

AGENDA ITEM

MAY 123

Proposed Amendments to
Rules of Procedure re
Alternative Discipline
Program

DATE: April 22, 2008

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

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Amendments to the Rules of Procedure Regarding
Modification of the Alternative Discipline Program – Proposed
Adoption Following Public Comment

EXECUTIVE SUMMARY

In light of concerns expressed by the California Supreme Court in October 2007, the State Bar Court and the Office of the Chief Trial Counsel met and agreed upon proposed modifications to the State Bar Court's Alternative Discipline Program ("ADP"). Those proposed modifications are reflected in the proposed amendments to the Rules of Procedure of the State Bar of California ("Rules of Procedure") attached hereto as Appendix A. If adopted, the proposed amendments to the ADP would (1) establish guidelines and limitations regarding the acceptance of attorneys into the ADP; (2) require stipulations of facts and conclusions of law in ADP matters to be agreed upon and executed within 120 days of referral for ADP evaluation; (3) create a presumption regarding the need for inactive enrollment if the recommended discipline includes an actual suspension of 90 days or more; (4) require the nexus between the attorney's substance abuse or mental health issue and his/her misconduct to be established by clear and convincing evidence; (5) provide for *de novo* review of a hearing judge's decision to admit or deny admission to the ADP and of a hearing judge's decision to terminate or deny termination of the attorney from the Program; (6) make stipulations as to facts and conclusions of law public upon the State Bar Court's approval of the stipulation and admission of the attorney into the ADP; (7) release the attorney 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; and (8) unless otherwise stipulated by the parties, prohibit a hearing judge who presided over an ADP matter and received confidential information about the attorney from acting as the trial judge in the event the attorney declines to participate in the ADP or his/her disciplinary proceeding is otherwise returned for handling as a standard disciplinary proceeding.

Following completion of the public comment period, the State Bar Court and the Office of the Chief Trial Counsel recommend adoption of the proposed amendments to the Rules of Procedure.

INTRODUCTION

The Alternative Discipline Program ("ADP"), which was originally named the Pilot Program for Respondents with Substance Abuse or Mental Health Problems, has been in existence for approximately five years. During that time, it has become apparent that some modifications to the ADP are appropriate.

On October 16, 2007, State Bar President Jeff Bleich, RAD Chair Holly Fujie, State Bar Court Presiding Judge JoAnn Remke, Executive Director Judy Johnson and selected members of the Senior Executive Team met with senior Supreme Court staff to discuss the Supreme Court's concerns about various aspects of the current operation of the ADP. The areas of the Supreme Court's concerns included, but were not limited to, (1) the amount of time and State Bar resources expended on ADP cases; (2) the lack of eligibility criteria for participation in the ADP; (3) the lack of any opportunity to seek *de novo* review of State Bar Court Hearing Department decisions and orders in ADP proceedings; and (4) the lack of timely public access to approved stipulations as to facts and conclusions of law.¹

In light of the Supreme Court's concerns, it was agreed at the conclusion of the meeting that the Presiding Judge and the Chief Trial Counsel would meet and attempt to reach agreement on proposed changes to the ADP that would be acceptable to both the State Bar Court and the Office of the Chief Trial Counsel and that would also address the concerns raised by the Supreme Court. The Presiding Judge and the Chief Trial Counsel have agreed upon the proposed modifications to the ADP that are reflected in this memorandum and in the proposed amendments to the Rules of Procedure that are attached hereto as Appendix A.

At a special meeting on November 28, 2007, the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") authorized the release of the proposed amendments to the Rules of Procedure regarding the Alternative Discipline Program for a 90-day public comment period. Seven public comments were received during the public comment period, which ended on March 17, 2008. These public comments are summarized below.

The State Bar Court and the Office of the Chief Trial Counsel recommend that the RAD Committee and the Board of Governors approve the proposed amendments to the Rules of Procedure in the form attached hereto as Appendix A, to become effective on July 1, 2008.

DISCUSSION

As the California Supreme Court has repeatedly emphasized, 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* (1992) 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

¹ In addition to meeting with senior Supreme Court staff, representatives of the Office of the Chief Trial Counsel and the State Bar Court also met with representatives of the Association of Discipline Defense Counsel on three occasions to discuss proposed changes to the ADP.

competency, to treat those individuals and to 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:

"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. There appears to be virtually unanimous agreement that attorneys with substance abuse and mental health problems should be able to obtain treatment for their problems. The LAP offers its treatment assistance to all attorneys, whether or not there are pending disciplinary complaints proceedings pending against them. However, based upon our experiences with the Alternative Discipline Program to date and in light of concerns expressed by the Supreme Court about the Program, it is clear that significant modifications to the ADP are necessary.

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 admittance into the ADP except those respondents who are subject to summary disbarment.²

The Supreme Court, the Office of the Chief Trial Counsel and the State Bar Court all agree that the current eligibility criteria for the ADP is too broad and that it should be narrowed. The Office of the Chief Trial Counsel and the State Bar Court have agreed to narrow eligibility for admittance into the ADP in several important respects.

² 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 of the United States 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).)

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 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*, 50 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 and the concerns expressed by the Supreme Court, the Office of the Chief Trial Counsel and the State Bar Court agree that additional limitations upon admittance into the ADP should be established. We recommend that participation in the ADP should be limited to respondents (a) whose misconduct does not warrant disbarment, irrespective of mitigating circumstances; (b) who have not committed egregious acts of misconduct that have significantly harmed their clients or the administration of justice; (c) who have a reasonable likelihood of succeeding in the ADP; and (d) 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;³

³ 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.

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 45 days prior to the first scheduled trial date;
4. The respondent's current misconduct involves acts of moral turpitude, dishonesty or corruption that has resulted in significant harm to one or more clients or to the administration of justice;
5. There is a finding, based upon expert testimony, that the respondent will not substantially benefit from treatment for his or her substance abuse or mental health problem;
6. 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 problem, 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.⁴ The attorney had also been disciplined on four previous occasions. The attorney presented expert testimony that he suffered from two major mental problems, i.e., 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):

⁴ Former rule 955 (current rule 9.20) of the California Rules of Court requires an attorney who resigns, is disbarred or has been actually suspended for 90 days or more to notify all clients, co-counsel, opposing counsel and courts in which the attorney has matters pending of the attorney's disqualification from practice. The attorney must also return client files and papers to the client and refund unearned fees to clients. The attorney must also file an affidavit with the Clerk of the State Bar Court attesting to his or her compliance with the notification requirement.

“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.”

Thus, while every member of the State Bar with a substance abuse or mental health problem may 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 of the United States, 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. (*In re Paguirigan* (2001) 25 Cal.4th 1, 8-9.) Summary disbarment is required, irrespective of any mitigating circumstances, including but not limited to any substance abuse or mental health problem that may have caused or contributed to 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 45 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).

We recognize that some respondents with substance abuse or mental health problems are reluctant to admit 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/her substance abuse or mental health issue, or at least acquiesce in an evaluation process, at the initial status conference. The Outline also provides that the failure or refusal to do so will preclude the respondent from later admittance into the Program. In that regard, the 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.”

However, 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.⁵

Allowing a respondent to enter into the ADP immediately before trial has at least three serious adverse consequences. First, it gives 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 the standard discipline 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 the 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 standard discipline 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

⁵ In many cases, the respondent’s request for referral to the 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 in the standard discipline proceeding that is acceptable to the respondent.

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 or recommended and the respondent must sign an ADP contract prepared by the State Bar Court. This ADP process usually takes much more than six months. Therefore, a last minute referral to ADP may result in a delay of more than one year from the filing of the notice of disciplinary charges to the respondent's potential admittance into the ADP.

In order to address this problem, the Office of the Chief Trial Counsel and the State Bar Court have agreed 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, not less than 45 days prior to the first scheduled trial date.

4. The Respondent Has Committed Acts of Moral Turpitude, Dishonesty or Corruption That Have Caused Significant Harm To One or More Clients or to the Administration of Justice

Business and Professions Code section 6237 expressly provides that the Legislature did not intend, by enacting the Attorney Diversion and Assistance Act, to limit or alter the powers of the Supreme Court to disbar or discipline attorneys.

Additionally, it is clear from Business and Professions Code section 6232, subdivision (b) that the Legislature intended to defer to the State Bar and to the Supreme Court the determination of the extent to which attorneys against whom disciplinary investigations or proceedings are pending should be allowed to participate in the Lawyers Assistance Program ("LAP").⁶ As previously indicated, an attorney against whom a disciplinary investigation or proceeding is pending can only be referred to LAP in one of three ways: (1) by the Office of the Chief Trial Counsel; (2) by the State Bar Court *after* the initiation of a disciplinary proceeding; or (3) voluntarily, but only in accordance with conditions agreed upon with OCTC or upon approval of the State Bar Court and if both of the following conditions apply:

- (a) 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**
- (b) The conduct does not involve actual harm to the public or to the respondent's clients.

Thus, there is nothing in the legislative authorization for the creation of the LAP that requires the State Bar or the Supreme Court to admit attorneys with pending disciplinary investigations or proceedings into the Program except upon such terms as the State Bar and the Supreme Court deem appropriate.

Only 27 other jurisdictions (including the District of Columbia and three of the four independent departments in the New York discipline system) have *any* kind of diversion

⁶ In adopting the Attorney Diversion and Assistance Act, the Legislature neither required, authorized nor even envisioned the creation of the Alternative Discipline Program ("ADP").

program for attorneys in the discipline process who have substance abuse or mental health problems. An additional 3 jurisdictions either have a “pilot” diversion program (i.e., Kentucky) or have proposed diversion programs (Delaware and Utah).

Virtually every other existing or proposed program severely limits participation in their program to attorneys who have committed either “minor” or “less serious” misconduct and/or who do not have a record of prior discipline. Most of these jurisdictions specifically exclude respondents who have misappropriated client funds, who have caused actual harm to clients and/or who have engaged in conduct involving dishonesty, fraud or deceit or other egregious misconduct. (An overview of the bar discipline diversion programs in other states is attached hereto as Appendix B.) California is the **only** jurisdiction that currently allows program participation by attorneys who have engaged in acts of moral turpitude, dishonesty or corruption that have caused significant harm to the attorneys’ clients or to the administration of justice.

As stated earlier, the Supreme Court has repeatedly held that the primary purposes of sanctions for attorney misconduct are “the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.” (*In re Morse* (1995) 11 Cal.4th 184, 205; *In re Silverton* (2005) 36 Cal.4th 81, 91; *In re Brown* (1995) 12 Cal.4th 205, 217.)

The failure of the State Bar and the Supreme Court to impose significant discipline upon attorneys who have committed serious acts of misconduct which has resulted in significant harm to the attorneys’ clients and/or to the administration of justice not only undermines the public’s confidence in the legal profession but also erodes the high professional standards rightfully expected of attorneys.

In light of the foregoing, the Office of the Chief Trial Counsel and the State Bar Court have agreed that respondents who have engaged in acts of moral turpitude, dishonesty or corruption which have caused significant harm to their clients or to the administration of justice should not be permitted to participate in the Alternative Discipline Program.⁷

5. The Respondent Will Not Substantially Benefit From Treatment For His/Her Substance Abuse or Mental Health Problem

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 (i.e., suitability and amenability to treatment) 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

⁷ These respondents would, of course, still be able to seek treatment from the LAP for their substance abuse or mental health problems and would be able to present evidence regarding their rehabilitation from those problems as potential mitigation in the standard discipline proceeding.

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.)⁸

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 separate 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 how it would continue to seriously interfere with his ability to practice law. The Supreme Court held that evidence of mental illness has a different significance in a disciplinary context from mental fitness proceedings and that it is only entitled to consideration as a mitigating factor if there is a strong likelihood of rehabilitation. In particular, the Supreme 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. [Citation 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 Supreme 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 mere existence of a substance abuse or mental health problem is not sufficient to warrant a respondent’s admittance into the ADP. Public protection and the integrity of the profession requires that there must also be evidence that the substance abuse or mental health condition is one that is susceptible to treatment and rehabilitation to the extent that the disorder

⁸ Additionally, in *Porter v. State Bar, supra*, 52 Cal.3d at p. 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.)

no longer exists or that the respondent has “so overcome and controlled the disorder that it is unlikely to cause further misconduct.” (*Porter v. State Bar, supra*, 52 Cal.3d at p. 527.) The State Bar Court and the Office of the Chief Trial Counsel have agreed that a finding by the State Bar Court, based upon expert testimony, that the respondent will not substantially benefit from treatment for his or her substance abuse or mental health problem, will preclude the respondent’s admittance into the ADP.

6. 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 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 cases, the respondent should be required to have his/her matter heard as a standard discipline proceeding and should be required to demonstrate any mitigation, including rehabilitation from substance abuse or mental health problems, as part of the standard 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 problem was either incomplete or was not 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.

Thus, the early execution of a stipulation as to facts and conclusions of law is correctly recognized as being essential to an appropriate and timely 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.⁹ In many other cases, however, the delay is more fairly attributable to the

⁹ 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 proceedings can and should be available to assist with the negotiation and preparation of ADP stipulations.

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 problem. In most cases, however, the respondent is permitted to continue to practice 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 law, he/she is unlikely to be in a hurry to complete the stipulation.

The Office of the Chief Trial Counsel and the State Bar Court recommend the adoption of a new rule that will require the parties to submit an executed stipulation as to facts and conclusions of law no later than 120 days following referral of the respondent to the LAP for evaluation. In the event that the parties fail to submit the executed stipulation on a timely basis, the Program Judge may return the proceeding for processing as a standard discipline matter.¹⁰

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 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 problem. 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 State Bar Court and the Office of the Chief Trial Counsel have agreed that, in every case in which the degree of discipline to be imposed following successful completion of the ADP includes a period of actual suspension of 90 days or more, there should be a presumption that the respondent’s inactive enrollment is appropriate and necessary for the protection of the public. However, the proposed rule will not require inactive enrollment if the Program Judge finds, in writing, that such inactive enrollment is not necessary for the protection of the public or of the respondent’s clients.

¹⁰ Obviously, an order of the Program Judge returning a proceeding to the standard discipline process would only be appropriate if the Judge concluded that the respondent is significantly responsible for the failure to execute the stipulation as to facts and conclusions of law in a timely manner.

D. The Nexus Between the Respondent's Misconduct and His/Her 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) set forth the standard of 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 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 to Standard 1.2(e)(iv)].)¹¹

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.

¹¹ 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* (Review Dept. 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.)

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 dysphonia¹², 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.

By contrast, while current rule 802(c) of the Rules of Procedure requires a "nexus" between the respondent's substance abuse or mental health problem 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.) Current 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 own 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 problem. Thus, both the LAP evaluation and the nexus declaration are almost entirely based upon the respondent's own self-serving, and largely uncorroborated, statements.

The proposed amendment to rule 802(d) would specifically require the respondent to establish the nexus between his or her substance abuse or mental health problem 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 problem causally contributed to the respondent's misconduct.

E. Review of ADP Proceedings

Current rule 807 of the Rules of Procedure 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 a respondent from the Program.

The review provided by current rule 807 is limited to abuse of discretion or error of law, a standard of review that is much narrower and more limited than the independent or "*de novo*" review provided in standard discipline 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

¹² "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.

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 repeatedly 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 permit review of the Program Judge's nexus determination or his/her alternative 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 Program Judge has abused his/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.

In standard discipline 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 Program Judge's alternative disciplinary recommendations and thereafter complied with all ADP conditions for 18 to 36 months prior to his or her successful completion of the ADP.

In light of similar concerns expressed by the Supreme Court, the Office of the Chief Trial Counsel and the State Bar Court have agreed to an amendment to rule 807 of the Rules of Procedure that provides for the Review Department's expedited *de novo* review, upon the request of either the respondent or the Office of the Chief Trial Counsel, with respect to issues decided by the Program Judge in ADP proceedings, including but not limited to, (1) whether the respondent meets the eligibility requirements for admittance to the Program; (2) whether the nexus between the respondent's misconduct and his/her substance abuse or mental health problem has been established by clear and convincing evidence; (3) the appropriate disposition or recommendation as to discipline; (4) the termination of the respondent from the ADP; and (5) the denial of the State Bar's motion to terminate the respondent from the ADP.

F. Availability to the Public of the Stipulation as to Facts and Conclusions of Law Following Approval by the Program Judge

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. Current 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 regarding the nature and extent of his/her treatment is “absolutely confidential” absent an express written waiver by the respondent.¹³ 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 State Bar 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 of 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 remains unpaid. Under current ADP procedures, the only information available to a member of the public who is considering retaining the attorney is (a) a copy of the notice of disciplinary charges (“NDC”) filed in the State Bar Court by the Office of the Chief Trial Counsel; and (b) the facts 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 a significant amount of estate funds or that much, if not all, of the stolen funds remain unpaid. Moreover, if the attorney is allowed to continue practicing law while his or her ADP proceeding is pending, the potential client may conclude that the allegations of the NDC are not true or, at a minimum, that the facts are not as serious as they may appear in the NDC.

This lack of important public information is neither necessary nor defensible. Business and Professions Code section 6234 provides only limited confidentiality 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

¹³ Current 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 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, § 6093.5.)

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 the respondent's current and prospective clients with important information about the respondent's conduct, the Office of the Chief Trial Counsel and the State Bar Court have agreed to an amendment of rules 803(b) and 806(c) 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 Upon the Respondent's 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 respondent's current participation 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. In most cases, the new complaints allege misconduct 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, the new misconduct may warrant a modification of the ADP Judge's previous decision regarding the alternative levels of discipline. In addition, 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 State Bar Court and the Office of the Chief Trial Counsel have agreed that new rule 804.5 of the Rules of Procedure should be added 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 the parties. Both the new proceedings and the prior ADP proceeding would then be adjudicated through the standard discipline process. In addition, new rule 804.5 provides that newly alleged misconduct that occurred after the respondent's admittance to the Program cannot be incorporated into the ADP without the stipulation of the parties and the agreement of the Program Judge and, if proved by clear and convincing evidence, the new misconduct may also constitute grounds for the respondent's termination from the Program.

H. Disqualification of the 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 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 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 or 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 standard 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 is the same person. Additionally, pursuant to proposed new rule 804.5(c), the respondent may be released from the ADP and the proceeding may be returned for standard discipline case processing if there are allegations of new misconduct that were committed after the respondent's admittance to the ADP.

The Office of the Chief Trial Counsel and the State Bar Court agree to the adoption of new rule 802.5 of the Rules of Procedure, which would prohibit the ADP Judge from acting as the trial judge in the above-referenced situations unless (a) the parties agree on the record that the ADP judge can also act as the trial judge; or (b) the ADP Judge has not been privy to otherwise confidential information, e.g., a stipulation as to facts and conclusions of law which has been vacated or to treatment, evaluation or nexus information.

PUBLIC COMMENT

Seven comments were received during the 90-day public comment period. Copies of the public comments will be made available at your meeting. A summary of each comment is set forth below:

1. Center for Public Interest Law

Robert C. Fellmeth, Executive Director of the Center for Public Interest Law and the former State Bar Discipline Monitor, submitted a public comment supporting the proposed modifications to the ADP. In his 14-page letter, Professor Fellmeth stated that the Center for Public Interest Law ("CPIL") especially supports the proposed rule changes that would (a) limited respondent eligibility for participation in the ADP; (b) require the agreed-upon stipulation of facts and conclusions of law to be executed within 120 days of referral to the ADP and made public as soon as the respondent is accepted into the ADP; (c) presume that inactive enrollment of the respondent is appropriate if an actual suspension of 90 days or more is recommended; and (d) clarify that the burden is upon the respondent to provide clear and convincing evidence that he/she suffers from substance abuse and/or mental illness and that there is a nexus between that substance abuse/mental illness and the misconduct at issue.

CPIL made two additional recommendations. First, CPIL proposed that the State Bar should formally request a performance audit of the Lawyers Assistance Program (“LAP”) and the ADP by either an independent monitor or by the Bureau of State Audits. Second, CPIL recommended that the ADP should be limited to attorneys with chemical dependency problems, where compliance is subject to measurable verification.

2. James O. Heiting, Esq.

Former State Bar President James O. Heiting submitted a public comment in which he made the following observations and comments: (a) the ADP is not a true diversion program and, under the ADP, all participants have a resulting public record of discipline; (b) any requirement that a respondent no longer suffers from the disorder to be accepted into the program does not make sense; (c) the respondent should not be precluded from participating in the ADP based upon arguments “by hired guns” as to whether he/she will benefit from the program or is “susceptible to treatment and rehabilitation”; (d) it is unreasonable and inappropriate to preclude a respondent from participation in the ADP if he/she seeks admission less than 45 days before trial; (e) the fact that a respondent has previously participated in the ADP should not necessarily preclude subsequent participation; (f) a rebuttable presumption of inactive enrollment is appropriate; (g) the nexus between the substance abuse/mental health issue and the misconduct should not be required to be established by clear and convincing evidence; (h) the LAP evaluations are more comprehensive and thorough than reflected in the proposal; (i) LAP has not been consulted in a meaningful way about the proposed modifications; and (j) public protection is enhanced by the LAP and ADP.

3. Ellen A. Pansky, Esq.

Ms. Pansky regularly represents respondents in State Bar disciplinary proceedings. In her public comment, Ms. Pansky made the following observations and comments: (a) the proposed amendments do not carry out the legislative intent set forth in Business and Professions Code section 6320 that the program was intended as a true diversion program; (b) there is not, to Ms. Pansky’s knowledge, significant misuse or abuse of the ADP by respondents; (c) there is no legitimate reason why a referral to ADP must be made no less than 45 days before trial since denial is a typical feature of substance abuse; (d) the ADP should not require the parties to stipulate to every fact or conclusion of law and the State Bar Court should have discretion to make its own findings of fact and conclusions of law if the parties cannot reach agreement; (e) OCTC charges violations of Business and Professions Code section 6106 (commission of an act of moral turpitude, dishonesty or corruption) in virtually every notice of disciplinary charges and often takes the position that disbarment is the appropriate discipline, which would result in the preclusion of a large number of respondents from participation in the ADP; (f) a requirement of expert testimony to establish the substance abuse or mental health issue and/or the amenability of the respondent to successful treatment will result in significant delay and expense to the respondent; (g) a respondent should not be required to stipulate to facts and conclusions of law with regard to a later disciplinary complaint as a prerequisite to remaining in the ADP; (h) highly sensitive and confidential information regarding the respondent’s problems should not be released to the public; and (i) there is no need for a rule disqualifying an ADP judge from hearing a matter after the respondent declines to participate in the ADP or the proceeding is otherwise returned for processing as a standard disciplinary matter.

4. Association of Discipline Defense Counsel

David Cameron Carr, President of the Association of Discipline Defense Counsel (“ADDC”), submitted a public comment setting forth the following observations and comments: (a) the limitations on eligibility for admission into the ADP are not authorized by legislation and will result in a significant increase in litigation activity in the State Bar Court; (b) there is nothing in the legislation that indicates that the ADP was intended as a “minor misconduct” program; (c) there should not be a rule that stipulations be agreed-upon and executed within 120 days of referral to ADP because OCTC has an inflexible attitude toward stipulations; (d) ADDC does not oppose the rebuttable presumption of inactive enrollment in cases involving actual suspension for 90 days or more; (e) ADDC does not oppose a requirement that the nexus between the substance abuse/mental health issue and the respondent’s misconduct be established by clear and convincing evidence; (f) ADDC opposes *de novo* review of hearing judge decisions; (g) ADDC opposes making the stipulation public upon the respondent’s acceptance into the ADP because it will be a disincentive for participation in the program; (h) ADDC opposes the proposal to release the respondent from the ADP but bind him/her to previous stipulations if new charges of misconduct are received and the parties cannot agree upon the facts of the new matter; (i) ADDC does not oppose the disqualification of a hearing judge who has previously presided over the ADP matter.

5. Janis Thibault, LAP Director

Janis Thibault, Director of the Lawyers Assistance Program (“LAP”), submitted a public comment in which she made the following comments and observations: (a) the ADP should not limit participation to attorneys who commit only minor misconduct because the requirement of participation for 5 years with monitoring by LAP provides adequate public protection; (b) Ms. Thibault recognizes that other states have much narrower eligibility requirements but believes that the ADP is a “cutting edge” program; (c) requiring a professional assessment as to whether the respondent will benefit from participation in the ADP will clog and slow down the system; (d) while LAP has no direct interest in the nexus issue, Ms. Thibault opines that requiring the nexus to be demonstrated by clear and convincing evidence must preclude the participation of some respondents who could benefit from treatment; (e) many evaluations last more than 90 minutes and some involve testing – much of the evaluation is based upon the respondent’s own representations but mental health professionals are skilled at recognizing denial, incongruence and dishonesty; (f) beside the initial assessment, respondents must complete the LAP evaluation period and be accepted into the LAP by the Evaluation Committee. This period lasts about three months.

6. Nancy W. Keough, Esq.

Attorney Nancy W. Keough represents several complaining witnesses with respect to a disciplinary complaint they submitted against an attorney who, until recently, was seeking admission into the ADP. Ms. Keough made the following proposals regarding modification of the ADP: (a) the respondent should not be allowed to enter the ADP if he/she has violated a prior disciplinary order, is charged with moral turpitude, has two or more prior impositions of discipline or is accused of retribution against a client who filed a complaint against the respondent; (b) if a respondent seeks admission to the ADP based upon substance abuse or mental health issues, he/she should be suspended from practice until a State Bar Court judge determines that the respondent can practice without further risk of misconduct; (c) victims of attorney misconduct should be allowed to testify at ADP proceedings and should have access to all information about the ADP proceeding; (d) there should be no confidentiality or denial of

public access to information after the notice of disciplinary charges is filed; (e) all complaints should be investigated within 60 days of receipt and the notice of disciplinary charges should be filed within 10 days of the completion of the investigation; (f) there should be specified time standards for the processing of ADP proceedings; (g) all cases should be completed through the State Bar Court decision within six months from filing; (h) the State Bar should indemnify any victims of financial, emotional or other abuse where the attorney is allowed to practice by the State Bar or State Bar Court in violation of the proposed modifications set forth above; (i) the State Bar should make all disciplinary complaints, investigations and proceedings available to the Director of the Department of Consumer Affairs; (j) the Department of Consumer Affairs should be allowed to initiate a disciplinary proceeding against an attorney when the State Bar has failed to act in a timely or effective way.¹⁴

7. Phillip Feldman, Esq.

Mr. Feldman is a member of the Association of Discipline Defense Counsel ("ADDC") and regularly represents respondents in disciplinary proceedings. Mr. Feldman left several telephone voice messages in which he made the following comments and observations with respect to the proposed modifications to the ADP: (a) opposes any requirement that the respondent and OCTC stipulate to facts and conclusions of law as a condition for admission to the ADP and setting forth a time period for doing so is inappropriate; (b) the State Bar Court should not be compelled to explain whether or not public protection requires that the respondent be immediately placed on inactive enrollment; (c) State Bar Court judges should not be hamstrung with excessive and needless mechanics but should exercise unfettered and motivational appraisals of problem solving; (d) requiring proof of causation by clear and convincing evidence is counterproductive and an attorney who is willing to admit that he/she needs help and devote the time and energy to the ADP should not be required to prove the nexus by clear and convincing evidence; (e) *de novo* review is anachronistic; (f) the ADP does not embrace "true diversion" which is the missing element of the legislative mandate.

These public comments will be addressed at the time of the RAD Committee's meeting on May 15, 2008.

CONCLUSION

The Alternative Discipline Program ("ADP") is a beneficial adjunct to the Attorney Assistance and Diversion Act and, when working in conjunction with the Lawyers Assistance Program, can provide important assistance in the rehabilitation of attorneys with substance abuse or mental health problems against whom disciplinary complaints have been filed.

In the opinion of the Office of the Chief Trial Counsel and the State Bar Court, the proposed amendments to the Rules of Procedure set forth as Appendix A, if ultimately adopted, will strengthen the ADP to make it more efficient and effective, will provide greater public protection, will ensure greater public accountability and will substantially decrease opportunities for manipulating or delaying the proceedings. The proposed amendments also address and resolve the significant concerns raised by the Supreme Court with respect to the current Program.

¹⁴ Ms. Keough made additional recommendations which do not appear directly related to the ADP and, therefore, are not summarized here.

PROPOSED RESOLUTIONS

If you agree that the amendments to the Rules of Procedure of the State Bar that have been jointly proposed by the Office of the Chief Trial Counsel and the State Bar Court in response to concerns raised by the California Supreme Court should be adopted, your approval of the following resolutions would be appropriate:

Proposed Resolution for the RAD Committee

“RESOLVED that the Board Committee on Regulation, Admissions and Discipline Oversight hereby recommends to the Board of Governors that the proposed amendments to the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, be approved effective July 1, 2008, and that those rules, as amended, shall apply to all pending and future matters except for those matters in which the respondent attorney has already been admitted to the State Bar Court's Alternative Discipline Program.”

Proposed Resolution for the Board of Governors

“RESOLVED, upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, that the Board of Governors hereby adopts the proposed amendments to the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, effective July 1, 2008.

FURTHER RESOLVED that the aforementioned amendments to the Rules of Procedure shall apply to all pending and future matters except for those matters in which the respondent attorney was already admitted to the State Bar Court's Alternative Discipline Program on May 31, 2008.”

SJD:dim
Attachment