing congestion and delay, then Chief Judge Lawrence H. Cooke announced an increase in the use of compulsory arbitration as a partial solution. The program was expanded to 17 more counties, in addition to the original four, and the monetary limit for arbitration was increased to $6,000.10 In 1981, 27 counties were using the program,11 and in 1983, the program was active in 30 counties, with New York City accounting for 52% of the dispositions.12

In 1991, due to severe budget constrictions experienced by the court system statewide, the compulsory arbitration program and the pre-arbitration judicial hearing program of the New York City Civil Court were suspended. “[L]itigants [with monetary claims of under $6,000] who once had a case resolved within 30 to 60 days of commencement, now had waits of up to two years to be placed on the general calendar.”13

In 1992, funding for the courts was restored, allowing the courts to return to near normal operations. Included in the new cost saving and revenue generating measures was the authorization of the use of Judicial

9. Id. at 19.
Hearing Officers to process compulsory arbitration cases.\textsuperscript{14} By 1993, the program was again functioning throughout the state, including in New York County and Kings County, but not Queens or Bronx counties.\textsuperscript{15} However, the program was dismantled in Kings County by the end of that year. Since 1994, there has been a compulsory arbitration program authorized in 31 counties of New York State, including New York County.\textsuperscript{16} Prior to 1994, compulsory arbitration covered cases where the maximum recovery per cause of action was $6,000. In 1994, New York County raised the maximum recovery per cause of action to $10,000.

Below are statistics from 1983 to 1991, the year that the arbitration program was temporarily halted, that show the number of cases added to the civil action calendars of all five boroughs (not including default judgments entered); cases disposed of; and cases processed through the compulsory arbitration program. The statistics show that a sizable number of cases were arbitrated rather than tried.

### NUMBERS OF CASES ON CIVIL ACTION CALENDARS COMPARED TO ARBITRATION CALENDARS IN NEW YORK CITY CIVIL COURT: 1983-1991\textsuperscript{17}

<table>
<thead>
<tr>
<th></th>
<th>Cases added to Civil-Action Calendar</th>
<th>Calendared Dispositions</th>
<th>Cases Processed in the Arbitration Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>37,377</td>
<td>31,915</td>
<td>8,736</td>
</tr>
<tr>
<td>1985</td>
<td>40,284</td>
<td>30,229</td>
<td>8,052</td>
</tr>
<tr>
<td>1986</td>
<td>36,565</td>
<td>29,434</td>
<td>7,660</td>
</tr>
<tr>
<td>1987</td>
<td>37,317</td>
<td>32,874</td>
<td>7,211</td>
</tr>
<tr>
<td>1988</td>
<td>36,982</td>
<td>30,832</td>
<td>7,438</td>
</tr>
<tr>
<td>1989</td>
<td>36,254</td>
<td>30,092</td>
<td>7,149</td>
</tr>
<tr>
<td>1990</td>
<td>40,335</td>
<td>32,244</td>
<td>7,700</td>
</tr>
<tr>
<td>1991</td>
<td>28,808</td>
<td>28,000</td>
<td>5,342</td>
</tr>
</tbody>
</table>


\textsuperscript{15} See, in general, the 16th, 17th, 18th, 19th, and 20th Annual Reports.

\textsuperscript{16} This information and the following is gleaned from the 17th, 18th, 19th, and 20th Annual Reports.


\textsuperscript{18} The Annual Reports covering the years 1983-1988 described this category as: “Cases Removed from Civil Action Calendar for Processing in Arbitration Program.” It is presumed that this designation is the equivalent of the category employed in the years 1989-1991.
In the more recent years for which statistics are available, the arbitration program in New York County has continued to siphon off a small but significant number of cases that otherwise would have been calendared for trial, and has done so in a manner that, as described below, is an efficient use of time and resources.

**NUMBER OF NEW YORK CITY CASES ON CIVIL ACTION CALENDARS IN COMPARISON WITH CASES ON NEW YORK COUNTY’S ARBITRATION CALENDARS 1994-1996**

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Received for Arbitration (NY County)</th>
<th>Cases Disposed of (NY County)</th>
<th>Demands for Trials de Novo</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>2,649</td>
<td>3,236</td>
<td>503</td>
</tr>
<tr>
<td>1995</td>
<td>2,699</td>
<td>2,511</td>
<td>455</td>
</tr>
<tr>
<td>1996</td>
<td>2,160</td>
<td>2,286</td>
<td>394</td>
</tr>
</tbody>
</table>

**NUMBER OF NEW YORK COUNTY CASES ON CIVIL ACTION CALENDARS IN COMPARISON WITH CASES ON ARBITRATION CALENDARS 1997-1998**

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Added to Civil-Action Calendar (all boroughs)</th>
<th>Cases Received for Arbitration</th>
<th>Arbitration Cases Awards Granted</th>
<th>Demands for Trials de Novo</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>10,696</td>
<td>2,145</td>
<td>1,024</td>
<td>382</td>
</tr>
<tr>
<td>1998</td>
<td>11,246</td>
<td>1,867</td>
<td>1,141</td>
<td>389</td>
</tr>
</tbody>
</table>

4. **NEW YORK COUNTY’S CURRENT PROGRAM**

New York County’s current program was re-instituted in 1993. The

---

19. The following statistics are from the Annual Reports for the years 1994-1996. For 1994: 17th Annual Report, pp. 30, 32 (Table 7); 1995: 18th Annual Report, pp. 29, 31 (Table 7); 1996: 19th Annual Report, pp. 29, 31 (Table 7).

20. More cases were disposed of through arbitration in 1994 than received due to the resumption of the arbitration program in 1993 and a carryover in cases from 1993 into 1994.

21. Total reflects a carryover from previous year.

22. The Committee thanks Myles McKenna, Deputy Chief Clerk, New York City Civil Court, for the following statistics.

23. The Committee thanks Myles McKenna, who provided much of the following information.
program now uses Judicial Hearing Officers rather than attorney panels. Currently, Part 31 at 111 Centre Street is designated for the pre-arbitration calendar screenings. When a case has been noticed for trial, and the recovery sought is not more than $10,000, it is added to the arbitration program and scheduled for a pretrial calendar hearing. If the case is not settled at that time, it is then adjourned for arbitration (Room 488). This is a “true day certain,” and adjournments are generally not allowed. If a party defaults or neither side appears at the arbitration hearing, there is a $75.00 fee to restore it to the hearing calendar. However, because both parties agree in person, at the pre-arbitration conference, to a date convenient for both of them, and because there is a penalty for not keeping a hearing date, there are very few “missed” or “adjourned” hearings. At present in New York County, the normal wait for arbitration is 30 days. This compares very favorably with the up to 12-week wait for a trial.

In general, New York County uses one Judicial Hearing Officer to conduct the arbitration hearings, as well as a Judicial Hearing Officer in the pre-arbitration calendar part. It is estimated that a Judicial Hearing Officer disposes of eight to ten cases a day. The Judicial Hearing Officer renders a decision immediately and a written decision (the Arbitration Report) is subsequently mailed to the parties. Any party has a right to demand a trial de novo within 35 days of the date of the Arbitration Report, and the case is then added to the trial calendar. The applicant must pay a fee of $75.00.

5. PROPOSAL TO EXPAND THE COMPULSORY PROGRAM TO KINGS AND BRONX COUNTIES

The compulsory arbitration program was designed specifically to address the issue of congested trial parts. It has proved its success throughout New York State over the years, expanding from one to four counties, and since then has been enlarged again and again and is now employed throughout the State. It is a successful device that can certainly alleviate a part of the backlog affecting the Civil Court in Brooklyn and the Bronx.

Cost

The compulsory arbitration program as currently operating in New York County runs with minimal expense. This is due to its very structure. There is no need, for instance, for a clerk’s office and the attendant court personnel. No record is made of the proceedings (similar to cases heard in the Small Claims Parts). A major administrative process, the scheduling
and notification of parties, is vastly streamlined and made nearly fail-proof by the fact that parties schedule a date in person at the pre-arbitration calendar call. Furthermore, if one or more parties does not appear, the party must pay $75.00 to have the case rescheduled.

The main expense of the program in New York County is the per diem salaries of the Judicial Hearing Officers. By statute, Judicial Hearing Officers are paid $250/day or portion thereof (see Rules of the Chief Judge, § 28.18 and § 122.8 of Rules of the Chief Administrator). However, inasmuch as there are normally eight to ten arbitration hearings scheduled each day, this means that on a full day, each case arbitrated “costs” $31.25 or less. This sum is obviously vastly lower than the amount it costs for a judge to adjudicate a trial.

**ALLOCATION OF COURT RESOURCES (TIME)**

It must be stressed that for more than twenty years, the compulsory arbitration programs throughout New York State have proven capable of handling a small but steady number of cases each year, and most are disposed of without going to trial. Moreover, they are completed in one day and, in New York County, typically take no more than one hour. This compares exceedingly favorably with the length of an actual trial and the likely adjournments and postponements prior to trial. In New York County, a case currently entering the arbitration program is, on average, completed within 12 weeks. This is a significant savings of time for litigants and their attorneys. Furthermore, it allows the court to process many more cases in any one day than it could if all those arbitrated cases were on the regular trial calendar.

There is concern among some court administrators that “too many” litigants will demand trials de novo, thus making the arbitration process simply an extra hoop through which litigants must jump, and adding a small but significant cost to the running of the courts in continuing the arbitration program. The data show however that only a small percentage of trials de novo are sought. Below is a table showing the percentage

---

24. In comparison, a panel using three attorneys would cost $120 per case ($40 per attorney, per case, by statute).

25. It is true that in a certain percentage of cases, parties do demand trials post arbitration, and this percentage, higher in New York County than the statewide average, appears to be increasing (although there was a drop in 1995). It is also true, as detailed in the chart below, that in the years when the courts in Queens, the Bronx and Brooklyn operated compulsory arbitration programs, litigants in Queens often made the highest number of demands for trials de novo, and those in the Bronx made the fewest.
of demands for trials de novo for the years 1983-1997 in the four boroughs of New York City that used the program, as well as the statewide percentage rate.

1983-1997

PERCENTAGES OF DEMAND FOR TRIALS DE NOVO
COMPARISON BETWEEN NEW YORK CITY AND STATE

<table>
<thead>
<tr>
<th>Year</th>
<th>New York</th>
<th>Kings</th>
<th>Queens</th>
<th>Bronx</th>
<th>Statewide</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>18</td>
<td>18</td>
<td>21</td>
<td>17</td>
<td>13</td>
</tr>
<tr>
<td>1985</td>
<td>16</td>
<td>18</td>
<td>21</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>1986</td>
<td>16</td>
<td>19</td>
<td>20</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>1987</td>
<td>16</td>
<td>17</td>
<td>19</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>1988</td>
<td>15</td>
<td>16</td>
<td>20</td>
<td>15</td>
<td>17</td>
</tr>
<tr>
<td>1989</td>
<td>15</td>
<td>16</td>
<td>18</td>
<td>17</td>
<td>15</td>
</tr>
<tr>
<td>1990</td>
<td>13</td>
<td>17</td>
<td>16</td>
<td>12</td>
<td>14</td>
</tr>
<tr>
<td>1991</td>
<td>17</td>
<td>24</td>
<td>16</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>1992</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>11</td>
</tr>
<tr>
<td>1993</td>
<td>14</td>
<td>7</td>
<td>---</td>
<td>---</td>
<td>8</td>
</tr>
<tr>
<td>1994</td>
<td>16</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>10</td>
</tr>
<tr>
<td>1995</td>
<td>18</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>8</td>
</tr>
<tr>
<td>1996</td>
<td>17</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>8</td>
</tr>
<tr>
<td>1997</td>
<td>19</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>10</td>
</tr>
</tbody>
</table>

In addition, the Committee believes that the additional burden on litigants subjected to a de novo trial will be minimal. This is because the arbitration hearing typically takes an hour or less. Accordingly, even in those cases where a trial de novo is requested, the hour spent in the arbitration hearing will not significantly add to the litigants' overall burden and total cost. And, of course, in most instances, the hearing itself will finally determine the matter because of the absence of a demand for trial de novo.

The Committee recognizes that there will be certain costs involved in setting up a compulsory arbitration program. One or more Judicial Hear-

---

ing Officers will have to be hired, space will have to be allocated for the pre-arbitration calendar screening and the hearings, and forms will have to be printed. However, once the program gets underway, the savings of judicial time and expense will quickly begin to aggregate.

The Committee suggests that any new program instituted in the Bronx or Brooklyn process cases up to the $10,000 maximum, as a way of insuring sufficient volume to justify the existence of the program and to take as much weight as possible off of the trial calendars in those courts.

The Committee also suggests that the maximum amount handled by compulsory arbitration be increased, perhaps to as much as $15,000. This will address the declining numbers of cases that enter the arbitration program in an era when most cases typically are brought for amounts in excess of $10,000.27

6. CONCLUSION

It is clear that a compulsory arbitration program implemented in Brooklyn and the Bronx could help alleviate the appalling backlog of cases by disposing of a certain number in a quick and efficient fashion. Moreover, this could be done at virtually no increased cost and virtually no burden on parties and their counsel. It is time for Civil Court litigants in Brooklyn and the Bronx to have their cases adjudicated on the same basis as litigants in other boroughs.

June 1999

27. The problem of there being fewer cases eligible to enter the arbitration program because they involve amounts over $10,000 is compounded in Kings County by the fact that such a large portion of the Court’s docket there is comprised of CPLR 325-d cases which, by definition, involve cases seeking damages of over $25,000. Thus, raising the maximum amount handled by arbitration to $15,000 will make fuller use of the arbitration program in that Court. see n.3, supra.
Committee on The Civil Court

Mark Walfish, Chair
Judith M. Shampanier, Secretary

David Black                 William J. Neville
Saul David Bruh             Michelle Pahmer
Eliot J. Cherson            George Postel
Clement J. Colucci          Davida S. Scher
Ruth Curtis                 Stephen M. Sinaiko
Arthur F. Engoron          David Skaller
Warren A. Estis            Philip S. Straniere
Anthony J. Fiorella, Jr.   Ira Daniel Tokayer
Darrell L. Gavrin           Gregory Walthall
Julia Herd*                Michael G. Youngs
Juliet P. Howard

*Subcommittee Chair
Former subcommittee members: Dan A. Lowenthal, III, and Nina Taylor
### New Members

**As of August 1999**

<table>
<thead>
<tr>
<th>RESIDENT</th>
<th>DATE ADMITTED TO PRACTICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paul S. Adler</td>
<td>11/63</td>
</tr>
<tr>
<td>David W. Alberts</td>
<td>11/91</td>
</tr>
<tr>
<td>Andrew W. Albstein</td>
<td>01/82</td>
</tr>
<tr>
<td>Lisa Alter</td>
<td>01/82</td>
</tr>
<tr>
<td>Michael R. Ambrecht</td>
<td>08/91</td>
</tr>
<tr>
<td>Stephen Wade Angus</td>
<td>07/94</td>
</tr>
<tr>
<td>Richard Appleby</td>
<td>01/73</td>
</tr>
<tr>
<td>David Michael Ash</td>
<td>03/98</td>
</tr>
<tr>
<td>Reginald D. Asiedu</td>
<td>12/83</td>
</tr>
<tr>
<td>Alexei O. Auld</td>
<td>07/99</td>
</tr>
<tr>
<td>Alan P. Baden</td>
<td>11/73</td>
</tr>
<tr>
<td>HyungJ. Bak</td>
<td>02/99</td>
</tr>
<tr>
<td>Tracy Anbinder Baron</td>
<td>09/96</td>
</tr>
<tr>
<td>James R. Bennett</td>
<td>10/76</td>
</tr>
<tr>
<td>Michael R. Berlowitz</td>
<td>01/74</td>
</tr>
<tr>
<td>Nicole P. Bingham</td>
<td>12/98</td>
</tr>
<tr>
<td>Michael Bochenek</td>
<td>04/96</td>
</tr>
<tr>
<td>Christopher K. Bowen</td>
<td>12/88</td>
</tr>
<tr>
<td>Erica M. Broido</td>
<td>01/92</td>
</tr>
<tr>
<td>Jennifer Lynn Buczek</td>
<td>05/99</td>
</tr>
<tr>
<td>John J. Busillo</td>
<td>05/85</td>
</tr>
<tr>
<td>Boyd G. Carano</td>
<td>11/84</td>
</tr>
<tr>
<td>Pamela Ki Mai Chen</td>
<td>11/86</td>
</tr>
<tr>
<td>Brian Douglas Coad</td>
<td>07/84</td>
</tr>
<tr>
<td>Lisa M. Cobb</td>
<td>12/93</td>
</tr>
<tr>
<td>Alan S. Cohen</td>
<td>12/78</td>
</tr>
<tr>
<td>Michael David Cohen</td>
<td>02/99</td>
</tr>
<tr>
<td>Dominick P. de Chiara</td>
<td>06/92</td>
</tr>
<tr>
<td>Peter de Vital</td>
<td>01/95</td>
</tr>
<tr>
<td>Louis R. Dienes</td>
<td>05/96</td>
</tr>
<tr>
<td>Christine D. Doniak</td>
<td>11/98</td>
</tr>
<tr>
<td>Joshua L. Dratel</td>
<td>03/82</td>
</tr>
<tr>
<td>Lauren G. Dreilinger</td>
<td>05/99</td>
</tr>
<tr>
<td>Mary T. Dunleavy</td>
<td>03/99</td>
</tr>
<tr>
<td>Brett R. Eagle</td>
<td>06/99</td>
</tr>
</tbody>
</table>
## NEW MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Firm/Company</th>
<th>City</th>
<th>State</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kevin J. Fee</td>
<td>Kornstein Veisz</td>
<td>New York</td>
<td>NY</td>
<td>02/86</td>
</tr>
<tr>
<td>H. Leigh Feldman</td>
<td>Robinson Silverman Pearce</td>
<td>New York</td>
<td>NY</td>
<td>12/92</td>
</tr>
<tr>
<td>John M. Ferguson</td>
<td>Goodwin Procter &amp; Hoar LLP</td>
<td>New York</td>
<td>NY</td>
<td>04/99</td>
</tr>
<tr>
<td>Joseph G. Finnerty Jr.</td>
<td>Piper &amp; Marbury LLP</td>
<td>New York</td>
<td>NY</td>
<td>07/63</td>
</tr>
<tr>
<td>Ronald G. Fisher</td>
<td>Victim Services Inc.</td>
<td>New York</td>
<td>NY</td>
<td>03/92</td>
</tr>
<tr>
<td>Jonathan L. Flaxer</td>
<td>Winick &amp; Rich PC</td>
<td>New York</td>
<td>NY</td>
<td>06/80</td>
</tr>
<tr>
<td>Grace Parke Fremlin</td>
<td>Graham &amp; James LLP</td>
<td>New York</td>
<td>NY</td>
<td>11/81</td>
</tr>
<tr>
<td>Jane S. Friedman</td>
<td>Morgan Lewis &amp; Bockius LLP</td>
<td>New York</td>
<td>NY</td>
<td>09/98</td>
</tr>
<tr>
<td>Yao Fu</td>
<td>Menaker &amp; Herrmann LLP</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Ashley K. Goodale</td>
<td>Dewey Ballantine LLP</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Steven L. Goulden</td>
<td>NYC Law Department</td>
<td>New York</td>
<td>NY</td>
<td>05/86</td>
</tr>
<tr>
<td>Robert D. Grauer</td>
<td>McCarter &amp; English LLP</td>
<td>Newark</td>
<td>NJ</td>
<td>04/97</td>
</tr>
<tr>
<td>Amy Grossberg</td>
<td>Cohen &amp; Grossberg LLP</td>
<td>New York</td>
<td>NY</td>
<td>01/94</td>
</tr>
<tr>
<td>Caramia R. Hart</td>
<td>New York State Commission</td>
<td>New York</td>
<td>NY</td>
<td>06/91</td>
</tr>
<tr>
<td>Debra I. Heitner</td>
<td>Watters &amp; Svetkey LLP</td>
<td>New York</td>
<td>NY</td>
<td>06/99</td>
</tr>
<tr>
<td>Karl Hutter</td>
<td>Gagoasian Gallery</td>
<td>New York</td>
<td>NY</td>
<td>06/95</td>
</tr>
<tr>
<td>Sharon H. Jacoby</td>
<td>Kleinberg Kaplan Wolff</td>
<td>New York</td>
<td>NY</td>
<td>09/92</td>
</tr>
<tr>
<td>Norma J. Jennings</td>
<td>Office Court Administration</td>
<td>New York</td>
<td>NY</td>
<td>06/91</td>
</tr>
<tr>
<td>Jack L. Johnson</td>
<td>Vinson &amp; Elkins LLP</td>
<td>New York</td>
<td>NY</td>
<td>08/95</td>
</tr>
<tr>
<td>Jasmine H. Jordaan</td>
<td>Social Justice Project</td>
<td>Brooklyn</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Susan B. Kalib</td>
<td>Schoeman Updike &amp; Kaufman</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Darcy M. Katris</td>
<td>Brown &amp; Wood LLP</td>
<td>New York</td>
<td>NY</td>
<td>05/86</td>
</tr>
<tr>
<td>Anthony E. Keating</td>
<td>Metropolitan Trans Authority</td>
<td>New York</td>
<td>NY</td>
<td>11/90</td>
</tr>
<tr>
<td>Christopher J. Kelly</td>
<td>Gersten Savage Kaplowitz</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Claire R. Kelly</td>
<td>Brooklyn Law School</td>
<td>Brooklyn</td>
<td>NY</td>
<td>11/93</td>
</tr>
<tr>
<td>Andrew C. Kirwin</td>
<td>Weinstein Soybel &amp; Kirwin</td>
<td>New York</td>
<td>NY</td>
<td>12/92</td>
</tr>
<tr>
<td>Ralph Kleinman</td>
<td>Sanofi Pharmaceuticals, Inc.</td>
<td>New York</td>
<td>NY</td>
<td>04/84</td>
</tr>
<tr>
<td>Michael Adam Kofsky</td>
<td>247 E 28th St.</td>
<td>New York</td>
<td>NY</td>
<td>06/97</td>
</tr>
<tr>
<td>Roberta Beth Kotkin</td>
<td>NY Bankers Association</td>
<td>New York</td>
<td>NY</td>
<td>05/86</td>
</tr>
<tr>
<td>Amy Ilene Kroe</td>
<td>US District Court (SDNY)</td>
<td>New York</td>
<td>NY</td>
<td>01/99</td>
</tr>
<tr>
<td>Christopher M. Kubiak</td>
<td>Coudert Brothers</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Robert E. Leamer</td>
<td>Metropolitan Jewish Health</td>
<td>Brooklyn</td>
<td>NY</td>
<td>05/77</td>
</tr>
<tr>
<td>Jonathan B. Leiken</td>
<td>Skadden Arps Slate</td>
<td>New York</td>
<td>NY</td>
<td>11/97</td>
</tr>
<tr>
<td>Christina M. Lewicky</td>
<td>Kahn &amp; Block LLP</td>
<td>New York</td>
<td>NY</td>
<td>06/93</td>
</tr>
<tr>
<td>Jody H. Litt</td>
<td>Levy Boonshoft &amp; Lichtenber</td>
<td>New York</td>
<td>NY</td>
<td>03/99</td>
</tr>
<tr>
<td>Steven I. Locke</td>
<td>Carabba Locke &amp; Olsen LLP</td>
<td>New York</td>
<td>NY</td>
<td>11/93</td>
</tr>
<tr>
<td>Stanton Lovenworth</td>
<td>Dewey Ballantine LLP</td>
<td>New York</td>
<td>NY</td>
<td>04/78</td>
</tr>
<tr>
<td>Kathleen Anne Mahoney</td>
<td>US Attorney’s Office (EDNY)</td>
<td>Brooklyn</td>
<td>NY</td>
<td>04/83</td>
</tr>
<tr>
<td>Mari B. Maloney</td>
<td>American International</td>
<td>New York</td>
<td>NY</td>
<td>12/87</td>
</tr>
<tr>
<td>Stanley Mark</td>
<td>Asian American Legal</td>
<td>New York</td>
<td>NY</td>
<td>01/78</td>
</tr>
<tr>
<td>Colleen Martin</td>
<td>Hoey King Perez Toker</td>
<td>New York</td>
<td>NY</td>
<td>02/95</td>
</tr>
<tr>
<td>Matthew Justin Martin</td>
<td>Cameron &amp; Hornbostel LLP</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Name</td>
<td>Firm/Month</td>
<td>Address</td>
<td>City</td>
<td>State</td>
</tr>
<tr>
<td>--------------------------</td>
<td>-----------------------------------------</td>
<td>------------------</td>
<td>-----------</td>
<td>-------</td>
</tr>
<tr>
<td>Theodore V. H. Mayer</td>
<td>Hughes Hubbard &amp; Reed LLP</td>
<td>New York</td>
<td>NY</td>
<td>01/78</td>
</tr>
<tr>
<td>James D. McConnell</td>
<td>Hargraves McConnell</td>
<td>New York</td>
<td>NY</td>
<td>09/93</td>
</tr>
<tr>
<td>Steven Meier</td>
<td>Roberts &amp; Holland LLP</td>
<td>New York</td>
<td>NY</td>
<td>12/98</td>
</tr>
<tr>
<td>Michael J. Meketan</td>
<td>Sheldon Lobel PC</td>
<td>New York</td>
<td>NY</td>
<td>12/98</td>
</tr>
<tr>
<td>Jennifer K. Mendlczycki</td>
<td>McDonald Carroll &amp; Cohen</td>
<td>New York</td>
<td>NY</td>
<td>01/99</td>
</tr>
<tr>
<td>Anthony John Miller</td>
<td>United Nations</td>
<td>New York</td>
<td>NY</td>
<td>03/67</td>
</tr>
<tr>
<td>Clare K. Miller</td>
<td>200 E 90th St.</td>
<td>New York</td>
<td>NY</td>
<td>03/88</td>
</tr>
<tr>
<td>Jeffrey H. Miller</td>
<td>Corwin Solomon &amp; Tannenbaum</td>
<td>New York</td>
<td>NY</td>
<td>07/98</td>
</tr>
<tr>
<td>Robert E. Mirsky</td>
<td>Price Waterhousecoopers LLP</td>
<td>New York</td>
<td>NY</td>
<td>06/97</td>
</tr>
<tr>
<td>Robert Eli Michael</td>
<td>Robert E. Michael &amp; Assoc.</td>
<td>New York</td>
<td>NY</td>
<td>06/75</td>
</tr>
<tr>
<td>Holly T. Mitchell</td>
<td>Coudert Brothers</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Nikki M. Montgomery</td>
<td>Wolf Haldenstein Adler</td>
<td>New York</td>
<td>NY</td>
<td>06/98</td>
</tr>
<tr>
<td>Michael Frank Morano</td>
<td>Cooper &amp; Dunham LLP</td>
<td>New York</td>
<td>NY</td>
<td>12/98</td>
</tr>
<tr>
<td>Paul D. Nguyen</td>
<td>Port Authority of NY &amp; NJ</td>
<td>New York</td>
<td>NY</td>
<td>03/79</td>
</tr>
<tr>
<td>Yongjun Ni</td>
<td>Ernst &amp; Young</td>
<td>New York</td>
<td>NY</td>
<td>01/99</td>
</tr>
<tr>
<td>Donal A. O’Brien</td>
<td>172-49 Henley Rd.</td>
<td>Jamaica</td>
<td>NY</td>
<td>03/99</td>
</tr>
<tr>
<td>Ifeyinwia O. Oguagha</td>
<td>Levin &amp; Srinivas LLP</td>
<td>New York</td>
<td>NY</td>
<td>08/97</td>
</tr>
<tr>
<td>Claudia Oliveri</td>
<td>Law Office of Ruthamm Niosi</td>
<td>New York</td>
<td>NY</td>
<td>06/99</td>
</tr>
<tr>
<td>Tania M. Pagan</td>
<td>William Pagan &amp; Assoc PC</td>
<td>New York</td>
<td>NY</td>
<td>03/90</td>
</tr>
<tr>
<td>Vanessa S. Pereira</td>
<td>Tozzini &amp; Freire</td>
<td>New York</td>
<td>NY</td>
<td>02/98</td>
</tr>
<tr>
<td>Steven W. Perlstein</td>
<td>Schulte Roth &amp; Zabel LLP</td>
<td>New York</td>
<td>NY</td>
<td>06/99</td>
</tr>
<tr>
<td>Clay J. Pierce</td>
<td>Salans Hertzfeld Heilbronn</td>
<td>New York</td>
<td>NY</td>
<td>06/96</td>
</tr>
<tr>
<td>Imke Ratschko</td>
<td>Becker Glynn Melamed</td>
<td>New York</td>
<td>NY</td>
<td>06/99</td>
</tr>
<tr>
<td>Kyle A. Reed</td>
<td>Chadbourne &amp; Parke LLP</td>
<td>New York</td>
<td>NY</td>
<td>10/97</td>
</tr>
<tr>
<td>Harry Robins</td>
<td>Morgan Lewis &amp; Bockius LLP</td>
<td>New York</td>
<td>NY</td>
<td>11/96</td>
</tr>
<tr>
<td>Jonathan R. Rod</td>
<td>Freshfields LLP</td>
<td>New York</td>
<td>NY</td>
<td>12/85</td>
</tr>
<tr>
<td>Meryl S. Rosenblatt</td>
<td>Friedman Kaplan</td>
<td>New York</td>
<td>NY</td>
<td>06/93</td>
</tr>
<tr>
<td>Jeffrey S. Rosenstock</td>
<td>Guardian Life Insurance Co.</td>
<td>New York</td>
<td>NY</td>
<td>12/95</td>
</tr>
<tr>
<td>Emily Ruben</td>
<td>The Legal Aid Society</td>
<td>Brooklyn</td>
<td>NY</td>
<td>08/86</td>
</tr>
<tr>
<td>Matthew Cye Sandoval</td>
<td>Bear Stearns &amp; Company Inc.</td>
<td>New York</td>
<td>NY</td>
<td>05/99</td>
</tr>
<tr>
<td>Annamarina A. Scerbo</td>
<td>Jackson &amp; Nash LLP</td>
<td>New York</td>
<td>NY</td>
<td>03/99</td>
</tr>
<tr>
<td>Daniel Schimmel</td>
<td>Shearman &amp; Sterling</td>
<td>New York</td>
<td>NY</td>
<td>03/95</td>
</tr>
<tr>
<td>Harold E. Schwartz</td>
<td>Caribiner International Inc.</td>
<td>New York</td>
<td>NY</td>
<td>12/89</td>
</tr>
<tr>
<td>Walter Scott</td>
<td>Bryan Cave LLP</td>
<td>New York</td>
<td>NY</td>
<td>03/85</td>
</tr>
<tr>
<td>Fiona Lee Shakoor</td>
<td>Freshfields LLP</td>
<td>New York</td>
<td>NY</td>
<td>04/99</td>
</tr>
<tr>
<td>Elena Sharara</td>
<td>Fischbein Badillo Wagner</td>
<td>New York</td>
<td>NY</td>
<td>01/98</td>
</tr>
<tr>
<td>David Michael Silk</td>
<td>Wachtell Lipton Rosen</td>
<td>New York</td>
<td>NY</td>
<td>04/89</td>
</tr>
<tr>
<td>Anthony T. Simari</td>
<td>Seymour I. Hurwitz</td>
<td>New York</td>
<td>NY</td>
<td>01/98</td>
</tr>
</tbody>
</table>
# NEW MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Organization</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gary Mitchel Smith</td>
<td>O'Melveny &amp; Myers</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Vanessa J. Spears</td>
<td>401 Morgan Avenue</td>
<td>Brooklyn</td>
<td>NY</td>
</tr>
<tr>
<td>Steven E. Star</td>
<td>Meyer Suozzi English</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Rachel A. Stein</td>
<td>GNYHA Ventures Inc.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Anke Steinecke</td>
<td>Davis Wright &amp; Tremaine LLP</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Kimberly A. Summe</td>
<td>Pillsbury Madison</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>William J. Sushon</td>
<td>Skadden Arps Slate</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>John Charles Timm</td>
<td>166 W 88th St.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Theresa Trzaskoma</td>
<td>Sullivan &amp; Cromwell</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Thomas Twyman</td>
<td>NYC Police Department</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Steven D. Underwood</td>
<td>Pennie &amp; Edmonds LLP</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Raisha Vaidya</td>
<td>White &amp; Case LLP</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Brian D. Waller</td>
<td>Ohrenstein &amp; Brown LLP</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Janet Christine Walsh</td>
<td>United Nations</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>David Patrick Warner</td>
<td>Consolidated Edison Company</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Jeanne M. Weisneck</td>
<td>Jones Hirsch Connors</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Adrienne K. Wheatley</td>
<td>Cravath Swaine &amp; Moore</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Linda A. Willett</td>
<td>Bristol-Myers Squibb Co.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Michael H. Williams</td>
<td>Phoenix House</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Agnes J. Wilson</td>
<td>American Arbitration</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Anne Rose Wolfson</td>
<td>Intralink Inc.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Jonathan D. Wry</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>David H. Yin</td>
<td>NYC Dept of Probation</td>
<td>Brooklyn</td>
<td>NY</td>
</tr>
</tbody>
</table>

## JUDICIAL

<table>
<thead>
<tr>
<th>Name</th>
<th>Organization</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carol J. Goldstein</td>
<td>Bronx Family Court</td>
<td>Bronx</td>
<td>NY</td>
</tr>
<tr>
<td>Alan D. Marrus</td>
<td>NYS Supreme Court</td>
<td>Brooklyn</td>
<td>NY</td>
</tr>
<tr>
<td>Lori S. Sattler</td>
<td>Office Court Administration</td>
<td>New York</td>
<td>NY</td>
</tr>
</tbody>
</table>

## SUBURBAN

<table>
<thead>
<tr>
<th>Name</th>
<th>Organization</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Donna R. Besteiro</td>
<td>Great Brands Of Europe Inc.</td>
<td>Stamford</td>
<td>CT</td>
</tr>
<tr>
<td>Cesar Bilbao</td>
<td>Law Office of Bryan Rothenberg</td>
<td>Mineola</td>
<td>NY</td>
</tr>
<tr>
<td>Michelle Lynn Greenberg</td>
<td>New Jersey Supreme Court</td>
<td>Hoboken</td>
<td>NJ</td>
</tr>
<tr>
<td>Nancy A. Hampton</td>
<td>Stein &amp; Schonfeld</td>
<td>Garden City</td>
<td>NY</td>
</tr>
<tr>
<td>Matthew John Nolfo</td>
<td>Littman Krooks Roth</td>
<td>White Plains</td>
<td>NY</td>
</tr>
<tr>
<td>Steven Dean Phillips</td>
<td>63 Palmers Hill Rd.</td>
<td>Stamford</td>
<td>CT</td>
</tr>
<tr>
<td>Deirdre K. Pierson</td>
<td>Ruskin Moscou Evans</td>
<td>Mineola</td>
<td>NY</td>
</tr>
<tr>
<td>Janeeen A. Price</td>
<td>21 Trenor Dr.</td>
<td>New Rochelle</td>
<td>NY</td>
</tr>
<tr>
<td>Robert W. Romano</td>
<td>8 Palmer Place</td>
<td>Armonk</td>
<td>NY</td>
</tr>
<tr>
<td>Shauna E. Weinberg</td>
<td>Rosenfeld &amp; Maidenbaum</td>
<td>Cedarhurst</td>
<td>NY</td>
</tr>
</tbody>
</table>

## NONRESIDENT

<table>
<thead>
<tr>
<th>Name</th>
<th>Organization</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evan M. Fogelman</td>
<td>The Fogelman Literary Agenc</td>
<td>Dallas</td>
<td>TX</td>
</tr>
</tbody>
</table>

SEPTEMBER / OCTOBER 1999 • VOL. 54, NO. 5

685
### NEW MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Institution/Company</th>
<th>City, State, Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cameron R. Hume</td>
<td>U.S. Dept. of State</td>
<td>Washington DC 06/78</td>
</tr>
<tr>
<td>Charles R. Mills</td>
<td>Kirkpatrick &amp; Lockhart LLP</td>
<td>Washington DC 12/77</td>
</tr>
<tr>
<td>Frederick M. Oberlander</td>
<td>P.O. Box 2359</td>
<td>Montauk NY 06/99</td>
</tr>
<tr>
<td>Paul J. Pantano, Jr.</td>
<td>McDermott Will &amp; Emery</td>
<td>Washington DC 09/80</td>
</tr>
<tr>
<td>Abraham Prosesky</td>
<td>Leauder Wild &amp; Coetzec</td>
<td>South Africa 02/99</td>
</tr>
<tr>
<td>Winfried F. Schmitz</td>
<td>Boesebeck Droste Rae</td>
<td>Germany 12/88</td>
</tr>
<tr>
<td>Susan S. Yoon</td>
<td>Kangwon Provincia Employmen</td>
<td>Korea 09/92</td>
</tr>
<tr>
<td>Chun Wei</td>
<td>Sullivan &amp; Cromwell</td>
<td>Hong Kong 10/90</td>
</tr>
</tbody>
</table>

### LAW SCHOOL GRADUATE

<table>
<thead>
<tr>
<th>Name</th>
<th>Institution/Company</th>
<th>City, State, Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sarah D. Abeles</td>
<td>Proskauer Rose LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Kristen M. Ahearn</td>
<td>Memorial Hospital</td>
<td>New York NY</td>
</tr>
<tr>
<td>Cosmo Cromarty Bloom</td>
<td>30-76 35th St.</td>
<td>Astoria NY</td>
</tr>
<tr>
<td>Deborah J. Chirichello</td>
<td>Republic Financial</td>
<td>New York NY</td>
</tr>
<tr>
<td>Danielle Cortina</td>
<td>American Int'l. Group Inc.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Andrea Elise Croll</td>
<td>600 Warburton Avenue</td>
<td>Hastings On Hudson NY</td>
</tr>
<tr>
<td>Louis Joseph Denkovic</td>
<td>Citigroup Inc.</td>
<td>New York NY</td>
</tr>
<tr>
<td>David Ross Ehrlich</td>
<td>Wisehart &amp; Koch</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jacinth A. Fairweather</td>
<td>The Chase Manhattan Bank</td>
<td>New York NY</td>
</tr>
<tr>
<td>Lisa Dianne Fill</td>
<td>427 43rd Street</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Mary G. Fontenot</td>
<td>Ostrolenk Faber Gerb</td>
<td>New York NY</td>
</tr>
<tr>
<td>Candice F. Frost</td>
<td>303 West 66th Street</td>
<td>New York NY</td>
</tr>
<tr>
<td>Joseph Gitler</td>
<td>Parker Chapin Flattau</td>
<td>New York NY</td>
</tr>
<tr>
<td>Alan Jay Goodman</td>
<td>Allergy Asthma &amp; Impunity</td>
<td>Livingston NJ</td>
</tr>
<tr>
<td>Martin G. Gorham</td>
<td>Dechert Price &amp; Rhoads</td>
<td>New York NY</td>
</tr>
<tr>
<td>Erika N. Gottfried</td>
<td>Chadbourne &amp; Parke LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Duane M. Harley</td>
<td>1579 Crescent Ave.</td>
<td>Teaneck NJ</td>
</tr>
<tr>
<td>Ahad J. Hoskins</td>
<td>457 West 57th Street</td>
<td>New York NY</td>
</tr>
<tr>
<td>Joseph James Hurley</td>
<td>Conn. Superior Court</td>
<td>Waterbury CT</td>
</tr>
<tr>
<td>Richard P. Kearney</td>
<td>3236 Schley Avenue</td>
<td>Bronx NY</td>
</tr>
<tr>
<td>Robert Michael Lia</td>
<td>Fried Frank Harris</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jacqueline Nicole Lipson</td>
<td>Berkman Bottger &amp; Rodd</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jane M. Love</td>
<td>Cooper &amp; Dunham LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mari Maemoto</td>
<td>Sindell Law Offices PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Rebecca H. Marek</td>
<td>Walter Conston Alexander</td>
<td>New York NY</td>
</tr>
<tr>
<td>Catherine Marten</td>
<td>Fried Frank Harris</td>
<td>New York NY</td>
</tr>
<tr>
<td>Kristen M. McElroy</td>
<td>349 E 82nd St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Karin E. McInerney</td>
<td>265 Lafayette St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Christine Meding</td>
<td>Judge Denny Chin</td>
<td>New York NY</td>
</tr>
<tr>
<td>Zhu Julia Mei</td>
<td>Shearman &amp; Sterling</td>
<td>New York NY</td>
</tr>
<tr>
<td>Shayne L. Melchin</td>
<td>CME Inc.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mayu Miyashita</td>
<td>Sindell Law Offices PC</td>
<td>New York NY</td>
</tr>
</tbody>
</table>
NEW MEMBERS

Guido W. Moeller 1361 Lexington Ave. New York NY
Celine Sanae Moriya Forte Management Inc. New York NY
Dinorah S. Nunes NY County District Attorney New York NY
Brigid Casey O’Connor NYC Police Department Brooklyn NY
Margery Perlmutter Arte NY New York NY
Donna Marie Perrette Ernst & Young New York NY
Kimberly D. Pittman Paul Hastings Janofsky New York NY
Oleg Rabinovich 25 Callan Ave Staten Island NY
Amy M. Rausch 184 Thompson Street New York NY
H. Marie Reilly 150-25 17th Rd. Whitestone NY
Seth Mitchell Rosen Law Office Of Lee Nuwer New York NY
James Schwartz 30 Lincoln Plaza New York NY
Catherine Sicari 2 Colony Court Hazlet NJ
Damani Thomas-Wilson 1115 Dorchester Road Brooklyn NY
Richard A. Tsai 2534 Broadway New York NY
Jessica F. Vasques Center For Battered Woman’s New York NY
Roberta Carola Vitale Heller Herman New York NY
Andrew D. Walcott Teachers Insurance Annuity New York NY
Alicia F. Williams Merrill Lynch New York NY
Barbara Wong Sindell Law Offices PC New York NY
Charles J. Zangara Argus Research Corp. New York NY

LAW STUDENT MEMBERSHIP

Stephanie Evin Benig 689 Columbus Ave. New York NY
Ian Boczko Wachtell Lipton Rosen New York NY
Jody A. Boudreault 493 North Main St. Randolph MA
Kristin Powell Buff Wachtell Lipton Rosen New York NY 12/99
Christopher G. Campbell Piper & Marbury LLP New York NY
David Lee Cargille 8 Tennyson Dr. Plainsboro NJ
Guy Chayoun Holland & Knight LLP Washington DC
Robert E. Craig 13 S. Oxford St. Brooklyn NY
Earl M. Crittenden Jr. 310 E 55th St. New York NY
Lawrence T. De Angelis 320 Nassau Rd. Huntington NY
Angela C. de Cespides 91 Westland Ave. Boston MA
Heather B. Conoboy 304C Patriot Lane Williamsburg VA
Dara Michelle Denberg 200 Mercer St. New York NY
Frank Richard Dudis 1244N Inwood Terrace Fort Lee NJ
Margaret M. Garnett Wachtell Lipton Rosen New York NY
Kenneth A. Goss 670 Mix Avenue Hamden CT
Brian D. Gottlieb Wachtell Lipton Rosen New York NY
Lauryn Powers Gouldin Wachtell Lipton Rosen New York NY
### New Members

<table>
<thead>
<tr>
<th>Name</th>
<th>Affiliation</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sean James Griffith</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Matthew Michael Guest</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>William Richard Harker</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mary-Kathleen Harvey</td>
<td>10 North Broadway</td>
<td>White Plains NY</td>
</tr>
<tr>
<td>Eleanor Anne Heard</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Scott Richard Irwin</td>
<td>Piper &amp; Marbury LLP</td>
<td>New York NY 12/99</td>
</tr>
<tr>
<td>David Ephraim Kahan</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Daniel L. Klein</td>
<td>184 Joralemon St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Mark A. Koenig</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jessica M. la Marche</td>
<td>New York Law School</td>
<td>New York NY</td>
</tr>
<tr>
<td>Karen Michelle Lee</td>
<td>21-43 29th Street</td>
<td>Long Island City NY</td>
</tr>
<tr>
<td>Jeffrey S. Margolin</td>
<td>77 Fulton St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Joseph M. Medic</td>
<td>30-05 42nd St.</td>
<td>Astoria NY</td>
</tr>
<tr>
<td>Rosanna Misticoni</td>
<td>284 Congress Ave.</td>
<td>Lansdowne PA</td>
</tr>
<tr>
<td>Alison Daniela Morantz</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Maurizo J. Morello</td>
<td>605 Park Ave.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Laura M. Nardone</td>
<td>836 Park Ave.</td>
<td>Hoboken NJ</td>
</tr>
<tr>
<td>James J. Park</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Tuaranna R. Patterson</td>
<td>Holland &amp; Knight LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mordechai D. Pelta</td>
<td>144-54 69th Road</td>
<td>Flushing NY</td>
</tr>
<tr>
<td>Pammela S. Quinn</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>George J. Rheault</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Diane Robertson</td>
<td>64 Fort Greene Place</td>
<td>Brooklyn NY 12/99</td>
</tr>
<tr>
<td>Loren K. Robinson</td>
<td>57 South Oxford Street</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Karen Schoen</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Sylvia Semerdjian</td>
<td>50 Joannoua</td>
<td>Oceanside NY</td>
</tr>
<tr>
<td>Khizar Amjad Sheikh</td>
<td>252 Ramona Ave.</td>
<td></td>
</tr>
<tr>
<td>Staten Island NY</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jenny J. Sherman</td>
<td>Sullivan &amp; Cromwell</td>
<td>New York NY</td>
</tr>
<tr>
<td>Richard J. Soleymanzadeh</td>
<td>P.O. Box 420</td>
<td>Island Park NY</td>
</tr>
<tr>
<td>Roxana C. Sosa</td>
<td>165 Conover St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Simone L. Sterling</td>
<td>113-17 197th Street</td>
<td>Hollis NY 12/99</td>
</tr>
<tr>
<td>Keith Taketo Tashima</td>
<td>391 Third Street</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>James Hong Tee</td>
<td>Harvard Law School</td>
<td>Cambridge MA 12/99</td>
</tr>
<tr>
<td>Karl Remon Thompson</td>
<td>Wachtell Lipton Rosen</td>
<td>New York NY</td>
</tr>
<tr>
<td>Cindy Zee</td>
<td>Piper &amp; Marbury LLP</td>
<td>New York NY 12/99</td>
</tr>
</tbody>
</table>

**Correction:** In the July/August issue of the Record, the names of two members were misspelled. The correct spellings are: Betty A. Ryberg of Proskauer Rose LLP and Joseph E. Sarachek of Balfour Investors Inc. We apologize for the errors.
A Selective Bibliography

Political Asylum in the United States

Ronald I. Mirvis

NOTE: Refugee is a term distinct and different from asylum or asylee. However, since there are analytical similarities, some refugee material has been included in this bibliography.


Adell, April. Fear of persecution for opposition to violations of the international human right to found a family as a legal entitlement to asylum for Chinese refugees. 24 Hofstra L. Rev. 789 (1996).


Anker, Deborah and others. Women whose governments are unable or unwilling to provide reasonable protection from domestic violence

* Not in the Association's collection.
may qualify as refugees under United States asylum law. 11 Geo. Immigr. L. J. 709 (1997).


Baldassare, Michael A. Political asylum—prosecution of refugee under a generally applicable law can give rise to persecution, and thus require granting the withholding of deportation, if the generally applicable law is enforced because of the refugee’s political opinion and if the refugee can establish the requisite fear of persecution. 28 Seton Hall L. Rev. 699 (1997).

Barber, Kevin S. Rejecting China’s coercive population-control policy as grounds for political asylum. 41 Vill. L. Rev. 521 (1996).

Bartlett, Robyn J. Immigration law—political asylum—Supreme Court imposes heavy burdens on aliens seeking political asylum. 17 Suffolk Transnt’l L. Rev. 254 (1994).


Boed, Roman. The state of the right of asylum in international law. 5 Duke J. Comp. & Int’l L. 1 (1994).

BIBLIOGRAPHY


Bresnick, Rebecca. Reproductive ability as a sixth ground of persecution under the domestic and international definitions of refugee. 21 Syracuse J. Int’l L. & Com. 121 (1995).


Coleman, Steven E. Alien seeking relief from deportation based upon likelihood of persecution if deported must demonstrate that he or she is likely to be singled out for persecution. 24 Seton Hall L. Rev. 1722 (1994).


Derechin, Daniel P. Alan Freeman, refugee law and Bosnian rape camps: our role in the slaughter. 11 Geo. Immigr. L. J. 811 (1997).

des Groselliers, Jennifer A. In re Kasinga: “when the axe came into the forest, the tree said the handle is one of us.” 24 New Eng. J. on Crim. & Civ. Confinement 89 (1998).


*Godfrey, Peter C. Defining the social group in asylum proceedings: the expansion of the social group to include a broader class of refugees. 3 J. L. & Pol’y 257 (1994).


*Griffith, Elwin. Problems of interpretation in asylum and withholding of deportation proceedings under the Immigration and Nationality


Henes, Brian F. The origin and consequences of recognizing homosexuals as a “particular social group” for refugee purposes. 8 Temple Int’l & Comp. L. J. 377 (1994).


*Jones-Bibbs, TiaJuana. United States follows Canadian lead and takes an unequivocal position against female genital mutilation. 4 Tulsa J. Comp. & Int’l L. 275 (1997).

Junker, Eva N. A juxtaposition of U.S. asylum grants to women fleeing female genital mutilation and to gays and lesbians fleeing physical harm: the need to promulgate an INS regulation for women fleeing...


Lazarus, Jason D. An illustration of the need for a change in the United States’ immigration laws to provide appropriate consideration of asylum claims by Chinese nationals fleeing China’s coercive population control. 5 J. Transnat’l L. & Pol’y 65 (1995).

*Leary, Heather A. The nature of global commitments and obligations: limits on state sovereignty in the area of asylum. 5 Ind. J. Global Legal Studies 297 (1997).


Light, Mary McGee. The well-founded fear standard in refugee asylum: will it still provide hope for the oppressed? 45 Drake L. Rev. 789 (1997).


BIBLIOGRAPHY


Patel, Krishna. Recognizing the rape of Bosnian women as gender-based persecution. 60 Brook. L. Rev. 929 (1994).


Salamat, Kathy M. Expanding the judicial interpretation of “persecution,” “well-founded fear,” and “social group” to include anyone fleeing “general civil violence”? 40 How. L. J. 255 (1996).


POLITICAL ASYLUM IN THE U.S.


Sheridan, Mary M. The United States has opened its doors to victims of female genital mutilation. 71 St. John’s L. Rev. 433 (1997).


*Stern, Amy. Female genital mutilation: United States asylum laws are in need or reform. 6 Am. U. J. Gender & L. 89 (1997).


Villiers, Janice D. Closed borders, closed ports: the plight of Haitians seeking political asylum in the United States. 60 Brook. L. Rev. 841 (1994).


BOOKS


BIBLIOGRAPHY
POLITICAL ASYLUM IN THE U.S.


INTERNET SITES
CAVEAT: The Internet is a dynamic, fluid, and unregulated information medium. Caution must be exercised assessing a web site’s factual reliability and currentness.

