



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: April 27, 2007

TO: Members of the Board Committee on Regulation,
Admissions & Discipline Oversight

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Modifications to the Alternative Discipline Program –
Request for Release of Proposed Amendments to Rules of Procedure
for 90-Day Public Comment Period

ISSUE

Whether the Board Committee on Regulation, Admissions and Discipline Oversight (“RAD Committee”) should release proposed amendments to the Rules of Procedure of the State Bar of California (“Rules of Procedure”), in the forms attached hereto, for a 90-day public comment period.

The proposed amendments to the Rules of Procedure proposed by the Office of the Chief Trial Counsel, if ultimately adopted, would modify the operation of the State Bar’s Alternative Discipline Program (“ADP”) by, among other things:

1. Establishing guidelines and limitations upon the respondent attorneys (“respondents”) who are eligible to be accepted into the ADP;
2. Requiring stipulations as to facts and conclusions of law to be agreed-upon and executed within 60 days of referral for ADP evaluation;
3. Requiring the State Bar Court to affirmatively determine whether a respondent who enters the ADP may continue to practice law without danger to his or her clients or to the public;
4. Requiring the respondent to establish the nexus between his or her substance abuse or mental health issue and the admitted misconduct by clear and convincing evidence;
5. Providing for expedited de novo review of the State Bar Court’s decision to admit or deny admittance of a respondent to the ADP and of decisions terminating or denying termination of a respondent from the ADP;
6. Making the stipulation as to facts and conclusions of law in ADP matters public upon the State Bar Court’s approval of the stipulation and admission of the respondent into the ADP;

7. Releasing the respondent from the ADP if new allegations of contemporaneous misconduct cannot be incorporated into the ADP proceeding but binding the parties to previously agreed-upon stipulations as to facts and conclusions of law;
8. Providing that, unless otherwise stipulated by the parties, the State Bar Court Hearing Judge who presided over an ADP matter involving a respondent may not act as the trial judge in that proceeding if the respondent is terminated from the ADP and his or her disciplinary matter is returned for handling as a standard proceeding.

The State Bar Court concurs that certain modifications to the ADP are appropriate, but disagrees with the recommendations of the Office of the Chief Trial Counsel in several significant respects, which are set forth below, and has proposed alternative modifications to the program. (State Bar Court's response and proposal starts on page 19.)

RECOMMENDATION

The Office of the Chief Trial Counsel and the State Bar Court jointly recommend that the RAD Committee authorize the release of the proposed amendments to the Rules of Procedure, in the form attached hereto as Appendix A (Office of the Chief Trial Counsel proposals) and Appendix B (State Bar Court proposals) for a 90-day public comment period.

DISCUSSION

As the California Supreme Court has repeatedly noted, its primary concern in State Bar disciplinary proceedings is always the protection of the public, the preservation of confidence in the legal profession and the maintenance of the highest possible professional standards for attorneys. (See, e.g., *Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *Harford v. State Bar* (1990) 52 Cal.3d 93, 100.)

When it enacted the Attorney Diversion and Assistance Act in 2001, the Legislature specifically stated that its intent was to seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol or mental illness that affect their competency and to treat those individuals and find ways to return them to the practice of law in a manner that will not endanger the public health and safety. (Bus. & Prof. Code, § 6230.)

However, the Supreme Court has recognized that the need for public protection is paramount, notwithstanding the fact that the attorney's misconduct was caused by a mental or other impairment. In *Slaten v. State Bar* (1988) 46 Cal.3d 48, 63, the Supreme Court stated as follows:

“The purpose of disciplinary proceedings is the protection of the public and the need for public protection is the same whether or not the attorney is mentally impaired. [Citation omitted.] Thus our focus must be on assurance of high professional standards, whatever the unfortunate causes, emotional or otherwise, of an attorney's failure to meet those standards. [Citation omitted.]”

The Lawyer Assistance Program (“LAP”) primarily addresses the treatment of substance abuse and mental health problems of attorneys who are referred to LAP or who voluntarily seek to participate in LAP. The program offers support and structure to attorneys recovering from these disorders. Experts provide consultations regarding rehabilitation and private support groups are offered to attorneys in the program.

The Alternative Discipline Program (“ADP”), however, addresses the substance abuse and/or mental health problems of attorneys against whom formal disciplinary proceedings have been initiated in the State Bar Court. While the LAP provides treatment oversight for respondents in the Alternative Discipline Program, it is the responsibility of the ADP to ensure public protection, preservation of confidence in the legal profession and maintenance of the highest possible professional standards for attorneys.

The ADP has now been in operation for approximately five years. The Program has both current and prospective value. However, based upon our experiences with the Program to date, it is clear that significant modifications to the ADP are appropriate.

The perspective and the recommendation of the Office of the Chief Trial Counsel are set forth first. The State Bar Court’s agreement, disagreement and/or suggested alternative modification is set forth thereafter.

I. The Office of the Chief Trial Counsel’s Proposal

A. Eligibility for Participation in the ADP

Under the current Program Outline for the Alternative Discipline Program, **all** respondents against whom disciplinary proceedings or investigations are pending are eligible for the ADP except those respondents who are subject to summary disbarment.¹

It is the opinion of the Office of the Chief Trial Counsel that current eligibility criteria for the ADP is too broad and that it should be narrowed in several important respects.

Business and Professions Code section 6232, subdivisions (a) and (b) allow referrals to LAP by (1) the Office of the Chief Trial Counsel; or (2) the State Bar Court following the initiation of a disciplinary proceeding. Significantly, Business and Professions Code section 6232, subdivision (b)(3) provides that a respondent against whom a disciplinary proceeding or investigation is pending can voluntarily enter into the LAP only in accordance with conditions agreed upon with OCTC or upon

¹ An attorney is subject to summary disbarment if he or she has been finally convicted of an offense that is a felony under the laws of California, the United States or any state or territory thereof, and an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude. (Bus. & Prof. Code, § 6101, subd. (c).)

approval of the State Bar Court. However, even with OCTC or State Bar Court approval, the respondent is only statutorily eligible to participate in the LAP if **both** of the following conditions apply:

- (1) The investigation or proceeding is based primarily on the self-administration of drugs or alcohol or the illegal possession, prescription, or nonviolent procurement of drugs for self-administration, or on mental illness; **and**
- (2) The conduct does not involve actual harm to the public or to the respondent's clients.

Business and Professions Code section 6230 emphasizes the Legislature's intent to identify and rehabilitate attorneys with impairment due to drugs or alcohol or due to mental illness that affect their "competency." However, section 6230 also reflects a legislative intent that any return to practice following treatment must be accomplished in a manner that will not "endanger the public health and safety." Similarly, Business and Professions Code section 6237 provides that it is the intent of the Legislature that the authorization of a Lawyers Assistance Program not be construed as limiting or altering the powers of the Supreme Court to disbar or discipline members of the State Bar.

As previously indicated, the Supreme Court has repeatedly stated that its primary concern in State Bar disciplinary proceedings is always the protection of the public, the preservation of confidence in the legal profession and the maintenance of the highest possible professional standards for attorneys. (*Porter v. State Bar, supra*, 52 Cal.3d at p. 527; *Harford v. State Bar, supra*, 52 Cal.3d at p. 100.) Moreover, the Supreme Court has specifically held that the need for public protection remains the same whether or not the attorney is mentally impaired and that the focus must always be on assurance of high professional standards. (*Slaten v. State Bar, supra*, 46 Cal.3d at p. 63.)

Based upon these principles, the Office of the Chief Trial Counsel strongly recommends that additional limitations upon admittance into the ADP should be established. The Office of the Chief Trial Counsel recommends that participation in the ADP should be limited to respondents (1) whose misconduct does not warrant disbarment, irrespective of mitigating circumstances; (2) who have a reasonable likelihood of succeeding in the ADP; and (3) who are not seeking to participate in the ADP as a means of delaying the ultimate disposition of the proceeding or avoiding disbarment. Accordingly, a respondent should not be eligible for participation in the ADP in the following cases:

1. The respondent has engaged in misconduct that warrants disbarment, irrespective of mitigating circumstances;²
2. The respondent has been convicted of a felony involving moral turpitude *per se* that, upon finality of the conviction, would warrant summary disbarment;
3. The respondent applied for participation in the ADP less than 90 days prior to the first scheduled trial date;

² This includes cases in which disbarment is warranted by the seriousness of the misconduct in the current proceeding and/or cases in which disbarment in the current proceeding is warranted in light of the respondent's record of prior discipline.

4. The respondent suffers from a personality disorder or other mental condition that is not susceptible to successful therapeutic rehabilitation or where there is not a strong prognosis for future rehabilitation; or
5. The respondent has previously participated in the ADP and has either successfully completed the Program or has been terminated from the Program.

A brief explanation of each of these proposed exclusions is set forth below.

1. The Misconduct Warrants Disbarment Irrespective of Mitigating Circumstances

Even where a respondent suffers from a substance abuse or mental health issue, there are circumstances in which the protection of the public, the preservation of public confidence in the legal profession and/or the maintenance of high professional standards for attorneys requires that the respondent be disbarred.

For instance, in *Phillips v. State Bar* (1989) 49 Cal.3d 944, 947-950, the attorney was found, in three separate client matters, to have failed to perform the legal services for which he was retained and to have failed to adequately communicate with his clients. The attorney had also been found culpable of violating conditions of his probation in a prior disciplinary proceeding and of failing to comply with rule 955 of the California Rules of Court in the prior proceeding. The attorney had also been disciplined on four previous occasions. The attorney presented expert testimony that he suffered from two major mental problems: a severe passive/aggressive personality disorder and depression. The expert testified that the attorney would perform better in a structured environment, such as a large law firm, and that he had made progress in his treatment with another psychiatrist. However, the expert testified that, although treatment may help the attorney control the disorder, the disorder is ultimately incurable. (*Phillips v. State Bar, supra*, 49 Cal.3d at pp. 950-951.)

The Supreme Court did not find the attorney's mental disorder to be a mitigating factor in his disciplinary proceeding, stating as follows (*Phillips v. State Bar, supra*, 49 Cal.3d at p. 954):

“As to personality disorder, petitioner is correct that mental disorder may serve as a mitigating factor; but this is true only if one establishes through clear and convincing evidence that he no longer suffers from the disorder. (Std. 1.2(e)(iv); see also *Ballard v. State Bar, supra*, 35 Cal.3d at p. 289.) [fn. omitted.]

“Dr. Vicary testified that petitioner has improved during treatment, but also stated that petitioner's disorder is incurable and may only be controlled by continuous lifelong psychotherapy and by a highly structured environment free of client interaction. Even in that kind of environment, Dr. Vicary cautioned that if petitioner was pressed by a partner or an office manager to complete an assignment, he might respond irrationally and in a self-destructive manner. We certainly cannot grant petitioner a limited right to practice

law in certain kinds of stress-free environments. In any case, because petitioner has not convinced this court that he no longer suffers from the disorder, the [review] department properly did not consider it as a mitigating circumstance.”

The Supreme Court concluded that the attorney’s current misconduct and his prior record of discipline showed a continuing course of serious professional misconduct extending over a number of years. The Court further found that this course of conduct, as well as the attorney’s continuing personality disorder, posed a substantial risk of future harm to the public and the profession. As a result, the Supreme Court concluded that disbarment was appropriate. (*Phillips v. State Bar, supra*, 49 Cal.3d at p. 956.)

Similarly, in *In re Nevill* (1985) 39 Cal.3d 729, 733, an attorney was convicted of voluntary manslaughter in the shooting death of his wife, whom the attorney believed was having an extramarital affair. At the trial of his criminal matter, a forensic psychiatrist who had examined the attorney testified for the defense that the attorney had a “mixed personality disorder,” which meant that he was a “psychologically weak, immature, and fragile individual” who dealt with problems in a childlike fashion. The psychiatrist further testified that the attorney’s disorder did not cause the shooting, but contributed to the attorney’s inability to handle significant stress. The psychiatrist concluded that the attorney was “coming apart psychologically” before the killing and, therefore, did not have the capacity to intend to kill.

In considering the appropriate discipline to be imposed upon the attorney, the Supreme Court emphasized the great need to protect the public and the profession. The Court stated that “[p]etitioner’s professionally diagnosed childlike responses to the stresses of life heighten our concern. While ‘we are not insensitive to the personal and professional problems that frequently besiege the practitioner’ (citation omitted), it is our duty to protect the public from those attorneys who, for whatever reason, are unable to cope with pressure and adversity. The safety of the public, and the integrity of the profession require no less.” (*In re Nevill, supra*, 39 Cal.3d at p. 735.)

As it had in *Phillips*, the Supreme Court did not find attorney Nevill’s mental condition to be mitigating, stating (*In re Nevill, supra*, 39 Cal.3d at p. 736):

“Likewise, petitioner’s mental condition is not mitigating. In *Possino*, we expressly rejected the assertion that disbarment was inappropriate given the errant attorney’s psychological condition, stating, ‘[w]e realize that in many cases psychoneurotic problems may underlie professional misconduct and moral turpitude. In this area our duty lies in the assurance that the public will be protected . . . rather than in an analysis of the reasons for his delinquency.’ (Citations omitted.) Though petitioner’s behavior may have been caused by his ‘personality disorder,’ that disorder will not preclude his disbarment.”

Thus, while every member of the State Bar may certainly benefit from participation in the LAP, the Office of the Chief Trial Counsel strongly recommends that the ADP should only be available to those members whose admitted misconduct and/or record of prior discipline does not warrant

disbarment for the protection of the public, the preservation of confidence in the legal profession or the maintenance of high professional standards for attorneys.

2. The Respondent Is Convicted of a Summary Disbarment Offense

Business and Professions Code section 6102, subdivision (c) provides that the Supreme Court “shall” summarily disbar any attorney who is finally convicted of a felony under the laws of California, the United States or any state or territory thereof provided that an element of the offense is the specific intent to deceive, defraud, steal or make or suborn a false statement or if the offense involves moral turpitude *per se*.

In such cases, the attorney has no right to a hearing regarding the facts and circumstances surrounding his or her conviction. Summary disbarment is required, irrespective of any mitigating circumstance, including but not limited to any substance abuse or mental health problem that may have caused the misconduct.

Rule 802(b) already provides that a respondent who has been convicted of a criminal offense that subjects him or her to summary disbarment is not eligible to participate in the ADP.

3. The Respondent Seeks Admission to the ADP Within 90 Days of the First Scheduled Trial Date

The goal of the ADP is to identify potential candidates for the Program at the earliest possible time. The Office of the Chief Trial Counsel regularly inquires about substance abuse or mental health problems during its disciplinary investigations and notifies respondents of the existence and potential availability of the ADP. Although Business and Professions Code section 6232, subdivision (b)(2) does not ostensibly permit the State Bar Court to refer an attorney to the LAP until after formal disciplinary charges against the attorney have been filed in the State Bar Court, rule 801(b) of the Rules of Procedure allows a State Bar Court Hearing Judge to make a referral of a respondent to the ADP at the time of the Early Neutral Evaluation Conference (i.e., prior to filing a notice of disciplinary charges in the State Bar Court).

The Office of the Chief Trial Counsel recognizes that some respondents with substance abuse or mental health issues are reluctant to admit that they have such problems or are in denial that they have a legitimate problem. However, recognizing the importance of early identification and referral of potential ADP candidates, the Program Outline for the Alternative Discipline Program adopted by the State Bar Court requires a respondent to identify his or her substance abuse or mental health issue or at least acquiesce in an evaluation process at the initial status conference and provides that the failure or refusal to do so will preclude the respondent from later admittance into the Program. In that regard, the State Bar Court’s Program Outline provides as follows:

“If the respondent denies at the initial status conference that he/she has a substance abuse or mental health problem, or does not agree to contact LAP for the evaluation process, the Program Judge informs the respondent that he/she will not be

allowed to request referral to the Alternative Discipline Program at a later date in the proceedings. The Program Judge also informs the respondent that his or her initial denial of a problem may be considered in subsequently determining whether mitigation credit for a substance abuse or mental health problem is appropriate in his/her disciplinary proceeding.”

Regrettably, the practice in these cases has been significantly different from the procedure outlined in the State Bar Court’s Program Outline. It is not at all unusual for a respondent to deny that he/she has a substance abuse or mental health problem until shortly before the commencement of trial. In some cases, the respondent has sought referral to the ADP on the morning of the scheduled trial. In at least one case, the respondent’s “admission” that he/she had a substance abuse or mental health problem occurred after the respondent had repeatedly denied, including under oath, that he/she had such a problem.³

Allowing a respondent to enter into the ADP immediately before trial has at least three serious adverse consequences. First, it gives at least the appearance that the respondent is “gaming” the system and that he/she is intentionally seeking to delay the proceedings and to avoid the imposition of discipline for as long as possible. This is especially the case where the respondent has previously denied having a substance abuse or mental health problem and only seeks an ADP referral after he or she has been unsuccessful in settling the case for what the respondent believes is an acceptable level of discipline.

Second, when a respondent initially denies that he/she has a substance abuse or mental health problem and the disciplinary matter proceeds on a normal disciplinary track, the Office of the Chief Trial Counsel must take all steps necessary to prepare for trial including, as appropriate, engaging in discovery; subpoenaing financial, court and other records; interviewing and/or deposing witnesses, etc. It is both costly and unfair to the Office of the Chief Trial Counsel to permit a respondent to wait until the eleventh hour to overcome his/her “denial” of a substance abuse or mental health problem and obtain a referral to ADP.

Third, a last-minute referral to the ADP causes significant delay in the disposition of the proceeding. In the vast majority of cases, the first scheduled trial date in the normal disciplinary track is at least six months after the filing of the notice of disciplinary charges. Moreover, the ADP referral and evaluation process is time-consuming. In addition to the evaluation process by LAP, potential ADP cases require the respondent and the Office of the Chief Trial Counsel to reach agreement upon a stipulation as to facts and conclusions of law. In addition, the respondent must provide proof of the nexus between his/her misconduct and the alleged substance abuse or mental health problem and the parties must provide a recommendation to the State Bar Court regarding the appropriate level of discipline that should be imposed or recommended in the ADP process. Finally, the State Bar Court must issue a decision regarding the alternative levels of discipline that will be imposed and the respondent must sign an ADP contract prepared by the State Bar Court. This ADP process frequently takes much more than six months.

³ In many cases, the respondent’s request for referral to ADP occurs only after the respondent has been unable to reach agreement with the Office of the Chief Trial Counsel on a level of discipline that is acceptable to the respondent.

The Office of the Chief Trial Counsel strongly recommends that respondents who wish to be admitted to the ADP should be required to disclose the existence of a substance abuse or mental health problem at any early stage of the proceeding and, in any event, less than 90 days prior to the first scheduled trial date.

4. A Respondent with a Personality Disorder or Other Mental Disorder That is Not Amenable to Treatment or for Which Rehabilitation is Unlikely

The State Bar Court's Program Outline for the Alternative Discipline Program provides that, in determining whether a respondent is eligible to participate in the ADP, the State Bar Court [ADP] Program Judge must consider whether the respondent is "suitable or amenable to treatment."

An examination of Supreme Court case law demonstrates that an affirmative answer to this question should be central to a determination of the respondent's eligibility to participate in the ADP.

The Supreme Court has held that a mental disorder may serve as a mitigating factor in a disciplinary proceeding, "but this is true only if [the respondent] establishes through clear and convincing evidence that he no longer suffers from the disorder." (*Phillips v. State Bar, supra*, 49 Cal.3d at p. 954.) Stated another way, "[a]n attorney's psychiatric condition has been considered in determining whether lesser discipline than disbarment is appropriate, but only if successful therapeutic rehabilitation or a strong prognosis for future rehabilitation is established. (*Ballard v. State Bar* (1983) 35 Cal.3d 274, 289.)"⁴

Thus, in *Phillips v. State Bar, supra*, 49 Cal.3d at p. 954, the Supreme Court found that, while the respondent's personality disorder had improved during treatment, it is incurable and can only be controlled by continuous lifelong psychotherapy and by a highly structured environment. As a result, the Supreme Court concluded that the respondent had not convinced the Court "that he no longer suffers from the disorder" and that, therefore, the mental health problem could not be considered as a mitigating circumstance. The Supreme Court ordered the attorney's disbarment.

Similarly, in *Ballard v. State Bar, supra*, 35 Cal.3d at pp. 279-281, 284, the respondent was found culpable of misconduct in 32 client matters over a six-year period. After examining the respondent on five occasions, a psychiatrist diagnosed him as having "a chronic, long-standing personality disorder referred to as 'paranoid personality.'" The psychiatrist outlined the ways in which the respondent's disorder accounted for his past misconduct and would continue to seriously interfere with his ability to practice law.

⁴ Additionally, in *Porter v. State Bar* (1990) 52 Cal.3d 518, 527, the Supreme Court held that the respondent "must show that he has so overcome or controlled the disorder that it is unlikely to cause further misconduct." (See also, *In re Naney* (1990) 51 Cal.3d 186, 197.)

The Supreme Court held that evidence of mental illness has a different significance in a disciplinary context from mental fitness proceedings and is only entitled to consideration as a mitigating factor if there is a strong likelihood of rehabilitation. In particular, the Court held as follows (*Ballard v. State Bar, supra*, 35 Cal.3d at p. 289):

“In the disciplinary context, evidence of mental illness has a different significance than it does when the propriety of mental fitness proceedings is under consideration. In the former context, such evidence is not a mitigating factor which will justify or exonerate an attorney from bearing the responsibility for his professional misconduct. [Citation omitted.] An attorney’s psychiatric condition has been considered in determining whether lesser discipline than disbarment is appropriate, but only if successful therapeutic rehabilitation or a strong prognosis for future rehabilitation is established. [Citations omitted.] This is consistent with the nonpunitive, protective purpose of State Bar disciplinary proceedings. [Citation omitted.]”

The Supreme Court noted that the psychiatrist had observed that, while “some individuals with this personality disorder can be helped and can be modified . . .”, he opined that the respondent represented “a very difficult treatment problem” because the personality disorder he exhibited “is by its nature very difficult to work with psychotherapeutically.” As a result, the Court concluded that the respondent’s mental health condition was not entitled to consideration as a mitigating circumstance and that “it does not appear that a sufficiently strong likelihood of petitioner’s rehabilitation exists to justify a rejection of the State Bar’s recommendation of disbarment.” (*Ballard v. State Bar, supra*, 35 Cal.3d at p. 289.)

Thus, the Office of the Chief Trial Counsel submits that the mere existence of a mental health problem is not sufficient to warrant a respondent’s admittance into the ADP. Public protection and the integrity of the profession require that there must also be clear and convincing evidence that the mental health condition is one that is susceptible to treatment and rehabilitation to the extent that the disorder no longer exists or that the respondent has “so overcome and controlled the disorder that it is unlikely to cause further misconduct.”

5. The Respondent Has Previously Participated in the ADP

The ADP provides a qualifying respondent with an important opportunity to seek rehabilitation from his/her substance abuse or mental health problem and, if successful, to receive significant mitigation credit for such rehabilitation in determining the appropriate degree of discipline, if any, that should be imposed as a consequence of the respondent’s admitted misconduct.

However, a respondent who has been terminated from the ADP as a result of his/her termination from the LAP or non-compliance with ADP conditions imposed by the State Bar Court should not have a second opportunity to take advantage of the ADP. In such circumstances, the respondent should be required to have his/her matter heard as a normal disciplinary proceeding and should be required to demonstrate any mitigation, including rehabilitation from substance abuse or mental health problems, as part of the standard disciplinary proceeding.

Similarly, a respondent who has “successfully completed” the ADP but who, thereafter, has a subsequent disciplinary proceeding based upon further complaints of misconduct should not be allowed to participate in the ADP a second time. In these cases, it is apparent that the respondent’s rehabilitation from his/her substance abuse or mental health issue was not complete or genuine.

B. Requiring Stipulations as to Facts and Conclusions of Law to be Executed Within Specified Time Periods

The State Bar Court’s Program Outline for the Alternative Discipline Program provides that a stipulation between the respondent and the Office of the Chief Trial Counsel is a prerequisite to the respondent’s participation in the ADP. Additionally, the Program Outline provides that the stipulation must be submitted to the Program Judge within 90 days of the initial status conference.

The early execution of a stipulation as to facts and conclusions of law is essential to an appropriate determination of the respondent’s eligibility for ADP.

In practice, however, the preparation and submission of an executed stipulation often takes much longer. Regrettably, there have been cases in which the Deputy Trial Counsel has been significantly responsible for delays in the preparation of such stipulations.⁵ In many other cases, however, the delay is more fairly attributable to the respondent. Very frequently, the respondent is not anxious for the ADP matter to proceed quickly. Once the State Bar Court has referred the respondent to the Lawyers Assistance Program (“LAP”) for an evaluation, the respondent begins to receive treatment for his/her substance abuse or mental health issue. In most cases, however, the respondent is permitted to continue practicing law during the evaluation process and while the stipulation as to facts and conclusions of law is being negotiated. Therefore, if the respondent wants to continue practicing, he/she is unlikely to be in a hurry to complete the stipulation.

The Office of the Chief Trial Counsel recommends that a new rule be adopted requiring the parties to submit an executed stipulation as to facts and conclusions of law no later than 60 days following referral of the respondent to the LAP for evaluation. The proposed new rule would also provide that, if the Court finds that the respondent or his/her counsel is primarily responsible for the failure to submit a timely stipulation, the Court shall return the matter to the standard disciplinary process.

⁵ The Office of the Chief Trial Counsel currently has a total of four Deputy Trial Counsel assigned to ADP cases, three in Los Angeles and one in San Francisco. However, because of the number of cases in the ADP process, the caseloads of these Deputy Trial Counsel is very heavy and that workload has sometimes adversely impacted their ability to quickly negotiate and prepare stipulations as to facts and conclusions of law. To address delays caused by the Office of the Chief Trial Counsel, I have concluded that Deputy Trial Counsel assigned to standard disciplinary proceeding can and should be available to assist with the negotiation and preparation of ADP stipulations.

C. Inactive Enrollment of ADP Respondent

Business and Professions Code section 6233 specifically recognizes that an attorney who wishes to participate in the LAP and has a pending disciplinary investigation or proceeding may be required to be enrolled as an inactive member of the State Bar or may be required to agree to various practice restrictions, such as monetary accounting or restrictions upon the scope of the attorney's practice. The Legislature's expressed intent in enacting the Attorney Diversion and Assistance Act was to rehabilitate impaired attorneys so that they can practice law in a manner that will not endanger the public health and safety. Section 6233 also provides that, upon successful completion of the program, an attorney who has been placed on inactive status by the State Bar Court as a condition of program participation may receive credit for the period of inactive enrollment towards any period of actual suspension imposed by the Supreme Court.

Placing an ADP participant on inactive status serves several purposes. First, placing an attorney who is suffering from a current substance abuse or mental health problem on inactive status allows the attorney to focus upon his/her treatment and rehabilitation. Second, if the substance abuse or mental health problem is acute and/or the respondent's admitted misconduct is serious, inactive enrollment provides immediate protection for the public and the attorney's clients. Third, a number of the ADP participants who have successfully completed the ADP have argued that it is unfair or incongruous to require them to be suspended or otherwise disciplined by the Supreme Court after they have successfully completed the ADP and have been found to be "rehabilitated" from their substance abuse or mental health issue. Finally, requiring an ADP participant to be placed on inactive status at the outset of his/her ADP participation would discourage respondents who are seeking admittance into the ADP simply as a means of delaying the imposition of discipline.

Since public protection is a primary purpose of the discipline system, the Office of the Chief Trial Counsel recommends that, in every case in which the degree of discipline to be imposed for successful completion of the ADP includes a period of actual suspension, the State Bar Court Hearing Judge should be required to determine whether the respondent's immediate inactive enrollment is required for the protection of the public and, in any case in which such inactive enrollment is not required, the State Bar Court should be required to find that such inactive enrollment is not necessary for the protection of the public and/or the respondent's clients.

D. Nexus Between Respondent's Misconduct and Substance Abuse or Mental Health Problem

The Supreme Court has recognized that "[f]or an attorney's rehabilitation from alcoholism or other substance abuse to be entitled to *any* significant mitigating weight, the attorney must establish these facts: (1) the abuse was addictive in nature; (2) the abuse causally contributed to the misconduct, and (3) the attorney has undergone a meaningful and sustained period of rehabilitation." (*In re Billings* (1990) 50 Cal.3d 358, 367; *Harford v. State Bar, supra*, 52 Cal.3d at p. 101.) The Supreme Court has further held that "clear proof of all three elements" is necessary and that the attorney carries "the heavy burden of establishing that the misconduct was caused in significant measure by substance abuse from which the attorney has made substantial progress towards recovery." (*Harford v. State Bar, supra*, 52 Cal.3d at p. 101.)

Similarly, as previously indicated, psychological disorders are mitigating “if convincingly established by substantial credible evidence” (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667; *Bowles v. State Bar* (1989) 48 Cal.3d 100, 110) and if the attorney can show “that he has so overcome or controlled the disorder that it is unlikely to cause further misconduct.” (*Porter v. State Bar, supra*, 52 Cal.3d at p. 527; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Standard 1.2(e)(iv) of the Standards for Attorney Sanctions for Professional Misconduct (“Sanction Standards”) also recognizes that extreme emotional difficulties, physical disabilities and/or substance abuse problems may be mitigating. However, Standard 1.2(e)(iv) sets forth the proof that is required to qualify for mitigation:

“Circumstances which shall be considered mitigating are:

“(iv) extreme emotional difficulties or physical disabilities suffered by the member at the time of the act of professional misconduct ***which expert testimony establishes was directly responsible for the misconduct***; provided that such difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse; ***and further provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties or disabilities.***” (Emphasis added.)

(See also, *Porter v. State Bar, supra*, 52 Cal.3d at p. 527; *In re Naney, supra*, 51 Cal.3d at p. 197 [both of which specifically cite Standard 1.2(e)(iv)].)⁶

The State Bar Court Review Department held in *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295, that the respondent must establish, by clear and convincing evidence, the causal connection between her alcoholism or drug addiction and her specific acts of misconduct.

Additionally, in *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443, the Review Department declined to find a respondent’s Parkinson’s disease, torticollis and dysphonia⁷, along with his alleged depression arising from an emotional divorce and the death of his parents, to be mitigating because there was no expert testimony in the record to establish that his physical and mental problems “were directly responsible for his misconduct” and because there was no expert testimony in the record to establish that he no longer suffered from those difficulties and disabilities.

⁶ The respondent has the burden of establishing, by clear and convincing evidence, the existence of any and all circumstances in mitigation. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 291-292, 295; *In the Matter of Twitty* (1994) 2 Cal. State Bar Ct. Rptr. 664, 673; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 699.)

⁷ “Torticollis” is a condition in which the head is tilted toward one side while the chin is elevated and turned toward the opposite side. “Dysphonia” is the medical term for hoarseness or other phonation disorders.

By contrast, while rule 802(c) of the Rules of Procedure requires a “nexus” between the respondent’s substance abuse or mental health issue and the acts of misconduct, the rule defines “nexus” as simply meaning “evidence that there is a *reasonable likelihood* that the substance abuse or mental health issue either precipitated the respondent’s misconduct or that it was a contributing cause of the misconduct.” (Emphasis added.) Rule 802(c) is silent both as to the standard of proof of the causal connection and as to the requirement that such connection be established by expert testimony.

Currently, the “nexus” between a respondent’s misconduct and his/her substance abuse or mental health issue is typically established in two ways. First, an LAP evaluator interviews the respondent and prepares a written “evaluation.” However, the interview between the respondent and the evaluator only lasts about 90 minutes, no testing is conducted and the evaluation is based only upon the respondent’s representations and statements about his or her condition and the causes giving rise to that condition. This is usually the primary (and sometimes sole) “evidence” of the respondent’s substance abuse or mental health problem. Second, the respondent prepares a declaration that causally connects his or her misconduct with the substance abuse or mental health issue. Thus, both the LAP evaluation and the nexus declaration are almost entirely based upon the respondent’s own self-serving statements.

The proposed amendment to rule 802(c) would specifically require the respondent to establish the nexus between his or her substance abuse or mental health issue and his/her acts of admitted misconduct by clear and convincing evidence and would further provide that the term “nexus” means that the substance abuse or mental health issue was directly responsible for the respondent’s misconduct.

E. Review of ADP Proceedings

Rule 807 of the Rules of Procedure currently provides that the only decisions or orders of the Program Judge that may be reviewed by the State Bar Court Review Department are (1) a decision of the Program Judge to admit the respondent to the Program or to deny admittance to the Program; and (2) a decision of the Program Judge to terminate a respondent from the Program or to deny the State Bar’s motion to terminate the respondent from the Program.

The review provided by rule 807 is limited to abuse of discretion or error of law, a standard of review that is much narrower than the independent or “de novo” review provided in standard disciplinary proceedings. In virtually all other State Bar disciplinary and regulatory proceedings, the Review Department conducts an independent or “de novo” review of the record and may adopt findings, conclusions of law and a disciplinary recommendation different from those of the hearing judge. (See *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 332-333; *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 14; see also, rule 9.12, Calif. Rules of Ct.; rules 301, 305(a) and 308(d), Rules Proc. of State Bar.) Moreover, the Supreme Court has held that it gives greater weight to the disciplinary recommendations of the Review Department than to the recommendations of the Hearing Department. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1036; *Grim v. State Bar* (1991) 53 Cal.3d 21, 30.)

By contrast, however, the scope of review for abuse of discretion is extremely narrow. Where a trial court has discretionary power to decide an issue, a reviewing court may not substitute its own judgment for that of the trial judge; the trial court's exercise of discretion may not be disturbed in the absence of a clear showing of abuse. (*Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240, 1251; *Blank v. Kirwin* (1985) 39 Cal.3d 311, 331.) The test for abuse of discretion is whether the trial court exceeded the bounds of reason, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. Reversible abuse exists only if there is no reasonable basis for the court's action. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

The severe limitations imposed by the current rule have made the decisions of the Program Judge virtually non-reviewable. No review is specifically provided under the current rule to challenge the Program Judge's nexus determination or his or her disciplinary recommendations. Moreover, since there are currently no specific eligibility criteria for admittance to the ADP (other than a respondent's criminal conviction of a summary disbarment offense), it is virtually impossible to demonstrate that the Hearing Judge has abused his or her discretion by admitting a respondent to the ADP, even though the respondent has committed extremely egregious misconduct or has a lengthy record of prior discipline.

Without in any way denigrating the State Bar Court Hearing Department, the availability of independent review by the Review Department is essential to promoting consistency in the decisions and dispositions of the State Bar Court and to ensuring that there is a fair and adequate opportunity to raise legitimate factual and legal issues of broad import to the attorney discipline system. Significantly, the State Bar Court Review Department increased the recommended level of discipline from that recommended by the Hearing Judge in 9 of the 12 opinions issued by the Review Department in standard disciplinary proceedings during 2006; in some cases, this increase was dramatic.⁸ (See, e.g., *In the Matter of Julie Wolff* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. ___ [increase from public reproof recommended by the Hearing Judge to 18-month actual suspension]; *In the Matter of Ione Gray*, Case No. 03-O-03022 [increase from 6-month actual suspension recommended by the Hearing Judge to disbarment].)

In standard disciplinary proceedings, the Office of the Chief Trial Counsel may seek review by the State Bar Court Review Department and, if necessary, may petition for review by the Supreme Court from the final decision of the State Bar Court Hearing Judge. (See rule 9.14, Calif. Rules of Ct.; rule 301, Rules Proc. of State Bar.) However, such review is not available in ADP proceedings. Moreover, meaningful appellate review at the end of the proceeding could be fundamentally unfair to a respondent who agreed to participate in the ADP based upon the Hearing Judge's alternative disciplinary recommendations and thereafter complied with the ADP for 18 to 36 months prior to his or her successful completion of the ADP.

⁸ In the other three cases, the Review Department recommended the same level of discipline as that recommended by the Hearing Department; moreover, two of those three cases were disbarment recommendations.

The Office of the Chief Trial Counsel does not believe that providing an independent, expedited review of the decision to admit or deny admittance of a respondent to the ADP would be overly burdensome to the State Bar Court Review Department. It is the understanding of the Office of the Chief Trial Counsel that, at any one time, the appellate caseload of the State Bar Court Review Department is approximately 50 cases. It should be noted that the former, volunteer State Bar Court Review Department was required to conduct an independent review of *every* case decided by the former volunteer State Bar Court Hearing Department. As a result, the number of cases on calendar before the Review Department at each of its monthly meetings could exceed 100 cases. While the review exercised by the current Review Department may be more thorough and time-consuming, we believe that the Review Department can, and should, accommodate any increase in the number of cases that may be necessary in order to provide meaningful appellate review of ADP cases.

F. Availability of Stipulation to the Public Following Approval

Business and Professions Code section 6086.1 provides that the hearings and records of all attorney disciplinary proceedings are public following the filing of the notice of disciplinary charges.

Notwithstanding the requirements of section 6086.1, only limited information relating to ADP proceedings is currently available to the public. Rule 806 of the Rules of Procedure provides that, while the fact that a respondent is currently in the ADP and any pleadings or orders filed in the proceeding are public, information concerning the nature and extent of the respondent's treatment is "absolutely confidential" absent an express written waiver by the respondent.⁹ Additionally, documents submitted to the State Bar Court, including the stipulation as to facts and conclusions of law, the respondent's nexus evidence and the parties' briefs on the issue of the appropriate discipline to be imposed or recommended in the matter, may not be made public unless and until they are ordered filed by the Court upon the respondent's successful completion of the ADP or upon the respondent's termination from the Program.

The lack of public information regarding pending ADP proceedings in the State Bar Court seriously undermines public protection, public confidence in the discipline system and the public's right to access to information regarding the pendency of disciplinary proceedings against California attorneys. For instance, a respondent who practices probate law may have admitted in a stipulation to the misappropriation of significant amounts of money from numerous estates, most of which remain unpaid. Under current ADP procedures, the only information available to a member of the public who is

⁹ Rule 806(d) of the Rules of Procedure permits the Office of the Chief Trial Counsel to provide the complainant with a written summary of the status of the disciplinary proceeding against the respondent, a written summary of the acts of misconduct of which the respondent has been found culpable and a written summary of any agreements made by the respondent to make restitution, return client papers or property or to take other action relating to the complainant. This provision is entirely consistent with the statutory obligation of the Office of the Chief Trial Counsel to notify a complainant of the status of his/her complaint and of the disposition of the complaint. (Bus. & Prof. Code, s 6093.5.) However, at least one State Bar Court judge has interpreted rule 806(d) as precluding the Office of the Chief Trial Counsel from notifying a complainant of the status or disposition of his complaint in an ADP matter until the respondent has either successfully completed the ADP or has been terminated from the Program and the Supreme Court has entered a final disciplinary order which has become final.

considering retaining the attorney is (a) a copy of any notice of disciplinary charges filed in the State Bar Court by OCTC; and (b) the fact that the respondent is currently in the ADP. The potential client is not entitled to know that the respondent has admitted to the theft of significant estate funds from multiple estates and that much of the stolen funds remain unpaid.

This lack of important public information is neither necessary nor defensible. Business and Professions Code section 6234 provides only limited confidentiality protections to respondents in the ADP. First, the information made confidential by section 6234 relates only to the “information provided to or obtained by the Attorney Diversion and Assistance Act [i.e., LAP], or any subcommittee or agent thereof . . .” Second, section 6234, subdivision (a) expressly provides that such confidentiality may be waived by the attorney. Likewise, section 6234, subdivision (d) specifies that the information provided to or obtained by LAP may be discoverable and/or admissible in a disciplinary proceeding with the written consent of the attorney to whom the information pertains. There is nothing in the Attorney Diversion and Assistance Act that makes any portion of the disciplinary proceeding confidential or that precludes making the stipulation as to facts and conclusions of law available to the public.

In order to provide the public, the complainant and respondent’s current and prospective clients with important information about the respondent’s conduct, the Office of the Chief Trial Counsel recommends the amendment of rule 803 of the Rules of Procedure to make the stipulation as to facts and conclusions of law public once it is approved by the Program Judge and the respondent is accepted into the ADP.

G. Impact of Subsequent Proceedings on ADP Participation

During the first five years of the ADP, it has not been uncommon for new complaints of misconduct to be received regarding a participant in the ADP. If the new complaint involves alleged misconduct that occurred after the respondent was admitted into the ADP, that misconduct may constitute grounds for the respondent’s termination from the ADP and imposition of the higher level of discipline specified in the Program Judge’s decision regarding the alternative levels of discipline.

However, the more common situation to date is that the new complaint involves allegations of misconduct that occurred prior to the respondent’s admittance into the ADP and, in most cases, that is contemporaneous with the misconduct in the matters that are already the subject of the ADP proceeding. In these cases, the practice has been to incorporate the new matters into the existing ADP proceeding.

There are potential obstacles to that incorporation. If the new complaint involves more serious misconduct or multiple additional instances of the same misconduct, that new misconduct may warrant a modification of the ADP Program Judge’s previous decision regarding the alternative levels of discipline. Additionally, since a stipulation between the Office of the Chief Trial Counsel and the respondent is a prerequisite to participation in the ADP, the inability of the parties to reach an appropriate stipulation may also adversely impact the ability to incorporate the new matter(s) into the existing ADP proceeding.

In order to address this situation, the Office of the Chief Trial Counsel recommends that rule 803 be amended to provide that any subsequently filed notices of disciplinary charges involving misconduct that occurred prior to the respondent's admittance into the ADP be incorporated into the ADP proceeding and that, if the parties are unable to reach agreement on a stipulation as to facts and conclusions of law or, if the respondent is unwilling to accept the modified alternative levels of discipline, if any, the respondent shall be released from the ADP but the previously-agreed upon stipulation as to facts and conclusions of law shall remain binding on all parties. Both the new proceedings and the prior ADP proceeding would then be adjudicated through the standard discipline process.

H. Disqualification of ADP Judge to Act as Trial Judge

Rule 1231 of the Rules of Practice of the State Bar Court provides that settlement conferences are normally conducted before a judge other than the assigned trial judge, unless the parties have stipulated that the assigned judge may conduct the settlement conference. The primary reason for this rule is that, during the course of the settlement conference, the settlement conference judge may become privy to information that may not be available or admissible at trial or that may influence the judge to such an extent that the judge can no longer be an impartial adjudicator at the ultimate trial of the proceeding.

Similarly, the ADP Program Judge is privy to a great deal of information about a respondent who is seeking to participate in the ADP. Among other things, the respondent must stipulate to facts and conclusions of law regarding the nature and extent of his/her misconduct. The ADP Judge is also privy to information about the respondent's substance abuse or mental health problems, the respondent's compliance or non-compliance with LAP conditions and sensitive LAP treatment information. This information may, of course, affect the ADP Judge's view of the respondent and of the nature and extent of the respondent's alleged misconduct.

If the respondent is not accepted into the ADP or declines to sign the Program Agreement, the stipulation as to facts and conclusions of law is rejected and the proceeding is returned to the normal discipline process. Typically, the proceeding is reassigned to the same State Bar Court judge who was originally assigned to the case when the notice of disciplinary charges was filed. In some cases, the originally assigned judge and the ADP Judge are the same person.

The Office of the Chief Trial Counsel recommends that new rule 107 of the Rules of Procedure be adopted, following public comment, to preclude the ADP judge from acting as the trial judge in any proceeding absent the stipulation of the parties.

II. The State Bar Court's Response and Alternative Proposals

The State Bar Court appreciates the opportunity to respond to the Office of the Chief Trial Counsel's (OCTC) proposed modifications to the ADP. As an integral participant in the process, all comments and suggestions by OCTC are well respected. The success of the program largely depends on OCTC's ongoing cooperation and assistance. In general, however, the State Bar Court is concerned about any proposal that would unduly burden the court's limited resources, cause unnecessary delay to the proceedings, unfairly penalize attorneys seeking to participate in the ADP or restrict the judicial discretion that is imperative to handle these unique and complex cases. While no doubt unintended, it appears that several of the proposed modifications by OCTC would have these undesirable consequences. Based on the need to maintain a fair and efficient process, we would oppose several of the proposed modifications as currently drafted. The court's concerns and objections are set forth in section A below.

Notwithstanding the concerns, the State Bar Court agrees that it is an appropriate time to systematically review the ADP to determine the modifications, if any, necessary to improve its operation and efficiency. In sum, we believe that certain procedures should be clarified or modified to provide consistency with Supreme Court case law and the standards, while not placing needless burdens on the system. The court's proposals are set forth in section B below.

A. The Court's Response to OCTC's Proposal

The State Bar Court's objections to OCTC's proposal fall into two broad categories regarding modifications that: 1) unnecessarily restrict the judicial discretion that is imperative to handle these unique cases; or 2) unfairly penalize respondents who participate in the ADP.¹⁰ The court strongly believes the certain proposed rules, more fully addressed below, should be modified to address these concerns prior to adoption in order to prevent any potential negative impact on the overall operation of the ADP or the court.

1. Modifications should not unnecessarily restrict judicial discretion

Several of OCTC's proposals attempt to improperly limit or remove any discretion by the Hearing Judges in these cases. The cases in the ADP program are unique and complex, and it is impossible to apply a rigid set of rules. No two cases are alike and the system requires flexibility. The Hearing Judges must be provided with the necessary discretion to make appropriate decisions based on the issues before them. Thus, the court believes that the use of "shall" in the following proposed rules needs to be replaced with the discretionary "should" or "may":

¹⁰ For purposes of discussing whether OCTC's proposal should be released for public comment, the court has decided to address the key areas of concern. However, if the proposal were released, we would welcome the opportunity to address more minor drafting issues.

- rule 801(a) [time limit to enter the program];
- rule 803(c) [placing a respondent on involuntary inactive];¹¹ and
- rule 804.5(a) [grounds for termination from the program].

These modifications would allow the Hearing Judges to maintain the discretion essential in these cases, while, at the same time, setting forth clear directives and policies on how the cases should be processed.

In addition, the court strongly believes that the standard of review of the decisions and rulings in these cases by the Review Department of State Bar Court should be pursuant to an abuse of discretion/error of law standard as set forth in existing rule 300 of the Rules of Procedure. Not only does this standard recognize the unique role that Hearing Judges play in these cases, it will avoid the inevitable delay that would result if these cases were reviewed under the more stringent de novo standard. Currently, approximately 52% of the cases open at any given time in the Hearing Department are in some phase of the ADP.¹² If the rulings and decisions made by the Hearing Judges in these cases were subject to de novo review, the court system would virtually come to a standstill. If the Review Department were required to review the ADP rulings de novo, it simply would not have sufficient resources to timely process the other cases pending before it on plenary and interlocutory review. This would undoubtedly have a negative impact overall on the discipline system, and potentially negatively impact the public protection role of the State Bar. Accordingly, the State Bar Court strongly suggests that the Board adopt the alternative proposal in Appendix B, rule 807. As set forth below, the court's proposal allows for adequate and timely review, while not unduly burdening the system or delaying the process.

2. Modifications should not unfairly penalize attorneys in ADP

A number of OCTC's proposed eligibility requirements under rule 802 place a higher burden on attorneys seeking to participate in the ADP to establish mitigation than attorneys in the standard discipline process. These eligibility requirements would not only unfairly penalize these attorneys, but could hinder the important goal of rehabilitating attorneys with substance abuse or mental health problems.

a. Proposed rule 802(c)(3) – Mental health conditions and eligibility

In particular, under OCTC's proposed rule 802(c)(3), an attorney would not be eligible for the program if there is no clear and convincing evidence that the personality disorder or other mental health condition is "curable." Not only is this term vague and ambiguous, it is inconsistent with existing

¹¹ The court has set forth an alternative proposal regarding placing respondents on involuntary inactive enrollment that we believe more clearly describes the process, while protecting the public, the courts and the legal profession. (See Appendix B, rule 808.)

¹² While only approximately 15% of "new" respondents seek participation in the ADP, the overall pendency rate of ADP cases is high because it can take up to three years for a respondent to successfully complete the program.

Supreme Court case law. As set forth under OCTC's analysis above, the Supreme Court has stated that in order to establish mitigation, the attorney "must show that he has so overcome or controlled the disorder that it is unlikely to cause further misconduct" (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527) or establish successful therapeutic rehabilitation or a strong prognosis for future rehabilitation. (*Ballard v. State Bar* (1983) 35 Cal.3d 274, 289.) Since the issue of the criteria necessary to receive mitigating credit in a discipline case is already clearly established by Supreme Court case law, the court seriously questions the appropriateness of adding *different* standards or language to the Rules of Procedure. Thus, the court believes that the "eligibility factor" set forth in proposed rule 802(c)(3) should be deleted from the proposal. At the very least, in order to avoid increased litigation over nebulous terms and to treat all parties fairly, the reference to "curable" should be deleted.

b. Proposed rule 802(d) – Nexus definition

Furthermore, under the burden of proof regarding the required nexus between an attorney's condition and the misconduct, OCTC has included language that the condition must be "directly responsible" for the misconduct. (Rule 802(d).) Again, the language proposed by OCTC would place a higher burden on respondents seeking participation in the program than on attorneys in standard proceedings and should be deleted. (See *In re Billings* (1990) 50 Cal.3d 358, 367 [respondent must show the abuse "causally contributed" to the misconduct]; *Harford v. State Bar* (1990) 52 Cal.3d 93, 101, [attorney must establish that the misconduct was caused in "significant measure" by substance abuse].) The court's alternative proposal to modify the nexus, which is consistent with Supreme Court case law, is set forth in Appendix B under rule 802(c).

B. State Bar Court's Proposed Modifications to the ADP

Based on almost five years of operating and monitoring the ADP, the State Bar Court agrees that there are a number of necessary modifications. The following proposals would allow the court to continue to protect the public, the courts and the legal profession, while not hindering the important goal of rehabilitating attorneys with substance abuse or mental health problems.

1. Modify the nexus definition (Rule 802(c))

Currently, rule 802(c) of the Rules of Procedure of the State Bar requires a "nexus" between the respondent's substance abuse or mental health issue and the acts of misconduct. The rule defines "nexus" as meaning "evidence that there is a reasonable likelihood that the substance abuse or mental health issue either precipitated the respondent's misconduct or that it was a contributing cause of the misconduct." The State Bar Court's proposed modification is to delete the "reasonable likelihood" language and replace it with a "clear and convincing" standard. This modification would provide consistency between the nexus definition and Supreme Court case law.

2. Review of the Alternative Discipline Recommendations (Rule 807)

Rule 803(a) of the Rules of Procedure requires the Hearing Judge to provide the parties with a written statement regarding the disposition that will be imposed or recommended to the Supreme Court

upon successful completion of the ADP, and the disposition if respondent does not successfully complete the ADP (“alternative discipline recommendation”). The process currently does not permit either party to seek review of the Hearing Judge’s alternative discipline recommendation. (Rules Proc. of State Bar, rule 807.) The State Bar Court’s proposal is to provide that the Hearing Judge’s alternative discipline recommendation is subject to review pursuant to rule 300 of the Rules of Procedure (i.e., abuse of discretion or error of law) and to provide for an expedited review process. This proposal continues to recognize the importance of a Hearing Judge’s discretion in these cases, while assuring that discipline recommendations are appropriate and consistent.

3. Clarify the confidential nature of proceedings (Rule 806(b))

Currently, after a respondent is accepted into the ADP, the Hearing Judge holds periodic status conferences to monitor the respondent’s compliance. Pursuant to rule 806(b) of the Rules of Procedure, the nature and extent of a respondent’s treatment is absolutely confidential and shall not be disclosed to the public absent an express written waiver. (Bus. & Prof. Code, § 6234(a) [LAP information is absolutely confidential unless waived].) Since a respondent’s treatment progress is routinely discussed during these status conferences, the protocol has been to close these proceedings to the public in order to maintain the confidentiality mandated by statute. However, the proceedings are recorded and any order issued by the court is filed and made public, including any issues of non-compliance. The State Bar Court’s proposal is to formally adopt the protocol to provide that after a respondent is accepted into the ADP, the periodic status conferences are closed to the public in order to maintain confidentiality of sensitive treatment information.

4. Involuntary Inactive Enrollment (Rule 808)

Rule 802(a) of the Rules of Procedure provides that acceptance of a respondent for participation in the ADP is at the discretion of the Hearing Judge and may be subject to a respondent’s agreement to certain terms and conditions. Likewise, Business and Professions Code section 6233 provides that an attorney who participates in the LAP and has a pending disciplinary proceeding may be required to be enrolled as an inactive member or may be required to agree to various practice restrictions, including restrictions upon the scope of the attorney’s practice. The State Bar Court’s proposal is to adopt a rule to clarify the process to enroll a respondent as an inactive member, and to provide that in making the determination, the court may consider all relevant factors including whether the low level recommendation is 90 days or more actual suspension. The rule would also provide that the court may recommend that the respondent receive credit for the period of his or her inactive enrollment towards any period of actual suspension if he or she successfully completes the program.

5. Reduce the overall pendency of cases (Rule 802(a))

While only approximately 15% of respondents seek participation in the ADP, these cases require a considerable amount of the State Bar Court’s time and resources. Not only is the court required to monitor those respondents who are accepted into the program for 18-36 months, the evaluation process before a respondent is accepted into the program has proven to be particularly time-consuming. Although the Hearing Department works hard to move these cases along as quickly as possible, there

remains considerable delay. In order to increase efficiency and reduce delays in these cases, the State Bar Court's proposal provides that stipulations should be submitted to the court within 120 days of referral to the ADP or the judge may return the matter to normal case processing. This is longer than the 60 days proposed by OCTC, but far more realistic. If OCTC's proposal is adopted, the court believes it would be forced to spend unnecessary time and resources ruling on motions requesting that cases be returned to normal case processing after 60 days, even when there has been no *unreasonable* delay by either party.

PROPOSED RESOLUTIONS

If you agree that the amendments to the Rules of Procedure of the State Bar proposed by the Office of the Chief Trial Counsel and the State Bar Court should be released for a 90-day public comment period, your adoption of the following resolutions would be appropriate:

RESOLVED that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of proposed amendments to the Rules of Procedure of the State Bar of California in the form attached hereto as Appendix A (the Office of the Chief Trial Counsel's proposed amendments) and Appendix B (the State Bar Court's proposed amendments) for a 90-day public comment period;

FURTHER RESOLVED that the release of the aforementioned proposed rules for public comment does not constitute, and shall not be considered, as approval by the Board of Governors of the State Bar of the matters published."

SJD:dim
Attachments

