



July 27, 2021

The Honorable Steven C. González
Chief Justice
Supreme Court of the State of Washington

Re: Proposed Revisions to the Rules of Discipline and Incapacity

Dear Chief Justice Gonzalez:

I am writing on behalf of the over 4,800 members of the King County Bar Association (KCBA) to thank the Court for affording us, and others in the State, more time to comment on the proposed Rules of Discipline and Incapacity (RDI). The additional time allowed the KCBA the opportunity to host a virtual public forum—attended by 44 attorneys, legal professionals, and stakeholders—and to further review and analyze the proposal to supersede the rules for Enforcement of Lawyer Conduct (ELC) with the RDIs. This letter summarizes the various concerns identified during the forum and in follow-up deliberations among various KCBA committees, including its Judiciary and Litigation Committee. KCBA joins the chorus of entities and organizations that have raised significant concerns regarding the process through which the proposed RDIs were drafted and the considerable substantive concerns that these proposed rules raise. We respectfully ask that the Court revisit the process and assemble a taskforce under the direction of the Washington State Bar Association (WSBA) that is representative of all stakeholders—including the KCBA—that can propose revisions to the ELCs (and rules governing other legal professionals) that are consistent with the Court’s mission and the General Rules.

Entities such as Disability Rights Washington, the Solo & Small Practice Section of the WSBA, Respondents’ Counsel Roundtable, and individuals such as Anne L. Seidel have already identified many shortcomings and unintended consequences of the proposed RDIs. We do not repeat those concerns here, but note that the KCBA shares many of those concerns. Instead, in this letter we focus on concerns—both procedural and substantive—that were identified during the KCBA’s public forum and in follow-up committee deliberations.

According to its GR 9 statement, the Office of Disciplinary Counsel (ODC) believes that superseding the ELCs with the RDI will improve efficiency by creating a uniform process for all legal license categories and make the process more professional through the use of paid adjudication staff. The KCBA applauds and supports the ODC’s goal of having a uniform set of rules governing lawyers, Limited Practice Officers, and Limited License Legal Technicians, but has significant concerns regarding both the process through which the RDIs were proposed and considered and the unintended consequences—including the loss of safeguards that currently exist—of the proposed rule changes.

The Adoption Process Lacked Transparency and Was Non-Inclusive

Historically, revisions to existing Court rules have been vetted by a committee or taskforce under the direction of the WSBA and the revisions have been voted upon by its Board of Governors. As the largest voluntary bar association in Washington, KCBA is routinely asked to provide representatives to these committees and taskforces so that the over 4,800 attorney members of the KCBA can weigh in on proposed revisions, provide

much needed perspective gathered by its various committees and sections, and can be an equal partner in the process. The proposed RDIs have arrived at the Court via a very different route, whereby ODC, along with some WSBA employees and representatives handpicked by ODC, drafted the rules with no oversight by the WSBA Board of Governors or any involvement of an inclusive and representative taskforce. Many persons who participated in the KCBA's public forum and have reached out to our Public Policy and Judiciary and Litigation Committees questioned the lack of transparency and the justification for such a different, and not surprisingly non-inclusive, process.

Further, the lack of equal participation by respondents' counsel, minority bars, solo practitioners, disability groups, and lawyers practicing in fields in which the greatest number of grievances and disciplinary charges arise compromise the appearance of fairness. The fact that ODC had the final word on the proposed rules casts further doubt on the neutrality and balance of the RDIs.

ODC says that it solicited comments from respondents' counsel. Letters already submitted to the Court; however, contradict this assertion.¹ The ODC was the ultimate decision maker in finalizing the proposed rules. ODC drove the process from initial drafting, selection of reviewers and persons who could comment on the drafts, and finalizing the language of the rules. Of more concern to the KCBA is the fact that ODC appears to have unilaterally decided which comments to address and which to discard. WSBA's Board of Governors was not asked to provide its own review of the final product. The ODC-led committee was not open to the public. The comments and materials considered by ODC were not made public and were not available via the WSBA website or elsewhere.

We believe that it is important to have a more inclusive, neutral, and public process for the revision of the ELCs. A taskforce of the WSBA should be formed, with participation by lawyers, other legal professionals, and non-lawyers to ensure that the viewpoint of potential grievants is properly represented. ODC should, of course, have a voice and its experience credited, but the taskforce should ultimately decide what changes to the rules governing discipline and incapacity, if any, are warranted.

Additionally, at the KCBA's public forum (and elsewhere), concerns have been raised that groups most likely to be affected by the proposed RDIs were not represented at the table. Amongst those groups are solo and small firm lawyers, disabled lawyers, and family law and criminal defense lawyers. Solo and small firms often lack the mentorship and internal checks that larger law firms and public agencies have in place. The concerns regarding the effect of the proposed RDIs on disabled legal professionals have been well documented by Disability Rights Washington, Ms. Seidel, and the Washington Association of Disabled Lawyers and so are not repeated here. Family law and criminal defense lawyers practice in areas where emotions often run high, which leads to a corresponding rise in grievances filed. Finally, minority and specialty bar associations have a special interest in determining whether discipline falls more heavily upon their members. All these groups should be represented in the taskforce and have a meaningful voice in the revisions to the rules.

The Proposed RDIs Also Suffer from Various Substantive Shortcomings

In addition to these concerns about the process, this letter identifies several substantive shortcomings of the proposed rules that were discussed during and following KCBA's public forum on the proposed RDIs.

If the RDIs are adopted they will usher in a substantial centralization of authority in the ODC. Actions which were subject to oversight by a review committee will now lie wholly with the authority of the disciplinary

¹ The March 15, 2020, letter to the WSBA Board of Governors from the Respondent Counsel Roundtable states:

Two of our members participated in the "stakeholder review" process and both saw it as a fig leaf designed simply to create an illusion of input from others in the disciplinary process. Respondent counsel's feedback was largely ignored.

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. 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 as currently allowed under 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.

One particular area of concern to the KCBA is the removal of the authority of a review committee to issue an advisory letter under ELC 5.8. Such a letter is neither a sanction nor a form of discipline and it is not public information. The purpose of such a letter is “to caution a respondent lawyer concerning his or her conduct.” Such a non-disciplinary option is of great importance to all lawyers, but particularly to newly-minted attorneys who may have erred due to youthful zeal or lack of appropriate supervision or experience. In larger firms, there is typically some review and approval process before the work of new lawyers leaves the firm. This opportunity for mentorship and correction does not exist for lawyers in solo practice and often not in small firm practice. Thus, the likelihood of a misstep is greater. Statistics demonstrate that solo and small firm lawyers are more likely to have grievances filed and discipline imposed. The removal of advisory letters under ELC 5.8 is likely to have a disproportionate impact on new lawyers in solo and small firms, which often are at the forefront of increasing access to justice—an issue of critical importance to the Court.

The impact of discipline on new lawyers lingers longer; throughout a career newly begun. It can affect future hiring, availability and cost of malpractice coverage, and the severity of future discipline. It is not uncommon to have past discipline interjected into motions for sanctions in unrelated civil cases; the worse form of ER 404(a) evidence. The publication of disciplinary actions makes even minor infractions open to these abuses. Because advisory letters are non-public and do not represent sanctions, they have long served as a means to avert such consequences while steering a young lawyer back on course. Adoption of the RDI removes the authority of a review panel to use this important option and centralizes such discretion in the ODC. Further the ODC seeks to increase the impact of admonitions, which are already public information, and re-classify them as sanctions. The KCBA believes that these steps lead our profession in the wrong direction and have the potential to exacerbate the very ills they are meant to cure.

At the KCBA’s public forum on the proposed RDIs, concerns were also raised about the shift in the burden of proof to an allegedly disabled lawyer to avoid transfer to incapacity status on an interim basis. Leaving aside the difficulty of proving a negative, many raised concerns about the interplay between the proposed RDIs and the Americans with Disability Act. If ODC seeks to transfer an attorney to incapacity status on an interim basis, the ODC should bear the high burden of demonstrating incapacity—based on demonstrated actions and not simply on alleged status.

Additionally, the ODC recommends a shift to a paid Chief Regulatory Adjudicator (CRA) and staff. The CRA would be selected, hired, and employed by the WSBA. Under our current system, using volunteer hearing officer, there is a greater likelihood that a lawyer facing discipline will have someone who resembles him or her as a decision maker. Having the grievance heard by a lawyer with a similar practice background, similar size firm, or similar ethnic background makes the system stronger and more equitable. 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. These advantages of the current system are lost, or at least potentially compromised, by the move to a paid adjudicator with no option for a change of judge.

There has been no showing that the current model of using volunteers does not work. Such a dramatic change to the existing system—with its numerous potential unintended consequences—should be based not simply on a claim of increased efficiency but by a finding that the current model does not work. Here, the ODC is urging the change without making such a case against the current system, which all involved admit is producing just results. KCBA recognizes that a paid CRA and staff could have beneficial effects; for example, leading to

a more diverse group of hearing officers, but is not convinced that a compelling case has been made for this significant change in structure and urges a more thorough study before the idea is implemented.

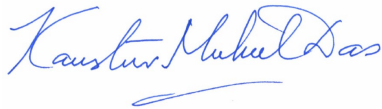
Several members of our association have also raised the concern that the proposed change from dismissing a grievance to simply closing the grievance is not a good idea. This change removes the finality of being able to tell a malpractice carrier, among others, that the matter is at end because the ODC can reopen the matter at some indeterminate time in the future. Once again, the KCBA does not believe enough evidence and analysis undergirds this significant change to the rules.

Finally, if such a wholesale change to the rules governing the conduct of legal professionals and paraprofessionals is to be implemented, the KCBA urges the Court to consider various other proposals that have been made in the past. For example, granting respondents a right of discovery (as opposed to having to apply to a hearing officer) would bring greater balance to a system in which the ODC has broad investigatory powers before filing a formal statement of charges. A taskforce assembled by the Court could explore this and other proposals as part of the revisions to the rules.

Although well-meaning and motivated by a desire to bring more uniformity and efficiency to the system, the proposed RDIs raise more concerns than they address. The KCBA urges the Court to take this opportunity to revert to its more traditional approach to rule making on disciplinary matters—assembling a taskforce under the direction of the WSBA. A taskforce that is inclusive and transparent, and takes into consideration the legitimate concerns of all affected stakeholders (both legal professionals and lay persons), should be assembled to revisit these changes to the ELCs and to propose discipline and incapacity rules that are just, fair, and contribute meaningfully to access to justice for all.

As always, we appreciate your attention to these concerns, and remain ready to work closely with the Court and the WSBA to improve the rules governing the conduct of legal professionals.

Yours sincerely,

A handwritten signature in blue ink that reads "Kaustuv Mukherjee Das". The signature is written in a cursive style with a long horizontal flourish at the end.

Kaustuv M. Das
President
King County Bar Association