

LAP Oversight Committee Recommendations, Stakeholder Feedback

Recommendation ONE, Referrals

Change Current Rule 5.381(B):

After Proceeding Begins. At any time after a proceeding in the State Bar Court begins, at the request of either the attorney or the Office of Chief Trial Counsel or on the court's own motion, an attorney ~~may~~ shall be referred to a judge whom the Presiding Judge has designated a Program Judge to determine the attorney's eligibility to participate in the Program. ~~A referral by the Court must be made at least 45 days before the first scheduled trial date in the proceeding.~~

1. Make referral to designated program judge mandatory upon party's request:

Change "may" to "shall" so that when a party requests referral to the program, the Court ~~"shall"~~ must refer the attorney to the designated program judge.

Committee's rationale: The designated Program Judge is the only one vested with responsibility/authority to determine eligibility. So, the referral itself should not be discretionary.

SBC: Disagree. Changing "may" to "shall," will eliminate judge's discretion.

OCTC: Agree if further modified. OCTC believes the rule should be further modified to allow the court to deny referral if it determines that a request is made for the purpose of delay.

2. Ensure consistent judicial assignment for program participants:

Add that following referral, the Program Judge will preside over the matter for all proceedings and determinations subject to Rules 5.382 (Acceptance) through 5.384 (Disposition) and 5.386 (Later Proceedings) through 5.387 (Termination).

Committee rationale: This will ensure consistency in application and results, as well as expectations and evaluations.

SBC: Disagree. This does not appear necessary because under the current court procedures, there is only one ADP judge assigned in each case, who handles all ADP proceedings for that case.

OCTC: Agree. Believes this should also include Rule 5.385 (Term).

3. Repeal referral deadline:

Strike the requirement that a referral must be made at least 45 days before the first scheduled trial date in the proceeding.

Committee rationale: The rules dictate that the referral may be made any time after the proceeding begins. Trial dates may change, as do circumstances and availability of information. Gamesmanship by the attorney in delaying a request may be avoided by requiring the attorney to request referral at least 45 days before the current trial date set. Others should not have such a time limit.

SBC: Disagree. Believes this will lead to more “gamesmanship.” Suggests modification that a referral “should” be made at least 45-days before the first scheduled trial date in the proceeding, except upon a showing of good-cause.

OCTC: Agree with eliminating the 45-days. But suggests referrals must instead be made within no later than 60-days after a proceeding begins.

Recommendation TWO, Conditions for Acceptance

Make modifications to current rule 5.382

Current Rule 5.382(A) requires as a condition of acceptance into the program, among other things, that the Court approve a stipulation of facts and conclusions of law signed by the parties. Modify to offer an alternative when a stipulation cannot be reached.

1. Retitle from “Stipulation Not Submitted” to instead reflect when there is a lack of a stipulation or an incomplete stipulation.

Rule 5.382(B) ~~Stipulation Not Submitted~~ **No Stipulation or Incomplete Stipulation**. If the parties do not sign and submit a stipulation of facts and conclusions of law to the Program Judge for approval within 90 days after the date the attorney was referred to the Program to determine eligibility, the Program Judge may return the proceeding for processing as a standard discipline proceeding.

Committee Rationale: This recommendation is made because it better reflects that there may be issues on which the parties cannot agree.

SBC: Disagree. Under the existing rules and procedures, a determination of eligibility must be based on a stipulation, and the judge cannot force the parties to reach agreement on a stipulation. The proposed changes would turn this model upside down, allowing acceptance into the program to be based instead on the court's determinations as to the facts and conclusions of law, based on submissions of evidence. This would require the court to hold what would essentially be a mini-trial. The Court does not believe this change would improve the program or that it is necessary – there are relatively few cases where there is a long delay in determining eligibility due to the inability to reach a stipulation.

OCTC: Agree.

2. Add to the rule that where parties cannot reach a stipulation to all or some of the facts or conclusions of law, the parties may submit evidence by way of declaration and documents.

Committee Rationale: This recommendation intends to address concerns raised by stakeholders that parties often struggle to agree on a stipulation, causing long-term delays, and sometimes, a total lack of a stipulation. This would allow a simple, efficient, and reasonable avenue to submit their positions to fashion the totality of findings of facts and conclusions of law that determine eligibility.

SBC: Disagree. See above.

OCTC: Disagree. Suggests instead eliminating the requirement that the attorney stipulate to conclusions of law that would affect eligibility, permitting the Program Judge to make its own findings regarding conclusions of law, based on the facts which the parties have stipulated.

3. Include timelines for stipulations and evidence to be submitted.

Include specific timelines for when a stipulation or declarations and documents to prove a fact or conclusion of law, must be exchanged and/or submitted to the program judge.

Committee Rationale: This will assist the court and all parties to achieve a well-reasoned and complete determination of eligibility in a timely fashion.

SBC: Disagree. Flexibility is needed to allow the judge in each case to determine the appropriate timeline for submission of a stipulation and supporting documentation.

OCTC: Disagree. OCTC notes that the current rule regarding stipulations requires that a stipulation be submitted to the Program Judge within 90 days after referral. OCTC proposes keeping this requirement. Rather than imposing any additional specific deadlines, OCTC proposes leaving any such deadlines to the discretion of the Program Judge, while imposing an overall deadline of 180 days to make a finding of acceptance or nonacceptance into the Program.

4. Add to the rule that either party may request a conference with the program judge to settle disputes of facts or law.

Committee Rationale: This can be effective in working out disagreements on issues. If this is unsuccessful the parties will still be able to present documentary evidence and declarations.

SBC: Disagree. The Court does not believe the change is needed and that under existing rules, the parties know they can come to the Program Judge for assistance in resolving a disagreement.

OCTC: Agree.

5. Provide for resolution in the absence of timely submissions.

Add to the modifications that if parties do not timely submit facts and conclusions of law or evidence to prove either in dispute, the program judge may make determinations on the submittals and/or, if there are no submittals, refer the matter back to a standard proceeding, without prejudice to a later referral under 5.381(B).

Committee Rationale: This is intended to ensure that matters will be decided in a timely fashion and without undue delay.

SBC: Disagree. The court disagrees with the proposal to allow the court to make determinations regarding the facts and conclusions of law when the parties are unable to reach agreement on a stipulation. The existing language of rule governing stipulations provides for what is proposed here, allowing the court to refer the matter back to a standard proceeding if a stipulation is not submitted within 90 days of referral.

OCTC: Disagree. OCTC has proposed a different approach (outlined above). Additionally, OCTC does not believe there should be repeated opportunities to seek a referral.

Recommendation 3, Ineligibility

Modify Current Rule 5.382(C)(1):

Grounds for Ineligibility. An attorney will not be accepted to participate in the Program if: (1) the stipulation of facts and conclusions of law, including aggravating factors, signed by the attorney and the Office of Chief Trial Counsel shows that the attorney's disbarment is ~~warranted~~ required, despite mitigating circumstances;

1. Prohibit eligibility only where disbarment is required.

Modify by deleting the prohibition on eligibility where the stipulation shows that disbarment is "warranted," despite mitigating circumstances to where the stipulation shows that disbarment is "required."

Committee Rationale: This recommendation is made because "warranted" can mean justified and leaves room for discretion. If disbarment is not required and is still subject to discretion, participation in the program should remain available. This will, at the least, enhance chances for public protection.

SBC: Agree.

OCTC: Disagree. OCTC notes that under the standards and statutes, the only time disbarment is "required" is when an attorney is convicted of a felony that subjects them to summary disbarment. OCTC believes the Program Judge should retain discretion to avoid accepting into the Program attorneys the Program Judge determines, based on the parties' stipulation, will be subject to disbarment despite any mitigating circumstances. This is particularly important if the ineligibility criterion of misconduct which amounts to moral turpitude, is eliminated.

2. Impose a 180-day deadline for eligibility determination.

Add a requirement that the program judge make a finding that the attorney is accepted or not accepted into the program no more than 180 days after the attorney's referral to the program. Any failure of the program judge to timely make such a finding will act as a finding of eligibility and acceptance into the program.

Committee Rationale: There is currently no time requirement for an eligibility determination. This addition will help ensure that matters will be decided in a timely manner and without undue delay. A judge's failure to timely make findings should have some consequence to the parties most likely to benefit public protection and the parties.

SBC: Disagree. In nearly all cases where there is a significant delay in making a determination of eligibility, it is due to the parties failing to submit a stipulation in a timely manner, a situation already addressed by the rules. In addition, if attorneys are accepted into ADP by default when no stipulation has been reached, there will not be approved stipulated facts and conclusions of law or an approved monitoring plan.

OCTC: Agree on the time requirement. Disagree that a failure of the program judge to timely make such a finding will act as a finding of eligibility and acceptance into the program.

Recommendation 4, "Moral Turpitude"

OPTION ONE to Amend Rule 5.382 (C)(3) Grounds for Ineligibility:

Strike the entire subsection:

(C) Grounds for Ineligibility. An attorney will not be accepted to participate in the Program if:

~~(3) the attorney's current misconduct involves acts of moral turpitude, dishonesty, or corruption that has resulted in significant harm to one or more clients or to the administration of justice;~~

Committee Rationale: The Committee determined that the addition of the phrase "moral turpitude" into the Rule has led to confusion because the definition is nebulous. This has created a lack of consistency in how that term has been defined and applied to potential applicants seeking admission into ADP. It is clear, given the timing of the Rule revisions, that enrollment in ADP has declined since those revisions.

SBC: Agree. The Court favors this option.

OCTC: Conditionally Agree. OCTC agrees to this recommendation if the Program Judge continues to retain discretion to avoid accepting into the Program attorneys the Program Judge determines, based on the parties' stipulation, will be subject to disbarment despite any mitigating circumstances and that a provision setting a minimum disciplinary sanction for offenses of this type is set.

OPTION TWO to Amend Rule 5.382 (C)(3) Grounds for Ineligibility:

Strike “moral turpitude” but leave the rest:

(C) Grounds for Ineligibility. An attorney will not be accepted to participate in the Program if:

(3) the attorney’s current misconduct involves acts of ~~moral turpitude~~, dishonesty, or corruption that has resulted in significant harm to one or more clients or to the administration of justice.

Committee Rationale: This option acknowledges the reasons the Board initially decided to add “moral turpitude” to the rule, but given the ambiguity of it, removes it from section (C)(3) while continuing to retain the remaining terms, “dishonesty” and “corruption” which are more clearly and easily defined and subject to less inconsistent application.

No specific feedback was received from stakeholders.

OPTION THREE to Amend Rule 5.382 (C)(3) Grounds for Ineligibility:

An alternative option is to strike “moral turpitude” but leave the rest and add has “or would be expected to” result:

(C) Grounds for Ineligibility. An attorney will not be accepted to participate in the Program if:

(3) the attorney’s current misconduct involves acts of ~~moral turpitude~~, dishonesty, or corruption that has resulted **or would be expected to result** in significant harm to one or more clients or to the administration of justice.

Committee Rationale: The Committee offered this option in order to separate the act from its consequence. So, if the act itself was wrong, then it would be wrong, whether or not someone was harmed. By way of example, two individuals both arrested for driving under the influence with blood alcohol concentrations at three times the legal limit, but only one of those individuals caused an accident that harmed another. Both were engaged in the same threatening behavior but only one (by chance) caused harm to another party. This modification would treat the two the same.

SBC: Disagree. The court is particularly concerned regarding the requirement under Option 3 that the court make a counterfactual prediction of what harm “would be expected to result” from the misconduct, apart from the factual determination of the harm that actually occurred.

OCTC: No feedback from OCTC.