



Date: April 27, 2021

To: Washington State Supreme Court
WSBA Board of Governors
WSBA Office of Disciplinary Counsel

From: Domestic Relations Attorneys of Washington (DRAW)

Re: *Proposed Rules for Discipline and Incapacity*

Dear Justices of the Washington State Supreme Court and WSBA Board of Governors:

Domestic Relations Attorneys of Washington (DRAW) is an organization of approximately six hundred family law attorneys who are located throughout the state of Washington. We are mostly sole practitioners or members of small law firms. Family law is one of the two areas of practice which draw the most bar complaints, the other being criminal law. Sole practitioners and attorneys in small firms draw more complaints than those in other modes of practice. Thus, DRAW's membership is disproportionately affected by the proposed disciplinary rules changes.

While we appreciate the fact that a purpose of the proposed changes is to expedite the disciplinary process, we have several concerns.

1. The proponent of the changes is apparently Terra Nevitt, Executive Director of the WSBA. The only other people who were able to speak before the proposal was prepared were apparently Douglas J. Ende, Chief Disciplinary Counsel of the WSBA, and Julie Shankland, General Counsel of the WSBA. While we appreciate the Court asking for input from stakeholders, we are at a disadvantage when the proposal has already been made by those who have interests potentially adverse to practicing attorneys.

2. According to the GR Cover Sheet, one of the purposes of these changes is to “improve outcomes”. What are these “improved outcomes”? Do not the existing rules provide safeguards to all concerned in a disciplinary proceeding? Is “improved outcomes” a euphemism for more findings of misconduct on the part of attorneys? Or for expedited outcomes at the expense of due process?
3. While DRAW does not object to the establishment of an Office of Regulatory Adjudicator, the proposed method of constituting that office is problematic. RDI 2.3 (c) states that the Bar is to hire the Chief Regulatory Adjudicator and staff, and that the Chief Regulatory Adjudicator then appoints Regulatory Adjudicators for specific cases. Who specifically in the WSBA is to hire the Chief Regulatory Adjudicator? That is not specified in the proposed rules. Does the Office of Disciplinary Counsel have a say in who is hired? If so, that is a conflict of interest. It would be similar to the prosecutor choosing the judge in a criminal case without the defendant having a say, or to allowing the plaintiff to hand-pick a jury without the defendant being allowed to participate in *voir dire* in a civil matter. DRAW proposes that the Board of Governors have the power to hire and fire the Chief Regulatory Adjudicator without input of any kind from the Office of Disciplinary Counsel. ODC should similarly have no say in who volunteer adjudicators or hearing adjudicators are. Again, this is to avoid an actual or perceived conflict of interest.
4. Attorneys should have a minimum of twenty days to respond to a complaint. That is the same as in civil matters. It can take time to review the complaint and to then hire an attorney, if necessary. There is no reason to cut the response time back to fifteen days. The shorter time frame would likely put more of a strain on attorneys who may be looking to retain counsel or consider their defenses. Allowing ODC the discretion to grant extensions helps but it does not cure this problem because the ODC has by definition a conflict of interest.
5. The possibility of sending an attorney an advisory letter should be retained. The cover letter states that ODC “routinely includes educational language in dismissal letters”; however, dismissal letters are not an option in the RDIs. In addition, review committees should be retained to examine ODC’s recommendation to bring charges, and those committees should retain the power to overrule the ODC on those decisions. Otherwise, more, not fewer, cases will go to full hearing. That is counter to the stated purpose of expediting the disciplinary process.
6. RDI 5.2 (c) states, “Disciplinary counsel has discretion to withhold information in whole or in part from the respondent or an individual otherwise eligible to receive it when disciplinary counsel deems it necessary to protect a privacy, safety, or other compelling interest of a complainant or other person.” This is problematic in two ways. First, the “prosecutor”, as it were, decides what information is to be provided to the respondent, which is a clear conflict of interest. Second, if this information is

withheld, it makes it impossible for a respondent to prepare a defense; yet, the respondent is subject to sanctions if the respondent withholds information for any reason (other than privilege). If it is extremely important to withhold information from the respondent/attorney, then there should be a procedure in place under which ODC must seek an order from a neutral third party to be allowed to keep the information confidential. That could perhaps be a separate official appointed by the Board of Governors for that purpose. Even this procedure raises issues. It would violate due process to discipline an attorney based on information he or she did not know and therefore could not respond to.

7. RDI 5.2 (d) states, "If a person or entity submits a complaint and asks to be treated as a confidential source, the person's identity may not be disclosed during an investigation or proceeding unless ordered by a regulatory adjudicator as necessary for the respondent to conduct a proper defense." This is problematic because there is no way for a respondent to know whether confidential information was used in rendering a decision unless the respondent knows the information and its source. If a person wants to be treated as a confidential source, that person's information should not be gathered at all because it can then taint the proceedings. Any person or entity that wants to provide information should be informed that the source of the information and the information itself will be disclosed to the respondent.
8. It is also impossible to prepare a defense if you do not know the nature of the charges and the evidence allegedly supporting the charges. For that reason, the ODC should be required to provide a copy of the disciplinary file to the accused attorney. This should include, at a minimum, the nature of the charges and all supporting documentation and statements relevant to the procedure, including exculpatory materials.

We appreciate your considering our comments.

Very truly yours,

Electronically signed:

Lisa Brewer

Lisa Brewer

President, DRAW

cc: Terra Nevitt, WSBA Executive Director
Douglas J. Ende, WSBA Chief Disciplinary Counsel
Julie Shankland, WSBA General Counsel

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: DRAW comments regarding proposed disciplinary rules changes
Date: Wednesday, April 28, 2021 8:02:48 AM
Attachments: [ltr to SC and BOG 4-27-21.docx](#)

From: Rick Bartholomew [mailto:kinickinic@aol.com]
Sent: Tuesday, April 27, 2021 4:44 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: DRAW comments regarding proposed disciplinary rules changes

External Email Warning! This email has originated from outside of the Washington State Courts Network. Do not click links or open attachments unless you recognize the sender, are expecting the email, and know the content is safe. If a link sends you to a website where you are asked to validate using your Account and Password, **DO NOT DO SO!** Instead, report the incident.

Dear Justices of the Washington Supreme Court,

DRAW (Domestic Relations Attorneys of Washington) is an organization of just under 600 family law attorneys throughout the state of Washington. Pursuant to the Court's order dated December 2, 2020, attached is a letter containing our comments regarding the proposed Rules for Discipline and Incapacity. Please contact me if you have any questions.

Rick Bartholomew
DRAW Legislative Liaison