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July 27, 2021

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

Sent via email only to supreme@courts.wa.gov

Re: *Proposed Rules for Discipline and Incapacity*

Dear Justices of the Washington State Supreme Court, Washington State Bar Association Board of Governors, and Washington State Bar Association Office of Disciplinary Counsel:

Thank you for your time and commitment in reviewing this response to the revisions of the Rules for Discipline and Incapacity (RDI). We are Family Law practitioners in Washington State. Due to the nature of Family Law, it is one of the two areas of practice which draw the most bar complaints, the other being criminal law. While we appreciate the stated purpose of the proposed changes - to expedite the disciplinary process, we are concerned about the lack of information and unanswered questions we have after reviewing the proposed changes. Specifically, we are concerned about 1) the process for the proposed changes, 2) whether the proposed revisions are tailored to remedy current issues, 3) the implications of the proposed revisions, and 4) several other specific proposed revisions as stated below.

1. The process by which these proposed changes were submitted has not provided input from the individuals affected by these changes. The tenets of the justice system require a fair and transparent process with the opportunity to be heard. These principles should be realized in this process. It is not fair or just that the only input was provided by parties potentially adverse to the parties affected by the changes. We believe a process involving all interested parties is appropriate and is more likely to result in proposed revisions that meet the needs of all parties affected and remedy current issues.
2. According to the GR 9 Cover Sheet, one of the purposes of these changes is to "improve outcomes". However, very little information is provided regarding what is broken about the current system. What are we trying to solve for? What inefficiencies are needing to be resolved? What options for remedying these issues were considered and why were the proposed revisions selected? What information is there regarding other jurisdictions

utilizing rules similar or the same as the proposed rules? Do those jurisdictions have the same inefficiencies we are currently experiencing? What is it about the outcomes that needs to be improved and how are these proposed changes tailored to remedy this concern to provide “improved outcomes”? What is the definition of “improved outcomes?”

3. What implications are there to the public and to attorneys with the proposed changes? Does the system create appropriate oversight and prioritize the opportunity for neutral adjudicators, transparency and opportunity to be heard?

I have additional specific concerns as stated below:

4. Attorneys should have a minimum of twenty days to respond to a complaint. This is standard in civil matters. Is there a reason to cut the response time back to fifteen days?
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. This is arguably the most important piece of the RDIs as it provides information to the party subject to a complaint information on how to change his/her behavior to avoid future complaints. If this piece of the process is irradiated, attorneys are losing the most valuable part of this process. This could potentially result in additional complaints as the attorney is not provided feedback on what is acceptable or not in order to change behaviors. If behavior is not changed complaints may continue where they could be mitigated with information in an advisory letter. This is an important piece to the efficiency of the process that should not be lost.
6. I share DRAW’s concern regarding RDI 5.2 (c):

Our additional questions are: what scenarios have there been in the past where this has been necessary? What are we trying to solve for? What is required for a situation to be deemed “necessary to protect a privacy, safety, or other compelling interest of a complainant?” Is there an example that can be provided where has been necessary in the past? Is there a scenario that the drafters have determine this clause is necessary to remedy? If so, what is that scenario? It seems that if attorneys are held to the standards in the RPCs there should not be a scenario where this language is necessary.

7. I share DRAW’s concern regarding RDI 5.2 (d):

What are we trying to solve for with the addition of this confidential source language? What specific scenario? Have the implications of this language been considered with input by the parties affected? Is there a better way to accomplish what is needing to be accomplished here so that the tenets of fairness, transparency, and opportunity to be heard are considered? Is this a potential violation of due process? Does the attorney not have the right to confront the complainant? How will the attorney prepare a defense

without all information regarding the nature of the charges, the evidence against him/her and the source of the information? Do other jurisdictions have the same or similar clause? If so, what information do we have about how it operates?

8. The GR 9 Cover Sheet references a flow chart “Appendix B” and states it is attached but it is not. The Cover Sheet indicates this flow chart provides more detail about the structure of the new disciplinary and incapacity system model. It would be helpful to have this document for review, consideration and comment prior to these changes being adopted.

After review of the revised RDIs it appears that a simplified procedural explanation is as follows:

- a. Per 2.2, Bar officers, the Executive Director, and Board of Governors members cannot serve as regulatory adjudicators or special conflicts disciplinary counsel during their terms or until three years have expired after departure from office.
- b. A complainant files a complaint with the WSBA;
- c. The Respondent may be required to pay all costs and expenses associated with the process from here forward pursuant to 13.8. Respondent may not seek to charge a complainant a fee or recover costs from complainant for responding to a complaint per 2.12 (e).
- d. The complaint is forwarded to the Office of Disciplinary Counsel (ODC);
- e. The Chief Regulatory Adjudicator (See 2.3 (c)) reviews the complaint and may either 1) file a request for an order authorizing the filing of a Statement of Charges or initiation of incapacity proceedings; or 2) close the complaint. Either way, this decision is not subject to review.
- f. The Respondent has 15 days to respond to the request for an order authorizing the statement of charges and ODC has 5 days to reply.
- g. Then an Authorization Panel (AP) (See 2.4 – The AP consists of the chair and two individuals assigned from the volunteer adjudicator pool (See 2.5), including an individual who has never been licensed to practice law and one member of the Bar. When practicable, the Chief Regulatory Adjudicator should assign to the Authorization Panel a member of the Bar who has the same license type as the respondent.) must review the filings and, if the evidentiary standard is met, may authorize the filing of a statement of charges.
- h. If the AP authorizes a statement of charges or incapacity proceedings, the matter moves forward as stated in the rules. The rules of evidence do not apply in the proceedings and the burden of proof is “clear preponderance of the evidence”.
- i. Per Title 11, an appeal may be filed within 30 days to the Appeal Panel (See 2.4 (c) An Appeal Panel consists of the chair and four individuals assigned from the volunteer adjudicator pool, including an individual who has never been licensed to practice law and three members of the Bar. When practicable, the Chief Regulatory Adjudicator should assign to the at least one member of the Bar who has the same license type as the respondent. See also 2.5, 2.6 and 2.7). No additional evidence is permitted unless allowed pursuant to 11.6.

- j. Per Title 12, the respondent or disciplinary counsel has the right to appeal an Appeal Panel decision recommending disciplinary suspension or disbarment. There is no other right of appeal except as specified in Title 8.

Thank you for your time and consideration of our comments.

Very Truly Yours,
GRAVIS LAW, PLLC

A handwritten signature in cursive script that reads "Jena Maxwell".

Jena Maxwell
Attorney at Law

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Dear Justices of the Washington State Supreme Court, Washington State Bar Association Board of Governors, and Washington State Bar Association Office of Disciplinary Counsel –

Attached please find my comments regarding the proposed amendments to the Disciplinary Procedural Rules. Thank you for your time and consideration.

Sincerely,

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