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Filed By Email Only

Washington State Supreme Court
c/o Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

RE: The Failure of Judicial Transparency and Trust in the RDI Adoption Process Must Be Rectified

Dear Washington State Supreme Court Justices:

In the Supreme Court oligarchy controlling the Washington attorney licensing system, a process which gives the chief prosecutor backdoor access to the Court creates the appearance that there is not a level playing field and that one stakeholder's voice is more important to the Court than others. You need to correct this.

In the name of judicial independence, the Court has long since rejected the Founding Fathers' belief in the importance of having three branches of government in favor of an oligarchy in which the Court functions as the legislature, executive and judicial branches. In the name of judicial independence, the Court has turned away from the system which provides for the licensing of the people who teach our children and who treat our bodies in favor of a unique governmental structure for those who represent people.

While I am certainly a vested player in the attorney licensing system, see P.S. below, I am not your policy consultant, political advisor or lawyer, but if I were I would tell you that "Justice must not only be done, but must also be seen to be done."[1] I would tell you that justice cannot be seen to be done when adversary procedural rules, the roadmap to justice, have been generated and adopted by a process which gives the prosecutor special and entitled access to the controlling body adopting them. If I were your policy consultant, I would tell you that such process is not good public policy. If I were your political advisor, I would tell you it sends the wrong signal to your most important election constituency, lawyers. If I were your lawyer, I would tell you, no matter how well intended, the process smacks of a violation of the appearance of fairness doctrine. In all three roles I would tell

[1] *Rex v. Sussex*, Justices, [1924] 1 KB 256.

you the better part of wisdom, is to step back from the current posture of the RDI adoption process and to reboot it.

In all three roles I would tell you that the interests of justice require rule adoption transparency and, as best as possible, the assurance to those whose lives will be controlled and potentially destroyed by the rules, that the process can be trusted to have been fair. That transparency and trust is destroyed when:

- A justice of the court reaches out to the chief prosecutor with no equivalent reaching out to the defense side, to set up "a liaison justice with the court."[2] This like a sitting Supreme Court Justice setting up a special liaison with the President of the Washington Prosecutor's Association to discuss and consult with while ignoring the Criminal Defense Bar.

- The chief prosecutor is given exclusive early access to the Court, to the exclusion of the defense, to pitch in a 20-minute PowerPoint presentation "(1) a draft of the RDI rules; and (2) a draft GR 9 Cover Sheet, with a high-level purpose statement highlighting key concepts of the RDI"[3] before the rules have been published for comment. No respondent's counsel will ever get that access.

- The chief prosecutor feels entitled and empowered to seek the off-the-record guidance from a justice of the Supreme Court about "the uproar at WSBA" due to the proposed RDIs and seeking that justice's "immensely helpful … thoughts and guidance on how to navigate the situation" and with the justice agreeing to provide such guidance.[4] Again, imagine controversial criminal law rule changes being submitted to the Court and the President of the Washington Prosecutors' Association sending such an email to one of the justices who will ultimately be asked, in a judicial role, to adopted and then later rule on such rules and the justice agreeing!

Transparency and trust are destroyed when lawyer defendants and their counsel are left to wonder how many other non-public liaisons, how many presentations and how many phone calls and other guidance and strategy contacts have occurred between the prosecutors and the Court. How can anyone truly say this process has the "appearance of fairness."

You are in the process of reviewing and adopting new lawyer disciplinary and disability proceeding rules, the Rules for Discipline and Incapacity ("RDI"). The proposed RDIs came about in contravention of the time-tested process developed by your predecessors for this type of rule adoption – creation of a task force by the Court or the

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[2] Justice Yu/Ende emails, July 8, 2020.
[3] Ende/Vandervort emails, September 20, 2020, with ccs to all members of the Court.
[4] Ende/Justice Yu emails, March 15, 2021.

Board of Governors comprising of representatives of all the stakeholders, that task force then generates a collaborative set of proposed rules with majority and minority reports, the review of those proposed rules and the reports by the Board of Governors followed by submission to this Court. The Court then publishes the proposed rules for comment and then, and only then, the Court becomes involved by reviewing the various competing interests and, in its legislative or administrative rule making role, adopts the final version. This process is transparent and avoids giving the impression that Court is anything other than a neutral arbiter, uncommitted to a pre-establish path in which one stakeholder's voice is more important to the Court than others particularly where the chief prosecutor and a member of the Court are working together on "how to navigate" controversy about the rules.

Presenting an entire set of rules and then asking for amendments is no substitute for the task force process. Every experienced rule drafter, including me and the chief prosecutor, knows that for many reasons the drafter has the advantage over the amender.

Arguments that the current RDI process is similar to rule making procedures for administrative agencies provides no comfort. The normal administrative agency rule making process occurs in the context of there being three branches in the government with the agency adopting rules which are then subject to legislative and judicial review. No executive branch administrative agency is given the authority to propose and adopt its own rules with the final determination of the legislative public policy function and the judicial scrutiny function then being made by itself. The oligarchy that is the attorney licensing system in Washington is in no way like the executive branch administrative rules process.

The appearance of fairness doctrine requires "" the decision-making process "not only [be] fair in substance, but fair in appearance as well."" If the RDIs are adopted on the current trajectory, the Court will not avoid:

> [T]he evil sought to be remedied [which] lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.

The Court will not have "[M]maintain[ed] public confidence in quasi-judicial decisions made by legislative bodies. *Harris v. Hornbaker*, 98 Wn.2d 650, 658, 658 P.2d 1219, (1983), (Omitting various citations).

As an oligarchy, with limited constitutional exceptions, the Court can do what it wants, including rejection of the appearance of fairness doctrine. I argue that the Court must, in its tripart role, bend over backward to avoid both the actual abuse and the appearance of abuse of its power. The public policies represented by the appearance of fairness doctrine have been worked out over years of case law and legislative action. That

public policy should not be rejected by the court just because it can, Instead, it should be adopted as a touchstone for guidance and wisdom.

In the RDI rule adoption process, the Court is exercising either its legislative function in the adoption of laws or its executive function in the adoption of administrative rules, but in either case, the Court must seek the "curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate." A system which gives the chief prosecutor backdoor access to the decision makers creates the appearance that there is not a level playing field and that one stakeholder's voice is more important to the court than others. This needs to stop.

This letter is not about the merits of the proposed RDIs and/or any deficiencies in them but rather it is about the much bigger picture of how the fairness of the court and its rules are perceived. Right now, that perception is not good. Although I am not your policy consultation, political advisor, or lawyer, I am a member of your Bar with a long-standing commitment, see below, to seeing a fair attorney disciplinary system. To achieve that fairness, I urge you to step back from the current posture of the RDI adoption process and to reboot it, using the time-tested taskforce process developed by your predecessors.

Sincerely,

Kurt M. Bulmer
Attorney at Law
WSBA # 5559

P.S. For those unfamiliar with my background I can advise that in 1974 I started a long history with the WSBA disciplinary system and its rules. I was present and active in the gestation and birth of the modern WSBA. I was the first full time prosecuting lawyer to work under the new rules which transitioned the lawyer disciplinary system from a county-based system to a state level system. I am in the unique position of being the only lawyer to have either worked for or worked with as opposing counsel every full time Chief Disciplinary Counsel for the WSBA. As a bar counsel and then as General Counsel, I directly prosecuted or supervised dozens of hearings and investigations against lawyers including John Erlichman, WSBA # 32, (who told me it took $10 million dollars for the Federal Government to get him, so what did I expect to do?; We disbarred him); John Rosellini (whose uncle was a sitting member of the Supreme Court); and the Honorable Jack Tanner (with the U. S. Senate Judiciary Committee waiting to confirm or possibly deny his judicial appointment, depending on our investigation). I am well aware of the pressures on bar counsel.

I helped establish the Washington State Bar Foundation and sat on its first board. I was instrumental in getting the LAP program started and in developing the spot audit program. I was one of ten persons on the national ABA Committee that developed and shepherded through the ABA House of Delegates the *Standards for Imposing Lawyer Sanctions* which continue to be used by the Washington State Supreme Court.

As a respondent's counsel I have defended and advised over a 1,000 lawyers, law firms and judges (including several members of the Supreme Court) in disciplinary hearings, disciplinary grievance responses and on ethical issues. I have argued over 45 cases in the Washington State Supreme Court on disciplinary, ethical, admission and unified bar organization issues. I have been an expert witness and am a frequent speaker at CLEs on disciplinary and rule matters. Over the years I have been an active participant in many of the RPC and procedural rules committees and task forces.

cc: Doug Ende, ODC
Members of the Respondents' Counsel Roundtable
President, WSBA Board of Governors
Others