



NEW YORK
CITY BAR

**COMMITTEE ON THE
LAWYER ASSISTANCE PROGRAM**

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August 28, 2015

Commission on Statewide Attorney Discipline
c/o Hon. Barry A. Cozier, Chair
25 Beaver Street
Eleventh Floor
New York, NY 10004-2310

**Re: Adoption of a Unified Diversion Rule in New York's
Attorney Disciplinary System**

Dear Judge Cozier,

We thank you for this opportunity to submit written testimony regarding New York State's attorney disciplinary system. In particular, we would like to address the role the current Diversion Rules play in the attorney disciplinary system and call for an adoption of a Unified Diversion Rule.

On August 11, 2015, J. Richard Supple, member of the New York City Bar's Committee on Professional Discipline presented oral testimony to the Commission in which he commented on the fact that currently, the Second, Third and Fourth Department have a diversion rule, but the First does not.¹ This letter supplements his comments. The New York City Bar Lawyer Assistance Program (LAP) and the New York State Bar LAP collaborated on a Proposed Unified Diversion Rule (Exhibit A) and recommend that it be adopted by all four Departments. It is our understanding that the New York State Bar will also be writing in support of our proposed rule.

Alcoholism, substance abuse and mental health problems can impair any professional's judgment and ability to function. For lawyers, if these problems are not addressed at an early stage, their progressive nature can result in significant harm to the attorney, their clients and the public. According to the latest Annual Report of the Lawyer's Fund for Client Protection of the State of New York, the apparent causes of misconduct for most of the lawyers involved in awards between 1982 and 2014 were often traced to *alcohol, drug abuse, gambling*, economic pressures, *mental illness*, marital, professional and medical problems.²

¹ Testimony of the New York City Bar Association Committee on Professional Discipline to the Chief Judge's Commission on Statewide Attorney Discipline, Aug. 11, 2015, *available at* <http://www2.nycbar.org/pdf/report/uploads/20072949-TestimonybeforetheChiefJudgesCommissiononStatewideAttorneyDisciplineProDis8.11.15.pdf>.

² Annual Report of the Board of Trustees for Calendar Year 2014, The Lawyers' Fund for Client Protection of the State of New York, at 14, *available at* <http://www.nylawfund.org/AR%202014.FINAL.2.11.15.pdf>.

The purpose of a Diversion Rule for lawyers whose less serious misconduct is related to a mental health, alcohol, substance abuse or other addiction is to encourage lawyers to address and remedy the underlying causes that contributed to the misconduct in a structured and supervised education and rehabilitation LAP Monitoring Program. Advocating for lawyers to self-identify and address these issues can result in lasting benefits to that attorney, the public and the profession. It also helps to confront the stigma and shame that all too often accompany these problems, preventing lawyers from coming forward and getting the assistance they need.

Currently, the Second, Third and Fourth Department utilize unique Diversion Rules modeled on a proposed rule developed by the New York State Lawyer Assistance Trust. Although the interpretation of the Rule differs slightly in each Department, the intent is the same (Exhibit B). If a Respondent can demonstrate a causal connection between his/her misconduct and an alcohol/drug problem, he/she can be diverted into a monitoring program sponsored by a Lawyer Assistance Program. If the Respondent successfully completes the monitoring program, the underlying disciplinary matters may be dismissed by the Appellate Division. According to the guidelines of the New York City Bar LAP Monitoring Agreement, if at any point, the respondent fails to comply with the conditions set forth in the Monitoring Agreement, the Disciplinary Committee is notified immediately. Continued monitoring with a reinforced plan may be sanctioned, or the misconduct is handled within the existing disciplinary process.

Although the First Department does not have a Diversion Rule at present, a significant number of the attorneys we have monitored were referred to LAP by the Appellate Division. By adopting a Diversion Rule, the First Department will give credence to the effective and enlightened approach that it has historically applied. We are well equipped to handle additional referrals from the First and Second Departments.

The New York City Bar LAP provides free, confidential help to attorneys, judges, law students and their family members struggling with alcohol/substance abuse, other addictions, depression, stress, anxiety and other mental health problems. Our services include: assessment and evaluation; intervention; supportive counseling; peer support; outreach and education and monitoring. Our catchment area is the five boroughs, comprising the largest number of practicing attorneys in the state. Our resources are available to the local bars and their LAP Committees, the courts, firms, agencies in the public sector and law schools. Our primary goal is to intervene *early* before an attorney's alcohol, addiction or mental health problem puts his/her health and clients at risk. We have learned through experience that some lawyers, although dedicated to represent their client's issues, often neglect their own. Attorneys whose alcoholism and mental health problems are not addressed are at much higher risk for disciplinary problems.

Our LAP Monitoring Program (Exhibit C) provides a Respondent with the structure, support and tools that are necessary to rehabilitate and recover. When a respondent is referred to LAP by a Departmental Discipline or Grievance Committee for monitoring, the respondent will undergo a comprehensive evaluation. The Respondent signs a monitoring agreement which requires a commitment to abstinence, random alcohol/drug testing, participation in a recovery support group and regular contact with their assigned monitor who is a trained attorney volunteer. The comprehensive evaluation helps us determine whether additional protocols are

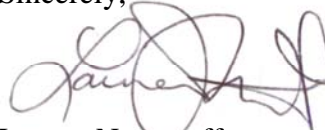
necessary. Respondents with a mental health diagnosis are required to be in treatment with a psychiatrist, psychologist, licensed clinical social worker or mental health professional approved by LAP. The monitor submits monthly reports to the LAP Director who forwards status reports to the Disciplinary Committee. In general, the monitoring period is at least one to two years.

During the past sixteen years, the New York City Bar LAP has successfully monitored many attorneys including some who were resistance at first but upon completing the program commented that it was the best thing that ever happened to them. Several have become volunteers for LAP, expressing a desire to “give back” to the profession. We are grateful for the opportunity to work as a team with the Appellate Divisions to help attorneys regain their health and fitness to practice.

We are aware that the existing Diversion Rules are underutilized. We urge the Commission to consider the Proposed Uniform Diversion Rule to be adopted and utilized by the four Appellate Divisions. Providing attorneys with the opportunity to rehabilitate is not only paramount for the lawyer, but also benefits the profession and the public. Adopting a Unified Diversion Rule would send a vital message that the profession is ready to address and remedy the problems that most frequently result in client complaints, lawyer misconduct and disciplinary proceedings.

If you have any questions, or would like any additional information, please feel free to contact Eileen Travis, Director of the New York City Bar LAP at 212-382-6613 or etravis@nycbar.org. Again, we thank you for the opportunity to submit our comments related to the Commission’s efforts to unify the state’s disciplinary system.

Sincerely,



Lauren Numeroff



Eileen Travis

Enclosures

EXHIBIT A

Proposed Uniform Diversion Rule

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 impaired by alcohol and/or other substance use and addictive disorders and/or mental illness, 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 the New York State Bar Association or the New York City Bar Association or a lawyers' assistance program/committee that monitors lawyers under supervision by the State or New York City Bar LAP, uses a monitoring agreement that is applicable to the presenting impairment and is approved by the court.

In determining whether to divert an attorney to a monitoring program, the court shall consider:

- (i) whether the alleged misconduct occurred during a time period when the attorney was impaired by alcohol and/or other substance use and addictive disorders and/or mental illness;
- (ii) whether the alleged misconduct is related to such impairment by alcohol and/or other substance use and addictive disorders and/or mental illness;
- (iii) the seriousness of the alleged misconduct; and
- (iv) whether diversion is in the best interests of the public, the legal profession and the attorney.

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.

In the event the attorney fails to enter into and/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.

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.

EXHIBIT B

"Model" Diversion Rule Recommended by LAT	Fourth Department (effective January 9, 2003)	Third Department (effective September 20, 2004)	Second Department (effective July 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>(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>(b) the alleged misconduct is sufficiently related to an alcohol or substance dependency problem on the part of the Respondent; and</p> <p>(c) the diversion is in the best interests of the public, the legal profession and the Respondent.</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>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>(i) the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency;</p> <p>(ii) the alleged misconduct is not such that disbarment from the practice of law would be an appropriate sanction; and</p> <p>(iii) diverting the attorney to a monitoring program is in the public interest.</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>(1) whether the alleged misconduct occurred during a time period when the attorney suffered from 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>(iii) the seriousness of the alleged misconduct; and</p> <p>(iv) whether diversion is in the best interests of the public, the legal profession, and the attorney.</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>(i) whether the alleged misconduct occurred during a time period when the attorney suffered from 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>(iii) the seriousness of the alleged misconduct; and</p> <p>(iv) whether diversion is in the best interests of the public, the legal profession and the attorney.</p>
<p>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.</p>	<p>Upon submission of written proof of successful completion of the monitoring program, the Appellate Division may dismiss the disciplinary charges.</p>	<p>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.</p>	<p>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.</p>
<p>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:</p> <p>(a) the Respondent fails to satisfactorily complete the terms and conditions of the monitoring program; or</p> <p>(b) the Appellate Division concludes that the Respondent has committed additional misconduct which warrants disciplinary action.</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>
<p>The Respondent shall be responsible for any costs associated with his or her diversion to the monitoring program.</p>	<p>Any costs associated with the attorney's participation in a monitoring program pursuant to this section shall be the responsibility of the attorney.</p>	<p>Any costs associated with the attorney's participation in a monitoring program pursuant to this subdivision shall be the responsibility of the attorney.</p>	<p>Any costs associated with the attorney's participation in a monitoring program pursuant to this subdivision shall be paid by the attorney.</p>
<p>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.</p>			

EXHIBIT C

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

Adopted November 3, 2006

LAWYER ASSISTANCE PROGRAM: MONITORING GUIDELINES

Section

1. Establishing a Lawyer Assistance Monitoring Program
2. Definitions
3. Purposes and Implementation
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§1. Establishing a Lawyer Assistance Monitoring Program

The New York State Lawyer Assistance Programs ("LAPs") including those sponsored by the New York State Bar Association, the New York City Bar Association, and the Nassau County Bar Association, and in cooperation with other local bar associations and local and statewide committees on lawyer assistance, hereby establish an Attorney Sobriety and Recovery Monitoring Program (hereafter, the "Monitoring Program").

§2. Definitions

- A. "Referring Authorities." As used in these guidelines, the phrase "Referring Authorities" shall mean the Judges of the Four Appellate Divisions; any members or staff of the Attorney Grievance or Discipline Committees; any members or staff of the Character and Fitness Committees; any members or staff of the Commission on Judicial Conduct; law school administrators or other states' lawyer assistance programs or committees, any of whom may refer Monitored Attorneys to the LAPs by court order or by letter.
- B. "Monitored Attorney." As used in these guidelines, the phrase "Monitored Attorney" shall include attorneys, judges, law school graduates, bar admission candidates, and law students, who are referred by any of the Referring Authorities; are in a process of recovery from alcoholism and/or substance abuse or other impairment; and who agree to abide by the conditions of the Monitoring Agreement.
- C. "Supervisor." As used in these guidelines, the term "Supervisor" shall mean the individual who oversees the Monitor. This responsibility will be undertaken by certain participants, as available. In each case, responsibility will be exercised in the following order of priority: by a local bar association's LAP Director (currently available in New York City and Nassau County, and as may subsequently become available); absent a local LAP Director, then by the Chair of the participating local bar association's lawyer helping lawyer committee, or his or her designee,

(committees are currently active in several counties throughout New York); and, absent either of these parties, by the New York State Bar Association's LAP Director.

- D. "Structured recovery support group." As used in these guidelines, the phrase "structured recovery support group shall include twelve-step programs as well as alternative recovery support groups that have been approved by the Supervisor.

§3. Purposes and Implementation

- A. The purposes of the Lawyer Assistance Monitoring Program are:

- 1) to protect the interests of clients from harm caused by impaired attorneys;
- 2) to protect the integrity of the legal profession from harm caused by impaired attorneys; and
- 3) to provide an alternative disciplinary sanction where the interest of the public and the profession can be adequately protected.

- B. To accomplish these purposes, the Lawyer Assistance Programs and local lawyer helping lawyer committees, where appropriate, will:

- 1) recruit and train volunteer Monitors to oversee and provide reports regarding a Monitored Attorney's compliance with the requirements of the Monitoring Agreement;
- 2) require participation by a Monitored Attorney at structured recovery support groups and, if required, in a professionally facilitated treatment program;
- 3) oversee the Monitors in the fulfillment of their duties; and
- 4) provide documentation of the Monitored Attorney's recovery to the Referring Authorities, as appropriate.

§4. Conditions for Participation as a Monitored Attorney

- A. A Monitored Attorney shall:

- 1) Execute a Consent for Release of Information; execute and comply with the terms and conditions of the required Monitoring Agreement for the duration of the term of the Agreement, as determined by the Referring Authority in consultation with the LAPs on a case-by-case basis;
- 2) Submit to oversight by a Monitor approved by a Supervisor;
- 3) Remain abstinent from all alcohol and other mood/mind-altering substances, except with respect to medications prescribed by a licensed health care provider and when taken in accordance with such prescription and approval by the Monitor;
- 4) Give notice to the Monitor before taking such prescribed medication, including the contact information for the prescribing health care provider;
- 5) Give notice to the Monitor before taking an over-the-counter medication that contains alcohol or mind or mood-altering characteristics.
- 6) Immediately report to the Monitor any failure to maintain abstinence;
- 7) Promptly advise personal health care providers of the terms of the Monitoring Agreement and waive confidentiality with any such health care provider in favor of the Monitor, Supervisor and Referring Authorities;
- 8) Execute a Consent for Release of Information to the Monitor, Supervisor or Referring Authorities and cooperate in providing all information relevant to the Monitoring Agreement and compliance or non-compliance with its terms and conditions;
- 9) Arrange, upon the Monitor and/or Supervisor's request, for communications between the Monitor and/or Supervisor and such health care provider;
- 10) Take necessary action to provide individually identifiable health information and medical records to the Monitor and Supervisor, upon request;
- 11) Contact the Monitor weekly, or more frequently if so required by the Monitor, throughout the duration of the Monitoring Agreement;

- 12) Attend meetings of an approved, structured recovery support group and, if required, a professionally facilitated treatment program;
- 13) Submit to random alcohol and drug screenings upon the request of the Monitor as described in Section 11, below; and
- 14) Agree that neither the Monitor nor the Supervisor nor and the Lawyer Assistance Program nor the lawyer assistance committees or its authorized agents are liable for any act or omission with regard to the oversight of the Monitored Attorney.

§5. Monitors' Responsibilities:

- 1) To monitor the Monitored Attorney's compliance with the Monitoring Agreement; and
- 2) To provide reports concerning that compliance; and
- 3) A Monitor shall provide the following reports to the Supervisor and the Monitored Attorney:
 - a) Periodic Reports, including a copy of the results of any alcohol and drug screenings required since the filing of the prior report;
 - b) Non-compliance Reports - immediately upon discovering any evidence of the Monitored Attorney's non-compliance with the Monitoring Agreement; and
 - c) A Final Report - Within two weeks following completion of the term of the Monitoring Agreement, summarizing the Monitored Attorney's record of compliance with the Monitoring Agreement; the Monitor also will send a copy of this final report to the Referring Authority.

§6. Eligibility Standards to be a Monitor

A. Monitors must

- 1) be either a lawyer in good standing who has been admitted to practice in New York with no disciplinary complaints filed against him/her for at least the last two years, or be a certified alcohol and substance abuse counselor, health care professional or lawyer assistance program director with an understanding of addiction and recovery; and
- 2) complete a bar association-sponsored Monitor training course, exhibit an understanding of the duties and responsibilities of a Monitor, and, by signing the Monitoring Agreement, indicate a willingness to fulfill those duties.

- B. If in recovery from an addiction, other compulsive disorder or an emotional or mental illness, a Monitor must have at least three years of continuous recovery from such condition.

§7. Standards for Monitor Conduct

A. A Monitor must

- 1) Meet regularly, in person, with the Monitored Attorney. For Monitored Attorneys newly in recovery, the meetings should generally occur once per week; for Monitored Attorneys in recovery for longer periods of time, the meetings should generally occur once per month;
- 2) File all required reports on a timely basis with the Supervisor and the Monitored Attorney;
- 3) Report to the Supervisor all incidents of non-compliance with the Monitoring Agreement by the Monitored Attorney;
- 4) Maintain confidentiality, except as provided herein; and
- 5) Report to the Supervisor if any disciplinary complaint is filed against him/her during the course of the term of the Monitoring Agreement.

B. A Monitor should

- 1) Be clear with the Monitored Attorney about the Monitor's expectations;
- 2) Be consistent with expectations, consequences and reporting;

- 3) Inform the Monitored Attorney when the Monitor will attend the same structured recovery support group meeting; and
- 4) Require the Monitored Attorney to submit to random drug and alcohol screens as provided in the Monitoring Agreement.

C. A Monitor can

- 1) Approve, when appropriate, a telephone contact in lieu of an in-person contact;
- 2) Grant, on an occasional basis and with the consent of the Supervisor, an exception to the recovery meeting attendance requirement;
- 3) Require on a predetermined periodic basis, written verification of all medication prescribed to the Monitored Attorney; and
- 4) Approve requests by the Monitored Attorney to take prescription medicine and/or over the counter products containing mood-altering substances.

D. A Monitor must not

- 1) Act as a recovery program sponsor for the Monitored Attorney;
- 2) Serve as a treatment provider or any other service provider for the Monitored Attorney;
- 3) Be responsible for the Monitored Attorney's recovery, or his/her compliance with the terms of the Monitoring Agreement;
- 4) Represent the Monitored Attorney in any capacity; or
- 5) Profit or appear to profit from the monitoring relationship in any way.

§8. Monitor Training

- A. Bar associations may sponsor periodic training programs for Monitors. If a sponsoring association does not have an in-house lawyer assistance program, then it should enlist the cosponsorship of an association that does.
- B. Monitor training should address the following topics:
 - 1) orientation to the Monitoring Program and the roles of the Monitor and Supervisor;
 - 2) the purpose and benefits of the Monitoring Program;
 - 3) the terms and conditions of the Monitoring Agreement;
 - 4) the responsibilities of the Monitored Attorney;
 - 5) an overview of the Referring Authority's role and responsibilities;
 - 6) medical and scientific information regarding the various addictions, compulsive disorders and mental and emotional impairments, the dynamics of enabling, the recovery process and the dynamics of relapse; and
 - 7) the mechanics of monitoring, including reporting requirements, drug screening procedures and the use of Monitoring Program forms.

§9. Termination of Status as a Monitor

- A. A Monitor shall resign if for any reason the Monitor is unable or unwilling to fulfill the responsibilities of a Monitor.
- B. A Monitor in recovery who uses alcohol or other mood altering substances, except as prescribed by a licensed health care provider, must resign.
- C. A Supervisor may remove a Monitor for failure to perform the prescribed duties or when it is in the Monitored Attorney's best interests.

§10. A Supervisor's Role; Reports

- A. A Supervisor must approve an individual to serve as a Monitor, and, where possible, will pair a Monitor with a Monitored Attorney with the same impairment.

- B. The Supervisor determines the frequency of required alcohol and drug screening tests and selects testing centers in accordance with criteria set forth below.
- C. The Supervisor shall review the periodic reports from the Monitor regarding the Monitored Attorney's compliance, and shall review the final report submitted upon completion of the term of the Monitoring Agreement. Unless otherwise required, the Supervisor shall compile such reports and file them periodically with the Referring Authority.
- D. In the event the Supervisor determines that the Monitored Attorney has failed to comply with the terms of the Monitoring Agreement the Supervisor will immediately notify the Monitor and, together they shall determine the appropriate response to the failure to comply.

§11. Random Alcohol and Drug Testing

- A. Random alcohol and substance screening is an integral part of the Monitoring Program.
- B. By terms of the Monitoring Agreement, a Monitored Attorney who is recovering from alcoholism and/or drug addiction will be required to submit to random alcohol and drug screenings and to bear the costs for those screenings;
- C. A Monitored Attorney who fails to be present at a specified testing site for a random screening within six (6) hours of any request and to fulfill the specimen requirements within three (3) hours after arrival at the screening site shall be considered in violation of the Monitoring Agreement.
- D. A Monitored Attorney must agree to notify the Monitor before traveling away from his/her business or residence on any trip involving one or more overnights away. The Monitor may, in his or her discretion, require that the Monitored Attorney submit to a screening at a testing center specified by the Monitor located in or near the out-of-town destination, and, upon return, may require the Monitored Attorney to appear for a screening at a specified testing center.
- E. The Monitored Attorney must execute a Consent for Release of Information with regard to the Monitoring Agreement, must sign a consent for release of HIPAA-related information and must cooperate in providing all information relevant to the Monitoring Agreement and his/her compliance with its terms and conditions to the Monitor, the Supervisor and the Referring Authority.
- F. Neither a Monitor nor the Supervisor nor the Lawyer Assistance Program, lawyer assistance committee or its authorized agents are responsible for any act or omission by the Monitored Attorney with regard to the Monitoring Agreement.

§12. Alcohol and Drug Testing Laboratory Selection Criteria

- A. The Supervisor shall select testing laboratories that are licensed by the New York State Department of Health or its equivalent State or federal agency, in case of a screen to be performed outside of New York State.
- B. Such testing laboratories must follow established chain of custody protocol and must obtain the appropriate Consent for Release of Information from the Monitored Attorney, giving permission to forward alcohol and drug screening results to the Monitor and/or Supervisor.

§13. Monitoring Agreement

The Lawyer Assistance Programs and lawyer assistance committees may accept an individual for participation in the Monitoring Program provided that the individual agrees to comply with all of the terms of the Monitoring Agreement, a copy of which is attached as an appendix to these guidelines.

§14. Confidentiality; Immunity

- A. All records maintained by the Lawyer Assistance Program's Monitoring Program are protected under 42 CFR Part 2. Information pertaining to the identification of any individual in the program, or any information pertaining to that individual, shall not be disclosed *unless*:
- 1) The individual consents in writing, and/or
 - 2) The disclosure is mandated by a court order.
- B. New York State Judiciary Law §499 states: Lawyer assistance committees
1. *Confidential information is privileged.* The confidential relations and communications between a member or an authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents, shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges shall be waived only by the person, firm or corporation that has furnished information to the committee.
 2. *Immunity from liability.* Any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of, any of the committees referred to in subdivision (1) of this section, shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of any proceeding, the good faith of any such person, firm or corporation shall be presumed.

APPENDIX

Monitoring Agreement

Monitor's Progress Report

Monitor's Report of Non-Compliance

Monitored Attorney's Consent for Release of Information

Attendance Log

Monitoring Agreement

WHEREAS, the Monitored Attorney has requested that monitoring services be provided as set forth herein,

NOW, THEREFORE, the Monitored Attorney, the Monitor and Supervisor agree as follows:

I. The **Monitored Attorney** agrees:

- (1) To remain abstinent from all alcohol and other mood-altering substances, except when drugs are prescribed by a licensed health care provider who is treating the attorney or supervising such treatment and such medications are approved by the Supervisor.
- (2) To notify the Monitor and Supervisor of his/her intent to take an over-the-counter medication that contains alcohol or mind or mood-altering substances.
- (3) To attend either a structured recovery support group and/or professionally facilitated treatment.
 - (a) If the Monitored Attorney agrees to attend a structured recovery support group:
 - (i) Then he/she shall attend daily, for the first 90 days of sobriety; and, thereafter, for the duration of the monitoring term, at least four meetings per week. The Monitored Attorney must have the attendance log sheet signed at each meeting to be made available to the Monitor.
 - (ii) Attendance at an appropriate structured recovery support group meeting for attorneys, located within a reasonable distance from the Monitored Attorney's residence or office, may suffice as one of the required meetings.
 - (iii) Then he/she shall obtain a sponsor who must agree to report at least monthly to the assigned Monitor regarding the Monitored Attorney's progress in the program. The Monitored Attorney agrees that it is his/her responsibility to insure that his/her sponsor contacts the Monitor as required.
 - (iv) Then he/she must make a *bona fide* effort to work actively on all of the steps of the appropriate program within the first year of recovery, as directed by the Monitored Attorney's sponsor.
 - (b) If the Monitored Attorney attends professionally facilitated treatment, then he/she shall attend as required by the health care provider and shall be held accountable regarding that attendance by the Monitor.
- (4) To submit to and bear the costs of random alcohol and drug screenings when requested by the Monitor and/or the Supervisor. The Monitored Attorney agrees to be present at a specified drug testing site for a random screening within six hours of any request and to fulfill the specimen requirements as soon as possible after arrival at the site.
- (5)
 - (a) To execute the attached Consent to Release of Information form and other similar forms intended to allow the flow of medical and other information between the personal health care providers providing services to the Monitored Attorney and the Monitor and Supervisor;
 - (b) To promptly advise personal health care providers and other relevant service providers of the terms of the Monitoring Agreement;

- (c) To take all other necessary action to facilitate the communications between the persons providing medical and other related services to the Monitored Attorney and the Monitor and Supervisor.
- (6) To contact his/her Monitor on a weekly basis, and to meet periodically with the Monitor, on a schedule to be determined by the Monitor and the Supervisor.
- (7) To notify the Monitor before traveling away from his/her business or residence on any trip involving one or more overnight stays away;
- (8) To immediately report arrests of any nature to his/her Monitor;
- (9) To comply with the terms of the Monitoring Agreement. Failure to comply with the terms of this agreement may be grounds for discharge from the Monitoring Program.
- (10) That the Referring Authority, by court order or request, may impose additional terms to the Monitoring Agreement and that the Monitored Attorney must comply with all terms.
- (11) That the Monitor may visit the Monitored Attorney at his/her business or residence from time to time.
- (12) That neither the Monitor nor the Supervisor nor the Lawyer Assistance Programs, nor the lawyer assistance committees or its authorized agents are responsible for any act or omission by the Monitored Attorney with regard to the Monitoring Agreement.

II. The duties and responsibilities of the **Monitor** are:

- (1) To periodically file progress reports with the Supervisor, and, upon termination of the Monitoring Agreement, a final report.
- (2) To report to the Supervisor:
 - (a) Any arrest of the Monitored Attorney;
 - (b) The results of the Monitored Attorney's alcohol and drug tests; and
 - (c) Failure by the Monitored Attorney to comply with the terms of the Monitoring Agreement;
- (3) Upon information that the Monitored Attorney has used alcohol or any other drug during the Monitoring Agreement term, the Monitor, in consultation with the Supervisor, may change the terms of the Agreement and require the Monitored Attorney to participate in detoxification, in-patient rehabilitation or an outpatient intensive treatment program or to take other appropriate action.

III. The duties and responsibilities of the **Supervisor** are:

- (1) Upon information that the Monitored Attorney has used alcohol or any other drug during the Monitoring Agreement term, Supervisor, in consultation with the Monitor, may change the terms of the Agreement and require the Monitored Attorney to participate in detoxification, in-patient rehabilitation or an outpatient intensive treatment program or to take other appropriate action.
- (2) To consider request(s) from the Monitored Attorney to modify the requirement regarding how many meetings the Monitored Attorney must attend during the first ninety days or subsequently during the remaining term of the Monitoring period and to determine whether to grant the request(s).
- (3) To periodically report to the Referring Authority regarding the Monitored Attorney.

Monitored Attorney	
Signature	
Address	
Phone Number & Email address	
Monitor	
Signature	
Address	
Phone Number & Email address	
Supervisor	
Signature	
Address	
Phone Number & Email address	

MONITOR'S PROGRESS REPORT

Date: _____
 Period Covered by this Report: _____

Monitored Attorney's Name

Home Address _____
 Business Address _____
 Home Phone _____
 Business Phone _____

Monitoring Program Admission Date _____
 Monitoring Program Anticipated Completion Date _____

Referring Authority Contact: _____
 Business Address _____
 Business Phone _____

Supervisor _____

To the best of my knowledge, the Monitored Attorney has met all of the requirements of the LAP Monitoring Program. I have met with the Monitored Attorney on a regular basis, in accordance with the LAP Monitoring Agreement. The Monitored Attorney has complied with requests for random drug screenings in a timely fashion, and the results from all random drug screenings conducted during this reporting period have been negative. The Monitored Attorney has provided evidence of attending structured recovery support group meetings (or professionally facilitated treatment) during this reporting period.

Comments: _____

Next Progress Report Due: _____

Submitted by:

Monitor's Name

Home Address _____
 Business Address _____
 Home Phone _____
 Business Phone _____
 Email Address _____

MONITOR'S REPORT of NON-COMPLIANCE

Date: _____
Period Covered by this Report: _____

Monitored Attorney's Name _____
Home Address _____
Business Address _____
Home Phone _____
Business Phone _____

Monitoring Program Admission Date _____
Monitoring Program Anticipated Completion Date _____

Referring Authority Contact: _____
Business Address _____
Business Phone _____

Supervisor _____

To the best of my knowledge, the Monitored Attorney has failed to meet all of the requirements of the LAP Monitoring Program. More specifically, (check all that apply)

- The Monitored Attorney has not complied with requests for random drug screenings in a timely fashion;
- The Monitored Attorney has failed to provide evidence of attending structured recovery support group meetings (or professionally facilitated treatment) during this reporting period; and/or
- The results from a random drug screening of the Monitored Attorney, conducted during this reporting period, were positive.

Comments: _____

Next Progress Report Due: _____

Submitted by:

Monitor's Name _____
Home Address _____
Business Address _____
Home Phone _____
Business Phone _____
Email Address _____

MONITORED ATTORNEY'S CONSENT FOR RELEASE OF INFORMATION

Name: _____
 (Last) (First) (M.I.)

DISCLOSURE WITH PATIENT'S CONSENT

Extent or nature of information to be disclosed: All information pertaining to health care treatment including treatment by certified alcohol and substance abuse counselors, certified social workers, psychologists and/or psychotherapists or other health care providers

Purpose or need for disclosure: Medical information relevant to continue participation in monitoring program under the direction of _____, the Monitor, and sponsored and supervised by _____.

[The local LAP Director, the Chair of the local bar association's lawyer helping lawyer committee or the NYSBA LAP Director (The "Supervisor")]

Name or title of the person or organization to which the disclosure is to be made:

_____, the Monitor and/or _____, the Supervisor.

HIPAA Release Authority. I intend for my Monitor and/or Supervisor to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164. I authorize any physician, health care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health care provider, any insurance company and the Medical Information Bureau Inc. or other health care clearinghouse [hereafter, "health care providers"] that has provided treatment or services to me or that has paid for or is seeking payment from me for such services, to give, disclose and release to my Monitor and my Supervisor, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, to include all information relating to psychiatric and/or psychological treatment including treatment by certified alcohol and substance abuse counselors, certified social workers, psychologists and/or psychotherapist; all pertinent medical history including treatment by personal physicians and/or other physicians.

The authority given my Monitor and/or Supervisor to receive individually identifiable health information shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my Monitor and/or Supervisor has no expiration date and shall expire only in the event that I deliver to my health care providers a written notice, signed by the Monitor, the Supervisor and me, revoking the disclosure authority.

I, the undersigned, have read the above and authorize my health care providers to disclose such information as herein described. I also understand that any disclosure by the health care providers is bound by Title 42 of the Code of Federal Regulations governing the confidentiality of alcohol and drug abuse patient records and that re-disclosure of this information to a party other than the Monitor, Supervisor and/or Referring Authority is forbidden without additional written authorization on my part.

 (Signature)

 (Print Name)

 (Witness)

 (Date)

ATTENDANCE LOG

Monitoring Program				
STRUCTURED RECOVERY SUPPORT GROUP MEETING ATTENDANCE LOG				
Date	Time	Meeting Type*	Location	Signature of Verifying Member
* Types of meeting (indicate both general & specific type):				
<u>General:</u> AA - Alcoholics Anonymous CA - Cocaine Anonymous NA - Narcotics Anonymous LG - Lawyers' Recovery Group (LCL)		<u>Specific:</u> D - Discussion Meeting SP - Speaker Meeting S/B - Step or Big Book Study Meeting B - Beginners Meeting		