To: COMMENTS supreme@courts.wa.gov.
July 29th 2021
From: Ken Henrikson #17592
RE: Proposed Adoption of RDI Rules for Discipline and Incapacity

Dear Court:

This comment add examples from my 34 years of practice to the KCBA comment previously submitted to this court.

Have an "underview" as a bottom-feeder in this profession, which is where the information exists, which may supplement your "overview".

I insert (underscored) KCBA comments that relate to my concrete personal observations underpinning their objections s they play out in "real life". This, to illustrate the mechanism by which this new rule structure will further reduce decision quality by concentrating authority, unleashing the additional furies of human nature inherent in groupthink, the Asch, Zimbardo, and Milgram experiments in excessive reliance on status-authority and suboptimal decisions that produce thalidomide babies, space shuttle disasters, and wrongful discipline and convictions.

KCBA comment says: "If the RDI is adopted it will usher in a substantial centralization of authority in ODC. Actions which were subject to oversight by a review committee will now lie wholly within the authority of the disciplinary counsel. For example, under the current rules decisions not to grant a deferral are reviewable under ELC 5.3(d)(2). That authority is abrogated under the RDI"

Here, I offer personal observations in years of service on the C & F board, and our decisions on whether to allow disbarred attorneys reinstatement, or a new attorney to sit for the bar exam based on character or disability; not unlike the disciplinary committee. Upon reading the thousand pages of materials, I get convinced it is an easy decision. Yet my certainty disintegrates during the hearing. I am yet again shocked at the strongly diverse opinions I had thought would be unanimous, which I would have still thought had they not been there. That's why we need them. There are some decisions I now wish I could have taken back, but this Supreme Court has also ratified my

dissenting decisions, in one case by only me and the lay member who convinced me. LACK of expertise is essential too. (read Ortega y Gassett's books).

ODC recommends a shift to paid hearing officers who are selected, hired and employed by WSBA. Under our current system, using volunteer hearing officers, there is a greater likelihood that a lawyer facing discipline may have someone who resembles him or her as a decision maker.

As a general rule, most of those with probable cause for my panel to adjudicate them have suffered adversity that tests anyone's ethics; adversity that those who sit in judgment of them would never experience, which leaves them with the assumption that only enduring moral character would have prompted such behaviors. But people learn from their mistakes, and gained knowledge that we "good people" take for granted as being born with. A lack of social skills is mistaken for evidence of bad moral character. Disabilities are confused with incompetence. Privacy to seek help is the greater value than obedience to demands for mental health records. Yet it is these very people that the legal profession needs to protect clients from being chewed up and spit out by the legal system. While there is now room on the bandwagon for these kinds of views, there wasn't when I was there, and more bandwagons need construction.

I say from experience, without these seven decision makers with a detailed deliberative process, forced to write majority and dissenting opinions, with lay members, you don't get fully developed facts so your Supreme Court gets nothing of substance to review. Then you get simple decisions of one person that this court could only rubber stamp.

Low decision quality can't be hidden. Word travels fast. I personally witnessed how lack of diversity in bar association decision-makers works when I saw discipline records of other state bar associations. They come before my Washington C & F board. For instance, a Southern state had banned a disabled minority attorney based on their closed "good ol' boy" network, but when the applicant

went before a deliberative process here, where the "witness" statements were deconstructed and additional witnesses (who were not intimidated) were heard from, it was an easy decision. But with incomplete information, it seemed like an open & shut case of misconduct and bad moral character. It is delusion to think we are better or worse than the South.

This is why we have 12 jurors.

Similarly, the ability to use the functional equivalent of a motion for change of judge (affidavit of prejudice) also lessens the impression that the proceeding will not be fair.

I understand the arguments for diversity based on experiences of protected classes, but you need more tools protect decision quality, which is the product the legal profession manufactures. The WSBA decision process must include diversity of philosophies, diversity of experience, of intellectual curiosity, temperament, as well as the protected classes. Functional diversity is maximizing the number of decision makers who the decision structure forces to challenge each other's assumptions; which means avoiding concentrations of power at all costs. It is this more nuanced diversity that opens up the dialog necessary for quality decisions. Ethnic, experiential, disability, and other diversity is a necessary start, but it is useless when power is concentrated. Power is nothing more than a license to not listen. Power begets more concentrated power, since like "academic incest," people re-appoint duplicates of themselves to succeed them, a simple principle of personnel management in every MBA program.

Removal of the authority of a review committee to issue an advisory letter under ELC 5.8… *Likewise, a grievant who does not believe that ODC properly considered her claims before closing a grievance will lose the right to appeal to the oversight of a review committee. ELC 5.7(b). ODC will have unaccountable discretion. Without a means of appeal, the new procedure gives unsuccessful grievants greater fuel to suggest that the process is just lawyers protecting lawyers.*

But the new rules more than the merely "suggest that the process is just lawyers protecting lawyers"

I see both experienced/inexperienced lawyers habitually commit ethical violations with irreparable harm. I get punished over decades for bringing it to people's attention. People trash police for their silence but in truth, who can say we are any better? It used to be that a lawyer, such as myself, could quietly submit bar complaints or judicial conduct complaints that merely ask the Bar to privately work with the lawyer to change their habits and policies, so as to stop harming their clients (usually for public defenders to provide constitutionally required services they had hitherto ignored. Without these options, even the Northern-liberal version of the "good ol' boys' & girls') network" of public defender administrators and WSBA hierarchy would have little alternative but to choose dismissal over the sledge hammer approach, which leaves the indigent clients to suffer the blows. As a powerless person, the more ensconced have flaunted that in my face. In real life, there is a disparity of power when large firms spend millions against the small firms without time to defend or build a case sufficient to fool the adjudicators. So I approach this from a different perspective than the KCBA's letter's concern over the disparate treatment to new and minority lawyers. It also harms the clients because it increases reluctance to correct habitual unethical behaviors just as juries are more reluctant to convict when the death penalty is mandatory.

The effective safeguard is a large number of diverse discipline processors with as many tools/options as possible. I see many clients' lives ruined, like serving life without parole

because, like cops and doctors, attorneys stick up for each other, their judgement clouded by their loyalty and friendship. Look at the internet blogs' public comments on their opinion of the cronyism of lawyers. The Bar Association has told me that they don't have the resources to investigate. Decades ago, before the WSBA austerity-paralysis, the WSBA employed many field investigators who requested documents that the grievant had no access to. But now I see a Catch-22 of no investigation without a prior investigation.

The other problems for grievants is the firm policy that for indigent clients, malpractice will not even be investigated or addressed unless years of appeals have been exhausted, and only then if the courts find that a meritorious issue was neglected, but the damage from malpractice is the neglect that keeps the malpractice off the record. The Bar Association either does not understand that, or they don't expend the necessary resources to make such understanding an option. This, in my personal observations, has emboldened lawyers to know their indigent clients get low priority because malpractice against those clients is treated summarily, and makes indigent clients housebroken to ever expect the minimal competence that paying clients get. But these rules make it so a person risks never getting relief from his grievance if he files it too early or wait years for the evidence to emerge, which he has no control over.

--KH

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera; Tracy, Mary
Subject: FW: COMMENT ATTACHED on Discipline rules.
Date: Thursday, July 29, 2021 4:17:18 PM
Attachments: Comment SEND July 29th WIP415.docx

From: HENRIKSON [mailto:henrikson@prodigy.net]
Sent: Thursday, July 29, 2021 4:17 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: abogadoze@gmail.com; HENRIKSON <henrikson@prodigy.net>
Subject: Re: COMMENT ATTACHED on Discipline rules.

From: HENRIKSON <henrikson@prodigy.net>
To: supreme@courts.wa.gov <supreme@courts.wa.gov>
Sent: Thursday, July 29th, 2021
Subject: COMMENT ATTACHED

To: Comments c/o Washington Supreme Court
From: Kenneth Henrikson #17592

COMMENT ATTACHED

Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by **no later than July 29th, 2021**. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

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