

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
APPROVAL OF THE ARIZONA) Administrative Order
ATTORNEY DIVERSION) No. 2010 - 127
GUIDELINES)
)
_____)

The Arizona Supreme Court has approved amendments to the Rules of the Supreme Court governing the attorney discipline system, which will become effective January 1, 2011. Pursuant to revised Rule 56(b), Rules of the Supreme Court, the Board of Governors of the State Bar have developed attorney diversion guidelines for approval by the Supreme Court. The Board of Governors of the State Bar has recommended approval of the attached Arizona Attorney Diversion Guidelines. Approval of the Diversion Guidelines now is necessary to allow implementation of the Guidelines on January 1, 2011.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the Court approves the attached Arizona Attorney Diversion Guidelines, which shall become effective January 1, 2011.

IT IS FURTHER ORDERED, pursuant to revised Rule 56(b), that the Diversion Guidelines shall be posted on the State Bar and Supreme Court websites and that effective January 1, 2011, Bar Counsel, the Attorney Discipline Probable Cause Committee, the Presiding Disciplinary Judge, a hearing panel, or the Court may offer diversion to an attorney, based upon the adopted Diversion Guidelines.

Dated this 10th day of December, 2010.

FOR THE COURT

REBECCA WHITE BERCH
Chief Justice

ARIZONA ATTORNEY DIVERSION GUIDELINES

Adopted by the Arizona Supreme Court

Effective January 1, 2011

I. The Purpose of the Diversion Program

The purpose of the Diversion Program is to protect the public by improving the professional competency of attorneys through educational, remedial and rehabilitative programs so that attorneys modify practices, procedures or other conduct that does not comply with the Arizona Rules of Professional Conduct. Diversion is intended as an alternative to a disciplinary sanction. The primary goals of the Diversion Program include the early identification of attorneys who have violated the Arizona Rules of Professional Conduct and whose cases involve minor misconduct. The conduct is generally related to poor office management procedures or personal issues that bear on the lawyer's ability to adequately discharge his/her duties to the client, court or profession. Through the Diversion Program the attorney is provided education or assistance to address specific conduct in an effort to prevent similar ethical violations from reoccurring.

In order to educate members of the State Bar about the Diversion Program, the State Bar shall advise all Respondents of the existence of these guidelines and make them available to all members upon request. The Diversion Guidelines will also be posted on the State Bar and Supreme Court websites.

II. Cases Eligible for Diversion

In all cases, the decision to utilize the Diversion Program will depend on the nature of the conduct and all relevant circumstances. Cases involving minor misconduct including neglect, poor administration or organization, poor practice skills, alcohol or drug addiction or abuse, or some other deficiency in professional capabilities or competence may be suitable for Diversion and attorneys whose problems are of the type addressed in Diversion will be encouraged to participate.

Bar Counsel, the Attorney Discipline Probable Cause Committee ("Committee"), the Presiding Disciplinary Judge, a Hearing Panel, or the Court will review the following factors to determine if Diversion is appropriate:

1. The lawyer engaged in professional misconduct and the basis for the misconduct is susceptible to remediation or resolution through alternative programs;

2. There is little likelihood that the attorney will harm the public during the period of participation;
3. Bar Counsel can adequately supervise the conditions of Diversion;
4. The attorney is likely to benefit by participation in the program.
5. The presumptive range of discipline in the particular matter appears likely to result in a reprimand or less.
6. The attorney has maintained a cooperative attitude toward the discipline investigation and proceedings.

III. Cases Not Eligible for Diversion

A matter generally will not be diverted under this Rule when:

1. The presumptive form of discipline in the matter appears likely to be greater than a reprimand;
2. The misconduct involves dishonesty, deceit, fraud, misrepresentation, theft, self-dealing, lack of respect for the legal system or like kinds of conduct;
3. The misconduct involves a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.
4. The misconduct involves the knowing or intentional misappropriation of funds or property of a client or a third party, or gross or sustained mismanagement of the lawyer's trust account;
5. The misconduct involves the attorney's commitment of family violence including domestic violence involving non-family members or non-married partners;
6. The misconduct was intentional or knowing and 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 where appropriate;
7. The matter is of the same nature as misconduct for which the attorney has been disciplined or participated in another diversionary or voluntary program in the last three years, unless there are extraordinary circumstances that justify a waiver of this exception;

8. The Respondent has a disciplinary history or other open cases that would suggest that the Respondent's participation in the Diversion program would not be appropriate or in furtherance of the goals of the program;
9. The Respondent is currently disbarred, suspended or on disability status;
10. The Respondent is not an Arizona attorney. An exception may be made if the Respondent resides in Arizona and has a continuous presence and law practice in an area of law where it is ethically permitted under the Rules;
11. Participation by the attorney is not likely to benefit the attorney and further the goal of protection of the public.

IV. Resolution through the Diversion Program

The option of resolving a case through the Diversion Program should be considered by Bar Counsel as early as possible in the disciplinary process. Diversion is available however, at any stage of the disciplinary process if it presents an appropriate resolution of the matter.

Bar Counsel will review the case including the charge, any response and/or any reply that has been received or any other information received. Bar Counsel will consult the *American Bar Association Standards For Imposing Lawyer Sanctions* (1991) and relevant Arizona case law. The purpose of this review is to determine whether, under all of the circumstances set out by rule or these guidelines, it appears that Diversion can reasonably be expected to cure, treat, educate or alter the Respondent's behavior or otherwise address the underlying cause of the misconduct so as to minimize the risk that the Respondent will commit the same or similar acts of misconduct in the future. In appropriate cases, Bar Counsel shall recommend diversion.

A Respondent's participation in Diversion is optional and will generally be by written agreement between the State Bar and the Respondent where the terms of Diversion will be established by Bar Counsel to address the specific issues presented. Otherwise, Diversion may also be by order of the Committee, the Presiding Disciplinary Judge, Hearing Panel or the Court.

V. Rejection of Diversion

At the intake stage, the Respondent has the right to refuse an offer of Diversion. If an offer of Diversion is made and refused, the matter may proceed to a full screening investigation pursuant to Rule 55, Ariz. R. Sup. Ct. If the Committee enters an Order of Diversion after a screening investigation, the Respondent has the right to object to the order and proceed under Rule 55(4)(B) Ariz. R. Sup. Ct.

An order of Diversion after a hearing on the merits is final, subject to the same rights of appeal as any other lawyer discipline case.

VI. Conditions of Diversion

A. Terms and Conditions of Diversion

1. The Terms and Conditions of Diversion shall be tailored to address the problem(s) underlying the particular charge of misconduct and any circumstances specific to the Respondent or the misconduct. Because the nature of the problems causing the misconduct may vary greatly, the need for flexibility in creating the Terms and Conditions is paramount.
2. Identification of the problem(s) giving rise to the misconduct in question is essential to the success of the Diversion Program. Accordingly, the State Bar, the Committee, the Presiding Disciplinary Judge or a Hearing Panel may request a Respondent to submit to an examination or assessment to assist in identifying or solving the problem(s), particularly if substance abuse, mental health problems or law office practices seem to be involved. Costs associated with such examination or assessment will generally be assessed to Respondent and payable as part of the Terms and Conditions of Diversion.
3. State Bar programs which may be utilized through the Diversion Program include:
 - a. The Membership Assistance Program (MAP) focuses on mental health issues, personal and emotional issues, substance abuse or addiction and other related issues;
 - b. The Law Office Management Assistance Program (LOMAP) targets the management of law office practices and procedures;
 - c. State Bar Trust Account Ethics Enhancement Program (TAEEP) focuses on the lawyer's trust account obligations;
 - d. State Bar Ethics Enhancement Program (EEP) provides a general overview of a lawyer's ethical obligations;
 - e. State Bar Fee Arbitration Program where disputes over legal fees between a lawyer, client or third person may be resolved;
 - f. State Bar Peer Review Program where a committee member is assigned to discuss with Respondent the behavior or particular conduct involved in the case; and,

- g. Continuing Legal Education (CLE) programs that target specific education areas that can be utilized through the diversion program.
4. The Terms and Conditions of Diversion may include participation in one or more of these programs listed in Section 3 and/or the appointment of a practice monitor, peer support monitor and/or mentor, as the circumstances warrant. In addition, if the facts warrant, other programs or terms not under the direct auspices of the State Bar may be utilized.
 5. In every case, whether Diversion is by agreement or by order, the Terms and Conditions will be in a writing signed by the Respondent, Bar Counsel and a State Bar program representative, if appropriate. Generally, the Terms and Conditions should require that the diverted Respondent pay all costs and expenses incurred in connection with Diversion, including the costs and expenses incurred in obtaining an expert or professional evaluation or assessment. Terms of payment may also be included in appropriate cases as determined by the imposing entity.
 6. The Terms and Conditions will specify that a material breach of the Terms and Conditions renders the agreement void, and may also constitute a separate disciplinary offense if the facts and circumstances so warrant.
 7. The Terms and Conditions will include a full or partial waiver of confidentiality, as appropriate, to allow reporting of any alleged breach of the contract.
 8. The Terms and Conditions may include a provision authorizing an examination of Respondent's trust account to ensure compliance with all applicable ethical rules.
 9. Any practice monitor, peer support monitor or mentor must report to Bar Counsel any material breach of the Terms and Conditions of Diversion.
 10. The Terms and Conditions of Diversion may require the Respondent to be evaluated or assessed by MAP, LOMAP, or other professional, and comply with reasonable recommendations resulting from that evaluation or assessment. The recommendations may add terms and monitoring not specified in the original Terms and Conditions. The entity vested with jurisdiction over the matter shall determine issues of the reasonableness of terms and/or monitoring.
 11. Participation in diversion is confidential pursuant to Rule 70, Ariz. R. Sup. Ct., unless disclosure is otherwise authorized by the Rules.

B. Practice Monitors

Terms and Conditions of Diversion may require the appointment of a practice monitor to ensure that the Respondent complies with the Terms and Conditions. Primary responsibility for locating the practice monitor rests with the Respondent.

All practice monitors must be approved by the State Bar, agree to participate in a State Bar orientation program, and agree to comply with any reporting requirements imposed under the Terms and Conditions.

C. Peer Support Monitors

Terms and Conditions of Diversion may require the appointment of a peer support monitor to ensure that the Respondent maintains sobriety or complies with Terms and Conditions of Diversion. Primary responsibility for locating the peer support monitor rests with the Respondent, but the MAP representative will endeavor to maintain a pool of individuals who have agreed to serve in this capacity.

All peer support monitors must be approved by the State Bar, agree to participate in a State Bar orientation program, agree to meet with or maintain contact with the MAP representative as deemed appropriate by the MAP representative, and agree to comply with any reporting requirements imposed under the Terms and Conditions.

D. Mentors

Terms and Conditions of Diversion may require the appointment of a mentor from whom a Respondent can seek advice and counsel about specific types of issues, for example, conflicts of interest. A mentor's role is limited to providing assistance in the specific areas specified in the agreement and does not extend to monitoring the Respondent's practice.

All mentors must be approved by the State Bar, agree to make himself or herself available to a Respondent regarding issues specified in the Terms and Conditions, and agree to any reporting requirements imposed under the Terms and Conditions.

VII. Material Breach of Terms and Conditions

Upon determining there is reason to believe that the Respondent has breached one or more of the Terms and Conditions of Diversion, Bar Counsel shall send Respondent or Respondent's counsel a notice advising of the breach of the Terms

and Conditions with an opportunity to respond to the alleged breach and/or to come into compliance with the Terms and Conditions.

If Respondent comes into compliance with the Terms and Conditions or otherwise provides a satisfactory explanation for the reasons the breach occurred, Bar Counsel may determine that no further action is required.

If Respondent does not come into compliance with the Terms and Conditions or provide a satisfactory explanation for the breach, Bar Counsel may open a new screening file alleging a breach of the Terms and Conditions of Diversion and may seek additional terms or a sanction if appropriate.

Such alleged additional violations may be processed as a new charge against the Respondent but the parties are not precluded, in the appropriate case, from incorporating new matters into the existing Terms and Conditions of Diversion and modifying the terms of the agreement as appropriate. Modifications to the Terms and Conditions of Diversion shall be approved by the entity vested with jurisdiction over the matter.

VIII. Termination of Diversion

Diversion is terminated upon completion of the Terms and Conditions, or a finding of material breach of the agreement.

Terms and Conditions of Diversion may include a provision that will allow for early termination. In all cases of early termination, the burden is on the Respondent to establish that termination is appropriate.

Upon successful completion of the Diversion Program, the underlying charge or charges shall be dismissed. Rule 71, Ariz. R. Sup. Ct. governs the records relating to dismissed charges.