Diversion Program Policy Statement

The purpose of the diversion program is to protect the public by improving the professional competency of and providing educational, remedial and rehabilitative programs to members of the Massachusetts Bar through operation of the following goals:

A. the early identification of attorneys whose violations of the Massachusetts Rules of Professional Conduct arise from his or her practice administration or organization, health or competence but do not raise questions about the lawyer's moral fitness or integrity;
B. the prevention of similar ethical violations by altering the circumstances that caused the violation, and
C. reducing recidivism and affording bar counsel more time in addressing serious disciplinary matters.

The diversion program is not an alternative to discipline in cases involving serious misconduct that will likely result in public discipline or misconduct that cannot be addressed by diversion.

Guidelines

1. Referral to the Program Prior to the commencement of a disciplinary hearing, bar counsel may offer diversion to a respondent if bar counsel concludes that the professional misconduct was not the result of any willful or dishonest conduct, the basis of the misconduct or incapacity is subject to remediation or resolution through alternative mechanisms, and the public interest and the welfare of the respondent's clients and prospective clients will not be harmed if the respondent complies with the program. Diversion may include, but is not limited to, participation in fee arbitration; law office management assistance; evaluation and treatment for substance abuse; psychological evaluation and treatment; medical evaluation and treatment; monitoring of the respondent's practice or accounting procedures; continuing legal education; passing the multistate professional responsibility examination; or other programs appropriate to the circumstances.

2. Participation in the Program As an alternative to discipline, bar counsel may offer a respondent participation in a diversion program in cases where there is little likelihood that the

respondent will harm the public during the period of participation, where bar counsel can adequately supervise the conditions of diversion, and where participation in the program is likely to benefit the respondent and accomplish the goals of the program. A matter generally will not be diverted when:

(1) the presumptive form of discipline in the matter is likely to result in public discipline;
(2) the misconduct involves misappropriation of funds or property of a client or a third party;
(3) the misconduct involves conviction of a crime as defined by Rule 4:01, sec. 12;
(4) the misconduct involves violence;
(5) the misconduct resulted in or is likely to result in actual injury (loss of money, legal rights, or valuable property rights) to a client or other person, unless restitution is made a condition of diversion;
(6) the respondent has been publicly disciplined in the last three years;
(7) the matter is of the same nature as misconduct for which the respondent has been disciplined in the last five years;
(8) the respondent has previously been referred to a diversion program for similar misconduct;
(9) the misconduct involves dishonesty, deceit, fraud or misrepresentation; or
(10) other facts and circumstances render diversion inappropriate.

3. Diversion Agreement If a respondent agrees to an offer of diversion, the terms of the diversion shall be set forth in a written agreement. The agreement shall specify the program(s) to which the respondent shall be referred, the general purpose of the diversion, the manner in which compliance is to be monitored, and any requirement for payment of restitution or costs. The agreement will also require an admission to facts, and it will identify the rules violations bar counsel claims are implicated. The diversion agreement may include a full or partial waiver of confidentiality, as appropriate, to allow reporting of any alleged breach of the contract.

4. Effect of Diversion Upon the respondent's entry into the diversion program(s), the underlying matter shall be stayed pending full compliance with the terms and conditions of the diversion agreement. Diversion shall not constitute a disciplinary sanction.

5. Effect of Successful Completion of the Diversion Program If bar counsel determines that the respondent has successfully completed all requirements of the diversion program, bar counsel shall close the file.

6. Effect of Failure to Complete Diversion Agreement and Use in Subsequent Proceedings If a respondent fails to fully complete all requirements of the agreement, bar counsel may elect to modify the agreement or terminate the agreement and reopen the disciplinary file. If the disciplinary file is reopened, the diversion agreement shall be admitted in evidence at any subsequent disciplinary hearing. All reports and submissions from providers participating in the diversion agreement are admissible at any subsequent disciplinary hearing on the underlying complaint(s). Failure to complete the agreement shall be admissible in evidence and may be considered as a matter of aggravation when imposing a disciplinary sanction. A breach of the agreement by the respondent may also constitute a separate disciplinary offense if the facts and circumstances so warrant.

The diversion agreement shall also be admitted in evidence in subsequent proceedings on later complaints in which the respondent is alleged to have committed misconduct, as evidence bearing upon the issue of sanction to be imposed if misconduct is found.

7. Effect of Rejection of Recommendation for Diversion If a respondent rejects a diversion recommendation, the matter shall proceed as otherwise provided in S.J.C. Rule 4:01 and the Rules of the Board of Bar Overseers.

8. Confidentiality Files and records resulting from the diversion of a matter are subject to S.J.C. Rule 4:01, section 20. Upon approval of an agreement, bar counsel shall inform the complainant that a diversion agreement has been entered into, that the disciplinary proceeding has been stayed, and that, if the respondent complies with the agreement, the proceeding will be terminated.