

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on September 13, 2024, the following order was made and entered:

RE: REQUEST FOR PUBLIC COMMENT ON AMENDMENTS TO THE RULES OF LAWYER DISCIPLINARY PROCEDURE, No. 23-29

Under Article VIII, §§ 1 and 3 of the West Virginia Constitution, the Court has jurisdiction to promulgate court rules. By that authority, the Court has considered amendments to the Rules of Lawyer Disciplinary Procedure regarding referrals to the West Virginia Judicial and Lawyer Assistance Program.

Upon consideration and review, the Court is of the opinion that the following amendments to the Rules of Lawyer Disciplinary Procedure should be published for period of public comment of thirty days. Comments must be filed in writing with the Clerk of the Court on or before Monday, October 14, 2024.

The amendments are set forth below. Additions are indicated by underscoring, and deletions are indicated by strike-through.

Rules of Lawyer Disciplinary Procedure

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Rule 6. Referrals to the West Virginia Judicial and Lawyer Assistance Program.

The Lawyer Disciplinary Board, by and through the Office of Lawyer Disciplinary Counsel (ODC), may provide a referral to the West Virginia Judicial and Lawyer Assistance Program (WVJLAP) of any lawyer who is the subject of a disciplinary complaint when there is a reasonable belief that the alleged misconduct of the lawyer is the result of impairment by drugs or alcohol, or by a mental, emotional, or physical condition, including the attendant mental or physical incapacity as a result of advancing years. The Rules set forth herein apply only to: (1) lawyers referred to WVJLAP by ODC as permitted by these Rules; and (2) lawyers who have contacted WVJLAP after receiving notice from ODC of a pending disciplinary complaint but prior to a referral by ODC pursuant to these Rules.

Rule 6.1. Notification; Form of Referral.

(a) Whenever the ODC and/or the Lawyer Disciplinary Board, by either its Investigative Panel or Hearing Panel Subcommittee, has made the determination to refer a lawyer to the WVJLAP, it will provide notification to the Executive Director. Referrals made pursuant to these Rules will be made in writing, will set forth a brief summary of the facts and circumstances resulting in the referral, will indicate that the lawyer is being referred to WVJLAP for participation in/compliance with any recommendations and/or requirements of WVJLAP, including, but not limited to, medical/clinical evaluation, treatment and/or counseling services, continuing care, and/or monitoring, will include an Authorization and Consent Form signed by the lawyer pursuant to Rule 6.3 herein, and, if applicable, will include a copy of any decision, or portion thereof, by either Panel which concerns referral of an impaired lawyer for evaluation and assistance by WVJLAP.

(b) Whenever the Supreme Court of Appeals of West Virginia issues a decision that includes a provision that the lawyer "shall" comply with WVJLAP's recommendations and monitoring program, the Clerk of the Court shall forward a copy thereof to the Executive Director.

Rule 6.2. Authority to Share Confidential Information for Purposes of Referral; WVJLAP Authorized Participation in Referral Process after Receipt of Referral.

(a) With regard to any referral made pursuant to these Rules, ODC shall have the authority and discretion to provide any and all information it deems reasonable or appropriate to WVJLAP concerning any complaint of alleged misconduct filed against a lawyer which is being/has been evaluated by ODC pursuant to Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure. Information provided by ODC to WVJLAP for purposes of the referral process authorized by this Rule shall be a permitted disclosure within the confidentiality requirements of Rule 2.6 of the Rules of Lawyer Disciplinary Procedure.

(b) With regard to any referral made pursuant to these Rules, upon receipt and review by WVJLAP of such referral and related information, WVJLAP shall have the authority and discretion to: (1) interview the lawyer concerning the information filed in the disciplinary complaint; (2) interview the Complainant concerning the information filed in the disciplinary complaint; (3) refer lawyer for medical/clinical evaluation by an approved provider, and/or recommend/reguire treatment, counseling, continuing care, monitoring, and/or other assistance deemed necessary or appropriate by WVJLAP; (4) provide notice to ODC, after investigation and evaluation, that the lawyer does not have an impairment for which WVJLAP can provide assistance, or that the lawyer's impairment is deemed untreatable due to advancing years and/or attendant physical or mental incapacity, and provide recommendation(s) to ODC, if any, including that the lawyer should consider retirement, to be considered by ODC for purposes of the disciplinary complaint and any related proceedings; (5) upon request by ODC, provide documentation and/or testimony for use at a disciplinary hearing(s) involving the lawyer for the purpose of setting forth the substantive findings and recommendations

of WVJLAP and the lawyer's progress in complying with those recommendations; (6) provide notice to ODC, after investigation and evaluation, that the information received and/or reviewed by WVJLAP appears to have no basis in fact, and that the ODC should consider dismissal of the disciplinary complaint, or applicable component thereof; and/or (7) take any other action deemed necessary or appropriate by WVJLAP to the extent permitted by the Rules governing WVJLAP.

Rule 6.3. Confidentiality of Referral Process; Lawyer Authorization and Consent Required; Refusal.

(a) Subject to the limited disclosures permitted by these Rules, the referral and any information, documentation and/or communications between ODC and WVJLAP related to the referral process or the referred lawyer shall be confidential. Any information received by either agency will be maintained as confidential information in accordance with the agency's applicable rules and as required by law.

(b) Any lawyer referred by ODC to WVJLAP pursuant to these rules shall be required to sign an Authorization and Consent form, a copy of which shall be provided to WVJLAP. The Authorization and Consent form shall: (1) inform the lawyer that information obtained by the ODC or WVJLAP related to the disciplinary complaint and the referral may be shared between ODC and WVJLAP; (2) shall provide the express consent of the lawyer permitting ODC and WVJLAP to share such information with each other; (3) shall advise the lawyer that all information provided to and/or received from WVJLAP for purposes of the referral and as permitted by these Rules shall be kept confidential by the ODC and WVJLAP as required by applicable Rules; (4) that disclosure of any information and/or documents received from WVJLAP deemed necessary by ODC in the prosecution of the disciplinary matter involving lawyer shall be placed under seal by ODC; and (5) that any closing document that will be made part of the lawyer's public file shall not set forth any specific information received from WVJLAP, but may state that the lawyer was either successful or unsuccessful in compliance with or completion of the recommendations/requirements of WVJLAP.

(c) If a lawyer refuses to sign the Authorization and Consent form required by this Rule, such refusal shall constitute the lawyer's refusal to participate in the referral process as a potential diversion process and/or mitigating factor with regard to the disciplinary complaint involving the lawyer, and upon such refusal the ODC, at its discretion, shall proceed accordingly; however, refusal to sign an Authorization and Consent form shall not preclude a lawyer from seeking or receiving assistance from WVJLAP.

Rule 6.4. Report of Lawyer Compliance with WVJLAP Recommendations; Effect of Compliance.

ODC may request written status updates periodically or at agreed intervals concerning any lawyer who has been referred to WVJLAP pursuant to these Rules. Upon request or at agreed intervals, WVJLAP will provide ODC with a written update concerning the referred lawyer's compliance with WVJLAP recommendations, including with any applicable monitoring agreement. Upon successful completion of WVJLAP

recommendations, including any applicable monitoring agreement, WVJLAP will provide a report concerning the lawyer's overall compliance. A lawyer's successful completion of WVJLAP recommendations, including any applicable monitoring agreement, shall be considered a mitigating factor in any related disciplinary proceeding involving the lawyer.

Rule 6.5. Failure to Comply With Referral Process And Recommended Assistance.

(a) After a lawyer has been referred to WVJLAP for assistance pursuant to these Rules, if the Executive Director determines that the referred lawyer fails to meet the criteria for further assistance, intervention or monitoring, or that the referred lawyer is not currently willing or capable of receiving assistance due to the lawyer's resistance to WVJLAP's efforts to contact and/or assist the lawyer after he/she has been provided a reasonable opportunity to receive assistance, the Executive Director will promptly report that determination and the bases therefore, in writing, to the ODC. The Executive Director will also promptly provide ODC with written notice of noncompliance in situations including, but not limited to, the following:

(1) Upon referral, a referred lawyer's failure to establish and maintain contact with WVJLAP or cooperate in good faith in the referral process, including, but not limited to, cooperation with WVJLAP to secure and facilitate appropriate evaluation, counseling, treatment and/or monitoring within the time period set by ODC; or

(2) After evaluation and implementation of WVJLAP recommendations, including, but not limited to, treatment, counseling, continuing care, and/or monitoring, a referred lawyer's failure to substantially comply with WVJLAP recommendations, including, but not limited to, the terms and conditions of a monitoring agreement entered into by the lawyer with WVJLAP.

(b) Refusal by a lawyer to execute a waiver to grant WVJLAP access to psychological/medical or similar records deemed necessary for evaluation and/or treatment, or any refusal to comply with WVJLAP recommendations, including entering into a monitoring agreement with WVJLAP, shall constitute noncompliance by the lawyer and the Executive Director will promptly report such noncompliance to ODC.

(c) At the discretion of ODC, noncompliance may be considered an aggravating factor in any related disciplinary proceeding involving the lawyer.

(d) Upon receipt of a report of noncompliance, the ODC will evaluate the current facts and circumstances of the situation and, if necessary, immediately file a petition with the Supreme Court of Appeals of West Virginia pursuant to Rule 3.23 of the Rules of Lawyer Disciplinary Procedure.

Rule 6.6. Expenses for Evaluation, Treatment, and Related Services.

Consistent with Rule 9 of the Rules governing WVJLAP, when WVJLAP makes any recommendation for psychological, medical and/or clinical evaluations or treatment, including any recommendations for continuing care, which are not covered by the lawyer's health care plan, all expenses for those recommended services shall be the sole responsibility of the lawyer.

Rule 6.7. Referral Process; Written Acceptance or Rejection by Lawyer.

All referrals made to WVJLAP pursuant to these Rules shall be non-adversarial and the lawyer shall be given ten (10) days within which to provide written confirmation to the ODC of his or her decision to accept or reject the referral to WVJLAP for the purpose of participation in/compliance with WVJLAP recommendations for psychological/medical/clinical evaluation, treatment/counseling, continuing care, and/or monitoring.

Rule 6.8. Period of Limitation for Filing Information.

Any information filed alleging impairment or incapacity as a component or basis of a complaint against a lawyer that is filed more than two years 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 actionable, nor shall it require a referral pursuant to these Rules, unless it is determined that the impairment or incapacity still exists at the time the complaint is filed. ODC will evaluate information filed beyond the period of limitation set forth by this Rule, including the facts and circumstances of the filing and the current situation/condition of the lawyer who is the subject of the filing, prior to making a referral to WVJLAP pursuant to these Rules.

**AUTHORIZATION AND CONSENT TO DISCLOSURE OF
INFORMATION BETWEEN ODC AND WVJLAP FOR
PURPOSES OF REFERRAL PURSUANT TO RULE 6 OF THE
RULES OF LAWYER DISCIPLINARY PROCEDURE**

RE: Complaint of: _____
I.D. No.: _____

I, _____, Respondent in the above-named complaint, DOB _____, S.S. No. _____, hereby acknowledge that pursuant to Rule 6 of the Rules of Lawyer Disciplinary Procedure I am being referred to the West Virginia Judicial and Lawyer Assistance Program (JLAP) by the Office of Lawyer Disciplinary Counsel (ODC) for participation in/compliance with any recommendations determined to be reasonably necessary or appropriate by JLAP, including, but not limited to, medical/clinical evaluation, treatment and/or counseling services, continuing care, and/or monitoring. As part of the referral process, I further acknowledge and agree that JLAP and ODC, by and through their authorized representatives and agents, will share information/documentation and communicate with each other about the complaint, any findings, determinations and/or recommendations of JLAP involving me and the bases thereof, my compliance or noncompliance with any and all JLAP recommendations, and other matters reasonably deemed necessary or appropriate by JLAP or ODC for purposes of the referral process.

This Authorization and Consent is granted for the sole purpose of the referral process and the investigation and evaluation of the above-referenced complaint by ODC. I hereby acknowledge my understanding that any information/documentation received by ODC from JLAP pursuant to the authorization provided by me by signing this Authorization and Consent may be used or disclosed by ODC in subsequent proceedings before either the Investigative Panel or the Hearing Panel of the Lawyer Disciplinary Board, or the Supreme Court of Appeals of West Virginia. However, it is my understanding, which is relied on by me in signing this Authorization and Consent, that any such information/documentation used or disclosed by ODC in subsequent proceedings shall be placed under seal and not available to members of the general public, including the Complainant herein.

Accordingly, I hereby expressly authorize the herein described sharing of information/documentation and communication between ODC and JLAP, including, but not limited to, disclosure by either party to the other of any and all information obtained by either of them involving the complaint, the referral, the findings, determinations and/or recommendations of JLAP involving me and the bases thereof, my compliance or noncompliance with any and all JLAP recommendations, and any other matters reasonably deemed necessary or appropriate for disclosure by and between JLAP or ODC for purposes of the referral process.

Signed this ____ day of _____, 20__.

Print Name

Signature

True Copy

Attest: /s/ C. Casey Forbes
Clerk of Court

