

Rule 2.19

Disability and Impairment

New York State Lawyer Assistance Trust

Hon. Sarah L. Krauss

May 7, 2004

In text of its testimony at the Commission's Fourth Public Hearing, the New York State Lawyer Assistance Trust ("NYSLAT") offers comment in support of the following text recommended by the ABA Commission on Lawyer Assistance Programs for inclusion in the Model Code of Judicial Conduct relating to a judge's responsibility in dealing with attorneys or judges who may be demonstrating behaviors consistent with impairment. (Additions underlined.)

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.

NYSLAT notes that the proposed language does not deal with the diversion from discipline of judges who may be exhibiting the effects and the behaviors related to alcoholism and/or chemical dependency and believes it should do so. In NYSLAT's view, the 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.

NYSLAT responds to several of the Commission's concerns, as follows:

- The Commission's concern expressed at the Second Public Hearing (2/6/04 in San Antonio, TX) 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.

NYSLAT notes that, as adopted in NY, 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. NYSLAT sees no reason why a diversion program for judges could not operate in a similar fashion, i.e., by providing for a waiver of confidentiality with regard to treatment as a consequence of being diverted from any disciplinary action by a judicial disciplinary authority.

- The Commission raised the issue of whether a monitor would impede the independence of a judge's discharge of judicial responsibilities.

NYSLAT points out that a monitor only monitors the use of addictive substances and the on-going treatment for those problems, but not the judge's activities or performance in the courtroom. Thus, there should be neither actual nor perceived interference with the judge's ability to exercise independence in judicial decision making.

- The Commission raised the issue of whether it should be concerned about the fact, or even the perception, that a judge is receiving assistance.

In NYSLAT's view, this concern is the same as that for any major health issue a judge may face during the judge's career, and that basic human concern for a suffering individual's health and his or her life should not hinder efforts to assist a judge who is afflicted with an addiction problem.

- The Commission inquired about the typical length of referral to the program, and must the judge take a leave of absence during the treatment period?

NYSLAT provides specific information about the nature and timeline for assistance programs.

- The Commission inquired about the length of judicial leaves of absence.

In NYSLAT's view, a judge should be afforded a generous period of sick leave, as in the case of other medical difficulties, such as 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.

- The Commission expressed concern about the potential for judges' differing, subjective, views of what constitutes "impairment."

It is NYSLAT's experience that most individuals err on the side of caution in such circumstances and that action is not taken unless a person with a perceived problem has demonstrated fairly clearly over a period of time that such a problem exists.

- The Commission inquired about the nature and timing of a response to the complaining party.

If assistance takes place upon the action of a "referring party," there is not complaint. If assistance takes place upon the bringing of a formal complaint of unprofessional conduct, NYSLAT believes 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.

- The Commission asked to what extent a judge may be face discipline for failure to report someone perceived as impaired.

In NYSLAT's view, a judge who fails to refer should not be subject to discipline under the language of the proposed rule states that a judge "shall" take or initiate corrective action. NYSLAT views the requirement to take action as ethical and moral, but not capable of subjecting one who does not report to discipline.

- The Commission 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 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.

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