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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE:)	
)	
UTAH STATE BAR)	PETITION TO AMEND RULES
)	OF LAWYER DISCIPLINE AND
)	DISABILITY TO CREATE A
Petitioner.)	DIVERSION RULE
)	

The UTAH STATE BAR, by and through its General Counsel, files this Petition to amend the Rules of Lawyer Discipline and Disability (“RLDD”) to create a new diversion rule. Diversionary procedures, when appropriately applied in the attorney disciplinary process, can provide a suitable alternative to more traditional resolutions after an informal complaint has been filed. The purpose of the new rule is to provide for an educational, remedial and rehabilitative program in select cases for members of the Bar facing traditional attorney discipline. Certain safeguards are included in the proposed rule to help ensure that the opportunities afforded are properly offered and are not abused. The lawyer facing discipline, the complainant and future clients will benefit from the assistance provided to an attorney in the new diversion process. A copy of the proposed rule, which would be incorporated in the RLDD, is attached as Exhibit “1”.

BACKGROUND

Approximately two years ago, the Commission authorized a subcommittee to explore the possibility of instituting a formal diversion program within the current attorney discipline process.¹ The Commission believed that a well-crafted rule and formal program would be a helpful enhancement to the current disciplinary process. The subcommittee undertook research, including consultation with the OPC, and went through a number of rule drafts as the concept continued to be discussed. The diversion route is intended to help rehabilitate and educate lawyers who admit to less serious violations of ethical rules. Diversion applies to misconduct with a likely sanction less than a suspension from practice. When respondent lawyers complete their prescribed diversion program, typically the complaint is dismissed and no discipline is imposed. Programs and resources may include such things as: ethics training, law office management consultation, substance abuse treatment, counseling, trust accounting and law office management courses and legal education courses. The Commission voted to approve the attached rule at a regularly scheduled meeting on March 8, 2007.

Diversion programs are not a novel concept. Currently, 21 states have some form of a diversion process.² An attached e-mail from the Washington State Bar Association distributed through the National Organization of Bar

¹ The Bar's Office of Professional Conduct (OPC) in conjunction with the Ethics and Discipline Committee has, in fact, intermittently treated a small number of cases not deemed appropriate for traditional discipline as suitable for diversion. The first diversion case appears to have been recorded in 2000.

² States with diversion programs (western states appear in italics) are: *Arizona, California, Colorado*, the District of Columbia, Florida, Hawaii, Kansas, Louisiana, Maryland, Michigan, Missouri, New Hampshire, New Jersey, *Nevada*, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, *Washington* and Wisconsin.

Counsel LISTSERV reflects a summary of information relating to these programs (Exhibit “2”). Key points include: (1) what entity administers the program; (2) what entity determines diversion eligibility and what criteria are used; (3) whether a diversion contract is employed; (4) and what are the most significant issues involved in a diversion process. In comparing pertinent information from the various jurisdictions set forth in the summary, it appears that Utah’s proposed program is similar to those already in existence. For example, out of the 21 states that have a diversion program only two apparently do not utilize a contract to impose conditions on the respondent.

THE PROPOSED RULE

The formal diversion program, as outlined in the attached proposed rule, has two primary components: (1) a written agreement between the respondent and the chair of a new Diversion Committee; and (2) referral to appropriate programs and resources. Requirements for the diversion contract are found under subsection (f) (1) of the rule. The contract will be specifically tailored to the respondent’s individual circumstances. Among other things, the agreement must contain the terms and conditions of the respondent’s plan as well as necessary terms providing oversight in order to ascertain if there has been compliance. The contract terminates either when it is fulfilled or there is a material breach. If the latter occurs, disciplinary proceedings may be instituted, resumed or reinstated under section (j) (2) of the proposed rule. Section (j) (3) contains a review process if an alleged material breach is disputed by the respondent. The review process also provides for a hearing before the Diversion Committee. If the terms of the contract are fulfilled, under section (j) (1) successful completion of the

contract is a bar to any further disciplinary proceeding based on the same allegations.

Eligible participants in the new diversionary process will have had no prior imposition of attorney discipline within the previous three years and more importantly, the misconduct must have been of a “less serious nature” as stated in section (c) of the rule. For instance, in order to be considered for diversion, the lawyer must not have misappropriated client funds or engaged in dishonesty, deceit, fraud or misrepresentation. The misconduct expressly must not be of such a nature as to warrant a suspension or disbarment which would prohibit the lawyer from practicing law. Under section (a) of the rule, referral to appropriate programs would include such things as fee arbitration, monitoring, or psychological and behavioral counseling. Any other resource or corrective course of action not specifically listed under this section may also be considered in devising an appropriate plan to address the respondent’s situation. Finally, respondents are responsible to pay an initial fee of \$250 along with a \$50 monthly fee to help offset the costs in the administration of the program. See section (k). There is a provision to waive these fees upon a hardship request, the validity or appropriateness of which will be determined by the chair of the Diversion Committee.

For comparison purposes, copies of other states’ diversion rules are attached at Exhibit “3”. Utah’s proposed rule most closely resembles Washington’s rule although certain provisions have been incorporated from other jurisdictions as well.

THE DIVERSION COMMITTEE

Just as the proposed rule will be included in the RLDD because it is designed to address a complaint against a practicing lawyer, the new Diversion Committee is more like the Court's Ethics and Discipline Committee whose members operate under RLDD provisions. Therefore, the Bar respectfully asks the Court to constitute a committee similar to that of the Ethics and Discipline Committee with its membership appointed by the Court, rather than the President of the Bar.

CONCLUSION

The new diversion rule will be a welcome addition in the disciplinary process. It carefully allows alternatives where traditional methods of addressing misconduct do not attempt and are largely unsuccessful in reaching the underlying problems. For the reasons set forth above, the Bar requests the Court approve the proposed diversion rule as attached to this petition.

Dated this ____ day of April, 2007.

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