

## **STATE OF WEST VIRGINIA**

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 12th day of March, 2009, the following order was made and entered:

**RE: PROPOSED RULE CHANGES TO CREATE A NEW WEST VIRGINIA  
LAWYER ASSISTANCE PROGRAM**

On a former day, to-wit, November 18, 2008, came Karen Kahle, Chair of the West Virginia State Bar Committee on Lawyer Assistance and Intervention ("Lawyer Committee"), and presented to the Court proposed RULES OF THE WEST VIRGINIA LAWYER ASSISTANCE PROGRAM, such proposal having been unanimously approved by the Board of Governors of the West Virginia State Bar. In order to implement the proposed West Virginia Lawyer Assistance Program, the Committee proposed that the new RULES OF THE WEST VIRGINIA LAWYER ASSISTANCE PROGRAM be adopted to replace Rules 5.0 through 5.15 of the West Virginia Rules of Lawyer Disciplinary Procedure, which would be abrogated, and that a new subsection be added to Article III, Section 1 of the By-Laws of the West Virginia State Bar.

On December 9, 2008, the Court approved a period of public comment on the proposal, to conclude on January 8, 2009. Thereafter, on February 26, 2009 and March 2, 2009, came Henry W. Morrow, Jr., Chair of the Board of Governors Ad Hoc Committee on Lawyer Assistance, and Karen Kahle, Chair of the Lawyer Committee, and presented to the Court revisions to the proposal in light of the public comments received, such revisions having been approved by the Board of Governors.

Upon consideration whereof, the Court is of the opinion to and does hereby defer further consideration of the proposal until such time as the amendments to Article III of the By-Laws have been approved by the membership as required by Article X of the By-Laws.

Justice Albright did not participate in the consideration of this matter. Senior Status Justice McHugh sitting by temporary assignment. Insertions are indicated by underscoring, deletions by strikethrough, to read as follows:

## **"West Virginia Rules of Lawyer Disciplinary Procedure**

### ~~Rule 5.0. Lawyer Committee on Assistance and Intervention.~~

~~The Supreme Court of Appeals does hereby establish a Lawyer Committee on Assistance and Intervention [Committee] to receive and review complaints alleging lawyer disability or impairment.~~

### ~~Rule 5.1. Membership~~

~~The Committee shall consist of fifteen members.~~

### ~~Rule 5.2. Terms.~~

~~The members of the Committee shall serve terms of three years~~

### ~~Rule 5.3. Appointment.~~

~~The members shall be appointed by the Board of Governors of The West Virginia State Bar.~~

### ~~Rule 5.4. Reappointment.~~

~~The members of the Committee shall be eligible for reappointment without limitation.~~

### ~~Rule 5.5. Election of officers.~~

~~The members of the Committee shall annually elect a Chairperson and Vice Chairperson. The Chairperson, and in the Chairperson's absence the Vice Chairperson, shall perform the duties normally associated with that office and shall preside over all meetings of the full Committee, ruling on all motions, objections, and evidence.~~

### ~~Rule 5.6. Quorum.~~

~~Seven members of the Committee shall constitute a quorum. The Committee shall act only with the concurrence or a majority of those present and voting.~~

### ~~Rule 5.7. Panels.~~

~~The Committee is authorized to organize itself into such panels as it deems appropriate in the furtherance of its powers and responsibilities.~~

~~Rule 5.8. Disqualification.~~

~~A member of the Committee may not participate as such in any proceeding involving a charge against such member, such member's spouse, or a person within the third degree of relationship to either the member or the member's spouse. The appropriate appointing authority may make temporary appointments to fill a disqualified member's position in a given proceeding. Committee members shall disqualify themselves in any proceeding in which a judge, similarly situated, would be required to disqualify himself or herself.~~

~~Rule 5.9. Authority.~~

~~The Committee shall have the authority to (1) receive information regarding a psychological or medical impairment which has significantly affected a lawyer's ability to practice law; (2) receive information regarding substance abuse which has significantly affected a lawyer's ability to practice law; (3) refer information deemed by the Committee to relate to violations of the Rules of Professional Conduct arising from a psychological impairment, a medical impairment, or substance abuse to the Office of Disciplinary Counsel to conduct a full investigation; (4) interview the complainant concerning the information filed; (5) interview the lawyer concerning the information filed; (6) recommend a psychological and/or medical examination of the lawyer if determined by the Committee that such examination is warranted by the information received; (7) recommend a program of rehabilitation based on information received from a psychological and/or medical evaluation; (8) conduct a post rehabilitation review if deemed necessary; or (9) dismiss the information as having no basis.~~

~~Rule 5.10. Confidentiality.~~

~~All information received by the Committee pursuant to Rule 5.9 shall be kept confidential. In the event a lawyer complies with the recommendations of the Committee and rehabilitative intervention is successful, the Committee shall take no further action and all records shall be sealed and kept confidential. Except as pursuant to Rules 5.11 and 5.12, the Committee shall not release any information regarding its activities. (Amended by order entered December 6, 1994, effective January 1, 1995.)~~

~~Rule 5.11. Refusal to comply.~~

~~Refusal by a lawyer to execute a waiver to grant the Committee access to psychological/medical records shall constitute refusal to comply with the Committee's recommendations. In the event a lawyer otherwise refuses to comply with recommendations of the Committee, the Committee may, in its discretion, refer the original information received to the Office of Disciplinary Counsel to conduct a full investigation.~~

~~Rule 5.12. Failure of rehabilitation.~~

~~If, after a period of rehabilitation and reevaluation, the Committee finds that rehabilitative measures have not been effective, the Committee may, in its discretion, file all information received with the Office of Disciplinary Counsel to conduct a full investigation.~~

~~Rule 5.13. Evaluation expenses.~~

~~All expenses incurred by the lawyer for psychological and/or medical evaluation shall be the responsibility of the lawyer.~~

~~Rule 5.14. Proceedings and process.~~

~~All proceedings before the Committee shall be nonadversarial. A form for the filing of information pursuant to Rule 5.9 may be promulgated by the Committee and filed with the Office of Disciplinary Counsel. The evidence to be considered by the Committee shall include the information filed, interview of complainant, interview of the lawyer, and psychological and/or medical evaluations. All proceedings shall be formal and confidential. The rulings of the Committee shall be in the form of a recommendation only. A lawyer shall be given thirty days within which to accept or reject the Committee's recommendation. It shall be the responsibility of the lawyer to notify the Chairperson of the Committee in the event of acceptance of the recommendation.~~

~~Rule 5.15. Period of limitation for filing information.~~

~~Any information filed more than six months after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of an impairment or incapacity of a lawyer shall not be considered unless it is determined by the Committee that an impairment or incapacity exists at the time of filing."~~

**"Rules of the West Virginia Lawyer Assistance Program**

**Preamble.**

The Supreme Court recognizes that a wide range of influences can detrimentally affect the performance of a lawyer. Prominent among such influences are the effects of chemical dependence or mental conditions that result from disease, disorder, trauma or other infirmity that impair the ability of a lawyer to practice. Lawyer impairment is detrimental to the interests of clients, litigants, our legal system, the general public and the health and quality of life of the impaired lawyer. The vast majority of States have responded to the issue of lawyer impairment by creating funded lawyer assistance programs as contemplated by these rules, acknowledging the principle that every member of the bar has an obligation to the public to participate in an appropriate response to lawyer impairment. The Supreme Court finds that the West Virginia Lawyers Assistance Program is an appropriate method for addressing the issue of lawyer impairment and that the program will promote the integrity of the legal profession and will thereby directly benefit the people of West Virginia.

**Rule 1. Establishment of the West Virginia Lawyer Assistance Program (WVLAP).**

(a) *Establishment.* — There is hereby established a state-wide lawyer assistance program to be known as the West Virginia Lawyer Assistance Program (WVLAP), which shall

provide immediate and continuing help to lawyers who suffer from any physical or mental health condition that affects their ability to practice.

(b) Purpose. — WVLAP has four primary purposes: (1) To protect the interests of clients and the general public from harm caused by impaired members of the legal profession; (2) To assist impaired members of the legal profession to begin and continue recovery; (3) To educate the bench, the bar, and the public to the causes of and remedies for impairments affecting members of the legal profession; and (4) To develop programs that emphasize prevention of conditions that might negatively affect members of the legal profession.

***[Note by the Clerk: The following changes to proposed subsection (c)(1) were made after the period of public comment.]***

(c) Funding and Administration. — (1) The Board of Governors of the West Virginia State Bar shall annually assess a sum to be paid by all dues-paying members of the West Virginia State Bar, except those members exempted by order of the court, to fund the WVLAP to the extent necessary to carry out the full purposes of the WVLAP as set forth in these rules. Funding for WVLAP shall be determined by the Board of Governors of the West Virginia State Bar pursuant to Article III, Section 1 of the By-Laws of the West Virginia State Bar. In making funding decisions, the Board of Governors shall give due and careful consideration to any budget recommendations duly adopted by the board of directors of the WVLAP but shall not be bound by any such recommendations. The Board of Governors and the WVLAP board of directors shall work together to take all reasonable and appropriate steps to achieve the goals and objectives set forth in these Rules.

(2) WVLAP shall seek to establish additional private and public sources of funding.

(3) Funding for WVLAP may also include gifts or bequests from any source and earnings on investments of the WVLAP fund.

(4) All such funds so assessed and obtained shall be restricted to use by WVLAP.

(5) WVLAP may retain and invest its funds which may be carried over to future fiscal years.

## **Rule 2. Board of Directors.**

(a) Management. — The West Virginia Lawyer Assistance Program shall be administered by a board of directors appointed by the Board of Governors of the West Virginia State Bar. The WVLAP officers may make recommendations and nominations to the Board of Governors for appropriate persons to be appointed to the Board of Directors which shall be given due consideration by the Board of Governors. Officers of the Board shall consist of a chair, a vice-chair and a secretary. The officers shall be annually elected by the board of directors.

(b) Composition. — The Board shall consist of fifteen (15) members. Board members shall be selected from the membership of the West Virginia State Bar, except that the Board may include up to four (4) persons who are not members of the West Virginia State Bar. The members shall have diverse experience, knowledge and demonstrated competence in the problems of chemical dependency or mental conditions that affect members of the legal

profession. Geographic location of the Board membership shall be taken into consideration and the membership shall be geographically diverse.

(c) Terms. — (1) The Board of Governors shall appoint Board members for initial terms as follows: Five members for one year terms; five members for two year terms; and five members for three year terms.

(2) Subsequent appointments shall be for a term of three years.

(3) No member may serve more than two successive three-year terms; provided, however, that this limitation may be waived as to any member upon the affirmative vote of two-thirds of the Board and approval of the Board of Governors.

(d) Duties of the Board. — The members of the Board shall have the following powers and duties: (1) Establishing WVLP's by-laws, policies and procedures, consistent with the intents and purposes of these rules. Such by-laws, policies and procedures shall be established after reasonable notice to the Board of Governors and opportunity for comment.

(2) General administrative and management responsibility to operate the program to achieve its purpose and goals.

(3) Responsibility to hire and fire the WVLP executive director.

(4) To prepare, approve and present an annual budget to the Board of Governors.

(5) To make annual reports to the Supreme Court and Board of Governors.

(6) To ensure that the duties listed under Rule 3 are carried out in the absence of a director of the program.

(e) Meetings. — The Board shall meet quarterly. It shall also meet upon call of the chair, vice chair or upon the request of five (5) or more members upon reasonable notice to all members. A quorum for any meeting shall be a majority of the Board then existing.

### **Rule 3. Executive director of the program.**

(a) Appointment/Hire. — The Board shall recruit, hire, retain, supervise and may terminate the WVLP executive director.

(b) Qualifications. — The executive director shall have sufficient experience and training to identify and assist impaired members of the legal profession and to work well with the volunteers, plus any additional qualifications deemed necessary by the Board.

(c) Duties and Responsibilities. — The executive director's duties and responsibilities shall include but not be limited to the following:

(1) To work with the Board to develop a vision and plan to ensure that the WVLP becomes a vital and credible resource for the West Virginia legal community;

(2) To act as the initial contact point for all referrals to the WVLP, whether voluntary or involuntary. The director should always remain accessible to current members or to any attorney seeking help, and should never be insulated from the telephone or from personal contact. The position will require that the director be ready, either alone or together with a program volunteer, to travel within the State to meet with an attorney in need of assistance;

(3) To help members of the legal profession and their families to secure counseling and treatment for chemical dependency and mental conditions, by maintaining current information on available treatment services, both those that are available without charge as well as paid services. In this regard the director will be responsible for evaluating referral resources such as individual health care providers (physicians, counselors, therapists, etc.) and treatment programs, and developing a resource listing that is available for lawyers and others using the services of WVLPAP;

(4) Establish and maintain regular contact with other bar associations, agencies and committees that serve either as sources of referral or resources in providing help;

(5) To help lawyers, judges, law firms, courts and others, with the advice and assistance of a health care professional, identify and intervene with impaired members of the legal profession;

(6) To establish and oversee monitoring services with respect to recovery of members of the legal profession for whom monitoring is appropriate or ordered;

(7) To recruit, select, train and coordinate the activities of volunteer lawyers and judges who will provide assistance, and to maintain a current contact list of those volunteers. In furtherance of this duty the executive director should assist in coordinating volunteer support meetings and attend the meetings on a periodic basis to address questions or concerns of the volunteers;

(8) To work to establish and maintain a policy that ensures confidentiality, as required by these rules, as an essential component of the WVLPAP. Included in this duty will be the establishment of rules or policies relating to maintaining the confidentiality of those seeking assistance (whether voluntary or involuntary), as well as the confidentiality of LAP volunteers;

(9) To plan and deliver educational programs to inform the public, the judiciary, state and local bar associations, law firms, civic and educational organizations of the advocacy of early intervention and prevention and the assistance that is available to those in need;

(10) To be responsible for the day-to-day administration of the WVLPAP, including the development of job descriptions for WVLPAP staff personnel, and the hiring, training, and assessing of such individuals, including clinicians, assistants, and office personnel, as budgetary considerations allow. The director will also be responsible, with the oversight of the Board, for development of the WVLPAP's annual budget and oversight of its fiscal management;

(11) To act as the WVLPAP's liaison with the ABA Commission on Lawyer Assistance Programs and with lawyer assistance programs throughout the country;

(12) To network with other professional assistance organizations located in West Virginia;

(13) To establish private and public sources of funding for LAP; and

(14) Such other duties and responsibilities as may be established by the Board.

#### **Rule 4. Volunteers.**

The program shall enlist volunteer lawyers and judges whose responsibilities may include:

(a) Assisting in interventions planned by WVLPAP;

(b) Serving as twelve-step program sponsors and/or recovery mentors;

(c) Acting as local contact for members of the legal profession seeking help from the WVLPAP;

(d) Acting as a contact between WVLP and the courts, the Lawyer Disciplinary Board, the Office of Disciplinary Counsel, and other State bar organizations, committees, and law schools;

(e) Providing compliance monitoring as may be appropriate; and

(f) Performing any other function deemed appropriate and necessary by the Board to fulfill its purposes.

Volunteers shall act on behalf of WVLP only in accordance with these rules and the by-laws, policies and procedures of the WVLP, and shall be bound by the confidentiality provisions of these rules.

### **Rule 5. Services.**

WVLP may provide the following services as the Board determines feasible based upon the available financial, volunteer, and other resources:

(a) Immediate and continuing assistance to members of the legal profession who suffer from the effects of chemical dependency or mental conditions that result from disease, disorder, trauma or other infirmity and that affects their ability to practice;

(b) Planning and presentation of educational programs to increase the awareness and understanding of members of the legal profession to recognize problems in themselves and in their colleagues; to identify the problems correctly; to reduce stigma; and, to convey an understanding of appropriate ways of interacting with affected individuals;

(c) Investigation, planning and participation in interventions, assessments and/or evaluations with members of the legal profession in need of assistance;

(d) Sponsoring and maintaining substance abuse and/or mental health support meetings for members of the legal profession;

(e) Aftercare services upon request, by order, or under contract that may include but are not limited to, the following: assistance in structuring aftercare and discharge planning; assistance for entry into appropriate aftercare and professional peer support meetings; and assistance in obtaining a primary care physician or local peer counselor; and

(f) Monitoring services that may include but are not limited to, the following: alcohol and/or drug screening programs; tracking aftercare, peer support and twelve-step meeting attendance; providing documentation of compliance; and providing such reports concerning compliance by those participating in a monitoring program as may be required by the terms of that program.

### **Rule 6. Referrals.**

(a) *Self-referral.* — Any lawyer may voluntarily contact the WVLP seeking assistance.

(b) *Referrals from third parties.* — WVLP shall receive referrals concerning any member of the legal profession from any source. The identity of the referring third-party shall be held in confidence by WVLP unless the third-party consents to disclosure.

(c) Disciplinary authority referrals. — WVLAB shall receive referrals from the West Virginia Supreme Court, the Lawyer Disciplinary Board, the Office of Disciplinary Counsel, or the Board of Bar Examiners (individually referred to hereafter as a "referring authority") of any lawyer whom the referring authority determines or believes should be contacted by WVLAB.

(d) Referral by WVLAB — In the event an impaired lawyer resists all efforts of assistance by WVLAB, the executive director or any member of the Board may, in its discretion, notify the initial referral source of the lawyer's resistance for the sole purpose of allowing the referral source to pursue other recourse or resources. Moreover, the executive director may refer an impaired lawyer who resists all efforts of assistance by WVLAB to the Office of Disciplinary Counsel for an investigation, but such referral shall only be made with the approval of the board.

### **Rule 7. Confidentiality.**

(a) Except as required by law, or to prevent the commission of a crime other than a victimless criminal act involving only the subject lawyer, or to prevent a person from committing serious harm to self or others, all information provided to or gathered by WVLAB, and actions taken by WVLAB, shall be privileged and held in strictest confidence and shall not be disclosed or required to be disclosed to any person or entity outside of WVLAB, unless such disclosure is authorized by the lawyer to whom it relates or as provided in Rule 6.

(b) The director, board members, employees, and agents, including volunteers recruited and covered under Rule 4, shall be deemed to be agents of WVLAB for purposes of the privilege and confidentiality provisions of this Rule.

### **Rule 8. Privilege and immunity.**

~~Privilege.~~ Except as otherwise provided in these rules all information provided with respect to any referral, investigation, monitoring or follow-up under these rules shall be privileged. The director, board members, employees, and agents, including volunteers acting on behalf of WVLAB under Rule 4, shall be absolutely immune from civil suit in the same manner as members of the judiciary in this state for any conduct undertaken on behalf of the WVLAB.

### **Rule 9. Costs.**

*[Note by the Clerk: The following changes to proposed Rule 9 were made after the period of public comment.]*

Payment for all services provided under these Rules shall be the responsibility of the lawyer receiving such services. and WVLAB shall not be liable for the costs of any services provided under these Rules. Provided, however, that WVLAB shall have discretion to financially or otherwise assist lawyers, on a case by case basis, to obtain services anticipated under these Rules.

**Rule 10. Miscellaneous.**

(a) At any time it deems reasonable and feasible, and without the necessity of amending these rules, the board of directors may, through its by-laws, expand the assistance contemplated herein to encompass judges, law students or others in the legal profession.

(b) Any diversion or other program entered into by a lawyer as a result of an agreement with the Office of Disciplinary Counsel or otherwise imposed by order of the Supreme Court of Appeals, which program requires involvement of WVLAP in rehabilitative efforts on the part of the lawyer, shall govern the extent and scope of confidentiality which may be asserted by the lawyer. To the extent such agreement and/or order may require WVLAP to violate a confidentiality protection granted under these rules, the order or agreement shall control and any disclosure made pursuant thereto shall not be deemed a breach of confidentiality otherwise imposed by these rules.

(c) At any time it deem reasonable and feasible, and without the necessity of amending these Rules, the WVLAP and the Office of Disciplinary Counsel may, through written agreement between them, establish a program of diversion from discipline and entry into rehabilitation for those lawyers deemed candidates for such a diversion program.

(d) It is hereby acknowledged that an impaired lawyer's completion of rehabilitation in conjunction with WVLAP may be considered as a mitigating factor with respect to any disciplinary action arising out of the impairment for which rehabilitation was completed."

"By-Laws of the West Virginia State Bar

ARTICLE III. ACTIVE MEMBERSHIP FEES.

**§ 1. Amount.**

The annual membership fees for members shall be fixed by the board. Any time the board shall desire to increase the annual membership fee, it shall choose either of the two following procedures:

1. Approval by two-thirds ( 2/3 ) of the entire authorized board.
2. The submission of the proposed increase to all the active members, by mail, with a majority of the members being required to vote in favor of the proposed increase.

The board may put such increased fees into effect upon securing the approval of the supreme court of appeals.

The annual membership fee for active members shall be as follows:

Less than one year \$100  
One to three years \$200  
Over three years \$250

Inactive members \$100

The fee for an active but not practicing member shall be the same as the fee for an active member.

Any active member first admitted to practice after the 2nd day of July and before the 1st day of May of a fiscal year shall pay an active membership fee of fifty dollars (\$50.00) for said fiscal year in which admission takes place. The next active membership fee for any such member shall be considered the first annual membership fee payment.

Any active member admitted to practice in accordance with the Rule 4.0 of the supreme court of appeals respecting Admission of Attorneys From Other States shall be considered an active member who has made four or more annual membership fee payments, but if any such member is first admitted to practice after December 31st and before June 30 of the fiscal year shall be an active membership fee of seventy-five dollars (\$75.00) for said fiscal year in which admission takes place.

*[Note by the Clerk: The following changes to proposed subparagraph 3 were made after the period of public comment.]*

~~3. Without the need to seek the approval of the supreme court of appeals, the board at, or prior to, the annual meeting each year shall establish the annual assessment to be levied for the fiscal year commencing immediately thereafter, as required by Rule 1(c)(1) of the Rules of the West Virginia Lawyer Assistance Program, which annual assessment shall be in addition to the membership fees established herein. For purposes of enforcement of this assessment, once fixed by the board, the annual assessment shall become a part of the membership fee and the rules relative to the collection and payment of membership fees shall apply in all respects to the assessment, including any penalties and /or suspension for nonpayment as set forth in this Article.~~

**3. Additional Annual Assessment for West Virginia Lawyer Assistance Program.**

Without the need to seek approval of the Supreme Court of Appeals, the board at, or prior to, the annual meeting each year shall establish the annual assessment, not to exceed fifty dollars (\$50.00), to be levied upon dues paying members for the fiscal year commencing immediately thereafter, as required by Rule 1(c)(1) of the Rules of the West Virginia Lawyer Assistance program, which annual assessment shall be in addition to the membership fees established herein. For purposes of enforcement of this assessment, once fixed by the board, the annual assessment shall become a part of the membership fee, and the rules relative to the collection and payment of membership fees shall apply in all respects to the assessment, including any penalties and/or suspension for nonpayment as set forth in this Article. The maximum assessment provided for herein may be increased, but only by following the same procedures as set forth herein for an increase in active membership fees."

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court