

# AGENDA ITEM

**JANUARY 154** - LAP Rules -  
Return from Public Comment

Date: December 8, 2009

To: Members of the Board Committee on Member Involvement, Relations & Services  
Members of the Board of Governors

From: The Oversight Committee of the Lawyer Assistance Program

Re: STATE BAR RULES, TITLE 3, DIVISION 2, CHAPTER 6 -- LAWYER  
ASSISTANCE PROGRAM, PROPOSED AMENDMENTS, RETURN FROM  
PUBLIC COMMENT

## **Executive Summary**

The proposed Lawyer Assistance Program ("LAP") rule changes came before this Board Committee on November 13, 2009. The Committee authorized the distribution of the proposed changes for a public comment period of forty-five days. The public comment period ends on December 31, 2009. No public comment has been received to date. Any public comment received prior to the end of the public comment period will be posted prior to the Board's January 2010 meeting. If no substantive revisions are required by public comment received, the Board could consider adoption of the rewritten rules and program changes, with the rules and program changes to take effect January 8, 2010.

Board members with questions about the proposal may contact Janis Thibault at (916) 564-5222 ([Janis.Thibault@calbar.ca.gov](mailto:Janis.Thibault@calbar.ca.gov)).

## **BACKGROUND**

Changes to the proposed rules are summarized below. The proposals substantially change the Rules and Regulations Governing the Lawyer Assistance Program and the Rules Governing the Financial Assistance Plan of the State Bar of California Lawyer Assistance Program by combining them into a single set of rules and by reflecting significant proposed program changes. The revisions are completely consistent with the spirit and programmatic purpose of the Attorney Diversion and Assistance Act (Business and Professions Code §§6230 *et seq.*), the statute which created the Lawyer Assistance Program.

Copies of the current and the proposed rules are attached. To enable readers to compare current and proposed rules, source rules are footnoted in italics. These footnotes are drafting devices that would be deleted in a Board-adopted version. Footnotes in Roman type, which are citations or cross-references to other rules, would be retained.

## **ORGANIZATIONAL AND STYLISTIC CHANGES**

The proposed rules consolidate the two sets of current rules regulating the operations of the LAP, the Rules and Regulations Governing the Lawyer Assistance Program and the Rules Governing the Financial Assistance Plan of the State Bar of California Lawyer Assistance Program, and eliminate duplicative provisions. The proposed rules would be called the Lawyer Assistance Program rules.

Provisions relating to criteria for acceptance and denial of acceptance, termination from, and completion of the LAP, which formerly were to be found only in an appendix to the LAP annual report, have been incorporated into proposed rules themselves.

Provisions of the current rules that duplicate or simply re-state provisions of the Attorney Diversion and Assistance Act or the Rules of the State Bar have been deleted.

Usage has been modernized. In addition to updating general conventions, such as expressing obligation by “must” rather than “shall,” the proposed rules modernize dated expressions.

## **PROGRAMMATIC CHANGES REFLECTED IN THE PROPOSED RULES**

1. The most significant change proposed for the LAP is the creation of an alternative program element – the Support LAP – which will be available for program participants who do not need, or do not wish to pay for, the level of oversight, monitoring, and verification of program compliance provided under the current program. **The creation of the Support LAP will enable the program to provide services to an expanded pool of participants without increasing existing staffing levels.** The Support LAP is designed for attorneys and former attorneys who self-refer to the program with no discipline charges pending, and

who therefore do not require monitoring or verification of compliance to comply with an agreement in lieu of discipline or order of the State Bar Court, or to satisfy other externally-imposed requirements. In addition to the support of LAP group participants and professional group facilitators, the LAP will develop and coordinate the activities of a network of volunteers who will also provide ongoing support to Support LAP participants in their recovery efforts.

2. The proposed changes would also establish a Monitored LAP for members, former members and candidates for admission who need to satisfy a specific monitoring or verification requirement imposed by the Office of Chief Trial Counsel, State Bar Court, Committee of Bar Examiners or other entity. The Monitored LAP also will be available to self-referred attorneys who wish to participate and who are willing to pay the additional costs. The Monitored LAP substantially duplicates the existing LAP.
3. The proposed changes also would create a distinct Orientation and Assessment (O&A, Rule 3.245), which would be available to all attorneys, former attorneys and candidates for admission to the Bar prior to their election to participate in either the Support LAP or the Monitored LAP. Although orientation and assessment is already an element of the current LAP, it is generally regarded as inseparable from the full program, and therefore not available without a commitment to the longer term program. By identifying the O&A as a stand-alone program, LAP staff hope to encourage more attorneys to seek assistance at the earliest possible time and prior to personal or professional ramifications.
4. The Rules Governing the Financial Assistance Plan of the State Bar of California Lawyer Assistance Program, which currently include a Policy Statement, a detailed explication of income eligibility criteria, a detailed explication of the contents of the application, verification, and numerous other, equally detailed provisions, are proposed to be replaced by Rule 3.252 relating to Financial Assistance. The detailed provisions of the current rules would be replaced, with the Board's approval, by new guidelines and a substantially revised application form.

The new proposed rule relating to financial assistance provides only an outline of the financial assistance program, which is proposed to be changed in one significant respect—**loans will be for a period of one year only, and not renewable. The object of this proposed change is to further slow the growth of the outstanding loan obligation owed to the State Bar and to enhance repayment of the funds loaned to participants.**

#### **OTHER SUBSTANTIVE CHANGES AND CLARIFICATIONS**

- The proposed rules specifically make the LAP (but not financial assistance) available to current candidates for admission to the State Bar, consistent with current practice. For several years, the Committee of Bar Examiners has referred candidates for admission to the LAP, in furtherance of its statutory directive to ensure the good moral character of all prospective admittees. This

practice is consistent with the statutory and programmatic purposes of the LAP, but currently is not specifically authorized by either statute or rule.

- The second paragraph of the “Scope and Purpose” section of the current rules, relating to the establishment of a Lawyer Assistance Program Oversight Committee, has been moved to new proposed Rule 3.241 relating to the Lawyer Assistance Program Oversight Committee.
- Provisions of current Rule I that duplicate the provisions of B&P Code §6231 or State Bar Rules 6.60-6.63 have been deleted and the language of the replacement rules (3.241 and 3.242) streamlined.
- A new provision (3.242(C)) explaining the establishment and authority of the Evaluation Committees to determine acceptance or denial of admission to the LAP, and termination from or completion of the program, has been added.
- Former Rule IV relating to confidentiality has been elevated in importance to proposed new Rule 3.243, and provisions of the former rule duplicating the provisions of B&P Code §6234 replaced by a reference to the governing statute.

#### **SUMMARY OF PROPOSAL**

In addition to simplifying and consolidating the various rules governing the operation of the LAP, the proposed rules reflect proposed changes in the LAP which have been developed to address program growth while reducing program costs, and to reduce the amount of and establish greater control over funds loaned to program participants.

#### **FISCAL AND PERSONNEL IMPACT**

The programmatic changes reflected in the proposed rules are designed to allow the program to serve an expanded pool of participants without increasing existing staffing levels. The proposed rules related to the loan plan are designed to further slow the growth of the outstanding loan obligation owed to the State Bar and to enhance repayment of the funds loaned to participants.

#### **BOARD BOOK IMPACT**

None.

#### **RULE AMENDMENT**

The proposed rules would replace the Rules and Regulations Governing the Lawyer Assistance Program which were originally adopted by the Board of Governors effective October 10, 2002, and amended once, effective December 10, 2005, and the Rules Governing the Financial Assistance Plan of the Lawyer Assistance Program, which were originally adopted by the Board of Governors effective December 7, 2002, and have been amended three times, most recently effective March 7, 2008.

**STRATEGIC IMPACT**

None.

**PROPOSED BOARD COMMITTEE RECOMMENDATION**

Should the Board Committee agree with the proposed rules, it should adopt the following resolution:

**RESOLVED**, following publication for comment and no comments having been received, that the Board Committee on Member Involvement, Relations & Services recommends that the Board of Governors of the State Bar of California hereby adopt the proposed modified Lawyer Assistance Program Rules, in the form attached hereto as Exhibit A.

**PROPOSED BOARD RECOMMENDATION**

**RESOLVED**, following public comment period and no comments having been received, and upon recommendation of the Board Committee on Member Involvement, Relations and Services, that the Board of Governors of the State Bar of California hereby adopt the proposed modified Lawyer Assistance Program Rules, in the form attached hereto as Exhibit A; and that the modifications be effective immediately.

Attachment

Exhibit A: Proposed Lawyer Assistance Program Rules—annotated.

## Exhibit A

### Title 3. Programs and Services Division 2. Attorney Members

#### Chapter 6. Lawyer Assistance Program

##### Rule 3.240 Purpose of the Lawyer Assistance Program<sup>1</sup>

The Board of Governors of the State Bar of California (“Board”) has established a Lawyer Assistance Program (“LAP”) to enhance public protection by rehabilitating members and former members of the State Bar and candidates for admission to the practice of law who are impaired by abuse of alcohol or drugs, or by mental illness, so that they are able to practice law competently.

##### Rule 3.241 Lawyer Assistance Program Oversight Committee

- (A) A Lawyer Assistance Program Oversight Committee (“committee”) of twelve members, six of whom are appointed by the Board as required by statute,<sup>2</sup> is authorized to establish and implement criteria for LAP participation and completion, and to otherwise oversee LAP operation.<sup>3</sup>
- (B) The Board annually appoints a committee chair and vice chair. To be eligible for appointment, a committee member must have served on the committee for at least one year and have at least one year remaining in his or her term. A member

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<sup>1</sup> The “Scope and Purpose” section of the current rules provides:

“The Lawyer Assistance Program (LAP) was established by the Legislature as a means of identifying and rehabilitating attorneys with impairments due to the abuse of drugs or alcohol, or due to mental illness.

Pursuant to the Business & Professions Code section 6231, the board will establish a committee to oversee the operation of the Lawyer Assistance Program. Section 6231(c) further provides that with the approval of the State Bar’s Board of Governors ‘the committee may adopt reasonable rules and regulations as may be necessary or advisable for the purpose of implementing and operating the Program.’”

<sup>2</sup> Business & Professions Code § 6231.

<sup>3</sup> Derived from the 2<sup>nd</sup> paragraph of the “Scope and Purpose” section of the current rules (see Footnote #1) and current Rule I, Section , which provides:

“Section 1. The Oversight Committee appointed by the State Bar of California, the Governor, the Speaker of the Assembly and the Senate Rules Committee pursuant to the provisions of the State Bar Act will be known as the Lawyer Assistance Program Oversight Committee (“Committee”).

Section 2. The members of the Committee will serve terms of four (4) years and may be reappointed as many times as desired. The board will stagger the terms of the initial members appointed.”

seeking appointment or reappointment must provide a written statement of qualifications in accordance with instructions of the current chair.<sup>4</sup>

#### Rule 3.242 Duties of oversight committee

- (A) The committee is to meet regularly at locations within California.<sup>5</sup> Special meetings may be called by the chair or vice chair and must be held at the State Bar offices in San Francisco or Los Angeles. Meetings must comply with State Bar requirements.<sup>6</sup>
- (B) The committee may authorize subcommittees of two or more members of the committee to transact business on its behalf.
- (C) The committee may establish one or more Evaluation Committees<sup>7</sup> in both the Northern and Southern regions of the state. Each three-member Evaluation Committee consists of a physician, a clinician, and a local member of the State Bar experienced in recovery. Evaluation Committees are authorized to accept or deny applications for admission to the LAP,<sup>8</sup> to determine completion of the LAP,<sup>9</sup> and to terminate individuals from LAP participation.<sup>10</sup>

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<sup>4</sup> Derived from current Rule I, Sections 3, 3.1, and 3.2:

*“Section 3. The State Bar’s Board of Governors will, on an annual basis, appoint a Chair and Vice-Chair for the Committee.*

*Section 3.1. Eligible candidates must have served at least one (1) full year of their term on the Committee and have at least one (1) full year of their term remaining.*

*Section 3.2. Any Committee member who is interested and eligible may submit his or her name, along with a one page written statement of qualification, no later than November 1. The current Chair will forward these names and statements to the designated Board of Governor’s Committee for consideration.”*

<sup>5</sup> Derived from Rule I, Section 4. *“Meetings of the Committee may be held at such places in California and at such times as may be fixed by the Committee. Meetings may also be held at the offices of the State Bar, either in San Francisco or Los Angeles, at the call of the Chairperson or the Vice-Chairperson. Notice of the time and place of all meetings will be given in accordance with the Board of Governors of the State Bar of California’s Policies Governing Open Meetings, Closed Sessions, and Records of Regulatory Committees.*

*Section 5. For the transaction of business, a quorum of the Committee will consist of one-half of all members appointed and sitting, plus one. However, less than that number may adjourn from day to day.”*

<sup>6</sup> See State Bar Rules 6.60-6.63.

<sup>7</sup> Derived from current Rule I, Section 6. *“The Committee is empowered to appoint subcommittees to facilitate the purpose and administration of these Rules. The Committee may act in any matter by a subcommittee composed of not less than two Committee members”*

<sup>8</sup> Rule 3.247

<sup>9</sup> Rule 3.249

<sup>10</sup> Rule 3.250

- (D) The committee must maintain records that enable it to respond promptly to State Bar requests for information regarding financial assistance loans and collections and must report annually to the Board and Legislature on the operation of the LAP.

#### Rule 3.243 Confidentiality<sup>11</sup>

Except as permitted by law or these rules, participant information provided to or obtained by the LAP or any of its agents is confidential unless confidentiality is waived in writing by the participant.<sup>12</sup>

#### Rule 3.244 Eligibility

- (A) The LAP is open to active, inactive, and former members of the State Bar and current candidates for admission to the State Bar (“candidates for admission”) who have submitted an Application for Registration<sup>13</sup>. To participate in the LAP, an applicant must

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<sup>11</sup> *Derived from Rule IV, the provisions of which duplicate the provisions of B&P Code § 6234 and therefore need not be repeated in the rules. The provisions of current Rule IV provide:*

*“Section 1. An attorney who is not the subject of a current investigation may voluntarily enter the Program on a confidential basis. This confidentiality will be absolute unless waived by the attorney.*

*Section 2. Any information provided to or obtained by the Program, or any subcommittee or agent thereof, will be:*

*(a) confidential, and this confidentiality will be absolute unless waived in writing by the attorney;*

*(b) exempt from the provisions of Business and Professions Code section 6086.1;*

*(c) not discoverable and/or not admissible in any civil proceeding, without the written consent of the attorney to whom the information relates;*

*(d) not discoverable and/or not admissible in any disciplinary proceeding, without the written consent of the attorney to whom the information relates to;*

*(e) except with respect to the provisions of subsection (d) of Business and Professions Code section 6232, the limitations on the disclosure and admissibility of information set forth in this section will not apply to information relating to an attorney’s failure to cooperate with the Program, or with an attorney’s unsuccessful completion of the Program.*

<sup>12</sup> Business & Professions Code § 6234.

<sup>13</sup> Rule 4.16. Application for Admission

(A) An Application for Admission consists of an Application for Registration, an Application for Determination of Moral Character, and an application for any required examination. Each application must be submitted with the required documentation and the fees set forth in the Schedule of Charges and Deadlines. The Committee determines when an application is complete.

(B) The Application for Registration must be filed first, before any other application is transmitted to the Committee. The applicant is required by law either to provide the Committee with a Social Security Number or to request an exemption because of ineligibility for a Social Security Number. Registration is deemed abandoned if all required documentation and fees have not been received within sixty days of filing. No refund is issued for an abandoned registration.

(C) After filing the Application for Registration, an applicant for admission may file an Application for Determination of Moral Character, an application for any examination as required by these rules and any other document or petition permitted by these rules.

*Rule 4.16 adopted effective September 1, 2008.*

- (1) voluntarily agree to participate;
  - (2) provide medical information and disclosure authorizations as required; and
  - (3) sign a participation agreement that includes a promise to comply with all LAP recommendations.
- (B) Participation in the LAP does not relieve a participant of any duty required by agreement or stipulation with the Office of the Chief Trial Counsel, by court order, or by any law relating to attorney conduct or discipline.<sup>14</sup>

#### Rule 3.245 Orientation and Assessment<sup>15</sup>

All attorneys, former members of the State Bar and candidates for admission are eligible to participate in the Orientation and Assessment (“O&A”). The O&A is also a prerequisite for participation in the Support LAP or the Monitored LAP. The O&A includes one or more of the following:

- (A) assessment by a LAP case manager;
- (B) referral to external resources and treatment providers;
- (C) up to four sessions in a LAP-facilitated support group;
- (D) up to two sessions of personal, career, or financial counseling; and
- (E) volunteer support.

#### Rule 3.246 Application<sup>16</sup>

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<sup>14</sup> Restates Rule III, Section 3. “Acceptance into, or participation in, the Program will not relieve an attorney who voluntarily enters the Program while under investigation, or following the initiation of a disciplinary proceeding, of any lawful duties or obligations otherwise required by any agreements or stipulations with the Office of the Chief Trial Counsel, court orders, or applicable statutes relating to attorney discipline.”

<sup>15</sup> New provision, incorporating portions of Rule III:

Section 1. Any attorney may voluntarily enter the Program, for treatment purposes, on a confidential basis. Confidentiality pursuant to this section will be absolute unless waived in writing by the attorney.

Section 2. An attorney currently under investigation by the State Bar or following the initiation of a disciplinary proceeding, may also enter the Program by:

- (a) referral of the Office of Chief Trial Counsel;
- (b) referral of the State Bar Court.

<sup>16</sup> The current rules do not contain any provisions specifying the criteria for acceptance or denial of acceptance to the program, for termination from the program, or for completion of the program. Current

An eligible member, former member, or candidate for admission who wishes to continue participating in the LAP must apply for either the Support LAP or the Monitored LAP. The Evaluation Committee reviews the applications and may deny an application if it determines that

- (A) the applicant does not meet eligibility criteria;
- (B) the applicant will not substantially benefit from the LAP; or
- (C) the applicant's participation would be inconsistent with public protection.

#### Rule 3.247 Support LAP

- (A) The Support LAP is open to members and former members of the State Bar, and candidates for admission who have completed the O&A and do not require the LAP to verify their participation or provide any other monitoring report.
- (B) For the first six months, the Support LAP includes
  - (1) a plan of structured rehabilitation activities;
  - (2) oversight and support by LAP staff;
  - (3) participation in a LAP-facilitated support group, if directed; and
  - (4) laboratory testing as directed.
- (C) After six months, the Support LAP includes
  - (1) a plan of structured rehabilitation activities;
  - (2) oversight and support from a LAP volunteer; and,
  - (3) participation in a LAP-facilitated group if desired.

#### Rule 3.248 Monitored LAP

- (A) The Monitored LAP is open to members and former members of the State Bar or candidates for admission who have completed the O&A and who require the LAP to

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*Rule I, Section 8, provides: "The Committee will establish practices and procedures for the acceptance, denial, completion, or termination of attorney's participation in the Program, and it may recommend rehabilitative criteria for adoption by the Board of Governors" Those criteria currently are contained only in an Appendix to the LAP Annual Report, and therefore are not easy to find or readily accessible to the public. They have been incorporated into the proposed revised rules 3.245, 3.249, and 3.250, to enhance accessibility.*

verify their participation in the LAP for the Office of Chief Trial Counsel, the State Bar Court, the Committee of Bar Examiners, or any other entity.

- (B) The applicant for the Monitored LAP must have a diagnosed substance-related or mental health disorder to participate.
- (C) The Monitored LAP includes
  - (1) a plan of structured rehabilitation activities;
  - (2) oversight and support by LAP staff;
  - (3) participation in a LAP-facilitated support group, if directed;
  - (4) laboratory testing as directed; and
  - (5) verification of participation and compliance by the LAP.

#### Rule 3.249 Completion of LAP<sup>17</sup>

A participant is deemed to have completed the LAP when the Evaluation Committee determines that the participant:

- (A) has maintained three years of continuous sobriety or, in cases of mental health, stability;
- (B) has made lifestyle changes sufficient to maintain ongoing sobriety or stability; and
- (C) has satisfied the terms of the participation agreement.

#### Rule 3.250 Termination from the LAP<sup>18</sup>

A participant may be terminated from the LAP if the Evaluation Committee determines that:

- (A) the participant will not substantially benefit from the LAP;
- (B) further participation would be inconsistent with the LAP's mission of public protection; or
- (C) the participant failed to satisfy the terms of the participation agreement.

#### Rule 3.251 Costs and Fees<sup>19</sup>

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<sup>17</sup> See footnote 15.

<sup>18</sup> See footnote 15.

<sup>19</sup> Derived from Rule III of the current rules, which provides:

A participant is responsible for all LAP-related expenses and may be charged a reasonable fee for administrative costs. Financial assistance is available to eligible participants as provided by these rules.

#### Rule 3.252 Financial Assistance

- (A) A LAP participant who is an active or inactive member of the State Bar may be eligible for financial assistance in the form of a loan from the State Bar. Former members of the State Bar and candidates for admission to the practice of law are not eligible for financial assistance
- (B) The loan covers no more than one year of participation in the LAP per member. Loan proceeds are dispersed directly to approved service providers. Unless determined otherwise by the committee, covered services are limited to LAP group fees and laboratory testing fees.
- (C) To obtain a loan, the participant must submit a completed application provided by the LAP and provide all requested information. Eligibility is based upon a current income formula determined by the committee. Loans are made solely on the basis of financial need.
- (D) The loan recipient is liable for all sums distributed to service providers on his or her behalf. If a loan recipient ceases to be a LAP participant, the total amount loaned on behalf of the participant becomes immediately due and payable to the State Bar by the participant. Arrangements may be made to repay the loan, with interest, in installment payments.
- (E) A LAP participant who received financial assistance before the effective date of this rule is bound by the terms of any agreement applicable to that assistance.<sup>20</sup>

Provisions of current rules proposed for deletion:<sup>21</sup>

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*Section 1. Attorneys will be responsible for payment of all expenses relating to treatment and recovery, including but not limited to the costs of hospitalization, drug testing, group meetings, individual therapy, etc.*

*Section 2. A reasonable administrative fee may also be charged to attorneys for the purpose of offsetting the costs of administering the Program.*

*Section 3. To ensure that no member attorney is denied acceptance into the Program solely due to the lack of ability to pay, member attorneys may apply for financial assistance from the fund established for this purpose by the State Bar.*

*Section 4. Former members may apply to participate in the Program. Former members are not eligible for program sponsored financial assistance.*

<sup>20</sup> *New Rule 3.252 proposes to replace the current Rules Governing the Financial Assistance Plan of The State Bar of California Lawyer Assistance Program, which are extremely long and detailed, including extensive formulas for determining eligibility for financial assistance, application requirements, and other provisions more properly contained in supplemental criteria adopted by the LAP Oversight Committee, with approval by the Board, and in the application forms themselves*

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<sup>21</sup> *The following provisions of the current rules are duplicative of provisions of the Lawyer Diversion and Assistance Act or other, controlling provisions of the State Bar Rules, and therefore are proposed for deletion:*

*From Rule I:*

*Section 7. Subject to the approval of the Board of Governors, the Committee may adopt reasonable rules and regulations as may be necessary or advisable for the purpose of implementing and operating the Program.*

*Section 9. Written notice may be given by personal service or sent by mail, postage prepaid, addressed to the participant at the participant's official membership records address, and if sent by mail, will be deemed to have been received by the addressee five (5) days after deposit in the mail if the address is within the State of California, ten (10) days after deposit in the mail if the address is outside the State of California but within the United States, and twenty (20) days after deposit in the mail if the address is outside the United States.*

*Section 10. Unless specified otherwise in these rules, any forms, letters, applications or documents will be deemed filed with the Committee at the earlier of the following:*

*(a) When actually received in substantially complete form as defined by the Committee, by the Committee at the State Bar offices in either San Francisco or Los Angeles;*

*(b) On the date of the first postmark thereon if the form, letter, application or document is substantially complete as defined by the Committee and was placed in the United States mail postage prepaid and addressed to the Committee at either the State Bar's San Francisco or Los Angeles Offices.*

*From Rule V*

*Section 1. Acceptance into or participation in the Program will not relieve the attorney of any lawful duties and obligations otherwise required by any agreements or stipulations with the Office of the Chief Trial Counsel, court orders and applicable statutes relating to attorney discipline.*

*Section 2. The extent to which an investigation is terminated, formal charges are dismissed, or the level of discipline is reduced as a result of an attorney's participation in the Program, will be entirely dependant upon the terms of the attorney's agreement with the Office of the Chief Trial Counsel or the decisions or orders issued by the State Bar Court.*