

# **Alternative Discipline Process: Interim Program Update**

**To:** Benchers

**Purpose:** Update

**From:** Staff

**Date:** March 8, 2024

## Background

1. The Law Society’s Alternative Discipline Process was developed based on a report of the Law Society’s Mental Health Task Force entitled “Recommendation on the development of an Alternative Discipline Process”<sup>1</sup> (the “Report”), which recommended that:

No later than September 2022, the Law Society will implement an alternative discipline process (“ADP”) to address circumstances in which there is a connection between a health condition and a conduct issue that has resulted in a complaint investigation. The ADP will comport with the purpose, principles, design features and policy rationale described in the Mental Health Task Force’s September 2021 recommendation report and commence as a three year pilot project. Following an interim and final review of the pilot project in 2023 and 2025, respectively, the matter will return to the Benchers for a final determination as to whether to establish the ADP as a permanent regulatory program.

2. The Benchers approved this recommendation on October 16, 2021. On April 22, 2022 the Benchers approved the Rules that would allow for the creation of an alternative to discipline process for health (“ADP”). Once the Rules in support of ADP were approved by Benchers, the Law Society implemented the process as a pilot the following month in May 2022.
3. The Report required an update to Benchers in 2023. A brief update on the status of ADP was provided at the Benchers meeting on June 3, 2023. The purpose of this report is to provide Benchers with a more fulsome update regarding the operation of the ADP.

## Operationalization of the Process

4. In implementing the ADP, staff ensured the principles articulated in the Report were integrated in the operationalization of the process. A helpful summary of the principles can be found in the Report as follows:

95. Deeply informed by the principles of voluntariness, confidentiality, no-risk and the protection of the public, the proposed ADP takes an innovative and proactive approach to professional regulation. The scheme is also comprehensive and complex, as evidenced by the volume of material in this report devoted to describing the design elements of, and policy rationale for, the alternative discipline process.

96. By creating a regulatory environment that promotes the disclosure of health conditions that have impacted on a lawyer’s conduct, and customizing the regulatory response in a manner that focuses on supporting the lawyer and the Law Society in addressing the underlying health issue, participation in the ADP reduces the likelihood

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<sup>1</sup> [Recommendation on the development of an Alternative Discipline Process, Mental Health Task Force, Law Society of BC](#)], para 93

that the problematic conduct will escalate or recur in the future. This, in turn, enhances the protection of the public.

5. An example of how the ADP principles were operationalized is that ADP records are maintained in our records management systems in a way that ensures that they are not accessible to any Law Society staff other than those working in ADP. By maintaining strict confidentiality of information in ADP, lawyers can feel safe to share whatever information they wish to share about their health.
6. Another key ADP principle is voluntariness; in order to action this principle, ADP staff ensure that they provide clear information to lawyers interested in ADP such as the details of what the process entails and what will be expected of them. Accordingly, before they enter the ADP, lawyers sign a detailed consent, so that they are fully aware of what the process will require.
7. To ensure that the process poses “no risk” to the Law Society and the lawyers participating in the ADP, the Law Society requires lawyers to agree not to rely upon any delay created by their time in ADP in the event they choose to leave ADP and return to the investigation and discipline process, or if the Executive Director refers them back to the investigation and discipline process. In these circumstances there is no risk to the lawyer, because if their matter is referred out of ADP, the fact they were unsuccessful in completing the ADP process will not adversely impact them in the investigation and discipline processes.
8. A key principle of the ADP process is that the public interest is paramount and this principle threads through each stage of the process. ADP is a remedial program that provides a safe and flexible space for lawyers to take the steps they need to be healthy for practice. While ADP provides support, ultimately it is the courage, commitment and hard work of the lawyer that allows them to complete the ADP. We have found that the lawyers in ADP are deeply committed to their profession and clients, and they are often willing to put in the significant effort necessary to address their health issues. As such, ADP is truly a regulatory program where the public interest and the lawyer’s interest can overlap.

## **Overview of the Process**

9. Once a lawyer with a complaint file is identified as a possible candidate for ADP, an eligibility assessment occurs. Per Rule 3-9.1(3), a lawyer is eligible for entry into ADP if:
  - a) the lawyer acknowledges the existence of a health issue that may have contributed to an alleged discipline violation by the lawyer;
  - b) the lawyer consents in writing to the Executive Director proceeding under this division;and

- c) the Executive Director is satisfied, in all the circumstances of the alleged discipline violation, including whether it involved substantial harm to the complainant or another person, that it is likely to be in the public interest to proceed under this division.
10. At this stage, in accordance with Rule 3-9.3(1), additional health information is often collected from the lawyer, to the satisfaction of the Executive Director, that: a health issue may have contributed to an alleged discipline violation by the lawyer, that the lawyer could benefit from the remedial initiatives offered through the ADP, and most importantly it is in the public interest for the lawyer to engage in remedial measures.
  11. The extent of the medical information requested at this point will depend on the facts of each case. For instance, the Executive Director may rely entirely on the lawyer's representations about their health issue, may request information from a lawyer's personal care providers (like a physician or counsellor), or may request that the lawyer attend an independent medical examination ("IME") performed by a health care professional mutually agreed on by the parties.
  12. Once sufficient information has been collected, eligibility can be assessed. Guidelines have been developed to assist the Executive Director in making this eligibility assessment, and specifically to assist in the assessment of whether proceeding with a matter through the ADP is likely to be in the public interest. Considerations include whether the lawyer's alleged discipline violation is sufficiently serious that the regulatory process warrants some level of public oversight through the investigation and discipline process; whether the available evidence supports a determination that access to treatment for the lawyer's health issue(s) will meaningfully address the underlying causes of the alleged discipline violation, such that the lawyer will be unlikely to commit a similar violation in the future; and whether the lawyer displays a sufficient level of insight and trustworthiness, based on their communications with the Law Society, such that the lawyer can be trusted to disclose relevant information to the Law Society and comply with the terms of their ADP agreement.
  13. The public interest provides a good foundational principle for vetting files, and to assess eligibility throughout the lifecycle of the ADP. Generally speaking, referral to ADP is appropriate where the lawyer's interests and the public interest correspond. That is, where assisting a lawyer to treat or manage a health issue allows them to continue to provide legal services in conformity with their Law Society requirements. Where this is unlikely to be the case, or where the confidential nature of the ADP might prevent a just outcome, referral to ADP is inappropriate.
  14. Once a lawyer meets the threshold eligibility for entrance into ADP, the ADP staff and the lawyer negotiate an ADP consent agreement that is tailored to the lawyer's specific circumstances. ADP is designed to provide the complainant with a role as well. Specifically, complainants have an opportunity to provide a statement regarding any impact that the

lawyer's alleged misconduct had on them. This statement may factor into the terms of any ADP agreement between the lawyer and the Law Society, including any terms related to remediation.

15. Once the ADP consent agreement is approved by the Executive Director, the ADP staff lawyer supports the lawyer in satisfying the terms of the agreement. That support can include regular check-ins, troubleshooting any potential compliance issues, and ensuring that progress is being made on the various terms of the agreement. When the lawyer successfully completes the terms of the agreement, they leave the ADP. The complainant is then informed generally about the outcome of the ADP process, i.e. that the lawyer successfully completed the process or was referred back to the regular investigation and discipline process.

## Data & Observations

### Statistics

16. Since the ADP began in May 2022, 17 lawyers have expressed an interest in participating in the process and have been considered for ADP:

Of that total:

- 10 lawyers met threshold eligibility;
- 6 lawyers were determined to be ineligible; and,
- 1 lawyer is currently under consideration for threshold eligibility.

Of the ten lawyers who met the threshold eligibility and participated in the ADP:

- 3 have successfully completed their ADP agreement and are no longer in the process;
- 5 are remain at various stages in the process; and,
- 2 lawyers have been referred back to the regular investigation and discipline process as their participation in the ADP was no longer in the public interest.

17. Some of the health issues that lawyers in ADP have disclosed include: addiction, anxiety, depression, psychotic disorder, eating disorder, burnout and ADHD.

## ADP Staff Observations

18. Statistics only tell part of the story. The experience of working with lawyers in ADP has been profoundly impactful and humbling for ADP staff. Lawyers in the process have demonstrated themselves to be hard-working and caring individuals, who are excited for the opportunity to address health issues. Many have already started the work of addressing their health issues prior to their referral into ADP, including by attending in-patient addiction treatment, setting up medical monitoring with their employer or firm, or receiving treatment from health care providers.
19. Some of the ADP staff observations to date are:
  - a) The flexible nature of ADP allows the development of ADP Agreements that are not cookie-cutter or a one size fits all approach. As such, even when there are lawyers who have similar diagnoses, their ADP agreements can differ significantly based on individual circumstances;
  - b) Taking an individualized and collaborative approach with lawyers can result in less costly but equally effective treatment and monitoring plans for participants and the Law Society. A lawyer who is insightful and committed to their wellbeing and to their practice, is very helpful in crafting the terms of a successful ADP agreement. In one case, for example, a physician's IME concluded that the participating lawyer would require extensive medical monitoring for a substance use disorder. However, the cost of such a monitoring program was prohibitive. After discussions with the lawyer, the IME physician was consulted again and was asked to consider whether a narrower (and less costly) monitoring plan would suffice to monitor whether the lawyer was maintaining their sobriety. With the physician's approval, and given the lawyer's specific circumstances, an effective and tailored monitoring plan was created;
  - c) A lawyer is an expert in their own care, and they know what treatments work best for them. Coerced or forced medical care is less likely to be effective, and giving a lawyer autonomy over the care they receive can empower that lawyer to take more responsibility for their recovery, and help to rebuild some of the self-esteem they may have lost while they were experiencing a health issue and having a conduct concern or complaint brought to the attention the Law Society; and,
  - d) ADP has been transformational for lawyers engaged in the process. As a result of ADP, lawyers have left the process having more tools to support them in maintaining their health and well-being. Additionally, the insights gained from ADP have led lawyers to change areas of practice or employment setting to better align with their health needs.

## Summary

20. As a remedial program, the ADP represents the convergence of the public and lawyer interests. The program's principles have operated appropriately to ensure that the lawyers who belong in ADP gain entry and those whose matters need investigation in the public interest stay in the regular process. By addressing health issues impacting practice sooner (than can be done in the investigation and discipline processes), it is our hope that lawyers who complete the ADP will be positioned in the long term to be healthy in the practice of law.