

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Linford, Tera](#)  
**Subject:** FW: COMMENTS RE: OFFICE OF DISCIPLINARY COUNSEL PROPOSED RULES  
**Date:** Monday, May 3, 2021 8:16:59 AM  
**Attachments:** [Bar Bulletin Losing Your License Will Be Easier Under Proposed \(002\) \(1\).pdf](#)

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**From:** David Mann [mailto:mann@ledgerlaw.com]  
**Sent:** Friday, April 30, 2021 5:29 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** COMMENTS RE: OFFICE OF DISCIPLINARY COUNSEL PROPOSED RULES

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Honorable Justices of The Supreme Court of The State of Washington:

I have come to understand that the Office of Disciplinary Counsel (“ODC”), along with other employees of the Washington State Bar Association, have drafted proposed Rules for Discipline and Incapacity (RDI).

All references cited to herein are drawn from the March 1, 2021 article authored by Anne Seidel, Esq. published in the King County Bar Association "Bar Bulletin", attached hereto.

The proposed RDI have been called the “most substantial reexamination of the functioning of the discipline system in Washington” in decades. Despite the implications, the rules were drafted without any input from practicing attorneys who represent lawyers accused of misconduct.

Ms. Seidel likened the drafting process to having criminal procedural rules drafted solely by prosecutors with input from court administrators.

A March 10, 2020, WSBA Executive Director’s Report stated that “it is anticipated the rules will be presented to the BOG (Board of Governors) in spring 2020 ...” That did not happen. Instead, at the BOG’s June 2020 meeting, Supreme Court Justice Mary Yu informed the BOG that because the Court exclusively oversees the lawyer discipline process, the rules would be submitted directly to the Court. Yet, at the very same meeting, the BOG approved proposed amendments to the Rules of Professional Conduct, the substantive rules enforced through the lawyer discipline system.

**Impact.** Lawyers in small or solo practices are disproportionately subject to discipline. Because WSBA has failed to study racial or other inequities, there are no readily available statistics on whether nonwhite or immigrant attorneys are more likely to be a respondent (the subject of a grievance).

A study in California found that Black male attorneys were disbarred or resigned at almost four times the rate of white male attorneys. An unscientific review of Washington public discipline from 2020 shows a possible disproportionate number of nonwhite attorneys subject to discipline. While we don't have good statistical information, it remains important to keep in mind which groups of lawyers may be most likely to be affected by an unfair set of procedures.

**Elimination of volunteer hearing officers.** Currently, all hearing officers, except the Chief Hearing Officer, are volunteers. This system benefits both the hearing officers, who are able to gain adjudicative experience that is helpful for future careers as judges or ALJs, and also provides a panel of adjudicators with a breadth of experience with the potential for racial, geographic, firm size and practice area diversity.

Under the new proposal, there will be possibly one paid adjudicator presiding over all hearings. That gives an enormous power to at most a few individuals who are likely to feel beholden to ODC to remain in that position.

Notably, while volunteers are selected by a Volunteer Selection Board appointed by the Supreme Court, the Bar gets to select the Chief Regulatory Adjudicator, who then can choose any other adjudicators. RDI 2.5; RDI 2.3(c). Currently, a respondent may have an assigned hearing officer removed without cause (similar to an affidavit of prejudice). ELC 10.2(b)(1). That will not be available under the proposed rules.

Although the GR 9 cover sheet states that the proposed system is consistent with developments in Arizona, Colorado and Oregon, in those states hearings are conducted by a panel consisting of a paid adjudicator and two volunteers.

**ODC discretion substantially increased.** The proposed rules remove much of the current oversight of ODC's decisions. For example, they significantly increase ODC's discretion in filing formal charges. Although ODC still has to obtain authorization to do so, the proposed rules require that ODC be given authorization unless a reasonable finder of fact could not find an alleged rule violation. Currently, a review committee can deny ODC's request to bring formal charges if the alleged violation is too insignificant to merit public discipline.

This change will make the review process meaningless in the vast majority of cases, leading to more lawyers in formal disciplinary proceedings. In addition, the proposal gives the respondent only 15 days to respond to ODC's request to file formal charges, even though it may have taken ODC a year or longer to issue that request. RDI 5.10(b). Often the respondent does not retain counsel until receiving the notice that ODC wants to pursue discipline, making a timely objection unlikely for many.

Other proposed changes that remove oversight of ODC's decisions include the following:

**Eliminate a grievant's appeal of a dismissal.** ELC 5.7(b). While ODC is correct that eliminating that right will increase efficiencies, it also removes a safeguard that helps create consistent outcomes.

**Give ODC unfettered discretion to reopen any grievance that it found to be without merit.** Rather than dismissing grievances, ODC will "close" them (RDI 5.11), leaving respondent attorneys without finality, and subject to "Kafka-esque" targeting.

**Eliminate the right to appeal ODC's decisions on whether to defer an investigation pending related civil or criminal litigation.** ELC 5.3(d)(2).

**Eliminate a respondent's ability to contest ODC's refusal to destroy files, giving it the authority to keep any file indefinitely, which will appear on a discipline report required for bar admission in another state, and also allowing old, dismissed files to be used against the lawyer in a subsequent grievance.** ELC 3.6(d)(e); RDI 3.9(b).

**Remove the appeal process for ODC's decision on whether to withhold information from a grievant or respondent.** ELC 5.1(c)(3)(B). This often arises when a respondent provides personal information, such as a spouse's health condition, to explain conduct mentioned in a grievance, but does not want the grievant to be aware of those circumstances.

**Eliminate a provision that would subject disciplinary counsel to a contempt proceeding for wrongful release of information.** RDI 3.1(d); ELC 3.2(f).

**Give ODC sole discretion to seek an interim suspension of a lawyer's license based on alleged risk to the public.** RDI 7.2(a); ELC 7.2(a)(1)(A).

**Allow ODC to seek costs in incapacity proceedings without first obtaining authorization to do so.** RDI 8.10; ELC 8.6.

**Increased sanctions.** The proposed rules remove the authority of review committees to issue advisory letters or admonitions instead of granting ODC's request to file formal charges. Advisory letters accompany a dismissal but caution the lawyer to avoid similar conduct in the future. ELC 5.8.

Currently, a review committee can issue an admonition, which the respondent can reject. That process, eliminated under the proposed rules, allowed a respondent to avoid the time and expense of hearing. Admonitions are not currently a sanction but will be under the new rules. ELC 13.1; RDI 13.5(a). In short, it will be more difficult for a lawyer who has committed an isolated minor rule violation to escape being sanctioned.

**Incapacity.** The current and proposed rules both permit a lawyer to be removed from practice based on an allegation of incapacity. The issues under the Americans with Disabilities Act raised by taking action against someone based on a medical diagnosis rather than on conduct are beyond the scope of this article, but should have been considered when the proposed rules were drafted.

One notable change is that to avoid an interim prohibition against practicing law, the respondent will bear the burden of proving, by a clear preponderance, that continued practice of law will not be detrimental. RDI 8.2(c)(2), 8.4(d)(2).

Currently, only a lawyer who has had a disbarment recommendation after a full hearing has such a burden. ELC 7.2(a)(2).

By contrast, the burden of proof will be on lawyers accused of incapacity even though they have not had a hearing but instead, were at most given 15 days to respond to ODC's submission to a review panel. RDI 8.2(c)(2); 5.10(b).

**Changes not made.** Had there been a process that involved all participants in the lawyer discipline system, as there was when the current set of rules (Rules for Enforcement of Lawyer Conduct) was developed, proposals to increase fairness for accused attorneys could have been considered.

For example, the lowest levels of discipline in many states are private, while in Washington, even an admonition is public and permanently listed on the bar's website. When Washington eliminated private admonitions in the 1990s, the effect was less severe because potential clients could not use the internet to discover attorney discipline. Now a small error can be career-ending, particularly for less-established solo practitioners.

Diversion is the only way a lawyer can avoid the negative publicity of discipline, but only ODC can offer diversion and there is no oversight of ODC's decisions to deny diversion to a lawyer. A better system would permit respondents to appeal denials of diversion or, as in Arizona, allow diversion to be offered by hearing officers and review panels,<sup>8</sup> thereby making consistent outcomes more likely.

The lopsided nature of discovery should also be corrected. Before formal charges are filed, ODC can issue subpoenas, take depositions and require lawyers to produce documents and information. A respondent is entitled to no discovery other than requests for admission without an agreement of the parties or on motion.

In Oregon, by contrast, both parties can take depositions and issue requests for production. OSB Rules of Procedure 4.5(b)(1). Oregon also allows an award of costs to the prevailing party (OSB Rules of Procedure 10.7(b)), unlike our rule which permits costs only to ODC. ELC 13.9; RDI 13.8. A rule such as Oregon's would disincentivize bringing unsupportable charges.

Finally, it is well known that lawyers suffer from mental health and addiction issues at a far greater frequency than the general public.<sup>9</sup> A better process would have led to changes that would provide more support for these attorneys to get treatment instead of punishing them with public discipline.

**Bottom Line.** The current rules already disfavor respondents unfairly. If the proposed rules are enacted, it will open the door to "Kafka-esque" targeting by permanent WSBA staff and ODC, and allows for prosecution based on the *mere allegation* of wrongdoing without any independent review.

IN THE NAME OF FAIRNESS AND SUBSTANTIAL JUSTICE, PLEASE PROTECT US,  
HONORABLE SUPREME COURT OF THIS FINE STATE.

Please be in touch with me directly should you wish to hear of my personal experience with the WSBA, and my view of the far-reaching and very grave implications of these proposed rules.

I remain, Very Truly Yours,

/s/

--

David L. Mann, Esq.

LEDGER LAW FIRM

*"Do not be daunted by the enormity of the world's grief. Do justly, now. Love mercy, now. Walk humbly, now. You are not obligated to complete the work, but neither are you free to abandon it." - Talmud*

**\*\*NOTE: Please include Ms. Elizabeth Reed ([elizabeth@ledgerlaw.com](mailto:elizabeth@ledgerlaw.com)) on all case-related correspondence\*\***

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# BAR BULLETIN

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## Losing Your License Will Be Easier Under Proposed Rule Changes

📅 March 1, 2021 | in [General](#)

### MARCH 2021 BAR BULLETIN

By **Anne Seidel**

Proposed new rules that will substantially change the procedures for lawyer discipline are currently pending before the Supreme Court with a comment period ending April 30. These changes will make it more difficult for those unfortunate enough to be accused of unethical behavior to avoid the financial and reputational consequences of public discipline.

**Development of rules.** The Office of Disciplinary Counsel (“ODC”), along with other employees of the Washington State Bar Association, drafted the proposed rules, called the Rules for Discipline and Incapacity (RDI).<sup>1</sup> Even though this is the “most substantial reexamination of the functioning of the discipline system in Washington” in almost two decades, the rules were drafted without any input from practicing attorneys or those of us who represent lawyers accused of misconduct.

The stated goal of the revisions was “to create efficiencies and improve outcomes.”<sup>2</sup> The drafting process was akin to having new criminal procedural rules drafted solely by prosecutors with input from court administrators. The bar then solicited “feedback” from a hand-picked group of “stakeholders,” resulting in only minor revisions to the proposed rules.<sup>3</sup>

A March 10, 2020, WSBA Executive Director’s Report stated that “it is anticipated the rules will be presented to the BOG (Board of Governors) in spring 2020 ...”<sup>4</sup> That did not happen. Instead, at the BOG’s June 2020 meeting, Supreme Court Justice Mary Yu informed the BOG that because the Court exclusively oversees the lawyer discipline process, the rules would be submitted directly to the Court. Yet, at the very same meeting, the BOG approved proposed amendments to the Rules of Professional Conduct, the substantive rules enforced through the lawyer discipline system.

**Impact.** Lawyers in small or solo practices are disproportionately subject to discipline. Because WSBA has failed to study racial or other inequities, there are no readily available statistics on whether nonwhite or immigrant attorneys are more likely to be a respondent (the subject of a

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grievance).

However, a study in California found that Black male attorneys were disbarred or resigned at almost four times the rate of white male attorneys.<sup>5</sup> An unscientific review of Washington public discipline from 2020 shows a possible disproportionate number of nonwhite attorneys subject to discipline. While we don't have good statistical information, it remains important to keep in mind which groups of lawyers may be most likely to be affected by an unfair set of procedures.

**Elimination of volunteer hearing officers.** Currently, all hearing officers, except the Chief Hearing Officer, are volunteers. This system benefits both the hearing officers, who are able to gain adjudicative experience that is helpful for future careers as judges or ALJs, and also provides a panel of adjudicators with a breadth of experience with the potential for racial, geographic, firm size and practice area diversity.

Under the new proposal, there will be possibly one paid adjudicator presiding over all hearings.<sup>6</sup> That gives an enormous power to at most a few individuals who are likely to feel beholden to ODC to remain in that position.

Notably, while volunteers are selected by a Volunteer Selection Board appointed by the Supreme Court, the Bar gets to select the Chief Regulatory Adjudicator, who then can choose any other adjudicators. RDI 2.5; RDI 2.3(c). Currently, a respondent may have an assigned hearing officer removed without cause (similar to an affidavit of prejudice). ELC 10.2(b)(1). That will not be available under the proposed rules.

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Other proposed changes that remove oversight of ODC's decisions include the following:

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- Eliminate the right to appeal ODC’s decisions on whether to defer an investigation pending related civil or criminal litigation. ELC 5.3(d)(2).
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Finally, it is well known that lawyers suffer from mental health and addiction issues at a far greater frequency than the general public.<sup>9</sup> A better process would have led to changes that would provide more support for these attorneys to get treatment instead of punishing them with public discipline.

**Bottom Line.** The current rules disfavor respondents but if the proposed rules are enacted, there will be an increased likelihood of permanent public sanctions.

*Anne Seidel limits her practice to legal ethics issues, including defense of bar grievances. She can be reached at 206-284-2282 or [anne@anneseidel.com](mailto:anne@anneseidel.com).*

*1 GR 9 cover sheet. The proposed rules and the GR 9 cover sheet are available at [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=5807](https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=5807). The proposed rules also apply to LLLTs and LPOs and use the term "licensed legal professionals." This article only addresses lawyer discipline.*

*2 Id.*

3 This statement is based on a comparison of the draft rules sent to the “stakeholders” and the set published for comment by the Court.

4 Materials for 3/19/20 Board of Governors Meeting at 18, available at [https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2019-2020/board-of-governors-meeting-materials-march-2020.pdf?sfvrsn=969a0ef1\\_6](https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2019-2020/board-of-governors-meeting-materials-march-2020.pdf?sfvrsn=969a0ef1_6).





5 <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf>. The disbarment/resignation rate for Black males was 3.9% versus 1.0% for white males.

6 GR 9 cover sheet, section II.1.

7 Mark A. Turner, *The Adjudicator’s First Year*, 79 Oregon State Bar Bulletin (July 2019) at 9, available at <https://www.osbar.org/bulletin/issues/2019/2019July/index.html?page=9>; Ariz.R.S. Sup. Ct. Rules, Rule 52(b); Colo. R.C.P. 251.18(b); see also Proposed Colo.R.C.P. 242.7(c).

8 Ariz.R.S. Sup. Ct. Rules, Rule 56(b).

9 See, e.g., Krill, Johnson, & Albert, *The Prevalence of Substance Use and Other Mental Health Concern Among American Attorneys*, 10 *Journal of Addiction Medicine* 46 (2016).

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