REPORT OF

THE COMMISSION TO EXAMINE SOLO AND SMALL FIRM PRACTICE

FEBRUARY 2006

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INTRODUCTION

The vast majority of attorneys practicing law in the State of New York work in solo and small firms. More than 83.5% of attorneys in New York are solo practitioners, 14.7% work in offices of between two and nine attorneys, and only 1.8% of attorneys work in "large" firms, defined as firms having 10 or more attorneys.[1]

Seeking to address how the Judiciary can support solo and small firm lawyers in the practice of law, Chief Judge Judith S. Kaye appointed the Commission to Examine Solo and Small Firm Practice in May 2004. In announcing the panel, Chief Judge Kaye stated, "These lawyers face daily challenges distinct from those of their larger firm colleagues and have developed valuable perspectives on how to improve the courts, the practice of law, and lawyer professionalism. The time has come to tap into their unique experiences and insights."

Thirty active solo and small firm practitioners came together as members of the Commission from across the State to examine the challenges faced by the majority of the state's legal profession and to make recommendations for improvements to facilitate solo and small firm practice in the New York courts.

At its inaugural meeting on May 24, 2004, the Commission discussed its charge and defined its mission. There were literally hundreds of issues that the Commission could examine. Time - and common sense - limited the group to far fewer issues. The Commission identified the most significant issues affecting solo and small firm practitioners and allocated its work among five subcommittees to examine these issues in detail: Case Processing and Scheduling; Attorney Regulation; Technology; Strengthening the Profession; and Law Office Economics.

The Case Processing and Scheduling Subcommittee explored the methods of scheduling and managing court cases. Its members researched and analyzed the problem of calendaring conflicts and the use of staggered calendars, preliminary, pre-trial, and appellate conferences, alternative dispute resolution programs, and court rules and forms. The Attorney Regulation Subcommittee explored how various court rules and the process for promulgating such rules impact solo and small firm practitioners and examined the requirements relating to engagement letters and retainer agreements, fee dispute arbitration, billing, and disciplinary and grievance procedures. The Technology Subcommittee studied how the court system can harness technology to address the issues faced by solo and small firm practitioners and how the implementation of technological advances can level the playing field between the small and large firm. The Strengthening the Profession Subcommittee investigated issues that impact attorney professionalism and public perception of attorneys, particularly for solo and small firm practitioners. These included lawyer advertising, diversity, and pro bono opportunities. The Law Office Economics Subcommittee looked at ways to address the cost of running the business of a solo practitioner or small firm, including

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1. New York State Bar Association, *The 2004 Desktop Reference on the Economics of Law Practice in New York State, Benchmarks and Referents for Law Practice Management*, 2004, page 2.

expert and disbursement fees, malpractice insurance, and payment of fees for legal services.

In gathering relevant data, the Commission obtained views and comments from a variety of sources. The Commission held three public hearings - in New York City, Albany, and Rochester - to listen to colleagues and exchange ideas. To solicit ideas and recommendations, the Commission disseminated a survey directed to solo and small firm practitioners through the assistance of bar associations. The Commission also made the surveys available at courthouses in each of the state's 62 counties.

Commission members met with members of the judiciary, including Hon. Ann Pfau, First Deputy Chief Administrative Judge, and many District Administrative Judges and Supervising Judges, for input and feedback. Members also conferred with non-judicial personnel working for the Office of Court Administration ("OCA") and in local courthouses.

The executive summary which follows provides an overview of the Commission's findings. The recommendations propose changes and enhancements in court services and processes to improve the practice of law by solo and small firm practitioners, and in the process, enhance the quality of representation to their clients and make more effective use of court resources. We hope the implementation of our recommendations will lead not only to improvements for solo and small firm practitioners and the legal profession, but will also promote public confidence in the legal system.

The Commission could not have done its work without the support and cooperation of numerous individuals and organizations. We express our gratitude to the many solo and small firm practitioners who took valuable time out of their schedules to answer our surveys, attend our public hearings, and offer their feedback. Their voices reaffirmed to us that the task we undertook had relevance and meaning to our colleagues and our profession. We recognize the willingness of state agencies, both here in New York State and in other jurisdictions to supply data and information. We note the assistance of the staff of the National Center of State Courts who provided exhaustive comparative research every time we reached out to them. We thank the many bar associations throughout the state and the New York State Bar Association, without which we could never have mounted our survey, and who provided interviews, reports, statistics, and other data that enabled us to follow up on ideas and suggestions generated by bar volunteers before us.

We thank the many members of the judiciary and non-judicial staff of the New York State Unified Court System who provided us with assistance. We appreciate the contribution to our process made by First Deputy Chief Administrative Judge Ann Pfau and the Administrative and Supervising Judges throughout the state who took the time to meet with Commission members. We thank Chief Administrative Judge Jonathan Lippman, his staff, and employees of the Office of Court Administration who provided daily support and ensured that we obtained the information we needed. Their dedication to the delivery of an efficient and productive system of justice inspired us.

Of course, we owe enormous gratitude to the remarkable efforts of the chairs of our subcommittees - Dolly Caraballo, Esq., Anne Reynolds Copps, Esq., Carman M. Garufi, Esq., Kenneth A. Kanfer, Esq., David W. Meyers, Esq., and John K. Plumb, Esq. Their hard work and steadfast commitment to this project have led to the development of meaningful recommendations that will improve the quality of practice for solo and small firm practitioners.

Finally, we thank Chief Judge Kaye for recognizing that solo and small firm practitioners face unique challenges and for her efforts on behalf of this majority of the legal profession. We are grateful to her for providing us with the unprecedented opportunity to recommend reforms to enhance the practice of law for them and for all attorneys who practice in the New York State courts.

Respectfully submitted,

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EXECUTIVE SUMMARY

Time is a resource that cannot be stretched or leveraged by a solo or small firm practitioner. Time spent unproductively cannot be regained. This observation appeared repeatedly throughout the Commission's investigations. As a result, many of the Commission's recommendations seek to streamline the practice of law and make systems more efficient. The Commission recognizes the importance of professionalism and makes recommendations on how solo practitioners and small firms can incorporate the highest standards of professionalism in their practices.

Streamlining Court Procedures

Many of the Commission's recommendations outline how the court system can structure calendaring, docketing, case management, and court appearances to enhance productivity for practitioners. The recommendations for case processing and scheduling have a common goal --- bridge the divide between the large and small firm by making the court system work the same for any sized firm. More efficient and less time-consuming court processes will provide enormous benefit to the majority of New Yorkers who utilize the services of solo and small firm practitioners.

In a civil case, a preliminary conference is intended to simplify the issues to be tried, establish a timetable for discovery, add any other necessary parties and, if appropriate, discuss settlement. At the conclusion of the conference, the court issues an order incorporating what transpired, including any directives and stipulations. However, at least in the downstate courts, attorneys have expressed frustration with preliminary conferences. While various measures have been implemented to make conferences more productive and to reduce the overall time devoted to attending such conferences, lingering systemic problems remain. Often the preliminary conference becomes an exercise in scheduling and the dates in the schedule are subject to extension.

Parties should attempt to agree on a discovery plan as soon as possible following commencement of litigation. The court system should allow attorneys to e-mail and/or fax consent discovery schedules to the court. The Commission believes that adoption of this proposal will eliminate needless trips to the courthouse and have an immediate, beneficial impact on solo and small firm practitioners. The Commission further recommends that counsel be given the opportunity to complete a preliminary conference form and, where there is agreement on the issues, to submit the form in lieu of an appearance at the preliminary conference.

Many solo and small firm practitioners expressed frustration to the Commission over the amount of time spent waiting in court. Attorneys commented on the stress associated with having to be in two places at once and/or the stress of wasting time waiting for their cases to be called. Many attorneys noted their concerns for billing clients for "down time" in court.

The data gathered by the Commission reveals that certain types of cases and tasks lend themselves to staggered calendars. Motions, preliminary and pretrial conferences, and certain Family Court appearances are the three most often noted situations where staggered calendars would eliminate

waiting time for attorneys, especially in the New York metropolitan area. Since "one size does not fit all," the court system should carefully consider whether a hard and fast rule for staggered calendars is appropriate in all courts statewide. Courts and judges should have discretion to deviate from any staggered calendaring rule so that courts can accommodate the differences in rural and urban courts and in different types of cases. In order to fully consider all of the concerns that many solo and small firm practitioners and court personnel provided to the Commission, the Commission recommends that the court system implement a pilot project in the larger metropolitan areas prior to establishing statewide rules.

Local court rules, although well intentioned, create a plethora of mini-jurisdictions inside New York State. Case processing and scheduling receive different treatment depending on the local court rule. The complexity caused by a patchwork of rules and regulations creates a disproportionate burden for the solo and small firm practitioner. The lack of uniformity in applying rules, such as the Uniform Rules for the New York State Trial Courts, and variations in procedures burden the attorney, and thus, the litigant's resources.

To address this problem, the Commission recommends that the Chief Judge establish a separate commission to determine whether local rules should be converted, incorporated, or subsumed into one uniform set of rules; or eliminated entirely. The Commission further recommends that all rules and forms be available on the court system's website together with detailed descriptions of the filing procedures for each locality.

Technology as a Tool

Technology has revolutionized many aspects of the legal profession, including legal research, communications, and document production. Technology can alleviate many of the time and efficiency problems facing solo and small firm practitioners. The court system, through its website and other technological initiatives, has shown how technology can benefit attorneys and the general public. Since the ability to communicate electronically by telephone, facsimile, and e-mail has increased tremendously, the Commission feels that attorneys should be able to communicate electronically with the court to achieve greater efficiency. Many of the Commission's recommendations are geared toward taking advantage of new technology.

While courts in some counties utilize faxes, not all do. In some counties, clerks will refuse to provide information regarding the status of orders to show cause, thereby necessitating daily personal appearances to obtain such information. The courts should use fax machines to provide practitioners with marked orders to show cause, preliminary conference orders, and other signed orders where an attorney now must employ a service or utilize personnel to pick up signed copies. Fax filing should be expanded to all types of claims and actions while fax service should be restricted to certain procedural *pro forma* matters to avoid overwhelming offices with large volumes of facsimiles and lengthy documents.

While not yet universal, Filing by Electronic Means ("FBEM") exists in several courts throughout the state. A substantial percentage of attorneys who responded to the Commission's survey expressed concerns regarding acquisition costs for computer hardware and software necessary to perform FBEM, as well as the time required to learn this new technology. A number of attorneys in upstate New York warned that they do not have access to high speed internet connection. Still others

questioned whether the court system would provide training for attorneys to learn FBEM and whether this training would be provided frequently and at convenient times. While expressing concerns, many attorneys recognized that FBEM could result in saving time and, ultimately, money.

It is critical to note that the majority of attorneys solicited by the Commission, including those who successfully used FBEM on a regular basis, opposed mandatory FBEM, and urged that the legislature and the court system keep FBEM voluntary. The Commission concurs.

Education and training are essential to the success of FBEM. The Commission sees the court system as ultimately responsible for providing appropriate and accessible training on FBEM to attorneys. The court system should adopt uniform statewide standards and guidelines for FBEM. The FBEM system must be user-friendly. Each courthouse should have an in-house service center staffed by court personnel qualified to assist with FBEM. The legislature should extend e-filing to pretrial conference orders, stipulations, orders to show cause, and other specified filings in all types of actions and proceedings. Courts should generate and file orders, judgments, notices and other documents electronically. Practitioners should be able to check on orders to show cause by e-mail.

The Commission on Public Access to Court Records chaired by Floyd Abrams, Esq. issued a report to the Chief Judge in February 2004 and recommended that the court system make court case records available on the Internet to the same extent as they are currently available utilizing paper files, and that all rules apply equally to paper and electronic filings. While the Commission recognizes the efforts made by the court system to date in providing electronic access to case records, such as the posting of decisions and court calendars through its "E-Courts" initiative, the Commission recommends that the court system implement the Abrams report to the fullest extent possible. A user should be able to view a document filed with the court by a single click of the mouse on a docket entry, rather than be requiring a user to manually launch a separate application for document viewing. The system should be easily searchable. However, the Commission concurs with the Abrams Commission that there are exceptions to the presumption of openness. The court system should not make case records available on the Internet which are not available to the public because they are sealed or otherwise deemed confidential. These would include Family Court, matrimonial, certain guardianship, criminal, or other case records which have restricted access pursuant to applicable law.

The Costs of Litigation

A solo or small firm practitioner must evaluate the costs of litigation since the payment of expert fees, disbursements, filing fees, transcript fees, and other costs may fall to the practitioner to advance. No one can dispute that expert fees and disbursements are major factors of law office economics, and thus, major factors behind the success or failure of many solo and small firm practitioners. While a client must bear the ultimate responsibility for payment, where circumstances require counsel to advance expert fees, the rising fees experts charge to testify on a party's behalf place an increasingly unbearable financial burden on solo and small firm practitioners, and in turn, on the clients they serve.

Many courts, in conjunction with local bar associations, have implemented expedited trial programs with relaxed evidentiary and expert rules in an attempt to curtail expert fees. One such program is the "Non Jury Initiative." Pursuant to the program, the parties must agree to waive costs and disbursements as well as the right to appeal from the determination of the matter by the presiding judge. Consequently, the judge's decision is binding. In personal injury cases, the plaintiff's recovery

in a Non Jury Initiative trial is limited to the defendant's insurance coverage.

Another program designed to hold down costs and save time is the "Summary Jury Trial." Such jury trials are non-binding unless the parties stipulate in advance to be bound by the verdict. These trials follow strict time constraints. In most cases the litigants complete the trial in one day.

One major benefit common to both the Summary Jury Trial and the Non Jury Initiative is the ability to present complex evidence such as medical experts without the enormous cost of live expert testimony. This results in significant financial savings to the litigant and reduces the sizeable costs of advancing disbursements.

Since the Non Jury Initiative and the Summary Jury Trial are both practical methods of resolving cases without incurring exorbitant expert fees and litigation expenses, the court system should adopt their usage in all courts throughout the state as available alternatives to regular trials.

Quite a few courts use Alternative Dispute Resolution ("ADR") programs, such as mediation, to resolve cases before trial and save litigants and attorneys time and money. When these programs work, they work well. However, the programs vary tremendously throughout the state. Now that programs have proliferated around the state, the Commission recommends that the court system assess which ADR programs work best and expand the availability of such programs throughout the state.

Early on, the Commission identified the availability and affordability of professional malpractice insurance in the State of New York as a troubling issue for solo and small firm practitioners. The high cost of malpractice insurance premiums and the difficulty in obtaining coverage from the best rated and admitted insurance carriers in the State of New York concerned the Commission's members. In order for solo and small firm practitioners to obtain competitive premiums from a wide range of insurance carriers offering coverage, New York needs a more competitive professional malpractice insurance market.

The Commission considered that one way to accomplish this could be to require that all lawyers admitted to practice law in the State of New York carry a minimum level of malpractice insurance. The Commission rejected such a requirement after a closely divided vote among its members. However, the Commission strongly recommends that all attorneys practicing law in the State of New York carry minimum levels of professional malpractice insurance for their own benefit, as well as for the benefit of the clients they serve. The Commission also recommends that Chief Judge Kaye appoint a task force to review the availability and affordability of malpractice insurance in New York State.

Regulatory Burdens on the Solo and Small Firm

The Commission recognized that many of the rules and regulations directed at attorneys have economic costs associated with them. The Commission therefore recommends that before rule-making authorities, including the Chief Judge, Chief Administrative Judge and the Appellate Divisions, adopt any new rule and/or regulation that would affect the day-to-day practice of law, they take a series of steps to notify the bar about the proposed rules and solicit comment. Upon publishing a proposed rule or regulation, the projected costs for compliance with the rules should be set forth in writing, together with a statement detailing what reporting requirements, forms or other paperwork attorneys will be required to prepare as a result of the proposed rule.

Various individuals have suggested to the Commission that statewide uniformity in the handling of disciplinary proceedings brought against members of the bar would benefit solo and small firm

practitioners. Thus, the Commission suggests that the New York State Legislature amend the Judiciary Law to provide that the responsibility of establishing disciplinary rules rests with the Administrative Board of the Courts, or alternatively, that the Appellate Divisions review their existing disciplinary procedures and promulgate uniform rules, which provide for consistency in the imposition of disciplinary action from department to department.

Strengthening the Profession

While economics and time management burdens impact a solo or small firm practitioner, issues of professionalism also play an essential role in shaping the health and welfare of a law practice. Solo and small firm practitioners are particularly vulnerable to circumstances that might prevent them from continuing to practice law. Unfortunately, events such as accidents, disability, and ultimately deaths do occur. Given the realities of life, advanced exit planning is essential to protecting clients' interests. An "Advance Exit Plan" is a directive prepared prior to a crisis by the practitioner which controls when the attorney ceases to practice.

Through proper education, most solo and small firm practitioners are likely to implement appropriate advance exit plans and designate people they know and trust to implement them. Local and state bar associations should develop committees to educate their members and monitor implementation. The court system should encourage attorneys to develop advance exit plans through educational efforts on its website and at courthouses throughout the state.

Lawyer advertising, especially television advertising, impacts the solo and small firm practitioner. Attorney advertising usage and costs have increased dramatically over the past decade. This increase has made it more difficult for the average solo and small firm practitioner to compete with large firms.

The legal profession has come to accept that lawyer advertising is here to stay. However, New York State has not subjected lawyer advertising to any systematic guidelines designed to protect the public from inappropriate advertising. Thus, the court system should sponsor a statewide survey to determine if "saturation advertising" is viewed by the New York public as an intrusion on privacy that reflects poorly upon the profession. The Commission also recommends that Chief Judge Kaye establish a Commission on Advertising to examine and regulate advertising content.

The Commission recognizes diversity as a broad and inclusive concept and supports the current initiatives that seek to increase diversity in the legal system. For the solo and small firm practitioner, encouraging diversity within a firm has less significance because of the size of the organization.

Yet diversity elsewhere in the legal system, particularly in the court system and in bar associations, is relevant for many solo and small firm practitioners. Many of the increasingly diverse populations in the State are served primarily, if not exclusively, by solo and small firm practitioners. For these attorneys, it is important that the court system promote fairness and the unbiased treatment of minority litigants and their attorneys.

Bar associations should educate solo and small firm practitioners as to the benefits of supporting diversity in their own organizations and elsewhere in the legal system. The court system should promote diversity in the pool of practitioners who qualify for court appointment as fiduciaries and assigned counsel through training programs. The court system should continue and expand diversity awareness and sensitivity programs for all judicial and nonjudicial court employees and strengthen

interpreter services for non-English speaking litigants.

Solo and small firm practitioners inherently face reduced time resources since they also bear the responsibility for running their offices and participating in outside bar activities, often without secretarial, paraprofessional, or other staff to assist. Pro bono representation is another important but time-consuming activity. In the face of great need and apparent stagnant participation by roughly half of the bar, the Commission recommends that all attorneys commit to a minimum of 20 hours per year of pro bono services, which amounts to less than two hours per month. The Commission strongly believes that participation in pro bono services to the poor must remain voluntary.

In closing, an executive summary by definition precludes a rendition of all of the Commission's findings and recommendations. The Commission refers the reader to the full report which follows and the complete listing of the recommendations which appears in the Appendix to this report.

PART I

STREAMLINE COURT PRACTICES TO FACILITATE SOLO AND SMALL FIRM PRACTICE

Overwhelmingly, the Commission found that solo and small firms have less ability to compensate for imperfections within the courts than large firms due to their lack of economies of scale. Thus, the Commission examined ways to improve the efficiency and effectiveness of court operations and processes to enhance the practice for solo and small firm practitioners.

The Commission's findings describe a system ripe for streamlining. The recommendations have a common goal - bridge the divide between the large and small firm - by making the court system work the same for any sized firm so that firms of all sizes thrive. More efficient and less time-consuming court processes will provide enormous benefit to the majority of New Yorkers who utilize the services of solo and small firm practitioners. The implementation of as many of the ensuing recommendations as possible can achieve that result.

Part I covers case processing and scheduling of preliminary, pre-trial, and appellate conferences, staggered calendaring, discovery management, and uniform rules. It also includes a section on technology in the courts.

A. Preliminary Conferences

In the Commission's opinion, one of the more frustrating aspects of civil litigation is the required appearance at preliminary conferences. While there have been various measures implemented to make preliminary conferences more meaningful and productive and reduce the overall time devoted to attending such conferences,[2] lingering systemic problems with the use of preliminary conferences adversely affect solo and small firm practitioners.

By design, a preliminary conference should save time by simplifying the issues to be tried, establishing a timetable for discovery, adding other parties as necessary, and encouraging settlement discussions. At the conclusion of the conference, the court must issue an order which incorporates what transpired, including any directives and stipulations.[3] However, with the exponential increase in litigation, downstate preliminary conferences have often degenerated into "cattle calls." Courtrooms

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2. *See* Section 208.9 of the Uniform Civil Rules for the New York City Civil Court which allows for a so-ordered stipulation and order to be used in lieu of an appearance at a preliminary conference (22 NYCRR § 208.9).

3. *See* Section 202.12 of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR § 202.12).

in the New York City metropolitan area face burdensome calendars that nearly one-hundred scheduled conferences dominate each day.[4]

Moreover, the Commission found that practitioners encounter a highly ineffective process from the date they first receive notice of the conference through the issuance of the preliminary conference order. The clerk's office randomly schedules the preliminary conferences, which are often adjourned due to scheduling conflicts. Yet, no simple mechanism for obtaining the adjournment exists. Some courts allow the preliminary conference to be adjourned by telephone if all attorneys are on the call; others authorize adjournments by letter; certain judges require stipulations; and still other judges require a personal appearance to obtain an adjournment.

Attorneys express frustration with preliminary conferences, especially the time they must invest to appear in court.[5] While most downstate conferences are called for 9:30 a.m., some attorneys arrive late, aware that the local practice is to allow for a "second call" and that a default will not be taken until after the calendar is called twice.

As for the conference itself, many inexperienced attorneys who lack any knowledge of the underlying facts and legal issues substitute for senior counsel who believe that the preliminary conference requires only the completion of a standardized form that supplies discovery cut off dates. As a result, the possibility of identifying and streamlining the outstanding factual and legal issues, establishing a meaningful discovery timetable, or engaging in realistic settlement discussions becomes

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4. It appears that many of the problems with preliminary conferences are unique to downstate practice. For example, in some upstate counties such as Onondaga County, the court or assigned judge sends a notice to counsel scheduling a preliminary conference but allows the attorneys to forego a personal appearance by submitting a proposed preliminary conference order. The Commission noted that in most cases counsel successfully confer and submit the proposed order rather than appear.

5. During its examination of the process, the Commission heard from numerous attorneys who believe that preliminary conferences in matrimonial proceedings are perfunctory, that preliminary conference orders should be executed between counsel without a personal appearance, and that staggered times for conferences and motions will maximize efficiency in the court system. Other attorneys expressed their view that personal appearances for matrimonial preliminary conferences are fruitful. For example, parties may resolve certain key issues, particularly grounds, at a preliminary conference. Or, the court may schedule an immediate hearing to resolve certain issues. At the conference, many judges require the parties to identify whether custody, maintenance, child support, and equitable distribution will be contested. As a result, many times the parties and their counsel now approach these conferences better prepared than ever before and far more can be accomplished.

doubtful.[6]

Even when experienced counsel familiar with the case appear at the conference, little is usually accomplished because little is required. The conferences too often amount to nothing more than an exercise in scheduling where attorneys set discovery dates as far in advance as possible, whether for the exchange of documents, interrogatories, or depositions. The Commission also found that whatever schedule appears in the preliminary conference order, most attorneys know that the dates are flexible and that the courts will permit liberal extensions. Accordingly, the initial dates established at the preliminary conference become a benchmark, not a requirement.

Against this backdrop, there is a real need to reassess the preliminary conference process. The current configuration of the preliminary conference process strains the court's resources due to the many requests to adjourn preliminary conferences, the arbitrary deadlines set in preliminary conference orders, the need for motions to restore cases that are marked off the calendar as a result of an attorney's failure to appear, and the use of subsequent conferences where new discovery dates are selected, thus rendering the initial conferences superfluous.

In the recent Comprehensive Civil Justice Program Report, First Deputy Chief Administrative Judge Ann Pfau proposed that the court system use e-scheduling and allow attorneys to e-mail consent discovery schedules to non-judicial case managers.[7] The Commission endorses this recommendation, without qualification or reservation. The Commission firmly believes that adoption of this proposal will eliminate needless trips to the courthouse and have an immediate, beneficial impact on solo and small firm practitioners.

The Civil Justice Program Report also refers to Intake Parts, a product of the Differentiated Case Management Plan.[8] Under the Intake Part system, counsel appear at centralized preliminary conference parts in certain larger counties (Bronx, Kings, Nassau, Queens, Suffolk and Westchester). The Part is staffed by non-judicial personnel who assist counsel in setting a discovery schedule. If an issue arises at the conference that cannot be resolved, the matter is referred to an assigned judge for a ruling.

The effectiveness and efficiency of these Intake Parts are questionable since attorneys must attend a court appearance on a calendar that may contain as many as 100 or more cases and quickly set discovery dates on a preliminary conference form, even though the dates may not relate to the actual discovery needs of the case. Since the subsequent wait to appear before the assigned judge may be lengthy, attorneys will often defer their discovery disputes and/or resort to motion practice. Because of these serious "loopholes" in the process, the Commission does not endorse the continued use of

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6. The recently adopted Uniform Rules of the Commercial Divisions may address some of these concerns in commercial cases. The rules require consultation between counsel in advance of the conference about the merits, discovery, and alternative dispute resolution. Counsel must have full familiarity with the case, authority to speak for a client, and come prepared. See Section 202.70 of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR §202.70). Available at http://www.nycourts.gov/rules/niformRulesofCommercialDivision.pdf.

7. Hon. Ann Pfau, First Deputy Chief Administrative Judge, New York State Unified Court System, *Comprehensive Civil Justice Program 2005: Study and Recommendations,* p.17.

8. Id., Appendix A, p. I.

Intake Parts and believes that the courts should disband such Parts.

The Commission recommends that the court system implement the following reforms to make the preliminary conference process more productive:

- Allow attorneys to download the preliminary conference form, complete it out of court, and fax or e-mail it to a central preliminary conference clerk in lieu of an appearance.
- Establish statewide uniform and simple procedures for the adjournment of a preliminary conference, such as by e-mail or fax.
- Establish uniform procedures whereby the preliminary conference is adjourned *sua sponte* when a dispositive motion has been made until after a decision has been rendered.
- Establish statewide uniform and simple procedures for conducting preliminary conferences.
- When appearances are required, implement procedures to assess monetary penalties against counsel who appear late without good cause.
- When appearances are required, schedule preliminary conferences later in the day to reduce the possibility of scheduling conflicts with the morning calendars or other tasks.
- Where appearances are required, implement staggered calendars.
- Reassess the sufficiency of the preliminary conference form and determine whether other material should be included on the form which would make the form more meaningful.
- Determine whether appearances should only be required when counsel cannot resolve an issue on the preliminary conference form.
- Study whether preliminary conferences are needed in each county, especially upstate.

B. Pre-Trial Conferences

The pre-trial conference falls on the eve of trial after the filing of the note of issue when most attorneys have realistic views of the strengths and weaknesses of their cases, and when most attorneys begin earnest settlement discussions. The court may address substantive trial issues such as obtaining admissions of fact, scheduling, amendment of pleadings or bills of particulars, limiting the number of expert witnesses, and insurance coverage.[9]

In certain respects, attorneys too often experience many of the same problems involved with a pre-note of issue conference, such as adjournments, multiple calendars, non-staggered pre-trial parts, and delays occasioned by too many conferences.

By nature, the conduct and purpose of a pre-trial conference vary from judge to judge. The

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9. *See* Section 202.26 of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR § 202.26).

process can lead to frustration and confusion in that practitioners cannot know for certain what to expect from a pre-trial conference. The outcome can range from the scheduling of another conference on some date weeks into the future to a trial for the very next day. Much of this uncertainty is due to the sheer volume of cases in the Supreme Court. Nevertheless, the Commission believes that pre-trial conferences can and should be productive.

Therefore, the Commission recommends that the court system:

- Explore ways to enhance and improve the scheduling and conduct of pre-trial conferences to enable attorneys to achieve quicker and more meaningful settlements.
- Establish uniform and simple procedures for conducting pre-trial conferences.

C. Pre-Argument Appellate Conferences

As of the date of this report, three out of the four departments of the appellate divisions may require that appellate counsel attend a Civil Appeals Management Program ("CAMP") conference, otherwise known as a pre-argument conference.[10] The Commission received comments from solo and small firm practitioners who view the conferences as unproductive and a drain on their limited resources.

Pre-argument conferences have enjoyed a measured level of success. In 2004, approximately 25 percent of appeals in the four departments were settled or withdrawn during such conferences.[11] Notwithstanding this modest success rate, issues remain regarding the impact of these conferences on solo and small firm practitioners.

Often, the courts turn to retired judges or judicial hearing officers ("JHOs") to preside over these conferences. The Commission found that while JHOs were expected to have familiarity with the record on appeal and be in a position to highlight the shortcomings in an appellant's or appellee's legal arguments, too often JHOs lacked sufficient knowledge of the appeal or of the matter as a whole to effectuate a meaningful settlement.

By the time a party perfects an appeal, the appellant has invested considerable resources. The appellant has already committed to the attorney's fees for the preparation of an original and reply brief, and the costs of disbursements. The cost for the assembly and printing of the record alone usually involves a significant cash outlay. For these reasons, many litigants, particularly those who have budgeted and spent a fixed sum for litigation and appellate expenses, will not agree to withdraw their appeal before oral argument.

Also, solo and small firm practitioners frequently represent individuals and small businesses who have deep emotional ties to their litigation, such as matrimonial litigants and individuals who are attempting to dissolve a business or partnership. For these individuals, the decision to litigate, as well as the decision to appeal from an unfavorable ruling, affects every aspect of their personal lives.

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10. *See e.g.* Section 600.17 of the Rules of the Supreme Court, Appellate Division, First Department, Section 670.4 (b) of the Rules of the Supreme Court, Appellate Division, Second Department.

11. Data supplied to the Commission by the Appellate Divisions.

Consequently, after making a monumental decision to litigate in the first place, these litigants may not entertain a request to withdraw or settle their appeal.

Solo and small firm practitioners must take the time to attend pre-argument appellate conferences themselves. Large firms, on the other hand, often send junior associates who have worked on the brief and have general familiarity with the issues on appeal. Consequently, the requirement to appear at pre-argument appellate conferences has a greater impact on the solo and small firm practitioner.

Therefore, the Commission recommends that:

- The Appellate Divisions revise their rules to permit counsel to opt out of a pre-argument conference without prejudice to the appeal.

D. Staggered Calendar Calls

A staggered calendar schedules court appearances in time increments (*e.g.*, five matters in each half-hour segment) rather than scheduling an entire morning or afternoon docket to begin at one appointed hour. The number of cases scheduled at each time increment may vary depending on the overall size of the court's docket and the subject matter of the court.

The Commission concludes that an overwhelming majority of solo and small firm practitioners clearly favor some sort of staggered calendaring of cases.[12] The Commission noted that staggered calendars may make better use of attorney time and client resources by reducing the time spent waiting in court to attend court appearances. Many solo and small firm practitioners expressed frustration over the amount of time wasted and commented on the stress associated with having to be in two places at once and/or the stress of wasting time waiting for their case to be called.[13] Moreover, scheduling multiple cases for the same time creates a "cattle call" atmosphere.

Indeed, many small and solo practitioners represent individuals and small businesses who are most affected by fees and expenses and are concerned about billing their clients for "down time" in court.[14] Attorneys often feel they cannot bill their clients for the waiting time. This creates an overworked and underpaid sentiment, particularly among solo and small firm practitioners who can least afford to lose valuable billing time. Conversely, when attorneys do bill for time spent waiting in court, they are then subject to criticism and complaints from unhappy clients. This, in turn, may result in solo and small firm practitioners discounting their invoices for services.

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12. The Commission drew this conclusion from its review of survey responses, testimony at hearings, discussions with various judges and court personnel, comparative sources, and input from Commission members themselves.

13. In surveys submitted to the Commission, one attorney asserted that "the single greatest waste of time is time waiting in courts" and another stated that "we cannot be everywhere at 9:30 a.m. and the Courts cannot handle us all at 9:30 a.m."

14. One practitioner succinctly noted to the Commission that "clients become angry as the hourly billable climbs and they see their attorney sitting 'doing nothing' for upwards of one and a half hours before the case is called."

Clients who must attend court appearances and wait for long periods suffer a double monetary loss. Not only do litigants pay for their attorney's waiting time, they also lose wages and work time to attend court. Many litigants also must pay for childcare, parking, and transportation to go to court. While their attorneys have no control over the waiting time, many clients leave with the impression that the courts are inefficient at managing cases and that judges and lawyers have no consideration for litigants' interests.

In reviewing all of the information gathered by the Commission, a clear and distinct difference between upstate/rural courts and downstate/urban courts emerged. In many rural courts, judges "wear several hats" as they sit terms in Family Court, County Court, Supreme Court, and/or Surrogate's Court. Likewise, many upstate or rural practitioners have cases pending in all of those courts before the same judge because the nature of small firm rural practice produces generalized rather than specialized practices. Thus, a solo or small firm rural practitioner may have to appear before a judge in Family Court in the morning, then return for an afternoon appearance before the same judge for a County Court matter. In these circumstances, scheduling could be done in such a way that the same judge could hear the various matters for one attorney in the morning, even if the matters relate to different courts.

Many upstate and rural courts do not have the problems associated with the overburdened dockets of the downstate/urban courts. Some practitioners noted that upstate and rural courts do not need mandatory staggered calendars, because certain judges in those courts already employ such calendaring. Since some rural courts may have smaller caseloads than urban courts, attorneys often face less time waiting for their cases. As one survey respondent commented, calendar management suggestions such as staggered calendars "raise the risk, if not the certainty, of imposing things that work in midtown Manhattan, on small, rural counties where they would be meaningless at best, detrimental at worst." Thus, these differences must be taken into consideration when implementing a staggered calendar process.[15]

The information gathered by the Commission revealed that certain types of cases and tasks lend themselves more easily to staggered calendars. Motions, preliminary and pretrial conferences, and Family Court appearances for certain proceedings were the three most often noted situations where staggered calendars would eliminate waiting time for attorneys, especially in the New York metropolitan area.

However, since "one size does not fit all," the implementation of any hard and fast rules for staggered calendars in all courts statewide should be carefully considered. Courts and judges should have discretion to deviate from any staggered calendaring rule to accommodate the differences encountered in rural and urban courts and in the types of cases. In order to fully address these concerns, the Commission recommends that the court system implement a pilot project in one or more of the larger metropolitan areas for certain types of cases or tasks to examine whether it would be beneficial

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15. Care must be exercised to ensure that staggered calendars do not result in "micromanaging" an attorney's time, especially if schedules are overly precise. As one survey participant remarked, "staggered calendars don't work unless judges make realistic time estimates." Still another attorney cautioned that "a staggered call requires a smaller firm to have multiple attorneys in one Courthouse. The concept that staggered calls allow for people to appear in more than one part is not feasible as certain judges and parts will far exceed allotted time slots."

to establish statewide rules regarding the staggering of calendars.[16]

In some courts, motions and conferences are routinely scheduled on a single case for the same motion term. Understandably, it is laudable for the Judiciary to attempt to resolve all issues on any given case since all attorneys are present for motion term. At first blush, this scheduling practice appears to conserve attorneys' time and resources. However, the actual effect of this practice leaves little time for the remainder of the cases farther down the docket for that particular day's motion calendar. These cases often get short shrift or their attorneys are required to return in the afternoon. Thus, the courts should discontinue the practice of scheduling multiple tasks (conferences, motions, etc.) on any given case on motion term calendars with heavy dockets. In the alternative, if judges prefer to schedule one case for multiple purposes on a motion calendar, the court should reduce the number of cases on the docket for that day accordingly.[17]

Family Courts clearly have the largest caseload of any of the courts whether in rural or urban areas. Family Courts should utilize staggered times for appearances on most Family Court petitions. For example, cases docketed for the morning calendar should be scheduled at staggered times such as 9:30, 10:30, or 11:30 a.m. If all parties and counsel are not present when the case is called at its scheduled time, say 9:30 a.m., it should be moved to the end of the morning calendar. Attorneys who repeatedly show up late without good cause should be penalized.[18]

Courts should set staggered times for preliminary and pretrial conferences in civil matters, including matrimonial cases. Several conferences should not be scheduled at the same time. Courts

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16. For example, in some courts in the New York City metropolitan area, motion terms are split into aptly named "Submit Parts" and "Oral Argument Parts." The Oral Argument Parts should stagger motion argument times similar to the practice found in the federal courts. Three to four motions could be scheduled in each half-hour segment in the order of their readiness with regard to the presence of all counsel. Absent good cause for tardiness or nonappearance, a party should not be permitted to reschedule the oral argument if their attorney does not appear for the motion or appears more than a half hour late.

17. The "Central Part" system, currently used in Manhattan and Brooklyn, whereby attorneys are required to appear to have return dates set and judges assigned to initial motions also constitutes an additional and unnecessary appearance. Since no substantive review of the pending motion is made, the "Central Part" practice should be reassessed and revised. Courts in the larger metropolitan areas could adopt the system utilized in many less populated counties. In these areas, when no judge has previously been assigned to the case and attorneys file motion papers, the clerk of the court assigns the judge and the return date at the time of filing of the motion. Appearances that accomplish only the assignment of a judge and the setting of a return date waste time for both attorneys and litigants. Such purely administrative tasks should never require appearance by counsel.

18. Additionally, courts should publish the dockets for attorneys via e-mail or on a court website well in advance of the hearing dates so that attorneys can review the dockets to determine whether conflicts in appearances exist and attempt to resolve the conflicts before the scheduled appearance date. See Technology section below for further recommendations in this regard.

should also set realistic estimates of the time needed for each conference and strictly adhere to the established schedule.

While staggered times for criminal arraignments may be difficult to implement because of prisoner transport issues, courts should attempt to schedule arraignments in half hour staggered segments. Realistic time estimates should also be considered so that each half hour will not be scheduled with more arraignments than are possible to complete given the best of circumstances.

Many solo and small firm practitioners spend a considerable amount of time in Town and Village Justice Courts which often do not begin until the early evening after the attorney has already worked a full business day. Most Justice Courts schedule all of their cases for any given evening's docket for the same time. Frequently, the solo or small firm attorney is also required to be in two different Justice Courts in towns across the county on the same evening. Many of these courts require a personal appearance if only to have a matter adjourned.[19] These courts cannot possibly hear all of the cases at the same time and could schedule a specific number of cases in each half-hour segment depending on the size of the docket.[20]

Matters involving *pro se* litigants generally take more time than appearances in cases where parties are represented. Consequently, whether the matter is in Surrogate's Court or Supreme Court, or is a motion or calendar call to set a trial date, courts should establish a separate calendar for appearances involving *pro se* litigants.

In short, waiting time is wasted time. Frustration and dissatisfaction for solo and small firm practitioners escalate with the amount of time they waste waiting in court. Wasted time and other inefficiencies also compromise the integrity of the judicial system and erode public confidence in the ability of the courts to administer justice effectively and resolve society's disputes. Thus, while the implementation of staggered calendars may not be the only answer to these concerns, it may alleviate overburdened calendars and make court appearances more efficient and productive for attorneys and the clients they serve.

The court system must take into consideration the availability of court resources, the feasibility of organizing court schedules to implement staggered calendars, and the differences between upstate and downstate courts and/or rural and metropolitan courts before any recommendations are implemented. The Commission recommends that:

- Courts set motion return dates at staggered, fixed times.
- Courts stagger preliminary conferences, if not conducted by telephone, or disposed of by mail or e-mail.
- Courts stagger pre-trial conferences with realistic estimates for conference lengths and adhere to publicized schedules.
- Family Courts schedule cases throughout the day, i.e., at 9:30 a.m., 10:30 a.m., 11:30 a.m., 2:00 p.m., 3:00 p.m., and 4:00 p.m.
- Courts stagger criminal arraignments.

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19. Justice Courts also should permit adjournment requests by telephone without requiring a personal appearance.

20. Cases involving transported prisoners would necessarily take priority over other cases.

- Town and Village Justice Courts stagger appearance times in accordance with the number of cases on the calendar.
- Supreme and Surrogate Courts establish separate calendars for *pro se* litigants and heirs.
- Courts and judges retain some discretion to deviate from any staggered calendaring rule.
- The court system implement a pilot project in a large urban area to test staggered calendars by tasks, as well as courts, prior to establishing any new statewide rules on staggered calendars.
- Courts stagger motion argument times in Oral Argument Parts.
- Courts discontinue the practice of scheduling multiple tasks on any one case on motion term calendars in larger cities.
- Courts reassess and revise Central Part systems.
- Courts publish dockets for attorneys through e-mail and on the court website well in advance of hearing dates.

E. Discovery Management

Discovery is by far the most time consuming phase of most litigation. Unnecessary and protracted discovery impacts solo and small firm practitioners the hardest since these practitioners need to keep litigation costs and fees in line in order to increase net revenues. Thus, more effective discovery management can help to reduce litigation costs for these attorneys and their clients.

After studying discovery practices, the Commission made several findings. Early judicial intervention may prevent unnecessary and extensive discovery and result in earlier case resolutions by fostering more timely settlements and verdicts.

Optimally, attorneys should agree on a discovery plan as soon as possible after commencement and avoid the need to meet with an assigned judge for discovery management. Parties could then submit the discovery plan to the judge to be "so ordered." When the parties submit such an agreed upon discovery plan, the judge should not order further conferences on discovery.

This method was recently adopted for use in the New York City Civil Courts. Pursuant to a newly adopted rule, parties who can agree upon a timetable for completion of disclosure sign a stipulation form and return it to the court prior to the scheduled conference date.[21] The court then marks the stipulation "so ordered" and cancels the conference unless the court directs otherwise. The Commission recommends that the court system expand the use of this procedure to Supreme and County Courts on a statewide basis by amending the uniform rules for Supreme and County Courts accordingly. Moreover, any proposed new rule should provide that a party may request a conference if the party has a good faith belief that it would facilitate a settlement, narrow the issues for trial, and/or

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21. *See* Section 208.9 of the Uniform Civil Rules for the New York City Civil Court (22 NYCRR § 208.9).

address other issues, including but not limited to, discovery issues. If the court finds, after scheduling a conference, that there was no legitimate basis for a refusal to agree on a discovery timetable, the court should assess costs against the uncooperative party pursuant to the current preliminary conference rule.[22] Courts should insist on compliance with resulting discovery orders. However, courts should not automatically penalize parties because of failure to comply with discovery dates or schedules. Courts should remain flexible and willing to consider that some cases are more complex and require more time for discovery. Courts should discourage the practice employed by some firms of intentionally frustrating discovery efforts and forcing motion practice, which stretches the resources of solo and small firm practitioners. Technology can facilitate effective discovery management. Forms should be uniform and available on the OCA website. Courts should accept completed forms by facsimile or e-mail. Courts should utilize telephone conferencing, and where possible, electronic communications, to address discovery matters.[23] By avoiding the time and expense associated with personal appearances, discovery management will become more efficient and less costly.

When discovery schedules are established by the parties and court intervention is not required, discovery is manageable, less costly, and proceeds in a more timely fashion. However, for those discovery disputes which cannot be resolved in this fashion, the courts should consider implementing a more streamlined process to address discovery issues which may include the use of JHOs and non judicial staff to meet with the parties when judges are not readily available to resolve such problems.

In summary, the Commission recommends that the courts:

- Require parties to attempt to agree on a discovery plan as soon as possible following commencement of litigation and submit the plan to the court to be "so ordered" and accepted by fax or e-mail. If parties and the court are all in agreement, the court should not require an in-person preliminary conference.
- Encourage early court intervention to manage and streamline a discovery plan to the extent that parties cannot otherwise agree.
- If discovery management conferences remain mandatory, utilize such conferences as opportunities to explore and encourage early settlement/resolution.
- Issue scheduling orders, which provide for, at a minimum, discovery cutoff dates, pretrial/status conferences, disclosure of experts, and dates for filing the note of issue.
- Adopt a form scheduling order for statewide use and make the form available to attorneys on the OCA website.
- Insist upon compliance with scheduling orders absent good cause.
- To avoid delay and expense, permit the use of teleconferences and electronic communications to address discovery problems, without the necessity of formal motion practice and personal appearances.

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22. Section 202.12(f) of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR § 202.12(f)).

23. The Uniform Rules for the Commercial Division address some of these concerns. For example, attorneys may use telephone conferences with the court to attempt to resolve discovery issues.

- Explore the use of JHOs and nonjudicial staff to meet (or teleconference) with parties to attempt to resolve disputes.

F. Uniform Statewide Rules, Forms, and Practice

When the Commission reviewed the results of the survey of solo and small firm practitioners and listened to speakers at the public hearings, it found a general consensus that the New York State courts should establish truly uniform rules, forms, and procedures throughout the state. While uniform rules do exist, there is inconsistency in their application, leading to many problems for practitioners and their clients.

Many practitioners feel that local court rules, although well intentioned, create a plethora of mini-jurisdictions inside New York State. Case processing and scheduling receive different treatment depending on the local court rule. The lack of uniformity in applying the Uniform Rules of the New York State Trial Courts creates unnecessary pressure upon attorneys. Variations in procedures burden the attorney, and thus, the litigant's resources.

Attorneys often have to scramble to learn the procedure in a particular county or a particular part. For example, an attorney may have to travel to one county to pick up a signed Order to Show Cause. However, a court in another county will send it to the attorney's office via facsimile. Also, if an attorney's practice is limited to a particular county or district part, he or she may not have sufficient mastery of the distinct variations of practice and procedure.

Whatever rules and forms that exist in a specific locality should be easily located by an attorney through posting on the court system's website. The court system should provide practitioners with information regarding rules and forms. The ability to download forms and documents will accomplish several objectives: (a) attorneys will be able to efficiently prepare *pro forma* documents; (b) attorneys will be able to rely on pre-approved forms; and (c) attorneys will not have to subscribe to costly form books and disks.

With the input of the trial judges, the court system should examine the labyrinth of local rules to determine if some rules should be established on a statewide basis. If a rule is worth having in one part of the state, it may very well improve the process in other parts of the state.[24] The court system may also choose to eliminate all local rules entirely.[25]

Indeed, the plethora of requirements creates multiple and unnecessary levels of red tape. The preparation of a discovery-related motion illustrates this point. In order to prepare what should be a *pro forma* application, attorneys must first check the applicable CPLR provisions, then the Uniform Rules for the New York State Trial Courts, and finally the individual part rules established by the assigned judge. Once prepared, filing the motion presents another obstacle. Pursuant to local rules and

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24. The recent amendments to the Uniform Rules for the New York City Civil Court and adoption of the Uniform Rules for the Commercial Division affecting preliminary conferences demonstrate the need to examine whether one uniform set of rules should be established.

25. *See e.g*, Rule 1.1, Georgia Judicial Branch, Uniform Superior Court Rules [repeal of local rules].

procedures, certain counties and clerks require various additional affidavits (i.e., emergency affidavits) and forms, particularly in matrimonial proceedings. Thus, an identical set of motion papers may be accepted for filing in one county but rejected in another. For the solo or small firm practitioner who must re-draft the motion papers to conform to a clerk's or county's rules, the extra burden is untenable.

The Commission believes that the current "patchwork" system of rules and forms should be replaced with a more efficient and consistent process. Therefore, the Commission recommends that:

- The Chief Judge appoint a commission to determine whether local rules should be converted, incorporated, or subsumed into one uniform set of rules; or eliminated entirely.
- OCA improve its website to create a comprehensive on-line database of downloadable common litigation and estate documents, available in Word and WordPerfect format and in English and Spanish, so that attorneys can easily download and copy forms. Such forms would include retainer agreements for commercial and matrimonial proceedings, notice of appearance, notice of motion, notice of appeal and order to show cause (and other forms to supplement the forms currently available on the OCA website such as the Statement of Rights and Responsibilities, Request for Judicial Intervention, Request for Appellate Division Intervention ("RADI"), and uncontested matrimonial forms).
- The court system post rules and downloadable forms which exist in a specific locality on its website and create an on-line database of all uniform rules to assist attorneys in identifying particular local rules.
- The court system creates an on-line database of county by county filing procedures to assist attorneys in determining the precise rules which apply to the documents they wish to file.
- The court system establishes uniform statewide procedures for the conduct of preliminary conferences.

G. Technology As a Tool to Connect the Solo and Small Firm Practitioner with the Court System

Technology can alleviate many of the time and efficiency problems facing solo and small firm practitioners and help them make better use of court resources. In utilizing the latest technological advances, the courts can help ensure that these practitioners keep pace with large firms in delivering high quality services to their clients in this modern world.[26]

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26. In studying this issue, the Commission's Technology Subcommittee reviewed the public hearing transcripts, the surveys, and technology reports issued in this and other jurisdictions, and met with numerous court personnel and staff working in OCA's Division of Technology, Counsel's Office, and in the individual courts.

1. The Need for Wider Use of Facsimile Transmissions

In 2003, a pilot program was launched that enabled attorneys to file papers by facsimile in certain types of actions (commercial claims and tax certiorari, conservatorship, and mental hygiene proceedings) in Monroe, Westchester, New York, and Suffolk Counties.[27] Since their inception, these pilots have operated on a limited basis. However, the Commission believes that practitioners would readily adopt a statewide program which permits the filing of documents by facsimile, since most practitioners are accustomed to using facsimile machines as part of their daily practice. Therefore, the Commission recommends that the practice of filing by facsimile be expanded to all types of claims and actions. If it is impractical to have papers filed by facsimile with the Clerk's office, facsimile filings could initially be limited to particular judges or parts.[28]

Courts should use facsimile machines to provide practitioners with signed or declined orders to show cause, preliminary conference orders, and other signed orders so that attorneys do not need to employ a service or utilize personnel to pick up signed copies. Thus, courts should require the attorney for the party who submits an order to show cause to provide a fax number, as well as an unbound copy, so that the clerk or judge's staff can easily transmit the signed order by fax and eliminate the need for further follow-up or appearances by the attorney.[29]

In summary, the Commission recommends that the court system adopt rules which:

- Permit the transmission of stipulations of adjournments, preliminary conference orders, and correspondence by facsimile.
- Require that courts provide copies of signed or declined orders to show cause to counsel by facsimile.
- Require courts to provide copies of decisions, orders, and judgments to counsel by facsimile.
- Expand the pilot program for filing by facsimile to all types of claims and actions and widely publicize same.
- Consider allowing service by fax, but restrict such service to certain procedural *pro forma* matters.

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27. *See* Section 202.05(a) of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR§ 202.05(a)).

28. While service by facsimile could prove beneficial to solo and small firm practitioners, the Commission noted that such a process should be restricted to certain procedural *pro forma* matters, as solo and small firm practitioners could be unduly burdened by the facsimile of lengthy or large volumes of documents.

29. While courts in some counties utilize facsimiles, not all do. In some counties, clerks have refused to provide information regarding the status of orders to show cause, thereby necessitating daily personal appearances at the courthouse over several days to obtain such information.

2. Retest Teleconferencing and Introduce Videoconferencing

A majority of the attorneys responding to the Commission's survey recommended that teleconferencing be made available for preliminary and other conferences, where appropriate. At a minimum, courts should permit teleconferencing for certain delineated motions and/or conferences with or without the consent of all the parties. Judges should also resolve discovery issues by conference calls, whenever possible.

The Commission learned that New York County attempted to provide teleconferencing services for motor vehicle cases with limited success. Approximately six judges participated in the experiment. The Commission attributes the lack of success to one or all of the following: (1) the availability of the teleconferencing service was not widely disseminated or publicized to the general population of attorneys; (2) the cost of approximately fifty-five dollars ($55.00) for each attorney participating in the teleconference was prohibitive; (3) there were mechanical problems with the equipment; and (4) the system was physically cumbersome, causing an increase in the workload of the part clerks.[30] While the courts have recently revamped the telephone systems in several courthouses to permit teleconferencing, the court system should investigate the types of teleconferencing systems used in other jurisdictions and the companies that offer such services. To ensure a competitive system, the Commission recommends that the court system select several judicial districts in which to retest teleconferencing, and solicit bids from companies providing teleconferencing services.[31] The Commission also believes that video conferencing offers great opportunities to solo and small firm practitioners, particularly those who practice in upstate counties. As in the federal courts, this would allow attorneys to argue motions and attend court conferences from the courthouses in their respective jurisdictions, avoiding the need to travel long distances from county to county. Thus, while videoconferencing is currently available for cases involving the Department of Corrections and in certain criminal matters, the Commission

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30. Apparently, attorneys also had difficulty getting orders signed by judges after the parties had reached an agreement since the part clerks, who were on the telephone while the parties worked out dates and other matters, had to wait for the agreed upon order to be transmitted by facsimile by the parties. This did not always occur immediately after the telephone conference. The part clerks then had to confirm that the order set forth what the part clerk had heard during the teleconference and present the order to the judge for signature on that same day. Finally, the clerks had to transmit the signed order by facsimile to counsel for the parties. Also, judges often became annoyed with the technology, which did not always function properly.

31. Rather than limit the testing of teleconferencing to types of cases, the Commission suggests that the court system assess such technology by assigning teleconferencing testing to particular judges within each court and within each judicial district. Any teleconferencing service that is offered must be capable of accommodating more than six parties on a single teleconference call. Based upon the experiences of the judicial districts and the feedback from the teleconferencing companies, the court system will be in a better position to refine teleconferencing services offered throughout the State.

proposes that videoconferencing be made available in a wide range of matters and on a statewide basis. The Commission also recommends that in implementing any such program, the court system establish centrally located videoconferencing centers in courthouses throughout the state to permit an attorney to "appear" without travel.

With available technology, it is a waste of time and a disservice to clients for attorneys to spend several hours waiting to meet with a judge or a court attorney for brief conferences and appearances. Therefore, the Commission recommends that the court system:

- Select several judicial districts in which to retest teleconferencing.
- Solicit bids from different companies to provide teleconferencing services for conferences involving multiple parties.
- Assess teleconferencing by making it available to particular judges within each court and within each judicial district.
- Implement a pilot videoconferencing program and widely publicize it through different channels, including the UCS Website, the New York Law Journal, and local bar associations.
- Promote the use of videoconferencing in the courts, particularly for complex motion practice and appellate arguments.
- Establish centrally located videoconferencing centers in courthouses throughout the State.

3. Filing by Electronic Means Will Lead to Greater Efficiency for the Solo and Small Firm Practitioner But Only if Introduced Slowly and with Support

In 2003, the New York State Legislature passed legislation to permit the courts to establish Filing by Electronic Means ("FBEM") programs. Originally available only in tax certiorari claims in Supreme Court in Monroe, Westchester, New York, and Suffolk Counties, and in commercial claims in the Commercial Divisions of Supreme Court in Albany, Monroe, Nassau, New York, Suffolk, and Westchester Counties, legislation was later enacted to expand the use of FBEM to include tort cases and the Court of Claims.[32] Small Claims cases in the New York City Civil Court may be e-filed through the use of authorized vendors such as nCourt or Intresys TurboCourt. In addition, all cases in Supreme Court, Broome County, are eligible for filing by electronic means.[33] E-filing requires the consent of all parties. By commencing a case using the FBEM system and/or by serving a Notice Regarding Availability of Electronic Filing, a party indicates the desire to use FBEM. Parties served with the Notice must respond to it promptly. Parties who wish to consent must file with the court and

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32. Data available through the Division of Technology and Research, Office of Court Administration indicates that in 2005, parties used FBEM to commence 649 commercial cases, 62 tort cases, and 19,735 tax certiorari matters.

33. The rules governing e-filing are contained in Sections 202.5-a and 202.5-b of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR §§ 202.5-a, 202.5-b), and Sections 206.5, 206.5-a, and 206.5-aa of the Uniform Rules for the Court of Claims (22 NYCRR §§ 206.5, 206.5-a, 206.5aa).

serve on all parties a Consent Form and also record their consent in the FBEM system. If a party is represented by an attorney who has previously registered as a Filing User in connection with another case, the attorney may file and serve a Consent electronically by checking the designated box and following the instructions on the FBEM website. If a party does not wish to consent, the party must promptly so indicate in writing to all other parties and forward a copy of the writing to the court. FBEM permits attorneys to mark sensitive documents in their filings for exclusion from public view on the web.[34]

A substantial percentage of attorneys who responded to the Commission's survey expressed concerns regarding the costs to acquire the computer hardware and software necessary to perform FBEM and the time required to learn this new technology. A number of attorneys in upstate New York warned that they do not have access to high speed internet connection. Still others questioned if the court system provides training for attorneys to learn FBEM and whether this training is provided frequently and at convenient times.

The Commission learned that in a number of counties, FBEM training was available but few attorneys were aware of its availability. Some attorneys noted that the training programs offered by the federal courts for federal electronic filing, as well as by the state courts, were difficult to grasp initially. Some attorneys recommended that the court system make training programs available to secretaries and paralegals, as well as to individual attorneys.

While expressing a number of concerns, many attorneys recognize that FBEM could result in saving time and, ultimately, money. The use of FBEM eliminates trips to the courthouse to file papers and provides immediate access to all papers filed in a particular matter and to the court's docket. The Commission believes that FBEM will enhance and promote accuracy and efficiency in maintaining records for attorneys and the courts.

Nonetheless, fundamental concerns remain for attorneys unfamiliar or untrusting of technology. Unquestionably, attorneys who are not familiar with scanning documents and using *Adobe* software need training and practice before they can feel comfortable with FBEM. Some of the survey respondents stated that for their first filing, it took them a few hours longer to perform the necessary tasks and they encountered technical difficulties. Those attorneys who have used FBEM on more than a few occasions stated that FBEM ultimately saves time, permits them to file papers any time of day or night, and provides immediate access at any time of day or night to filed papers, decisions, and court orders. Further, FBEM provides attorneys with the flexibility to work from any location where internet access is available.

It is critical to note that the majority of attorneys solicited by the Commission, including those who successfully used FBEM on a regular basis, urged that FBEM remain voluntary. Indeed, it has been reported that some judges consider FBEM impractical because they require staff to download and

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34. Pursuant to the rules governing electronic filing, parties must consent in writing to FBEM (*see* 22 NYCRR §202.5-b). The particular judge assigned to the case then has the discretion whether to permit FBEM. Upon consent of the parties and the judge, papers filed in the action are filed solely by electronic means and other than for cases pending in the Commercial Division, no paper filings are required. The parties also must agree to abide by a "User's Manual" provided by the Chief Administrator of the Courts.

print documents in order to review them or ask counsel to supply courtesy copies to the court. [35] While the FBEM system is patterned after the Federal PACER system, it does not require special gadgetry. The only hardware and software required are a personal computer, an internet browser, a scanner, and *Adobe Acrobat* software.

Thus, the Commission recommends that the New York State Legislature expand the voluntary use of FBEM to other types of cases and to other counties. At a minimum, FBEM should be extended to pretrial conference orders, stipulations, orders to show cause, and other specified filings in all types of actions and proceedings. Courts should also generate and file orders, judgments, notices and other documents electronically.

The court system should emphasize that the use of FBEM will produce cost savings for all, save time and increase the speed with which attorneys can send documents to the court and opposing counsel. The financial benefits include savings on office supplies, paper, ink, postage, and storage facilities. Of course, such savings can only be fully realized if paper filings and service copies are reduced or eliminated. Other financial aspects to consider include the compatibility and integration of systems - Federal, State, Appellate, and Public Access Systems - which will permit a practitioner to move between systems with the click of a button.

To assist would-be e-filers, the court system has developed a number of reference tools such as a downloadable FBEM user manual, an FBEM Practice System (on-line tutorial), a help desk (phone number 1-646-386-3033), and a website.[36] There is also an FBEM Resource Center, which, in addition to providing one-on-one assistance to e-filers at the Supreme Court, New York County, also hosts free weekly two-hour CLE training courses. While Resource Center personnel also travel to counties around the State to train attorneys, judges and court staff upon request, trainings should be more widely available throughout the state and advertised to attorneys. Through trainings offered to attorneys in each county, the court system can ensure that attorneys perceive the potential value of FBEM in their practices and persuade those reticent to try it. The availability of the training sessions should be extensively publicized and notices should be disseminated routinely to bar associations.

The Resource Center also has a high speed scanner that may be used by litigants/attorneys who do not have the technology available to them. The Commission believes that the establishment of additional centrally located technology centers throughout the state would assist solo and small firm practitioners to transition into FBEM by permitting solo and small firm practitioners to reap the benefits of FBEM without requiring them to purchase equipment that they may or may not use. Further, the court system should enhance the FBEM Practice System by providing a help-option and should regularly review its user manual and other reference tools to ensure their effectiveness in facilitating FBEM training.

Education and training are essential to the success of FBEM. The Commission believes that it is the responsibility of the court system to provide frequent training on FBEM to attorneys. FBEM

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35. Notably, Rule 21 of Section 202.70 (g) of the Uniform Civil Rules of the Supreme Court and the County Court (22 NYCRR § 202.70 (g)) requires counsel to provide courtesy papers of all motion papers and proposed orders in Commercial Division cases in the FBEM program.

36. Available at http://iapps.courts.state.ny.us/fbem/mainframe.html.

training programs should be offered several times a week at convenient hours, including after 5:00 p.m., to permit the largest number of attorneys possible to participate.

The court system should study other training models for implementation, including the United States District Courts for the Southern and Eastern Districts of New York and the United States Bankruptcy Court for the Southern District of New York. For example, these courts offer training sessions for attorneys within their courthouses several days each week which give attorneys the opportunity to practice e-filing through simulated filing exercises with the assistance of court personnel.

In addition to training programs offered at the respective courthouses, the Commission encourages the Administrative Judges of the courts to partner with local bar associations to offer hands on training programs at no cost to attorneys. In this regard, the court system should promulgate guidelines to Administrative Judges establishing the curriculum of the training programs. For example, FBEM training programs should feature instruction as to what hardware and software is required, including hardware and software specifications and versions, as well as the tasks that the configurations and versions can and cannot perform. In addition to the mechanics of e-filing, training should include the creation of PDF documents in order to get past the resistance to, or fear of, technology by some attorneys. The training program should also provide attorneys with informational handouts on specifications for the hardware and software, including an estimate of the approximate costs to acquire all equipment, hardware, and software. The training should include suggestions as to the many alternatives available for purchasing software. Moreover, e-filing programs should allow access by users of such operating systems as *Apple*, *Linux*, and other open sources so that solo and small firm practitioners will not be forced to make major changes in order to participate in the new system and will be able to take advantage of future reductions in costs as the technology improves.[37] The court system can facilitate the transition to e-filing by clearly informing attorneys that it accepts documents created using other software, and identify such software.

In addition, training programs should include instruction on how to use technology to eliminate or block out confidential information, such as social security numbers, bank account numbers, financial institution data, and credit card numbers contained in exhibits or other papers. If FBEM training programs are to address the needs of the solo and small firm practitioner, the training program must be directed to the needs of the individual attorney who will be making the technology purchases, putting the documents together, and doing the filing - not clerks in a technology department, which may be the case in larger law firms. The court system should publicize that under current rules, attorneys may receive mandatory continuing legal education credits for technology courses as part of their mandatory CLE requirements.

In an effort to monitor the quality of FBEM training programs, the Commission recommends that the court system develop a mechanism to receive feedback from Administrative Judges regarding both the difficulties and successes experienced with FBEM training programs, as well as the concerns and difficulties expressed by attorneys in mastering FBEM. The court system should use this feedback to develop additional guidelines to improve FBEM training statewide and promote greater use of FBEM. The Commission recommends that Administrative Judges meet periodically with trial judges

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37. Although *Adobe Acrobat* may be a leader in the field of portable document format (PDF), there are other more affordable PDF software programs such as *Pdf995 Suite*, *Nitro PDF Professional, BCL All PDF Converter,* and *Jaws PDF Creator*, which may be either free or under $100.00.

and attorneys to exchange their experiences with FBEM and share feedback. This feedback will provide the court system with the content for periodically updating its website with helpful hints and information regarding how to successfully and efficiently perform FBEM.

It is critical to the success of FBEM training that the court system advertises the availability of training programs. The Commission believes that more attorneys will voluntarily participate in FBEM if sufficient and adequate training and information are provided. Thus, the Commission recommends that the courts in each judicial district provide information as to the type of FBEM training that is being offered and the dates and times of the FBEM training to the local bar associations for dissemination to its members. All training courses offered throughout the state by both the courts and bar associations should be widely publicized through various methods, including by posting on the court system's website, and should include a name and contact number for scheduling training sessions. There should also be a process established by which users are advised of changes in policy relative to FBEM.

The court system should adopt uniform statewide standards and guidelines for FBEM. The system must be user friendly so as to increase access to the courts. Each courthouse should have an in-house service center staffed by court personnel qualified to assist with FBEM.

In summary, the Commission makes the following recommendations with respect to e-filing:

- The legislature should expand the voluntary use of FBEM to other types of cases and to other counties.
- At a minimum, FBEM should be extended to pretrial conference orders, stipulations, orders to show cause, and other specified filings in all types of actions and proceedings.
- Courts should generate and file orders, judgments, notices and other documents electronically.
- Since education and training are essential to the success of FBEM, the court system should provide and advertise appropriate, accessible, and frequent training on FBEM.
- The court system should provide additional and centrally located technology centers throughout the state that solo and small firm practitioners may use to e-file and reap the benefits of FBEM without purchasing equipment which are staffed by court personnel to provide in-person assistance for troubleshooting.
- The court system should enhance its online tutorial, the FBEM Practice System, by providing a help-option and should regularly review the content of its downloadable user manual, website and other reference tools to ensure their effectiveness in facilitating FBEM training.
- The court system should review the FBEM process and implement improvements and changes through feedback from the Administrative Judges, the trial bench, and the bar.
- The court system should adopt uniform statewide standards and guidelines for FBEM.
- The court system should develop a public relations or marketing campaign to encourage the use of FBEM.

4. The Availability of Court Files on the Internet

In its report to the Chief Judge in February 2004, the Commission on Public Access to Court Records, chaired by Floyd Abrams, Esq., recommended that the court system make court files which already are deemed available to the public on the Internet to the same extent as they are currently available utilizing paper files, and that rules and conditions of public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet.[38] However, that Commission also recommended that in light of the potential for harm to privacy interests and the personal security of individuals who are involved in judicial proceedings that may be occasioned by public disclosure of certain narrow categories of information, that information should not be referred to in court papers, and therefore, should not become public without leave of court. That Commission also noted that the court system should ensure that case records are not made available on the Internet which are not available to the public in paper form because they are sealed or otherwise deemed confidential, such as Family Court, matrimonial, certain guardianship, criminal, or other case records which have restricted access pursuant to applicable law.

In implementing the recommendations of this report, the court system has established policies and procedures for judges to submit decisions for posting on the court system's website which emphasize the privacy safeguards that the courts should follow in preparing and sending decisions. The court system has drafted computer programs and distributed both software and scanning equipment throughout the state to permit and encourage trial courts to transmit all appropriate decisions. Currently, the court system encourages the judiciary to either scan the actual decision (which has been signed and stamped) or to upload a *WordPerfect* version of the decision (unsigned, but with an indication of the signing date). The decisions on the court system's website are available for free. As a result of these efforts, more courts have been sending decisions for posting on the website which includes decisions rendered by the Court of Appeals, the four Appellate Divisions of the Supreme Court, and some downstate trial courts.

To date, public access to case records on the Internet has been primarily limited to decisions and orders. With regard to case file documents, Broome County has initiated a pilot project to scan and post online all documents within a case. The Broome County Clerk will scan civil documents (as the case proceeds) and court staff will scan all criminal documents (after the case is finished so that papers in sealed cases will not be scanned). In addition, the court system's website now contains voluminous case documents scanned over the years by the New York County Clerk's office.[39] Presently, neither of these projects charges a fee for accessing the scanned images.

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38. The Commission on Public Access to Court Records, *Report to the Chief Judge of the State of New York*, February 2004. Available at http://www.nycourts.gov/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf.

39. In the New York County Supreme Court Clerk's office, documents are currently scanned but not yet posted.

The Commission believes that greater availability of case files over the Internet would provide an exceptional benefit to solo and small firm practitioners. Consequently, the Commission recommends as follows:

- The court system should ensure that the recommendations of the Commission on Public Access to Court Records are implemented to the fullest extent possible.
- The court system should provide a system for public access to case documents which is easily searchable and in which a user can view a document filed with the court by a single click of the mouse on a docket entry, rather than be required to manually launch a separate application for document viewing.
- Court staff should continue to maintain control over access to cases deemed confidential by statute or order.
- Attorneys should safeguard confidential and proprietary information, including but not limited to, social security numbers, financial account numbers, and the names and birth dates of minor children.
- In providing public access, the court system should continue to ensure the confidentiality of case files in family court, matrimonial, certain guardianship, criminal, and other matters as provided by applicable law.

5. The Unified Court System Website

The website of the New York State Unified Court System ("UCS")[40] is a great source of information and a valuable tool for the solo and small firm practitioner. Since the Commission's creation in 2004 and its members' first meeting with various members of technology staff at OCA, the website has undergone tremendous changes. The web site is organized into six major areas: courts; litigants; attorneys; jurors; judges; and careers. It has 39,000 static web pages, 7,000 PDF files, 10,000 image files and more than 250,000 decision files. The website currently offers, among other things, information on attorneys and judges, attorney registration, Mandatory Continuing Legal Education ("MCLE'), fee arbitration, fiduciary appointments, Alternative Dispute Resolution, Litigation Coordinating Panel, and decisions. The site posts press releases, employment information, the Rules of the Chief Judge and Chief Administrator, and emergency information about court closings. The website also provides select forms, including, but not limited to Family Court forms, Surrogate Court forms, Request for Judicial Intervention, Statement of Net Worth, Name Change forms, and HIPAA authorization forms. The website contains a webmap or table of contents that is not the easiest to locate, but once found makes the site much easier to navigate. The webmap or table of contents is available by clicking first on the "Search" button on the main page and then on "Site Table of Contents."

The website offers free web-based access to calendar information for pending cases in the following courts: Supreme Civil (statewide), most criminal courts in thirteen counties (New York City, Nassau, Suffolk, Erie and the Ninth Judicial District[41]) and the New York City Housing Court. The

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40. The UCS website is www.nycourts.gov.

41. The Ninth Judicial District includes Westchester, Rockland, Orange, Putnam, and Dutchess Counties.

Criminal Records & Information Management System ("CRIMS"), provides online access to criminal cases with future appearance dates in all criminal courts in New York City and Nassau and Suffolk Counties, the County Courts in the Ninth Judicial District, the Erie County Court, the Buffalo City Court, and the New York City Housing Court. It also displays universal summons case information for the five counties of New York. An attorney seeking to access CRIMS must complete a CRIMS Access form and agree in writing to the Terms and Conditions of such access. [42] The Future Court Appearance System ("FCAS") permits access to any open Civil Supreme Court case where a Request for Judicial Intervention has been filed in the 62 counties of the State. Case information may be accessed by searching by firm or attorney name, party name, or index number. FCAS also permits online access to decisions in the following counties: Allegany; Bronx; Broome; Cattaraugus; Chautauqua; Cortland; Delaware; Erie; Kings; Livingston; Madison; Monroe; Nassau; New York; Niagara; Oneida; Onondaga; Ontario; Orange; Putnam; Queens; Richmond; Schuyler; Seneca; Steuben; Suffolk; Westchester and Wyoming Counties. It also permits access to court calendars by judge and by part.

There are plans for the Supreme Court Civil calendars to offer information on disposed cases as well. Calendars in the Family Courts (statewide) will be posted (with identifying petitioner information redacted). Through its website, the court system also offers "CaseTrac," a fee-based service providing case tracking and e-mail notification features. Web pages are created and maintained both by OCA technical web site staff located at 25 Beaver Street in Manhattan and by many technical staff members within the courts. All adhere to web publishing standards established by the OCA technical web staff under the guidance of OCA administrators.

The Judicial Districts have web pages specific to their courts. There is a CourtHelp site that provides courthouse addresses and extensive information for self-represented litigants; a jury site that provides information for jurors including the jury handbook, employer guide, frequently asked questions, orientation videos, online qualification questionnaire and an exit survey; a Law Library site that provides information about the court system's legislative program, a glossary of legal terms and links to other law related sites; and an "E-Courts" site that provides access to e-filing, online calendars and online decisions. The court system's web-based judicial directory debuted in February 2005.

Information involving jurors, sealed cases and family court litigants and other sensitive data is kept strictly confidential and is not available on the web. The website also uses "hidden word" technology to guard against data mining of certain types of calendar and decision data.

Currently, about one-half of the material on the website meets the standards for disability access published by the World Wide Web Consortium (i.e., the web page is able to be easily converted to spoken text by screen-reader software). Most of the website's basic web pages can be read by screen-reader software; whereas the more complex pages (containing tables of data or graphics) require additional (behind-the-scenes) programming to permit them to be read by automated screen-reader software. The court system recently introduced a Spanish language version of the Court Help website.[43] Five years ago, court administrators decided to organize all court websites under a single, uniform

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42. The terms and conditions specify the scope of access permitted, the purpose of such access and obligates an attorney to protect the security of the information obtained through CRIMS and restricts the dissemination of the information obtained.

43. Available at http://www.nycourts.gov/courthelp/spanish/spindex.html.

statewide website, creating a technical web staff reporting to top management. Over the past few years, this unified web effort has made great progress toward standardizing the format and organizing the content of the disparate court sites that had cropped up throughout the state. The website now has a standard interface and a style manual published for all web designers. Many courts still maintain their own web pages and post their own information using this common format. The web staff uses an automated "link-checker" and constantly spot-checks web pages for accuracy.

However, there are complaints about the website concerning its lack of uniformity and consistency. The information available from section to section differs and sometimes conflicts with the previous section. Also, from week to week the screens and availability of information changes, making navigation difficult to master.[44] Therefore, the Commission recommends that the court system impose a standard with respect to what information should be included on the website for each particular court. The site should also maintain a uniform format. Further, the Commission recommends that the court system enhance and improve its website by including:

- A button labeled "Site Table of Contents" rather than "Search" to access the webmap or Site Table of Contents simply by clicking on the button.
- Under the category of judges, the complete address, including the room, telephone, and fax numbers for chambers and courtrooms, specifically identified; the names of the part clerks and judges' law clerks or court attorneys and other staff, including their particular responsibilities, current e-mail addresses, fax numbers, and current telephone numbers; judges' rules, part rules and preferences, including information as to whether the part has a second call and if so, at what time; and the procedures for adjournments, conferences, discovery schedules, and time frames.
- A statewide directory of all court personnel linked to the various local court web pages.
- The names and telephone numbers of the clerks for each department on the local court web pages.
- Online answers to frequently asked questions.
- Information about filing requirements for particular forms and a list of court forms.
- Uniform forms which can be completed and submitted either electronically or in hard copy which are compatible with *Word* and/or *WordPerfect* word-processing software programs, in both English and Spanish.
- Access to the status of filings and other matters.
- Sample pleadings and other widely used or required documents such as retainer agreements.
- A search function for the decision database in addition to listing decisions simply by date.
- Information regarding future court appearances which is uniformly available for each court by party name, index number, or firm name.

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44. The Commission also observed that some web pages, such as those of the Surrogate's Court in New York and Bronx Counties, provided insufficient information.

6. Availability of Wireless Internet Service and Other Technological Advances Recently Implemented

Wireless internet capability is available in only a few courthouses throughout the State. The court system is taking a varied approach to providing internet access within courthouses. At this time, the court system does not support vendor installations of wireless access technology within the courthouses because of the potential for interference with the courts' own equipment. Where the courts install wireless access, vendors are free to use it to offer enhanced services to attorneys such as real-time reporting in high-profile cases. Where the courts have installed wired or wireless internet access for the public, these public terminals are protected against hackers and prevent users from accessing inappropriate web sites.

The court system has developed the technology to deploy wired internet connections to any courthouse without compromising the security of "CourtNet," the court system's internal network. The court system has installed wired connections with free access to the internet at locations throughout the state. It is piloting the use of wireless technology in courthouses in Buffalo, Binghamton, and the Bronx (Housing Court). This technology will permit court staff to securely access CourtNet through wireless computers and also permit wireless access to the internet for the public without compromising the security of CourtNet. Due to the cost of installing wireless access, the court system plans to follow a targeted approach by installing wireless in specific courthouse locations rather than throughout the entire courthouse.

Several courthouses have "digital" courtrooms available for the technological presentation of evidence. Courthouses located at 60 and 100 Centre Street in New York County, as well courthouses in Suffolk, Monroe, and Onondaga counties have had an electronic courtroom for a number of years. The courthouse facility located at 330 Jay Street in Brooklyn has advanced equipment installed in each courtroom. The court system is investigating the utility of a portable system that can be moved throughout the courthouse to the courtroom of the judge hearing the case. This portable system uses standard components, and promises to dramatically reduce the cost and increase the availability of this technology to a wider number of judges and courtrooms.

To date, these rooms receive light to moderate use. Such lack of usage may result from a lack of knowledge and information on the part of practitioners.

Therefore, the Commission recommends that:

- The court system make Wireless Internet Service available in every court in which service is geographically available.
- The court system provide more plug-in availability in courtrooms and in the courthouses generally.
- Courthouses set aside at least one room equipped with computers, wireless internet access and plug-in availability, for attorneys to sit and work (and even hang their coats).
- The court system provide training in the technological presentation of evidence, which would increase the visibility of such technology to the bar.

7. Use of E-mail to Communicate with the Courts

In this Internet age, communication by e-mail is commonplace. E-mail is used to converse with family and friends. Businesses and vendors use e-mail to fill orders with suppliers and provide client support. Many solo and small firm practitioners communicate by e-mail with their clients, who are accustomed to the use of e-mail in their own personal and professional lives. E-mail expedites the communication process by allowing users to send and receive messages regardless of their location, or the time or hour of day. The Commission believes that the use of e-mail by the courts would enhance the efficiency of many court processes by saving time and money for solo and small firm practitioners and their clients.[45] Therefore, the Commission recommends that:

- Courts use e-mail to give counsel notice of the date and time of appearances.
- Courts permit practitioners to check on the status of orders to show cause and other applications by e-mail.
- The court system explore implementing a process to encourage increased communication with the courts through e-mail.

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45. The Uniform Rules of the Commercial Division provide that in cases not pending in the court's FBEM system, "the court may permit counsel to communicate with the court and each other by e-mail." See Rule 4, Section 202.70(g) of the Uniform Civil Rules of the Supreme Court and the County Court (22 NYCRR §202.70 (g)).

PART II

HOLDING DOWN THE COSTS OF PRACTICE FOR THE SOLO AND SMALL FIRM PRACTITIONER

In the Commission's survey, practitioners were asked to identify the costs of running an office and ways in which the court system, the legislature, and bar associations could assist practitioners in dealing with the economic realities of solo and small firm practice. The survey responses confirmed what many members serving on the Commission had already identified and articulated. Solo and small firm practitioners statewide have an ever-present concern about overhead expenses which affects their ability to provide the highest quality legal services. They struggle to balance the costs of practice against earning a decent living for themselves and their families in an ever increasing competitive, demanding, and expensive business environment. Practitioners explained that high overhead costs, and in particular, insurance premiums (both malpractice and health), staff salaries and related office costs, and the costs of litigation had a significant impact on their ability to operate a successful law practice.[46]

With these overhead costs increasing significantly, solo and small firm practitioners must spend more time practicing simply to meet overhead and maintain a particular standard of living. The practitioner's quality of life suffers as more and more time is devoted to meeting overhead expenses, maintaining the office, meeting mandatory requirements, and serving the client. The Commission acknowledges that many of the economic expenses of running an office are not necessarily issues in which the courts have or should have any involvement or oversight. However, as one survey participant noted, the court system should exhibit "a sensitivity and understanding that solo and small firms face many of the same overhead costs of larger firms, but not the corporate and wealthy clients."

With this in mind, Part II discusses the costs of litigation that solo and small firm practitioners bear, alternative methods to address the spiraling cost of litigation, and the enormous cost of professional liability insurance.

A. The Costs of Litigation

While clients must remain ultimately liable for the expenses of litigation,[47] practitioners often are required to advance expert fees, disbursements, filing fees, transcript fees, and other costs on behalf

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46. Many solo and small firm practitioners run their offices with minimal staff - some with only one or no full-time secretary. Besides health insurance and salaries, other expenses in operating a practice may include utilities, rent, library services, continuing legal education, technology, and other office equipment.

47. *See* Section 1200.22 of the Disciplinary Rules of the Code of Professional Responsibility (DR 5-103).

of their clients. Consequently, expert fees and disbursements are major factors of law office economics affecting the success or failure of many solo and small firm practitioners.[48]

The public hearings, survey responses, discussions with bar leaders, and the plaintiff and defense bar, demonstrated that the high cost of expert fees place an unbearable financial burden on solo and small firm practitioners. In personal injury litigation, attorneys often accept cases on a contingency basis and advance the payment of expert fees and disbursements until the conclusion of the case. If successful, the attorney recoups the disbursements and fees. However, these financial outlays can be substantial and the collection of advanced fees from clients in unsuccessful cases can be problematic. This also frequently occurs in matrimonial litigation and in other cases where attorneys advance substantial expert fees and other disbursements, notwithstanding the fact that their retainers have since been exhausted. Cases which are billed on an hourly basis raise different issues. In some circumstances, attorneys may have no choice but to proceed with a case and make significant outlays for expert fees even if the client fails to pay his or her legal fees.

While many solo and small firm practitioners who practice in the area of personal injury litigation complain about exorbitant expert fees, the Commission opposes the uniform regulation of expert fees. It believes that the regulation of expert fees would have an adverse effect on a litigant's ability to retain the best experts available and chart their own litigation strategy. Indeed, it is possible that experts would remove themselves from the market if they were subject to set fees and external regulations.[49]

When attorneys serve treating physicians with subpoenas pursuant to CPLR §2303 to give non-opinion testimony regarding the treatment of a particular patient, the subpoenas all too often are ignored. Thus, the Commission believes that the $50.00 maximum penalty provided in CPLR §2308 does not deter non-compliance with subpoenas and should be increased accordingly.

Many courts, in conjunction with local bar associations, have implemented expedited trial programs with relaxed evidentiary and expert rules in an attempt to curtail expert fees. One such program is the "Non Jury Initiative" which the Supreme and Civil Courts in Bronx County have implemented. Pursuant to the program, the parties must agree to waive costs and disbursements as well as the right to appeal from the determination of the matter by the presiding judge. Consequently, the judge's decision is binding. In personal injury cases, the plaintiff's recovery in a Non Jury Initiative trial is limited to the defendant's insurance coverage. Additionally, the parties can stipulate to a high/low limit within the insurance coverage. The limits of a defendant's insurance policy and the details of any high/low stipulation are not disclosed to the presiding judge. Attorneys do not have to submit written Findings of Fact and Conclusions of Law. Following the determination, the parties do not enter a judgment but instead exchange General Releases and Stipulations of Discontinuance.

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48. Another area of substantial financial outlay during litigation is the cost of bringing a record custodian to court to authenticate business records. In many instances the custodian charges high fees to discourage a court appearance. The Legislature alleviated this burden somewhat in 2002 by the adoption of CPLR §3122-a which allows the submission of written certification of the business records in lieu of oral testimony by a custodian of records to authenticate business records. The Commission believes that the adoption of this statute reduced such trial fees and disbursements.

49. In personal injury cases, it is not uncommon for physicians with the best credentials to decline to appear in courts as experts or to set exorbitant fees to discourage requests to testify.

Parties may offer medical records, including but not limited to, hospital records, treatment records, diagnostic test results, and narrative reports in lieu of medical testimony. Expert testimony or previously exchanged expert reports establish both past and future lost income.

A similar program designed to hold down costs and save time is the "Summary Jury Trial." Summary Jury Trials are non-binding trials by jurors conducted in accordance with strict time constraints. Each side has ten minutes for opening statements, ten minutes for closing statements, and one hour each for presentation of case witness testimonies.

"A summary jury trial is an adversarial proceeding in which jurors are asked to render a non-binding verdict after an expedited trial. (Alternatively, the verdict may be binding on consent.) In most cases, the trial is completed in one day. Limits are placed on both the time each side has to present their case and the number of live witnesses called to testify. Testimony may be presented through deposition transcripts or sworn affidavits. Key to the savings of time and expense is the submission of medical evidence through the reports of providers, rather than through live testimony. When the presentation of evidence is complete, the parties immediately deliver closing arguments. The jury is then charged and retires to deliberate..."[50]

In recent years, the Eighth Judicial District has used summary jury trials extensively. During the period 2002-2004, one day summary jury trials in Chautauqua County resulted in the resolution of 100% of the cases scheduled.[51] The program has been expanded to Niagara and Erie counties and is being tested by judges in a number of upstate courts.[52]

Unlike the Non Jury Initiative, a party has the right to a full jury trial in the event they are not satisfied with the outcome of the Summary Jury Trial, unless the parties stipulate to make the Summary Jury Trial binding. Evidence can be presented by way of video tapes, medical reports, and deposition testimonies. Parties achieve significant savings by being able to submit and/or read expert reports into the record. In addition, since the proceeding is heard by a judge and a jury, clients may prefer resolving their disputes by this method since they get their "day in court" as opposed to being directed to an arbitrator or mediator. As in the Non-Jury Initiative, the parties in the Summary Jury Trials may stipulate to a high/low parameter of a verdict.

One major benefit that is common to both the "Summary Jury Trial" and the "Non Jury Initiative" is the ability to present complex evidence such as medical evidence without the enormous cost of live expert testimony. This results in significant financial savings to the litigant and limits the enormous costs of advancing such fees by solo and small firm practitioners.

Therefore, the Commission recommends that:

- Since the "Non Jury Initiative" and the "Summary Jury Trial" used in some jurisdictions are both practical methods of resolving cases without incurring

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50. Hon. Ann Pfau, First Deputy Chief Administrative Judge, New York State Unified Court System, *Comprehensive Civil Justice Program 2005: Study and Recommendations,* pp. 44-45, citing the New York State Supreme Court, Eighth Judicial District, *Summary Jury Trial Program Manual.*

51. Id. at p. 45.

52. Id. at p. 45.

- exorbitant expert fees and litigation expenses, the court system should implement such programs on a statewide basis as alternatives to regular trials in a process established as follows:
    1. At the time a note of issue or notice of trial is filed, the plaintiff should be given the option to elect an "expedited trial" in the form of a Non Jury Initiative or a Summary Jury Trial.
    2. Within twenty days of the plaintiff requesting a Non Jury Initiative or a Summary Jury Trial, the defendant should have the right to serve and file an objection to the plaintiff's request, and state the reasons why said request is being objected to.[53]
    3. In the event the plaintiff does not request the Non Jury Initiative or the Summary Jury Trial, the defendant should have the right to make a request for a Non Jury Initiative or a Summary Jury Trial within twenty days of the plaintiff filing and serving a note of issue.
    4. All cases which are placed on a Non Jury Initiative or a Summary Jury Trial track should be scheduled for a trial date, no later than 120 days after the filing of a note of issue.[54]
    5. For good cause shown, parties should be permitted to opt out of the Non Jury Initiative or a Summary Jury Trial track and have their case restored to the general trial calendar in the same position commensurate with the initial filing date of the note of issue. A judge in his/her discretion may advance the case on the general calendar.[55]
- In order for the above processes to serve as effective methods of saving or reducing expert fees and litigation expenses, the applicable rules (*see* CPLR § 3101 (d); 22 NYCRR §202.17) regarding expert retention and disclosure should be examined and amended as necessary.
- The New York State Legislature should increase the $50.00 financial penalty set forth in CPLR § 2308 to foster greater compliance with judicial subpoenas.

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53. Requiring the parties to make the selection at the time the note of issue or notice of trial is filed will encourage the parties to carefully evaluate their cases, including value, potential recovery, and the cost of experts.

54. This would encourage attorneys to utilize the expedited trial programs if it will bring a fast resolution to their clients' cases at reduced costs.

55. In the event a case becomes more complex, or for any other good reason, after a Note of Issue or notice of trial is filed, either party should be permitted to transfer out of the expedited trial program to the regular trial calendar. An application for transfer should be made to a judge, so as to prevent either party from transferring out of the expedited trial program solely to delay a trial and prejudice the other party.

B. Alternative Dispute Resolution as an Alternative to Litigation

In alternative dispute resolution ("ADR"), a third party helps litigants resolve their controversies outside of the litigation. Courts utilize various forms of ADR programs to facilitate the resolution of disputes throughout New York State.

The following is a list of ADR programs available throughout the court system:

First Judicial District
New York County Supreme Court, Commercial Division, Multi-Option ADR Program
New York County Supreme Court, Civil Division, Neutral Evaluation Program
Second Judicial District
Kings County Supreme Court, Commercial Division, Mediation Program
Kings County Supreme Court Neutral Evaluation Program for Matrimonial Cases
Fourth Judicial District
Schenectady County Supreme Court Child Custody/Visitation Mediation Program
Seventh Judicial District
Seventh Judicial District Supreme Court Child Custody/Visitation Mediation Program
Monroe County Supreme Court, Civil Division, Mediation Program
Eighth Judicial District
Erie County Supreme Court Multi-Option ADR Program for Civil Cases
Erie County Supreme Court Neutral Evaluation Program for Matrimonial Cases
Chautauqua County Supreme Court Summary Jury Trial Program for Personal Injury Cases Under $100,000
Ninth Judicial District
Orange County Supreme Court Multi-Option ADR Program for Matrimonial Cases
Westchester County Supreme Court Mediation Program for Matrimonial Cases
Westchester County Supreme Court, Commercial Division, Mediation Program
Tenth Judicial District
Nassau County Supreme Court, Commercial Division, Mediation Program
Nassau County Supreme Court Neutral Evaluation Program for Tort Cases
Nassau County Supreme Court Neutral Evaluation Program for Matrimonial Cases
Nassau County Supreme Court, Civil Division, Voluntary Arbitration Program for Tort Cases

These programs have demonstrated success. For example, in a two year period, through the New York County neutral evaluation program, parties settled 3,352 cases and during 2004, the neutral evaluators in Erie County resolved 621 cases.[56]

Quite a few courts also use mediation successfully to resolve cases before trial and thereby save litigants and attorneys time and money. In the mediation programs developed in the Commercial Parts in New York, Erie, Nassau, and Westchester Counties, selected cases are referred to mediation after a preliminary conference or at any other time deemed appropriate by the judge. The New York County program accepts cases referred from the Justices of the Commercial Division, as well as those outside

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56. Hon. Ann Pfau, First Deputy Chief Administrative Judge, New York State Unified Court System, *Comprehensive Civil Justice Program 2005: Study and Recommendations,* p.43.

of the Commercial Division. In the Eighth Judicial District, staggered calendars are used for mediation cases.

The Commercial Division in New York County Supreme Court operates a successful court-annexed mediation program. Moreover, in 2004, of the 274 commercial cases referred to mediation in New York County, 192 cases completed the process, with a favorable resolution occurring in 104 cases (54%).[57] In Monroe County in the Seventh Judicial District, the Court utilizes the services of a full time mediator on a non-mandatory basis. However, the program has not been operating for a sufficient length of time to generate statistics regarding its success.

One of the Commission's survey questions asked lawyers for their opinions regarding court mandated mediation. A majority of the respondents did not favor mandatory mediation. Some commented that mediation should be mandated in personal injury cases and defendants compelled to arrange for adjusters to be present at the mediation. Some commented that to be successful, parties should be present at mediation. Some survey participants referred to the New York City Mediation parts at 80 Centre Street as "cattle calls" with attorneys sometimes spending the better part of the day waiting for their adversaries to appear. Others noted the benefits of mediation as a means of resolving legal disputes without expending expert fees.

The Commission acknowledges the frustration expressed by practitioners about mediation and other ADR programs. When these programs work, they work well. However, the availability and use of such programs vary tremendously throughout the state. Thus, there is a real need for the court system to examine these programs to assess which methods work best and why, and implement those programs on a statewide basis.

Therefore, the Commission recommends that:

- The court system establish a task force to study ADR programs and issue a comparative analysis to define the landscape of such programs in the courts in the years ahead.
- The court system establish statewide programs, regulations, and evaluation processes to ensure best practices in ADR.
- The court system establish enhanced standards whereby neutrals such as mediators undergo extensive negotiation and settlement training and are subject to periodic evaluation; these standards should include provisions that neutral volunteers should be experienced attorneys, chosen with the assistance of the local bar associations and administrative judges.
- The court system review and evaluate the mandatory mediation programs currently in effect in the various Judicial Departments in New York State to determine if mandatory mediation should be required, particularly in cases with ad damnum clauses of less than $100,000.
- The court system examine whether participation in neutral evaluation programs should be mandated.
- ADR programs should require parties to be present. With respect to defendants represented by insurance carriers, insurance adjusters or someone with authority to settle on behalf of defendants should be present or available by telephone.

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57. Hon. Ann Pfau, First Deputy Chief Administrative Judge, New York State Unified Court System, *Comprehensive Civil Justice Program 2005: Study and Recommendations,* p.44.

- With respect to those counties where mediation is required prior to trial, Court Scheduling Orders should be revised to include dates and times for mediation in mediation parts with attorneys required to be present at scheduled times; mediation should be held at the outset of the case after filing of the pleadings, and again after the note of issue has been filed.

C. Support the Award of Counsel Fees for Non-Monied Spouses

Matrimonial litigants throughout the state often rely on solo and small firm practitioners for representation.[58] It is elementary that in order to stay in business, solo and small firm practitioners rely on the timely payment of their legal fees. Where clients cannot pay their attorneys these fees, it is in the discretion of the court whether to award legal fees and costs to the "non-monied" spouses who seek to have their "monied" spouses pay counsel fees and costs, including interim fees. The Commission found that courts are too often inconsistent in first awarding such fees and then enforcing their payment.

Since such an award is a discretionary matter, practitioners may decide that the uncertainty of payment of their fees precludes them from offering representation to non-monied spouses who seek their representation. Others must decide whether to seek withdrawal from the matter, even if trial is imminent. While this adversely impacts the solo and small firm practitioner, it also prejudices the non-monied spouses they serve.

Indeed, without an adequate award of counsel fees, a non-monied spouse is at a tremendous disadvantage. To obtain an award, the non-monied spouse must secure an attorney who will take the case with the expectation of an award of counsel fees and incur legal fees for the cost of such an application. As a practical matter, it is common for monied spouses to ignore the resulting order. The non- monied spouse and his or her attorney must then expend additional efforts in an attempt to secure an order from the court enforcing the award. These difficulties hinder the efforts of non-monied spouses in securing counsel and may result in parties appearing *pro se* in matrimonial actions.

To address these issues, the Commission believes that the judiciary should be more pro-active in ordering and enforcing awards of counsel fees and costs to non-monied spouses and recommends the following:

- Judges assigned to matrimonial parts receive specific training relating to awards to non-monied spouses to ensure the proper issuance and expeditious enforcement of such awards as may be appropriate.

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58. In 2004, Chief Judge Judith Kaye appointed the Matrimonial Commission, chaired by the Honorable Sondra Miller, former Associate Justice of the Appellate Division, Second Department. The Chief Judge charged this panel with probing every facet of divorce in New York and offering recommendations for reform. The Commission acknowledges the extensive work performed by the Matrimonial Commission regarding counsel fees and other issues facing matrimonial litigants and their counsel. We look forward to the imminent release of their report and recommendations.

- The court system should explore implementing streamlined procedures for securing and enforcing counsel fee awards.[59]

D. Attorney Malpractice Insurance and the Impact on Solo and Small Firm Practitioners

Early on, the Commission identified the availability and affordability of professional malpractice insurance in the State of New York as troubling issues for solo and small firm practitioners. In its survey, the Commission asked several questions designed to solicit information as to the annual premium amounts paid by these practitioners for attorney malpractice insurance. The Commission's Law Office Economics Subcommittee also contacted current and former administrators at the New York State Insurance Department.

The rising cost of malpractice insurance premiums and the availability of coverage from the best rated and admitted insurance carriers in the State of New York raised concerns for the Commission. While the survey was not intended to produce statistical results, responses to survey questions on regarding average annual attorney malpractice premiums varied widely, ranging from several hundred to several thousand dollars. [60] Notably, and very disconcertingly, some participants responded that they do not carry any professional malpractice insurance.[61]

An astonishing 26 percent of solo and small firm practitioners (defined as one to nine attorneys in a firm) do not carry professional liability insurance.[62] The average annual premium statewide for that same category has been reported to be somewhere between $2,790 and $3,118.[63]

In response to a specific Commission inquiry, the State Insurance Department indicated that the Department was unaware of "any problems of availability of professional liability insurance for

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59. Where appropriate, courts may consider whether an order should designate the counsel fee award as a form of spousal support and/or child support to avoid discharge in bankruptcy (*see* 11 USC §523(a)(5) and 11 USC §101 (14A)).

60. What is not known is whether there is any difference in premiums based upon individual practice areas; that is, some practice areas, where carriers require more detailed information by way of supplements to their application for professional malpractice insurance (*e.g.*, securities law), presumably have higher premiums attributable to that practice area.

61. There is no requirement under New York State law that an attorney admitted to practice law in the State of New York carry professional malpractice insurance. It is not uncommon, however, that a client require that his or her attorney carry minimum amounts of coverage in the area of representation that the attorney is providing for the client.

62. New York State Bar Association, *The 2004 Desktop Reference on the Economics of Law Practice in New York State, Benchmarks and Referents for Law Practice Management*, 2004, p. 63.

63. Id. at p. 63.

attorneys in solo or small practices."[64] Based upon the survey results and testimony received at its three public hearings, the Commission believes that the question is not necessarily limited to "availability." Rather, it believes that the question relates to both availability and affordability of professional malpractice coverage from the best rated and admitted insurance carriers in the State of New York. The Commission also concluded that those individuals most affected by this problem (i.e., solo and small firm practitioners) simply have not complained to the New York Insurance Department.[65]

Notwithstanding, it is very clear from the responses to the Commission's survey that this may indeed be a significant issue. As noted earlier, 26 percent of solo and small firm practitioners do not carry professional liability insurance at all, a troubling statistic from a public policy perspective.

In order for solo and small firm practitioners to obtain competitive premiums from a wide range of the best rated and admitted insurance carriers offering coverage, New York needs a more competitive professional malpractice insurance market. The Commission considered that one way to accomplish this may be the enactment of a new rule requiring that all lawyers admitted to practice law in the State of New York carry a minimum amount of professional malpractice insurance coverage. [66] Commission members, after careful consideration and much discussion - demonstrated by a closely divided vote- chose not to recommend that the State Legislature (or the Appellate Divisions) require that admitted attorneys carry minimum amounts of professional malpractice insurance as a condition of practicing law in the State of New York. The Commission acknowledges such a new mandate would cause alarm across the legal community. The Commission does strongly recommend, however, that all attorneys practicing law in the State of New York voluntarily carry minimum levels of professional malpractice insurance for their own benefit as well as for the benefit of the clients whom they serve.

The Commission also recommends that the court system create a task force to review the availability and affordability of malpractice insurance in New York State. Such a task force could review whether professional liability insurance policy premiums would be less expensive than they are today if all practicing attorneys in the State of New York were required to carry minimum amounts of

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64. Letter dated June 30, 2005 from Mark Presser, Assistant Deputy Superintendent and Chief, Property Bureau, New York State Insurance Department. Greg Serio, former Superintendent of Insurance, also echoed this sentiment to David Meyers, Esq., Chair of the Law Office Economics Subcommittee.

65. Similarly, it would seem likely that those law firms which would not be considered small firms (i.e., those firms with more than nine practicing attorneys) simply cannot afford to not have professional liability coverage for their practices.

66. No such requirement currently exists. By comparison, in order to obtain "attending and consulting privileges" in a medical center in the State of New York, medical doctors must carry medical malpractice insurance. As a result, a market has been created in New York of four to five medical malpractice insurance carriers that provide licensed doctors in the State of New York with, comparatively speaking, cost effective insurance products. In addition, because the actual medical institutions also carry their own medical malpractice insurance policies, those institutions subsidize the individual policy premium rates.

coverage.[67] According to OCA, as of December 31, 2004, there were just over 215,000 attorneys registered to practice law in the State of New York. From an economics standpoint, if the legal community replicated the medical profession by requiring that attorneys carry professional liability coverage, a more competitive market of insurance carriers might result. Likewise, because the medium to larger firms in New York could under no circumstances afford not to carry professional malpractice insurance policies, those medium to large sized firms could conceivably subsidize the policy premium rates for solo and small firm practitioners.

The task force should also consider public policy arguments that favor requiring licensed attorneys to carry professional malpractice insurance. For example, some believe that requiring attorneys to carry minimum amounts of professional liability insurance coverage would protect attorneys from litigious clients. Of course, clients would have protection from attorneys who commit malpractice.

In its study of the issue the Commission sought national data on malpractice coverage. The Commission found that only Oregon mandated professional liability malpractice insurance for its legal community and has done so since 1977. Oregon's experience indicates that the requirement of mandatory malpractice insurance has done two things: (a) because mandatory malpractice insurance covers all claims, there is no incentive not to report claims, and (b) the emphasis in Oregon, as a result, is on malpractice prevention.[68]

In addition, the Commission recommends that the task force investigate, in conjunction with bar advocacy groups, whether the current Client Security Fund should be expanded to insure other risks. All attorneys admitted to practice in the State of New York must register biennially, whether they are resident or nonresident, active or retired, or practicing law in New York or anywhere else.[69] The fee for this registration is $350, of which $60 is deposited in the Lawyers' Fund for Client Protection, $50 is allocated to the Indigent Legal Services Fund, and the remainder is deposited in the Attorney Licensing Fund.[70] The Lawyers' Fund for Client Protection is a self-insurance plan that the State of New York provides to protect those individuals who may have lost money as a result of, among other things, the theft of funds by their attorney. Such a fund could possibly absorb other risks. Additionally,

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67. Some of the evidence the Commission received during the course of its public hearings, review of surveys, and general investigations, suggests that this would be the case. Whether this is "economically" true, however, is beyond the scope of examination, as well as the expertise, of this Commission.

68. See commentary at http:/victimsofthesystem.org/commentary.html, citing Jeff Crawford, Director of Administration for the Oregon State Bar Professional Liability Fund. The commentary also states that Oregon malpractice insurance costs $1,800 per year for the mandatory $300,000 coverage and that the Oregon State fund sells additional insurance coverage for amounts in excess of $300,000.

69. Section 468-a of the NY Judiciary Law and Section 118 of the Rules of the Chief Administrator (22 NYCRR §118).

70. No fee is required from an attorney who certifies that he or she is retired from the practice of law, see Part 118.1(g) of the Rules of the Chief Administrator (22 NYCRR §118.1(g)).

there may be other risk-spreading methods that the Lawyers' Fund for Client Protection can utilize to enable it to take on other types of professional liability coverages. For example, this pool of money, or a portion of it, could be made available to the private insurance market so that an even better and more competitive market of insurance products would be created by more admitted carriers.[71]

In summary, the Commission recommends that:

- All attorneys practicing law in the State of New York voluntarily carry minimum levels of professional malpractice insurance.
- The court system create a task force to review the availability and affordability of malpractice insurance in New York State.

71. While the Commission suspects that markets would be created if there was compulsory coverage, both on the underwriter side and the producer side, it is beyond the expertise of the Commission to forecast such a result.

PART III

REDUCING REGULATORY BURDENS ON THE SOLO AND SMALL FIRM PRACTITIONER

Solo and small firm practitioners throughout the State overwhelmingly expressed to the Commission that they oppose any further mandatory rules and regulations imposed on their practices. As a result of hearing this sentiment expressed repeatedly, the Commission decided to examine the economic effect of regulation on the solo and small firm.

During the past 20 to 30 years, the practice of law has become more subject to business pressures. Lawyers, especially in small-sized offices, must operate in an efficient, and economically sound fashion -- as should any prudent business owner. The Commission sought to determine whether the imposition of new rules and regulations on a regular basis impacts the practice of law.

Part III reports on the Commission's findings with respect to rule-making and specific areas of regulation including continuing legal education, fee arbitration, grievance and disciplinary procedures, and certain matrimonial requirements.

A. Rule-Making and its Effect on Attorneys

The data gathered by the Commission reveals that many solo and small firm practitioners feel excluded by the court system in two key areas; first, in not learning of commissions, panels and committees that are formed to consider the revision of rules and/or the creation of new rules; and second, by having little or no opportunity to provide input and comment on regulatory proposals before their enactment. Yet, rule changes significantly impact the day to day operation of a solo and small firm practice. Examples of such rules include the 1993 "Matrimonial" or "Milonas" rules and the more recent changes to Part 36 of the Uniform Rules on Fiduciary Appointments.

Input from the bar and practitioners allows rule-making authorities to weigh the effects of regulatory proposals on the practice of law. An open rule-making process generates comparative analysis for rule-makers which yields thoughtful and outcome-based regulations. For example, a new subdivision (h) to section 202.8 of the Uniform Civil Rules for the Supreme and County Courts was recently promulgated which requires practitioners to send a letter to a judge who has failed to decide a motion within 60 days of submission or argument. The letter calls to the court's attention that the parties are still waiting for a decision. Since all counsel must comply with this rule, the court cannot hold it against counsel for making the required inquiry. Initially, such a regulation appears to move the litigation process forward by allowing attorneys to call to task errant judges without fear of reprisal. In actuality, this practice forces attorneys to take one more step, with the corresponding increase in client billing, without necessarily having the desired effect on recalcitrant judges. In situations such as these, an open dialogue between regulators and practitioners may have generated other methods to solve the problem. A process to analyze the effect on attorneys could have evaluated the added burden on counsel.

The court system publicizes proposed rules and changes and not only disseminates proposed rules to bar associations statewide, but also submits the texts of proposed and newly promulgated rules

for publication in legal newspapers such as the New York Law Journal. The court system also posts rule changes on its website.

While proposed changes may receive adequate coverage in legal newspapers such as the metropolitan, New York City based New York Law Journal, the Commission found that upstate and rural practitioners across New York State do not read downstate publications on a daily basis or at all. Moreover, bar members do not necessarily know about proposed changes if bar leadership does not have an adequate mechanism for keeping members informed. Notably, not all solo and small firm practitioners belong to bar associations.

The Commission considered how to address these perceptions and practices, and sought guidance from existing frameworks established within the state's executive branch. The Commission looked at the procedures imposed upon state agencies pursuant to the State Administrative Procedure Act ("SAPA").[72]

The New York State Constitution vests in the Chief Judge the responsibility for the administration of the courts.[73] The Chief Judge delegates numerous powers and duties to the Chief Administrator who supervises on behalf of the Chief Judge the administration and operation of the court system.[74] For example, the Chief Administrator is vested with the authority to adopt administrative rules for the efficient and orderly transaction of business in the trial courts, in consultation with the Administrative Board of the Courts[75] or the appropriate Appellate Divisions.[76] The Appellate Divisions are authorized to adopt rules regulating attorney conduct.[77]

These ruling-making authorities in the judicial branch are not obligated to adhere to the provisions of SAPA -- since the judiciary is not a state agency.[78] While the Commission acknowledges that the provisions of SAPA do not apply to the powers of the judiciary, the Commission observes that many, though not all, of the SAPA provisions address the concerns expressed by solo and small firm practitioners. For example, SAPA provides that in the development of a new rule, State agencies shall consider utilizing approaches that will minimize adverse economic impact on small businesses.[79] By

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72. See McKinney's Consolidated Laws of New York Annotated : Book 56A, State Administrative Procedure Act.

73. Article VI Section 28 of the New York State Constitution.

74. Article VI Section 28 of the New York State Constitution.

75. The Administrative Board of the Courts consists of the Chief Judge and the Presiding Justice of each of the four Appellate Divisions.

76. Section 80.(b)(6), Administrative Delegation of the Chief Judge, Number 1.

77. NY Judiciary Law §90.

78. Section 102(1) of such act specifically states the term "agency" does not include "agencies in the legislative and judicial branches." *See also People v Granatelli,* 108 Misc. 2d 1009 [1981].

79. SAPA §202-B.

analogy, solo and small firm practitioners should receive similar consideration by rule-making authorities.[80]

The Commission recognizes that rule-making authorities currently employ a number of procedures designed to provide notice of rule-making. After much discourse and deliberation, the Commission recommends that rule-making authorities adopt (or continue) the following steps as part of a regular course of rule-making practices to benefit solo and small firm practitioners:

- Before any rule-making authority establishes any new rule and/or regulation that would affect the day-to-day practice of law by attorneys within the State of New York, the rule-making authority should submit a notice of the proposed rule/regulation to the various bar associations throughout the state - local, speciality, and state associations - as well as cause the same to be posted prominently in the courthouses throughout the State of New York and on the UCS website at least ninety (90) days before the implementation date of the rule/regulation.
- Bar associations and/or individual attorneys admitted to practice in the State of New York should be afforded the opportunity to submit written comments on the proposed rule at any time within 45 days of the date of receipt of the aforesaid notice of proposed rule and/or regulation from the rule-making authority.
- When a rule- making authority determines that a proposed rule change will have a substantial economic impact on the profession, it should consider holding a public hearing within each of the four departments at a date, time and location convenient for members of the bar in order to entertain oral comment on the proposed rule and/or regulation. The public hearing should be conducted no later than sixty (60) days after the publication of the notice set forth above.
- If a rule-making authority decides to adopt a proposed rule/regulation, it should consider utilizing approaches designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule or regulation upon attorneys throughout the State.
- Upon publishing a proposed rule or regulation, a rule-making authority should set forth in writing the projected costs for the implementation of and compliance with the rule upon attorneys. If such an estimate of costs cannot be established, through court system data the rule-making authority should include a reason or reasons why the estimate is not provided.
- Upon publishing a proposed rule or regulation, a rule-making authority should set forth in writing the necessity and benefits to be derived from the rule.
- Upon publishing a proposed rule or regulation, a rule-making authority should publish a statement detailing what, if any, reporting requirements, forms or other paperwork attorneys will be required to prepare as a result of the rule being proposed.

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80. The Commission believes that bar associations stand ready to assist in providing data on the economic impact of proposed rules on practitioners.

- Upon publishing a proposed rule or regulation, a rule-making authority should set forth in writing any other considerations that led to the proposed rule-making.
- After completion of the above procedures, and after due consideration of the comments received, a rule-making authority may (a) withdraw the proposed rule, (b) proceed to adopt the proposed rule, or (c) modify the proposal and seek written comments on the said modification.

B. Mandatory Continuing Legal Education and Assigned Counsel Cases

The Commission supports the fundamental purposes behind continuing legal education - that practitioners need to stay current and competent in their fields of practice. However, many survey participants expressed their concern about the cost of courses, diminishing practical benefits, and the loss of billable time while attending Mandatory Continuing Legal Education ("MCLE") programs.

The Commission discussed the wide availability and mix of course offerings. It also examined the perception that the quality of courses is inconsistent. The rules regulating such programs direct that continuing legal education courses or programs comply with certain standards.[81] For example, the rules provide that "the course or program must have significant intellectual or practical content and its primary objective must be to increase the professional legal competency of the attorney in ethics and professionals, skills, practice management and/or areas of professional practice" and shall be "taught by instructors with expertise in the subject matter."[82] However, the Commission believes that the Continuing Legal Education Board ("CLE Board")[83] should explore better ways to ensure compliance with these provisions and review accredited providers and their programs.[84] Further, as noted above, the Commission suggests that the court system publicize that attorneys may receive MCLE credits for technology courses as part of their MCLE requirements.[85]

The Commission also noted how MCLE has been given to encourage pro bono services.[86] The Commission believes that participants in assigned counsel programs should also receive MCLE credit

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81. *See* Section 1500.4(b) of the Rules of the Supreme Court, Appellate Division, All Departments (22 NYCRR §1500.4(b)).

82. *See* NYCRR §1500.4(b)(2), and (3).

83. The CLE Board consists of 16 resident members of the bench and bar. Three members are chosen by each of the Presiding Justices of the Appellate Divisions, and four members are selected by the Chief Judge. The Chief Judge designates the chair. Board members serve at the pleasure of the Administrative Board of the Courts. *See* 22 NYCRR §1500.3.

84. *See* NYCRR §1500.4(c)(4).

85. *See* NYCRR §1500.2(e).

86. *See* NYCRR §1500.22(j).

to bolster participation in assigned counsel programs.[87] The Commission heard testimony and considered the effects of the January 2004 assigned counsel fee increases on the availability of assigned counsel. While it did not study this issue extensively, the Commission recommends that proper consideration be given to provide that MCLE credit is earned for services provided by practitioners through assigned counsel work. For example, there are numerous organizations within New York State that provide and facilitate organized pro bono services such as the Erie County Bar Association Volunteer Lawyers Project ("VLP"). Such programs are certified[88] to offer one MCLE credit for every six hours of pro bono work, with a maximum of six MCLE credits per reporting period. No more than six hours of MCLE credit may be given in a two-year reporting period for performing pro bono legal services.

The CLE Board could establish a similar accreditation and formula for the various assigned counsel programs. The Commission does not intend this recommendation to create competition for participation between the assigned counsel and pro bono programs. To prevent such a problem, assigned counsel participants should earn less credit than pro bono counsel. As noted above, pro bono attorneys may receive up to one credit hour of MCLE for every six hours of legal work performed and no more than six hours of MCLE credit in any two-year reporting period. The Commission suggests assigned counsel receive one MCLE credit for every 12 hours of assigned counsel work, with a maximum of four MCLE credits per reporting period. While this formula does not make the assigned counsel program more lucrative for attorneys, it could make participation less financially onerous. The issuance of MCLE credit for such work saves the practitioner some of the costs usually borne for such training. At the same time, the formula would allow the attorney to continue to earn a fee for the time spent.

Similarly, volunteer neutrals who participate in court-annexed alternative dispute resolution programs should receive MCLE credits. This would encourage more participation in programs designed to decrease the burdens of litigation costs for litigants.

In summary, the Commission recommends that:

- The CLE Board review the panoply and quality of course offerings as part of the mandatory re-certification of MCLE providers.
- The court system publicize that attorneys may receive MCLE credits for technology courses as part of their MCLE requirements.
- Assigned counsel receive one MCLE credit for every 12 hours of assigned counsel work, with a maximum of four MCLE credits per reporting period.
- Volunteer neutrals who participate in court annexed alternative dispute resolution programs receive MCLE credits for their work.

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87. In 2004, Chief Judge Judith Kaye appointed the Commission on the Future of Indigent Defense Services. Chaired by former Judge Burton Roberts and Professor William Hellerstein, this Commission was asked to take a top-to-bottom look at New York's existing indigent defense system. Our Commission acknowledges this Commission's work in evaluating existing programs to provide access to justice for criminal defendants and looks forward to the imminent release of their report.

88. *See* NYCRR §1500.22(j).

C. Disciplinary Grievance Procedures

Throughout the course of its work, various individuals suggested to the Commission that statewide uniformity in the handling of disciplinary proceedings brought against members of the bar would benefit solo and small firm practitioners. In response, the Commission reviewed the attorney discipline processes throughout the state.[89]

State residents merit competent legal representation. An attorney's competency is reviewed initially when an applicant to the New York State Bar must take and pass the bar examination ("bar exam") given by the New York State Board of Law Examiners. In addition to legal theory, the test also includes a professional responsibility section. Upon passage of the bar exam, each applicant must submit affidavits, references, and records to a Character and Fitness Committee within his or her Appellate Division. The Committee recommends individuals for admission only if the Committee is satisfied that the individuals possess the appropriate moral character and fitness to practice law. Once admitted, an attorney must certify on a regular basis to the Chief Administrator of the Courts that he or she has taken a required number of MCLE courses during the past reporting period. Attorneys must derive a portion of those credits from courses that teach ethics and professionalism. Each of the four Appellate Divisions of the New York State Supreme Court has been authorized by statute to censure, suspend, or disbar attorneys guilty of "professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice ...."[90] Unlike other states, New York administers the disciplinary process by the Appellate Division within each Department.[91] In 1990, the Appellate Division jointly adopted the Lawyer's Code of Professional Responsibility as a standard for regulating attorney conduct.[92]

Each Appellate Division is authorized by statute to establish its own rules and procedures to investigate allegations of attorney misconduct, to prosecute the same and to impose sanctions, if warranted.[93] These various rules address:

1. Composition of attorney grievance committees;
2. Investigative procedures;
3. Notice of charges;

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89. The legal profession is the only profession within the State of New York regulated outside of the executive branch of government. The New York State Education Department's Office of Professional Discipline investigates most other professions and, if necessary, prosecutes them. The New York State Department of Health Office of Professional Medical Conduct ("OPMC") investigates and, if necessary, prosecutes misconduct by physicians and physician assistants.

90. *See* Judiciary Law §90(2).

91. The rules adopted by the different Departments are located as follows: First Department at 22 NYCRR Part 603; Second Department at 22 NYCRR Part 691; Third Department at 22 NYCRR Part 806; and Fourth Department at 22 NYCRR Part 1022.

92. *See* 22 NYCRR §1200.

93. *See* Judiciary Law §90.

4. Hearing opportunities;
5. Appeal rights;
6. Penalties; and
7. Resignations and reinstatement procedures.[94]

The rules of each of the four departments establish an Attorney Grievance or Disciplinary Committee. Although similar in nature, there are some differences among the departments. The First and Third Departments have a single committee. The Second and Fourth Departments have three committees that sit in each district. The number of attorneys on each committee varies and some non-lawyer members of the public also sit on the committees. A chief attorney and staff consisting of attorneys, investigators, and clinical personnel - all employees of the court system - support the grievance committees.

After the staff receives and reviews a particular complaint (usually required to be in writing), the staff and the committee decide if there is a basis to proceed with an investigation. If no basis exists, the Committee dismisses the complaint. Otherwise, an investigation begins and includes interviews of witnesses, solicitation and review of documents and records, and the request of a written answer from the respondent attorney. The respondent attorney may be asked to submit to an exam under oath with a staff attorney or to appear before a panel of grievance committee members.

Upon completion of the investigation one of the following may occur:

1. The matter may be dismissed;
2. If serious misconduct is found, (such as abuse of trust account funds for personal purposes), the Committee may recommend that formal proceedings be instituted by the Appellate Division;
3. Under some circumstances, the committee may issue letters of caution or admonition. Within the First Department, reprimands can be issued, and dismissals with caution within the Second Department; or
4. In the Third Department, an attorney may be issued a Letter of Education that is non-disciplinary in nature; however, it may be considered in the event of subsequent allegations of misconduct.

The Second, Third, and Fourth Departments delegate jurisdiction over minor matters to county bar associations. In the First Department, the departmental grievance committee handles all complaints.

When the Appellate Divisions receive serious matters for the purpose of commencing formal proceedings, sanctions may result. These include censure, suspension, or disbarment. If an attorney is suspended or disbarred, he or she may seek to be reinstated by the Appellate Division at the conclusion of the suspension or seven years after disbarment.

The Appellate Division, Second Department released new rules relative to the disciplinary process on July 27, 2005.[95] The new rules include:

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94. In addition to examining the rules of the Appellate Divisions, Commission members consulted the following sources: New York State Bar Association, *Government Law & Policy Journal*, Vol. 7, No.1, Summer 2005; New York State Bar Association, *Legal Handbook*, Ch. 21, p.15.

95. Available at: http:/www.nycourts.gov/courts/ad2/pdf/AdministrativeOrderADM2005-07221-ReAttorneyAdmissionDisciplineAndReinstatement.pdf.

1. A reduction of the minimum suspension period from one year to six months (other departments allow suspensions of three months);
2. If an attorney is suspended for one year or less, there will no longer be a requirement that a judge or referee investigate and review a reinstatement application from the suspended attorney;
3. In cases where an application for reinstatement is denied, the new Court rule will require that there be a one year waiting period before an attorney can submit a new application for reinstatement;
4. The Court rejected a recommendation to impose term limits on members of the Department's Grievance Committees; the Third and Fourth Departments limit a member to serve two three-year terms;
5. The Court also ruled that those seeking admission must undergo a criminal background check and newly admitted attorneys must participate in an ethics orientation program.

Over ten years ago, the New York State Bar Association's Committee on Professional Discipline conducted a comprehensive study of the lawyer discipline system in New York State and presented a report to the Bar Association House of Delegates.[96] While the House of Delegates approved some of the Committee's recommendations, it rejected the recommendations that called for uniform disciplinary procedures. That 1995 Report represents the last time such a study has been conducted. The formal Report consisted of 344 pages and included a draft of proposed uniform rules and procedures for departmental disciplinary committees in all four appellate divisions. The Report asserted that the proposed rules were intended to accomplish four objectives:

1. Provide a clear statement of the procedures by which lawyers are disciplined;
2. Establish, statewide, a uniform system for such procedures;
3. Promote the fair, prompt and efficient disposition of complaints of professional misconduct; and
4. Allow, where the public interest requires, greater public access to disciplinary proceedings. [97]

The Commission encourages the review of existing procedures by the departments in order to promote consistency in the imposition of sanctions throughout the state. Uniform statewide procedures would: clarify the procedures by which attorneys are disciplined; establish a statewide, unified system for discipline; and permit consistency in the imposition of sanctions throughout the state.

In order to create such a uniform system, the Commission recommends that:

- The New York State Legislature amend the Judiciary Law to vest in the Administrative Board of the Courts the responsibility to establish uniform rules and procedures for the attorney disciplinary process in all four Appellate Divisions.
- Absent such legislation, the Appellate Divisions adopt statewide uniform rules.

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96. The New York State Bar Association Committee on Professional Discipline, *Lawyer Discipline in New York*, February 10, 1995.

97. Id. at p. 52.

D. Procedures for Resolving Fee Disputes

In reviewing the issue of attorney regulation in New York State, the Commission undertook a review of the fee dispute resolution program[98] which provides for the informal and expeditious resolution of fee disputes between attorneys and their clients through arbitration.[99] The "Part 137" program applies to disputes where representation in civil matters commenced on or after January 1, 2002.[100] In accordance with set procedures for arbitration, arbitrators determine the reasonableness of fees for professional services rendered, including costs, taking into account all relevant facts and circumstances.

A Board of Governors administers the Fee Dispute Resolution Program statewide.[101] The Board of Governors consists of 18 members - 12 members of the Bar of the State of New York and six members of the public who are not lawyers. The Chief Judge and the Presiding Justices of the Appellate Divisions are each permitted to select a specified number of attorney members and public members. The Board of Governors oversees the creation and operation of the fee dispute programs subject to the approval of the Presiding Justices of the Appellate Divisions of each department. The Board of Governors strongly encourages arbitration programs to offer mediation services as well.

Many local bar associations administer the individual programs in counties throughout the state. In some districts, the local programs are administered by the District Administrative Judge. The individual programs have the discretion to create local written instructions and procedures for administering their programs which are subject to approval by the Board of Governors. Fee dispute programs are not uniform across New York State, but vary from local program to local program.

Arbitration is not binding unless the parties and the attorneys sign a document consenting to final and binding arbitration. Otherwise, the aggrieved party may file for a *de novo* review of the arbitrator's decision within 30 days after the decision has been mailed. The amount in dispute must be more than $1,000 but less than $50,000, except that a local program may hear disputes involving other amounts if the parties have consented.[102] In disputes involving amounts less than $6,000, the dispute is submitted to one attorney arbitrator.[103] In disputes involving the sum of $6,000 or more, the

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98. The Commission reviewed materials including the Board of Governors' 2004 Annual Report to the Administrative Board of the Courts with Appendices; the Task Force on Client Satisfaction Subcommittee on Fee Dispute Resolution, October 1998 Final Report to the Administrative Board of the Courts; the Ninth Judicial District Fee Dispute Resolution Program Annual Report for the Period of February 23, 2003 through December 31, 2003; and the answers to the survey question relating to fees disputes.

99. *See* 22 NYCRR §137.

100. The provisions of Part 136 of the Rules of the Chief Administrator (22 NYCRR §136) continue to apply to fee disputes in all domestic relations matters where representation began prior to January 1, 2002.

101. *See* 22 NYCRR §137.3.

102. *See* 22 NYCRR §137.1.

103. *See* Part 137, Standards and Guidelines, §8, Appendix A.

matter is submitted to a panel of arbitrators, which shall include at least one non-lawyer member.[104] While some local program rules provide that such panels shall consist of at least two attorneys, the Commission noted that the composition of such panels appears to vary widely.

Part 137 arbitration cannot be used for disputes stemming from representation in criminal matters; claims involving substantial legal questions, including professional malpractice or misconduct; claims against an attorney for damages or affirmative relief other than the adjustment of the fee; where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court or where the fee has been determined pursuant to a court order; or where a non-client submits the request to arbitrate.[105] If no attorney services have been rendered for more than two years, a client is precluded from electing arbitration to resolve the fee in dispute and the attorney may commence a collections suit without giving the client the notice of the right to arbitrate.[106]

Attorneys must participate in arbitration under Part 137. Attorneys who fail to participate in the arbitration process subject themselves to referral to the appropriate grievance committee of the Appellate Division for appropriate action.[107] Prior to initiating any collection activity against a client, an attorney must notify the client of his or her right to arbitration under Part 137 using prescribed forms available from the applicable arbitral body.

At arbitration, the attorney must prove the reasonableness of the fee by a preponderance of the evidence and present documentation of work performed and billing history.[108] When required by regulation, an attorney must present his or her signed retainer agreement and record of billings at least every 60 days.[109]

In reviewing the experience of attorneys with fee arbitration, the Commission observed that the attorney often defends all of the time billed and services rendered. The client then presents his or her account of the services rendered and time expended. Often, the amount of the fee owed does not warrant the amount of preparation the attorney must expend to defend the fees actually at issue at the hearing.

Attorneys must have the ability to respond sufficiently to the client's Request for Arbitration Petition and prepare for the arbitration. In order to do so, clients need to provide more specificity in their requests for arbitration. This will significantly reduce the preparation time that an attorney must devote to preparing a response by eliminating the need to gather evidence for the defense of undisputed portions of bills. Further, with more specific Arbitration Petitions, the arbitral bodies administering the arbitration will be in a better position to determine if arbitration is even appropriate.

Often an attorney's retainer agreement states that the client will receive the attorney's billings on a regular basis, that the client should review the bill upon receipt, and that the client should notify

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104. *See* Part 137, Standards and Guidelines, §8, Appendix A.

105. *See* 22 NYCRR §137.1.

106. *See* 22 NYCRR §137.1(6).

107. *See* 22 NYCRR §137.11.

108. *See* 22 NYCRR §137.7.

109. *See* 22 NYCRR §1851.1 and 22 NYCRR §1400.3; *see also* 22 NYCRR §1215.1 [engagement letter requirements].

the attorney of any objections within a specified period of time. In those instances where the client does not object and later raises the formerly undisputed bills in arbitration, attorneys feel frustrated that the client can thwart not only the agreement he or she made, but contract law as well.[110]

The Standards and Guidelines of the Part 137 Rules specify that "Arbitrators shall complete a minimum of six hours of fee dispute arbitration training approved by the Board."[111] The Board may consider previous arbitration training and experience in determining whether an arbitrator meets the requisite training requirements. All arbitrators must complete a short orientation program designed to introduce them to Part 137 practices and procedures. Programs may require that arbitrators undergo periodic refresher courses.

Training for arbitrators varies throughout the state. For example, it was reported to Commission members that in some trainings, arbitrators have been instructed that they must strictly adhere to the terms of the attorney's retainer agreement in the absence of a clearly excessive or illegal fee. The Commission learned that in other programs, trainers have taken a more liberal approach and have told arbitrators that they can use their discretion to look beyond the terms of a retainer agreement to determine the reasonableness of the fee. This inconsistent guidance may result in confusion and improper awards.

Consequently, the Commission recommends that the court system establish a uniform and statewide training curriculum which specifies how arbitration decisions should be made. Further, the training curriculum should address the significance of the signed retainer agreement or engagement letter, by noting that the role of the arbitrator is to decide if the fees charged are "fair and reasonable" by first applying the terms of the engagement letter or retainer agreement.

The Commission also recommends that the court system adopt uniform and statewide standards for the appointment of arbitrators and structuring panels. On any panel where only one arbitrator sits, whenever possible, that arbitrator should have some practical experience in the area of law in which the arbitrating attorney provided representation to the complaining client. On panels of three, the panel should consist of at least two attorney arbitrators, one of whom has some practical experience in the area of law in which the arbitrating attorney provided representation to the complaining client. It is critical that where only one arbitrator sits, the attorney who acts as arbitrator has some practical experience in the same area of law as the attorney participating in the fee dispute and understands the intricacies of that particular area of law and what is expected in representing clients with similar civil legal matters.

Currently, Part 137 requires that where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward a written notice to the client entitled, "Notice of Client's Right to Arbitrate," by certified mail or by personal service. The rules further state that, "The attorney and client may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to *de novo* review. Such consent shall be in writing in a form prescribed by the Board of Governors."[112]

Both the client and the attorney benefit from the finality of the outcome of an arbitrated fee dispute. Finality allows prompt payment or refund of fees. Binding arbitration eliminates further steps

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110. An account stated exists when a party to a contract receives bills or invoices and fails to protest within a reasonable time, *see Bartning v Bartning*, 16 AD3d 249 (1st Dept. 2005).

111. *See* Part 137 Standards and Guidelines, §10, Appendix A.

112. *See* 22 NYCRR §137.

to secure the award of the arbitrator such as having to wait thirty days so that the time to elect a trial de novo expires. While an attorney's participation in fee dispute arbitration may be time consuming for a solo or small firm practitioner, as compared to collection litigation, binding arbitration may prove less burdensome for both the attorney and client and provide a method to streamline the resolution of a fee dispute for both parties.[113]

By eliminating the right for both parties to request a trial *de novo*, the decision of the arbitrator is binding and prompt steps may be taken by both parties to collect fees. Neither party will have to expend additional time in preparing for a *de novo* trial on the same issues. It should be noted that this does not negate the requirement to confirm the award into a court order through an Article 78 proceeding if the award is not paid, or the right to bring such a proceeding on the basis of the narrow grounds set forth therein.

Thus, the Commission recommends that the Part 137 Rules and Guidelines be revised as follows:

- If the client initiates a fee dispute, the client must specify prior to the arbitration which charge or part of the bill or legal service the client disputes and provide such notice to the attorney. The arbitrator(s) must specifically limit the hearing to those items in the bills or performed as services specified by the client.
- If a client does not object to billings received on a regular basis through the course of representation, the burden should shift to the client to provide a meritorious explanation as to why he or she did not object to the attorney's fees within the time prescribed by the retainer agreement, and to prove that the attorney's fee was not fair or reasonable.
- Training curricula for arbitrators should be uniform statewide and specify how arbitration decisions are made, explain the significance of the signed retainer agreement or engagement letter, and explain that the role of the arbitrator is to decide whether the attorney's fees are "fair and reasonable" by applying the terms of the engagement letter or retainer agreement, unless the fees charged are illegal, excessive, or otherwise prohibited by law.
- Establish a uniform approach to appoint arbitrators and structure panels. On any panel where only one arbitrator sits, that arbitrator should be experienced in the area of law in which the arbitrating attorney provided representation to the complaining client. On panels of three, the panel should consist of at least two attorney arbitrators, one of whom has some practical experience in the area of law in which the arbitrating attorney provided representation to the complaining client.
- Amend the rules to provide that the arbitration award is final subject only to review under CPLR article 78. Neither the attorney nor the client may request a *de novo* hearing.

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113. According to the *2004 Board of Governors Annual Report to the Administrative Board of the Courts for Fee Dispute Resolution*, on average, attorneys were awarded at least half of their fees under the current Part 137 programs. The 2004 Annual Report is available at http://www.nycourts.gov/admin/feedispute/annualrpt/2004AR-public-final.pdf.

E. Matrimonial Regulatory Issues Affecting Solo and Small Firm Practitioners

Various court rules impact solo and small firm practitioners in matrimonial actions both as retained counsel and as court appointed law guardians. The economics of a litigant retaining and keeping counsel has become more important since the implementation of these rules. The payment of legal fees and the collection of awarded legal fees are areas of significant importance with considerable impact on the economics of practice in the area of family law.

1. The Process for Obtaining Security Interests From a Client to an Attorney

The procedures and requirements for an attorney in a matrimonial action to obtain security interests are set forth in the Disciplinary Rules of the Lawyers' Code of Professional Responsibility.[114] A security interest includes a confession of judgment, promissory note, or a lien on real property to secure an attorney's fee.[115]

Prior to the enactment of this rule, a non-monied spouse had the ability to retain counsel by giving a security interest to an attorney. A client in a matrimonial proceeding may not have access to liquid assets for legal representation. While the Commission recognizes that the rule may have been designed to protect the best interests of litigants involved in matrimonial cases, the Commission also finds that, too often, these restrictions result in an unduly burdensome restriction on attorneys and also limit a client's access to counsel.

In response, the Commission recommends that:

- The process for obtaining a security interest should be reviewed, and if appropriate, streamlined, simplified, expedited, or eliminated as overly burdensome requirements.
- Amendments to the regulations should explore ways to protect the client's rights, weighed against the expense and need for qualified counsel.
- Where there is an agreement between the client and the attorney consenting to a security interest, the issue should be addressed and presented at the preliminary conference, thus permitting speedy judicial review, and approval as appropriate.

2. The Ability to Withdraw as Attorney for Non Payment or the Failure by the Client to Honor the Terms of Retainer Agreement

Commission members highlighted the importance of making motions to withdraw when the client does not pay and will not discharge the attorney. Such relief can be difficult to obtain, especially when a trial date is forthcoming.

Attorneys can be compelled to continue as counsel when clients fail to honor the terms of their retainer agreement. Regulations require that an attorney in a matrimonial action have a written retainer agreement with a client, which must be filed with the court. The rules provide the agreement shall state

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114. *See* 22 NYCRR § 1400.5.

115. *See* 22 NYCRR § 1400.5.

under "what circumstances the attorney might seek to withdraw from the case for nonpayment of fees..."[116] If a client violates the payment terms of the retainer agreement and other provisions of that agreement, an attorney can bring an application to withdraw.[117] While a retainer agreement may contain a specific provision that the attorney can withdraw as counsel for nonpayment of fees upon proper application to the court, the Commission finds that the courts too often deny such applications.

The Commission believes that realistically, at the time of retention, no attorney can forecast the eventual legal costs that a client will incur. In order to allow clients the opportunity to raise sufficient funds, attorneys often do not request a retainer in the amount the attorney estimates the legal fees could reach if a case proceeds through discovery and on to trial. Moreover, setting a retainer amount for the total estimated legal fees would be a disservice to the community since many litigants would be unable to secure representation. However, it has been held that matrimonial attorneys should make an assessment of their likely fees and the income and assets of the parties available to satisfy such fees prior to offering representation.[118]

In many instances, when a court will not grant an attorney's application to withdraw, the attorney must then finance the cost of trial, resulting in both a disservice to the client and an enormous economic hardship to the attorney, particularly solo and small firm practitioners who can least afford to provide services without payment.

Consequently, the Commission recommends that:

- Judges consider the economics of practice when balancing the state's need to protect the interests of litigants.
- Courts should grant requests for withdrawal for nonpayment of fees except in extenuating circumstances in order to avoid a repugnant situation for attorneys.

3. Increase the Annual Cap on Awarded Fees for Privately Paid Law Guardians and Push for Enforcement of Such Awards

Law guardians protect the interest of children in divorce actions. Depending on the appellate department, the trial court may direct the parties to pay the law guardian's fees, usually with an initial retainer. During the course of the case, the charges accumulate. At the end of the case, the privately paid law guardian usually finds the retainer exhausted. In all too many instances, one or both parties fail to pay the initial retainer or subsequent fees. The law guardian has the right to seek full payment through an application to the court. If granted, the attorney then must enforce the order. Commission members have expressed frustration over the lack of enforcement of ordered fees, even initial retainers.

Part 36 of the Rules of the Chief Judge limits fiduciary appointments by providing that an appointee whose aggregate fiduciary compensation exceeds $50,000 in any calendar year shall be unable to accept compensated appointments during the next calendar year.[119] This $50,000 per year cap is calculated on awarded, but not necessarily paid compensation and applies to privately paid law

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116. *See* 22 NYCRR §1400.3(12).

117. CPLR §321(b)(2); 22 NYCRR § 1200.15(c)(1)(vi).

118. *See Klein v Klein*, 6 Misc. 3d 1009(A)[Sup Ct, Nassau County, 1995].

119. *See* 22 NYCRR §36.2(d)(2).

guardians.[120] Therefore, law guardians whose awards of compensation have exceeded $50,000 in a given year are ineligible for appointment in the following year. In smaller counties with limited numbers of experienced and qualified law guardians, judges may have difficulty selecting qualified law guardians who are eligible to serve because of the constraints of this rule. This results in a disservice to children and litigants. The hourly rates and initial retainers set by the court for law guardians should also reflect their abilities.

Recently, the Commission on Fiduciary Appointments, chaired by Sheila Birnbaum, Esq., recommended increasing the Part 36 compensation cap to $75,000, but only for Court Examiners.[121] However, the Commission on Fiduciary Appointments also recommended that the Administrative Board revisit the $50,000.00 cap to ensure that "it is not discouraging service by other categories of fiduciaries."[122] This Commission believes that the $50,000 cap discourages service by law guardians and hinders the appointment of experienced and qualified law guardians to represent children in New York State. Therefore, the Commission recommends that:

- Part 36 should be amended to raise the cap on compensation for law guardians to $75,000. The cap should be computed on awards actually paid from the date collected.
- To secure the payment of orders awarding law guardian fees, judges should consider including a provision in their orders that those fees are in the nature of child support and are not dischargeable in bankruptcy.
- To facilitate the enforcement of law guardian fees, final orders should specify that in the event of a default in payment by a set date, the award can be reduced to a judgment without further proceedings based on the law guardian's affirmation of non compliance.

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120. *See* 22 NYCRR §36.1(a)(3).

121. *Report of the Commission on Fiduciary Appointments*, February 2005, pp. 22-24. Available at http://www.nycourts.gov/reports/fiduciary-2005.pdf.

122. Id. at 24.

PART IV

STRENGTHENING THE PROFESSION

While economics and time management burdens affect a solo or small firm, issues of professionalism also play an essential role in shaping the health and welfare of a practice. Part IV discusses the effect of lawyer advertising on small firms. This Part also examines the impact of diversity and pro bono on their practices. Finally, by their very size, solo and small firms must plan for the eventual termination of their practices. This section includes findings and recommendations on planning for the continuity of practice.

A. Lawyer Advertising

Lawyer advertising, especially television advertising, impacts solo and small firm practitioners. Generally, advertising relates to cases involving claims based on personal injury and compensation based on a contingent fee. Both television and yellow page lawyer advertising usage and costs have increased dramatically over the past decade. This increase has made it more difficult for solo and small firm attorneys to advertise and compete with those attorneys who do.

In 1993 the New York State Bar Association ("NYSBA") created a Special Committee on Lawyer Advertising and Referral Services (the "Special Committee") to "monitor developments in lawyer advertising nationally and within the State, make recommendations concerning changes in existing lawyer advertising rules . . . . ." The Special Committee issued a report approved by the NYSBA House of Delegates on June 28, 1996 (the "Report"). It determined that the "false, deceptive or misleading" standard was difficult to police under the existing Code of Professional Responsibility and the various appellate divisions charged with enforcing such regulations were already overburdened. The Special Committee directed part of its recommendations at regulation of lawyer solicitation of a prospective client or clients, and, the remainder of the Report concerned publicity and advertising. This included adding an Ethical Consideration to the Code of Professional Responsibility to provide examples of what constitutes false, deceptive, or misleading advertising. It also provided for the creation of a commission on advertising to educate the bar, media and the public, as well as to review proposed advertising.

The NYSBA has never constituted the recommended commission on advertising. However, in May 2005, the Monroe County Bar Association in Rochester issued Attorney Advertising Guidelines[123] and established a review committee to pre-screen advertising voluntarily submitted by attorneys. The Monroe committee also reviews any complaints but lacks authority to regulate or impose discipline.

The lawyer advertising rules prohibiting statements or claims that are false, deceptive or

123. Available at http://www.meba.org/documents/Adguidelines2005.pdf.

misleading[124] have not stemmed the increase in lawyer advertising. For example, the Appellate Division, Fourth Department considered the television commercials of an attorney, "Jim the Hammer" Shapiro and determined that they "contained false and misleading statements" relied upon by clients in retaining him.[125] The television commercials depicted Mr. Shapiro as an experienced, aggressive personal injury lawyer who had taken personal action on behalf of clients. He did not meet with clients. He had not lived or practiced law in New York since 1995. As a result of his improper conduct and false and misleading advertising, Mr. Shapiro was suspended for two years.

Lawyer advertising in its current form, especially television and yellow pages, is generally unseemly and demeans the legal profession as a whole in the eyes of the public and the bar. Television advertising by a few has attracted contingent fee cases away from the majority of solo and small firm practitioners. Legal television advertising now qualifies as "saturation advertising." Those in need of a lawyer's services are attracted by saturated television commercials and can be induced to believe that they will be personally represented by the lawyer or lawyers on the screen. Something must be done for the public and the profession to regulate this advertising.

For example, a public survey should be considered to develop data for statistical examination in order to evaluate whether such saturation advertising decreases confidence in the legal system giving rise to a substantial state interest in regulating attorney advertising. Such a survey, if authorized, should be conducted by a statistical consultant engaged by the court system.

The Commission recognizes that restrictions on lawyer advertising have been challenged in the state and federal courts. In *Florida Bar v Went For It, Inc.*, the Supreme Court held that under *Bates v State Bar of Arizona,*[126] and its progeny, lawyer advertising is commercial speech and as such, is accorded only a limited measure of first amendment protection.[127] Under the intermediate scrutiny framework set forth in *Central Hudson Gas and Elec. Corp. v Public Serv. Comm'n of NY*,[128] a restriction on commercial speech, like the advertising at issue, is permissible if the government:

1. Asserts a substantial interest in support of its regulation;
2. Establishes that the restriction directly and materially advances that interest; and
3. Demonstrates that the regulation is "narrowly drawn."[129]

In *Florida Bar v Went For It, Inc.*,[130] the Florida Bar (an integrated bar and not a voluntary bar as in New York) had enacted a 30-day ban on targeted direct mail solicitation of potential clients or their family who had been injured in an automobile accident or a similar occurrence. The Bar had argued that

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124. See Disciplinary Rules, DR-101A.

125. *In re Shapiro*, 7 AD3d 120 [4th Dept 2004].

126. *Bates v State Bar of Arizona*, 433 US 350 [1977].

127. *Florida Bar v Went For It, Inc.*, 515 US 618 [1995].

128. *Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n of NY*, 447 US 557 [1980].

129. *Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n of NY*, 447 US 557 [1980], *supra.*

130. *Florida Bar v Went For It, Inc.*, 515 US 618 [1995], *supra.*

it had a substantial interest in preventing the erosion of confidence in the profession that such repeated messages, sometimes referred to as saturation advertising have engendered. The Florida Bar demonstrated that the harm targeted by the regulation was quite real as indicated by a bar study that contains extensive statistical and anecdotal data suggesting that the Florida public viewed direct mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. That study cited extensively in *Florida Bar v Went For It, Inc.*[131] consisted of a106 page summary over a two-year study period and concluded that the Florida public views direct mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. A similar study should be commissioned in New York prior to any promulgation of new regulations meant to curtail saturation advertising and define advertising that is "false, deceptive, and misleading."

The Florida State Bar, an agency of state government, has created a Standing Committee on Advertising empowered by the Supreme Court of Florida to evaluate all non-exempt lawyer advertisements, as well as all direct mail communications to prospective clients, for compliance with the Rules Regulating the Florida Bar.[132] There are rules and regulations which define exempt and non-exempt advertising and the permissible content of any attorney advertisement. The rules and regulations define the process by which attorney advertisements are to be reviewed and evaluated, as well as a process by which to challenge, or appeal, an unfavorable evaluation. Finally, there is a filing requirement whereby any lawyer or law firm who wishes to advertise in the State of Florida is required to file a copy of prospective advertisements with the Standing Committee for review.[133] This filing requirement serves as a mechanism to ensure compliance with the rules and regulations. However, the determinations of the Standing Committee are advisory in nature and non-binding on a grievance committee. Further, the failure to file a prospective advertisement with the Standing Committee does not appear to be a basis for disciplinary action/grievance on its own, but leaves the law firm/lawyer without recourse should the advertisement later be deemed to violate any of the rules and regulations governing attorney advertising. With respect to the rules and regulations themselves, it appears that they have been drafted to comply with the dictates of the United States Supreme Court's rulings on the Commercial Speech Doctrine, including *Florida Bar v Went For It, Inc.*[134] New York should consider enactment of a similar regulatory scheme.

In 2005, the NYSBA created a special committee, the Task Force on Lawyer Advertising (the "Task Force"), to recommend changes in the disciplinary rules on advertising. At the same time, an already existing state bar committee, the Committee on Standards of Attorney Conduct ("COSAC") was evaluating the revised Model Rules of Professional Conduct adopted by the ABA in 2003. Both the

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131. *Florida Bar v Went For It, Inc.*, 515 US 618 [1995], *supra.*

132. See Rule 4-7 et. seq. of the Rules Regulating the Florida Bar available at http://www.floridabar.org/divexe/rrtfb.nsf/FV/0F86471D570BEBC285256BBC0053DF00.

133. *See* Rule 4-7.7(a) of the Rules Regulating the Florida Bar.

134. *Florida Bar v Went For It, Inc.*, 515 US 618 [1995], *supra.*

Task Force and COSAC have filed reports with the State Bar Executive Committee and House of Delegates.[135] In addition, the Administrative Board has been charged by the Chief Judge with responsibility "to review the Disciplinary Rules regarding advertising and consider amending them." It is hoped by this Commission that collegiality will prevail in a collective effort among these various committees to achieve meaningful revisions of the current rules coupled with effective oversight over lawyer advertising.[136]

The Task Force has recommended that a number of the advertising ethical considerations become rules. These include: adding a test of "materiality" to the present "false, deceptive or misleading" test; retention of advertisements for four years, generally; disclosure of non-attorney spokespersons or actors in ads; a blackout period of 15 days before any attorney sends written solicitation to victims or their families regarding personal injury or wrongful death; identification of any document or envelope containing an ad as "Attorney Advertisement," disclosure of an intention to refer a case and identification of the attorney to whom the case is being referred and; if fee information is disclosed in advertising, the continuation of its use over stated periods.

In summary, the Commission makes the following recommendations concerning lawyer advertising:

- The code format of the existing Code of Professional Responsibility should be revised to embrace the rule format as set forth in the ABA Model Rules of Professional Conduct.
- The revised rules should make the code commentaries that relate to lawyer advertising part of the new rules to be approved by the appellate divisions.
- Prior to enactment of any major disciplinary rule changes involving lawyer advertising, a statewide survey should be sponsored by the Office of Court Administration to determine if "saturation advertising" is viewed by the New York public as an intrusion on privacy that reflects poorly upon the profession.
- A statewide Commission on Advertising should be established by the Chief Judge on a district or departmental basis with appropriate regulations that include the following provisions:

  (a) All attorneys must maintain copies of their advertising material for a period to be established by the Commission on Advertising ("CA") and file copies of the advertising materials with the CA within a prescribed time period.

  (b) Attorneys must pay a fee to the CA for the required filing to defray the cost of the CA's operation.

  (c) The CA shall randomly monitor all forms of advertising that the CA determines to be "false, deceptive or misleading," and advise the advertiser of its decision in writing.

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135. New York Bar Association Task Force on Lawyer Advertising Report, November 2005. Available at: http://www.nysba.org/Content/ContentGroups/Reports3/Report_from_Task_Force_on_Lawyer_Advertising/LawyerAdvertisingReport.pdf.

136. Pursuant to the Judiciary Law, the ultimate responsibility for revisions to the disciplinary rules rests with the Appellate Divisions.

(d) Upon the specific voluntary request of an advertiser to the CA, render an opinion whether certain proposed advertising is "false, deceptive or misleading" to the proposed advertiser.
(e) If the CA makes a negative determination and the advertiser proceeds with its use, the CA shall so inform the appropriate Grievance Committee.

B. Attorneys Must Make a Plan for the Continuity of Their Practice

Solo and small firm practitioners are particularly vulnerable to circumstances that might prevent them from continuing to practice law. Unfortunately, such events as accidents, illness, disability, planned or unplanned retirement and, ultimately, death, do occur. Given the realities of life, "Advance Exit Planning" is essential to protecting clients' interests and those of the practitioner and his or her family. An Advance Exit Plan is a directive prepared in advance of a crisis by the practitioner which controls what will happen and how when the attorney ceases to practice.

Currently no disciplinary rule exists which directs the steps a lawyer must take to protect the client in the event of the lawyer's sudden inability to practice. Several rules and ethical considerations apply, and when coupled with general principles of attorney professionalism, help to furnish guidance when dealing with these complex issues. For example, attorneys must avoid neglecting a matter under the disciplinary rules.[137] The lack of an Advance Exit Plan can cause delay, confusion, and poor legal representation. The implementation of an Advance Exit Plan strategy minimizes the multi-layered disruptions which result from closing a practice. The transition process will ensure more competent and continuous client representation. Under the disciplinary rules,[138] an attorney must ensure that a client's funds and property are returned promptly. Additionally, these rules require the proper maintenance of bookkeeping records and client files.[139] One component of an Advance Exit Plan is to specify the proper review and maintenance of files. Accurate and ongoing bookkeeping creates a viable system for the return of client property and funds in the event the practice stops.

In order to ensure the development and implementation of an Advance Exit Plan, solo and small firm practitioners must recognize the serious consequences which result from the lack of such a plan and take the necessary steps to implement one. NYSBA established a Special Committee on Law Practice Continuity to study and create proper planning for solo and small firm practitioners. The Committee's recent report includes a step-by-step planning checklist, as well as documents that address the designation of a successor-attorney who would substitute for an incapacitated or unavailable attorney. Once executed, such legal documents authorize the attorney to close the law practice and transfer files as necessary.

A complete advance exit plan would:

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137. *See* 22 NYCRR 1200.45 [DR 9-101].

138. *See* 22 NYCRR 1200.46 [DR 9-102].

139. 22 NYCRR 1200.46 [DR-9-102], *supra.*

1. Obtain consent from clients to transfer their property and assets to other counsel;
2. Provide clients with their property and assets and the client file, as well as copies of any material a client requests;
3. Return any unearned retainers or deposits;
4. File notices, motions, and pleadings on clients' behalfs;
5. Contact the malpractice carrier concerning claims, or potential claims, and advise that there has been a death or an interruption of practice and obtain an extension or tail coverage;
6. Dispose of closed or inactive files;
7. Send statements for unbilled services and expenses to clients;
8. Pay current liabilities and expenses;
9. Determine if the attorney was serving as registered agent for any corporation and provide appropriate notice to the corporation;
10. Determine if the attorney was serving as executor or trustee under any estate and provide appropriate notice;
11. Execute any necessary documents to facilitate the appointment of a new fiduciary;
12. Rent or lease an alternate space;
13. Handle any other issues that would be appropriate to the winding-down or transfer of the practice.[140]

An Advance Exit Plan should include certain legal documents that may be necessary to address a practice in transition. These include: an agreement to close the law practice in the future; an authorization and consent to close the law practice; a limited power of attorney to manage the law practice at a future date; general medical records and release forms; specific provisions in the Last Will and Testament regarding the sale of the law practice; for professional corporations and PLLC's documents appointing an appropriate agent to manage a solo law practice in the event of the inability to practice law; sample practice closing letters; sample request forms for file transfers; acknowledgments of receipts of file authorization for the transfer of a client file; a continued representation letter advising that the practice will be closed; and a destruction of documents letter.

The New York State Bar Association has published a guide for establishing an Advance Exit Plan in the event of disability, retirement or death.[141] This publication offers a series of guidelines and checklists for consideration when preparing for the eventual end to the practice of law. The guide also offers downloadable forms such as a limited Power of Attorney, Disclosure of Protected Health Information, Authorization, and Consent to Close Office.

The state bar has drafted a proposal to impose a uniform court rule which would provide for the judicial appointment of a caretaker attorney when a solo practitioner has not implemented an Advance

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140. New York State Bar Association, *Report by the Special Committee on Law Practice Continuity.*

141. The New York State Bar Association, *"Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death."* Available at: http://www.nysba.org/Content/ContentGroups/Planning_Ahead/Book.pdf.

Exit Plan.[142] The process would begin by the filing of an Order to Show Cause and would operate in a similar fashion to an adult guardianship proceeding commenced pursuant to CPLR article 81. While the Commission supports the concept of such a regulation, there is concern that there may be duplication and confusion if an administrator is appointed and is serving in all but name only as the caretaker attorney.

The implementation of a new regulation that could provide for a caretaker attorney is an important tool that may be necessary to deal with extreme cases. However, proper advanced planning will prevent the need for the appointment of a judicial caretaker attorney. The solo or small firm practitioner's wishes regarding who should step in and under what circumstances should be given preferential treatment.

In summary, the Commission recommends that:

- Solo and small firm practitioners who find themselves unable to practice, for whatever reason, have an advance exit plan already in place.
- Through proper education, most solo and small firms are likely to implement an appropriate advance exit plan and designate people they know and trust to implement such a plan.
- Local and state bar associations should develop committees to educate their members about Advance Exit Plans and monitor their implementation.
- Local and state bar association committees should provide a panel of qualified attorneys to step in for solo and small firm practitioners when their practice is interrupted.
- OCA should encourage attorneys to develop advance exit plans through educational efforts and postings on the UCS website.
- Efforts should be made to monitor the effectiveness of the various planning initiatives. It is important to look at the voluntary versus involuntary process and to evaluate the effectiveness of any proposed regulation from various points of view including protecting the client interest, protecting the attorney whose practice is interrupted, and, certainly, protecting the attorney's family who will undoubtedly experience financial hardship if the practice is interrupted.

C. Diversity within the Legal System for the Solo and Small Firm Practitioner

The importance of diversity in all aspects of the legal system is becomingly increasingly recognized. A number of studies and reports examining diversity within major segments of the legal profession have been issued by, among others, the U.S. Equal Employment Opportunity Commission, the Franklin H. Williams Judicial Commission on Minorities, the New York State Judicial Committee on Women in the Courts, as well as various bar associations.

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142. For more information regarding the proposed caretaker rule, see the NYSBA Executive Committee and House of Delegates' Report, June 23-25, 2005, available at: http://www.nysba.org/Content/NavigationMenu/About_NYSBA/Executive_Committee_and_House_of_Delegates_Report/Executive_Committee_and_House_of_Delegates_Report1.htm.

The concept of diversity and its significance for the legal profession has been broadly stated as follows:

> "Diversity is an inclusive concept and encompasses, without limitation, race, color, ethnicity, gender, sexual orientation, gender identity and expression, religion, nationality, age, disability and marital and parental status. With greater diversity, we can be more creative, effective and just, bringing more varied perspectives, experiences, backgrounds, talents and interests to the practice of law and the administration of justice. A diverse group of talented legal professionals is critically important to the success of every law firm, corporate or governmental law department, law school, public service organization and every other organization that includes attorneys."[143]

One area that has received considerable attention is the presence of women and minorities among the ranks of partners and associates of large law firms. These numbers are taken as an indicator of the inroads made by these groups into what many consider to be the most prestigious levels of the profession. In addition, data on the number of women and minorities within these firms are readily available. In 2003, the U.S. Equal Employment Opportunity Commission analyzed diversity in law firms with 100 or more attorneys based upon reports made by these firms to the EEOC.[144] Given the high visibility of the large private law firms and their leadership roles within the profession, bar associations such as the Association of the Bar of the City of New York and the New York County Lawyers' Association have made great efforts in obtaining commitments from these firms to adhere to principles that encourage diversity.

For solo and small firm practitioners, however, encouraging diversity within their firms or practices has less significance because the size of their organizations does not generally permit systematic efforts to achieve diversity. While the benefits of diversity are no less valid for a small firm than for a large firm, diversity within a small firm organization is not at this time a priority for the profession.

Yet, diversity elsewhere in the legal system, particularly within the court system and the bar associations, is relevant for many solo and small firm practitioners. For example, many of the increasingly diverse populations in the State are served primarily, if not exclusively, by solo and small firm practitioners. For these practitioners, it is important that the courts and court personnel be fair and unbiased toward minority litigants and their attorneys. In this regard, it should be noted that participants in a May 2004 workshop at a conference sponsored by the Franklin H. Williams Judicial Commission on Minorities expressed the following concerns:

> "Lack of diversity in the judiciary and in most [court personnel] positions, especially managerial positions.... Stereotyping still existed. There was an assumption that

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143. The Association of the Bar of the City of New York, *Statement of Diversity Principles*, p. 4. Available at: http://www.abcny.org/pdf/diversity_principles.pdf.

144. U.S. Equal Employment Opportunity Commission, *Diversity in Law Firms*, 2003. Available at: http://www.eeoc.gov/stats/reports/diversitylaw/#intro.

minorities were in court for criminal matters.... Minorities were overlooked and treated as if they were invisible.... There was a lack of professionalism toward minorities."[145]

With respect to the treatment of women in the courts, some progress has been noted:

"The courtroom environment for women attorneys, judges, and litigants is widely-perceived to be far better than it was fifteen years ago. Women are less likely to be addressed disrespectfully or be subjected to demeaning treatment.... When inappropriate behavior manifests itself in the courtroom, judges are far more likely to initiate action to correct the situation."[146]

However, this outlook was tempered with the following observations:

"Women still face obstacles. Some attorneys and judges still treat women less courteously or respectfully; women encounter 'old boys' networks and behavior that cast them in the role of outsider; women's credibility, particularly in domestic violence cases, may be subjected to greater scrutiny than that of men, and women who are strong or aggressive are at times singled out and subjected to offensive behavior."[147]

With respect to the treatment of ethnic minorities in the courts, the Conference of State Court Administrators ("COSCA") has defined the issue as follows:

"The judicial system faces both documented incidents and widespread perception of unequal treatment in the courts. Both demand a swift and unequivocal response, because the perception of unfairness impacts the public's trust and confidence in the courts and the justice system.... In considering what action to take to meet this challenge, it is clear that some of the problems cited arise in or are related to other components of the justice system, and that the courts do not have direct responsibility for or control over them. Yet the courts occupy a unique position within the justice system, as a neutral body and the ultimate arbiter of disputes, whose proceedings are open to the public. Thus, the public often sees the courts as the ultimately responsible entity, holding the courts accountable for the actions of the entire system. Indeed, precisely because the public looks to the courts above all for fairness and equal treatment, the courts should take the lead role in addressing the issue of racial and ethnic bias throughout the justice system, as well as do

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145. Franklin H. Williams Judicial Commission on Minorities, *Findings from the Leadership Development Conference: Courts for the 21st Century Upstate Conference*, January 2005, p. 21. Available at: http://www.nycourts.gov/ip/minorities/2005-Leadership-Development-Conference.pdf.

146. *The Fifteenth Year Report of the New York State Judicial Committee on Women in the Courts,* 2001, p. 15. Available at: http://www.courts.state.ny/ip/womeninthecourts/index.shtml.

147. *The Fifteenth Year Report of the New York State Judicial Committee on Women in the Courts,* 2001, *supra,* p 15.

everything possible to ensure fairness and eliminate injustices within the courts themselves."[148]

In considering a response to this perception of unfairness, COSCA made, among others, the following recommendations:

1. Conduct education, professional and sensitivity awareness programs on racial and ethnic bias for all judicial and nonjudicial court employees.
2. Promote diversity in all court appointments (e.g., fiduciaries and assigned counsel) by improving the diversity of the pool of qualified individuals.
3. Provide adequate interpreter services, so that non-English speaking litigants are not deterred from pursuing their legal rights because of language barriers and can participate fully in the proceedings.[149]

Bar associations are important sources for attorneys of mentoring and networking opportunities, resources for increasing legal skills, places to debate and address important legal issues, and sources of leadership opportunities. The New York State Bar Association's Diversity Policy, adopted by its House of Delegates, states:

> "We are a richer and more effective Association because of diversity, as it increases our Association's strengths, capabilities and adaptability. Through increased diversity, our organization can more effectively address societal and members needs with the varied perspectives, experiences, knowledge, information and understanding inherent in a diverse membership."

Many bar associations have actively undertaken to increase the diversity in their organizations, both for membership and leadership. The New York County Lawyers' Association has made the following observations and recommendations, among many, specifically for solo and small firm practitioners:

1. Many minority attorneys who work in solo practices or in small firms have little or no mentoring opportunities.
2. Access to support groups for minority attorneys who work in solo practices or in small firms is especially important to provide opportunities to network and share experiences and ideas. Bar associations should develop mentoring programs and provide networking opportunities in which minority attorneys who work in solo practices and in small firms can participate.

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148. The Conference of State Court Administrators, *Position Paper on State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness*, December 2003, pp.2-3. Available at http://cosca.dni.us/PositionPapers/racialethnicwhitepaper.pdf.

149. The Conference of State Court Administrators, *Position Paper on State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness*, December 2003, supra, p. 5.

3. Government operated programs, such as Assigned Counsel programs, must recruit a diverse group of attorneys and provide qualifying training programs to ensure minority attorney participation.[150]

Finally, it should be noted that every attorney - no matter where he or she is part of the legal profession - has the ability to advance diversity in the profession. The American Bar Association Commission on Racial and Ethnic Diversity in the Legal Profession addressed ways to promote diversity and stated as follows:

> "Individual lawyers have many opportunities to promote diversity in the legal profession. Regardless of whether they are minorities, individual lawyers can mentor minority law students and lawyers, join and support minority bar associations, and initiate and support diversity efforts within the organizations in which they work.... Minority lawyers (and lawyers-to-be) also must invest in themselves. Like all lawyers, they must continue to hone their skills as lawyers, but they also should take advantage of the many opportunities that exist to help them advance their careers, including active participation in minority and majority bar associations."[151]

The Commission recognizes diversity as a broad and inclusive concept and supports the current initiatives that seek to increase diversity in the legal system and encourages the implementation of additional initiatives. The Commission makes the following recommendations:

- Encourage bar associations to educate solo and small firm practitioners as to the benefits of supporting diversity in their own organizations and elsewhere in the legal system.
- Promote diversity in the pool of practitioners qualified for court appointments as fiduciaries and assigned counsel through training programs.
- Continue and expand diversity awareness and sensitivity programs for all judicial and nonjudicial court employees.
- Encourage bar associations to develop and maintain mentoring programs and networking opportunities for solo and small firm practitioners of diverse backgrounds.
- Strengthen interpreter services for non-English speaking litigants in the courts.

D. Pro Bono Services

A universal definition of "pro bono service" does not exist. In 1990, the Chief Judge's Committee to Improve the Availability of Legal Services, chaired by Victor Marrero, defined "qualifying pro bono service" as follows:

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150. The New York County Lawyers' Association, *Report of the Task Force to Increase Diversity in the Legal Profession*, January 2002, pp.28-29. Available at: www.nycla.org/siteFiles/sitePages/sitePages266_3.pdf

151. American Bar Association Commission on Racial and Ethnic Diversity in the Legal Profession, *Miles to Go: Progress of Minorities in the Legal Profession*, December 2004.

A. Legal service rendered in civil matters to persons who cannot afford to pay counsel, or to such persons in criminal matters for which there is no government obligation to provide funds for legal representation;

B. Activity related to simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and

C. Legal services provided to charitable, public interest organizations on matters which are designed predominantly to address the needs of poor persons.[152]

Currently the Code of Professional Responsibility provides that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."[153] Ethical Consideration 2-25 provides as follows:

> "Each lawyer should aspire to provide at least 20 hours of pro bono services annually by providing legal services at no fee and without expectation of fee to: (1) person of limited financial means, or (2) not for profit, governmental or public service organizations, where the legal services are designed primarily to address the legal and other basic needs or persons of limited financial means, or (3) organizations specifically designed to increase the availability of legal services to persons of limited means."

Recently, the House of Delegates of the New York State Bar Association voted to expand the definition of "pro bono."[154] The new NYSBA definition urges lawyers to aspire to provide annually at least 20 hours of free legal services to persons of limited means or to organizations that serve the basic needs of such persons or that are designed to increase the availability of legal services to such persons. The expanded definition urges lawyers to provide financial support for organizations that provide legal services to benefit persons of limited means. Attorneys are also encouraged to provide legal services, at no fee or at a substantially reduced fee to various nonprofits that serve the public good and to the judicial system to support alternative dispute resolution programs and other court programs. The new policy also encourages participation without payment in activities that improve the law, the legal system or the legal profession.

The survey done by this Commission did not offer a definition of pro bono when inquiring about pro bono activities. A number of participants indicated that they considered clients who were unbilled or failed to pay to constitute at least a part of their pro bono service. Other participants considered that work assigned to them as law guardians or as Section 18B attorneys constituted pro bono work, given that such work is paid at a rate substantially below typical hourly rates. Other participants considered a very wide variety of matters to fall within their personal definition of pro bono. "Pro bono" may be like another legal concept - you know it when you see it.

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152. *Final Report of The Pro Bono Review Committee*, New York Unified Court System, 1994, p. 5.

153. *See* Canon 2 of the Code of Professional Responsibility.

154. Further information regarding the action by the NYSBA and the text of its proposed definition is available at: http://www.nysba.org/Content/ContentGroups/Pro_Bono_Dept_/PB.News.Summer.2005.pdf

In Chief Judge Kaye's 2005 State of the Judiciary, she stated that "we have no intention of mandatory pro bono."[155] However, attorneys in the Third and Ninth Judicial Districts are being assigned "mandatory" pro bono matrimonial cases. [156] In the Third Judicial District, cases are assigned based on the number of matrimonial RJI forms filed by a practitioner. In the Ninth Judicial District, the assignments are triggered by filing a matrimonial Note of Issue.[157]

Such assignments place a significant burden on solo and small firm practitioners. Unlike in large firms, there may be no associates who can assist or who can be trained by working on such a case. Solo and small firm practitioners inherently have reduced time resources since these attorney also have responsibilities for bookkeeping, marketing, bar activities, and other similar responsibilities, often without secretarial, paraprofessional, or other staff to assist.

Recent studies by OCA and NYSBA show that solo and small firms proportionately do a greater amount of pro bono work than larger firms.[158] The OCA report indicates that participation in pro bono is lower in New York City than anywhere else in the State. Hon. Judge Juanita Bing Newton, Deputy Chief Administrative for Justice Initiatives has indicated that between 1990 and 1993, 48% of lawyers performed pro bono for the poor. The number remained the same in 1997. In 2002, 46% of lawyers performed pro bono work, averaging 41 hours per year. This number is more than double the aspirational benchmark established by NYSBA in 2005. The NYSBA reports that solo and small firms on average allocate more hours to pro bono per attorney per week than larger firms.[159]

In the survey done by this Commission, the comments on pro bono varied widely. Lawyers noted that pro bono clients often do not appreciate what they do not pay for or settle when they should. Concerns about liability were raised. Others noted the financial difficulties of advancing disbursements and not being repaid. One attorney stated that pro bono interfered with making a living. Yet, many

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155. Chief Judge Judith S. Kaye, *State of the Judiciary Address*, February 2005, p.13. Available at: http://www.nycourts.gov/admin/stateofjudiciary/soj2005.pdf.

156. The assignment is made by order of the District Administrative Judge, which results in mandatory pro bono representation as a practical matter.

157. Courts have determined that there is an inherent power to assign pro bono counsel. *See Matter of Smiley*, 36 NY2d 433 [1975]; *Medina v Medina*, 109 AD2d 691 [1985]. CPLR §1102 (a) provides that "the Court in its Order permitting a person to proceed as a poor person may assign an attorney."

158. *Final Report of the Pro Bono Review Committee*, 1994, p. 20; New York State Bar Association, *The 2004 Desktop Reference on the Economics of Law Practice in New York State, Benchmarks and Referents for Law Practice Management*, 2004, p. 30.

159 . New York State Bar Association, *The 2004 Desktop Reference on the Economics of Law Practice in New York State, Benchmarks and Referents for Law Practice Management*, 2004, supra at p. 267. (Yet, the *New York Legal Needs Study* produced by NYSBA in 1993 found that the poor in New York face nearly three million civil legal problems per year without the assistance of a lawyer. This same Report found that the availability of legal services to the poor was uneven across the State. Furthermore, the participation of the Bar varied widely across the State.)

lawyers expressed great satisfaction in pro bono work. One attorney stated, "It makes me feel that I am worthy of practicing law – better than getting paid!" Another attorney said, "I am reducing the stress level in my community and making a difference." Other attorneys noted the positive public relations and personal returns of performing pro bono service.

The testimony before the Commission at the public hearings varied as well. One lawyer spoke of having his life threatened by someone he represented for free. Another referred to pro bono as "an unfunded mandate." Still others reminded us that all lawyers are here to help, such as one who asserted that "pro bono means just that – for the good."

In the face of great need and apparent stagnant participation by roughly half of the Bar, the Commission recommends that:

- The provision of pro bono services to the poor must remain voluntary. In those areas where it is effectively mandatory, it should revert to voluntary.
- All attorneys should commit to provide a minimum of 20 hours per year of pro bono services. This amounts to less than two hours per month. Where possible, attorneys should aspire to exceed the goal set by the NYSBA. Attorneys in larger firms should perform a proportionate share of pro bono services. All firms should have policies that encourage, recognize, and reward attorneys to participate in pro bono activities.
- The courts should provide incentives to attorneys who participate in pro bono activities. This should include more CLE credit for pro bono work and specific public recognition of attorneys who do the public good. Attorneys should voluntarily keep track of the time they spend on pro bono matters.
- OCA and local bar associations should provide free CLE and training for attorneys who agree to perform a specified number of hours or cases of pro bono services. Mentors should be assigned to these attorneys to assist them. Training should include a broad series of topics including but not limited to public benefits law, real estate law, landlord and tenant issues, predatory lending, divorce, custody, grandparents' rights, foreclosure, and other issues faced by the poor.
- The New York State Legislature should enact legislation which provides an exemption from malpractice claims in pro bono cases or establishes a public fund to cover such claims (currently Private Attorney Involvement (PAI) coverage is provided by some legal services programs).
- Programs which match attorneys and pro bono clients should provide training for the clients. The training should include instruction designed to ensure clients have reasonable expectations, understand that there are no guaranteed outcomes in litigation, recognize the benefits of settlement, and maintain appropriate interactions with attorneys.
- Bar Associations at all levels should organize more programs to do the public good locally. It should also be noted that there are ways to perform pro bono in a limited fashion such as at legal clinics.
- Bar Associations should more widely publicize the means to participate in pro bono activities, including on their websites.

- The New York State Legislature and the United States Congress should provide more funding to legal services corporations to represent the poor since the needs of the poor cannot be met by pro bono attorneys alone.
- Bar Associations, legal services corporations, and larger law firms should provide secretarial, library, and technology assistance to lawyers in connection with their pro bono services.
- Legal publishers should provide free online research time for pro bono cases.
- Law students should begin doing the public good by volunteering to do legal research and assist with drafting documents under the supervision of private attorneys, legal services corporations, and clinics.
- Those attorneys who are prohibited from outside work by the nature of their employment should be encouraged to donate funds equivalent to 20 hours of pro bono work to support legal services corporations.
- Local bar associations should sponsor frequent *pro se* divorce clinics. County Clerk and court personnel should participate in training the attorneys who will voluntarily staff these clinics.
- The District Attorneys and Attorney General should prosecute non-lawyer businesses which are engaged in the unlawful practice of law. Fines should be imposed which can be used to support the work of legal services corporations. (These businesses also exact large fees from poor consumers by claiming that they can do what an attorney does for less money. Often they are more expensive and the work product is unusable.)
- The organized bar should publicly recognize lawyers who do the public good on a frequent basis. This will encourage attorneys to participate and help bolster the reputation of lawyers generally.
- Courts should give attorneys who serve pro bono greater consideration in scheduling and hearing court appearances in these cases by providing expedited or more immediate access, or by establishing separate calendars for pro bono cases or staggering calendars to expedite the hearing of pro bono cases.
- OCA should publicize that probono.net/ny provides a comprehensive resource on pro bono opportunities. OCA should place the link to probono.net/ny in a more prominent place on its website.
- Bar Associations should maintain referral lists which consistently include attorneys who will take pro bono and modest means cases.

CONCLUSION

In her 2004 State of the Judiciary, Chief Judge Judith S. Kaye stated:

> "Solo and small firm practitioners have a different perspective on how best to address changes in the legal profession resulting from globalization, technological change, legal and regulatory complexity, and higher client expectations. Since they do not usually have large support staffs, these lawyers in daily practice also face challenges in meeting schedules and complying with competing court appearance obligations. In some instances, fairly simple changes in administrative requirements could make a big difference for these practitioners and their clients."[160]

From simple changes in administrative requirements to more complex initiatives, the Commission has proposed a number of ways that the Judiciary and the New York State Unified Court System, together with the New York State Legislature and bar associations can enhance the practice of law by solo and small firm practitioners. We hope that the implementation of the recommendations contained in our report will result in improvements for this majority of the legal profession and benefits for all litigants and attorneys statewide.

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160. Chief Judge Judith S. Kaye, *The State of the Judiciary Address*, February 2004. Available at: http://www.nycourts.gov/admin/stateofjudiciary/soj2004.pdf

APPENDIX

RECOMMENDATIONS

PART I

STREAMLINE COURT PRACTICES TO FACILITATE SOLO AND SMALL FIRM PRACTICE

A. Preliminary Conferences

The Commission recommends that the court system implement the following reforms to make the preliminary conference process more productive:

- Allow attorneys to download the preliminary conference form, complete it out of court, and fax or e-mail it to a central preliminary conference clerk in lieu of an appearance.
- Establish statewide uniform and simple procedures for the adjournment of a preliminary conference, such as by e-mail or fax.
- Establish uniform procedures whereby the preliminary conference is adjourned *sua sponte* when a dispositive motion has been made until after a decision has been rendered.
- Establish statewide uniform and simple procedures for conducting preliminary conferences.
- When appearances are required, implement procedures to assess monetary penalties against counsel who appear late without good cause.
- When appearances are required, schedule preliminary conferences later in the day to reduce the possibility of scheduling conflicts with the morning calendars or other tasks.
- Where appearances are required, implement staggered calendars.
- Reassess the sufficiency of the preliminary conference form and determine whether other material should be included on the form which would make the form more meaningful.
- Determine whether appearances should only be required when counsel cannot resolve an issue on the preliminary conference form.
- Study whether preliminary conferences are needed in each county, especially upstate.

B. Pre-Trial Conferences

The Commission recommends that the court system:

- Explore ways to enhance and improve the scheduling and conduct of pre-trial conferences to enable attorneys to achieve quicker and more meaningful settlements.
- Establish uniform and simple procedures for conducting pre-trial conferences.

C. Pre-Argument Appellate Conferences

The Commission recommends that the Appellate Divisions revise their rules to permit counsel to opt out of a pre-argument conference without prejudice to the appeal.

D. Staggered Calendar Calls

The Commission recommends that:

- Courts set motion return dates at staggered, fixed times.
- Courts stagger preliminary conferences, if not conducted by telephone, or disposed of by mail or e-mail.
- Courts stagger pre-trial conferences with realistic estimates for conference lengths and adhere to publicized schedules.
- Family Courts schedule cases throughout the day, i.e., at 9:30 a.m., 10:30 a.m., 11:30 a.m., 2:00 p.m., 3:00 p.m., and 4:00 p.m.
- Courts stagger criminal arraignments.
- Town and Village Justice Courts stagger appearance times in accordance with the number of cases on the calendar.
- Supreme and Surrogate Courts establish separate calendars for *pro se* litigants and heirs.
- Courts and judges retain some discretion to deviate from any staggered calendaring rule.
- The court system implement a pilot project in a large urban area to test staggered calendars by tasks, as well as courts, prior to establishing any new statewide rules on staggered calendars.
- Courts stagger motion argument times in Oral Argument Parts.
- Courts discontinue the practice of scheduling multiple tasks on any one case on motion term calendars in larger cities.
- Courts reassess and revise Central Part systems.
- Courts publish dockets for attorneys through e-mail and on the court website well in advance of hearing dates.

E. Discovery Management

The Commission recommends that the courts:

- Require parties to attempt to agree on a discovery plan as soon as possible following commencement of litigation and submit the plan to the court to be "so ordered" and accepted by fax or e-mail. If parties and the court are all in agreement, the court should not require an in-person preliminary conference.
- Encourage early court intervention to manage and streamline a discovery plan to the extent that parties cannot otherwise agree.
- If discovery management conferences remain mandatory, utilize such conferences as opportunities to explore and encourage early settlement/resolution.
- Issue scheduling orders, which provide for, at a minimum, discovery cutoff dates, pretrial/status conferences, disclosure of experts, and dates for filing the note of issue.
- Adopt a form scheduling order for statewide use and make the form available to attorneys on the OCA website.
- Insist upon compliance with scheduling orders absent good cause.
- To avoid delay and expense, permit the use of teleconferences and electronic communications to address discovery problems, without the necessity of formal motion practice and personal appearances.
- Explore the use of JHOs and nonjudicial staff to meet (or teleconference) with parties to attempt to resolve disputes.

F. Uniform Statewide Rules, Forms, and Practice

The Commission recommends that:

- The Chief Judge appoint a commission to determine whether local rules should be converted, incorporated, or subsumed into one uniform set of rules; or eliminated entirely.
- OCA improve its website to create a comprehensive on-line database of downloadable common litigation and estate documents, available in Word and WordPerfect format and in English and Spanish, so that attorneys can easily download and copy forms. Such forms would include retainer agreements for commercial and matrimonial proceedings, notice of appearance, notice of motion, notice of appeal and order to show cause (and other forms to supplement the forms currently available on the OCA website such as the Statement of Rights and Responsibilities, Request for Judicial Intervention, Request for Appellate Division Intervention ("RADI"), and uncontested matrimonial forms).

- The court system post rules and downloadable forms which exist in a specific locality on its website and create an on-line database of all uniform rules to assist attorneys in identifying particular local rules.
- The court system creates an on-line database of county by county filing procedures to assist attorneys in determining the precise rules which apply to the documents they wish to file.
- The court system establishes uniform statewide procedures for the conduct of preliminary conferences.

G. Technology As a Tool to Connect the Solo and Small Firm Practitioner with the Court System

1. *The Need for Wider Use of Facsimile Transmissions*

The Commission recommends that the court system adopt rules which:

- Permit the transmission of stipulations of adjournments, preliminary conference orders, and correspondence by facsimile.
- Require that courts provide copies of signed or declined orders to show cause to counsel by facsimile.
- Require courts to provide copies of decisions, orders, and judgments to counsel by facsimile.
- Expand the pilot program for filing by facsimile to all types of claims and actions and widely publicize same.
- Consider allowing service by fax, but restrict such service to certain procedural *pro forma* matters.

2. *Retest Teleconferencing and Introduce Videoconferencing*

The Commission recommends that the court system:

- Select several judicial districts in which to retest teleconferencing.
- Solicit bids from different companies to provide teleconferencing services for conferences involving multiple parties.
- Assess teleconferencing by making it available to particular judges within each court and within each judicial district.
- Implement a pilot videoconferencing program and widely publicize it through different channels, including the UCS Website, the New York Law Journal, and local bar associations.
- Promote the use of videoconferencing in the courts, particularly for complex motion practice and appellate arguments.
- Establish centrally located videoconferencing centers in courthouses throughout the State.

3. ***Filing by Electronic Means Will Lead to Greater Efficiency for the Solo and Small Firm Practitioner But Only if Introduced Slowly and with Support***

The Commission makes the following recommendations with respect to e-filing:

- The legislature should expand the voluntary use of FBEM to other types of cases and to other counties.
- At a minimum, FBEM should be extended to pretrial conference orders, stipulations, orders to show cause, and other specified filings in all types of actions and proceedings.
- Courts should generate and file orders, judgments, notices and other documents electronically.
- Since education and training are essential to the success of FBEM, the court system should provide and advertise appropriate, accessible, and frequent training on FBEM.
- The court system should provide additional and centrally located technology centers throughout the state that solo and small firm practitioners may use to e-file and reap the benefits of FBEM without purchasing equipment which are staffed by court personnel to provide in-person assistance for troubleshooting.
- The court system should enhance its online tutorial, the FBEM Practice System, by providing a help-option and should regularly review the content of its downloadable user manual, website and other reference tools to ensure their effectiveness in facilitating FBEM training.
- The court system should review the FBEM process and implement improvements and changes through feedback from the Administrative Judges, the trial bench, and the bar.
- The court system should adopt uniform statewide standards and guidelines for FBEM.
- The court system should develop a public relations or marketing campaign to encourage the use of FBEM.

4. ***The Availability of Court Files on the Internet***

The Commission recommends as follows:

- The court system should ensure that the recommendations of the Commission on Public Access to Court Records are implemented to the fullest extent possible.
- The court system should provide a system for public access to case documents which is easily searchable and in which a user can view a document filed with the court by a single click of the mouse on a docket entry, rather than be required to manually launch a separate application for document viewing.

- Court staff should continue to maintain control over access to cases deemed confidential by statute or order.
- Attorneys should safeguard confidential and proprietary information, including but not limited to, social security numbers, financial account numbers, and the names and birth dates of minor children.
- In providing public access, the court system should continue to ensure the confidentiality of case files in family court, matrimonial, certain guardianship, criminal, and other matters as provided by applicable law.

5. *The Unified Court System Website*

The Commission recommends that the court system enhance and improve its website by including:

- A button labeled "Site Table of Contents" rather than "Search" to access the webmap or Site Table of Contents simply by clicking on the button.
- Under the category of judges, the complete address, including the room, telephone, and fax numbers for chambers and courtrooms, specifically identified; the names of the part clerks and judges' law clerks or court attorneys and other staff, including their particular responsibilities, current e-mail addresses, fax numbers, and current telephone numbers; judges' rules, part rules and preferences, including information as to whether the part has a second call and if so, at what time; and the procedures for adjournments, conferences, discovery schedules, and time frames.
- A statewide directory of all court personnel linked to the various local court web pages.
- The names and telephone numbers of the clerks for each department on the local court web pages.
- Online answers to frequently asked questions.
- Information about filing requirements for particular forms and a list of court forms.
- Uniform forms which can be completed and submitted either electronically or in hard copy which are compatible with *Word* and/or *WordPerfect* word-processing software programs, in both English and Spanish.
- Access to the status of filings and other matters.
- Sample pleadings and other widely used or required documents such as retainer agreements.
- A search function for the decision database in addition to listing decisions simply by date.

- Information regarding future court appearances which is uniformly available for each court by party name, index number, or firm name.

6. *Availability of Wireless Internet Service and Other Technological Advances Recently Implemented*

The Commission recommends that:

- The court system make Wireless Internet Service available in every court in which service is geographically available.
- The court system provide more plug-in availability in courtrooms and in the courthouses generally.
- Courthouses set aside at least one room equipped with computers, wireless internet access and plug-in availability, for attorneys to sit and work (and even hang their coats).
- The court system provide training in the technological presentation of evidence, which would increase the visibility of such technology to the bar.

7. *Use of E-mail to Communicate with the Courts*

The Commission recommends that:

- Courts use e-mail to give counsel notice of the date and time of appearances.
- Courts permit practitioners to check on the status of orders to show cause and other applications by e-mail.
- The court system explore implementing a process to encourage increased communication with the courts through e-mail.

PART II

HOLDING DOWN THE COSTS OF PRACTICE FOR THE SOLO AND SMALL FIRM PRACTITIONER

A. The Costs of Litigation

The Commission recommends that:

- Since the "Non Jury Initiative" and the "Summary Jury Trial" used in some jurisdictions are both practical methods of resolving cases without incurring exorbitant expert fees and litigation expenses, the court system should implement such programs on a statewide basis as alternatives to regular trials in a process established as follows:
    1. At the time a note of issue or notice of trial is filed, the plaintiff should be given the option to elect an "expedited trial" in the form of a Non Jury Initiative or a Summary Jury Trial.
    2. Within twenty days of the plaintiff requesting a Non Jury Initiative or a Summary Jury Trial, the defendant should have the right to serve and file an objection to the plaintiff's request, and state the reasons why said request is being objected to.
    3. In the event the plaintiff does not request the Non Jury Initiative or the Summary Jury Trial, the defendant should have the right to make a request for a Non Jury Initiative or a Summary Jury Trial within twenty days of the plaintiff filing and serving a note of issue.
    4. All cases which are placed on a Non Jury Initiative or a Summary Jury Trial track should be scheduled for a trial date, no later than 120 days after the filing of a note of issue.
    5. For good cause shown, parties should be permitted to opt out of the Non Jury Initiative or a Summary Jury Trial track and have their case restored to the general trial calendar in the same position commensurate with the initial filing date of the note of issue. A judge in his/her discretion may advance the case on the general calendar.
- In order for the above processes to serve as effective methods of saving or reducing expert fees and litigation expenses, the applicable rules (*see* CPLR § 3101 (d); 22 NYCRR §202.17) regarding expert retention and disclosure should be examined and amended as necessary.

- The New York State Legislature should increase the $50.00 financial penalty set forth in CPLR § 2308 to foster greater compliance with judicial subpoenas.

B. Alternative Dispute Resolution as an Alternative to Litigation

The Commission recommends that:

- The court system establish a task force to study ADR programs and issue a comparative analysis to define the landscape of such programs in the courts in the years ahead.
- The court system establish statewide programs, regulations, and evaluation processes to ensure best practices in ADR.
- The court system establish enhanced standards whereby neutrals such as mediators undergo extensive negotiation and settlement training and are subject to periodic evaluation; these standards should include provisions that neutral volunteers should be experienced attorneys, chosen with the assistance of the local bar associations and administrative judges.
- The court system review and evaluate the mandatory mediation programs currently in effect in the various Judicial Departments in New York State to determine if mandatory mediation should be required, particularly in cases with ad damnum clauses of less than $100,000.
- The court system examine whether participation in neutral evaluation programs should be mandated.
- ADR programs should require parties to be present. With respect to defendants represented by insurance carriers, insurance adjusters or someone with authority to settle on behalf of defendants should be present or available by telephone.
- With respect to those counties where mediation is required prior to trial, Court Scheduling Orders should be revised to include dates and times for mediation in mediation parts with attorneys required to be present at scheduled times; mediation should be held at the outset of the case after filing of the pleadings, and again after the note of issue has been filed.

C. Support the Award of Counsel Fees for Non-Monied Spouses

The Commission believes that the judiciary should be more pro-active in ordering and enforcing awards of counsel fees and costs to non-monied spouses and recommends the following:

- Judges assigned to matrimonial parts receive specific training relating to awards to non-monied spouses to ensure the proper issuance and expeditious enforcement of such awards as may be appropriate.
- The court system should explore implementing streamlined procedures for securing and enforcing counsel fee awards.[161]

D. Attorney Malpractice Insurance and the Impact on Solo and Small Firm Practitioners

The Commission recommends that:

- All attorneys practicing law in the State of New York voluntarily carry minimum levels of professional malpractice insurance.
- The court system create a task force to review the availability and affordability of malpractice insurance in New York State.

161. Where appropriate, courts may consider whether an order should designate the counsel fee award as a form of spousal support and/or child support to avoid discharge in bankruptcy (*see* 11 USC §523(a)(5) and 11 USC §101 (14A)).

PART III

REDUCING REGULATORY BURDENS ON THE SOLO AND SMALL FIRM PRACTITIONER

A. Rule-Making and its Effect on Attorneys

The Commission recommends that rule-making authorities adopt (or continue) the following steps as part of a regular course of rule-making practices to benefit solo and small firm practitioners:

- Before any rule-making authority establishes any new rule and/or regulation that would affect the day-to-day practice of law by attorneys within the State of New York, the rule-making authority should submit a notice of the proposed rule/regulation to the various bar associations throughout the state - local, speciality, and state associations - as well as cause the same to be posted prominently in the courthouses throughout the State of New York and on the UCS website at least ninety (90) days before the implementation date of the rule/regulation.
- Bar associations and/or individual attorneys admitted to practice in the State of New York should be afforded the opportunity to submit written comments on the proposed rule at any time within 45 days of the date of receipt of the aforesaid notice of proposed rule and/or regulation from the rule-making authority.
- When a rule- making authority determines that a proposed rule change will have a substantial economic impact on the profession, it should consider holding a public hearing within each of the four departments at a date, time and location convenient for members of the bar in order to entertain oral comment on the proposed rule and/or regulation. The public hearing should be conducted no later than sixty (60) days after the publication of the notice set forth above.
- If a rule-making authority decides to adopt a proposed rule/regulation, it should consider utilizing approaches designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule or regulation upon attorneys throughout the State.
- Upon publishing a proposed rule or regulation, a rule-making authority should set forth in writing the projected costs for the implementation of and compliance with the rule upon attorneys. If such an estimate of costs cannot be established, through court system data the rule-making authority should include a reason or reasons why the estimate is not provided.
- Upon publishing a proposed rule or regulation, a rule-making authority should set forth in writing the necessity and benefits to be derived from the rule.

- Upon publishing a proposed rule or regulation, a rule-making authority should publish a statement detailing what, if any, reporting requirements, forms or other paperwork attorneys will be required to prepare as a result of the rule being proposed.
- Upon publishing a proposed rule or regulation, a rule-making authority should set forth in writing any other considerations that led to the proposed rule-making.
- After completion of the above procedures, and after due consideration of the comments received, a rule-making authority may (a) withdraw the proposed rule, (b) proceed to adopt the proposed rule, or (c) modify the proposal and seek written comments on the said modification.

B. Mandatory Continuing Legal Education and Assigned Counsel Cases

The Commission recommends that:

- The CLE Board review the panoply and quality of course offerings as part of the mandatory re-certification of MCLE providers.
- The court system publicize that attorneys may receive MCLE credits for technology courses as part of their MCLE requirements.
- Assigned counsel receive one MCLE credit for every 12 hours of assigned counsel work, with a maximum of four MCLE credits per reporting period.
- Volunteer neutrals who participate in court annexed alternative dispute resolution programs receive MCLE credits for their work.

C. Disciplinary Grievance Procedures

In order to create a uniform system, the Commission recommends that:

- The New York State Legislature amend the Judiciary Law to vest in the Administrative Board of the Courts the responsibility to establish uniform rules and procedures for the attorney disciplinary process in all four appellate divisions.
- Absent such legislation, the Appellate Divisions adopt statewide uniform rules.

D. Procedures for Resolving Fee Disputes

The Commission recommends that the Part 137 Rules and Guidelines be revised as follows:

- If the client initiates a fee dispute, the client must specify prior to the arbitration which charge or part of the bill or legal service the client disputes and provide such notice to the attorney. The arbitrator(s) must specifically limit the hearing to those items in the bills or performed as services specified by the client.
- If a client does not object to billings received on a regular basis through the course of representation, the burden should shift to the client to provide a meritorious explanation as to why he or she did not object to the attorney's fees within the time prescribed by the retainer agreement, and to prove that the attorney's fee was not fair or reasonable.
- Training curricula for arbitrators should be uniform statewide and specify how arbitration decisions are made, explain the significance of the signed retainer agreement or engagement letter, and explain that the role of the arbitrator is to decide whether the attorney's fees are "fair and reasonable" by applying the terms of the engagement letter or retainer agreement, unless the fees charged are illegal, excessive, or otherwise prohibited by law.
- Establish a uniform approach to appoint arbitrators and structure panels. On any panel where only one arbitrator sits, that arbitrator should be experienced in the area of law in which the arbitrating attorney provided representation to the complaining client. On panels of three, the panel should consist of at least two attorney arbitrators, one of whom has some practical experience in the area of law in which the arbitrating attorney provided representation to the complaining client.
- Amend the rules to provide that the arbitration award is final subject only to review under CPLR article 78. Neither the attorney nor the client may request a *de novo* hearing.

E. Matrimonial Regulatory Issues Affecting Solo and Small Firm Practitioners

1. *The Process for Obtaining Security Interests From a Client to an Attorney*

The Commission recommends that:

- The process for obtaining a security interest should be reviewed, and if appropriate, streamlined, simplified, expedited, or eliminated as overly burdensome requirements.

- Amendments to the regulations should explore ways to protect the client's rights, weighed against the expense and need for qualified counsel.
- Where there is an agreement between the client and the attorney consenting to a security interest, the issue should be addressed and presented at the preliminary conference, thus permitting speedy judicial review, and approval as appropriate.

2. ***The Ability to Withdraw as Attorney for Non Payment or the Failure by the Client to Honor the Terms of Retainer Agreement***

The Commission recommends that:

- Judges consider the economics of practice when balancing the state's need to protect the interests of litigants.
- Courts should grant requests for withdrawal for nonpayment of fees except in extenuating circumstances in order to avoid a repugnant situation for attorneys.

3. ***Increase the Annual Cap on Awarded Fees for Privately Paid Law Guardians and Push for Enforcement of Such Awards***

The Commission recommends that:

- Part 36 should be amended to raise the cap on compensation for law guardians to $75,000. The cap should be computed on awards actually paid from the date collected.
- To secure the payment of orders awarding law guardian fees, judges should consider including a provision in their orders that those fees are in the nature of child support and are not dischargeable in bankruptcy.
- To facilitate the enforcement of law guardian fees, final orders should specify that in the event of a default in payment by a set date, the award can be reduced to a judgment without further proceedings based on the law guardian's affirmation of non compliance.

PART IV

STRENGTHENING THE PROFESSION

A. Lawyer Advertising

The Commission makes the following recommendations concerning lawyer advertising:

- The code format of the existing Code of Professional Responsibility should be revised to embrace the rule format as set forth in the ABA Model Rules of Professional Conduct.
- The revised rules should make the code commentaries that relate to lawyer advertising part of the new rules to be approved by the appellate divisions.
- Prior to enactment of any major disciplinary rule changes involving lawyer advertising, a statewide survey should be sponsored by the Office of Court Administration to determine if "saturation advertising" is viewed by the New York public as an intrusion on privacy that reflects poorly upon the profession.
- A statewide Commission on Advertising should be established by the Chief Judge on a district or departmental basis with appropriate regulations that include the following provisions:

  (a) All attorneys must maintain copies of their advertising material for a period to be established by the Commission on Advertising ("CA") and file copies of the advertising materials with the CA within a prescribed time period.

  (b) Attorneys must pay a fee to the CA for the required filing to defray the cost of the CA's operation.

  (c) The CA shall randomly monitor all forms of advertising that the CA determines to be "false, deceptive or misleading," and advise the advertiser of its decision in writing.

  (d) Upon the specific voluntary request of an advertiser to the CA, render an opinion whether certain proposed advertising is "false, deceptive or misleading" to the proposed advertiser.

  (e) If the CA makes a negative determination and the advertiser proceeds with its use, the CA shall so inform the appropriate Grievance Committee.

B. Attorneys Must Make a Plan for the Continuity of Their Practice

The Commission recommends that:

- Solo and small firm practitioners who find themselves unable to practice, for whatever reason, have an advance exit plan already in place.
- Through proper education, most solo and small firms are likely to implement an appropriate advance exit plan and designate people they know and trust to implement such a plan.
- Local and state bar associations should develop committees to educate their members about Advance Exit Plans and monitor their implementation.
- Local and state bar association committees should provide a panel of qualified attorneys to step in for solo and small firm practitioners when their practice is interrupted.
- OCA should encourage attorneys to develop advance exit plans through educational efforts and postings on the UCS website.
- Efforts should be made to monitor the effectiveness of the various planning initiatives. It is important to look at the voluntary versus involuntary process and to evaluate the effectiveness of any proposed regulation from various points of view including protecting the client interest, protecting the attorney whose practice is interrupted, and, certainly, protecting the attorney's family who will undoubtedly experience financial hardship if the practice is interrupted.

C. Diversity within the Legal System for the Solo and Small Firm Practitioner

The Commission makes the following recommendations:

- Encourage bar associations to educate solo and small firm practitioners as to the benefits of supporting diversity in their own organizations and elsewhere in the legal system.
- Promote diversity in the pool of practitioners qualified for court appointments as fiduciaries and assigned counsel through training programs.
- Continue and expand diversity awareness and sensitivity programs for all judicial and nonjudicial court employees.
- Encourage bar associations to develop and maintain mentoring programs and networking opportunities for solo and small firm practitioners of diverse backgrounds.
- Strengthen interpreter services for non-English speaking litigants in the courts.

D. Pro Bono Services

In the face of great need and apparent stagnant participation by roughly half of the Bar, the Commission recommends that:

- The provision of pro bono services to the poor must remain voluntary. In those areas where it is effectively mandatory, it should revert to voluntary.
- All attorneys should commit to provide a minimum of 20 hours per year of pro bono services. This amounts to less than two hours per month. Where possible, attorneys should aspire to exceed the goal set by the NYSBA. Attorneys in larger firms should perform a proportionate share of pro bono services. All firms should have policies that encourage, recognize, and reward attorneys to participate in pro bono activities.
- The courts should provide incentives to attorneys who participate in pro bono activities. This should include more CLE credit for pro bono work and specific public recognition of attorneys who do the public good. Attorneys should voluntarily keep track of the time they spend on pro bono matters.
- OCA and local bar associations should provide free CLE and training for attorneys who agree to perform a specified number of hours or cases of pro bono services. Mentors should be assigned to these attorneys to assist them. Training should include a broad series of topics including but not limited to public benefits law, real estate law, landlord and tenant issues, predatory lending, divorce, custody, grandparents' rights, foreclosure, and other issues faced by the poor.
- The New York State Legislature should enact legislation which provides an exemption from malpractice claims in pro bono cases or establishes a public fund to cover such claims (currently Private Attorney Involvement (PAI) coverage is provided by some legal services programs).
- Programs which match attorneys and pro bono clients should provide training for the clients. The training should include instruction designed to ensure clients have reasonable expectations, understand that there are no guaranteed outcomes in litigation, recognize the benefits of settlement, and maintain appropriate interactions with attorneys.
- Bar Associations at all levels should organize more programs to do the public good locally. It should also be noted that there are ways to perform pro bono in a limited fashion such as at legal clinics.
- Bar Associations should more widely publicize the means to participate in pro bono activities, including on their websites.
- The New York State Legislature and the United States Congress should provide more funding to legal services corporations to represent the poor since the needs of the poor cannot be met by pro bono attorneys alone.

- Bar Associations, legal services corporations, and larger law firms should provide secretarial, library, and technology assistance to lawyers in connection with their pro bono services.
- Legal publishers should provide free online research time for pro bono cases.
- Law students should begin doing the public good by volunteering to do legal research and assist with drafting documents under the supervision of private attorneys, legal services corporations, and clinics.
- Those attorneys who are prohibited from outside work by the nature of their employment should be encouraged to donate funds equivalent to 20 hours of pro bono work to support legal services corporations.
- Local bar associations should sponsor frequent *pro se* divorce clinics. County Clerk and court personnel should participate in training the attorneys who will voluntarily staff these clinics.
- The District Attorneys and Attorney General should prosecute non-lawyer businesses which are engaged in the unlawful practice of law. Fines should be imposed which can be used to support the work of legal services corporations. (These businesses also exact large fees from poor consumers by claiming that they can do what an attorney does for less money. Often they are more expensive and the work product is unusable.)
- The organized bar should publicly recognize lawyers who do the public good on a frequent basis. This will encourage attorneys to participate and help bolster the reputation of lawyers generally.
- Courts should give attorneys who serve pro bono greater consideration in scheduling and hearing court appearances in these cases by providing expedited or more immediate access, or by establishing separate calendars for pro bono cases or staggering calendars to expedite the hearing of pro bono cases.
- OCA should publicize that probono.net/ny provides a comprehensive resource on pro bono opportunities. OCA should place the link to probono.net/ny in a more prominent place on its website.
- Bar Associations should maintain referral lists which consistently include attorneys who will take pro bono and modest means cases.