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NYCLA ADOPTS “REPORT ON THE NYS COMMISSION ON JUDICIAL CONDUCT”

NOVEMBER 18, 2009 – NEW YORK, NY – The New York County Lawyers’ Association (NYCLA) has adopted a report of its Task Force on Judicial Independence, “Report on the New York State Commission on Judicial Conduct,” which is designed to enhance the fairness of proceedings before the Commission and reduce the danger that the Commission may unintentionally compromise the independence of the judicial process. The Report’s recommendations include: enhanced due process in Commission procedures; a higher standard of proof, that of “clear and convincing evidence,” necessary to support a Commission finding of judicial misconduct; and professional liability insurance for judges paid for by the Office of Court Administration (OCA) to defray the costs of defending against a complaint. (To view the Report, go to NYCLA’s homepage, www.nycla.org.)

“The Report sheds light on an area that has frequently been viewed with great concern in terms of due process considerations,” said Hon. Betty Weinberg Ellerin, co-chair of the Task Force, former Presiding Justice of the Appellate Division, First Department, now senior counsel at Alston & Bird LLP and NYCLA board member. “We believe that the recommendations in the Report, if followed, will do much to enhance the fairness of the process and instill confidence in those who hold a contrary perception.”

Task Force on Judicial Independence

The Task Force on Judicial Independence was established in 2006 in keeping with NYCLA’s long history of commitment to an independent judiciary. Under the leadership of Judge Ellerin and Norman L. Reimer, executive director of the National Association of Criminal Defense Lawyers and former NYCLA president, as co-chairs, the Task Force comprises lawyers, judges and academics. In 2007, it held focus groups to identify issues that affect judicial independence and sponsored a major conference at which judges discussed pressures from the media, judicial administration, institutional players and the New York State Commission on Judicial Conduct.

Subcommittee on the Commission on Judicial Conduct

The Task Force created the Subcommittee on the Commission on Judicial Conduct to analyze procedures and make recommendations for changes that would promote judicial independence. Co-chaired by Hon. Marcy L. Kahn, Judge, Supreme Court of the State of New York, and Klaus Eppler, a partner at Proskauer Rose, LLP and former NYCLA president, the Subcommittee reviewed published material relating to the Commission, the Commission’s Operating Procedures and Rules, its website and Policy Manual, and solicited and received input from present and former staff of the Commission, including Robert H. Tembeckjian, administrator of the Commission, attorneys who practice before the Commission, and judges.

As the Report’s Overview notes:

“The Commission clearly performs a very important function. The need to insure that judges and other participants in our system of justice act with integrity and that there is a public perception of such integrity cannot be overstated. However, the Task Force’s review has indicated that enforcement of standards for judicial conduct carries with it a danger that the independence of the judicial process may be compromised. The Task Force has also noted that there is a significant difference between the perception of the members of the Commission and its staff, on the one hand, and of the judges who have been involved in proceedings before the Commission and their attorneys, on the

other hand, as to how the Commission operates and the effect of its proceedings on the judges and the judicial system.

The suggestions and recommendations contained in this Report are designed to enhance the fairness of proceedings before the Commission and to reduce the danger that the Commission may unintentionally compromise the independence of the judicial process. Some of the recommendations are for changes in the rules of the Commission, and others are for changes in the way that the Commission or its staff operates that are not contained in the rules. Other recommendations would require changes in the New York State Constitution or legislative enactment. Although the Task Force believes that its recommendations will result in due process improvements, it does not expect that they will solve all problems or that they will eliminate the inherent tension between enforcement of standards of judicial conduct and the independence of the judiciary.”

Other recommendations in the Report include:

1. Ideally, the Commission (and NYCLA) should advocate for an appropriate amendment of the Judiciary Law to remove the investigative/prosecutorial function of the Commission from the adjudicatory function. The Task Force believes this change does not necessarily require a constitutional amendment.
2. The Task Force concurs with Mr. Tembeckjian’s view that since the great majority of complaints are dismissed at the initial review and inquiry stage, it is probably unnecessary (and perhaps counter-productive) to notify judges before the Commission authorizes an investigation. However, where an initial review and inquiry continue for more than 120 days, the Task Force believes it is appropriate to notify the judge so that he or she may preserve applicable evidence and recollections of the conduct in question.
3. The Policy Manual should provide for more extensive notice than is currently provided to permit the judge to obtain and consult with counsel and review relevant materials prior to the required appearance or written response.

The Task Force on Judicial Independence urges the implementation of the recommendations contained in its Report and expects to consider other issues relating to the Commission in the future.

The New York County Lawyers' Association (www.nycla.org) was founded in 1908 as the first major bar association in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence and has continuously played an active role in legal developments and public policy.

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