Disability Rights
WASHINGTON
Washington's protection and advocacy system

April 23, 2021

Steven C. González, Chief Justice
c/o Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Rules Concerning Incapacity Proceedings

Chief Justice González:

Disability Rights Washington provides the following comments on the proposed amendments to the Rules for Discipline and Incapacity ("RDI"). Title 8: Incapacity Proceedings is especially concerning to us as advocates for Washingtonians with disabilities. Not only do we have concerns about the substance of the proposed rule which appears to be an explicit attack on attorneys with disabilities, but we are concerned that Washington State Bar Association ("WSBA") staff led this process and did not build this new rule that clearly focuses on disabled lawyers from the ground up with the input of the state's minority bar association specifically focused on disabled lawyers. As such, we support the concerns expressed in the comments of the Washington Attorneys with Disabilities Association and provide this separate comment to provide additional emphasis and perspective as an advocacy organization focused on disability civil and human rights.

Disability Rights Washington is mandated by federal law and designated by the Governor of Washington to provide protection and advocacy services for people in Washington with physical, sensory, and mental disabilities. Disability Rights Washington is governed by a board of directors that is a majority people with disabilities. We have authority to pursue a full range of legal assistance to people with disabilities including legal representation, regulatory and legislative advocacy, and education and training which includes numerous trainings to lawyers and law students about disability law and ethical representation. As a result of Disability Rights Washington's extensive involvement in both the disability community and legal

community, we are well positioned to assist the Court in more fully understanding the importance of avoiding the ableism and sanism in its rules regarding the fitness to practice law.

Stigma and bias against people with disabilities is ubiquitous in our culture. Ableism is a word that describes negative, stereotyped beliefs about people with disabilities generally and sanism is a more specific term addressing the negative, stereotyped beliefs about people with mental illness. Retired New York Law School Professor Michael Perlin has written extensively about the effects of irrational prejudice against people who have been labeled as having a mental disability.[1] Sanism is based predominantly upon stereotypes, myths, superstitions, and a lack of individualization of people with mental disabilities.[2] And as Professor Perlin points out, sanism is generally invisible and largely socially acceptable.[3] Sanism is a force in our legal systems because judges, politicians, lawyers, legal scholars, and jurors are all a part of our sanist community.[4] Relevant to the proposed rule, sanism infects our legal systems when people in power make decisions based on discriminatory myths and assumptions, not evidence:

> The entire legal system makes assumptions about persons with mental disabilities--who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their conditions are immutable. These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we may become mentally disabled.[5]

Professor Perlin calls this decision-making based on assumptions and discriminatory myths the use of "ordinary common sense," where people unconsciously discriminate in response to events in both everyday life and the legal process.[6]

---

[1] *See, e.g.,* Michael L. Perlin, *"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems,* 25 Ga. St. U. L. Rev 607 (2009); Michael L. Perlin, *"Things Have Changed:" Looking at Non-Institutional Mental Disability Law Through the Sanism Filter,* 46 N.Y.L. Sch. L. Rev. 535 (2003) [hereinafter Perlin, *"Things Have Changed"*]; Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did,* 10 J. Contemp. Legal Issues 3 (1999) [hereinafter Perlin, *"Half-Wracked Prejudice Leaped Forth"*]; Michael L. Perlin, *On "Sanism,"* 46 SMU L. Rev. 373 (1992). Although Perlin has written extensively on sanism, he attributes the term to Dr. Morton Birnbaum. Perlin, *"Half-Wracked Prejudice Leaped Forth,"* at 4 n.15 (citing Morton Birnbaum, *The Right to Treatment: Some Comments on its Development,* in Medical, Moral and Legal Issues in Health Care 97, 106-07 (Frank J. Ayd ed., 1974)).

[2] *Id.*

[3] *Id.*

[4] *See On "Sanism,"* 46 SMU L. Rev. at 398-405.

[5] Perlin, *"Half-Wracked Prejudice Leaped Forth," supra* note 1, at 17.

[6] Perlin, *"Things Have Changed," supra* note 1, at 536.

Examples of sanist myths and assumptions about people with mental disabilities can help illustrate this concept of "ordinary common sense." For instance, a popular myth is that mental disabilities can be easily identified by laypeople and that they match up closely to popular media depictions.[7] Another assumption is that people with mental disabilities simply do not try hard enough or are child-like.[8] A very common myth is that most individuals with mental illness are dangerous and frightening.[9] There is also a widely held belief that people with mental disabilities are presumptively incompetent.[10] These preconceived notions set the stage for the "ordinary common sense" that underlies the rule being proposed here.

Title 8 of the rule which is ostensibly focused on capacity to practice law is triggered "when disciplinary counsel obtains information that a licensed legal professional may lack the mental or physical capacity to practice law...." While the rule does not say the word disability, it uses code for disability and it is clear this rule is focused on examining the fitness of only attorneys with disabilities simply due to the presence of their disability. It is not triggered by conduct of an attorney irrespective of their disability status. The legal definition for disability under the Washington Law Against Discrimination is built around a "sensory, mental, or physical impairment"[11] and the Americans with Disabilities Act also relies upon "physical or mental impairment."[12] Simply avoiding saying the word disability makes this rule no less focused on disability when the sole trigger for the examination hinges on the presence of a mental or physical difference.

The Americans with disabilities Act and Washington Law Against Discrimination are civil rights laws. Their sole purpose is to stop ableist and sanist discrimination. In passing the Americans with Disabilities Act of 1990 (ADA), Congress found that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals

---

[7] Perlin, *On "Sanism,"* 46 SMU L. Rev. at 395.
[8] *Id.* at 394, 396.
[9] *Id.* at 394.
[10] *Id.* at 394.
[11] 49.60.040(7)(a).
[12] 42 U.S.C. § 12102(1)(a).

> and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society....[13]

Upon signing the ADA, President George H.W. Bush described the legislation as taking a "sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp."[14] President Bush proclaimed that the passage of the ADA was another showing that Americans will not tolerate discrimination, and that the "shameful wall of exclusion" would finally come tumbling down.[15] That was over 30 years ago, and people with disabilities still face discrimination on a daily bases, and as seen here even by people with sufficient legal training to understand the impact of their actions.

People whose bodies and minds work differently are a protected class, and for an important reason. Despite this, the WSBA has decided that this, and only this, protected class should be scrutinized to see if they are fit to practice law. The presence of that difference, whether as a result of a change in functioning or the way the lawyer's mind and body has always worked, is the only thing that may trigger this examination. The rule seeks to exclude from practicing law any attorney who "lacks the mental or physical capacity to practice law...."[16]

---

[13] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 329 (1990).

[14] "Remarks of President George Bush at the Signing of the Americans with Disabilities Act," *available at* http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

[15] *Id.*

[16] *See* RDI 8.1 (a). The definition also references RDI 8.5 which provides a list of legal orders which automatically prove a lawyer subject to one of these orders lacks capacity. This list is problematic as it does not focus on specific conduct that impacts practice. Instead, it is based entirely on sweeping assumptions about all people subject to the orders listed. For example, it lists being found not guilty by reason of insanity as automatically proving incapacity to practice law. Being found not guilty by reason of insanity does not actually have anything to do with a person's current mental state or ability to practice law at present. Instead, it is a narrow legal examination of a specific point in the past which may or may not have been impacted by the temporary influence of chemicals or episodic mental illness, not necessarily an immutable condition currently impacting the ability to practice law. Another unsupported, sweeping exclusion is of anyone committed for treatment longer than 14 days. First of all, many people are committed to a treatment facility for longer than 14 days because the first period of commitment is now 120 hours, not counting weekends and holidays, and then the second is 14 days so everyone held more than the initial commitment period will hit the WSBA's limit. Second, involuntary treatment is triggered by a number of things, including and very frequently being a danger to one's self. Having self-injurious or even suicidal thoughts or actions that necessitate inpatient treatment has nothing to do with the ability to exercise legal judgements or act diligently with respect to a client's case. Whether someone is hospitalized to recover from a serious heart attack or mental illness, the examination should be whether conduct or a lack of conduct in the form of preparation and mitigation negatively impacts clients or other practice requirements. The list of order in RDI 8.5 does not concern itself with the attorney with a heart attack at all and simultaneously is an automatic bar to practice that prohibits

There is nothing in this circular definition to describe what capacity means other than having a physical or mental disability that makes the attorney lack capacity. Once triggered, there is no objective criteria for making determinations about the nature, scope, and duration of the alleged mental or physical incapacity. That lack of criteria invites bias. It not only allows, but necessitates WSBA staff make decisions based on all those discriminatory impressions Professor Perlin would call "ordinary common sense." The rule requires the WSBA staff make subjective conclusions about the impact of a disability as opposed to consider whether there is evidence of poor conduct. This rule scrutinizes ways of existing in the world, not violations of the code of conduct.

To start a close examination of the assumptions WSBA staff are expecting to make, we can look at physical differences. It is hard to envision a physical disability that would actually preclude the practice of law. Assistive technology is widely available. This is technology that allows, among other things, writing and speech with only the smallest of physical movements such as the movement of an eye or puff of air in a straw. Moreover, while the practice of law is quite varied, it is generally understood to be a thought and word oriented endeavor. The lack of physicality is a common aspect of most forms of practice. Despite that, the WSBA staff who led this process not only think it is possible for a physical disability to make someone unfit to practice law, they think it is necessary to construct a rule for such examinations. The rule they constructed specifically mentioned physical ability as something that will trigger an examination of capacity to practice law. Outside of unsupported bias about what people with physical disabilities are able to do, it is unclear what physical ways of being prevent an attorney from having the capacity to practice law.

Similarly, it is not clear what mental ways of being the WSBA believes prevent a lawyer from having capacity to practice law. The WSBA provided no definition of incapacity and offered no examples or objective criteria. Certainly, if a lawyer lacked due diligence, mismanaged funds, or made horrible legal judgements, those decisions could give some insight into how the lawyer's way of thinking impacts their practice of law. However, the way of

---

the attorney with a mental illness from offering any evidence that they should not lose their ability to practice given their actual conduct and situation.

thinking that resulted in the lack of due diligence or mismanaged funds may very well not be some immutable mental state deriving from a mental disability and instead just a lack of regard or inattentiveness. In that situation, it is the conduct that would be examined, not the lawyer's mental disability and its perceived global impact on their ability to practice. In such situation, the WSBA and this Court would have evidence of actual conduct that violated the Rules of Professional Conduct. However, this rule is specifically designed to avoid being constrained by facts around actual conduct. It is designed solely to make conclusion about the impact of a disability and speculate about how it may, but has not yet, prevent the proper practice of law.

Regardless of disability, there are many situations in which a lawyer may find that their ability to properly practice law is compromised. If an attorney goes under general anesthesia for a surgery, has been awake for multiple days working on a brief, gets sick, or takes certain medications as directed by a physician, they may not have the capacity to practice law for hours, weeks, or even longer. In most instances, there would be no disagreement about the lawyer's incapacity, in fact the impacted lawyer would be encouraged to plan ahead when possible and have contingencies in place for unforeseen events in order to properly meet the needs of their clients. This proposed rule not only does fails to consider this group, it does not even acknowledge that the lack of capacity is a common and accepted reality for all lawyers. There are times in every lawyer's practice that they are not capable of responding at the drop of a hat to any and all client needs. As a professional body we set up criteria for what a reasonable lawyer should be able to do, either alone or in concert with their firm or co-counsel, or with proper planning among them, their client, the opposing party, and the court. This rule, instead, implies a myth that incapacity is some permanent or at least longstanding immutable characteristic triggered by disability as opposed to the cyclical ebb and flow or normal human functioning that affects everyone in innumerably different ways. It is the way in which a lawyer addresses the foreseen and unforeseen moments in which they cannot respond to client needs that should be the sole determiner of whether the lawyer is fit to practice. That brings us back to conduct. The question should be, has the lawyer let clients down due to a lack of diligence or judgement, not does the lawyer have some physical or mental way of being that the WSBA has a hard time understanding.

As the Washington Attorneys with Disabilities Association comments lay out, it was not that the WSBA finally relented and proposed changes to this Court to remove discriminatory questions about mental health treatment history during the bar application process. In 2016, the Court adopted amendments to the Admission to Practice Rules 20-25.6 pertaining to Character & Fitness. These revisions eliminated questions regarding mental health history from the character and fitness review of bar applicants.[17] The purpose section of those changes explained that the United States Department of Justice, which both promulgates regulations for and enforces the Americans with Disabilities Act, requires state bar association character and fitness inquires be focused on current, not past, facts and that those facts be focused on conduct that impacts fitness, not perceptions affiliated with disability status.[18]

It took a lot of advocacy to remove these discriminatory questions.[19] When Disability Rights Washington and others first presented the WSBA with legal analysis and Department of Justice findings from other states, the WSBA staff refused to move a fix forward. The WSBA eventually did present appropriate amendments to that rule to this Court in 2016, but only after Disability Rights Washington produced a short documentary with bar members from around the state and legal experts from around the county, and a significant number of bar members, including the Washington Attorney General[20] provided input supporting changes that eliminated bias against applicants with mental illness. Despite that work fresh in the minds of disabled lawyers, disability advocates, and presumably WSBA staff, the bar association has come up with a process to do at the back door what they are prohibited from doing at the front door. At the time of admission the WSBA is required to look at conduct only, not generalized

---

[17] Suggested Amendments, Admission and Practice Rules (APR) Rules 20–25.6, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=487.

[18] *Id.*

[19] *See* https://www.disabilityrightswa.org/questions-of-discrimination/. This page includes links to media coverage and letters on the topic from bar members, advocacy organizations, and the American Bar Association. It also includes a link to one of two videos on the subject produced by Disability Rights Washington's video production team, Rooted in Rights. The original documentary focused on moving the WSBA to act has been taken down as it was outdated once the WSBA agreed to propose changes. A subsequent video about the impact of inquiring about mental illness in the admission process is still available for viewing on the page as it is applicable to people with mental illness looking to practice in other jurisdictions that still have discriminatory application questions and the sentiment of the people in the video has direct relevance to the stigma built into the proposed rule around incompetence.

[20] https://www.disabilityrightswa.org/wp-content/uploads/2018/02/AG-Ferguson-Letter-to-WSBA.pdf.

assumptions about mental disability.[21] Under this new rule the WSBA would be able to push someone out of practice without tethering their analysis to actual conduct despite the fact that once someone has been practicing there would certainly be a much larger body of conduct from which to assess fitness than there is at the time of application. If the WSBA must limit its assessment of fitness at the time of application to conduct, they should have to limit any subsequent examination of fitness to conduct as well.

Finally, and most importantly, Disability Rights Washington would like to point out that this rule would not look like it does if the process were led by impacted members of the bar. Members of the bar with physical and mental disabilities hold their duties and responsibilities to their clients, the bar, the courts, and the core principle of justice just as strongly and deeply as lawyers who are not labeled as disabled. They want to protect the community from bad lawyers just as much as anyone. They also know much more than other lawyers how ill-informed ideas are about lawyers with disabilities are and how stereotypes or assumptions about disability provide zero protection for clients. Instead, these stereotypes simply heap additional barriers to practice on a group of lawyers who already face significant barriers to acceptance by their fellow lawyers and the bench.[22]

Here, the WSBA drafted a proposed rule to prospectively regulate the legal practice of disabled lawyers on the unsupported speculation of WSBA staff that there certainly had to be some number of disabled lawyers whose disabilities impacted them to such an extent that they

---

[21] "The [D]epartment [of Justice] found that diagnosis and treatment, without problematic conduct, did not effectively predict future misconduct as an attorney and did not justify restrictions on admission." https://www.justice.gov/opa/pr/department-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates.

[22] The WSBA 2012 Membership Survey found that "21 percent of respondents acknowledge living with at least one disability or impairment. ... Individuals in this diversity group reported the second highest frequency of experienced barriers in the workplace, with 18 percent encountering barriers ("always," "often," or "sometimes"). The intensity of barriers experienced may be relatively high in that members of this group rank first among the seven diversity groups on a scale designed as a measure of intensity of the barriers experienced." p. 106. https://www.americanbar.org/content/dam/aba/administrative/women/wsba_membership_study2012.pdf. It should be noted that while this is the most current survey looking at this issue, it came out prior to the character and fitness application question changes referenced above. This may account for only 1.3% of respondents reporting a mental illness, compared to approximately 20% of the general population with a mental illness. That old admission rule and the rule being proposed today filter out lawyers with mental illness from practicing, promote stigma, and generally chill people being open about their mental health needs within the bar. Ironically, rules that promote stigma instead of focusing on conduct hinder proper planning that could mitigate poor outcomes for clients when a natural and understandable transitory moment of incapacity arises.

must be removed from the bar even if there are no conduct problems at present. Instead of asking the sole minority bar association dedicated to disabled lawyers in the state if they had ideas on the topic, the bar staff just drafted a rule themselves and asked for general community input. This not only led to the creation of an ableist and sanist rule in this specific instance, it perpetuated an arrogance many people in power have had and will continue to have until sufficiently challenged. They hold the dangerous idea that they because they hold positional power they know what is best, not just for themselves, but for everyone. They know the right way to practice law, they know the right way for lawyers' bodies to work, the right way for lawyers' brains to process, they know so much they do not need to even write down a process that would require they "show their math." They can simply lay out a circular, conclusory test without any elements for that test. It is the hubris from which generations of discriminatory acts flow and well established systems of discrimination are built and reinforced. Only by being humble and asking the people with the most experience – here, lawyers whose bodies and brains work differently form an arbitrarily established norm – for their directions, not just input, will we be able to build a less discriminatory and more just system of justice.

David Carlson
Director of Advocacy
Disability Rights Washington