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Is Diversion a Viable Alternative to Traditional Discipline?: An Analysis of the First Ten Years in Arizona¹

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The State Bar of Arizona, although the first regulatory entity to develop a “cafeteria plan” of diversion programs as alternatives to traditional lawyer discipline, is certainly not the first to struggle with the issue of lawyers whose lack of management acumen results in dissatisfied clients and expensive prosecution of minor misconduct. Professional regulation of lawyers has been studied and reported for the past 30 years, beginning with the publication in 1970 of *Problems and Recommendations in Disciplinary Enforcement* (known as the “Clark Report”)², produced by the Special Committee on Evaluation of Disciplinary Enforcement, whose chair was former U.S. Supreme Court Justice Tom Clark (American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, 1970). The Clark Report identifies Problem 16 (of 26) as “No informal admonitory procedures to dispose of matters involving minor misconduct” (Clark Report, 1970). The report summarizes it this way:

The disciplinary agency that has no alternative but to dismiss a complaint or prosecute a formal disciplinary proceeding will often decide to dismiss. Prosecution of a formal disciplinary proceeding predicated on an instance of minor misconduct is unduly harsh, wastes the agency’s limited manpower and financial resources on relatively insignificant matters, and, particularly in large urban areas, overburdens the court having disciplinary jurisdiction...

The dismissal of complaints involving minor misconduct, necessitated by the limited alternatives available to the disciplinary agency... subjects the profession to criticism by the public. The complainant who knows

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that the accused attorney has been guilty of misconduct but is unaware of the limited alternatives available to the disciplinary agency may conclude that the dismissal evidences the profession’s disinterest in effectively policing its members (Clark Report, 1970).

The Clark Report concluded that “the accused attorney may misinterpret the dismissal of the complaint against him as an indication that the disciplinary agency is either ineffective or disinterested.” The Committee also expressed concern that dismissal of numerous minor matters may “immunize the attorney guilty of repetitive acts of minor misconduct from substantial discipline.” The fourth and final concern was that disciplinary counsel may suffer loss of enthusiasm from experiencing the frustration of “finding themselves unable to dispose properly... of minor misconduct” in the face of no alternatives.

The Committee additionally noted that disciplinary systems also have “inadequate provision for dealing with attorneys incapacitated by reason of mental illness, senility or addiction to drugs or intoxicants.” Although the Committee promoted establishment of informal admonitions, the concept of “diversion” was not raised in the report’s 193 pages. The report did, however, recommend additional ancillary services, including fee arbitration and client security funds to protect clients harmed by the dishonesty of their lawyers. The State Bar of Arizona has implemented both of those recommendations in the intervening years.

Two decades after issuance of the Clark Report, another group brought together by the American Bar Association, the Commission on Evaluation of Disciplinary Enforcement (known as the “McKay Commission”)³ adopted recommendations, including alternatives to traditional, puni-

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tive disciplinary options. In February 1992, after Arizona's Rules of Supreme Court were changed to expand the range of disciplinary options and the diversion programs were in their infancy, the American Bar Association House of Delegates adopted the McKay Commission's recommendations (McKay Commission Report, 1992). The concept of lawyer practice assistance as an alternative to traditional disciplinary proceedings for minor misconduct clearly emerges in the 149-page report of the McKay Commission. Advocating that the Court should adopt procedures and develop criteria for "minor misconduct, minor incompetence, or minor neglect," the Commission envisions:

If disciplinary counsel determines that a matter meets the criteria established by the Court, disciplinary counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, or any other non-disciplinary proceedings authorized by the Court (McKay Commission Report, 1992).

In the model proposed by the McKay Commission, disciplinary counsel may resume disciplinary proceedings if the lawyer fails to comply with the terms of the agreement. If the lawyer complies with the terms, however, "... disciplinary counsel shall dismiss the disciplinary proceeding" (McKay Commission Report, 1992). The report sets out guidelines developed by the Florida Supreme Court, providing examples of conduct that would not be regarded as minor and would not be eligible for diversion, such as dishonesty, misrepresentation, deceit or fraud. Arizona's Diversion Guidelines, even after undergoing revision in 1994, include the same exceptions.

John T. Berry, formerly Chief Bar Counsel of the Florida Bar before assuming that position with the State Bar of Arizona, served as a member of the McKay Commission. He also has traveled extensively throughout the United States over the past 20 years on behalf of the ABA. He said he has reviewed lawyer regulation systems and made recommendations in at least 20 states and two foreign countries (personal e-mail communication, August 18, 2002). Mr. Berry, who is now Executive Director of the State Bar of Michigan, in August 2002 reflected on his longtime experience with lawyer regulation throughout the United States and the effort to carry on the tradition in Michigan:

Most input is anecdotal, especially in ethics school but it is my belief that it [diversion] reduced significantly recidivism and I know there were dramatic changes in attitude. ... I believe strongly in trying to help lawyers in the minor offenses ... and to hold lawyers to high accountability for serious offenses. ... Frankly, they [diversion programs] make sense.

Education rather than punishment only for minor offenses that come from bad office management or dealing with anger management or stress just makes common sense.

The Lawyer Regulation Handbook,⁴ published by the American Bar Association Joint Committee on Lawyer Regulation in 1999, uses as examples the Law Office Management Assistance the State Bar of Arizona and the Florida Bar's Law Office Management Advisory Service. The same two state bars are used as a focal point for discussion of "alternatives to discipline/diversion" (Joint Committee on Lawyer Regulation, 1999). Arizona was also cited for its fee arbitration and mediation programs.

Recommendation Four of the handbook suggests that jurisdictions set up Lawyer Practice Assistance Committees, the membership of which should include at least one-third nonlawyers. The Joint Committee recommends that, in addition to handling cases referred by disciplinary counsel or the Court, the Lawyer Practice Assistance Committee should provide assistance to lawyers voluntarily seeking management help (Joint Committee on Lawyer Regulation, 1999).

One of the roles outlined for the Assistance Committee is to assess the extent of the problem and create a plan to improve skills or systems. Another role envisioned for the Assistance Committee is to "recommend the creation of needed programs to bar associations or the state's highest court."

The Conference of Chief Justices at an August 1996 conference passed a resolution

authorizing development of a national study and plan of implementation to expand the parameters of lawyer regulation. Subsequently, the ABA's Center for Professional Responsibility and the Conference of Chief Justices co-sponsored a conference at Rancho Bernardo, California for state supreme court justices. Attendees were encouraged to instigate action to improve the disciplinary system in their own jurisdictions. The National Action Plan, first presented in published form in 1999, was developed in 2001 as a result of the interactive Rancho Bernardo conference (Conference of Chief Justices, 2002).⁵ The efforts did not stop there, however. In the spring of 1999, the National Conference on Public Trust and Confidence in the Justice System was held in Washington, D.C.; conference sponsors were the Conference of Chief Justices, the ABA, the Conference of State Court Administrators, and the League of Women Voters. Support for the conference was also provided by the National Center for State Courts.

Attendees at the D.C. conference electronically cast their votes for the most troublesome issues in improving public trust and confidence. "Winners" were poor customer relations with the public and the "role, compensation and behavior of the bar in the justice system" (Conference of Chief Justices, 2002). The dialogue that began at Rancho Bernardo was continued in March 2001 at a conference at Del Mar, California, at which a draft of the Implementation Plan was

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presented to justices from 35 jurisdictions. Suggestions from the Del Mar conference were incorporated into the final Implementation Plan, which was adopted in August 2001.

The National Action Plan includes establishment of state bar-sponsored law office management programs as one element of improving lawyer competence. The Plan states that state bar programs should "support efforts to improve law office efficiency" by providing assistance with "daily law office routines" and providing monitoring of lawyers referred from the discipline system. The Plan also calls for "required" participation in a law office management program as a recommended way of handling appropriate minor misconduct.

The State Bar of Arizona's "cafeteria plan" of options for lawyer regulation, rather than being a direct response to the Clark and McKay Commission recommendations, began a decade ago with the realization that lawyers whose minor ethical misconduct triggered the admonition to "go forth and sin no more" didn't know how. Hon. Harriet L. Turney, who in 1991 was Chief Bar Counsel of the State Bar of Arizona, noted that, without tools and tips, lawyers whose management processes were creating problems in their practice "didn't know how to be different." (personal communication, May 30, 2002). Until the State Bar found a way to break the cycle, said Judge Turney, lawyers and their clients would continue to suffer the consequences of such missteps.

Before an attorney serves as President of the State Bar's policy-making body, the Board of Governors (Board), he or she spends a year acting as Probable Cause Panelist (Panelist). The Panelist reviews a summary of every disciplinary charge received during his or her one-year term and determines whether the recommendations made by the Bar's professional legal staff, known as bar counsel, are appropriate based on analyses of facts and law. Prior to her tenure as Panelist – in fact, prior to her career as a widely known and respected immigration attorney — Roxana C. Bacon, President of the State Bar of Arizona in 1991, was a social worker. As a recent graduate working with just-arrived immigrants in San Francisco, Ms. Bacon learned that education was the best tool to achieve change (personal communication, July 9, 2002).

Prevention, not punishment, was the theme espoused by Judge Turney, Ms. Bacon, and others instrumental in the establishment of a "diversion" system to channel lawyers who received informal charges that appeared to stem from what Bacon calls "acute disorganization syndrome" into educational and remedial programs. Hon. Margaret H. Downie, Senior Bar Counsel in 1991 and later Chief Bar Counsel, noted that the appeal of a diversion program for practitioners is that "Lawyers don't want to get bar complaints" (personal communication, June 20, 2002). The appeal of diversion for the State Bar's Office of Lawyer Regulation (OLR), according to Ms. Bacon, is that it allows them to reduce the "waste of disciplinary time" spent on

minor matters and focus on the few "black hearts" who deliberately abuse the public. Ms. Bacon identified the "cafeteria plan" as a key goal for her year as President.

The first step in exploring possibilities for diversion was to convene a "fireside chat" with the "frequent flyers," the term coined by OLR to refer to those attorneys who continually received complaints based on the same types of management-related conduct. Typical complaints included failure to return clients' telephone calls promptly and failure to pursue client matters with appropriate diligence. These lawyers, said Ms. Bacon, were "not bad people, but they were drowning."

When invitations to the chat with the President went out, lawyers appeared eager to share their frustrations with managing their law practices. Most practiced alone or in small firms, where resources are often limited, time short, and deadlines many. The attendees were, according to Ms. Bacon, "good people who cared about their clients." She said they were eager, even though not compelled to attend, to share their ideas about a program that would help them to "make money *and* serve their clients." The problem was, Judge Turney noted, that lawyers "did not know how to be businessmen or women."

Moving forward a decade: The State Bar of Arizona spent nearly \$3.8 million in 2001 investigating the professional conduct of lawyers licensed in the state, prosecuting alleged violations of ethics rules, and monitoring compliance with terms imposed upon those whose conduct was sanctioned. That's about \$317 for each of the approximately 12,000 Arizona-licensed lawyers whose primary place of practice is within the state. There were twelve bar counsel that year, which works out to one for each 1,000 lawyers.

The number of inquiries about lawyers' conduct each year exceeds 6,000. That means that, on average, one of every two lawyers can expect to be the subject of a charge in any given year. Some do more than their share – a recently disbarred lawyer had in his career received nearly 200 charges. Each year, about 1,200 of those charges are actually investigated; the rest are dismissed either because the allegations, even if true, would not constitute a violation of the ethics rules or because a violation can't be proven by "clear and convincing" evidence, the standard of proof. The clients who filed these charges aren't happy with the dismissal.

A lawyer is relieved if a charge against him or her is dismissed without investigation. He or she may regard the charge as an anomaly and may go back to business as usual without taking any steps to prevent similar charges in the future. If the lawyer is paying attention, however, he or she will realize that where there's a disciplinary charge, there's a dissatisfied client not far behind. Many lawyers' client base depends on referrals from former satisfied clients. Those who are dissatisfied may discourage their friends, neighbors, and family members from becoming future clients. A decline in new clients means less revenue, which

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makes it harder for a lawyer to afford the right kind of staff. In turn, the lawyer may have to do more administrative and clerical duties him- or herself, which takes away from time available to communicate with clients and provide excellent service. That makes it more likely that future clients will complain. The cycle went on in that manner for Arizona lawyers for many years. With the coming of diversion programs, however, lawyers received tools, techniques, and tips, not just admonitions.

Each year, one in ten Arizona lawyers must participate in a lengthy process of prosecution. Lawyers who are represented face sometimes hefty attorney's fees, as well as loss of income while they are defending against the charge. If a lawyer is suspended, he or she also loses all the potential revenue that could have been earned during the time he/she is out of practice. It can be hard to get new clients after a lengthy suspension, so still more may be lost. It's a difficult and expensive process for all involved.

For serious disciplinary charges, it can be more than a year before the final hearing has been held and the public has at last been protected from that lawyer's unethical conduct by a sanction. Some charges are very serious indeed – in 2001, according to the Office of Lawyer Regulation Annual Report, 12 lawyers were disbarred, 40 lawyers were suspended, 30 lawyers were censured, 30 were informally reprimanded, and 58 were placed on probation.

All the reasons for instituting diversion programs sound logical. Dues-paying lawyers and the State Bar, however, exist in the real world. In that world, products and services have to be more than logical – they have to be affordable and they have to accomplish what they were established to do. To date, most evidence about the success of diversion in reducing disciplinary charges and helping lawyers be better businesspeople has been anecdotal, not empirical.

Prevailing opinion in the early years was that diversion was making a difference in repeat offenses, although it was regarded as too limited in its scope. For example, lawyers who had significant experience in practice, as well as those who had several similar charges pointing to a pattern of conduct or whose charges involved conflicts of interest, were ineligible. The original guidelines assumed that experienced lawyers could not benefit from management assistance because they should know better. Further investigation and experience taught otherwise. A committee developed new Diversion Guidelines and the Supreme Court adopted amendments to its rules concerning diversion. The revised guidelines included widened eligibility to include lawyers who had been in practice for significant periods of time. The committee also recognized that conduct stemming from poor management or impairments will continue until corrective action is taken, resulting in a pattern of conduct.

Subjective consensus and anecdotal evidence indicate diversion is still working from various perspectives, includ-

ing decreasing repeat disciplinary offenses, improving efficiency and profitability of lawyers' practices, and, in keeping with the ultimate goal, providing better service to clients. The latter, it is hoped, will assist in chipping away at some of the negative feelings of the public about lawyers that numerous surveys in recent years have identified.

A prominent Phoenix lawyer who frequently represents attorneys charged with ethical violations, Bryan Cave partner Mark I. Harrison, believes the likelihood of recidivism is increased among lawyers who go through the traditional disciplinary process. Even a minor infraction, says Mr. Harrison, is an "assault on the persona" and can be "emotionally debilitating" (personal communication, July 16, 2002). The process, he says, makes lawyers more alienated and less likely to initiate preventive procedures in their practice. He agrees with the first diversion proponents that many lawyers have a "lack of training and no clue about management." He favors wider use and a wider variety of diversion programs. Harrison opines that about 70 percent of informal charges could appropriately be diverted rather than prosecuted.

To obtain an understanding of LOMAP diversion, it is important to know what types of offenses are currently considered diversion-eligible and what is required of a lawyer who agrees to participate in a diversion program. LOMAP personnel play no role in deciding whether a lawyer who has received a disciplinary charge ("Respondent") is eligible for diversion; that decision is made by the assigned bar counsel, often after consultation with other bar counsel. Bar counsel may, however, ask the LOMAP Director to advise whether terms that will be beneficial and subject to adequate monitoring can be developed to deal with particular problems.

After bar counsel makes a determination that the matter is eligible under the guidelines for diversion and that a program can likely be developed to address problems that appear to have created the circumstances that resulted in the informal charge, a lawyer is invited to participate. For a lawyer who successfully completes the terms of diversion, the underlying charges are dismissed, and eventually expunged; if the lawyer receives another charge, the dismissed diversion cannot be used as a prior sanction in considering aggravation and mitigation. If the lawyer declines or does not qualify for diversion, on the other hand, the sanction that results stays on the lawyer's record forever and can be considered as an aggravating factor in future disciplinary proceedings.

If a lawyer decides to explore diversion, LOMAP personnel schedule an appointment to conduct an assessment at the lawyer's office of the relevant management areas. The topics covered in the assessment are determined by bar counsel based on the specific violations found in the matter. Bar counsel sometimes requests a "full" assessment; this means that all management procedures, policies, and systems that apply to the practice will be reviewed. The lawyer's staff may be requested to attend part of the meet-

[M]any lawyers have a "lack of training and no clue about management."

ing or to provide information. The respondent lawyer must always be present and a portion of the meeting includes only the lawyer and the LOMAP Director. Even if the lawyer delegates many tasks in the office to support staff, it is important that he or she know what procedures and processes are used and whether they are consistently and properly utilized. A lawyer may delegate duties; however, he or she always remains responsible for supervising to the extent necessary to assure that all tasks are completed timely and correctly. Supervision and training is of particular significance in the financial operations of the practice, especially maintenance of the trust account, which involves safekeeping funds that belong to clients or third parties.

Although bar counsel has recommended diversion as an appropriate resolution, one purpose of the on-site LOMAP assessment is to determine whether there are other problems or violations that indicate the matter may not be suitable for diversion. This situation most commonly arises in charges involving the lawyer's trust account.

Again, the LOMAP Director does not make a decision whether the additional information unearthed in the assessment disqualifies the lawyer from a diversion program. Instead, the Director prepares an "exception memo" outlining the findings in detail. Bar counsel makes a decision on eligibility after reviewing that memo. If the lawyer no longer qualifies, the matter is returned to bar counsel for further processing. If bar counsel determines that diversion remains an appropriate resolution, the process continues in the normal fashion.

Following the assessment, the LOMAP Director recommends specific terms, which are reviewed and approved or modified by assigned bar counsel. The terms the LOMAP Director recommends are based on the type and severity of management problems found during the assessment. If the Respondent is represented, his or her counsel must sign the diversion agreement to indicate that he/she "agrees as to the form and content." Only the Respondent is bound by the actual terms of the agreement.

LOMAP personnel assist with the implementation of the contract terms during the period of diversion and also verify compliance. In some cases, an experienced lawyer serves as a practice monitor, meeting with the participating lawyer regularly to assist with management concerns and compliance with the program. Monitors are particularly helpful with lawyers relatively new to practice or those who practice alone and do not have regular opportunities to get feedback from or brainstorm with more experienced practitioners. Many participants and monitors establish a mutual support system that continues long after the diversion program ends. A number of monitors have served in that role several times. LOMAP personnel, usually the Director, also meet the participant two or three additional times during the diversion.

During the past decade, only 17 files have been removed from diversion for a "material breach" of the lawyers' diver-

sion agreements. All others, with the exception of those for four lawyers who died during the course of their diversion program, were successfully completed. The term of diversion for several was extended, either because he or she was experiencing difficulty in making the necessary changes to procedures or systems, or because a subsequently received charge was referred to diversion and added to the first. The LOMAP Director reports apparent breaches to bar counsel, but does not make any determination of whether the breach will be considered "material." That determination is not made by bar counsel, either, although he or she determines whether the possible breach is serious enough that it must be reported to the Panelist, who is the review officer. If the matter is removed from diversion, bar counsel may recommend that another sanction be issued for the original informal charge or may prosecute the breach as a separate ethical violation.

Since the initiative of the diversion programs, the State Bar of Arizona has received national attention for its innovations in providing alternatives to traditional discipline for lawyers and has consulted with numerous other jurisdictions about the benefits of diversion and how to establish appropriate programs. What the State Bar of Arizona has not been able to provide, however, is hard evidence that diversion programs work in reality, not just in theory.

In keeping with directives established by the Board of Governors and its executive staff, the State Bar of Arizona emphasizes effective use of its members' money.

The organization is engaged in an ongoing effort to provide services of value to Arizona lawyers with minimal dues increases in upcoming years. As part of that effort, all programs offered by the organization are regularly reviewed based on their cost and effectiveness. Success of many programs can be measured simply by increases in the number of members participating. The effectiveness of LOMAP and other programs offered as diversion from disciplinary proceedings, however, should essentially be measured by "non-occurrences." LOMAP cannot be deemed to be successful as a diversion program simply because more lawyers are referred and participate. The goal of LOMAP's assistance, whether offered on request or upon referral, is to enable lawyers to implement better systems and practices and to teach them the skills necessary to avoid future disciplinary charges or malpractice claims stemming from poor management. One measurable indicator of success, then, would be a decrease in the number and severity of subsequent disciplinary charges.

Beyond tracking recidivism, optimal program planning calls for analysis of factors that may contribute to success, which vary among individual participants and programs. These factors include which systems and procedures were targeted, the length and intensity of the program, and the level of monitoring required or offered. Data about the number and type of complaints a lawyer received before diversion is relevant to determine which lawyers are good candi-

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dates for successful LOMAP diversion, based on types of disciplinary history and/or types of offenses. Armed with this data, LOMAP staff can determine the best structure and length of programs, as well as the appropriate level of supervision, to provide the most benefit to individual lawyers and the highest degree of protection to the public.

The study discussed in this article, which is based on data from the time the State Bar of Arizona's Law Office Management Assistance Program was established in April 1992 through April 2002, is, to the best of the researcher's knowledge, the only study of its kind to date. Although the Arizona "cafeteria plan" offers more alternatives than management assistance, the scope of this study is limited to lawyers whose diversion involved services offered by the Law Office Management Assistance Program. The researcher collected and analyzed data for all of the 661 charges that resulted in referral to a LOMAP diversion program, involving 448 separate lawyers. More than 100 variables were tracked. The researcher utilized several statistical procedures, including correlation and regression analysis, to determine outcomes of the program. The researcher also interviewed a number of people, including founders of LOMAP, a lawyer who represents other lawyers in disciplinary proceedings, and a former Chief Bar Counsel who has evaluated lawyer regulation systems in more than 20 states and two foreign countries.

This study's purpose was to evaluate the impact diversion has had on Arizona's lawyer regulatory system to date, as well as its potential for future impact. This information will help State Bar executives with the decisions about programs and resources they must make. It is also intended to give bar counsel and LOMAP personnel concrete data that can be used to make diversion programs more suited to the needs of the participants and the protection of the public. The study also will help other jurisdictions that are considering starting diversion programs, or jurisdictions that have programs but want to make them more effective in accomplishing their goals.

This study is also for the lawyers who will in future years be faced with the decision whether to invest their time and money in a diversion program – or, better yet, to proactively seek management assistance before the envelope arrives from the State Bar announcing that "An inquiry has been received concerning your professional conduct . . ."

The researcher elected to use a census approach rather than sampling because the entire population of interest is relatively small when compared to the approximately 19,000 lawyers licensed to practice law in Arizona. About 12,000 of those who are licensed are in active practice with their primary business location in the state. Archival data was collected and analyzed for all lawyers who received informal charges that resulted in Orders of Diversion from April 1, 1992, through April 30, 2002. Data collection began on May 1, 2002. A total of 661 files have been referred to diversion since 1992, representing 448 separate lawyers.

Other lawyers within the general attorney population were not considered relevant to this study because the intent was to determine changes in the number and severity of subsequent complaints among lawyers who were charged with conduct of a similar nature. It can be assumed that lawyers who were not referred to LOMAP diversion within the applicable time frame either received no charges that were serious enough to warrant a referral to diversion or received charges of a type not eligible for diversion, such as conduct involving dishonesty or self-dealing.

Within the population of interest, there are five groups: 1) attorneys who successfully completed a diversion program; 2) attorneys who entered into a Memorandum of Understanding (MOU) but breached its terms; 3) attorneys who declined to participate in diversion; 4) attorneys who did not respond to the Order of Referral to Diversion; and 5) attorneys who are currently participating in a LOMAP diversion program. The control group consists of the "untreated" attorneys, those who for any reason did not successfully complete a diversion program. The "treated" group comprises lawyers who did successfully complete a diversion program. Currently participating lawyers are included only to give a complete demographic picture of all referred lawyers.

If the archival data had indicated there was no appreciable difference – whether statistically significant or not — in the number or seriousness of subsequent charges between lawyers who had completed a diversion program and those who had not,

there would have been no justification for further exploration of aspects of a diversion program that serve as the best indicators of success in the program itself and in avoiding future charges. The study would have been redirected to determine why the programs are not effective and to identify modifications that might improve their effectiveness. Since the archival research indicated visually apparent improvements in both the number and severity of subsequent informal charges, the focus at that point shifted to factors most relevant to success.

The State Bar maintains the official record of all licensed attorneys; its membership database includes demographic information on each lawyer, including name of the lawyer and the law firm (if applicable), contact information, date of birth, year of first admission in any jurisdiction, year of admission in Arizona, other jurisdictions in which the lawyer is licensed, other languages in which the lawyer is proficient, up to three self-designated areas of practice, certified specializations, and status. Status refers to the current state of a lawyer's licensure: he or she may be active, inactive, over 70 years of age (with no further requirement to pay dues), suspended for administrative reasons, suspended based on disciplinary action, or involved in formal disciplinary proceedings. This information is all available to the public, as well as to all members of the State Bar staff.

In addition to the membership database, the State Bar maintains other specialized databases that are accessible only to

The study also will help other jurisdictions that are considering starting diversion programs.

those staff members with a need to know that information. The Office of Lawyer Regulation has a separate database that is blocked from access by anyone other than those directly involved in the disciplinary process. This database contains both information that is available to the public and information that is not public. In addition, the Attorney/Consumer Assistance Program (A/CAP), which acts as the central intake entity for all ethical charges, has a separate database to track inquiries received in that department and their disposition.

A complicating factor in collecting data concerning diversion participation is that all charges that have been dismissed, including those dismissed following diversion, are eligible under the Supreme Court rules for expunction after three years. Those charges are treated as if they never existed. Expunction of records is relevant to this study for two reasons. The first relates to the lack of database records for charges filed against lawyers on diversions successfully completed more than three years ago. Since LOMAP diversion began slightly more than ten years ago, there are many lawyers who completed their program more than three years ago. In addition, the expunction rule is relevant because, if a lawyer completed a diversion program more than three years ago and the record has been expunged, he or she has a "clean slate" for purposes of charges filed after expunction. Therefore, if a lawyer maintained a charge-free record for three years after completing diversion and received a charge after expunction, the new charge has not been counted as recidivism because the prior diversion no longer officially exists. To collect and analyze data over a long enough period time to adequately assess the impact and implications of diversion on the lawyer regulation system, however, it is not feasible to disregard diversions that were completed more than three years ago.

Electronic information concerning the specifics of a lawyer's diversion requirements, such as topics assessed, length of the program, whether the terms were limited or extensive, and whether a practice monitor was required, have been maintained by LOMAP since 1992. In addition, the researcher has, since assuming the position of LOMAP Director in July 1993, maintained additional records used to compile statistics each month for the Board. The researcher collected demographic information from the membership database, and, with the assistance of OLR staff, compiled data on number and type of charges and their dispositions maintained in the discipline database.

In addition, the researcher collected information concerning specific terms of individual lawyers' diversion programs from a case management software program maintained by LOMAP. Once a file regarding a dismissed matter is three years old, the physical file is expunged; the only information available after expunction is summarized data found in the LOMAP case management program. Physical files for matters that had not yet been expunged were reviewed if documents in their entirety were needed to clarify details of an attorney's program requirements.

The following tables and graphs provide an overview of the demographic characteristics of the population of inter-

est, divided into three groups: 1) all lawyers referred to LOMAP diversion, whether they participated or not; 2) lawyers who successfully completed LOMAP diversion – these lawyers constitute the "treated" group; and 3) lawyers who failed to successfully complete LOMAP diversion, either because they declined, did not qualify based on the severity of their offenses, or breached the terms of diversion – these lawyers constitute the control group.

Categories are:

- Misc/Dismissal – informal charges that are either dismissed without investigation (miscellaneous) or if investigation does not yield clear and convincing evidence of a violation
- IRP – Informal Reprimand and Probation – the level of disposition above diversion
- Probation – sanction that may be recommended either during informal or formal proceedings
- Censure – formal sanction
- Suspension – prohibited from practice for a specified period
- Interim suspension – prohibited from practice effective immediately, when potential for public harm is considered likely, while investigation or prosecution of charges continues
- Fee Arbitration – voluntary arbitration between lawyer and client concerning fee issues; if both parties agree to arbitrate, the process results in a binding award that can be reduced to judgment
- Peer Review – voluntary peer counseling to address unprofessional or uncivil, but not unethical, conduct

Years in Practice and Disciplinary History of All Lawyers Referred to LOMAP Diversion

ALL LAWYERS REFERRED TO LOMAP DIVERSION APRIL 1992 THROUGH APRIL 2002				
	MIN	MAX	MEAN	MEDIAN
Years in Practice	1.00	54.00	17.21	16.00
Misc/Dismiss Before	0.00	68.00	9.71	7.00
IRP Before	0.00	7.00	0.54	0.00
Probation Before	0.00	7.00	0.22	0.00
Censure Before	0.00	7.00	0.21	0.00
Suspension Before	0.00	7.00	0.09	0.00
Int Susp Before	0.00	0.00	0.00	0.00
Fee Arb Before	0.00	17.00	1.64	1.00
Peer Review Before	0.00	4.00	0.23	0.00

**Years in Practice and Disciplinary History of
All Lawyers Who Successfully Completed
LOMAP Diversion**

SUCCESSFULLY COMPLETED LOMAP DIVERSION APRIL 1992 THROUGH APRIL 2002				
	MIN	MAX	MEAN	MEDIAN
Years in Practice	1.00	54.00	17.53	16.00
Misc/Dismiss Before	0.00	61.00	9.39	7.00
IRP Before	0.00	7.00	0.51	0.00
Probation Before	0.00	7.00	0.21	0.00
Censure Before	0.00	7.00	0.21	0.00
Suspension Before	0.00	7.00	0.04	0.00
Int Susp Before	0.00	0.00	0.00	0.00
Fee Arb Before	0.00	17.00	1.71	1.00
Peer Review Before	0.00	4.00	0.26	0.00

**Years in Practice and Disciplinary History of All
Lawyers Who Failed to Complete LOMAP Diversion**

FAILED TO COMPLETE LOMAP DIVERSION APRIL 1992 THROUGH APRIL 2002				
	MIN	MAX	MEAN	MEDIAN
Years in Practice	2.00	47.00	16.43	16.00
Misc/Dismiss Before	0.00	68.00	11.10	6.50
IRP Before	0.00	5.00	0.65	0.00
Probation Before	0.00	4.00	0.32	0.00
Censure Before	0.00	6.00	0.30	0.00
Suspension Before	0.00	5.00	0.11	0.00
Int Susp Before	0.00	0.00	0.00	0.00
Fee Arb Before	0.00	15.00	1.60	1.00
Peer Review Before	0.00	2.00	0.20	0.00

**Subsequent Disciplinary Charges Filed Against All
Lawyers Referred to LOMAP Diversion**

ALL LAWYERS REFERRED TO LOMAP DIVERSION APRIL 1992 THROUGH APRIL 2002				
	MIN	MAX	MEAN	MEDIAN
Misc/Dismiss After	0.00	64.00	2.75	1.00
IRP After	0.00	5.00	0.20	0.00
Probation After	0.00	9.00	0.19	0.00
Censure After	0.00	5.00	0.07	0.00
Suspension After	0.00	10.00	0.14	0.00
Int Susp After	0.00	1.00	0.04	0.00
Fee Arb After	0.00	17.00	0.49	0.00
Peer Review After	0.00	4.00	0.04	0.00

**Subsequent Disciplinary Charges Filed Against Lawyers
Who Successfully Completed LOMAP Diversion**

SUCCESSFULLY COMPLETED LOMAP DIVERSION APRIL 1992 THROUGH APRIL 2002				
	MIN	MAX	MEAN	MEDIAN
Misc/Dismiss After	0.00	30.00	2.41	1.00
IRP After	0.00	2.00	0.07	0.00
Probation After	0.00	3.00	0.05	0.00
Censure After	0.00	3.00	0.04	0.00
Suspension After	0.00	2.00	0.01	0.00
Int Susp After	0.00	1.00	0.03	0.00
Fee Arb After	0.00	17.00	1.71	0.00
Peer Review After	0.00	1.00	0.02	0.00

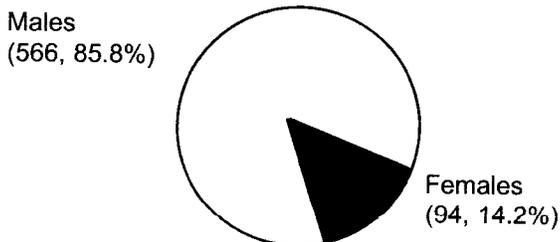
Subsequent Disciplinary Charges Filed Against Lawyers Who Failed to Complete LOMAP Diversion

FAILED TO COMPLETE LOMAP DIVERSION APRIL 1992 THROUGH APRIL 2002				
	MIN	MAX	MEAN	MEDIAN
Misc/Dismiss After	0.00	64.00	4.78	2.00
IRP After	0.00	5.00	0.63	0.00
Probation After	0.00	6.00	0.65	0.00
Censure After	0.00	5.00	0.18	0.00
Suspension After	0.00	10.00	0.57	0.00
Int Susp After	0.00	1.00	0.09	0.00
Fee Arb After	0.00	17.00	0.80	0.00
Peer Review After	0.00	4.00	0.10	0.00

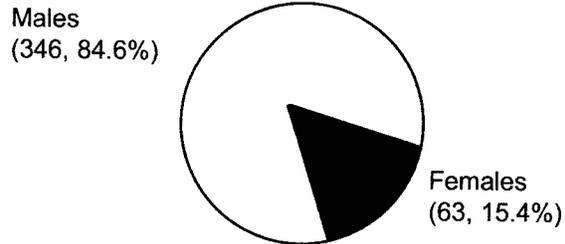
Data was also collected and analyzed based on factors such as gender, geographical location, and practice setting. Lawyers referred to diversion, on average, have been in practice slightly longer than the “average” years in practice found in *Economics of Law Practice in Arizona* (State Bar of Arizona, 2002). It is interesting to note that the above tables indicate that lawyers who succeeded in a diversion program had, on average, been in practice somewhat longer than those who failed to complete a diversion program.

The sample in *Economics of Law Practice in Arizona* indicates that 34 percent of active lawyers licensed and practicing in Arizona are female (State Bar of Arizona, 2002). In contrast, females constitute only 14.2 percent of all lawyers referred to diversion, a much smaller proportion than their representation in the general lawyer population. It is worth noting that, while 14.2 percent of informal charges that resulted in diversion were filed against female lawyers, females make up 15.4 percent of those who successfully completed diversion and only 10.6 percent of those who failed to complete their terms of diversion. Data analyzed for this study also indicate that female lawyers are referred to diversion earlier in their careers than their male counterparts.

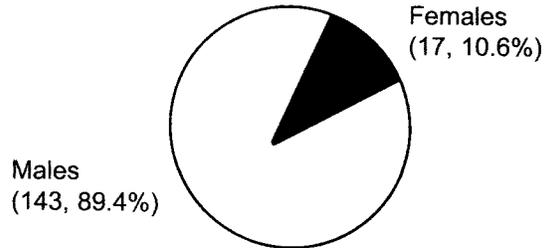
All Lawyers Referred to LOMAP Diversion, by Gender



All Lawyers Who Successfully Completed LOMAP Diversion, by Gender

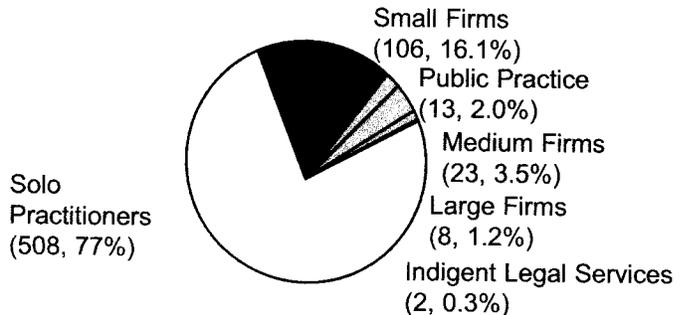


Lawyers Who Failed to Complete LOMAP Diversion, by Gender

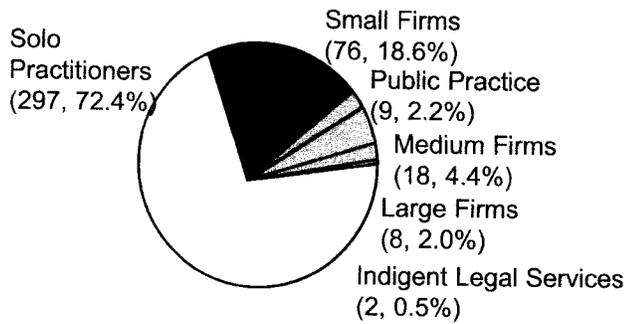


Sole practitioners heavily dominate referrals to diversion, comprising 77.0 percent of lawyers referred to diversion, followed, in decreasing order, by small firms, medium firms, large firms, public practice lawyers, and lawyers employed by indigent legal service agencies. A slightly smaller percentage of sole practitioners are included in data for lawyers who successfully completed a diversion program, with a larger percentage for all other categories. Among lawyers who failed to complete diversion — including those who declined to participate, those who did not qualify following assessment, and those who breached terms of diversion — the percentage of sole practitioners rose to 84.5 percent.

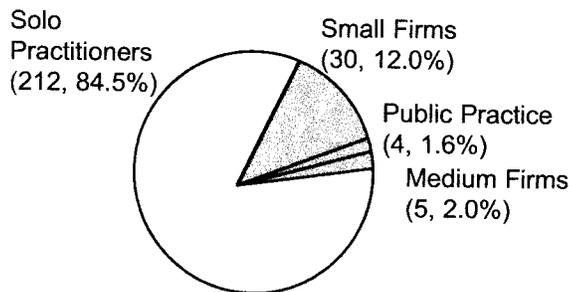
All Lawyers Referred to LOMAP Diversion, by Practice Setting



Lawyers Who Successfully Completed LOMAP Diversion, by Practice Setting



Lawyers Who Failed to Complete LOMAP Diversion, by Practice Setting



According to State Bar of Arizona Chief Deputy Bar Counsel Loren J. Braud (personal communication, September 2, 2002), sole practitioners may be more subject to disciplinary charges both because they have less support and back-up assistance from other lawyers and non-legal staff and because of the practice areas and clientele on which many of them focus. These often include representations of individuals or "consumers," who are more likely to file charges than companies in which employees are typically dealing with money other than their own.

Many sole practitioners work in the areas of family, criminal, or tort law. According to the Office of Lawyer Regulation Annual Report, those three practice areas generated the highest number of informal charges in 2001. The two most common complaints that resulted in informal charges in 2001 were lack of communication and lack of diligence. Communication and diligence can be particularly challenging for lawyers who practice alone and must spend time in court and meeting with clients. If they have no support staff, finding the time to return telephone calls and complete all the details of their work can be a daunting task.

Mr. Braud noted that many of the issues that lead to complaints by clients against lawyers in any practice setting or practice area involve access to necessary resources, including technological, financial and human ones. Time is one of the scarcest resources for many sole practitioners, he observed (personal communication, September 2, 2002). Many of the procedures and systems most frequently cited in informal charges can suffer from lack of resources, including time.

ALL LAWYERS WHO PARTICIPATED FREQUENCY OF PROCEDURES/SYSTEMS ASSESSED	
	Percentage of Assessments
Communication	67.0%
Diligence	64.4%
Conflicts of Interest	42.7%
Fees/Fee Agreements	41.1%
Billing	42.5%
Safekeeping Property	39.6
Trust Account	48.0%
Scope of Representation	39.8%
Declining/Withdrawing	38.7%
Supervision	41.6%
Competence	42.4%

The most impressive objective measure of diversion's effectiveness would be an observable and sharp drop in the frequency and severity of subsequent charges filed against lawyers who successfully completed a diversion program, as compared to those who were offered diversion and did not participate. Table 8 illustrates subsequent ethical misconduct for lawyers who completed diversion programs and those who did not. The difference in the frequency and severity of subsequent charges is visually obvious.

Percentage Difference in Receipt (Not Number) of Subsequent Disciplinary Charges Between Lawyers Who Successfully Completed LOMAP, Lawyers Who Did Not Receive Subsequent Charges Within Three Years of Completing LOMAP Diversion, and Lawyers Who Failed to Complete LOMAP Diversion

RECEIVED SUBSEQUENT CHARGES (ONE OR MORE)					
	Completed Diversion		Failed to Complete	Difference	
	All	No Charges 3 years	All	All	No Charges 3 years
Informal Charges	45.1%	18.1%	73.1%	+62%	+304%
Formal Charges	13.1%	2.4%	50.7%	+287%	+2012%
Disbarment	3.0%	0.0%	11.9%	+297%	-

Successfully completed diversion matters are eligible for expunction after three years. Thus, effectiveness of diversion can also be measured by the proportion of participants

who receive no further informal charges for at least three years after the diversion file is dismissed. The proportions of lawyers who received additional charges within three years and those who did not differ somewhat, but there is a much larger gap between both of those groups and lawyers who did not complete a diversion program.

Mean (Average) Number of Charges Received After Referral to or Completion of Diversion

SUBSEQUENT CHARGES		
Average Number Received by All Lawyers Referred to by LOMAP Diversion	Average Number Received by Lawyers with No Charges for at Least Three Years after Completion	Charges Received by Lawyers who Failed to Complete LOMAP Diversion
0.70050	0.078740	3.035700

Based on the data collected and analyzed, there is a statistically significant difference in the number and severity of subsequent disciplinary charges between lawyers who have completed a LOMAP diversion program and those who have not completed such a program. Empirical evidence indicates that natural variance – or chance – does not account for the finding that lawyers who have completed a LOMAP diversion program are significantly more likely to receive fewer and/or less serious subsequent disciplinary charges than lawyers who have not completed such a program.

Completion of diversion can affect other outcomes which, although less dramatic, have the potential to save time and resources for OLR and, thus, free more dues revenue for other uses. Even though miscellaneous matters are dismissed without investigation, A/CAP's time is involved in handling these files. Dismissal matters, although neither OLR nor the Respondent must participate after the initial investigation, also consume resources: Respondents must spend billable time preparing a response and may incur fees for representation; bar counsel must spend time investigating. Likewise, fee arbitrations and peer review referrals consume the time of both the referred lawyer and the volunteers. The following descriptive statistics address the relationship of diversion to these issues.

Descriptive Statistics for Disciplinary Charges and for Fee Arbitrations and/or Peer Review Referrals Received Before Order of Diversion or Order of Referral to Diversion

- Lawyers Who Had No Subsequent Charges Within Three Years Of Completing Diversion
 - Charges Before Order of Diversion
 - Minimum: 0.00 charges
 - Maximum: 9.00 charges

- Mean: 0.56 charges
- Median: 0.00 charges
- Fee Arbitrations and Peer Review Referrals Before Order of Diversion
 - Minimum: 0.00 events
 - Maximum: 14.00 events
 - Mean: 1.39 events
 - Median: 1.00 events
- Lawyers Who Successfully Completed Diversion (Whether or Not Additional Charges Occurred Within Three Years)
 - Charges Before Order of Diversion
 - Minimum: 0.00 charges
 - Maximum: 14.00 charges
 - Mean: 1.01 charges
 - Median: 0.00 charges
 - Fee Arbitrations and Peer Review Referrals Before Order of Diversion
 - Minimum: 0.00 events
 - Maximum: 18.00 events
 - Mean: 1.97 events
 - Median: 1.00 events
- Lawyers Who Did Not Complete Diversion
 - Charges Received Before Order of Referral to Diversion or Signing of Order of Diversion
 - Minimum: 0.00 charges
 - Maximum: 19.00 charges
 - Mean: 2.291 charges
 - Median: 1.00 charges
 - Fee Arbitrations and Peer Review Referrals Before Order of Referral to Diversion or Signing of Order of Diversion
 - Minimum: 0.00 charges
 - Maximum: 15.00 charges
 - Mean: 1.78 charges
 - Median: 1.00 charges
- Lawyers Who Breached Diversion Agreement
 - Charges Received Before Order of Diversion
 - Minimum: 0.00 charges
 - Maximum: 2.00 charges
 - Mean: 1.06 charges
 - Median: 1.00 charges
 - Fee Arbitrations and Peer Review Referrals Before Order of Diversion
 - Minimum: 0.00 events
 - Maximum: 3.00 events
 - Mean: 0.71 events
 - Median: 0.00 events
- All Lawyers Referred to Diversion (Excluding Open Files)

- Charges Received Before Order of Referral to Diversion or Order of Diversion
 - Minimum: 0.00 charges
 - Maximum: 14.00 charges
 - Mean: 1.11 charges
 - Median: 0.00 charges
- Fee Arbitrations and Peer Review Referrals Before Order of Referral to Diversion or Order of Diversion
 - Minimum: 0.00 events
 - Maximum: 18.00 events
 - Mean: 1.92 events
 - Median: 1.00 events

Although the quantities are relatively small, some diversion participants received either disciplinary charges, fee arbitrations, or peer review referrals related to conduct that apparently occurred (per the assumptions regarding timing of charges outlined previously in this report) during the term of their MOU. The maximum number of disciplinary charges relating to conduct that occurred during diversion was four for lawyers who had not received additional charges for at least three years after completing diversion. For all lawyers who completed diversion, whether or not they received additional charges within three years, the maximum number of charges during diversion also was four. The maximum number of fee arbitrations and/or referrals to peer review for the former group was four; for the latter group, the maximum number was five.

The average number of disciplinary charges for conduct during diversion for lawyers who went at least three years after completion without a charge was 0.06; the average number of fee arbitrations/peer review referrals was 0.13. For all lawyers who completed diversion, the average number of charges for conduct during diversion was 0.16; for fee arbitrations and peer review referrals, the average number for this group was 0.21.

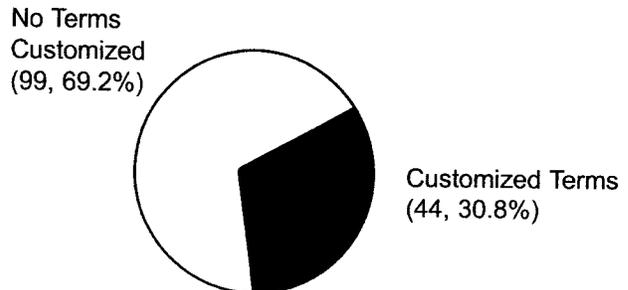
The receipt of informal charges for conduct during diversion does not appear to have any marked effect on whether or not lawyers receive informal charges within three years for conduct that occurred after completing the diversion program.

The impact of the extensiveness of terms imposed as part of the diversion agreement was also analyzed to determine which factors are relevant to success during and after diversion. As the following tables demonstrate, a greater percentage had extensive rather than limited terms among participants who received no subsequent charges within three years of successfully completing LOMAP diversion. The same was true for all lawyers who completed LOMAP diversion, whether or not they received additional charges within three years, although the proportion of participants who had extensive terms imposed was not as great. The use of customized terms does not appear to have any positive impact on the number or severity of subsequent disciplinary charges.

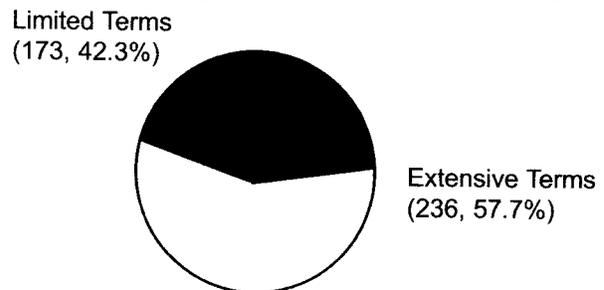
A graphical depiction of the proportions of extensive, limited, and customized terms for various groups is found in the following tables.

Extensiveness of Terms for Lawyers Who Had No Subsequent Charges Within Three Years of Successfully Completing LOMAP Diversion

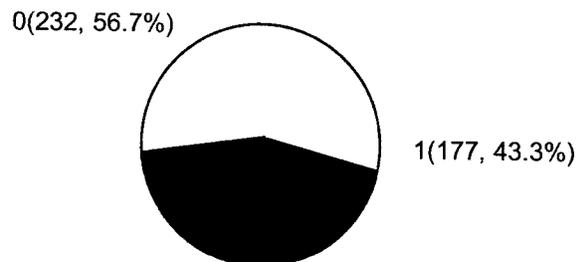
Use of Customized Terms for Lawyers Who Had No Subsequent Charges Within Three Years of Successfully Completing LOMAP Diversion



Use of Extensive Terms for All Lawyers Who Successfully Completed LOMAP Diversion



Use of Customized Terms for All Lawyers Who Successfully Completed LOMAP Diversion



The best reasons to train and support lawyers through diversion programs aren't found in the tables and graphs of this study. They can't be coaxed out by any number of fancy manipulations of computerized statistics software, and they aren't lurking in the data interpretation, either.

To learn the best reasons to train and support lawyers — and, by doing so, to give their clients experiences that won't leave them writing their own lawyer jokes — one must talk to the real visionaries of lawyer regulation and lawyer service. These are the people who found a mission more than a decade ago to fix problems, especially the day-to-day in-your-face kind, rather than commiserate about them. The founders and early supporters of the State Bar of Arizona's Law Office Management Assistance Program found a way to address the issues that eat away at the patience and pock-

etbooks of legal practitioners; in fact, they found a whole “cafeteria plan” of solutions. Perhaps the best reason to make a change in 1991 was that the old system of prosecuting minor offenses all the lengthy and expensive way to conclusion—meanwhile giving lawyers nothing to help them avoid the next time—wasn’t working.

Many of the benefits to lawyers from the various diversion programs springing up around the country can’t be measured quantitatively. It’s hard to put a value on bad things avoided and good will generated. However, bar associations and other entities charged with lawyer regulation operate in the real world, often the real not-for-profit world. Even in a unified bar, which can count on payment of dues from each practicing lawyer in the jurisdiction, there’s a finite amount of money to police those few who prey on their clients and to chip away at the poor public image of lawyers. Even mandatory bar associations strive to offer services that would make lawyers *want* to belong even if they weren’t required to do so. Every program and service needs to provide value to members at an affordable cost to the association. That’s when an objective data-based analysis can lend its own type of eloquence.

People want to see results for their investments of both time and money. It’s easier to find funding for a proven producer, and lawyers are more likely to participate in services of known quality. The author wishes the statistics in this study pointed to a nearly nil rate of recidivism among lawyers who’ve participated in diversion. Researchers reviewing the effectiveness of programs they direct always hope to see statistics that paint a picture in broad strokes.

What this researcher found instead are some very respectable and visually discernible differences in the “before” and “after” conduct of lawyers who’ve completed a LOMAP diversion program. As is often the case, however, the statistics designed to measure degree of correlation and/or causation don’t stand up and shout their agreement with the percentages and the pie charts.

The data analysis also provided clues about the variables that have more potential to foster success both during and after a diversion program and those that don’t have much impact one way or the other. For example, neither the breadth of an assessment nor the length of participation appears to be as critical as had been supposed. The extensiveness of the terms during the agreement, on the other hand, appears to have a much clearer link with desirable results.

The findings represent a launching point for improvements to the program, as well as enticing and important possibilities for further research and service opportunities. We now know, for instance, that about 20 percent of lawyers who do not receive additional disciplinary charges in the first three years after they complete diversion do so at some point after that. Even though the dismissed diversion matter has been expunged and the file literally destroyed, the attorney,

the clients, and the lawyer regulatory system would all be better off if a subsequent charge didn’t happen.

A number of options could be pursued to keep management skills alive after the initial flush of efficiency wears off. A good start might be a check-up call from LOMAP staff every few months for the first year, with periodic “maintenance” consultations by telephone or in-person after that time. Diversion participants sometimes call LOMAP years later with questions about new management challenges; this should be encouraged.

The study findings also make it clear that management assistance isn’t just for new or young lawyers. This was surprising to some of diversion’s early proponents, who expected that the program’s target clientele would be between five and twelve years in practice rather than sixteen or seventeen. The referrals to diversion have closely followed the general pattern of the Arizona lawyer regulatory system: the highest number of charges are filed against lawyers in their middle years. By that time, they may have built up a sizeable practice, which leaves their time stretched thinner than in earlier

years. Many professionals also defer raising a family until their schooling is complete and their practice established. This makes many of them the parent of small children at a time when the law practice is at its peak. Some lawyers, like other middle-aged workers, may be assisting elderly parents as well. Lawyers aren’t immune to the sandwich generation syndrome, and they also aren’t immune to the tremendous

changes in the way clients interact with their lawyers and the way lawyers run their businesses.

One of LOMAP’s founders, Roxana Bacon, noted that the later-than-expected time in their careers when management deficiencies are plaguing lawyers isn’t so surprising given the changes that have occurred in technology in the world at large and in the legal community in recent years. Many lawyers, she noted, must reinvent the way they practice law or lose their ability to be competitive. For some, this isn’t welcome news. A program that provides assistance in mastering management skills and maximizing the benefits of technology should be a bar association’s “first response” to disciplinary charges, she said. Some lawyers, Ms. Bacon noted, are watching the technological world spin around them while they are “still standing there with their index cards in their hand.”

Providing services to help lawyers manage their practices and any personal impairments that affect their ability to serve their clients, according to Ms. Bacon, “allows the profession to be kind to itself in a very appropriate.” She further noted that the benefits aren’t limited to attorneys: “It’s not about the lawyers. It’s about the public” (personal communication, July 9, 2002).

Mark Harrison knows from talking to his clients that the motivation to avoid future charges by working at the causes is more likely to be instilled by assistance rather than pros-

The study findings also make it clear that management assistance isn’t just for new or young lawyers.

education. The difference in attitude of clients when they are offered diversion instead of more involved disciplinary proceedings, he said, is “stunning” (personal communication July 16, 2002). Mr. Harrison favors a lawyer regulatory system and services for lawyers that are proactive in offering prevention before damage has been done to clients and to lawyers’ reputations.

Judge Turney still believes the key to achieving the goals originally established for diversion and voluntary assistance programs is offering services that can do something for both the lawyer and the clients by teaching how to “do things differently” in managing the business of law. Judge Downie holds to the principle that lawyers “don’t want to get bar complaints” and will make the effort to prevent them if they can. The State Bar of Arizona’s Executive Director Cynthia Zwick, an early proponent and long-term supporter of diversion programs, emphasizes that programs to help lawyers efficiently manage their practices should have a role not only in preventing bar charges and monitoring those for whom prevention came too late, but also in assisting lawyers who look to the bar to provide such services upon request.

The researcher made observations after analyzing the data that resulted in the following recommendations.

- Periodic research should be conducted to determine when diversion “graduates” are receiving additional charges, and LOMAP should offer management or other appropriate assistance. If a lawyer gets suspended, for example, having a new plan in place ready to go upon reinstatement is of great value in avoiding the same problems that resulted in the suspension in the first place. This type of contact would also provide a valuable source of information about what types of charges are being received following diversion so the root cause can be ferreted out and more effective solutions offered.
- Lawyers should be offered diversion as early as possible in response to minor charges. Although there was not a large difference, lawyers who began diversion with a more modest disciplinary history fared better in succeeding in the program and in avoiding subsequent charges than did those with a more extensive background of charges.
- New lawyers should get much more management training before they try to run a practice in the real world. Chicken-and-egg thinking is a barrier: Law schools focus on the substantive practice of law, with little practical training on running the firm as a business. Students don’t realize that they should be interested in learning management skills until they find out the hard way that knowing the law is only the beginning. Because they’re not interested while in school, students don’t push for more practical training. Bar examinations don’t test for practical and management skills, such as how to properly establish and maintain a trust account. Because they don’t show up in the exam questions, it doesn’t become a necessity to

Law schools focus on the substantive practice of law, with little practical training on running the firm as a business.

teach management skills.

- Lawyers need “refresher” training as they move into the “vulnerable” years, the time when their practice is busy and their management skills may be getting rusty or out-of-date with recent developments.
- Malpractice carriers should encourage their insured lawyers to obtain management training and/or assistance. They should encourage it by giving premium incentives. That kind of encouragement gets action.
- Although some jurisdictions do not allow lawyers to participate in diversion more than once in a specified time period, the data in Arizona indicates that some lawyers who receive additional charges after their first diversion “get it” and have no further encounters with OLR after another round of diversion.
- There need to be guidelines for how often or under what circumstances a lawyer can participate more than once in the same type of diversion program. Although it appears that several Arizona attorneys required a second or even a third diversion to get serious about consistently following the skills they learned, I have no good argument against the position advanced by Former Arizona Chief Bar Counsel John Berry, who favors regulating second tries. Mr. Berry said he feels that a lawyer who can’t make the necessary improvements in one shot at diversion constitutes too big a risk for client harm and should be more seriously disciplined for the protection of the public.
- Sole practitioners need more support. They need to be encouraged – early and often – to make “back-up buddy” arrangements to cover if they suddenly become disabled or for other reasons unable to practice. The State Bar’s Sole Practitioner and Small Firm Section more than ten years ago developed some excellent materials to assist lawyers in planning for such eventualities. Creation of a comprehensive guide for closing a practice, either for a planned transition or in the wake of an emergency, has been on the list of LOMAP projects for at least three years. It’s time to make it happen.
- The most common areas about which clients complain, year after year, are communications and diligence – doing things when promised and letting the client know they’ve been done. Giving clients the information they need to make decisions and feel comfortable that the case is moving forward fall into those “help with day-to-day office activities” that the Conference of Chief Justices talks about. Lawyers and practice management advisors alike tend to focus on the “big stuff,” more exciting things. Sound management know-how and know-when, however, are the building blocks of good client service. Without those, the practice will collapse from the weight of all that “big stuff” on top.
- Even though utilizing a practice monitor for lawyers in

diversion doesn't appear from the data analyzed in this study to make much difference, creating a pool of well-trained monitors who are themselves excellent managers has every potential of enhancing participants' chances of a successful and charge-free future.

- The variable that appeared from this study to be most influential of success in diversion and later was the extensiveness of the terms. Of course, the need is to have the right terms, not just numerous terms. Further research is indicated to determine which terms work best and which procedures to carry out those terms are easy and effective enough that lawyers won't give them up once there's no one monitoring how they manage their practice.
- There's much overlap between poor management, lack of resources, and personal issues such as stress, addictions, and mental health issues. Assistance to lawyers needs to be more holistic. Impairments hamper the ability to successfully complete a diversion program and to maintain good client relationships.
- Part of having a "whole-lawyer" approach to assistance programs is having a variety of available tools, techniques, and tips that are flexible and can be used to resolve a wide range of difficulties. More research is also indicated in this area. It would be helpful to develop empirical data about the effectiveness of other diversion programs. In particular, knowing the combinations of programs and services that work best for specific types

of problems would assist in tailoring extensive appropriate terms of participation.

- Continuous data collection and analysis are needed so State Bar executives and staff can obtain information quickly that allows them to know on an ongoing basis what's working and what's not and to recognize opportunities to add value to services provided to members. Only by focusing on empirical evidence can funds be channeled into the most efficient and effective programs to assist lawyers and, in turn, their clients.

Endnotes

1. Copyright © by Diane M. Ellis, January 2003.
2. American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT*. (ABA Final Draft, June 1970).
3. Commission on Evaluation of Disciplinary Enforcement. *LAWYER REGULATION FOR A NEW CENTURY*. (Report of the Commission on Evaluation of Disciplinary Enforcement) ABA Center for Professional Responsibility, 1992.
4. American Bar Association Joint Committee on Lawyer Regulation. *THE LAWYER REGULATION HANDBOOK*. ABA Center for Professional Responsibility and State Justice Institute, 1999.
5. Conference of Chief Justices, *IMPLEMENTATION PLAN FOR THE CONFERENCE OF CHIEF JUSTICES' NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM*. (Report of the Conference of Chief Justices). ABA Center for Professional Responsibility, 2002. ■

Nation, from page 25

lum. Though success on such multiple choice exams may not correlate to professional behavior in practice, it was suggested that failing such a test would be clear indication of a problem in this area.

In perhaps a more direct effort to measure professionalism, research is being conducted in Australia to determine whether lawyers' decisions when faced with a professional or ethical dilemma change during the first few years of law practice. In the study, third year law students and lawyers in the first and second year of practice are given several scenarios with moral, not rules-based choices. Intermediate results of the study indicate that ethnicity is not a factor as to whether or not the test taker makes the moral choice. Socioeconomic status is a minor factor, while gender appears to be a major one, with women more often selecting the moral course of action.

Panelists also addressed the methods of measuring professionalism used by medical schools and the medical profession, including peer evaluations, faculty feedback and the use of simulated patient sessions, wherein non-physicians act as patients during a clinical exam and provide feedback to the students. These simulated sessions help determine a medical student's knowledge, communication skills and professional presence. It was noted that a similar pilot program, entitled the Effective Lawyer-Client

Communication project, has been used in law school clinics to evaluate law students' communication skills in an initial interview with a client.

How Do We Get From Here to There?

In the final session of the conference, after discussing various strategies for enhancing lawyer accountability and measuring professionalism, Professor Rhode asked the attendees, "How do we get from here to there?" How do we get judges more involved? How do we get law schools to teach professionalism and ethics more effectively? How do we put the strategies generated at the conference into action? She suggested that to effectuate real change, the key conceptual areas of the professionalism issue, including access to justice, inadequate education, ineffectual disciplinary methods and the role of the judiciary, need to be closely examined on an individual basis. Rather than attempting to tackle these problems in a large conference setting, which often has little or no affect on the profession, it was suggested that smaller groups, consisting of individuals with experience in these key areas, be convened to derive "best practices" and methods of implementation. The conference organizers will be compiling a list of subjects and possible participants. The results of those efforts and the ideas for enhancing lawyer accountability that were developed at the conference will be included in an upcoming symposium issue of the South Carolina Law Review. ■