

MEMBER/PUBLIC COMMENT
The State Bar of California
180 Howard Street, San Francisco, CA 94105-1639
<http://www.calbar.ca.gov>

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SUBJECT: Evaluation of the State Bar Court Pilot Program for Respondents with Substance Abuse or Mental Health Issues – Recommendations For Modification of Program

Proposed amendments to the following:

- § 6007, Involuntary Enrollment as an Inactive Member, of the Business and Professions Code
- Rules 800 through 807 of the Rules of Procedure of the State Bar of California

DISCUSSION:

- **Background:** Effective January 1, 2002, Business and Professions Code sections 6230 through 6238 were added to the State Bar Act. Section 6231 directs the Board of Governors to establish and administer an Attorney Diversion and Assistance Program (“Lawyer Assistance Program” or “LAP”). Section 6232 provides for the referral to LAP of attorneys who are the subject of pending disciplinary investigations or proceedings. Section 6233 allows an attorney who has successfully completed the LAP and complied with all practice restrictions to receive either a dismissal of the underlying allegations or a reduction in the recommended discipline.

In order to effectively implement this statutory scheme with respect to attorneys against whom disciplinary investigations or proceedings are pending, the Board of Governors adopted, effective September 1, 2002, rules 800 through 807 of the Rules of Procedure of the State Bar of California. In accordance with these rules, the State Bar Court’s Pilot Program for Respondents with Substance Abuse or Mental Health Issues (“Pilot Program”) began operation on October 1, 2002.

Rule 807 of the Rules of Procedure provides that rules 800 through 806 shall remain in effect only until October 1, 2004, and as of that date will be repealed unless those rules are re-adopted or amended prior to that date. To assist in determining whether the Pilot Program should continue, the State Bar Court undertook an evaluation of the Program and agreed to report the results of that evaluation to the Board of Governors, along with recommendations, as appropriate, for modifications to the Program.

BRIEF SUMMARY OF CURRENT PILOT PROGRAM

With only two exceptions, all attorneys against whom disciplinary investigations or proceedings are pending (known as “respondents”) are eligible to participate in the State Bar Court’s Pilot Program. The first exclusion from the Pilot Program are those attorneys who have been convicted of criminal offenses that subject them to summary disbarment.¹ These convicted attorneys are not eligible to participate in the Pilot Program because disbarment is required for those offenses, without a hearing and irrespective of the existence of mitigating circumstances.

Secondly, every attorney who wishes to participate in the State Bar Court’s Pilot Program must first be accepted into and agree to participate in the Lawyer Assistance Program (“LAP”). An attorney who is not accepted into the LAP cannot participate in the Pilot Program. Only those attorneys who successfully complete the LAP are entitled to a dismissal of the charges or a reduction in discipline. (Bus. & Prof. Code, § 6233.)

There are three stages of involvement in the State Bar Court’s Pilot Program: (1) the referral stage; (2) the evaluation stage; and (3) the full program participation stage.

A respondent may be identified as a potential participant in the Pilot Program at any time, including during the Office of the Chief Trial Counsel’s disciplinary investigation, at the time of the Early Neutral Evaluation conference or after formal disciplinary charges have been filed in the State Bar Court. (See rule 801, Rules Proc. of State Bar.) The “referral stage” commences when the attorney is first identified as a potential participant in the Pilot Program. Either the Office of the Chief Trial Counsel or the respondent may ask the assigned State Bar Court judge for a referral to the Pilot Program or the assigned judge may make the referral on his or her own motion. A status conference is then scheduled before the Pilot Program Judge, who explains the Pilot Program to the respondent and inquires whether he or she is willing to be referred to the LAP for purposes of evaluation.

If he or she is interested in pursuing possible participation in LAP and the Pilot Program, the Pilot Program Judge refers the respondent to the LAP for an evaluation of the substance abuse or mental health issue. This is the “evaluation stage” of the proceeding. LAP’s evaluation of the respondent typically takes about 90 days to complete. As part of its evaluation, LAP also develops a treatment plan. If the attorney desires to participate in the LAP, he or she must sign a long-term participation agreement with LAP following the completion of the evaluation and development of the treatment plan. During this stage, the respondent and the Office of the Chief Trial Counsel work on reaching agreement on a stipulation as to facts and conclusions of law. The respondent must also establish that there is a nexus

¹ An attorney may be summarily disbarred following a final conviction of an offense which is a felony under the laws of California, the United States or any state or territory of the United States and “an element of the offense is the specific intent to deceive, defraud, steal or make or suborn a false statement or involved moral turpitude.” (Bus. & Prof. Code, § 6102, subd. (c).)

between the underlying allegations of misconduct and his or her substance abuse or mental health issue. (*Harford v. State Bar* (1990) 52 Cal.3d 93, 101; *Hippard v. State Bar* (1990) 50 Cal.3d 358, 367; *Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Lamb* (1990) 49 Cal.3d 239, 246.)

Once the LAP evaluation has been concluded, the parties have reached agreement on a stipulation as to facts and conclusions of law and the respondent has established the nexus between his or her misconduct and the substance abuse or mental health issue, the Pilot Program Judge issues a Decision Re: Alternate Recommendations for Degree of Discipline. (Rule 803(a), Rules Proc. of State Bar.) In this Decision, the Pilot Program Judge sets forth the disposition or discipline that will be imposed or recommended if the attorney successfully completes the Pilot Program and, alternatively, the discipline that will be imposed or recommended if the attorney agrees to participate in the Pilot Program but subsequently fails to successfully complete the Pilot Program.

After the Pilot Program Judge's Decision has been issued, the respondent decides whether or not to participate in the Pilot Program. If the attorney decides not to participate in the Program, the stipulation as to facts and conclusions of law and the Decision Re: Alternate Recommendations for Degree of Discipline are vacated and the disciplinary proceeding is returned to the originally-assigned judge for normal case processing.

On the other hand, if the respondent decides to participate in the Pilot Program, he or she must sign a Pilot Program Contract, in which the attorney agrees to comply with the participation conditions established by the Pilot Program Judge.² Once the respondent signs the Pilot Program Contract, the "full program participation stage" of the process commences. During this stage," the Pilot Program Judge holds periodic status conferences to ascertain whether the respondent is complying with the terms of the Pilot Program Contract and his or her long-term participation agreement with LAP. In order to successfully complete the Pilot Program, the respondent must be in the Pilot Program for a period of three years, although that period may be shortened to a minimum period of 18 months through earned incentive credits based upon the quality and extent of the respondent's compliance with LAP and Pilot Program conditions. In order to successfully complete the Pilot Program, the respondent must be substance free for a period of at least one year or, for attorneys with mental health issues, the Pilot Program Judge must approve the completion of the program based upon a recommendation from a mental health professional.

During the "full program participation stage" of the proceeding, the stipulation as to facts and conclusions of law and the Pilot Program Judge's Decision are merely lodged with the State Bar Court. Neither of these documents are filed until the respondent either successfully completes the Pilot Program or is terminated from the Program. However, upon the occurrence of either of these events, the stipulation and

² The Pilot Program Contract may, among other things, require the attorney to make restitution to his or her clients or the Client Security Fund or to perform other acts.

Decision are filed and the appropriate disposition or discipline is either imposed or transmitted as a recommendation to the Supreme Court.

While the fact that a disciplinary proceeding is pending against an attorney in the Pilot Program is public and the various filed pleadings and orders in the case are available to the public (Bus. & Prof. Code, § 6086.1), all medical and treatment information regarding the attorney is confidential (Bus. & Prof. Code, § 6234; rule 805). Additionally, documents that are merely “lodged” with the Court are not subject to public review.

As of April 30, 2004, there are 78 attorneys who have either been accepted into the Pilot Program or are seeking to participate in the Pilot Program. These attorneys account for 142 separate disciplinary cases.

RESULTS OF THE PILOT PROGRAM EVALUATION

A. The Evaluation Process

The State Bar Court conducted its formal evaluation of the Pilot Program between January and April 2004. The goal of the evaluation was to determine (a) whether the Pilot Program should continue; and (b) if so, what changes if any, should be made in the Program to improve its operation and efficiency.

The evaluation process had three separate components: (1) a written survey sent to Deputy Trial Counsel, Respondents’ Bar members and attorneys involved in one of the stages of participation in the Pilot Program; (2) public forums conducted in Los Angeles and San Francisco; and (3) interviews with LAP staff and the State Bar Court’s own staff.

It is also our intent, with the authorization of the Board Committee on Regulation, Admissions and Discipline Oversight, to publish this Evaluation Report and the Report’s recommendations for a 90-day public comment period.

1. Written Survey

The written survey was developed by the State Bar Court with the assistance of a consultant familiar with court operations. The survey included statements about the Pilot Program and asked the individual responding to the survey to indicate the degree to which he or she agreed or disagreed with the statement.³ The statements covered four general areas of interest relating to the Pilot Program, i.e., (a) communication about the Program; (b) interaction between the Pilot Program and the Lawyer Assistance Program; (c) Program participation; and (d) overall assessment of the Program.

³ There were 7 potential responses to each survey question: (1) “strongly agree”; (2) “agree”; (3) “agree somewhat”; (4) “disagree somewhat”; (5) “disagree”; (6) “strongly disagree”; and (7) “I don’t know.”

A total of 174 written survey questionnaires were mailed. Recipients were given a period of approximately four weeks within which to respond to the survey. A total of 25 responses were received (a 14.37% response rate). Surveys were sent to and received from the following categories of individuals:

<u>Group to Whom Survey Sent</u>	<u># Mailed</u>	<u># Received</u>
Pilot Program participants (at any stage)	92	11
Respondents' counsel	25	6
Office of Chief Trial Counsel attorneys	57	8

To increase accessibility and the potential volume of responses, the survey was also posted on the State Bar Court's section of the State Bar website. However, no additional survey responses were received as a result of posting the survey on the website.

2. Public Forums

The State Bar Court held two public forums to solicit input on the Pilot Program. The first public forum was held in Los Angeles on February 19, 2004, and the second was held in San Francisco on February 20, 2004. Notice of the public forums was sent to all participants in the Pilot Program, their counsel and to all Deputy Trial Counsel in the Office of the Chief Trial Counsel. Additionally, notification of the public forums was also mailed to all local, speciality and minority bar associations and was placed on the State Bar's website. Finally, a press release was issued and placed in the State Bar's "e-brief" document that is sent to interested parties.

Regrettably, each of the public forums was lightly attended. Only two individuals spoke at the public forum in Los Angeles, while three individuals spoke in San Francisco.

3. Interviews

Doug Hull, the State Bar Court's Senior Administrative Specialist, interviewed the staff of the LAP and members of the State Bar Court's own staff. In particular, Mr. Hull interviewed Janis Thibault, Director of LAP, three LAP Case Managers and six State Bar Court Case Administrators. Attorneys participating in the Pilot Program are assigned a Case Manager, who may also interact with the Pilot Program Judge in particular cases. State Bar Court Case Administrators act as court clerks for the State Bar Court judges. The six Case Administrators selected for interviews are directly involved in supporting the Pilot Program Judges. The questions posed in the interviews were modeled after the information contained in the written surveys.

B. Evaluation Results

1. Survey Results

Attached as Appendix A are tables setting forth the questions posed in the survey and the responses received from each of the three groups to whom the survey was sent (i.e., participants in the Pilot Program; respondents' counsel and Deputy Trial Counsel).

(A) Summary of Positive Survey Responses

- ☞ **The Court Should Continue the Pilot Program:** 19 of the 22 individuals who provided a substantive response to this survey question⁴ agreed that the Court should continue the Pilot Program [15 “strongly agreed”; 3 “agreed” and 1 “somewhat agreed”]. Three Deputy Trial Counsel strongly disagreed that the Pilot Program should be continued.
- ☞ **The Court Is Sensitive to Personal Nature of Issues:** All 20 of the individuals who responded to this question agreed that the Court is sensitive to the personal nature of the issues raised and discussed in the Pilot Program.
- ☞ **The Court Does a Good Job Maintaining Confidentiality:** 16 of the 17 individuals who answered this survey question agreed with the statement that the Court does a good job maintaining the confidentiality of the participants' substance abuse or mental health issues. Only one person (a Pilot Program participant) disagreed with that statement.
- ☞ **The Court Treated the Parties Fairly:** 17 of the 22 individuals responding to this survey question agreed that the Court was fair in its treatment of the parties, with 12 of those 17 respondents “strongly agreeing” with the statement. Of the 5 individuals who disagreed with the statement, 2 were Pilot Program participants and 3 were Deputy Trial Counsel.
- ☞ **Parties Were Made Aware of Pilot Program in Timely Manner:** 17 of the 21 individuals who answered this question agreed with the statement. Of the 4 individuals who disagreed, 3 were Pilot Program participants and 1 was a Deputy Trial Counsel.
- ☞ **Parties Had Adequate Chance to State Discipline Positions:** 18 of the 21 individuals who answered this survey question agreed that the Court gave the parties an adequate opportunity to state their respective positions on the degree of discipline that should be imposed. Of the 3 individuals who

⁴ One of the possible responses to each survey question is “I don’t know.” Additionally, of the 25 survey respondents, a number of individuals either failed or declined to answer one or more of the questions. Therefore, in summarizing the responses to each question, we have omitted reference to those individuals who either did not answer the question or answered “I don’t know.”

“disagreed somewhat” with this statement, 1 was a Pilot Program participant and 2 were Deputy Trial Counsel.

- ☞ **Court Provided Adequate Assistance to Parties in Reaching Stipulation:** 17 of the 20 survey respondents who answered this question agreed that the Court had provided adequate assistance to the parties in helping them reach a stipulation as to facts and conclusions of law. Two of the three individuals who “disagreed somewhat” with this statement were Pilot Program participants, while the third person was a Deputy Trial Counsel.
- ☞ **It Was Easy to Understand the Pilot Program:** 16 of the 21 individuals who provided a substantive response to this question agreed that the Pilot Program was easy to understand when it was explained by the Pilot Program Judge. Two Pilot Program participants, two Respondents’ counsel and two Deputy Trial Counsel disagreed with the statement.
- ☞ **The Written Information About the Pilot Program Provided by the Court Helped in Better Understanding the Program:** 16 of 21 individuals providing a substantive response to this question agreed that the written information provided to the parties by the Court helped them to better understand the Pilot Program. Of the five persons who disagreed that the written material was helpful to their understanding of the Program, two were Deputy Trial Counsel and three were Pilot Program participants or Respondents’ counsel.
- ☞ **Evaluation Process Was Consistent With Expectations:** 14 of the 18 individuals who answered this question agreed that the evaluation process conducted by the Lawyer Assistance Program was consistent with their understanding and expectations. Three of the 4 individuals who disagreed with the statement were Pilot Program participants.

(B) Summary of “Mixed” or “Divided” Survey Responses

- ☞ **The Evaluation Process By LAP Did Not Delay the Resolution of the Disciplinary Proceeding:** 14 of the 22 individuals who responded to this question agreed with the statement that LAP’s evaluation process did not delay the resolution of the disciplinary proceeding against the Pilot Program participant. However, 5 of the 8 individuals who disagreed with this statement were Deputy Trial Counsel, with their responses being either “strongly disagree” or “disagree.”
- ☞ **Terms of the Pilot Program Are Fair:** 13 of the 19 individuals who responded to this question agreed that the terms of the Pilot Program are fair. Four of the six individuals who disagreed with the statement were either Pilot Program participants or Respondent’s counsel.
- ☞ **Minimum Term for Pilot Program Participation is Appropriate:** There was significant disagreement in the responses to this question. Of the 9

individuals who agreed with this statement, 8 were either Pilot Program participants or Respondent's counsel. Of the 10 individuals who disagreed with the statement, 3 were Deputy Trial Counsel, 4 were Pilot Program participants and 3 were Respondent's counsel.

☞ **Sufficiency of Degree of Discipline:** There were three separate survey questions addressing the issue of discipline: (i) is the discipline too severe; (ii) is the discipline not severe enough; and (iii) is the discipline appropriate. Not surprisingly, there was a marked distinction between the views of Deputy Trial Counsel on the one hand and the Pilot Program participants and Respondent's counsel on the other hand.

✓ *Recommended Discipline Too Severe:* 16 individuals (7 Pilot Program participants, 5 Respondent's counsel and 4 Deputy Trial Counsel) disagreed with the statement that the levels of discipline recommended by the Court are too severe. The remaining 6 individuals who responded to this question (3 Pilot Program participants, 2 Respondent's counsel and 1 Deputy Trial Counsel) believe that the recommended discipline was too severe.

✓ *Recommended Discipline Not Severe Enough:* 16 individuals (9 Pilot Program participants, 5 Respondent's counsel and 2 Deputy Trial Counsel) disagreed with the statement that the discipline levels recommended by the Court are not severe enough. The remaining 4 individuals who responded to the question (1 Pilot Program participant and 3 Deputy Trial Counsel) agreed with the statement that the recommended discipline is insufficient.

✓ *Recommended Discipline is Appropriate:* 13 individuals (7 Pilot Program participants, 4 Respondent's counsel and 2 Deputy Trial Counsel) agreed with the statement that the levels of discipline recommended by the Court are appropriate. Of the 6 individuals who disagreed with the statement, 2 were Pilot Program participants, 1 was a Respondent's counsel and 3 were Deputy Trial Counsel.

2. Interview Results

(A) Interviews with LAP Staff

As previously indicated, the Director of the Lawyer Assistance Program and three LAP Case Managers were interviewed regarding their views about the Pilot Program. The questions asked in the interview were similar to those contained in the survey questionnaire.

All LAP interviewees strongly recommended the continued operation of the Pilot Program, although one of the Case Managers expressed the belief that the Program should be more of a true diversion program.

All LAP interviewees also agreed that the Court does a good job of cooperating with the LAP and supporting the LAP's treatment program. Several of the interviewees identified the Court's support and reinforcement of LAP treatment programs as one of the greatest strengths of the Pilot Program.

The LAP interviewees unanimously agreed that the Court is sensitive to the confidential nature of the LAP treatment information and does a good job of maintaining the confidentiality of the participants' substance abuse or mental health issues. There was also unanimous agreement that the Court is fair in its treatment of the parties and that the minimum term for Pilot Program involvement is appropriate, although one Case Manager indicated that some participants are confused by the fact that they are required to participate in the LAP for five years but are only required to participate in the Pilot Program for 18 to 36 months.

The only significant difference of opinion among the LAP interviewees related to communication issues. Three of the interviewees agreed that the Court communicates necessary information to the LAP, that it clearly communicates the type of information it is seeking from the LAP and that the LAP understands the needs of the Court with regard to LAP participation reports. One interviewee, however, noted that there is more communication between LAP and the Office of the Chief Trial Counsel than there is between LAP and the Court. Another interviewee commented that it isn't always clear whether the Court has communicated necessary information to LAP/Pilot Program participants, although the interviewee acknowledged that it may be attributable to the participant not hearing what the Court is telling them.

The LAP interviewees identified the following as the strengths of the Pilot Program:

- Provides external pressure on attorneys to participate in LAP
- Demonstrates sensitivity to substance abuse/mental health problems
- Provides opportunity to break disciplinary recidivism
- Matches recovery with personal accountability
- Provides a forum allowing attorneys to admit their problems instead of hiding or covering up those problems

When asked about the weaknesses of the Pilot Program, the LAP interviewees had the following responses:

- No great weaknesses
- Better communication about the Court's needs
- Better education of Court on what LAP does
- Length of time between application and acceptance into Pilot Program
- Not a complete diversion program

(B) Interviews with State Bar Court Staff

Interviews were conducted with the six State Bar Court Case Administrators who have worked with the Pilot Program Judges. Case Administrators act as court clerks, supporting their assigned judge in court, maintaining the official court file,

processing pleadings and filing and serving orders issued by the State Bar Court. The Case Administrators assigned to Pilot Program Judges were interviewed in particular for their insight in how Pilot Program cases could be processed more efficiently and for their assessment regarding the interactions between the Court and the parties in Pilot Program proceedings.

The Case Administrators were unanimous in their view that the Court has been sensitive to the confidential nature of the treatment and medical information relating to Pilot Program participants and that the Court has done a good job in maintaining that confidentiality. The Case Administrators also unanimously feel that the Court has been fair in its treatment of the parties in Pilot Program cases.

The Case Administrators were divided in their opinions regarding the adequacy of the resources available for Pilot Program matters. At least one Case Administrator stated that the State Bar Court resources were adequate but that additional Deputy Trial Counsel should be assigned to Pilot Program matters. Two Case Administrators stated that additional judicial resources were needed, perhaps by assigning Pilot Program matters to all hearing judges. Another Case Administrator opined that there were sufficient judicial resources but that additional State Bar Court staff resources were needed. Several Case Administrators noted that Pilot Program cases involve a considerable amount of paperwork but at least one Case Administrator contended that the amount of paperwork isn't much different from the paperwork involved in other cases.

All Case Administrators agreed that the Office of the Chief Trial Counsel and Respondent's counsel have been cooperative with the Court in Pilot Program matters and, for the most part, with one another. Several Case Administrators commented that the parties could benefit from additional court assistance in settlement discussions.

The Case Administrators also unanimously agreed that the reports received by the Court from the LAP are valuable, received on a timely basis and easy to understand.

Asked for suggestions for streamlining the Pilot Program process, most Case Administrators responded that the process was already fairly streamlined. The only substantive suggestions offered included additional assistance with settlement and the attorney's development of information relating to the nexus between his or her substance abuse or mental health problem and the misconduct in the proceeding.

3. Public Forums

There were a total of five speakers at the public forums conducted in Los Angeles and San Francisco on February 19 and 20, respectively. Speaking in Los Angeles were Board of Governors member James Heiting and Respondent's counsel, JoAnne Earls Robbins. In San Francisco, Deputy Trial Counsel Cydney Batchelor, LAP Oversight Committee member Richard Ewaniszuk and LAP Director Janis Thibault spoke.

Mr. Heiting spoke about the Pilot Program Interaction Advisory Committee, an ad hoc committee created in January 2003 to provide input and assistance in the coordination and implementation of both the Lawyer Assistance Program and the Pilot Program. Mr. Heiting is the chairperson of that committee. Mr. Heiting stated that, in his view, the LAP and Pilot Program are the best things that the State Bar has done for its members. In terms of areas where further improvement or development may be appropriate for both LAP and the Pilot Program, Mr. Heiting noted that (a) the LAP's requirement of a 5-year commitment for successful completion of the LAP is a disincentive for some attorneys participation, thereby precluding them from participating in the Pilot Program as well; (b) there are still some delays in the evaluation process; and (c) there needs to be more treatment alternatives available for LAP participants with mental health issues.

In her comments at the public forum in Los Angeles, Ms. Robbins, a former State Bar Court hearing judge and former Deputy Trial Counsel, stated that she felt the Pilot Program was a "wonderful program" that should have been started ten or fifteen years earlier. Ms. Robbins believes that there should be more emphasis on treatment of mental health issues in both the LAP and the Pilot Program. While there are other alternatives for individuals with substance abuse problems (e.g., The Other Bar, AA, etc.), people with emotional and mental challenges have fewer alternatives and often have neither insurance coverage or available community services for which they qualify. Ms. Robbins urged the Court and the Office of the Chief Trial Counsel to make information about the Pilot Program available to respondents at the earliest possible stage. Finally, Ms. Robbins stated that the 5-year LAP commitment was too long in some cases.

Deputy Trial Counsel Cydney Batchelor was one of the speakers at the public forum in San Francisco. Ms. Batchelor is the sole DTC assigned to handle Pilot Program cases in San Francisco. Charles Murray and Brooke Schaefer are the DTC assigned to Pilot Program matters in Los Angeles. Ms. Batchelor emphasized that the Pilot Program has made a substantial difference in the lives of many of the participants in the Program. However, Ms. Batchelor expressed her concern that the Pilot Program is only being used by the most serious disciplinary offenders and that attorneys who have committed less serious misconduct are unwilling to enter into the Pilot Program because of the period of time they must participate in the LAP. Ms. Batchelor stated that there should also be more opportunities for diversion for minor offenses. Finally, Ms. Batchelor expressed her desire for allowing Pilot Program participants to serve their disciplinary suspensions at the commencement of their participation in the Pilot Program rather than after they have completed the Program. Ms. Batchelor stated that, overall, the both the Pilot Program and LAP have been wonderful and that they have made an astonishing change in the lives of their participants.

In addition to being a member of the LAP Oversight Committee, Richard Ewaniszyk is a past president of The Other Bar and served on its Executive Committee for 14 years. Mr. Ewaniszyk was highly complimentary of the Pilot Program but agreed with Ms. Batchelor's statement that the Pilot Program is used primarily by the more serious offenders. Because participation in the LAP costs \$15,000 to \$20,000 and involves a 5-year commitment, attorneys who have committed minor offenses are

unwilling to expend that amount of time and money to take advantage of the Pilot Program. Mr. Ewaniszyk urged the State Bar Court and the Office of the Chief Trial Counsel to explore categories of offenses that would be eligible for diversion or an LAP commitment of only six months or one year. Mr. Ewaniszyk stressed the importance of the LAP and Pilot Program becoming involved with the attorney at a very early stage to “plant the seeds of what it takes to stay sober.” Finally, Mr. Ewaniszyk urged group therapy or discussion alternatives for individuals with mental health issues that are different from the group meetings attended by individuals with substance abuse problems.

The final speaker at the public forum in San Francisco was Janis Thibault, Director of the State Bar’s Lawyer Assistance Program. Ms. Thibault commented that she never imagined that there would be more than 70 attorneys involved in the Pilot Program at this early stage of the Program’s existence. She believes that this large number of participants is reflective of the cooperative effects of the State Bar Court, the Office of the Chief Trial Counsel and LAP. Ms. Thibault stated that one of the comments that she frequently receives from attorneys who are participants in the LAP and the Pilot Program relates to their positive interactions with the State Bar Court judges. Ms. Thibault stated that, while holding the attorneys accountable for their conduct, the Pilot Program Judges successfully communicate to these attorneys that they are interested in their success and are supportive of their rehabilitative efforts.

4. Written Comment From Chief Trial Counsel

On March 2, 2004, State Bar Court Presiding Judge Ronald W. Stovitz received a memorandum from Chief Trial Counsel Mike A. Nisperos regarding his comments about the Pilot Program. (A copy of Mr. Nisperos’ written comment is attached as Appendix B.)

In his memorandum, Mr. Nisperos stated that the Pilot Program has provided greater public protection by closely monitoring the treatment and law practices of attorneys in the Pilot Program and by immediately taking corrective action against those attorneys who are not in compliance with LAP or Pilot Program requirements. Additionally, Mr. Nisperos stated that the State Bar Court judges have demonstrated their personal commitment to the success of the Pilot Program and that State Bar Court resources have been assigned to facilitate its success.

However, Mr. Nisperos had a number of suggestions for changes to the Pilot Program, which are summarized below:

- While LAP may require its participants to remain in treatment for five years, the Pilot Program should be flexible in adjusting the Program’s disciplinary monitoring period in proportion to the severity of the misconduct;
- The State Bar Court should consider a greater diversity of treatment options for referral of Pilot Program participants;

- Diversion should be offered for low level misdemeanor convictions that involve drugs or mental health problems;
- Pilot Program participants should be allowed to serve any period of actual suspension at the beginning of their Pilot Program participation, rather than at the end of the Program;
- Some of the information contained in the State Bar Court's Program Outline for the Pilot Program should be incorporated into the Rules of Procedure, including (a) program eligibility; (b) scope of participation; and (c) disciplinary offenses excluded from the program;
- The Court should broaden the categories of individuals who are excluded from participation in the Pilot Program to include other misconduct, such as conduct that would have qualified for summary disbarment if the attorney had been criminally prosecuted and convicted of the alleged offense;
- The Court should amend the confidentiality rule to clarify the extent to which the Office of the Chief Trial Counsel may share information about the attorney with the complainant.

The State Bar Court has considered the suggestions that were included in Mr. Nisperos' March 2, 2004, memorandum and has included several of them in its recommendations set forth below. As to those suggestions which the State Bar Court has not recommended at this time, the Court provides the following brief responses to those suggestions:

1. Adjustment of Discipline Monitoring Term: The Court is adamant in its position that individuals should participate in the Pilot Program for a minimum of 18 months (which includes earned reductions in the period of participation) and that the attorney must be substance free for a minimum period of one year or, in cases of mental health issues, until the Court receives a report from an appropriate mental health professional indicating that Pilot Program monitoring is no longer necessary. However, the Court currently does consider shorter periods of subsequent disciplinary probation. As in other disciplinary matters, the Court seriously considers the recommendations of the parties as to the appropriate period of probation, especially where it is a joint recommendation of the Office of the Chief Trial Counsel and the respondent attorney.
2. Diversity of Treatment: In order to participate in the Pilot Program, the Court requires the attorney to be accepted for participation in the Lawyer Assistance Program. The reasoning behind this requirement is two-fold. First, the statutory right to diversion or a reduction in discipline is *only* available to those attorneys who successfully complete LAP. (Bus. & Prof. Code, § 6233.) Secondly, the Court is willing to offer significant reductions in the discipline to be imposed or recommended in Pilot Program cases because it has

confidence in the treatment oversight provided by LAP and in the cooperative and ongoing relationship between LAP and the Court.

No attorney is required to participate in either LAP or the Pilot Program. Likewise, the fact that an attorney does not participate in the Pilot Program does not preclude him or her from receiving mitigating credit for rehabilitation from a substance abuse or mental health problem. However, by declining to participate in LAP and the Pilot Program, the attorney must present clear and convincing evidence demonstrating his or her entitlement to that credit. (See *Harford v. State Bar*, *supra*, 52 Cal.3d at p. 101; *Porter v. State Bar*, *supra*, 52 Cal.3d at p. 527.)

3. Diversion for Minor Criminal Convictions: The Court does not have any conceptual problems with offering diversion to attorneys who suffer low level misdemeanor convictions for alcohol and personal drug use offenses. Dismissal of the disciplinary proceeding following successful completion of the Pilot Program is already available for such offenses. Furthermore, the Office of the Chief Trial Counsel can move for a dismissal of a proceeding if they have entered into an agreement in lieu of discipline on any of these low level cases. However, to the extent that the Office of the Chief Trial Counsel proposes that no disciplinary proceeding should be initiated as a result of these convictions, the proposal would require a statutory change. Business and Professions Code section 6101, subdivisions (c) and (d) require that the certified record of all convictions be filed with the Supreme Court and that disciplinary proceedings shall be undertaken. (See rule 951(a), Calif. Rules of Ct. [delegating statutory duties under sections 6101 and 6102 to State Bar Court]; see also, rule 320(a), Rules Proc. of State Bar.) The only exception to this statutory requirement that has been made in the past is the transmittal of first-time convictions for driving under the influence. Because of the volume of these convictions, the Supreme Court previously directed the State Bar transmit only the second or subsequent DUI convictions.
4. Exclusion of Non-Summary Disbarment Conduct From Pilot Program: As previously indicated, the only type of disciplinary matter that is automatically excluded from the Pilot Program is a criminal conviction that meets the criteria for summary disbarment under Business and Professions Code section 6102, subdivision (c). In his memorandum, Mr. Nisperos suggests also excluding from the Pilot Program conduct which would have qualified for summary disbarment if the attorney had been criminally prosecuted for the conduct and had been convicted of that conduct.

The State Bar Court does not believe that such an exclusion is appropriate. Any misappropriation of client funds in an amount in excess of \$400 constitutes “grand theft” within the meaning of Penal Code section 487, subdivision (a) and, if prosecuted and convicted, would qualify for summary disbarment. Therefore, all misappropriations in excess of \$400 would be excluded from the Pilot Program. Similarly, any false statement in a declaration prepared by an attorney constitutes “perjury” within the meaning

of Penal Code section 118, subdivision (a) and, if prosecuted and convicted, would qualify for summary disbarment.

In the Court's view, participation in the Pilot Program should be as broadly available as possible. If the attorney's misconduct is causally connected to his or her substance abuse or mental health issue, it appears to the Court that treating the underlying problem (i.e., the substance abuse or mental health issue) will significantly reduce, if not eliminate, the likelihood that the misconduct will be repeated. However, by excluding the attorney from participation in the Pilot Program, it may preclude the attorney from receiving needed treatment for his or her problem.

PROPOSAL: State Bar Court Recommendations for Modifications to the Pilot Program

A. Remove "Pilot" Designation From Pilot Program

The judges and staff of the State Bar Court, the Director and staff of the Lawyer Assistance Program, the Chief Trial Counsel and all respondents and Respondents' counsel who responded to the written survey support the continuation of the Pilot Program. However, notwithstanding the strong support of the Program by the Chief Trial Counsel, a number of the Deputy Trial Counsel who responded to the survey did not believe that the Pilot Program should continue.

Nevertheless, the State Bar Court recommends that the Program should continue and that the "Pilot" designation should be removed. The State Bar Court is still considering potential alternatives for the name of the Program, but is currently considering "State Bar Court Program for Respondents with Substance Abuse or Mental Health Issues" and "Alternate Discipline Program for Impaired Attorneys."

B. Proposed Amendment to Business and Professions Code Section 6007(b)

Among the most frequent criticisms or perceived shortcomings of the Pilot Program has been the alleged inability of Pilot Program participants to serve any period of actual suspension recommended by the Pilot Program Judge's Decision at the commencement of their Pilot Program participation rather than upon their successful completion of or termination from the Pilot Program.

Additionally, while Business and Professions Code section 6233 and the State Bar Court's Program Outline for the Pilot Program recognize that a participant may receive credit for periods of his or her inactive enrollment towards any period of actual suspension, the only currently available vehicle for that inactive enrollment is Business and Professions Code section 6007, subdivision (b)(3), which requires a finding by the State Bar Court that, because of mental infirmity or illness or the habitual use of intoxicants or drugs, the attorney is (a) unable or habitually fails to perform his or her duties as an attorney; or (b) is unable to practice law without substantial threat of harm to the interests of his or her clients or the public. While Pilot Program participants have recognized that they have substance abuse or mental

health issues, most of them dispute that their conduct falls within the requirements of section 6007, subdivision (b)(3).

As a result, the State Bar Court recommends an amendment to Business and Professions Code section 6007, to add a new subdivision (b)(4), in the form attached hereto as Appendix C, that would allow the parties to stipulate to or the Court to order the inactive enrollment of a member who is participating in the Pilot Program and for the attorney to receive credit for such period of inactive enrollment towards whatever period of actual suspension may be imposed at the conclusion of the proceeding.⁵

C. Termination from Program

A respondent's termination from the Program has a significant upon him or her since it will result in the State Bar Court's imposition or recommendation to the Supreme Court of the higher level of discipline set forth in the Court's Decision Re: Alternative Degrees of Discipline. In appropriate cases, this higher level of discipline may be disbarment.

As a result, the Court concludes that it is appropriate to provide the parties with notice of the Court's intent to terminate the respondent from the Program and to allow the parties, including the respondent, to show cause why he or she should not be terminated. The proposed addition of new rule 805 of the Rules of Procedure, in the form attached hereto as Appendix D, would require the Court to issue an order to show cause and to provide the parties with an opportunity to respond and, upon request, a hearing before a final termination decision is made.

D. Confidentiality

Business and Professions Code section 6086.1 provides, in essence, that the hearings and records of disciplinary proceedings in the State Bar Court are public following the filing of a notice to show cause or other initiating document.

⁵ While respondent attorneys appear eager to serve any period of actual suspension at the commencement of their participation in the Pilot Program, there are a couple of dangers in doing so. The State Bar Court provides alternative discipline recommendations (i.e., one recommendation in the event the attorney successfully completes the Pilot Program and a second, more severe disciplinary recommendation in the event the attorney fails to complete the Program). It is conceivable, therefore, that the attorney may serve the shorter period of actual suspension on the assumption that he or she will successfully complete the Program and then be required to serve a second period of actual suspension if the attorney is subsequently terminated from the Program. Additionally, allowing the attorney to serve the actual suspension at the outset of the Pilot Program presumes that the Supreme Court, in acting upon the State Bar Court's disciplinary recommendations, agrees that the lower level of proposed discipline is appropriate. Since the Supreme Court has inherent power to impose greater discipline than that recommended by the State Bar Court, the Supreme Court may order a further period of actual suspension at the conclusion of the proceeding if it does not believe that the lower level of discipline recommended by the State Bar Court was adequate.

On the other hand, Business and Professions Code section 6234 provides that any information provided to or obtained by the Attorney Diversion and Assistance Program, or any subcommittee or agent thereof, shall be absolutely confidential unless waived by the attorney and shall be exempt from the provisions of section 6086.1.

The proposed amendment to rule 805 of the Rules of Procedure, in the form attached hereto as Appendix D, would clarify that the pendency of the disciplinary proceeding against a Program participant and any pleadings or orders that are filed in the proceeding are public and available for public inspection but that any information regarding the participant's medical evaluation or treatment and any document that has been lodged, but not filed, with the State Bar Court shall be confidential and shall not be subject to public disclosure unless the participant waives confidentiality or the Court orders the document(s) to be filed.

Additionally, the proposed amendments would clarify that the parties' Stipulation as to Facts and Conclusions of Law and the Court's Decision Re Alternate Degrees of Discipline may be shared in confidence with the Office of Probation and with the Client Security Fund in order to facilitate the ability of those offices, respectively, to monitor the attorney's compliance with Pilot Program conditions and to process reimbursement applications submitted to CSF as a result of the attorney's admitted misconduct.

Finally, the proposed amendment would clarify the information that the Office of the Chief Trial Counsel may share with the complaining witness about the attorney's participation in the Pilot Program.

E. Nexus

Supreme Court case law requires that, in order for a respondent attorney to be given mitigation credit for a substance abuse problem, the attorney must establish by clear and convincing evidence that (a) the abuse was addictive in nature; (b) the abuse causally contributed to the misconduct; and (c) the attorney has undergone a meaningful and sustained period of rehabilitation. (*Harford v. State Bar, supra*, 52 Cal.3d at p. 101; *In re Billings, supra*, 50 Cal.3d at p. 367.)

Similarly, in case of mental health problems, Supreme Court case law requires that, in order for the attorney to be given mitigation credit for a mental health issue, he or she must establish by clear and convincing evidence that (a) the mental health problem or emotional difficulty was directly responsible for the misconduct; and (b) the attorney no longer suffers from the mental health problem or emotional difficulty. (*Porter v. State Bar, supra*, 52 Cal.3d at p. 527; *In re Lamb, supra*, 49 Cal.3d at p. 246.) In these cases involving mental health issues or emotional difficulties, the attorney must show that he or she has so overcome or controlled the disorder that it is unlikely to cause further misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 197.)

In order to observe these Supreme Court requirements, the "nexus" between the attorney's substance abuse or mental health issue and his or her misconduct must also

be shown in Pilot Program cases. The proposed amendment to rule 802 attached hereto as Appendix D defines the term “nexus” for purposes of Pilot Program participation and notifies the respondent attorney that he or she has the burden of establishing that nexus.

ANY KNOWN FISCAL/PERSONNEL IMPACT: No Fiscal or Personnel Impact is Anticipated

ATTACHMENTS: Appendix A, Pilot Program Questionnaire Responses
Appendix B, Memorandum, Evaluation of State Bar Court Pilot Program

SOURCE: Board Committee on Regulation, Admissions and Discipline Oversight
Friday, May 21, 2004
Agenda Item III.C

DEADLINE: Written comments must be received by Friday, August 27, 2004, 5:00 p.m.

DIRECT COMMENTS TO:

Michael Alewine
State Bar Court
180 Howard Street, 6th Floor
San Francisco, CA 94105-1639
Telephone Number: (415) 538-2017
Fax Number: (415) 538-2040
michael.alewine@calbar.ca.gov

Pilot Program Questionnaire Responses

Totals	Total Responses	25	25	25	25	25	25	25	25	25	25	25	25	25	25	25
	Strongly Agree	Agree	Agree Somewhat	Disagree Somewhat	Disagree	Strongly Disagree	Don't know/ Did not answer									
The parties were made aware of the program by the Court in a timely manner.	10	7	0	1	2	1	4									
It was easy to understand the Pilot Program including its stages when it was explained by the Judge.	7	6	3	1	2	2	4									
The written information provided by the Court about the Pilot Program helped me understand the program better.	2	9	5	4	1	0	4									
The evaluation process by the LAP was consistent with my understanding and expectations.	6	6	2	2	0	2	7									
The evaluation process by the LAP did not delay the resolution of the disciplinary matter.	7	5	2	2	3	3	3									
The Court was sensitive to the personal nature of the issues discussed in the Pilot Program.	15	3	2	0	0	0	5									
The Court does a good job maintaining confidentiality of the participant's substance abuse or mental health issues.	13	2	1	0	0	1	8									
The Court was fair in its treatment of the parties.	12	2	3	1	2	2	3									
The Court provided adequate assistance to help the parties reach a Stipulation as to Facts and Conclusions of Law	9	4	4	3	0	0	5									
The parties had an adequate opportunity to state their position regarding the levels of discipline.	12	4	2	3	0	0	4									
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were too severe.	4	1	1	2	5	7	5									
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were not severe enough.	2	0	2	2	3	11	5									
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were appropriate.	5	5	3	4	1	1	6									
The minimum term for participation in the Pilot Program is appropriate	1	5	3	4	1	5	6									
The terms of the Pilot Program contract were fair.	6	4	3	5	1	0	6									
There should be more than one judge in each venue (San Francisco and Los Angeles) handling Pilot Program matters.	6	2	2	2	1	3	9									
The Court should continue the Pilot Program.	15	3	1	0	0	3	3									

Pilot Program Questionnaire Responses

Total Responses

11 11 11 11 11 11 11 11 11 11 11 11 11 11 11

	Strongly Agree	Agree	Agree Somewhat	Disagree Somewhat	Disagree	Strongly Disagree	Don't know/ did not answer
The parties were made aware of the program by the Court in a timely manner.	4	3	0	0	2	1	1
It was easy to understand the Pilot Program including its stages when it was explained by the Judge.	4	2	2	0	2	0	1
The written information provided by the Court about the Pilot Program helped me understand the program better.	0	4	4	1	0	0	2
The evaluation process by the LAP was consistent with my understanding and expectations.	3	3	1	1	0	2	1
The evaluation process by the LAP did not delay the resolution of the disciplinary matter.	4	4	1	2	0	0	0
The Court was sensitive to the personal nature of the issues discussed in the Pilot Program.	6	2	1	0	0	0	2
The Court does a good job maintaining confidentiality of the participant's substance abuse or mental health issues.	6	1	0	0	0	1	3
The Court was fair in its treatment of the parties.	6	2	1	1	0	1	0
The Court provided adequate assistance to help the parties reach a <i>Stipulation as to Facts and Conclusions of Law</i>	4	3	1	2	0	0	1
The parties had an adequate opportunity to state their position regarding the levels of discipline.	4	3	2	1	0	0	1
The levels of discipline recommended in the Decision <i>re: Alternative Recommendations for Degree of Discipline</i> were too severe.	2	1	0	2	3	2	1
The levels of discipline recommended in the Decision <i>re: Alternative Recommendations for Degree of Discipline</i> were not severe enough.	0	0	1	2	2	5	1
The levels of discipline recommended in the Decision <i>re: Alternative Recommendations for Degree of Discipline</i> were appropriate.	3	3	1	1	0	1	2
The minimum term for participation in the Pilot Program is appropriate	1	2	3	3	0	1	1
The terms of the Pilot Program contract were fair.	3	3	3	1	0	0	1
There should be more than one judge in each venue (San Francisco and Los Angeles) handling Pilot Program matters.	4	1	1	2	0	0	3
The Court should continue the Pilot Program.	9	2	0	0	0	0	0

Pilot Program Questionnaire Responses

Total Responses

6 6 6 6 6 6 6 6 6 6 6 6 6 6 6

	Strongly Agree	Agree	Agree Somewhat	Disagree Somewhat	Disagree	Strongly Disagree	Don't know /did not answer
The parties were made aware of the program by the Court in a timely manner.	4	2	0	0	0	0	0
It was easy to understand the Pilot Program including its stages when it was explained by the Judge.	2	2	1	0	0	1	0
The written information provided by the Court about the Pilot Program helped me understand the program better.	1	2	1	1	1	0	0
The evaluation process by the LAP was consistent with my understanding and expectations.	1	3	1	0	0	0	1
The evaluation process by the LAP did not delay the resolution of the disciplinary matter.	2	1	1	0	1	0	1
The Court was sensitive to the personal nature of the issues discussed in the Pilot Program.	4	0	1	0	0	0	1
The Court does a good job maintaining confidentiality of the participant's substance abuse or mental health issues.	3	0	1	0	0	0	2
The Court was fair in its treatment of the parties.	4	0	1	0	0	0	1
The Court provided adequate assistance to help the parties reach a Stipulation as to Facts and Conclusions of Law	2	0	2	0	0	0	2
The parties had an adequate opportunity to state their position regarding the levels of discipline.	5	0	0	0	0	0	1
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were too severe.	2	0	0	0	2	1	1
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were not severe enough.	0	0	0	0	1	4	1
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were appropriate.	1	2	1	1	0	0	1
The minimum term for participation in the Pilot Program is appropriate	0	2	0	0	0	3	1
The terms of the Pilot Program contract were fair.	1	1	0	2	1	0	1
There should be more than one judge in each venue (San Francisco and Los Angeles) handling Pilot Program matters.	1	1	1	0	0	1	2
The Court should continue the Pilot Program.	4	1	0	0	0	0	1

Respondents' Counsel

Pilot Program Questionnaire Responses

Total Responses

8 8 8 8 8 8 8 8 8 8 8 8 8 8 8 8

	Strongly Agree	Agree	Agree Somewhat	Disagree Somewhat	Disagree	Strongly Disagree	Don't know /did not answer
The parties were made aware of the program by the Court in a timely manner.	2	2	0	1	0	0	3
It was easy to understand the Pilot Program including its stages when it was explained by the Judge.	1	2	0	1	0	1	3
The written information provided by the Court about the Pilot Program helped me understand the program better.	1	3	0	2	0	0	2
The evaluation process by the LAP was consistent with my understanding and expectations.	2	0	0	1	0	0	5
The evaluation process by the LAP did not delay the resolution of the disciplinary matter.	1	0	0	0	2	3	2
The Court was sensitive to the personal nature of the issues discussed in the Pilot Program.	5	1	0	0	0	0	2
The Court does a good job maintaining confidentiality of the participant's substance abuse or mental health issues.	4	1	0	0	0	0	3
The Court was fair in its treatment of the parties.	2	0	1	0	2	1	2
The Court provided adequate assistance to help the parties reach a Stipulation as to Facts and Conclusions of Law	3	1	1	1	0	0	2
The parties had an adequate opportunity to state their position regarding the levels of discipline.	3	1	0	2	0	0	2
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were too severe.	0	0	1	0	0	4	3
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were not severe enough.	2	0	1	0	0	2	3
The levels of discipline recommended in the Decision re: Alternative Recommendations for Degree of Discipline were appropriate.	1	0	1	2	1	0	3
The minimum term for participation in the Pilot Program is appropriate	0	1	0	1	1	1	4
The terms of the Pilot Program contract were fair.	2	0	0	2	0	0	4
There should be more than one judge in each venue (San Francisco and Los Angeles) handling Pilot Program matters.	1	0	0	0	1	2	4
The Court should continue the Pilot Program.	2	0	1	0	0	3	2

Deputy Trial Counsel



**THE STATE BAR
OF CALIFORNIA**

**INTER-OFFICE
COMMUNICATION**

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.¹ 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,

¹The 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.
John K. VandeKamp, Esq.
Starr Babcock, Esq.
Janis Thibault, MFT

**PROPOSED AMENDMENT TO
BUSINESS AND PROFESSIONS CODE SECTION 6007(b)**

[Added language in **bold**; deleted language in ~~strikeout~~]

§6007. Involuntary Enrollment as an Inactive Member

[Subdivision (a) remains unchanged]

- (b) The board shall also enroll a member of the State Bar as an inactive member in each of the following cases:
- (1) A member asserts a claim of insanity or mental incompetence in any pending action or proceeding alleging his or her inability to understand the nature of the action or proceeding or inability to assist counsel in representation of the member.
 - (2) The court makes an order assuming jurisdiction over the member's law practice, pursuant to Section 6180.5 or 6190.3.
 - (3) After notice and opportunity to be heard before the board or a committee, the board finds that the member, because of mental infirmity or illness, or because of the habitual use of intoxicants or drugs, is (i) unable or habitually fails to perform his or her duties or undertakings competently, or (ii) unable to practice law without substantial threat of harm to the interests of his or her clients or the public. No proceeding pursuant to this paragraph shall be instituted unless the board or a committee finds, after preliminary investigation, or during the course of a disciplinary proceeding, that probable cause exists therefor. The determination of probable cause is administrative in character and no notice or hearing is required. In the case of an enrollment pursuant to this subdivision, the board shall terminate the enrollment upon proof that the facts found as to the member's disability no longer exist and on payment of all fees required.
 - (4) After notice and opportunity to be heard before the board in a disciplinary proceeding relating to Article 15 of this chapter, the board finds that such inactive enrollment is necessary for the protection of the public or that it will contribute to the member's recovery from substance abuse or mental health issues. If the court orders a period of actual suspension in the disciplinary proceeding, any period of inactive enrollment pursuant to this subdivision shall be credited against the period of actual suspension ordered.**

[Subdivisions (c) through (h) remain unchanged]

APPENDIX C

PROPOSED AMENDMENTS TO RULES 800 through 807, RULES OF PROCEDURE

(Proposed new language are indicated by the use of ***Bold, Italics and Underline***, while deletions are indicated by ~~Strikeout~~.)

K. ~~PILOT~~ PROGRAM FOR RESPONDENTS WITH SUBSTANCE ABUSE AND/OR MENTAL HEALTH ISSUES

RULE 800. PURPOSE OF ~~PILOT~~ PROGRAM; AUTHORITY

Consistent with the intent of the Legislature expressed in Business and Professions Code section 6230, et seq., these rules apply to proceedings before the State Bar Court in which a respondent is identified as having a substance abuse or mental health issue and is seeking to participate in or has been accepted to participate in the State Bar Court's ~~Pilot~~ Program for Respondents with Substance Abuse and/or Mental Health Issues ("~~Pilot~~ Program").

Eff. September 1, 2002.

Source: New

RULE 801. ELIGIBILITY TO APPLY FOR PARTICIPATION IN ~~PILOT~~ PROGRAM

- (a) At any time following the commencement of a proceeding in the State Bar Court, at the request of the respondent, the Office of the Chief Trial Counsel or on the court's own motion, a respondent may be referred to a judge who has been designated by the Presiding Judge as a ~~Pilot~~ Program Judge to determine the respondent's eligibility for participation in the ~~Pilot~~ Program.
- (b) Prior to the commencement of a proceeding in the State Bar Court, a judge assigned to conduct an Early Neutral Evaluation Conference pursuant to rule 75 may refer a respondent to a ~~Pilot~~ Program Judge to determine the respondent's eligibility for participation in the ~~Pilot~~ Program. Additionally, either the Office of the Chief Trial Counsel or the respondent may request the Court to make a referral to a ~~Pilot~~ Program Judge for such evaluation.

Eff. September 1, 2002. Revised: August 1, 2003.

Source: New

RULE 802. ACCEPTANCE FOR PARTICIPATION IN ~~PILOT~~ PROGRAM.

- (a) Acceptance of a respondent for participation in the ~~Pilot~~ Program shall be at the discretion of the ~~Pilot~~ Program Judge but shall be contingent upon the respondent's acceptance into the State Bar's Lawyer Assistance Program and upon such additional conditions as the ~~Pilot~~ Program Judge may impose, including but not limited to, a stipulation as to facts and conclusions of law in the pending disciplinary proceeding that is agreed upon and signed by the respondent and the Office of the Chief Trial Counsel and the respondent's written agreement to the court's terms and conditions for his or her participation in the ~~Pilot~~ Program.

- (b) *A respondent who has been convicted of a criminal offense that subjects him or her to summary disbarment pursuant to Business and Professions Code section 6102, subdivision (c) shall not be eligible to participate in the Program*
- (c) *In order to be eligible for acceptance into the Program, the respondent must establish that there is a nexus between his or her substance abuse or mental health issue and the acts that constitute disciplinable violations of the State Bar Act and/or the Rules of Professional Conduct. As used in herein, the term “nexus” means evidence that there is a reasonable likelihood that the substance abuse or mental health issue either precipitated the respondent’s misconduct or that it was a contributing cause of the misconduct.*
- (d) Unless otherwise agreed by the parties, in the event the respondent is not accepted into the Pilot Program or declines to sign the written agreement regarding the terms and conditions of his or her participation in the Pilot Program, any stipulation as to facts and conclusions of law signed by the parties in the pending disciplinary proceeding and entered into as a condition for participation in the Pilot Program shall be rejected and shall not be binding upon either the respondent or the Office of the Chief Trial Counsel.

Eff. September 1, 2002.
Source: New

RULE 803. ~~DISPOSITION~~ DEGREE OF DISCIPLINE; DEFERRAL OF IMPOSITION

- (a) If a respondent seeking to participate in the Pilot Program has entered into a stipulation as to facts and conclusions of law in the pending disciplinary proceeding and has agreed to or has fulfilled all of the other requirements identified by the Pilot Program Judge as conditions for the respondent’s participation in the Program, the Pilot Program Judge shall provide the respondent with a written statement regarding (1) the disposition that will be implemented or recommended to the Supreme Court in the event that the respondent successfully completes the Pilot Program; and (2) the disposition that will be implemented or recommended to the Supreme Court, based upon the stipulated facts and conclusions of law, if the respondent does not successfully complete the Pilot Program. Depending upon the extent and severity of the respondent’s stipulated misconduct, including the degree of harm suffered by his or her client(s), the disposition implemented or recommended following successful completion of the Pilot Program may range as low as the dismissal of the charges or proceeding and, as a result of termination from the Pilot Program, may range as high as disbarment.
- (b) If the respondent is accepted for participation in the Pilot Program, the stipulation as to facts and conclusions of law shall not be filed and the proposed disposition shall not be implemented or transmitted as a recommendation to the Supreme Court until the respondent either successfully completes the Pilot Program or is terminated from the Program.

Eff. September 1, 2002. Revised: August 1, 2003.
Source: New

RULE 804. TERM OF PARTICIPATION IN ~~PILOT~~ PROGRAM.

In order to successfully complete the ~~Pilot~~ Program, a respondent must participate in the Program for a term of 36 months from the date of acceptance in the Program, provided that, with earned incentives as specified in the written agreement signed by the respondent, the respondent may complete the ~~Pilot~~ Program in a minimum of 18 months. No respondent may successfully complete the ~~Pilot~~ Program without the certification of the Lawyer Assistance Program that he or she has been substance-free for a period of at least one year or, in the case of a respondent with mental health issues, without a recommendation from a mental health professional that is satisfactory to the ~~Pilot~~ Program Judge.

Eff. September 1, 2002.
Source: New

RULE 805. TERMINATION FROM PROGRAM

Prior to terminating a respondent from the Program, the Court shall issue an order to show cause notifying the parties of the Court's intent to terminate the respondent from the Program and the proposed reasons for the termination. Within ten (10) days of service of the Court's order to show cause, the parties in the written response, the Court shall hold a hearing on the order to show cause.

Eff. TBD
Source: New

RULE 806. CONFIDENTIALITY.

- (a) ~~A respondent's participation in the Pilot Program and the fact that the respondent has either successfully completed the Program or has been terminated from the Program shall be public.~~ **The fact that a respondent is currently in the Program and any pleadings or orders filed in the proceeding shall be public.**
- (b) All information concerning the nature and extent of the respondent's treatment is absolutely confidential and shall not be disclosed to the public absent an express written waiver by the respondent.
- (c) **Documents that are lodged with the Court, including but not limited to, stipulations as to facts and conclusions of law, the Court's written statement of proposed disposition, the respondent's nexus statement, the briefs of the parties on the recommended disposition and reports from the Lawyer Assistance Program regarding the respondent's compliance with Lawyer Assistance Program requirements shall not be public unless and until they are ordered filed by the Court upon the respondent's successful completion of the Program or the respondent's termination from the Program.**
- (d) **Notwithstanding the provisions of subdivision (c) above, the Court may provide the Office of Probation and/or the Client Security Fund with such documents as may be necessary to enable the Office of Probation to monitor the respondent's compliance with LAP and Program requirements and to enable the Client Security Fund to process any claim for**

reimbursement made against the Fund. Notwithstanding the provisions of subdivision (c) above, the Office of the Chief Trial Counsel may provide the complainant with (i) a written summary of the status of the disciplinary proceeding against the respondent, including the fact that the respondent is seeking to participate or has been accepted for participation in the Program; and (ii) a written summary of the acts of misconduct relating to the complainant that have been admitted by a respondent who has been accepted into the Program.

Eff. September 1, 2002.

Source: New

RULE 806Z. REVIEW

No decision or order of the Pilot-Program Judge may be reviewed by the State Bar Court Review Department except as follows:

(a) The decision of the Pilot-Program Judge to admit the respondent to the Pilot-Program or to deny the respondent admittance to the Pilot-Program shall be reviewable only pursuant to Rule 300.

(b) The decision of the Pilot-Program Judge to terminate a respondent from the Pilot-Program or to deny the State Bar's motion to terminate the respondent from the Pilot-Program shall be reviewable only pursuant to Rule 300.

Eff. September 1, 2002.

Source: New

~~Rule 807. SUNSET PROVISION~~

~~Rules 800 through 806 shall remain in effect only until October 1, 2004, and as of that date are repealed, unless otherwise those rules are re-adopted or amended prior to that date or the sunset date provided in this Rule is extended.~~

~~Eff.: December 7, 2002. Revised: January 1, 2004.~~

~~Source: New~~