



Recommendation on the Development of an Alternative Discipline Process (“ADP”)

For presentation at the September 24, 2021 Bencher meeting

Mental Health Task Force

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Executive Summary

1. Many legal regulators, including the Law Society of British Columbia, have observed that mental health and substance use issues can be a contributing, though not necessarily causative, factor in some instances of lawyer misconduct. Traditional approaches to regulation, which predominantly focus on whether there has been a discipline violation and imposing appropriate sanctions, are limited in their ability to tailor the regulatory response in a manner that addresses these and other health issues. Additionally, it appears that many lawyers have apprehensions about sharing relevant health information within the Law Society's current regulatory framework.
2. As new data confirms high rates of mental health and substance use issues within the profession, establishing alternative regulatory processes to address situations where a health issue has contributed to lawyer misconduct is recognized as an emerging best practice. Accordingly, the Mental Health Task Force has undertaken a detailed examination of how the Law Society's processes might be better equipped to promote the disclosure of relevant health information, integrate support and treatment into its regulatory response and ultimately improve outcomes for both the lawyer and the public.
3. Following this comprehensive review, and pursuant to the Task Force's terms of reference and the Law Society's strategic goal to revise its regulatory processes to support and promote mental and physical health, while upholding its public interest mandate, this report is dedicated to advising the Benchers with respect to the development of an alternative discipline process, or "ADP".
4. At its core, the proposed ADP is a voluntary, confidential process designed to customize the regulatory response in circumstances where a lawyer's conduct issue is linked to a health condition. In adopting an innovative and proactive approach to professional regulation, the ADP aims to support lawyers in addressing their underlying health issues, placing practitioners in a stronger position to meet their professional responsibilities. In this regard, the ADP creates the potential to realize significant public interest benefits by reducing the likelihood that problematic behaviour will escalate or reoccur.
5. Following a discussion of the elements of the proposed model, including the ADP's guiding principles and key design features, and a consideration of the policy issues engaged by creating an alternative discipline process in BC, the report concludes with a formal recommendation that the ADP is established as a three year pilot project, commencing in 2022.

Resolution

6. The Benchers adopt the recommendations of the Mental Health Task Force 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.

Background and Process

7. In recent years, a number of groundbreaking studies have documented concerning levels of mental health and substance use issues among lawyers, including rates of depression, anxiety and problematic alcohol use that greatly exceed that of the general population.¹ This emerging data indicates that these issues are widespread within the profession and can arise at any point in a lawyer’s career, affecting seasoned practitioners, mid-career lawyers and new entrants to the profession alike.²
8. Recognition of the pervasiveness of these issues within the legal profession has led to a remarkable shift in awareness of, and discussions about, lawyer wellbeing. Outdated views that those experiencing mental health and substance use issues are

¹ In 2016, research conducted by the American Bar Association and the Hazelton Betty Ford clinic found that between one-fifth to one-third of US lawyers qualify as problem drinkers, and that approximately 28 percent and 19 percent are struggling with depression and anxiety, respectively. See P.R. Krill, R. Johnson & L. Albert, “[The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys](#)” (2016) 10 J. Addiction Med. 46 (“ABA Study”). The Federation of Law Societies is currently undertaking a national survey to explore the prevalence of mental health and substance use issues among Canadian lawyers, modelled on an [earlier study](#) commissioned by the Barreau du Québec.

² See for example the ABA Study *supra* note 1 (lawyers in their first ten years of practice demonstrated the highest rates of problematic drinking with declining rates reported with the advancement in position and increasing age). See also J. Koltai, S. Schieman, & R. Dinovitzer, “[The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-Being in the Legal Profession](#)” (2018) J. Health Soc. Behav. 59(1) at 20 (a finding that Canadian lawyers at large firms in the private sector, widely considered to be the most prestigious roles, were most likely to experience depressive symptoms); J. Anker and P.R. Krill, “[Stress, drink, leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys](#)” (2021) PLoS ONE 16(5): e0250563 (a finding that there was heightened problematic drinking in female lawyers as compared to their male counterparts, and that women also had had elevated levels of anxiety, depression, and stress, highlighting a very real mental health disparity that exists within the legal profession).

blameworthy or simply not “up to” the rigours of practice have largely been displaced by evidence-based understandings of the complex physical, emotional, social and occupational causes and consequences of these issues. An increased focus on lawyer wellness by researchers, regulatory bodies, legal organizations and law schools, as well as the growing number of lawyers and judges that have stepped forward to share their personal stories, have begun to dismantle the stigma that can create significant barriers to speaking openly about these issues within the profession.

9. The Law Society of BC formally joined this conversation in 2018, with the establishment of the Mental Health Task Force. Over the course of following years, the Task Force has authored two reports that include 20 recommendations addressing the dual aspects of its mandate: to promote and protect the public interest by identifying ways to reduce the stigma of mental health issues, and to improve the manner in which the Law Society’s regulatory approaches address these issues.³
10. The Task Force has dedicated its third report to one of its remaining responsibilities pursuant to its terms of reference, namely: to advise the Benchers with respect to the development of a “diversion” or other alternative discipline process.⁴ This report, and the recommendation contained therein, reflects the Task Force’s considerable efforts to advance this aspect of its mandate through a detailed examination of how the Law Society’s regulatory approaches might be improved in circumstances where a health issue has contributed to lawyer misconduct.⁵
11. Work on developing a recommendation for the Benchers on alternatives to discipline began in 2019. As a preliminary step, the Task Force explored how conduct concerns associated with mental health or substance use issues are addressed within the Law Society’s regulatory processes. In doing so, the Task Force undertook a detailed review of the existing rules and consulted widely with the various groups within the Professional Regulation department to improve its understanding of how mental health and substance issues manifest in the course of the traditional discipline process and the limitations of the current approaches.⁶

³ Mental Health Task Force [First Interim Report](#) (October 2018) and [Second Interim Report](#) (January 2020).

⁴ Mental Health Task Force [Terms of Reference](#).

⁵ Misconduct refers broadly to an allegation, that if proven, would lead a hearing panel to find the lawyer had committed professional misconduct, conduct unbecoming a lawyer, a breach of the *Legal Profession Act* or the Law Society Rules or incompetent performance of duties undertaken in the capacity of a lawyer.

⁶ The Professional Regulation Department is comprised of several groups: Intake and Early Resolution, Investigations, Practice Standards, Custodianships, Unauthorized Practice and Discipline.

12. Building on this foundational work, the Task Force shifted its focus to a consideration of potential improvements to the Law Society’s existing processes, including establishing alternative approaches to discipline matters. Following a review of a wide range of rules, policy papers, reports and academic scholarship addressing the use of alternative discipline schemes in the medical, legal and criminal justice sectors, the Task Force concluded that establishing an alternative process for health-related conduct issues had sufficient merit to warrant the development of a recommendation to the Benchers.
13. A Task Force sub-committee was subsequently established to sketch out a framework for how such an alternative discipline process — or ADP— might operate in BC. Over the past year, the Task Force has refined this framework in consultation with the Professional Regulation and Policy and Planning departments, the results of which are presented to the Benchers in this recommendation report.

The Problem

14. Many legal regulators, including the Law Society of BC, have observed that mental health and substance use issues can be a contributing factor in some incidences of lawyer misconduct. Although there is not necessarily a causal relationship between mental health or substance use issues and misconduct, untreated health conditions can affect cognitive and other skills that are critical to a lawyer’s ability to discharge their professional responsibilities.⁷
15. Traditional approaches to regulation, which predominantly focus on establishing whether there has been a discipline violation and imposing appropriate sanctions, provide limited opportunities to address health issues that have affected a lawyer’s conduct. The Law Society does, however, have some latitude under Parts 3 and 4 of its rules to tailor its response in circumstances where a lawyer’s health condition has contributed to problematic behaviour. This includes referrals to the Practice Standards program’s remedial processes, establishing conditions or restrictions on practice or requirements for treatment and directing the lawyer to obtain clinical assessments and

⁷ Cognitive deficits may result in the inability to pay attention, process information quickly, remember and recall information, respond to information quickly, think critically, plan, organize and solve problems and initiate speech. Neurocognitive deficits are common in a range of mood and substance use disorders. See for example, P. D. Harvey and C. R. Bowie “[Cognition in severe mental illness: Schizophrenia, bipolar disorder, and depression](#)” in M. Husain and J.M. Schott (eds.) *Oxford Textbook of Cognitive Neurology and Dementia* (2016) Oxford University Press, c. 41; C. Bruijnen et al. “[Prevalence of cognitive impairment in patients with substance use disorder](#)” (2019) *Drug and Alcohol Rev.* vol. 38(4) at 435.

assistance.⁸ The Law Society may also consider the presence of a health issue as a mitigating factor when issuing discipline sanctions and in accommodating lawyers with a health-related disability.⁹

16. Although these measures can improve regulatory outcomes, generally speaking, very few lawyers disclose, and provide evidence in relation to, health conditions in the course of an investigation into a complaint. In the context of the high rates of mental health and substance use issues within the profession, the infrequency with which lawyers raise these issues in the Law Society's regulatory processes suggests that many practitioners have apprehensions about revealing that a health condition has adversely impacted on their ability to fulfill their professional responsibilities.¹⁰
17. What prevents lawyers from sharing information about mental health or substance use issues with the regulator? Research suggests that stigma and confidentiality concerns, including not wanting others to “find out”, are identified as the primary barriers to disclosure.¹¹ These concerns are likely compounded by the public nature of the lawyer discipline system, including the possibility of information being divulged to a complainant or appearing in a hearing panel’s reasons for judgment. Apprehensions may be further exacerbated by the current rules, which permit the Law Society to share health and other information across its regulatory programs,¹² as well as uncertainty as to who within the Law Society will have access to such information, for how long, and what use might be made of this information. Many lawyers may also be under the misconception that revealing a mental health or substance use

⁸ For example, a panel of three or more Benchers may order restrictions on practice or require a lawyer to undergo medical assessments, if satisfied that extraordinary action is necessary to protect the public. See Law Society Rules [3-10 and 3-11](#). Similarly, the Practice Standards Committee may make recommendations or orders with respect to conditions or limits on a lawyer’s practice as well as various types of health assessments and assistance. See Law Society Rules [3-19 and 3-20](#). Restrictions on practice or a change to non-practising status may also be negotiated at the investigation stage and prior to the involvement of a Committee.

⁹ In some cases, the Law Society will be required to accommodate a lawyer in order to meet its obligations under section 14 of the [Human Rights Code](#), [RSBC 1996] c. 210.

¹⁰ Even in instances where lawyers do volunteer information about mental health or substance use conditions, this often occurs at the final stages of the disciplinary process (e.g. as a defence at a hearing) when the matter becomes, from the lawyer’s point of view, more serious, and from the Law Society’s perspective, opportunities to take proactive steps to support the lawyer and protect the public interest have been missed.

¹¹ The two most common barriers to lawyers seeking assistance for substance use disorders are not wanting others to find out they need help and concerns regarding privacy or confidentiality. See ABA Study, *supra* note 1.

¹² For example, the Practice Standards Committee, which oversees a remedial program for lawyers with competency concerns, may undertake practice reviews and make recommendations with respect to restrictions on a lawyer’s practice, psychological or psychiatric assessments, counselling, medical assistance or assessments. If a lawyer fails to comply with these recommendations, the Committee may issue mandatory orders in this regard. Under Rule [3-21](#), the Practice Standards Committee may, at any stage, refer to the Discipline Committee all or any part of a practice review report, a report on the manner in which the lawyer has (or has not) carried out or followed any recommendations or any orders made by the Committee or a report on non-compliance with such orders.

disorder will, in and of itself, result in an adverse disciplinary outcome, and that it is therefore preferable to conceal these issues.

18. Failure to provide the regulator with information about a relevant health condition can lead to suboptimal outcomes for the subject lawyer, the Law Society and the public. In addition to limiting the extent to which the Law Society can employ proactive, remedial measures to help address the health concern, it also reduces the lawyer's ability to take advantage of referrals to appropriate support and resources. Absent evidence supporting a connection between the conduct issue and a health concern, the Law Society must proceed as if the matter is simply a conduct or competence issue. This forecloses opportunities to customize the regulatory response to help address the underlying health issue and reduces the likelihood that the necessary steps are taken to ensure the problematic conduct does not reoccur or escalate.
19. There are a number of ways to address the problems identified. Promoting awareness of mental health and substance use issues within the profession, combating stigma and improving the quality of, and access to, support resources will continue to be critical. Over the past several years, the Benchers have approved a number of the Task Force's recommendations in this regard.
20. The Task Force is of the view, however, that educational initiatives are not, on their own, sufficient. In the wake of emerging data confirming high rates of mental health and substance use issues within the profession, additional steps must be taken to ensure the Law Society's regulatory processes are better equipped to promote the disclosure of health information and to integrate support and treatment into the regulatory response. On this basis, and as described in greater detail in the remainder of this report, the Task Force recommends that the Law Society establish an alternative discipline process through which eligible matters are referred from a complaint investigation into a program specifically designed to address circumstances in which there is a linkage between a lawyer's conduct issue and a health condition.

The Proposed Model

21. Recognizing that traditional disciplinary processes can be poorly suited to addressing conduct issues associated with a health condition, a number of sectors have established alternative processes that focus on remediation and rehabilitation rather than imposing discipline sanctions. Diversionary criminal justice programs, for example, have long provided an alternative to prosecution in cases where voluntary mental health treatment and support are deemed to be reasonable alternatives to

criminal justice sanctions.¹³ Some self-regulating professions, including medicine and nursing, have also established alternatives to discipline to address misconduct linked to mental health or substance use issues.

22. The Task Force is aware of only one Canadian law society that has a formalized alternative discipline program.¹⁴ However, legal regulators in the United States have utilized alternatives to discipline — often referred to as “diversion” programs — to address lawyer misconduct for some time. Although the design features of these programs vary, the voluntary nature of a subject lawyer’s participation is a key feature. Additionally, to gain entry into the program, lawyers are generally required to meet a series of eligibility criteria, following which, they negotiate a contract with the regulator that sets the terms and conditions of their ongoing participation. Typically, a combination of rules and policies govern the operational aspects of the scheme. This includes referrals into the program, confidentiality assurances, the role of the complainant, the content of the diversion contract, the effect of the lawyer successfully fulfilling the terms of the contract as well as the consequences for breaching the agreement and costs associated with participating in the program.¹⁵
23. An examination of existing ADP schemes illustrates both the opportunities and complexities associated with creating alternative processes to deal with conduct matters linked to lawyers’ health issues, as well as the diversity of current approaches.
24. In many jurisdictions, the manner in which alternative processes have been designed has resulted in low participation in, and completion of, diversionary programs. Features that have likely contributed to the limited success of existing schemes include: overly restrictive or narrow eligibility requirements; the use of orders (e.g. for an independent medical assessment) and undertakings (e.g. abstinence from alcohol use), a breach of which may lead to further disciplinary consequences and

¹³ See for example, British Columbia Prosecution Service, Crown Counsel Policy Manual “[Alternatives to Prosecution - Adults](#)” (retrieved September 5, 2021).

¹⁴ Nova Scotia’s [Fitness to Practice Program](#) is the only operational alternative discipline program for lawyers in Canada, and is specifically designed to address circumstances where a lawyer’s ability to practise law has been substantially impaired by a physical, mental or emotional condition, disorder or addiction, pursuant to the process set out in [Part 9](#) of the Nova Scotia Barristers’ Regulations. The Benchers of the Law Society of Newfoundland and Labrador have approved, in principle, the development of an ADP-type program, but require legislative amendments prior to proceeding with implementation.

¹⁵ There are currently over 30 ADP programs in operation in the United States. For a history of the development of alternatives to discipline in the United States see S. Saab Fortney, “[The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms](#)” (2014), St. Mary’s Law Journal Symposium on Legal Ethics and Malpractice, Hofstra Univ. Legal Studies Research Paper No. 2014-01 at 10 (“Fortney”).

result in more severe outcomes for the lawyer as compared to the matter being dealt with through the regular discipline process; and the unrestricted sharing of health information with the formal discipline stream should the lawyer be unsuccessful in completing the alternative measures. Additionally, a number of diversion programs conflate a conduct issue linked to mental health or substance use issues with a competence matter. This further deters participation given that most lawyers will seek to avoid having their competency challenged by the regulator on the basis of the existence of a health issue.

25. Based on this review, the Task Force concludes that there are certain design features that must be avoided, and conversely, those that ought to be included in developing an alternative process for health-related conduct issues. Additionally, as the breadth of existing schemes demonstrates, there is no one-size-fits-all model for ADP, and each program must be tailored to the particular regulatory context in which it operates. For this reason, and as outlined in further detail in the next section of this report, the Task Force has been careful to avoid replicating an existing scheme in favour of a more deliberate and innovative approach that ensures that the proposed program is optimally suited to BC's regulatory environment and maximizes the potential benefits to both participant lawyers and the public interest.

Purpose, goals and guiding principles

26. Clearly identifying the purpose and goals of, and guiding principles for, a process that provides an alternative to traditional discipline is an essential first step in engineering an effective program.
27. The purpose of developing an ADP is to provide the Law Society with an opportunity to address alleged misconduct outside of the formal discipline stream in circumstances in which a lawyer's health condition is a contributing factor. The goal of the process is to individualize the regulatory response — with a focus on support, treatment, practice interventions and other remedial measures — to address the underlying health condition, rather than simply imposing sanctions. If the health issue is successfully resolved or managed as a result of the lawyer's participation in the ADP, it is likely that the risk of the conduct reoccurring will be reduced. This, in turn, enhances the protection of the public.
28. The ability of the ADP to achieve these goals will depend on its design. Unless the program creates an environment in which lawyers are willing to share relevant health information and commit to taking the necessary steps to address their health condition, the ADP's potential public interest benefits will not be realized. On this

basis, the design of the proposed ADP is informed by the following four guiding principles:

Confidentiality: The ADP must overcome the barriers to the disclosure of health information that exist within the regular discipline processes. Lawyers will only choose to participate in the process if they are satisfied that confidentiality measures are firmly in place to govern the collection and use of health and other personal information. This is particularly important given the stigma surrounding mental health and substance use disorders. While protecting the confidentiality of this information is a key consideration, the ADP must also retain as much transparency as possible in the circumstances.

Voluntariness: Participation in the ADP will be contingent on the extent to which lawyers clearly understand the voluntary nature of the process. Lawyers are more likely to provide the Law Society with the necessary information and take the required steps to address their health and associated behavioural issues if informed consent permeates all stages of the program's design.

Without risk process: It is important for the success of the ADP that there is no risk that those lawyers that opt to participate in the program's remedial processes will be subject to a "worse" regulatory outcome than they would had they remained in the traditional discipline process. It is equally important, however, that the implementation of the ADP does not inhibit the Law Society's ability to protect the public interest. Consequently, a key feature the ADP — and one which appears to differentiate it from many existing diversion programs — is that there is no risk to either the lawyer or the Law Society if a lawyer is unable or unwilling to complete the alternative process. Sanctions will not be imposed for a failed attempt to take remedial action and the matter will simply be returned to the regular discipline process. Consequently, both the lawyer and the Law Society will be in the same position they would have been had the ADP never been attempted. The public interest will be served either by the successful completion of the ADP or the application of the regular discipline process.

Public interest: At all stages of the process, the ADP must be informed by the Law Society's statutory mandate, which requires both policy and operational decisions to be based, ultimately, on what is in the public interest.

Key design elements

29. The proposed ADP comprises four key stages that chart a lawyer's progression through the process, namely: (1) eligibility and intake (2) negotiating the terms of the consent agreement (3) approval of the consent agreement, and (4) fulfilling the terms of the consent agreement. The material that follows outlines each of these stages and describes the manner in which they comport with the program's purpose, goals and guiding principles.

Eligibility and intake

30. Lawyers will be informed about the ADP during a complaint investigation and provided with information about its objectives, eligibility requirements, confidentiality assurances and what the lawyer can expect if the matter is referred. Similarly, the potential for a lawyer's participation in the ADP will be added to the list of discipline outcomes complainants receive from the Law Society in the course of responding to a complaint.

31. To reinforce the ADP's independence from the Professional Regulation department's disciplinary and remedial programs — as discussed in more detail below — eligibility for the ADP should be determined before a citation has been issued and the Discipline Committee has become involved in the matter.

Threshold eligibility

32. To clearly establish the ADP as an *alternative* process, the program must distinguish itself from the Law Society's regular disciplinary stream and the manner in which it collects and utilizes health information. In the Task Force's view, this will require the ADP to be entirely separate from the Professional Regulation department's discipline processes and the Discipline Committee. Additionally, on the basis that the Practice Standards Committee's mandate is to address lawyer competence, any association between the Practice Standards program and the ADP risks reinforcing the stigmatizing and incorrect view that there is necessarily a causal relationship between mental health and substance use disorders and competency issues, and should therefore be avoided.¹⁶ As such, establishing rules, policies and other operational

¹⁶ The Practice Standards program creates a process for investigating a lawyer's practice if there are reasonable grounds to believe the lawyer is practising law in an incompetent manner, including recommending remedial programs and issuing orders that impose conditions or limitations on the lawyers practice. See [section 27](#) of the *Legal Profession Act* and [Division 2](#) of the Law Society Rules.

firewalls to maintain the independence of the ADP from the Law Society’s other regulatory programs will be critical.

33. How might the Law Society assess whether a matter is suitable for an alternative to traditional disciplinary processes? A review of existing ADP schemes suggests that there is no standard approach to determining threshold eligibility for a referral into an alternative discipline process. In some jurisdictions, only those lawyers with a narrow set of health conditions (e.g. chemical dependency, mental health disorder) are eligible to participate. Other programs explicitly exclude certain conduct¹⁷ or limit eligibility to matters that constitute “less serious misconduct.”¹⁸ Several schemes rely on very broad eligibility criteria, including a lawyer's need for personal assistance or circumstances where there are “reasonable concerns” about a lawyer’s capacity.¹⁹
34. The Task Force is of the view that the public interest is best served by avoiding both an overly restrictive approach that has the potential to prematurely exclude matters that may benefit from the ADP, and an overly broad approach that may not provide the Law Society with the necessary discretion to determine that very serious allegations of misconduct are not appropriate for an alternative process.
35. Accordingly, the Task Force recommends that the following three factors govern the Executive Director’s decision as to whether a matter is eligible for a referral to the ADP:
 - (1) the lawyer’s acknowledgement of the existence of a health issue that has contributed to the conduct issue(s);
 - (2) the seriousness of the alleged conduct, including whether the conduct has resulted in, or is likely to result in, substantial harm to a client or another person; and
 - (3) written consent from the lawyer to participate in the ADP.
36. Guidelines will be developed with respect to the application of the second factor, and will reflect that certain conduct is not appropriate for the ADP. For example, conduct that if proven would result in a reasonable prospect of disbarment — such as the misappropriation of trust funds — would not be eligible for the ADP. The guidance

¹⁷ Many US diversion programs explicitly exclude certain types of conduct including misappropriation of trust funds, dishonesty, deceit, fraud or misrepresentation, conduct that constitutes a serious crime or conduct that results in substantial prejudice to a client or another person.

¹⁸ See for example, [Washington State Court Rules: Rules for Enforcement of Lawyer Conduct](#) at 6.1.

¹⁹ See for example, the Nova Scotia Barristers’ Society’s Fitness to Practice Program, which is governed by the Nova Scotia Barristers’ Society Regulations [9.3](#).

may also identify the types of conduct that would only be considered for the ADP in exceptional circumstances.²⁰

37. Adopting this principled and flexible approach when considering a matter's eligibility for ADP provides a level of consistency and transparency as to how determinations about entry into the ADP are made, and ensures that the subject lawyer consents to participation. At the same time, it provides the Law Society with the ability to assess a matter's suitability for the ADP on a case-by-case basis.²¹ This is particularly important during the early years of the program, when there remains a level of uncertainty with respect to the types of conduct for which referrals to the ADP may be sought.
38. Threshold eligibility determinations also serve a gatekeeping function, providing a mechanism to ensure that matters are not automatically referred to the ADP when, from a public interest perspective, they are clearly not appropriate for an alternative process.
39. To ensure that the impact of the conduct on the complainant is considered at the threshold eligibility stage, the application of the second factor will be informed by information that is routinely collected from complainants during the initial investigation of a complaint, regardless of whether a matter is being considered for the ADP. Importantly, the Law Society's investigating lawyer will not inform the complainant that the subject lawyer is being considered for the ADP when seeking this information. Protecting the confidentiality of the lawyer's health status in this manner will reduce the likelihood that lawyers will be deterred from considering the ADP based on concerns that others will become aware of the existence of a potential health issue before their eligibility has been determined. At the same time, this approach is not expected to limit or detract from the information obtained by the Law Society during the investigation process with respect to the impact of the conduct on the complainant.
40. The complainant will be provided with notice if, following the application of the eligibility factors, a decision is made to refer the matter to the ADP. Additionally, as discussed in further detail later in this report, the impact of the lawyer's conduct on the complainant is specifically considered in subsequent stages of the alternative

²⁰ Outlining exemptions in the supporting guidelines is similar to the approach taken by the BC Prosecution Service in its alternative measures program. See *supra* note 13.

²¹ For example, Nova Scotia's Fitness to Practice Program, which has been in operation for many years, has not established blanket exclusions on specific types of alleged misconduct.

discipline process, including an opportunity for the complainant to provide information to the Executive Director in this regard.

Provision of health information

41. Once threshold eligibility has been established and a lawyer is formally referred to the ADP, the matter will be assigned to a Law Society lawyer, referred to as the ADP counsel, who is responsible for working with the lawyer, and their counsel, if applicable, to craft the terms of the consent agreement.
42. Prior to commencing the negotiation of the terms of the consent agreement, the subject lawyer will be asked to provide the ADP counsel with health information verifying the existence of a health issue that has contributed to the conduct issue and that is sufficient to satisfy the Law Society that:
 - a. a health issue likely contributed to the conduct issue(s);
 - b. the lawyer could benefit from remedial initiatives; and
 - c. it would be in the public interest for the lawyer to engage in such remedial initiatives.
43. Any health or other personal information that is obtained by the Law Society during the lawyer's participation in the ADP will be treated as confidential, and lawyers will be advised what use will be made of such information prior to providing it to the Law Society. Absent the lawyer's consent, this information will not be disclosed to the complainant, the lawyer's firm or the public,²² nor will it be shared with, or used in, any concurrent or future Law Society proceedings except for the purpose of meeting the Law Society's legal obligations to accommodate the lawyer.²³
44. If the lawyer does not provide the Law Society with the required health information, or the information provided does not support a linkage between the conduct at issue and a health condition, the matter will be referred back to the Professional Regulation department and proceed as if no referral to the ADP had been made.
45. The collection of health information at this stage in the ADP serves three purposes. First, it enables the Law Society to assess whether there is a relationship between the

²² The Law Society Rules provide for the non-disclosure of confidential information in a number of other circumstances. See for example [Rule 4-15\(4\)](#) (pertaining to the confidentiality of conduct reviews) and [Rule 3-23](#) (pertaining the confidentiality of Practice Standards Committee deliberations).

²³ If, for example, the lawyer was unsuccessful in fulfilling the terms of the consent agreement and the matter was returned to the regular discipline process, the Law Society may be required to take into account the lawyer's health condition to meet its duty to accommodate under BC's [Human Rights Code](#). The use of this health information will be highly circumscribed and likely improve the regulatory outcome for the lawyer.

conduct that gave rise to the initial complaint and a health condition. Second, this information provides the Law Society with current, credible information about the lawyer's health status that will inform the next stage of the ADP, in which the terms of the consent agreement are negotiated.

46. Third, if the medical, clinical or other information indicates that it is reasonably likely that the lawyer's health condition will result in behaviour that may have an imminent, adverse impact on the public, the Law Society may be required to take immediate action. In such cases, the ADP counsel will seek the lawyer's consent to enter into an interim agreement, prior to negotiating and drafting the terms of the final consent agreement, to ensure the public is protected. Terms of the agreement will be guided by the information that is provided to the Law Society, and may include, for example, restrictions or conditions on practice until further information and treatment has been sought.
47. The Task Force regards the use of an interim agreement as preferable to requiring lawyers to enter into undertakings for a number of reasons. In addition to aligning with the principles of voluntariness and consent, interim agreements also eliminate the possibility of a lawyer being subject to disciplinary action (an outcome that the ADP is specifically designed to avoid) for a breach of an undertaking.²⁴ In contrast, failure to enter into, or fulfil the terms of, an interim consent agreement will not be associated with any disciplinary sanction, but will result in the matter being returned to the Professional Regulation department for further action, including any interim orders that are available through the regular discipline process. In this regard, all parties are in the same position they would have been in if the ADP did not exist.

Negotiating the terms of the consent agreement

48. Once a linkage is established between a health condition and the conduct issue, ADP counsel will work with the lawyer to negotiate the terms of the consent agreement that will govern the lawyer's ongoing participation in the alternative process. The goal of this stage of the ADP is to bring the lawyer and the Law Society together in a consent-based process to decide what remedial measures are required to support the lawyer in improving their health and meeting the expected standards of professional conduct.
49. The Task Force endorses a collaborative approach to drafting the agreement, rather than one in which the Law Society unilaterally proposes the terms. In addition to

²⁴ Under [Rule 3-8\(4\)](#) a complaint may be referred to the chair of the Discipline Committee if there are allegations that the lawyer has breached an undertaking given to the Law Society.

aligning with the ADP's overarching voluntary, consent-based approach, a cooperative and iterative process may result in lawyers suggesting additional or alternative terms, informed by their experiences of managing their health issue and their familiarity with their particular practice setting, and being more committed to actions that they, themselves, have proposed. Additionally, supports and treatments that are imposed rather than agreed to are significantly less likely to succeed or benefit the lawyer and the public interest.

50. Ultimately, the aim is to create a consent-based agreement that is tailored to the lawyer's individual health and practice circumstances. Terms may include a recommended treatment plan (e.g. participation in a rehabilitation program,²⁵ counselling, clinical assessments), medical monitoring and reporting requirements, practice restrictions (e.g. limits on practice, participation in mentorship programs or supervisory arrangements), restitutionary steps to mitigate loss or harm to the complainant or others resulting from the misconduct, an apology, or other corrective courses of action agreed to by the ADP counsel and the lawyer.
51. When proposing terms related to support and treatment, the Law Society must remain cognizant that its institutional expertise lies in the realm of professional regulation, not healthcare. Accordingly, prior to proposing or agreeing to terms related to the lawyer's health condition, it is expected that the ADP counsel will consult with the appropriate professionals. Additionally, ADP counsel should receive dedicated education and training in mental health first aid and substance use issues, to ensure they have a robust understanding of the types of health concerns that are anticipated to be addressed in the ADP and an enhanced level of understanding of the scope of available clinical information, diagnoses and treatments.
52. Additional terms that can be expected in every consent agreement include those that address the duration of the lawyer's participation in the alternative process; confidentiality and information-sharing; oversight of the fulfillment of, or amendment to, terms of the agreement; responsibility for reporting a breach of terms; the outcome of the lawyer's successful or unsuccessful completion of the ADP; and costs. Each agreement will also include a term that prohibits a lawyer from asserting delay or any other prejudice as the result of participation in the ADP if the matter is subsequently returned to the discipline stream.

²⁵ If the terms of the consent agreement include enrollment in treatment or support programs, secular options must be included among the range of options presented.

53. Neither the ADP counsel nor the subject lawyer are required to accept any given term and, if no agreement is reached, the matter will be returned to the Professional Regulation department in accordance with regular processes. If, however, the parties agree on terms, the matter advances to the next stage of the ADP, namely, the final approval of the consent agreement.

Approval of the consent agreement

54. To reinforce the objectivity and independence of the decision-making process, and to ensure the approval of the consent agreement is consistent with the standards of simplicity, fairness and expediency, the Task Force recommends that the final approval of the consent agreement is the responsibility of the Executive Director. This approach is expected to provide a more agile and timely process than is typically available through Committee decision making, and also avoids concerns about confidentiality and conflicts that may arise if the approval of the agreement were the responsibility of the Discipline or Practice Standards Committees, for example.

55. To improve transparency, it is proposed that the Executive Director's decision-making is guided by a series of factors, such as the nature and scope of the terms of the agreement, including specific action taken to protect the public; the nature and gravity of the alleged conduct; the impact of the conduct on the complainant or others; the lawyer's previous participation in the ADP, if any; the effect of the agreement on the administration of justice and the public's confidence in the integrity of the profession; whether participation in the ADP is likely to improve the lawyer's future professional conduct and accomplish the goals of the alternative discipline process; and the presence of aggravating or mitigating factors, such as whether the lawyer has acknowledged the misconduct and taken steps to redress the wrong.²⁶ The Executive Director's application of these factors will be supported by accompanying guidelines.

56. At this stage, it is also contemplated that the complainant will have an opportunity to provide a statement regarding the effect that the conduct has had on them, which will inform the Executive Director's consideration of this factor in the decision-making process and ensure that the complainant has a similar level of involvement as in current discipline processes, such as a conduct review.

57. To assist the Executive Director in their decision-making, limited consultations with health and other professionals may be necessary to determine whether, from a

²⁶ It is expected that in considering the approval of the consent agreement, the Executive Director will also be provided with submissions on behalf of the ADP counsel and the subject lawyer that addresses these types of factors.

- medical and clinical perspective and in relation to the lawyer's practice environment, the proposed terms of the consent agreement are appropriate. To maintain the confidentiality of the process, the subject lawyer's identity will not be revealed to those from whom expertise is sought.
58. To provide some level of Benchers oversight of the process, it is proposed that the Executive Director provides the Executive Committee with a summary of their decision to approve or not approve a consent agreement, including the manner in which the various factors were considered as part of that determination. Again, to preserve the confidentiality of the ADP, the lawyer will not be identified in the course of this reporting function.
59. If the Executive Director approves the agreement, the parties become subject to its terms for the duration of the lawyer's participation in the program. Alternatively, if the Executive Director declines to approve the agreement, the lawyer and the ADP counsel may propose amendments. In the event that the parties are unable to agree on mutually acceptable amendments, or the Executive Director determines that the amended agreement ought not to be approved based on the application of the above factors, the matter will be returned to the Professional Regulation department's regular processes for further action at "no risk" to either party, as both the Law Society and the lawyer will be in the same position that they would have been in had the matter not initially been referred to the ADP.
60. At all times, the consent agreement will be treated as confidential and will not be disclosed to the complainant, the public or the subject lawyer's firm without the lawyer's express consent,²⁷ nor will information relating to the lawyer's health condition or the terms of the consent agreement be shared with the Professional Regulation department's processes or committees unless this information is necessary to accommodate the lawyer pursuant to BC's *Human Rights Code*.

Fulfilling the terms of the consent agreement

61. In circumstances where the terms of the consent agreement include a treatment plan, monitoring and reporting will be an important element of supporting the lawyer transition back to a healthier practice and ensuring they comply with the agreement while doing so. If, for example, the agreement includes reporting requirements, it is expected that the terms will include a limited waiver of confidentiality that permits the Law Society to obtain the necessary information from treating professionals and

²⁷ A similar approach is taken with respect to the confidentiality of information and documents, reports or actions that form part of the Practice Standards Committee's consideration of a complaint. See [Rule 3-23](#).

monitoring agencies to evaluate whether the lawyer has fulfilled the terms of the agreement.

62. As a matter of policy, it is also expected that details about the frequency and duration of, and payment for, treatment and monitoring will have been established as terms of the agreement. To ensure that the ADP does not create barriers for those lawyers experiencing financial hardship, it is proposed that in situations where a lawyer can demonstrate that they cannot bear the full costs of the treatment or monitoring that is required to address the health issue, options for cost-sharing are considered during the process of negotiating the terms of the consent agreement.
63. Ideally, the lawyer will satisfy the terms of the consent agreement, in which case the outcome will typically be the resolution of the complaint, requiring no further action by the lawyer or the Law Society.²⁸ In other cases, it may be necessary to amend the consent agreement prior to the terms being fulfilled. In some circumstances, public interest considerations may support the Law Society publicizing the outcomes of completed ADP consent agreements in a general and anonymous way.
64. Amendments to the consent agreement may be proposed by either party and are subject to the approval of the Executive Director. Initiating an amendment may be appropriate, for example, if there is a change in the lawyer's circumstances or the Law Society receives new information. An amendment may also be necessary if there is a breach of terms related to treatment that requires action on behalf of the parties, such as additional clinical assessments or changes to the treatment plan. Recognizing that relapse and the reoccurrence of symptoms is a common feature of many health conditions, permitting amendments to the terms of the original agreement should be the preferred approach for a breach related to the management of the health issue, provided that it is in public interest to do so.²⁹
65. A material breach of the agreement can also result in the lawyer's participation in the ADP being terminated where that is in the public interest. In such cases, the matter will be returned to the Professional Regulation department for further action in accordance with its usual processes. Information relating to the lawyer's health condition that has been disclosed during the course of the ADP, however, will not be shared with the Professional Regulation department's staff or committees unless this

²⁸ In some circumstances, the public interest may require additional regulatory action following the completion of the ADP, which would be established in the terms of the consent agreement. It is not contemplated that the rules would permit the complainant to initiate a review of the decision to take no further action following the completion of the ADP or to otherwise challenge the decision to permit the lawyer to enter the ADP through the Complainants Review Committee.

²⁹ A similar approach is taken under [Rules 3-7.2 and 3-7.3](#).

information is necessary to accommodate the lawyer pursuant to the *Human Rights Code*.

66. There may be instances where a lawyer finds that they are unable to adhere to the terms to which they agreed, particularly where the terms include conditions related to substance use disorders. In accordance with the “no risk” nature of the ADP, a lawyer who elects to terminate the consent agreement will not be subject to sanction for doing so. Rather, the matter will be returned to the regular discipline stream for further action. As a result, failure to fulfill the terms of the consent agreement will leave the lawyer in the same position that they would have been in had participation in the ADP not been attempted. In this regard, unsuccessful efforts to complete the ADP will not have negative regulatory implications for the lawyer, nor will it constrain the Law Society’s ability to fulfil its public interest mandate through the regular discipline processes.
67. In the event that a disagreement arises as to whether the terms of the agreement have been fulfilled, the matter will be determined following an application to the President of the Law Society, and will be adjudicated by the President or their delegate.
68. Complainants will be notified when the lawyer successfully completes the program or, alternatively, if the matter is referred back to the Professional Regulation department for further action.³⁰
69. Finally, to reflect that the program is an *alternative* to the regular discipline process, the lawyer’s participation in the ADP should not form a part of their professional conduct record.³¹ Some form of internal record keeping will, however, be necessary to support a data-driven evaluation of the success of the ADP, including the number and type of conduct issues referred to the ADP, the proportion of lawyers that successfully fulfill the terms of their consent agreement and whether those that participate in the ADP experience future regulatory interventions.³²

³⁰ This is similar to the approach taken under [Rule 3-24](#) in which the Executive Director must notify the complainant in writing of the Practice Standards Committee’s decision, but not the content of any report or the Committee’s recommendations about the lawyer’s practice.

³¹ A number of alternative discipline programs in the United States take this approach, as does Nova Scotia’s Fitness to Practice Program. This is also similar to the approach adopted for conduct meetings, which do not form a part of a lawyer’s professional conduct record. The fact that a lawyer has undergone a practice review also does not form a part of their professional conduct record, although any resulting recommendations from the Practice Standards Committee do.

³² Academic commentators strongly support program administrators maintaining internal records for statistical purposes and to provide a more complete understanding of the impact and effectiveness of the alternative process. See Fortney *supra* note 15 at 15.

Policy Considerations

70. To ensure that the Benchers have a clear understanding of the ADP, much of this report has been devoted to describing the operational aspects of the proposed process. In this section of the report, a series of policy considerations are identified to further support the Benchers' discussions and deliberations regarding the establishment of an alternative discipline process in BC.

Public interest

71. Section 3 of the *Legal Profession Act* recognizes that supporting and assisting lawyers in fulfilling their professional duties is one of the ways in which the Law Society can protect and uphold the public interest.³³ This support and assistance ought to extend to all practitioners, including those experiencing health issues.

72. Establishing alternatives to traditional disciplinary approaches in circumstances where a health issue has contributed to lawyer misconduct is recognized as an emerging best practice for legal regulators.³⁴ By creating a process that is specifically designed to facilitate the disclosure and treatment of health conditions and focus the regulatory response on remediation and rehabilitation, the ADP aims to put lawyers in a stronger, healthier position to meet their professional responsibilities. In this regard, the ADP has the potential to realize significant public interest benefits by reducing the likelihood that the problematic behaviour associated with the health issue will escalate or recur.³⁵

73. The ADP's design ensures that public interest considerations inform all aspects of the process, including the initial eligibility decision and the negotiation and approval of the consent agreement. Additionally, once an agreement is approved, if information bears out that it is not in the public interest for the lawyer to continue in the ADP, the

³³ [Section 27](#) of the *Legal Profession Act* provides the authority for the Benchers to establish and maintain a program to assist lawyers in handling or avoiding personal, emotional, medical or substance abuse problems. To date, this authority has been used to establish the Practice Standards program. Under section 27(2) of the Act, the Practice Standards Committee is tasked with making investigations into a lawyer's competence to practice law.

³⁴ The US National Task Force on Lawyer Wellbeing recommends that legal regulators adopt alternatives to discipline as a means of enhancing lawyer well-being and improving client service. See National Task Force on Lawyer Wellbeing, "[The Path to Lawyer Wellbeing](#)" (August 2017) at Recommendation 22.4.

³⁵ There are few empirical studies that assess the effectiveness of alternative discipline systems. A study of the Arizona alternative discipline system is frequently cited in support of such programs. Based on a review of ten years of data, the study concluded that there was a statistically significant difference in the number and severity of disciplinary charges between lawyers who had completed the state diversion program and those who had declined to participate in the program. See D.M. Ellis, "[A Decade of Diversion: Empirical Evidence that Alternative Discipline is Working for Arizona Lawyers](#)" (2003) 52 Emory L.J. 1221 at 1229. The limitations of this study are explored in L.C. Levin, "[The Case for Less Secrecy in Lawyer Discipline](#)"(2007) 20 Geo. J. Legal Ethics 1 ("Levin").

matter will be returned to the Professional Regulation department to be addressed in accordance with those traditional processes.

74. The proposed ADP also aligns with the Law Society's commitment to proactive regulation, which is premised on the theory that the public is best served by a regulatory scheme that prevents problems in the first place, rather than one that focuses on issuing sanctions once problems have occurred.³⁶ Discipline does not make an ill lawyer well and, even in circumstances where health issues are treated as a mitigating factor at the penalty stage of a discipline hearing, the regulator has missed a critical opportunity to take steps earlier in its processes that may have improved the outcomes for both the lawyer and the public.
75. The revision of regulatory processes to support and promote mental and physical health is also identified as one of the Law Society's key strategic objectives and, to this end, the ADP assists the Law Society meet its strategic goals. Additionally, the ADP imbues many of the values identified in the Law Society's strategic plan, including taking an innovative and adaptive approach to regulation and being responsive to the changing needs of the profession.³⁷

Perceptions of the profession

76. Commentators have observed that the greater the likelihood that a lawyer's involvement in an ADP is made public, the less likely practitioners are to choose the process over traditional discipline.³⁸ If eligible lawyers decline to participate in the alternative process, the extent to which the ADP realizes its public interest benefits will be greatly reduced.
77. On this basis, the ADP must foster a regulatory environment in which lawyers feel it is safe to disclose health information and engage in the process of crafting and fulfilling the terms of a consent agreement. By integrating informed consent into each stage of the process, it is expected that more lawyers will consider the ADP, knowing that if they are unwilling or unable to continue to meet the program requirements, the conduct issue, but not health-related information, will simply be returned to the Professional Regulation department for further action.

³⁶ The Law Society oversees a number of proactive regulatory initiatives that support lawyers and firms in improving the services they provide to clients, including the practice advice, continuing professional development and law firm regulation programs.

³⁷ Law Society of BC [Strategic Plan 2021-2025](#).

³⁸ See for example Levin *supra* note 35.

78. As discussed earlier in this report, the ADP's actual and perceived independence from the discipline rules, processes, staff and committee will be critical to the program's acceptance by the profession as an alternative to traditional discipline. Establishing strict limits on information-sharing within and beyond the ADP is expected to diminish uncertainties regarding the confidentiality of the process and mitigate fears about the potential disciplinary consequence of providing health information to the Law Society.
79. The ADP must also be (and be seen to be) entirely separate from the Law Society's Practice Standards program. Housing the ADP within Practice Standards is at odds with the guiding principles of voluntariness and confidentiality given that the Practice Standards Committee is authorized to share health information obtained during its processes with the Discipline Committee and issue orders requiring lawyers to undergo psychiatric, psychological or other clinical assessments or counselling. Additionally, the mandate of the Practice Standards Committee is to address competency concerns.³⁹ As a regulatory initiative that strives to improve mental health within the profession, the ADP must not be administered in a manner that suggests that lawyers experiencing mental health or substance use issues are necessarily less competent. Although some health conditions may generate concerns about competency, care must be taken to ensure that the ADP does not conflate all health challenges with incompetence.⁴⁰
80. There are, however, some uncertainties as to whether the ADP will be effective in combatting stigmatizing views about mental health and substance use issues or the self-stigma that can arise in individuals living with these conditions. On the one hand, the ADP strives to acknowledge the impacts that mental health and substance use issues can have on conduct, to encourage lawyers to share this information with the Law Society and to address the health issue in a data-driven, evidence-based fashion. On the other hand, the act of creating a specialized process, and particularly one involving strict confidentiality assurances and the creation of a separate process for lawyers with health-related conduct issues, does create a possibility that the ADP will further entrench, rather than reduce, the stigma surrounding mental health and substance use issues.

³⁹ See [section 27](#) of the *Legal Profession Act*. See also Law Society Rule [3-16\(b\)](#).

⁴⁰ The *Legal Profession Act* recognizes a difference between conduct and competency issues. For example, section 26(2) of the Act authorizes the Benchers to make rules authorizing an investigation into the conduct *or* competence of a lawyer, and section 36(f) provides that the Benchers may authorize a hearing into the conduct *or* competence of a lawyer by issuing a citation. Similarly, the Law Society Rules recognize that discipline violations can be caused, among other things by misconduct *or* the incompetent performance of duties.

81. Clear and transparent communications with the profession about the rationale for, and operational details of, the ADP will go some ways to improving members' perceptions of the program. This messaging should strive to reduce the stigma surrounding mental health and substance use issues, which may otherwise prevent lawyers that experience these health concerns from considering the ADP.

Public perceptions

82. Consideration of the public's perception of the ADP is also important. A lack of transparency about what occurs within the ADP has the potential to negatively impact views about the program's legitimacy and fairness and the extent to which it fulfills the Law Society's public interest mandate. The ADP's emphasis on lawyers' rehabilitation and reducing the likelihood of future misconduct may also be criticized as overlooking the more immediate harms experienced by clients or others affected by a lawyer's conduct, or limiting opportunities for complainants to provide input into the regulatory process.
83. To address these concerns, communications with the profession and the public should emphasize the public interest objectives of the alternative discipline process and confront misconceptions that the ADP "protects" practitioners from discipline or otherwise limits the extent to which subject lawyers take responsibility for their actions.
84. Rules should also be established to ensure that complainants are provided with adequate notice of both a lawyer's initial referral to the alternative process and whether they have successfully completed the ADP. Additionally, as described earlier in this report, the impact of the alleged conduct on the complainant or another person is a factor that is considered in determining a matter's initial eligibility for the ADP, as well as during the final approval of a consent agreement by the Executive Director, and is expected to carry particular weight in circumstances where the complainant or others have experienced harm. Where appropriate, the terms of a consent agreement may also provide complainants with additional opportunities for input, or establish restitutionary steps or apologies agreed to by the lawyer.
85. Consideration may also be given to the merits of publicizing the outcomes of completed consent agreements in a general and anonymous way, akin to the publication of the outcome of conduct reviews, to demonstrate to the public how the

ADP achieves its objectives.⁴¹ Evaluations of the pilot project must also be publicly available, while ensuring that lawyers' privacy and confidentiality are protected.

Program impacts and costs

86. The long-term regulatory and budgetary impacts of the ADP will greatly depend on the number and type of conduct issues that are referred to the alternative process over time. Based on the uncertainty created by these and other variables, the Task Force recommends that the ADP is initially established as a three year pilot project, commencing no later than September 2022. This will enable the Law Society to undertake a preliminary assessment of the ADP's effectiveness and costs prior to making commitments as to the program's permanence as an alternative process.
87. To ensure that an assessment of the pilot project is data-driven and evidence-based, information will be collected in relation to a number of key metrics, including: the number matters that are eligible for, and referred to, the ADP; the types of health and conduct issues for which referrals are sought and granted; the proportion of consent agreements that are successfully completed; the timeliness of the process; the extent to which lawyers and complainants are satisfied with the regulatory outcomes; and the financial and human resources required to support the process. Given the relatively short duration of the pilot project, it is expected that limited data will be available with respect to recidivism rates among ADP participants.
88. It is difficult to accurately forecast the uptake of, and expenses associated with, the pilot project. The frequency with which mental health or substance use issues arise in the course of the Professional Regulation department's regular processes is likely a poor proxy for the ADP's potential use, given the limited number of lawyers that currently share health information with the Law Society. However, based on a review of data over the course of the past ten years, the Professional Regulation department estimates that several lawyers may be eligible to participate in the ADP in the first year of the pilot. It is anticipated that the number of participants will increase over time as awareness and acceptance of the ADP grows and lawyers become more comfortable in disclosing the required health information to the Law Society.
89. The pilot project's costs will also be impacted by the complexity and severity of health issues for which referrals are sought. The resources required to support the

⁴¹ A similar approach is taken with respect to the publication of conduct review summaries under [Rule 4-15](#) which must not identify the lawyer or complainant unless that person consents to being identified.

drafting, approval, monitoring and enforcement of a consent agreement will vary considerably depending on the nature of the health and conduct issues.

90. The foreseeable, short-term budgetary implications of the pilot project include the costs associated with developing new rules, policies and procedures for the ADP, hiring ADP counsel and ensuring that both counsel and the Executive Director have access to the necessary consultations with health experts and other professionals during the negotiation and approval of the terms of the consent agreement.
91. It is anticipated that a proportion of these expenditures will be accounted for through existing staff resources, while others will require the allocation of additional funds. Although the uncertainties associated with the number and type of matters that may be referred to the ADP make it difficult to predict the budgetary implications of the pilot, it is likely that the costs will be at least \$110,000 per year. As a result, the total costs for the ADP for the duration of the pilot are anticipated to be at least \$330,000. These costs may be offset to some degree by the savings associated with channeling some matters away from the Professional Regulation department's processes. However, in advance of the pilot project, it is not possible to quantify the scale of these savings, if any.
92. The Benchers will be provided with interim and final reports analyzing the impacts of the pilot and, following a consideration of these reports, would be expected to make a final decision about the permanence of the ADP by the end of 2025, which will necessarily involve further information about the long-term cost of supporting the alternative discipline process.

Recommendation

93. The following recommendation is presented to the Benchers for discussion and decision:

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.

Conclusion and next steps

94. Over the last four years the Mental Health Task Force has recommended, and the Benchers have unanimously approved, a suite of educational and regulatory initiatives designed to improve mental health within the profession. Building on this work, the Task Force now recommends that the Benchers approve the introduction of an alternative discipline process in the form of a three year pilot project, as means of improving the Law Society's regulatory response in situations where a health issue has contributed to a lawyer's conduct issue.
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 that the problematic conduct will escalate or recur in the future. This, in turn, enhances the protection of the public.
97. To achieve these goals, the ADP must balance the tensions between transparency and confidentiality, certainty and flexibility, due process and timeliness. The Task Force is of the view that the proposed process strikes this balance. However, given the significant resources required to develop and implement the ADP, it would be prudent for the Law Society to test the operational aspects of the process and evaluate its impacts, based on data and best-available evidence, in advance of making final decisions on the permanence of the ADP.
98. If the recommendation contained in this report is adopted by the Benchers, the matter will be referred to the Act and Rules Committee to develop the necessary rules. Work will also commence on creating the guidelines and procedures identified in this report, which must be in place prior to implementing the ADP. Early and ongoing communication with the profession and the public regarding the rationale for, and benefits of, the ADP will also be critical in raising awareness and acceptance of the program.