

NEW YORK CITY BAR ASSOCIATION

JOINT REPORT OF COMMITTEE ON PROFESSIONAL DISCIPLINE AND COMMITTEE ON THE LAWYER ASSISTANCE PROGRAM

A PROPOSAL FOR ADOPTION OF A DIVERSION RULE FOR LESSER MISCONDUCT RELATED TO ALCOHOL/SUBSTANCE ABUSE OR MENTAL HEALTH CONDITION

I. INTRODUCTION

In the last several decades, inspired by the recommendations made by the Clark Report¹ in 1970 and the McKay Commission² in 1992, the New York courts have adopted sweeping improvements to our lawyer's code of professional conduct and disciplinary system. In 1995, the Committee on the Profession and the Courts, appointed by the Honorable Judith S. Kaye, Chief Judge of the State of New York, and chaired by Louis A. Craco (the "Craco Committee"), reported its forward thinking recommendations, many of which were adopted.³ These adopted recommendations included, among others, mandatory continuing legal education, the expansion of the court rule addressing frivolous conduct, a mediation program for less serious disciplinary complaints, a statewide program for arbitration or mediation of attorney-client fee disputes, the posting of the *Statement of Client's Rights* and *Statement of Client's Responsibilities*, as well as the creation in 1999 of the Judicial Institute on Professionalism in the Law, often referred to as the "Ethics Institute."

In 1999, Chief Judge Kaye created the Commission on Alcohol and Drug Abuse in the Profession, referred to as the "Bellacosa Commission." The Bellacosa Commission made several key recommendations to "help lawyers address alcohol and substance dependency problems at the earliest possible point in a legal career."⁴

In furtherance of the goals of the Craco Committee and the Bellacosa Commission, the Committee on Professional Discipline and the Committee on the Lawyer Assistance Program jointly recommend that the Appellate Division, First Department establish a diversionary program for lawyers suffering from alcohol or substance abuse or a mental health condition.

Our recommendation is also based on previous reports issued by the City Bar's Committee on Professional Discipline in November 1996 and June 2000. In November 1996, in response to the Craco Report, the Committee on Professional Discipline published an extensive report entitled, *Alternative and Additional Disciplinary Sanctions and Remedies* ("1996 Alternative Discipline Report"), supporting a uniform court rule adopting a number of alternatives to the standard disciplinary options, including diversion for lesser misconduct.⁵ In June 2000, the Professional Discipline Committee recommended adoption of a diversion rule for lesser misconduct in its report entitled, *Diverting Substance-Abusing Lawyers From the Disciplinary Process: A Proposal*.⁶

The 1996 Alternative Discipline Report explained the rationale for its recommendations as follows:

The Appellate Divisions act sternly and vigorously against offending lawyers to protect clients and the public and to preserve the integrity of the courts and the legal system from practitioners whose conduct renders them unfit to continue in practice. For the most part, this is accomplished by disbarring the most serious offenders and suspending those who pose a less severe threat, but whose conduct is nonetheless quite serious. At the other end of the disciplinary spectrum, lawyers found guilty of less serious professional misconduct, who do not pose a threat to the public, are censured, reprimanded or admonished, which permits them to continue in practice, while formally recognizing that they have violated professional ethical standards.

We recognize, as have the courts and the disciplinary agencies, that these traditional types of professional discipline do not address or remedy the problems that most frequently result in client complaints and disciplinary proceedings. Most complaints

about lawyers concern their failure to return telephone calls, their failure to handle matters expeditiously, and their failure to explain things adequately and completely, resulting in attorney-client misunderstandings and miscommunications. A significant number of such complaints result from inadequate law office staffing, inadequate file or docket control systems, poor record-keeping, inexperience, lack of adequate training and supervision, or personal problems and professional pressures.

The alternative sanctions which we propose are intended to effect changes in the way some lawyers practice law, to better protect the public by insuring that such lawyers receive the necessary supervision and training to serve their clients effectively and ethically, and to reduce the number of complaints of serious and lower-level attorney misconduct.⁷

The 1996 Alternative Discipline Report considered a full range of alternative disciplinary tools available, including law office management and practice assistance. While the Committee on Professional Discipline and the Committee on the Lawyer Assistance Program remain committed to the goals set forth in the 1996 Alternative Discipline Report, the focus of our current recommendation is limited to the adoption of a diversion program for lawyers whose less serious misconduct is related to a mental health condition or alcohol or substance abuse.⁸

II. RECOMMENDATION

This joint proposal addresses the Bellacosa Commission's recommendation that each Appellate Division adopt a rule providing for diversion from the standard disciplinary process of complaints involving lesser misconduct that are causally related to alcohol or substance abuse. The Committee on Professional Discipline and the Committee on the Lawyer Assistance Program support such a diversionary program and recommend that the Appellate Division, First Department take the additional step of adopting a rule providing for diversion for lesser misconduct causally related to a mental health condition. Offering diversion, treatment and monitoring for lesser misconduct related to a mental health condition, as well as misconduct

related to alcohol or substance abuse, is consistent with the best interests of the profession and the public.

III. DIVERSION FOR LESSER MISCONDUCT RELATED TO ALCOHOL, SUBSTANCE ABUSE OR MENTAL HEALTH CONDITION

Diversion programs, like drug courts and pretrial intervention programs, are premised upon the widely accepted belief that monitoring, treatment and education programs for lawyers suffering from alcohol or substance abuse, mental health conditions, and/or lack of law office management skills, result in lasting benefits to the public and the profession alike. On the other hand, disciplinary complaints involving lesser discipline historically have resulted in dismissal or private discipline, without addressing the ongoing, underlying issues of a respondent's alcohol or substance abuse dependency or mental health issues.

The Bellacosa Commission concluded that adoption of a formal diversion rule would fulfill the legal profession's "professional and moral obligation to help lawyers address alcohol and substance dependency problems" by encouraging lawyers to identify and address substance abuse problems more readily and effectively and thus avoid harm to clients and the public.⁹ The Bellacosa Commission's diversion rule is a timely reflection of the widespread view that, under certain circumstances, mere punishment is neither effective nor humane.

After considering alternative discipline rules in a variety of jurisdictions and the American Bar Association's ("ABA") *Model Rules for Lawyer Disciplinary Enforcement*,¹⁰ we find no practical or policy reasons for excluding lawyers with mental health conditions or symptoms from diversion for lesser misconduct. While twelve-step programs for alcohol or substance abuse are more familiar and integral to lawyer assistance programs,¹¹ we believe that

support and treatment through diversion are as essential for lawyers struggling with mental health conditions or symptoms as for lawyers afflicted with alcohol or substance abuse.

Adoption of a diversionary rule that includes lawyers with mental health conditions or symptoms serves to notify the public that the legal profession is realistically addressing the problems that the profession and society at large are encountering. In addition, extending the proposed diversion rule to lawyers with mental health conditions will help lawyers with mental health issues avoid the bitter consequences of shame, secrecy and stigma that addicted lawyers have battled for decades. In turn, encouraging lawyers with mental health problems to come forward and seek assistance prevents further harm to the public and the profession.

By adopting a diversion rule for lawyers struggling with alcoholism, substance abuse, or a mental health condition, the First Department will be codifying the flexible and effective approach that historically it has employed in countless matters. For many years, the Court has fashioned conditional disciplinary sanctions on a case-by-case basis with great success. The result has been a significant body of disciplinary and reinstatement case law with conditions including psychiatric treatment, education or mentoring, or rehabilitation with monitoring by an approved program such as this Association's Lawyer Assistance Program ("NYC LAP") or the New York State Bar Association's Lawyer Assistance Program ("NYS LAP").¹² Instead of a twelve-step program, recovery from a mental health condition requires a treatment plan, treatment by a qualified professional and oversight by a monitor for a period of time. The monitor and professional are responsible for verifying their duties to the supervising Court or disciplinary authority.

Ignoring an identified group of lawyers in need is contrary to the precepts of the disciplinary system. NYS LAP and NYC LAP report a steadily increasing number of mental health related inquiries and requests for assistance. Information gathered by Eileen C. Travis, in her capacity as Director of NYC LAP, indicates that in 2005, almost 30% of the referrals to NYC LAP involve requests for treatment and monitoring for mental health conditions.

Carol M. Langford, an adjunct professor of law at the University of San Francisco School of Law and Chair, ABA Intellectual Property Section Ethics Committee, recently published *Depression, Substance Abuse and Intellectual Property Lawyers*, confirming that the incidence of depression and substance abuse among lawyers is significantly higher than in the general population.¹³

Similarly, an article in the June 2005 ABA Journal discussing the success of the ABA Commission on Lawyer's Assistance Programs, noted that:

One of every four lawyers suffers from stress, and out of 105 occupations, lawyers rank first in depression. In addition, a disproportionate number of lawyers commit suicide. These are some of the troubling conclusions that can be found in various studies of addiction and depression.¹⁴

Ms. Travis also reported that the majority of mental health condition referrals involve depression, in the form of either clinical depression or bipolar disorder. The remaining mental health condition referrals involve anxiety, stress, panic disorder, post-traumatic stress disorder, and personality disorders that result in inability to manage anger or inability to maintain relationships. As with alcohol or substance abuse, these illnesses impair an attorney's ability to function and have the potential of causing substantial harm to individual clients and the public.

In response to growing interest for detailed guidance, the ABA Commission on Lawyer Assistance Programs issued in 1998 the *Planning Guide for Designing and Implementing Lawyer Recovery Monitoring Programs* (“CoLap Planning Guide”).¹⁵

More recently, in February 2004, the ABA House of Delegates adopted *The Model Lawyer Assistance Program*, which has four specified purposes:

1. to assist lawyers, judges, and law students, or the legal community as defined by the [lawyer assistance program], in pursuing their recovery from chemical dependency or abuse, mental health, or physical issues;
2. to protect the interests of clients from harm that might result from lawyers impaired by substance abuse or dependency, physical, or mental health conditions;
3. to educate the bench, bar and law school community about the issues and concerns that negatively affect the legal profession; and
4. to develop programs that emphasize prevention of conditions that might negatively affect legal professionals or law students.¹⁶

The CoLap Planning Guide confirmed the prevalence of mental health conditions in the profession and the need to address this issue directly stating: “Recovery from mental and emotional disorders is the second most common situation monitored under Recovery Monitoring Programs. Of these disorders, major depression and bipolar disorder appear to be the most prevalent.”¹⁷ As a practical matter, we believe that these statistics indicate that without assistance to these lawyers, the public and the profession will waste enormous financial and human resources in expensive and lengthy disciplinary proceedings.

Generally, a recovery and monitoring program requires the candidate to:

- submit to a psychiatric or psychological assessment at the beginning of the monitoring period to be conducted by a mental health care provider approved by Discipline or Admissions or the [lawyer assistance program];

- take all actions necessary to allow the monitor as well as Discipline, Admissions or the [lawyer assistance program] to receive a copy of the assessment along with a treatment plan recommended by the mental health care provider and to discuss these with such provider;
- follow the recommended treatment plan throughout the duration of the monitoring period;
- continue under the care of a mental health care provider approved by Discipline or Admissions or the [lawyer assistance program] for the duration of the monitoring period, with such care to involve regular meetings with the mental health care provider; and
- take all actions necessary to allow the treating mental health care provider to give the monitor written and verbal information concerning the lawyer's progress in recovery.¹⁸

IV. DIVERSION IN NEW YORK AND OTHER JURISDICTIONS

Alternative disciplinary sanctions, including diversion for lesser misconduct related to alcohol or substance abuse, have been widely adopted. In most diversion programs, an attorney-respondent is diverted from the disciplinary system and an intervention replaces sanctions. Generally, the type of complaint for which diversion is available is a subset of all misconduct. If an attorney-respondent successfully completes the conditions set forth in a diversion contract without engaging in additional misconduct, the matter is dismissed. If the attorney-respondent fails to complete treatment or monitoring, the complaint is handled within the traditional disciplinary process. The Appellate Divisions for the Second, Third and Fourth Departments have adopted diversion programs for attorneys suffering from alcoholism or other substance abuse or dependency.¹⁹

Our proposed rule – providing for disciplinary diversion for lesser misconduct related to alcohol or substance abuse or a mental health condition – addresses the substantive and procedural concerns of a diversion program in detail.

V. PROPOSED RULE AND COMMENTARY

22 N.Y.C.R.R. _____. Diversion in Lieu of Discipline.

1. An attorney, who is the subject of an investigation or of charges of professional misconduct by the Departmental Disciplinary Committee, may be diverted from the disciplinary process, and any investigation or proceeding may be stayed, upon a determination by the Chief Counsel that diversion is appropriate in light of the factors set forth in subsection 2, *infra*. The Chief Counsel's determination shall be subject to approval by a member of the Policy Committee.
2. In determining whether an attorney-respondent qualifies for diversion, the Chief Counsel shall consider the following criteria:
 - (i) the nature and circumstances of the alleged misconduct, including its seriousness;
 - (ii) whether the alleged misconduct occurred during a time period when the attorney-respondent acknowledges having suffered from a mental health condition, alcohol abuse or other substance abuse;
 - (iii) the likelihood that the alleged misconduct is related to a mental health condition, alcohol abuse or other substance abuse;
 - (iv) the likelihood that the causes of the alleged misconduct can be controlled by proper supervised treatment and intervention;
 - (v) the desire and motivation of the attorney-respondent to participate in a diversionary program;
 - (vi) the disciplinary history of the attorney-respondent;
 - (vii) the best interests of the public, the legal profession and the attorney-respondent.
3. The attorney-respondent shall enter into a diversion contract with the Chief Counsel which shall specify the conditions of the diversion program including its

duration, which should not be less than two years from the date that the contract is entered into. The conditions shall take into consideration (i) the nature and circumstances of the alleged misconduct and (ii) the history, character and condition of the attorney-respondent.

The following conditions, and such others as the Chief Counsel deems appropriate, may be imposed:

- (i) participation in a lawyer assistance program or alcohol or substance abuse program approved by the Appellate Division;
 - (ii) evaluation by a psychiatrist, psychologist and/or other professional as may be appropriate;
 - (iii) compliance with the recommended treatment plan;
 - (iv) agreement to provide such treatment information as the Chief Counsel may require; and
 - (v) cooperation with the monitoring of the attorney-respondent's compliance with the diversion contract.
4. The Chief Counsel shall arrange for monitoring of the attorney-respondent's compliance with the diversion contract by referring the attorney-respondent to the NYC Lawyer Assistance Program or by requiring the attorney-respondent to confirm mental health treatment in accordance with a treatment plan approved by a designated professional or the NYC Lawyer Assistance Program or by implementing such other monitoring conditions as specified in the diversion contract including, but not limited to, the appointment of a monitor.
 5. The Chief Counsel shall inform the complainant that the attorney-respondent has entered into a diversion contract and shall further advise of the final disposition of the complaint.
 6. Upon determination by the Chief Counsel that the attorney-respondent has complied with the terms of the diversion contract, the Chief Counsel shall direct the discontinuance of the investigation and dismissal of the complaint.
 7. Upon determination by the Chief Counsel that the attorney-respondent has failed to comply with the terms of the diversion contract, or if the attorney-respondent commits additional misconduct after entering into the diversion contract, the Chief Counsel may, in his discretion, reinstate the disciplinary investigation or

proceeding, or take other appropriate action, subject only to review by the Policy Committee.

8. Unless otherwise provided for in the diversion contract, any costs associated with the attorney-respondent's diversion or participation in a monitoring program shall be the responsibility of the attorney-respondent.

VI. COMMENTARY

In drafting the proposed rule, we have relied upon the Bellacosa Commission's Model Diversion Rule, the diversion rules adopted by the Second, Third and Fourth Department,²⁰ and the rule submitted with the Committee on Professional Discipline's 1996 Report.²¹ Our use of the term "mental health condition" follows the language employed by *The Model Lawyer Assistance Program* adopted by the ABA in 2004.²²

ADMINISTRATION

Section (1) of the proposed rule places the authority to divert a disciplinary complaint, investigation or proceeding with the Chief Counsel of the Departmental Disciplinary Committee, subject to approval by a member of the Policy Committee.

Based on the disciplinary procedures currently employed in the First Department, it is logical to delegate the responsibility for determining whether a matter qualifies for diversion to the Chief Counsel. Because diversion is most appropriate at an early stage in the investigatory process before formal charges are brought, we believe that the Chief Counsel and the Policy Committee are best situated to determine whether a diversion contract for an attorney-respondent would be consistent with the standards set forth in the proposed rule. It is important to note that participation in the diversion program is voluntary on the part of the attorney, since the attorney's willingness to address the underlying condition is critical to a successful diversion.

DEGREE OF MISCONDUCT, CAUSAL CONNECTION, AND PUBLIC INTEREST

Section (2) of the proposed rule sets forth the list of factors to be considered in determining whether the attorney-respondent should be considered for diversion, including the degree of misconduct, the causal connection between the alleged misconduct and the respondent's mental health condition, or alcohol/substance abuse, and the best interests of the public, the legal profession and the attorney-respondent.

The Committees believe that a variety of factors should be considered in determining whether diversion is appropriate. These factors include: the nature and circumstances of the alleged misconduct, including its seriousness; its occurrence during a period when the attorney-respondent acknowledges to having suffered from a mental health condition, alcohol abuse or other substance abuse; the likelihood that the alleged misconduct is related to a mental health condition, alcohol abuse or other substance abuse; whether the causes of the alleged misconduct can be controlled by proper supervised treatment and intervention; the desire and motivation of the attorney-respondent to participate in a diversionary program; the disciplinary history of the attorney-respondent; and the best interests of the public, the legal profession and the attorney-respondent.

The Bellacosa Commission model diversion rule and the diversion rules of the Second, Third and Fourth Departments contain differing standards concerning the types of attorney misconduct that would be eligible for diversion. The Bellacosa Commission diversion rule permits diversion for alleged misconduct that would not result in *disbarment or suspension*; the Fourth Department allows diversion where the misconduct would not result in *disbarment*; and the Second and Third Departments consider *the seriousness of the alleged misconduct*.²³ The

Committees agree with the more flexible approach in the Second and Third Departments' rules, while recognizing that diversion is not usually appropriate in serious cases where the remedy traditionally has been disbarment, such as where an attorney has converted a client's or third party's funds.

Similarly, the Committees agree with the Second and Third Departments' requirements that consideration be given to "(i) whether the alleged misconduct occurred during a time period when the attorney-respondent suffered from alcohol or other substance abuse or dependency; [and] (ii) whether the alleged misconduct is related to such alcohol or other substance abuse or dependency."²⁴ Our proposed rule adopts this approach because it is consistent with the causal connection requirement established by the case law in the First Department. However, we also include consideration of whether "the alleged misconduct occurred during a time period when the attorney-respondent acknowledges having suffered from a mental health condition, alcohol abuse or other substance abuse" because of the paramount importance that the attorney-respondent recognize that a dependency or mental health condition exists as a first step toward recovery. (Proposed Rule, Sections 2(ii)).

Our version also follows the requirements of the Second and Third Departments that, among other considerations, a determination of diversion must be based upon the best interests of the public, the legal profession and the attorney-respondent. (Proposed Rule, Section 2(vii)).

DIVERSION CONTRACT

The Bellacosa Commission model diversion rule and the Second, Third and Fourth Department rules divert the attorney-respondent from the investigative stage by staying the investigation or determination of misconduct and, instead, referring the attorney-respondent to a

court-approved lawyer assistance program, with the court retaining jurisdiction to dismiss the disciplinary matter, or take other appropriate action, upon proof of successful completion of the monitoring program. However, to provide additional guidance to the Chief Counsel and the attorney-respondent as to the scope of the respondent's obligations, we recommend requiring the attorney-respondent to enter into a diversion contract setting forth the respondent's obligations, as recommended by the 1996 Alternative Discipline Report. Proposed subsection 3 includes a list of conditions to be considered in formulating the diversion contract.

In addition, the proposed rule provides for discontinuance of the investigation and dismissal of the complaint upon a determination by the Chief Counsel that the attorney-respondent has complied with the terms of the diversion contract. (Proposed Rule, Section 6). On the other hand, in the event that the Chief Counsel determines that the attorney-respondent has failed to comply with the terms of the diversion contract, or if the attorney-respondent commits additional misconduct after entering into the diversion contract, the Chief Counsel may, in his discretion, reinstate the disciplinary investigation or proceeding, or take other appropriate action, subject only to review by the Policy Committee. (Proposed Rule, Section 7).

We are also mindful of a criticism sometimes leveled against diversion programs generally, namely, that the original complainants customarily are not told of the diversion, but rather are often merely informed that their complaints have been dismissed. We believe that this is a valid criticism – but one which can easily be met by the addition of a condition to the diversion contract, namely that the respondent agrees to waive the usual confidentiality of the disciplinary process, at least to the limited extent of disclosing the diversion outcome to the

complainant. (Proposed Rule, Section 5). We believe that this added level of communication will help build the public's confidence in the disciplinary system.

NOTICE AND OPPORTUNITY TO BE HEARD UPON FAILURE TO COMPLY

The Bellacosa Commission model rule and the Second, Third and Fourth Department rules provide the attorney-respondent with notice and an opportunity to be heard in the event that the Court determines that the attorney-respondent has failed to complete the terms of diversion. Our proposed rule does not require the Court's approval for a referral to diversion. Similarly, the proposed rule does not provide the attorney-respondent with an opportunity for judicial review in the event that the Chief Counsel determines that the attorney-respondent has failed to comply with the terms of the diversion contract. The sole review of such determination would be by the Policy Committee. (Proposed Rule, Sections 1, 7).

We believe that judicial review would be burdensome and inconsistent with a flexible diversion program designed to be available to attorney-respondents at the earliest stages of an investigation. It should be noted that a return to the disciplinary process does not preclude the attorney-respondent from continued efforts at compliance and an opportunity, albeit at a different phase of the disciplinary proceeding, to obtain some form of alternative sanction.

COSTS

The Bellacosa Commission model rule and the Second, Third and Fourth Department rules provide that the attorney-respondent shall bear the costs of diversion and monitoring. Although we agree that this should be the norm, we have added language that would give the Chief Counsel some discretion concerning costs in formulating the diversion contract provision. (Proposed Rule, Section 8).

VII. CONCLUSION

A diversion rule for lesser misconduct, like many existing educational and assistance based programs, will serve the best interests of the public, the bar and attorney-respondents. While the First Department's past decisions clearly reflect a willingness to be innovative in fashioning appropriate remedies for lawyers suffering from alcoholism, substance abuse or mental health conditions, the Committees believe that a formal diversion rule will advance the Court's already significant achievements in improving the disciplinary system. Adoption of a diversion rule will also serve to focus the profession on the importance of devoting resources and attention to outreach, education and assistance to our colleagues in need of treatment for alcoholism or substance abuse or mental health conditions.

Dated: August 2006

Respectfully submitted,

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¹ American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* (Final Draft, June 1970).

² Report of the Commission on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century*, ABA Center for Professional Responsibility (1992).

³ Committee on the Profession and the Courts, *Final Report to the Chief Judge* (Nov. 1995).

⁴ Among other things, the Bellacosa Commission recommended (1) “modifying and supplementing existing court rules and procedures to facilitate the early detection of alcohol and substance dependency, intervention and referral to needed treatment of those experiencing alcohol and substance dependency;” and (2) the creation of the Lawyer Assistance Trust (“NYLAT”) to “provide Statewide leadership and financial assistance to programs for the treatment and prevention of alcohol and substance dependency among lawyers and judges.” See Commission on Alcohol and Substance Abuse in the Legal Profession, *Action Plan for Honorable Judith S. Kaye, Chief Judge of the State of New York and Honorable Jonathan Lippman, Chief Administration Judge of the State of New York* at 2-3 (Dec. 15, 2000) (“Bellacosa Report”). The NYLAT is funded by attorney registration fees, which it uses to support grants and projects within its stated purpose of alcohol education, treatment and intervention. See 22 N.Y.C.R.R. § 7500; see also www.nylat.org.

⁵ Committee on Professional Discipline, *Alternative and Additional Disciplinary Sanctions and Remedies*, 51 THE RECORD 726 (Nov. 1996).

⁶ Committee on Professional Discipline, *Diverting Substance-Abusing Lawyers From the Disciplinary Process: A Proposal*, 55 THE RECORD 836 (June 2000).

⁷ 51 THE RECORD at 727-28.

⁸ We view the limited diversion program proposed here as an appropriate first step toward the larger goal of codifying a range of alternative sanctions and tools recommended in the 1996 Report, with particular emphasis on diversion for lesser misconduct related to the attorney-respondent's inexperience and lack of law office management skills.

⁹ Bellacosa Report, *supra* note 4, at 2.

¹⁰ American Bar Association, Standing Committee on Professional Discipline, *The Model Rules for Lawyer Disciplinary Enforcement* (approved by the ABA House of Delegates on August 11, 1993 and amended on August 5, 1996, February 8, 1999, and August 12, 2002).

¹¹ See, e.g., <http://www.abcny.org/LawyersAssistance/HelpfulLinks.htm>.

¹² See, e.g., *Matter of Marinangeli*, 211 A.D.2d 272, 628 N.Y.S.2d 79 (1st Dep't 1995) (holding that attorney who was suspended after pleading guilty to a federal felony that he argued was caused by his addiction to alcohol and crack cocaine could be reinstated upon submission of evidence of his "continued rehabilitation and abstinence from the use of alcohol and freedom from substance abuse" with the condition that upon his reinstatement he participate in a monitoring program for an additional three years); *Matter of Fisher*, 174 A.D.2d 236, 580 N.Y.S.2d 228, 239-240 (1st Dep't 1992) (attorney with a history of psychiatric treatment who attempted to bribe the director of a bar association legal referral service censured rather than suspended because of the "causal connection between respondent's conduct and the change in his medication"); *Matter of McEnroe*, 174 A.D.2d 67, 577 N.Y.S.2d 828 (1st Dep't 1992) (attorney suffering from alcoholism when he neglected clients' legal matters, failed to maintain client contact, and failed to return unearned advanced fees voluntarily ceased to practice law and submitted evidence of his rehabilitation and would be automatically reinstated "upon submission and approval of evidence satisfactorily attesting to respondent's continued rehabilitation and abstinence from the use of alcohol as well as a proposal for appropriate supervision by a [monitoring] committee"); *Matter of Winston*, 137 A.D.2d 385, 528 N.Y.S.2d 843 (1st Dep't 1988) (retroactively suspending for three years an attorney who converted escrow funds but who enrolled in a drug treatment program and remained drug free for two years and ordering that the attorney's motion for reinstatement "shall be conditioned upon evidence demonstrating to the satisfaction of this court respondent's continued rehabilitation"); *Matter of Corbett*, 87 A.D.2d 140, 450 N.Y.S.2d 802 (1st Dep't 1982) (attorney whose neglect resulted in irreparable harm to client was censured where the conduct was related to attorney's alcoholism, attorney recognized the connection, participated in Alcoholics Anonymous, and made restitution).

¹³ Carol M. Langford, *Depression, Substance Abuse, and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 876 (2005).

¹⁴ Robert A. Stein, *Help Is Available*, 91 A.B.A. J. 64 (2005).

¹⁵ American Bar Association Commission on Lawyer Assistance Programs, *Planning Guide for Designing and Implementing Lawyer Recovery Monitoring Programs* (July 1998).

¹⁶ American Bar Association Commission on Lawyer Assistance Programs, Commission on Mental & Physical Disability Law, Standing Committee on Substance Abuse, *Model Lawyer Assistance Program*, Rule 1B.

¹⁷ See CoLap Planning Guide, *supra* note 15, at 16.

¹⁸ *Id.* at 16-17.

¹⁹ See 22 N.Y.C.R.R. Section 691.4(m) (Second Department); 22 N.Y.C.R.R. Section 806.4(g) (Third Department); 22 N.Y.C.R.R. Sections 1022.19(d)(2)(iii) and 1022.20(d)(3) (Fourth Department).

²⁰ Annexed hereto as Appendix A is a chart published by the New York Lawyer Assistance Trust that compares the provisions of the Bellacosa Commission's Model Diversion Rule and the Second, Third and Fourth Department Rules.

²¹ Annexed hereto as Appendix B is the text of the rule submitted by the Professional Discipline Committee with the 1996 Alternative Discipline Report.

²² See Model Lawyer Assistance Program, *supra* note 16, at Rule 1(A).

²³ See Appendix A.

²⁴ See, e.g., 22 N.Y.C.R.R. §§ 806.4(g)(1)(i)-(ii).

APPENDIX A

Comparison Matrix of Diversion Rules

"Model" Diversion Rule	Fourth Department	Third Department	Second Department
Recommended by LAT	effective 01/09/2003	effective 09/20/2004	effective 07/27/2005
<p>During the course of a disciplinary proceeding or investigation, the Appellate Division may defer disposition of the matter and divert the Respondent to a monitoring program if a Respondent claims disability due to alcohol or other substance dependency and the Appellate Division finds that:</p>	<p>When an attorney who is the subject of a disciplinary investigation or proceeding raises in defense of the charges or as a mitigating factor alcohol or substance abuse, or, upon the recommendation of chief counsel or a designated staff attorney pursuant to 22 NYCRR 1022.19 (d) (2) (iii), the Appellate Division may stay the matter under investigation or the determination of the charges and direct that the attorney complete a monitoring program sponsored by a lawyers' assistance program approved by the Appellate Division upon a finding that:</p>	<p>During the course of an investigation or disciplinary proceeding, when the attorney raises alcohol or other substance abuse or dependency as a mitigating factor, or upon recommendation of the committee, the Court may, upon application of the attorney or committee, stay the investigation or disciplinary proceeding and direct the attorney to complete a monitoring program sponsored by a lawyers' assistance program approved by the Court. In determining whether to divert an attorney to a monitoring program, the Court shall consider:</p>	<p>If during the course of an investigation, the consideration of charges by a grievance committee, or the course of a formal disciplinary proceeding, it appears that the attorney whose conduct is the subject thereof is or may be suffering from alcoholism or other substance abuse or dependency, the court may upon application of the attorney or committee, or on its own motion, stay the investigation, charges, or proceeding and direct the attorney to complete a monitoring program sponsored by a lawyers' assistance program approved by the court. In determining whether to divert an attorney to a monitoring program, the court shall consider:</p>
<p>(a) the alleged misconduct, if proven, would not result in the disbarment or suspension of the Respondent from the practice of law; and</p>	<p>(i) the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency;</p>	<p>(1) whether the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency;</p>	<p>(i) whether the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency;</p>
<p>(b) the alleged misconduct is sufficiently related to an alcohol or substance dependency problem on the part of the Respondent; and</p>	<p>(ii) the alleged misconduct is not such that disbarment from the practice of law would be an appropriate sanction; and</p>	<p>(ii) whether the alleged misconduct is related to such alcohol or other substance abuse or dependency;</p>	<p>(ii) whether the alleged misconduct is related to such alcohol or other substance abuse or dependency;</p>
<p>(c) the diversion is in the best interests of the public, the legal profession and the Respondent.</p>	<p>(iii) diverting the attorney to a monitoring program is in the public interest.</p>	<p>(iii) the seriousness of the alleged misconduct; and</p>	<p>(iii) the seriousness of the alleged misconduct; and</p>
<p>The monitoring program selected for this diversion option must be sponsored by a lawyers' assistance program approved by the Appellate Division.</p>		<p>(iv) whether diversion is in the best interests of the public, the legal profession, and the attorney.</p>	

(iv) whether diversion is in the best interests of the public, the legal profession and the attorney.

Upon confirmation by the lawyers' assistance program that Respondent has successfully completed the monitoring program, the underlying disciplinary matters or investigation may be dismissed by the Appellate Division.

Upon submission of written proof of successful completion of the monitoring program, the Appellate Division may dismiss the disciplinary charges.

Upon submission of written proof of successful completion of the monitoring program, the Court may direct discontinuance or resumption of the investigation or disciplinary proceeding, or take other appropriate action.

Upon submission of written proof of successful completion of the monitoring program, the court may direct the discontinuance or resumption of the investigation, charges or proceeding, or take other appropriate action.

Upon reasonable notice and opportunity to be heard, the Appellate Division may terminate the monitoring program and resume the underlying disciplinary proceedings or investigation or take other appropriate action, if:

In the event of an attorney's failure to successfully complete a Court ordered monitoring program, or, the commission of additional misconduct by the attorney during the pendency of the proceeding, the Appellate Division may, upon notice to the attorney and after affording the attorney an opportunity to be heard, rescind the order diverting the attorney to the monitoring program and reinstate the disciplinary charges or investigation.

In the event the attorney is not accepted into or fails to successfully complete the monitoring program as ordered by the Court, or the attorney commits additional misconduct after diversion is directed pursuant to this subdivision, the Court may, upon notice to the attorney affording him or her an opportunity to be heard, rescind the order diverting the attorney to the monitoring program and reinstate the investigation or disciplinary proceeding, or take other appropriate action.

In the event the attorney is not accepted into or fails to successfully complete the monitoring program as ordered by the court, or the attorney commits additional misconduct after diversion is directed pursuant to this subdivision, the court may, upon notice to the attorney affording him or her the opportunity to be heard, rescind the order diverting the attorney to the monitoring program and reinstate the investigation, charges or proceeding, or take other appropriate action.

(a) the Respondent fails to satisfactorily complete the terms and conditions of the monitoring program; or

(b) the Appellate Division concludes that the Respondent has committed additional misconduct which warrants disciplinary action.

The Respondent shall be responsible for any costs associated with his or her diversion to the monitoring program.

Any costs associated with the attorney's participation in a monitoring program pursuant to this section shall be the responsibility of the attorney.

Any costs associated with the attorney's participation in a monitoring program pursuant to this subdivision shall be the responsibility of the attorney.

Any costs associated with the attorney's participation in a monitoring program pursuant to this subdivision shall be paid by the attorney.

The diversion to monitoring option is not available under circumstances governed by those sections of these rules relating to proceedings to determine incapacity

or that may result in
disbarment or
suspension.

APPENDIX B

22 N.Y.C.R.R. _____ **Diversion of An Attorney in Lieu of Discipline**

(a) **Qualifications.** An attorney who is the subject of an investigation, or of charges by the grievance or departmental disciplinary committee of professional misconduct, may be diverted from the disciplinary process, and any investigation or proceeding stayed, provided that:

(1) the attorney's conduct does not involve misappropriation of funds or property of a client or a third party, or a serious crime as that is defined in the judiciary law and this court's rules;

(2) the attorney's conduct did not result in actual prejudice (loss of money, legal rights or valuable property rights) to a client or other person, unless restitution is made a condition of the diversion program;

(3) the lawyer has not been disciplined within the last five years, or within the last three years for similar conduct; and

(4) the lawyer has not been previously diverted from the disciplinary process, as provided in this rule.

(b) **Conditions.** The attorney shall enter into a diversion contract with the chief counsel, or his designee, of the grievance or departmental disciplinary committee, which shall specify the conditions of the diversion program, and which shall last for a specified period of time. The conditions shall take into consideration the nature and circumstances of the alleged misconduct and the history, character and condition of the attorney. The following conditions, and such others as the committee or its designee deems appropriate, may be imposed:

(1) periodic reports to the grievance or departmental disciplinary committee or a monitor designated and appointed by the committee;

(2) supervision or audit of the attorney's trust or special accounts by an outside monitor, as the committee may direct;

(3) satisfactory completion of a course of study, including attendance at specified ethics programs, law school courses, continuing legal education programs;

(4) satisfactory completion of the Multistate Professional Responsibility Examination;

(5) restitution;

(6) participation in a lawyer assistance program, or substance abuse program;

(7) participation in a law office management assistance program;

(8) satisfactory completion of a period of work with a mentor, selected with the committee's approval, to assist the attorney in improving the quality of the attorney's law practice and client relations; and

(9) payment of the costs of the diversion program.

(c) **Administration.** The chief counsel to the grievance or departmental disciplinary committee, or a monitor designated and appointed by the committee, shall be responsible for the supervision of attorneys who enter into diversion programs and contracts, unless otherwise specified by the committee. Where appropriate, the chief counsel or the monitor may recommend to the committee modifications of the conditions and may propose written modifications of the diversion contract, with the attorney's consent. The chief counsel or the monitor shall report to the committee the attorney's failure to comply with the conditions of diversion contract and program and upon such report, the original complaint against the attorney may be reopened for investigation or the disciplinary proceeding pending against the attorney may be resumed. If the attorney successfully completes the diversion program, the chief counsel or monitor shall report to the committee and shall recommend that the underlying complaint or disciplinary proceeding be dismissed. The complainant shall be advised by the committee that the attorney has entered into a diversion contract and shall be further advised by the committee of the final disposition of the complaint.

DISSENT

The proposed rule, in its current form, should not be adopted for the reasons stated below.

Diversion should not be considered unless the attorney seeking a stay of a disciplinary proceeding has taken affirmative steps to obtain assistance by enrolling (or having an application pending for enrollment) in an appropriate monitoring program and, in the case of one suffering from mental illness, receiving medical treatment. There should be a mandatory, threshold demonstration of contrition and self-recognition of the problem for diversion to be considered. If the compulsion inherent in a disciplinary proceeding is necessary to cause monitoring and treatment, enrollment should not be a mitigating factor. The failure to enroll should be an aggravating factor.

Diversion should be available only for violations of the disciplinary rules involving lesser misconduct. Although the Report is replete with references to "lesser misconduct," the rule, as proposed, is not so limited. The Committee specifically considered and rejected any limitation on the severity of the misconduct. The proposed rule simply makes "the nature and circumstances of the alleged misconduct, including its seriousness" one of many factors to be considered. Thus, at least to one advocate of the proposed rule, an attorney who used a small amount of trust funds to buy drugs could be eligible for diversion. If diversion is to be considered only for violations constituting "lesser misconduct," the rule should so state.

As a matter of public policy the illegal use of drugs should be an aggravating factor, not a mitigating factor. A Court rule should not make the violation of law a mitigating factor. Perhaps, for disciplinary purposes, the extent of the aggravation could be reduced if the attorney obtained appropriate counseling and monitoring. As between two attorneys both of whom engaged in the same wrongful conduct and are otherwise indistinguishable except for one attorney's alleging a relationship between the attorney's wrongful conduct and the illegal use of drugs, there is no justification for the drug abuser avoiding discipline while the "clean" attorney is disciplined.

The dismissal of the disciplinary charges or termination of the investigation should be conditioned on a finding that monitoring imposed by the "contract" with the Departmental Disciplinary Committee is no longer reasonably necessary or appropriate. Recidivism and relapse are unfortunately common. Unless the DDC has a reasonable basis to conclude that the attorney is no longer a risk to the public and the profession, continued monitoring should be required.

The rule, as proposed, makes the entire process secret beyond the Chief Counsel and a member of the Policy Committee. Not even the Appellate Division is advised of or has an opportunity to review the decisions. Thus, an attorney suspected of a significant violation may avoid all discipline in a secret, unreviewed proceeding. The rule is ripe for abuse and encourages additional mistrust of the secret disciplinary process by the already cynical public and profession.

Lumping together in the disciplinary rules mental *illness* and the *illegal* use (or possession) of drugs is not appropriate.

The proposed rule needs revision.

William H. Greilsheimer

May 3, 2006