



**THE STATE BAR  
OF CALIFORNIA**

**INTER-OFFICE  
COMMUNICATION**

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DATE: March 2, 2004  
TO: The Honorable Ronald W. Stovitz, Presiding Judge of the State Bar Court  
FROM: Mike A. Nisperos, Chief Trial Counsel  
SUBJECT: Evaluation of State Bar Court Pilot Program

As part of its self-evaluation process, the State Bar Court has requested feedback from respondents, their counsel, and the Office of the Chief Trial Counsel about the strengths and weaknesses of the pilot program for respondents with drug, alcohol or mental health issues (Pilot Program). I have encouraged individual deputies trial counsel to respond with their own comments to the extent they wished to provide them. In addition, I hereby provide OCTC's institutional response.

**Strengths of the Program**

Although there are many strengths of the State Bar Court program, the following two are noteworthy:

**Greater Public Protection**

This has been shown in two areas. First, respondents are showing objective signs of improvement in their lives and law practices as a result of their participation in the program, even after only one year of monitoring, testing and treatment. Second, the Court's program closely monitors respondents, and immediate corrective action can be taken when respondents are not in compliance with the requirements of the Court or the Lawyer Assistance Program (LAP). This is a major improvement from traditional discipline proceedings, where violations of probation have customarily not been addressed until after several violations have occurred.

**Compliance with Statutory Mandate**

Even in its pilot program phase, the Court's program has successfully responded to the legislature's mandate in the Attorney Diversion and Assistance Act of 2001 (Bus. and Prof. Code section 6230, *et seq.*). This has been accomplished through the Court's commitment of resources, as well as the assigned hearing department judges' personal commitment to the success of the program. OCTC sends its appreciation to the Court for these efforts.

### Weaknesses, Suggested Changes

OCTC has identified the following areas in which change could be considered:

#### Proportionality

Respondents who are eligible for the Pilot Program have committed a wide range of types and severity of misconduct. Currently however, the Court requires the same 5-year monitoring period of everyone no matter how comparatively serious or minor their misconduct.

This 5-year court-imposed *disciplinary* monitoring period mirrors the 5-year LAP-imposed *treatment* monitoring period. We believe the disciplinary monitoring period does not have to be identical to the treatment monitoring period, and that the Court should explore setting Pilot Program monitoring periods in proportion to the misconduct of participants. In addition to allowing appropriate flexibility in disciplinary response, this change would alleviate the current problem that the 5-year monitoring period discourages all but the most serious offenders from participating in the Pilot Program. Ideally, we believe the goal is to reach members before they have committed significant misconduct.

The difficulty with this suggestion is, of course, how the Court could measure compliance with LAP for purposes of imposing discipline if the 5-year participation in LAP is not completed. OCTC and LAP have discussed this issue and offer a potential solution to the problem based on the example of LAP's work with the Committee of Bar Examiners (CBX).

LAP works with CBX to evaluate applicants for admission to the State Bar. LAP performs this function by monitoring applicants for 6 months and then answering the following questions:

- (1) whether the applicant appeared to have gained insight into the impairment;
- (2) whether respondent was compliant with LAP; and
- (3) whether the applicant appeared to be in remission.

Based on the responses to these questions, CBX determines whether to certify the applicant for admission.

We suggest the Court specify the term of Pilot Program monitoring of each respondent based on the severity of the misconduct. At the end of the court imposed monitoring time, the Court would ask LAP to answer the above 3 questions and would then determine the final discipline to impose.

#### Diversity of Treatment

The Court also may wish to consider whether to seek a greater diversity of treatment options for referral of Pilot Program participants.

#### Transmittal of Criminal Convictions

At present, Bus. and Prof. Code sections 6101 and 6102 require the State Bar (through OCTC) to transmit all criminal convictions to the Court for the initiation of public proceedings. This requirement

has discouraged some respondents from participating in the Pilot Program. For low level misdemeanor convictions that involve drugs or mental health problems, respondents traditionally have received public reprovls or stayed suspension. In contrast, participation in the Pilot Program as currently constituted leaves respondents with a public record of discipline proceedings, even if the case is eventually dismissed upon successful completion of the program. During the past year, only a very few respondents with these low level convictions have enrolled in the program.

OCTC believes these respondents would be ideal candidates for the program. Thus, OCTC will propose to the RAD committee at its next meeting that it approve a recommendation to the Board of Governors to remedy the situation.<sup>1</sup> OCTC believes a straight diversion opportunity would substantially increase the number of respondents who would avail themselves of LAP services.

#### Front-End Suspension

OCTC believes that respondents should serve any period of actual suspension imposed by the Court at the low end of disciplinary range at the beginning of the program, rather than at the end. I understand that the Court agrees, and is working on that issue. OCTC will support any recommendation the Court makes to RAD or the Supreme Court in that regard.

#### Combine Outline and Rules

In its initial statement of the program, the Court divided its information into two separate sections: "Outline of the Program" and "Proposed Rules of Procedure". The Rules of Procedure, and two modifications were then sent out for public comment and adopted. However, information in the Outline remained informal background information. During the first year, it has been unclear what binding effect the information contained in the Outline has on the proceedings, if any, although that information has been critical to the operation of the program. For example, information contained in the Outline on treatment and the disciplinary process, eligibility for the program, the scope of participation in the program, and disciplinary offenses excluded from the program has not been included in the Rules of Procedure. As the first year has been completed and the Outline overview has been adjusted according to experience, OCTC suggests that the Court combine these two areas into the Rules of Procedure.

#### Exclusion of Non-Summary Disbarment Conduct from the Program

At present, the Outline provides that only misconduct subject to summary disbarment will "automatically" be excluded from the program. OCTC requests that the Court adopt standards to evaluate other misconduct to determine whether it also should be excluded from the program. For example, some misconduct would be subject to summary disbarment if it were prosecuted criminally,

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<sup>1</sup>The proposal to RAD will be that OCTC be allowed to exercise its prosecutorial discretion to divert misdemeanor convictions (if the facts and circumstances involve alcohol, drugs or mental health problems) directly to LAP for a 1-2 year period of monitoring, rather than transmitting all convictions to the Review Department as currently required. If, at the end of the monitoring period, LAP answers in the affirmative to the 3 questions listed above regarding the procedure used by CBX, OCTC would dismiss the case without bringing public charges. Otherwise, the conviction would be transmitted to the Court for prosecution.

but for some reason it is not. OCTC contends that to avoid unequal treatment of people engaging in the same acts, this misconduct should be also excluded from the Pilot Program and adjudicated in traditional discipline proceedings. Without direction from the Court that provides standards under which misconduct such as this would be evaluated for program purposes, there is a void in this area that has caused considerable acrimony between the parties. Respondents and their counsel have argued that only summary disbarment convictions are excluded; OCTC has argued that other misconduct can also be excluded. The Court's promulgation of a rule and accompanying standards would help resolve these positions.

Confidentiality:

The Court may wish to consider combining the separate confidentiality provisions in the Outline and the Rules of Procedure. In addition, OCTC would appreciate the Court's clarification of information it may share with complainants in the cases that are referred to the program. At present, OCTC informs these complainants: (1) that their cases are part of the program; (2) that respondents have or have not been accepted into the program; (3) that respondents have been terminated from the program (if applicable); and (4) that respondents have agreed to pay restitution, and if so in what amount (if applicable). OCTC believes this is the minimum amount of information necessary to satisfy the statutory requirements of Bus. and Prof. Code section 6093.5, which mandates that complainants be advised of the status of their complaints. In addition, providing the restitution information to the complainants is necessary to facilitate their claims to the Client Security Fund, or alternatively, to explain to them why they begin to receive payment from the Respondent. OCTC would appreciate the Court confirming this interpretation is correct.

On behalf of OCTC and my staff, I extend my appreciation for the Court's hard work over the past year, and its willingness to fine tune the program to improve its efficacy. We look forward to working with the Court however necessary to achieve this goal.

cc: James O. Heiting, Esq.  
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