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BEFORE THE ABA JOINT COMMISSION TO EVALUATE THE ABA MODEL CODE OF JUDICIAL CONDUCT

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On behalf of the New York State Lawyer Assistance Trust, I am here to offer comment in support of the new text recommended by the ABA Commission on Lawyer Assistance Programs for inclusion in the ABA Model Judicial Code as that suggested text relates to a judge=s responsibility in dealing with attorneys or judges who may be demonstrating behaviors consistent with impairment:

*Whenever a judge has reliable information that the performance of a lawyer or of another judge may be impaired by drugs or alcohol or other mental, emotional or physical condition, the judge shall take or initiate corrective action, which may include a [confidential] referral to an appropriate lawyer or judicial assistance program.*

The Lawyer Assistance Trust is a program of the unified court system here in New York State, which was created in November 2002, upon the recommendation of Chief Judge Judith Kaye=s Commission on Alcohol and Substance Abuse in the Legal Profession. Their Action Plan noted that

A[t]housands of people in New York=s legal community are suffering from the effects of the diseases of alcohol and substance dependency. They include lawyers, judges and law students. These diseases cause enormous personal suffering to those who are afflicted, their families, their professional colleagues, and their friends. They pose obvious risks to law clients, litigants, and the general public. But these diseases are treatable. Addiction may not necessarily be prevented, but the consequences can be avoided, or at least, mitigated through early intervention, and the suffering caused by addiction may be assuaged.@

Studies in this field of chemical dependency have indicated that at least 10% of all persons in the United States are chemically dependent, but experts agree that this number is higher for attorneys. A Washington study found problem drinking among 18 to 25% of lawyers, and a similar study in Arizona confirmed these numbers among young attorneys. The Washington study also found that 26% of the lawyers had used cocaine at some point in their lives, compared with 12 percent of the general population.

Judges should be able to recognize and address any alcohol and substance dependency problems that they or their colleagues face. Further, judges should be able to recognize and assist the lawyers who appear before them with any alcohol or substance dependency manifestations.

But you might ask Ahow will the judges be able to recognize these problems in their colleagues or in the lawyers who appear before them?@

Here in New York, the New York State Bar Association has had a lawyer assistance program in effect for more than 14 years, and during that time, its Director and the volunteers who are associated with the program have presented numerous substance abuse educational programs for the judiciary, lawyers and law students. Likewise, in the last five years, the Association of the Bar of the City of New York has retained a lawyer assistance program director, who provides outreach and educational services for those in the New York City-metropolitan area. They join with the eleven county-based lawyer assistance committees which are comprised of hundreds of volunteers throughout the state of New York who assist with outreach and networking to identify lawyers or judges with problems arising from alcohol or drugs or depression.

In the nearly three years of its existence, the Lawyers Assistance Trust has worked to bring statewide leadership and resources to address this issue of alcohol and substance abuse in the legal profession. The Trust has funded projects to educate the bench and the bar about this serious health issue that has existed in relative secrecy in years past.

It is the intention of the Chief Judge of the State of New York that the problem should no longer be dealt with in secrecy and no longer dealt with punitively.

As Chief Judge Judith Kaye has stated,

A[t]he legal profession B like the general population B includes individuals impaired by alcohol and drug abuse. However, unlike the general population, lawyers, judges and court personnel are invested with a unique public trust. How to assist these individuals, and how to protect the public against breaches of that trust, have long challenged our profession. . . . Empirical data show that a significant portion of disciplinary proceedings involve substance abuse. Nor are attorneys the only ones in the justice system who neglect professional obligations due to addiction. The Commission on Judicial Conduct has over the years disciplined judges for incidents stemming from alcohol and substance abuse. And we know that the statistics don=t tell the whole story of problems attended to privately B lawyer to lawyer, judge to judge, friend to friend.@

The Trust has recommended the adoption of court rules governing attorney discipline that, under certain circumstances, permit diversion of attorneys with alcohol or drug abuse problems to a court-approved monitoring program. Successful completion of the program may result in dismissal of the charges. Diversion to a monitoring program is not available if the underlying grounds for the disciplinary charges would result in disbarment or suspension. To date, the Fourth Department has adopted such rules, and the other three Departments have them under consideration. A majority of the four departments of the Appellate Division in New York already actually do refer attorneys to both of the Lawyer Assistance Programs which perform such conditional monitoring as a way to deal with such cases.

While we understand that the proposed paragraph of the Model Judicial Code does not deal with the diversion from discipline of judges who may be exhibiting the affects and the behaviors related to alcoholism and/ or chemical dependency, the Trust further recommends that, the New York Commission on Judicial Conduct consider the adoption of a comparable policy to permit diversion to treatment and monitoring for judges in less serious instances of judicial misconduct which are attributable to instances of alcohol or chemical dependency.

This ABA Joint Commission has the unique opportunity to create a model provision encouraging diversion to a judicial assistance program for judges who may be impaired by drugs, alcohol or other mental, emotional or physical condition and who may have had a complaint made against them which, under general guidelines for discipline, would not require removal or a public sanction.

We believe that the Model Judicial Code as well as the Commission on Judicial Conduct should strive for the optimal response in dealing compassionately with this serious problem, while protecting the public; and we, at the Lawyer Assistance Trust, support, at the minimum, the insertion of the text recommended by the Commission on Lawyer Assistance Programs.

At the San Antonio hearing, you expressed concern that the judge who reports an attorney or judge to a lawyer assistance program may have met the proposed rule=s requirements, but the lawyer assistance program has no additional reporting requirement.

The proposed language does not use the term "report" but asks the judge to make a determination based on reliable information whether some action should be taken, including "referral" to an appropriate lawyer or judge's assistance program.

Since a referral to a lawyer or judge assistance program at that stage would not necessarily be related to a disciplinary complaint, the rule here in New York is that such referral as well as the outcome of such referral is entirely confidential pursuant to Judiciary Law Section 499. The Lawyers Assistance Trust is not in favor of changing the confidentiality of such referrals.

With respect to the Diversion Rules, as adopted by the Fourth Department and proposed to the Second Department, as well as the practice in effect in the First Department, if an attorney is referred to a monitoring situation after a complaint has been made to the Grievance or Disciplinary Committee, all confidentiality protections MUST BE WAIVED by that attorney in order for him/her to be diverted for treatment.

The Diversion Rule provides that once the attorney is diverted to a monitoring program sponsored by a lawyer assistance program, that lawyer assistance program must confirm to the Appellate Division whether or not the attorney has successfully completed the monitoring program. If the attorney fails to complete the monitoring program, the underlying disciplinary proceedings may be resumed. We see no reason why a diversion program for judges could not operate in a similar fashion, *i.e.*, providing for a waiver of confidentiality with regard to treatment as a consequence of being diverted from any disciplinary action by the Judicial Conduct Commission.

A point was raised about whether a monitor would impede the independence of the judge's discharge of judicial responsibilities.

Assuming the judge was back on the bench after a concentrated period of treatment but still undergoing "monitoring" to ensure the continuance of a drug- and alcohol-free tenure on the bench, the monitor only monitors the use of addictive substances and the on-going treatment for those problems. The monitor does not monitor what the judge may be doing in the courtroom, or how the judge is doing his/her job. That is the Supervising Judge's responsibility. So there is no *actual*, nor should there be any *perceived*, interference with the judge's ability to exercise independence in judicial decision making.

Another point was raised whether your Commission should be concerned about the fact, or even the perception, that a judge was getting help. Our response to that concern is the same as it would be to any major health issue a judge may have to deal with during the judge's career -- basic human concern for a suffering individual's health and their very life should not give us pause when trying to assist someone in the judiciary who is afflicted with an addiction problem.

What would be the typical length of referral to the program, and must the judge take a leave of absence during the treatment period?

First, typically an affected person is sent to an in-patient detoxification program, for health reasons this is best handled by professionals. Second, the person may or may not be referred to an in-patient rehabilitation program which is typically 30 days but could be shorter or longer. After that, there is a period of aftercare and sometimes meeting attendance to ensure compliance with the treatment program which always includes complete abstinence from drugs and alcohol.

With reference to questions about a leave of absence, we think a judge should be afforded a generous period of sick leave as would any judge exhibiting other medical difficulties like heart attack or stroke, broken bones or serious infectious diseases. Alcoholism and any chemical dependency problem is considered a disease by the American Medical Association and should be treated as such.

A concern was expressed with respect to the subjectivity among judges, whose view of impairment might differ.

In life, we all have subjective differences in making judgments about others. In the world of referral to assistance programs, since it is all confidential, if the individual referred turns out not to have an addiction problem, then further steps by an assistance program come to a halt. My experience in this arena is that most individuals err on the side of caution if someone with a perceived problem has usually demonstrated fairly clearly over a period of time that such a problem exists before anyone is willing to do something about it.

How do you respond to the complaining party during that time?

Again, we need to delineate the two aspects of Judges Assistance. If there is a referring party, *i.e.*, a judge referring an individual to an assistance program because of a perception of an alcohol problem, there is only a concerned party, not a complaint.

If there has been a formal complaint of unprofessional conduct, we think that the complaining party will be informed to the same degree the disciplinary body would inform in other situations where a complaint does not amount to conduct for which removal or public sanction is warranted.

You asked in San Antonio to what extent will other judges be inhibited or affected by the possibility of discipline, if they don't report somebody who they may perceive as being impaired?

All Judges, of course, must to be guided by their own consciences. This determination that a colleague needs help is an unavoidably personal and subjective determination. No one can know what someone is thinking, or how one may be interpreting the actions of an attorney or another judge.

Therefore, it is our position that someone failing to refer would not be subject to discipline; insofar as the wording of the proposed rule states that a judge shall take or initiate corrective action, this requirement to take action is, we think an ethical and moral one, but not one that would subject a non-reporter to potential discipline: that would be using the proposed rule as a sword rather than as a shield. We think that the intent of the proposal is that it is primarily a shield; in other words, the party being referred for evaluation of a substance abuse problem would have no recourse against the judge since the judge shall take some corrective action, the defense to any complaint by an affected party is that there is a requirement to take action by the judicial conduct code.

Both forms of referring -- referring prior to any apparent disciplinary action, and referring after a complaint has been made -- must be seen as compassionate intervention in the affected judge's career. In the first instance, referring prior to any apparent degradation of work, the person referred is given an opportunity to come to terms with her/his disease (should there be disease) before loss of professional competence.

In the second instance, referring after a complaint is made, the person referred is given an opportunity to avoid the harsh consequences of most complaints, by complying with a program of treatment.

You further noted that a lawyer has an obligation to withdraw or not to commence representation if his or her ability to represent a client is materially impaired by a physical or mental condition, and you asked whether there is a similar obligation on the part of a judge not to serve or act in their judicial role if they were similarly impaired?

Whether one's right to remain employed is based on a "fitness for duty" determination or only on manifestation of incompetence is of no consequence in this intervention process. In either case, treatment can render moot the reasons for termination.

Thank you for this opportunity to give testimony with respect to the position of the New York State Lawyer Assistance Trust on the proposed wording in the Model Code of Judicial Conduct and thank you also for allowing us to clarify some of the issue raised in the San Antonio hearing.