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April 28, 2021

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Rules for Discipline and Incapacity

Dear Honorable Members of the Washington State Supreme Court:

Over time, the lawyer discipline system has become harsher and given ODC more and more discretion. If the proposed Rules for Discipline and Incapacity (RDI) are adopted, there will be no second chances for licensed legal professionals who commit even the most minor and inadvertent misconduct. Increasing ODC's discretion so dramatically will lessen confidence in the discipline system by both the public and practitioners and increase the risk of inconsistent outcomes.

Vulnerable members of the bar will be adversely affected by these rule changes. First, many of those who are subject to discipline have mental health issues, which is not surprising since lawyers have a far greater incidence of such diagnoses than the general public. I also believe that lawyers of color are more likely to be the target of grievances or discipline but cannot prove that because WSBA has been unwilling to study the issue. As just one possible reason, people are generally more likely to complain about those they perceive to be weak, which would lead to more grievances against lawyers of color. I have also seen grievances that were clearly motivated by racial animus. Because white families have more wealth than other groups, white lawyers are more likely to have family willing to pay for restitution or counsel,

both of which can help avoid public discipline. Similarly, in my experience, lawyers who are immigrants also find it more difficult to navigate the discipline system. The procedural rules could be improved to make it less likely that these practitioners will be unfairly disciplined, yet the drafting process failed to focus on this important issue.

There are many ways to improve the discipline system, increase efficiencies and promote fairness. But because these rules were developed solely by WSBA using an unprecedented process, other viewpoints and ideas were never considered. I urge the Court to reject these proposed rules and instead form a taskforce with all stakeholders represented to consider policy changes before drafting rules.

I agree that the Court has exclusive jurisdiction over the discipline system and that the WSBA Board of Governors (BOG) should not play any role in that system. The problem is that when the BOG was removed from oversight, nothing replaced the BOG in serving in that role. From what I can tell, there is no review of the timeliness or efficiency of ODC's work. Other states have separate court agencies that oversee the discipline system or committees that serve that function.

Process

The process used to develop these rules has been anything but transparent. I had to submit a public records request to the bar, pay $540, and wait over two months just to find out what comments were submitted by the so-called stakeholders group and what changes resulted from those comments.

WSBA apparently began its efforts to create new procedural rules in 2015 and according to the GR 9 Cover Sheet, they were "approved in concept by the Supreme Court in June 2017."

Initially, the goal was to combine the discipline systems for the three license types: lawyer, Limited Practice Officer (LPO) and Limited License Legal Technician (LLLT). At some point, the focus morphed from simply creating a coordinated discipline system to making wholesale changes for a more "efficient" and "streamlined" discipline system. *See* Ex A (Purpose statement from WSBA PowerPoint describing proposed changes). It is notable that WSBA's stated "purpose" did not include any consideration of fairness.

In January 2018, WSBA contacted proposed "stakeholders" to ask if they could serve as volunteer reviewers and indicated they expected the work would involve several feedback sessions "in the coming months." Ex B. For unknown reasons, the project dragged on and the so-called stakeholders were not convened for over two years.

WSBA has used the fact that it has worked on the proposed rules for five years as a reason to approve the rules, but the timeline for that work was entirely under WSBA's control and the fact that the process took longer than necessary does not mean the rules should be approved. WSBA could and should have involved others in the process from the get-go. Instead, the process was shrouded in secrecy. The meetings with the stakeholders were not listed on WSBA's website, even though WSBA was claiming to comply with the Open Public Meetings Act during that time period.

The stakeholder review process was woefully insufficient. It left out critical components. There wasn't a single LPO included. The bar thought a lawyer on the LPO Board was sufficient to speak for an entire license class of which he was not a member. Ex C. Unlike the Disciplinary Advisory Round Table (DART), it included neither an active Bar member not involved in the disciplinary process nor a member of any Minority Bar Association. Of the three Respondent

counsel handpicked by WSBA, one was part of the WSBA group that initially drafted the rules before he left his WSBA position and became respondent counsel. *Compare id.* (WSBA email among rules workgroup about stakeholders), Ex D (list of stakeholders). It is to his credit that when asked to volunteer as a stakeholder, he agreed to do so, but it is questionable why the bar chose someone who was not an independent evaluator when others were available. Another was a Portland attorney who primarily handles reciprocal discipline cases in Washington's system. The third was serving a dual purpose as both respondent counsel and a representative of DART.

Most importantly, the stakeholders were only asked to review the rules as drafted by WSBA and not propose policy changes. Instead of giving all the stakeholders the comments received from the other stakeholders, the comments were "summarized" by ODC and revised so they would not be "pointed." Ex E. The rewrites removed questions that were critical of the draft. For example, "Are the work product provisions under Rule 10.10(c) too broad?" became "What was the basis for the Rule 10.10(c) work product provisions?" *Id.*

At least one stakeholder asked whether it would be preferable to begin with policy discussions before going through the proposed rules. According to the Chief Disciplinary Counsel's email, "there's not actually a great answer to these questions" and at his direction, the question about first having a policy-oriented review was simply ignored. Ex F.

Problems with the Proposed Rules

As discussed above, the discipline procedures should be studied by a taskforce before new rules are adopted. If the Court instead decides to entertain these rules, the following revisions should be made. Please note that I have submitted a separate comment online regarding the disability/incapacity rules.

1. The rules eliminate resolutions for low-level discipline instead of increasing them.

The current Rules for Enforcement of Lawyer Conduct (ELC) permit a review committee to issue an advisory letter or an admonition instead of ordering a hearing. ELC 5.7(d). The RDI eliminate advisory letters altogether and admonitions can only be issued after hearing or by stipulation.

An admonition is currently public but not a sanction. ELC 13.5. Admonitions used to be nonpublic, as they are under the ABA Standards for Imposing Lawyer Sanctions, which guides sanction recommendations in Washington. They later became public but were destroyed after five years. More recently, admonitions became permanent but are still not sanctions. Under the RDI, they will be sanctions, making them indistinguishable from reprimands. To create an artificial distinction, the RDI requires probation for every reprimand whether it is needed or not. That will cause needless inefficiencies, despite the claimed purpose of increasing efficiencies.

Eliminating the review committee's ability to issue admonitions requires a licensed legal professional either to go to hearing or stipulate to resolve a matter with an admonition. Both of those are more time-consuming than the current review committee admonition process, again making the system less efficient.

The rules should instead make admonitions nonpublic. That will make our rules consistent with the ABA Standards and avoid ruining a young lawyer's career due to an inadvertent mistake that caused little or no harm. There is no evidence that having private admonitions as many other states do would in any way harm the public.

Proposal:

RDI 13.1 and 13.5 should be amended to make admonition a nonpublic action. RDI 5.10 should be revised to permit the Authorization Panel to issue nonpublic admonitions and advisory letters. See also my other comments about RDI 5.10 below. A summary of any admonition should be published in the Bar News to educate bar members, but it should not identify the person receiving the admonition.

2. ODC Is Given Far Too Much Discretion

The rules eliminate numerous checks on ODC's decision making. If the proposed rules are adopted, current provisions providing oversight of ODC's dismissal of grievances, decisions on deferrals, withholding of responses, and retention of files will be eliminated. When ODC's decisions are reviewed, the new rules impose standards of that review that give ODC an unprecedented amount of deference. For example, the reviewing committee cannot deny ODC's request for a hearing unless there isn't sufficient evidence under which a reasonable trier of fact could find a rule violation based on existing law or a good faith argument for an extension of existing law. Currently, there is no standard of review and review committees appropriately consider the totality of the circumstances. It is extremely inefficient to allow cases to be ordered to hearing if any reasonable trier of fact could find a rule violation when the totality of circumstances do not support discipline.

a. RDI 5.10 should be replaced with a rule similar to Colorado's proposed Rule 242.16,[1] which provides as follows:

(a) **Action by Regulation Committee.** On receiving a request from the Regulation Counsel under C.R.C.P. 242.15 or a recommendation from another investigator under C.R.C.P. 242.14(d), the Regulation Committee must determine whether there is

[1] Colorado's existing Rule 251.12 is similar but is not worded as clearly and does not contain the option of placing the matter in abeyance.

> reasonable cause to believe that grounds for discipline exist and, using its discretion and evaluating the considerations listed in subsection (b) below, will take one of the following actions:
> (1) Authorize the Regulation Counsel to file a complaint;
> (2) Impose private admonition;
> (3) Direct the Regulation Counsel to offer the respondent an opportunity to participate in a diversion program;
> (4) Place the matter in abeyance;
> (5) Direct further investigation; or
> (6) Dismiss the matter.
> (b) **Considerations in Taking Action**. In making a determination under subsection (a) above, considerations for the Regulation Committee include:
> (1) Whether it is reasonable to believe that misconduct warranting discipline can be proved by clear and convincing evidence;
> (2) The level of injury or potential injury caused by the alleged misconduct;
> (3) Whether the respondent previously has been disciplined; and
> (4) Whether the alleged misconduct may warrant public discipline.

This should be slightly revised to retain the option of dismissing with an advisory letter, as currently authorized by ELC 5.8, as discussed above.

Colorado's rule provides clear guidance to the reviewing body about what factors to apply when deciding whether to order a matter to hearing, without giving ODC's recommendation so much deference that the review will be essentially meaningless. Colorado's rule appropriately weeds out minor infractions so hearings are reserved for more serious matters. Colorado's rule is also consistent with the recommendation above that the rules permit private admonitions.

In addition, the time period in RDI 5.10(b) for a respondent to respond to ODC's request for a hearing is much too short. ODC can take a year or longer to investigate and prepare its analysis. The respondent should not have only 15 days to respond to such a critical document. The time period should be increased to 30 days after ODC provides the respondent with all discoverable material and any exculpatory evidence. Other states require disclosure of

exculpatory evidence and doing so ensures a fair process. *See, e.g.,* Rule 3.4 of West Virginia Rules of Lawyer Disciplinary Procedure; Rule 12(g) of The Delaware Lawyers' Rules of Disciplinary Procedure; Rule 25(d) of South Carolina Court Rule 413 - Rules for Disciplinary Enforcement.

b. Add More Review of ODC's Decisions

To promote confidence in the discipline system, the rules should continue to permit review of ODC's decisions and also allow review of denials of diversion by ODC. Review of dismissed grievances only occasionally changes the outcome, but the function served by review cannot be measured simply by whether the outcome changed. If there is an option for review, more care will be taken in determining whether to dismiss the grievance. The option for review also promotes better communication with grievants and more consistent results. It is obviously not in my clients' interest to maintain review of dismissed grievances, but I have serious concerns about the diminishment of the public's view of the discipline system if ODC has unfettered discretion to dismiss.

Proposals:

Retain ELC 5.1(c) (grievant right to receive response subject to exceptions with ODC's decision about withholding the response subject to review); ELC 5.3(d) (review of decision on deferral); ELC 3.7(b) (permitting review of ODC denial of request to destroy files for dismissed grievances after three years); ELC 3.2((f) (permitting contempt action for wrongful release of information) or revise RDI 3.1(d) as suggested below); ELC 15.1(d) (requiring review committee authority for a re-examination in a random trust account audit).

Permit grievants to seek review of dismissals by the Chief Regulatory Adjudicator as discussed below or alternatively retain ELC 5.6(d) (review of dismissals).

Revise RDI 6.1 to permit authorization panels to approve diversion as an alternative to discipline and to permit respondents to seek review by an authorization panel of ODC's denial of a request for diversion.

c. Call Dismissed Files "Dismissed", not "Closed" and Eliminate ODC's Right to Reopen

Lawyers with malpractice insurance want to be able to tell the carrier that a complaint was dismissed, not "closed." "Closed" is a vague term and it is not clear why the rules should not continue to say a complaint was dismissed, as it has for decades. RDI 5.11(c) (finality) provides no finality. There is no time frame within which disciplinary counsel may consider information about a closed matter.

Proposal:

RDI 5.11 should be revised to substitute "dismissal" for "closure" and "dismiss" for "close." RDI 5.11 should be eliminated because as discussed above, ODC's dismissals should be subject to review, with the same 45-day deadline as in ELC 5.7(b).

d. Remove ODC's Increased Ability to Obtain Interim Suspensions

Interim suspensions take away a practitioner's livelihood with almost no process. They should be reserved for the most egregious situations. The RDI add two provisions that make interim suspensions more likely and neither is warranted. First, RDI 7.2(e) adds an interim suspension for failure to comply with probation. ODC asserts that it is more efficient and streamlined to go straight to the Supreme Court. It is always more efficient to eliminate a fact-

finding hearing, but fairness should take precedence over efficiency. Moreover, a suspension is not always the appropriate sanction for a minor failure to comply with probation.

The RDI also eliminate the show-cause procedures in ELC 7.2(b) for interim suspensions. This takes away what in some cases is the respondent's only hearing before a possible loss of his or her license. ELC 7.2(b)(5) requires the respondent to notify the Court at least a week before the show-cause that the respondent intends to appear. That provision is adequate to eliminate any unnecessary show-cause hearings as they are stricken if the respondent does not notify the Court.

Finally, RDI 7.2(d) is inconsistent with *In re Disciplinary Proceeding Against Curran*, 115 Wn.2d 747, 772, 801 P.2d 962 (1990), which held that the presumptive sanction for some felonies is reprimand. RDI 7.2(d) requires that ODC seek an interim suspension whenever there is a felony conviction, regardless of whether the presumptive sanction is felony. This has resulted in lawyers being suspended when the ultimate sanction was reprimand. *See, e.g., In re Lori Guevara,* Proceeding No. 14#00009.

Proposals:

Delete RDI 7.2(e) and delete "may be grounds for an interim suspension under Rule 7.2 and" from RDI 13.6(c). Replace RDI 7.3(d) with ELC 7.2(b). Change RDI 7.2(d) to say disciplinary counsel "may" petition for an interim suspension.

3. Create a Discipline Oversight Committee

As mentioned above, there appears to be no oversight of ODC or the discipline system as a whole. I propose creating a Committee similar to Colorado's Advisory Committee under

Colorado proposed rule 242.3. *See also* CRCP 251.34(b)(3) (current Advisory Committee rule).

That rule provides as follows:

> Rule 242.3. Advisory Committee
> (a) Permanent Committee. The Supreme Court Advisory Committee on the Practice of Law (Advisory Committee) is a permanent committee of the supreme court.
> (b) Membership and Meeting Provisions.
> (1) Members and Liaison Justices. Two supreme court justices serve as non-voting liaisons to the Advisory Committee. The Advisory Committee comprises up to 13 volunteer members, including a Chair and Vice-Chair. Members other than the Chair and Vice-Chair serve one term of up to seven years. The supreme court appoints the members. Diversity must be a consideration in making appointments. At least nine of the members must be lawyers admitted to practice in Colorado and at least two of the members must be nonlawyers. Members' terms should be staggered to provide, so far as possible, for the expiration each year of the term of at least one member. Members must include:
> (A) The Chairs (or the annual designees) of the following committees: the Regulation Committee, the Law Committee, the Character and Fitness Committee, the Board of Continuing Legal and Judicial Education, and the Board of Trustees for the Colorado Attorneys' Fund for Client Protection;
> (B) A member of the Colorado Bar Association's Ethics Committee;
> (C) A member of the Standing Committee on the Rules of Professional Conduct; and
> (D) A Colorado lawyer who has represented respondents in proceedings under this rule.
> (2) Dismissal, Resignation, and Vacancy. Advisory Committee members serve at the pleasure of the supreme court, and the supreme court may dismiss them at any time. An Advisory Committee member may resign at any time. The supreme court will fill any vacancies.
> (3) Chair and Vice-Chair. The supreme court appoints members of the Advisory Committee to serve as Chair and Vice-Chair. The Chair and Vice-Chair may serve in their respective roles for up to an additional seven years after their initial membership term, such that each may serve a total of 14 years on the Advisory Committee. The Chair and Vice-Chair must not represent a party in a proceeding under this rule during the Chair's or Vice-Chair's term of service. The Chair and Vice-Chair serve at the pleasure of the supreme court.
> (4) Quorum. A majority of the members of the Advisory Committee constitutes a quorum, and the action of a majority of those present and comprising a quorum constitutes the official action of the Advisory Committee.
> (5) Reimbursement. Advisory Committee members are entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in performing their official duties.

(c) Powers and Duties. The Advisory Committee is authorized and empowered to act in accordance with this rule, including by:

(1) Assisting the supreme court to make appointments under this rule, including appointments to the supreme court's permanent committees under the Rules Governing the Practice of Law and to the pool of Hearing Board members;

(2) Reviewing the productivity, effectiveness, efficiency, and resources of the legal regulation system, including the Office of the Presiding Disciplinary Judge, the Office of the Attorney Regulation Counsel, the Colorado Attorneys' Fund for Client Protection, the Colorado Lawyer Assistance Program, and the Colorado Attorney Mentoring Program, and to report findings and recommendations to the supreme court;

(3) Adopting practices needed to govern the internal operation of the Advisory Committee, subject to the supreme court's approval;

(4) Developing and overseeing programs consistent with the Preamble to the Rules Governing the Practice of Law;

(5) Periodically reporting to the supreme court on the operation of the Advisory Committee;

(6) Recommending to the supreme court proposed changes to the Rules Governing the Practice of Law;

(7) Recommending to the supreme court, under C.R.C.P. 253 and procedures adopted by the Advisory Committee, whether to approve lawyers' peer assistance programs; and

(8) Assisting in any matters the supreme court directs.

4. Retain Volunteer Hearing Officers

There is no reason provided in the GR 9 coversheet for eliminating volunteer hearing officers. Having worked in the lawyer discipline area since 1994, I have observed a significant improvement in the quality of hearing officers. The advent of the Disciplinary Selection Panel, ELC 2.2(e), has most likely contributed to this. While I believe there remains work to be done in recruiting more diverse hearing officers and in improving the timeliness of filing of hearing officer orders, the solution to those issues do not require adding a Regulatory Adjudicator selected by WSBA. Rather, the rules should contain reasonable time frames for hearing officers to act and state that hearing officers who do not comply may be removed from the hearing officer panel. The Volunteer Selection Board, perhaps through WSBA staff, should also be required to

notify Minority Bar Associations, and perhaps other groups, of available volunteer positions in the disciplinary system.

Creating a single Regulatory Adjudicator who is chosen by WSBA (meaning, potentially, by ODC) will diminish confidence in the discipline system. Already there is much distrust among both the public and bar members about the discipline system. Volunteer hearing officers from the community are independent from the Bar and that helps promote trust in the system. The volunteer hearing officers also bring a wealth of experience and diversity of practice areas, backgrounds and geographical locations to the discipline system. In addition, having a paid Regulatory Adjudicator does not guarantee that decisions will be made in a timely manner. The lawyer discipline system has had a paid Chief Hearing Officer for years. Some have acted very promptly but that was not the case for everyone in that position.

The GR 9 statement references Arizona, Colorado and Oregon's use of professional adjudicators. Those states do not permit a single professional adjudicator to decide cases. Rather, all three of those states use a three-person panel consisting of a professional adjudicator and two volunteers. Mark A. Turner, *The Adjudicator's First Year*, 79 OREGON STATE BAR BULLETIN (July 2019) at 9[2]; Ariz.R.S. Sup. Ct. Rules, Rule 52(b); Colo. R.C.P. 251.18(b); *see also* Proposed Colo.R.C.P. 242.7(c).

Proposals:

Revise the rules so that a volunteer hearing officer presides over every hearing. Reinstate ELC 10.2(b), permitting removal without cause. Retain the Chief Regulatory Adjudicator but have that person appointed by the Volunteer Selection Board under RDI 2.5, and change the name of the Volunteer Selection Board to Discipline Selection Board. Change RDI 2.5 to require

[2] Available at https://www.osbar.org/bulletin/issues/2019/2019July/index.html?page=9

that applications from finalists for Chief Regulatory Adjudicator be posted for one month on the court or the bar's website and allow anyone to comment on the applications. This is what Arizona did when it recently had an opening for its Presiding Disciplinary Judge. Ex G. Require better recruitment of discipline personnel and volunteers. Add a provision that requires removal of a hearing officer for untimely decisions without good cause. Change the Chief Regulatory Adjudicator's duties to remove serving as a hearing officer and make the Chief Regulatory Adjudicator or another Regulatory Adjudicator a nonvoting member of adjudicative panels under RDI 2.4. Add review of challenges to dismissals to the Chief Regulatory Adjudicator's duties (see discussion above regarding review of dismissals).

5. Improve Hearing and Discovery Procedures

Hearing Procedures. Since at least 1983, the civil rules have been used as guidance in lawyer discipline proceedings. RLD 4.1(a); ELC 10.1(a). It is helpful to have a more detailed set of procedural rules to use as guidance as well as the significant caselaw interpreting those rules. The RDI eliminate this provision without substituting any other set of rules. This is a mistake. ELC 10.1(a) should be reinstated.

RDI 10.10(c), which codifies the work product doctrine, is confusing and unnecessary. If the civil rules continue to be used as guidance, any work product issue would be considered under CR 26(b)(4).

Discovery. Under both the current ELC and the proposed RDI, the ability to conduct discovery is extremely and unfairly lopsided. Before charges are filed, ODC can require the respondent to provide information or documents and can also issue subpoenas for depositions or to obtain documents from third parties. The respondent does not even have a right to receive

notice when such a subpoena is issued. The respondent is only permitted to seek discovery after the formal complaint (or statement of charges) is filed but no discovery is permitted other than Requests for Admission without ODC's agreement or hearing officer permission. This makes discovery substantially more expensive and inefficient because ODC often refuses to agree to discovery, necessitating a motion to the hearing officer.

Other states permit more expansive discovery without the need for a motion. For example, Oregon allows requests for production and depositions. OSB Rules of Procedure 4.5(b)(1). In addition, as discussed above, ODC should be required to provide all exculpatory evidence prior to asking an Authorization Panel to order a hearing.

Proposals:

Add ELC 10.1(a) and (b). Delete RDI 10.10(c). Revise RDI 10.10(a) to permit interrogatories as well as Requests for Production. Revise RDI 5.10 to require ODC to provide all exculpatory evidence at the same time that it serves the respondent with a request to file a statement of charges. Revise RDI 5.7(a) to remove the last sentence and require ODC to provide the respondent with notice of any subpoena consistent with CR 45.

6. Make the Award of Costs and Restitution More Fair

Costs. The discipline system would be considerably more efficient if costs were awarded to the prevailing party instead of only permitting ODC to be awarded costs. Doing so would encourage ODC to resolve cases where it will not be able to sustain its burden of proof on any counts. Such cases waste valuable resources for both ODC and the respondent. Other states permit award of costs to the prevailing party and Washington should adopt a similar rule. *See, e.g.,* Maryland Rules of Procedure19-709(a); Oregon State Bar Rules of Procedure 10.7(b).

Restitution. The purpose of the discipline system is to take actions against legal licensed professionals' licenses to practice, and not to serve as a collection agency for former clients or others who believe they are entitled to monetary compensation. That is the role of the civil justice system. Currently, restitution may be ordered when appropriate, but ODC does not obtain judgments for restitution, nor is payment of interest required. ODC has forced respondents to pay restitution to avoid public discipline or suspension. That unfairly burdens lawyers with low incomes who don't have friends or family able to help. RDI 13.7 makes that worse by requiring interest on restitution not paid in 90 days and permitting money judgments to be entered for restitution. That provision will serve to encourage people to file unsupportable grievances in the hopes of obtaining a judgment for restitution, clogging the discipline system with unnecessary grievances and burdening respondents who will have to prove they did not engage in the alleged misconduct.

Discipline for failure to pay. It is unfair to discipline a practitioner for being poor, but RDI 13.7(e) and 13.8(*l*) do so by providing that failure to pay, without proof of having the means to do so, may be grounds for discipline.

Proposals:

Revise ELC 13.8 to provide that the prevailing party may obtain an award of costs and expenses under this rule, using Maryland's rule as guidance. Delete RDI 13.7(d) and (g). Revise RDI 13.7(e) and 13.8(*l*) to make failure to pay grounds for discipline only if the respondent has the means to pay and does not do so.

7. Other Proposed Rule Changes

There are numerous other rules that need revision. For efficiency, I have attached the text of the relevant rule sections and proposed revisions, with explanatory comments.

Sincerely,

Anne I. Seidel

Enc.

RDI 1.2

~~NO STATUTE OF LIMITATION~~STALE MATTERS

(a) **General rule.** The Office of Disciplinary Counsel or the Board shall not entertain any complaint arising out of acts or omissions occurring more than four years prior to the date of the complaint, except as provided in subsection (b).

(b). **Exceptions.**

(1) The four year limitation in subsection (a) shall not apply in cases involving theft or misappropriation, conviction of a crime or a knowing act of concealment.

(2) When litigation has resulted in a finding that the subject acts or omissions involved civil fraud, ineffective assistance of counsel or prosecutorial misconduct by the respondent-attorney, a complaint may be entertained if filed or opened within: (i) four years of the subject acts or omissions; or (ii) two years after the litigation in which the finding was made becomes final, whichever date is later.

(c) Litigation "becomes final" within the meaning of subsection (b)(2)(ii) at the conclusion of direct or collateral review, including discretionary review in the Supreme Court of the United States and the highest state court, or at the expiration of time for seeking the review. Litigation resulting in a finding of civil fraud, ineffective assistance of counsel or prosecutorial misconduct is not a prerequisite to Office of Disciplinary Counsel's or the Board's entertaining a complaint involving one of those three forms of misconduct, and subsection (b)(2) should not be read to impose such a requirement.

~~No statute of limitation or other time limitation restricts submitting a complaint, initiating an investigation, or commencing a proceeding under these Rules, but the passage of time since an act of misconduct occurred may be considered in determining what if any sanction or remedy is warranted~~.

EXPLANATION:

This is Rule 85.10 of Pennsylvania's Disciplinary Board Rules and Procedures. Having a statute of limitations for most complaints will promote efficiency by reducing the use of resources on stale complaints. Pennsylvania's rule wisely contains an exception for theft, misappropriation, criminal convictions and concealment and allows later filing based on court findings.

RDI 2.2

WASHINGTON STATE BAR ASSOCIATION

(a) Function. The Washington State Bar Association:

(1) through the Bar's Executive Director, provides administrative and managerial support to enable the Office of Disciplinary Counsel, the Office of the Regulatory Adjudicator, and other Bar staff and appointees under these Rules to perform the functions specified by these Rules; and

(2) performs other functions and takes other actions necessary and proper to carry out the duties specified in these Rules or delegated by the Supreme Court.

(b) Limitation of Authority.

~~(1)~~ The Bar officers, Executive Director of the Bar, Board of Governors, LLLT Board, and Limited Practice Board have no authority to direct the investigations, prosecutions, appeals, or discretionary decisions made under these Rules, or to alter the decisions or recommendations of regulatory adjudicators or adjudicative panels.

~~(2) The Chief Disciplinary Counsel or Chief Regulatory Adjudicator must report a violation or attempted violation of this section to the Chief Justice of the Supreme Court. If the person is a licensed legal professional, the violation may also be grounds for discipline.~~

(c) Restrictions. 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.

(d) Independence. In discharging their responsibilities under this Rule and in carrying out duties specified elsewhere in these Rules, the Bar and its Executive Director ensure that the Bar's discipline and incapacity systems are organized and structured to:

(1) safeguard the decision-making independence of the Office of the Regulatory Adjudicator and to appropriately separate its adjudicative processes from the investigative and prosecutorial functions delegated to the Office of Disciplinary Counsel; ~~and~~

(2) ensure the limitations of authority set forth in section (b)~~(1)~~ are respected; ~~.~~ and

(3) The Chief Disciplinary Counsel or Chief Regulatory Adjudicator must report a violation or attempted violation of this section to the Chief Justice of the Supreme Court. If the person is a licensed legal professional, the violation may also be grounds for discipline.

EXPLANATION:

The decision-making independence includes both independence from those listed in section (b) and independence of the adjudicators from ODC. Violations or attempted violations of either of these provisions should be reported.

RDI 2.5

VOLUNTEER SELECTION BOARD

(a) Duties. The Volunteer Selection Board makes recommendations to the Supreme Court for the appointment and removal of volunteer adjudicators, and special conflicts disciplinary counsel. Information about the conduct or performance of a volunteer adjudicator, or special conflicts disciplinary counsel received by the Volunteer Selection Board, and deliberations of the Volunteer Selection Board, are confidential.

(b) Composition. The Volunteer Selection Board consists of five voting members and the Chief Regulatory Adjudicator as a non-voting member. The voting members are appointed by the Supreme Court and must include four active members of the Bar and one individual who has never been licensed to practice law. Voting members serve staggered three-year terms ending on September 30 of the applicable year. The Supreme Court appoints one of the voting members of the Board to serve as chair. No member may be appointed to serve more than two consecutive full terms. The Office of Disciplinary Counsel is prohibited from any involvement in proposing candidates for the Volunteer Selection Board.

EXPLANATION:

This rule does not explain how the Court will obtain names of potential members of the Volunteer Selection Board nor how they will be selected. It would be inappropriate for ODC to have any role in the selection process. This rule could also be improved by providing the public with an opportunity to submit comments about applicants for the Volunteer Selection Board.

RDI 2.9

OFFICE OF DISCIPLINARY COUNSEL

(a) Definition and Function. The Office of Disciplinary Counsel consists of the Chief Disciplinary Counsel and other staff employed under section (c) of this Rule. The Office of Disciplinary Counsel and its staff perform investigative, prosecutorial, and other functions under these Rules.

(b) Disciplinary Counsel. Disciplinary counsel acts as counsel on all matters under these Rules and performs other duties as authorized by these Rules or as delegated by the Chief Disciplinary Counsel. Disciplinary counsel is subject to RPC 3.8(a), (d), (f) and (g). Disciplinary counsel must comply with all orders issued by the ORA or the Court. Disciplinary counsel must conduct any investigation or investigatory hearing fairly and impartially and seek to elicit any and all facts which might be exculpatory or incriminatory of the accused attorney. All proceedings under these rules shall be expeditiously conducted to the end that no complainant be deprived of his right to a timely, fair and proper investigation of a complaint and that no respondent be subjected to unfair and unjust charges.

(c) Chief Disciplinary Counsel and Staff. The Bar must employ a suitable lawyer member of the Bar as Chief Disciplinary Counsel, suitable lawyer members of the Bar as disciplinary counsel, and other suitable staff as necessary to perform the functions and duties set forth in these Rules.

(d) **Ex Parte Communication Prohibited.** The Office of Disciplinary Counsel must not communicate ex parte with ORA, any adjudicator, or any hearing officer.

EXPLANATION:

Section (b), second sentence: Disciplinary counsel's role is akin to a prosecutor's. Subjecting disciplinary counsel to the same ethical rules as prosecutors will promote fairness and justice.

Section (b), third sentence: This is identical to RDI 2.12(c). Both parties should have the same obligation to comply with all orders.

Section (b), fourth sentence: This is based on Rule 5 of The Rules of Discipline for the Mississippi State Bar.

Section (d): ODC should not be permitted to communicate ex parte with any adjudicator or staff.

RDI 2.10

SPECIAL CONFLICTS DISCIPLINARY COUNSEL

(c) Appointment, Qualifications, and Assignments.

(1) The Supreme Court, upon recommendation from the Volunteer Selection Board, appoints individuals to a pool to serve as special conflicts disciplinary counsel but does not assign matters to special conflicts disciplinary counsel in particular cases except as specified in section (3) of this Rule. Special conflicts disciplinary counsel are appointed for staggered three-year terms ending on September 30 of the applicable year. Each year, the Bar will create a randomly-ordered list of the individuals in the pool.

(2) Special conflicts disciplinary counsel must be active lawyer members of the Bar, have no record of public discipline, have no disciplinary or incapacity proceedings pending or imminent, and have no other active role in Washington's discipline and incapacity system or regulatory system.

(3) When a matter is referred to special conflicts disciplinary counsel under section (b) of this Rule, the Chief Regulatory Adjudicator ~~has discretion to select a particular individual~~will assign the next individual or individuals on the list of ~~from the pool of~~ special conflicts disciplinary counsel to handle the matter. If the assigned individual declines the appointment, the Chief Regulatory Adjudicator will appoint the next individual on the list. If the Chief Regulatory Adjudicator is unable to make the assignment or elects not to because of a disqualifying conflict or another legal or ethical restriction, the assignment is made by the Chair of the Volunteer Selection Board, Chief Justice or the Chair of the Volunteer Selection Board~~Chief Justice~~'s designee.

EXPLANATION:

To ensure confidence in the discipline system, it is imperative that there be no appearance that anyone within the system can influence investigations of other participants in the system. Having special conflicts disciplinary counsel appointed randomly will help ensure that the system is seen as fair. Anyone in the pool should be capable of handling any matter assigned, and if not, that individual can decline the appointment.

There should be an option to have two or possibly more special conflicts disciplinary counsel appointed if the case is complex and/or if a hearing is likely. ODC sometimes assigns more than one disciplinary counsel to a matter and cases assigned to special conflicts disciplinary counsel should also have that option.

RDI 2.11

ADJUNCT DISCIPLINARY COUNSEL

(d) Access to Disciplinary Information. Adjunct disciplinary counsel have access to any confidential disciplinary information only as necessary to perform the duties required by these Rules. Adjunct disciplinary counsel must return any files and documents to the Bar promptly upon completion of the duties required by these Rules and must not retain copies.

EXPLANATION:

"Only as" is added to section (d) to emphasize that confidential disciplinary information should be provided in as limited fashion as possible.

RDI 2.12

RESPONDENT

(a) Respondent. A respondent is a licensed legal professional who is the subject of a complaint, investigation, or proceeding under these Rules.

(b) Representation by Counsel. A respondent may be represented by counsel during any stage of a complaint, investigation, or proceeding under these Rules.

(c) Duty to Comply with Orders. A respondent must comply with all orders issued by the ORA or the Court.

(d) Duty to Provide Authorization for Release of Medical Records. Any inquiry about drug or alcohol dependence, a health diagnosis, or treatment for either can occur only if it appears that the Respondent has engaged in conduct for which the Respondent could be subject to discipline and (1) the drug or alcohol dependence, health diagnosis, or treatment information was disclosed voluntarily to explain the conduct; or (2) ODC learns from a third-party source that the drug or alcohol dependence, health diagnosis, or treatment was raised as an explanation for the conduct. If ODC makes a request under such circumstances during an investigation ~~requested~~, a respondent must provide written releases and authorizations to permit disciplinary counsel access to ~~medical, psychological, or psychiatric~~drug or alcohol dependence or health records ~~that are reasonably related to the investigation or proceedings~~, subject to a motion to the ORA to limit the scope of the requested releases and authorizations for good cause shown. In proceedings under Title 8, this duty is governed by Rules 8.2(d), 8.3(f), 8.4(e), and 8.11(a)(2).

(e) Restriction on Charging Fee to Respond to Complaint. A respondent may not seek to charge a complainant a fee or recover costs from a complainant for responding to a complaint. A respondent may charge a client who is not the complainant a fee if the fee is otherwise permissible.

EXPLANATION:

RDI 2.12(d): The proposed language is derived from APR 22.1(e). The application process was revised to comply with the ADA and limit access to confidential medical records. The disciplinary system should follow a similar practice. ODC should not have a right to obtain medical records whenever it believes they are "reasonably related" to an investigation or proceeding. Rather, if the respondent raises a health or drug/alcohol dependence issue, ODC should be able to obtain relevant records. In addition, this provision should be limited to investigations because discovery in proceedings is governed by Rule 10.10.

RDI 2.12(e): This rule is not clear about whether a respondent can charge a client who is not the complainant a fee for responding to a complaint. If the fee is otherwise permissible under RPC 1.5, the respondent should be permitted to do so.

RDI 2.14

RESTRICTIONS ON REPRESENTING OR ADVISING INDIVIDUALS UNDER THESE RULES

(b) Former Bar Officials. After leaving office, ~~Bar officers,~~ the Bar Executive Director~~, and Board of Governors members~~ cannot represent individuals in pending or likely matters under these Rules until three years have expired after departure from office.

EXPLANATION:

The Bar officers and Board of Governors members have no role in the lawyer discipline system. There is no justification for preventing them from representing respondents after their departure from office and will unnecessarily discourage some bar members from becoming members of the Board of Governors.

RDI 3.1

CONFIDENTIALITY

(d) Wrongful Release. Disclosure or release of information made confidential by these Rules, except as permitted by these Rules, is strictly prohibited. If the person is a licensed legal professional, wrongful disclosure or release may be grounds for discipline. The Chief Disciplinary Counsel or Chief Regulatory Adjudicator must report any wrongful disclosure or release to the Chief Justice of the Supreme Court.

EXPLANATION:

The provision in ELC 3.1(f) that wrongful release may subject a person to an action for contempt of the Supreme Court has been deleted with no replacement. There should be some penalty for wrongful release of confidential information and if the person doing so is not a legal licensed professional, there would be none. The language added to Rule 3.1(d) is derived from Rule 2.2(b)(2), which similarly requires reporting to the Chief Justice.

RDI 3.7

PUBLIC STATEMENT OF CONCERN

(b) Procedure.

(1) A copy of the proposed statement of concern must be served on the respondent who is the subject of the statement of concern.

(2) The respondent may file an objection with the Clerk within ~~seven~~ 14 days of the service of the proposed statement of concern. The respondent must serve the objection on the Office of Disciplinary Counsel.

(3) If a timely objection is filed, the Chief Regulatory Adjudicator determines the procedure for prompt consideration of the objection. The proposed statement of concern becomes a public statement of concern only if the Chief Regulatory Adjudicator so orders. The Chief Regulatory Adjudicator's decision is not subject to further review.

(4) If no timely objection is filed, the proposed statement of concern becomes a public statement of concern ~~seven~~ 14 days after service.

EXPLANATION:

ELC 3.4(f)(2) allows 14 days and no examples have been provided to indicate that time period has caused any difficulties.

RDI 4.5

EXTENSION OR REDUCTION OF TIME IN PROCEEDINGS

In any proceeding, except for notices of appeal or matters pending before the Supreme Court, the ORA may, on its own initiative or on motion of a party, enlarge or shorten the time within which an act must be done in a particular case for good cause. Except for notices of appeal or matters pending before the Supreme Court, the respondent and disciplinary counsel may stipulate in any proceeding to extension or reduction of the time requirements.

EXPLANATION:

The sentence added is current ELC 4.5. It is a waste of time and resources to force the parties to obtain adjudicator approval to extend time. An adjudicator is not going to deny a joint request.

RDI 5.9

COOPERATION

(a) Duty to Respond. A licensed legal professional, whether or not a respondent as defined in Rule 2.12(a), must promptly respond to requests, inquiries, and subpoenas from disciplinary counsel, subject to Rules 2.13, 5.3, 5.6, and 5.7.

(b) Noncooperation Deposition. If a licensed legal professional has not complied with any request made under this Title for more than 30 days from the date of the request, disciplinary counsel may notify the licensed legal professional that failure to comply within 10 days may result in the licensed legal professional's deposition or subject the licensed legal professional to interim suspension under Rule 7.2. Ten days after service of this notice, disciplinary counsel may serve the licensed legal professional with a subpoena for a deposition. Any deposition conducted after the 10-day period and necessitated by the licensed legal professional's continued failure to cooperate may be conducted at any place in Washington State.

EXPLANATION:

For clarity, RDI 5.9(a) should say that the subpoena may be served 10 days after service of the notice, which is the current interpretation of ELC 5.3(h).

RDI 7.3

INTERIM SUSPENSION PROCEDURE

(f) Procedure During Court Recess. When a petition seeking interim suspension under this Title is filed during a recess of the Supreme Court, the Chief Justice, the Associate Chief Justice, or the senior Justice under SAR 10 may rule on the petition for interim suspension, subject to review by the full Court ~~on motion for reconsideration~~.

EXPLANATION:

Every licensed legal practitioner should be permitted to have the full Court consider whether an interim suspension is appropriate. It is not fair that simply because of when the petition is filed, some end up being heard by a single Justice. The phrase "on motion for reconsideration" should be deleted from RDI 7.3(f) to make clear that the consideration by the full Court is not the same as a motion for reconsideration under RAP 12.4. Rather, the respondent should be entitled to the same review by the Court as a respondent whose petition was not considered during a court recess.

RDI 9.1

STIPULATIONS

(h) Effect of Rejection. A rejected stipulation has no force or effect and neither it nor the fact of its execution is admissible in evidence in any disciplinary, civil, or criminal proceeding~~proceeding under these Rules~~.

EXPLANATION:

RDI 9.1(h) should retain the language from ELC 9.1(g) as far as the lack of admissibility of a rejected stipulation. Respondents will be more hesitant to stipulate if a stipulation may be admissible in a civil or criminal proceeding. This provision has been in the procedural rules since at least 1983. *See* RLD 4.14(d). There is no reason to remove it.

RDI 9.3

RECIPROCAL DISCIPLINE, RECIPROCAL RESIGNATION IN LIEU OF DISCIPLINE, AND RECIPROCAL PLACEMENT IN INCAPACITY INACTIVE STATUS

(a) Duty to Self-Report, Timing. Within 30 days of being publicly disciplined, resigning in lieu of discipline or its equivalent, placement of a license in incapacity inactive status or its equivalent in another jurisdiction,~~ or revocation of military certification,~~ a licensed legal professional admitted to practice in this state must inform the Office of Disciplinary Counsel of the public discipline, resignation in lieu of discipline, placement of the license in incapacity inactive status, or revocation of military certification. For purposes of this Rule:

(1) "Public discipline" means a public order of discipline or probation in another jurisdiction.

(2) "Jurisdiction" means any court or body authorized to conduct disciplinary proceedings against licensed legal professionals in the United States or any other country, including any state, province, territory, or commonwealth of the United States or any other country; any federal court; the District of Columbia; any administrative agency or tribal government; or the United States Armed Forces.

EXPLANATION:

Revocation of military certification is not the same as discipline in another state. This provision was added because one of the "stakeholders" suggested it. As far as I can tell, there has been no consideration if this is an appropriate basis for reciprocal discipline nor whether revocation of military certification involves the same due process as would occur in other forms of reciprocal discipline. This issue requires significant additional study before such a change should be made.

RDI 10.10

DISCOVERY AND PREHEARING PROCEDURES

(a) General. The parties should reasonably cooperate in the mutual informal exchange of relevant non-privileged information to facilitate the expeditious, economical, and fair resolution of the case.

(b) Discovery.

(1) *Requests for Admission.* After a statement of charges is filed, the parties may request admissions ~~in the manner provided by~~under CR 36. Under appropriate circumstances, the hearing adjudicator may apply the sanctions in CR 37(c) for improper denial of requests for admission.

(2) *Other Discovery.* Formal discovery, other than requests for admission, is available only by order of the hearing adjudicator or stipulation of the parties. Absent a stipulation, after a statement of charges is filed either party may file a motion under Rule 10.8 seeking authorization to conduct one or more of the methods of discovery ~~available~~ under CR 27-31 and 33-35. The hearing adjudicator has discretion to grant or deny the motion and must consider the following factors:

(A) the necessity of the information sought and whether it is available by other means;

(B) the nature and complexity of the case;

(C) the seriousness of the charges;

(D) the formal and informal discovery that has already occurred;

(E) the burden on the party or witness from whom the information is sought;

(F) the possibility of unfair surprise;

(G) the risk of undue expense or delay;

(H) the effect of the requested discovery on the orderly and prompt conduct of the proceeding; and

(I) the interests of justice.

(3) *Limitations.* The hearing adjudicator may impose conditions or limitations on discovery or requests for admission to assure an expeditious, economical, and fair proceeding

EXPLANATION:

It is confusing and unnecessary to reference procedures "available under" the civil rules in RDI 10.10(b)(1) and (b)(2). Removing "available" makes these provisions the same as currently in ELC 10.10.

RDI 10.11

SCHEDULING OF HEARING

(a) Hearing Location. Absent agreement of all parties and the hearing adjudicator, all disciplinary hearings must be held in Washington State~~, with a presumption that hearings will be held at the Bar offices~~. The ORA must make the arrangements for the hearing facilities.

(b) Scheduling Conference. No later than 30 days after the filing of the respondent's answer, the hearing adjudicator must convene an initial scheduling conference of the parties to discuss:

(1) the hearing date, which must be within 180 days of the date of the initial scheduling conference unless good cause is shown to set the hearing at a later date or unless the hearing adjudicator has granted a motion under section (e) of this Rule;

(2) any necessary prehearing deadlines;

(3) the location of the hearing;

(4) the expected length of the hearing;

(5) the parties' expected discovery requests;

(6) whether a settlement conference would be useful in resolving the matter;

(7) whether the parties consent to electronic service; and

(8) any other relevant issues.

(c) Scheduling Order. The hearing adjudicator must enter an order setting the date, time, and place of the hearing. The scheduling order should include any prehearing deadlines the hearing adjudicator deems required by the complexity of the case, as well as a determination regarding a settlement conference under section (h) of this Rule. The Scheduling Order generally should be in the following form~~ with the following timelines~~:

SETTLEMENT CONFERENCE DETERMINATION:

[ ] The hearing adjudicator finds that this case may benefit from a settlement conference, and a settlement officer should be appointed.

ELECTRONIC SERVICE:

[ ] The parties consent to electronic service of papers or documents under Rule 4.1(b).

IT IS ORDERED that the hearing is set to begin at [time] on [Hearing Date (H)] and each day thereafter until adjourned by the hearing adjudicator, at [location], and the parties must comply with prehearing deadlines as follows:

1. **Witnesses**. A preliminary list of primary witnesses, including addresses and phone numbers, and a designation of whether the witness is a fact witness, character witness, or expert witness, must be filed and served by [H-~~12~~ 16 weeks].

2. **Discovery**. Discovery authorized under Rule 10.10(b), if any, must be completed by [H-6 weeks].

3. **Motions**. Prehearing motions, other than motions to bifurcate under Rule 10.14, must be served by [H-4 weeks]. ~~Absent agreement of the parties, an exhibit not ordered or stipulated admitted may not be attached to a motion or otherwise transmitted to the hearing adjudicator unless the motion concerns the exhibit's admissibility.~~ The hearing adjudicator will advise the parties whether oral argument is necessary, and, if so, the date and time of the argument.

4. **Exhibits**. Lists of proposed exhibits must be exchanged by [H-3 weeks].

5. **Service of Exhibits**. Copies of proposed exhibits must be exchanged by [H-2 weeks]. The parties should redact the following personal identifiers from the proposed hearing exhibits: Social Security numbers, financial account numbers, and driver's license numbers

6. **Final Witness List**. A final witness list~~, including a final summary of the expected testimony of each witness,~~ must be exchanged by [H-2 weeks]. A copy of the final witness list, excluding the summary of expected testimony, must be filed and served by [H-2 weeks].

EXPLANATION:

RDI 10.11(a): It is unfair to respondents in Eastern Washington to require them to travel to Seattle for a hearing.

RDI 10.11(c): Hearing officers should be permitted to determine the appropriate deadlines in each case.

Paragraph (1) of the proposed order is revised because the current deadlines provide too little time for discovery after the disclosure of witnesses.

Paragraph (3) of the proposed order is revised to remove a provision that has proved to be confusing and unnecessary. A hearing officer should be presumed capable of ignoring any extraneous materials attached to motions.

Paragraph (6) of the proposed order is revised to remove the requirement for a "final summary of expected testimony of each witness." First, it is confusing to reference a "final" summary of expected testimony when there is no preliminary summary. More importantly, in my experience, little is gained by the exchange of expected testimony. I have seen summaries of expected testimony that contain no substantive information.

RDI 10.12

HEARING

(e) Respondent Must Bring Requested Materials. Disciplinary counsel may request that the respondent bring to the hearing any documents, files, records, or other written materials or things previously ~~requested~~ required to be produced in accordance with these Rules. The request must be in writing and served on the respondent at least three days before the hearing. Absent good cause, the respondent must comply with this request.

EXPLANATION:

RDI 10.12(e) is unclear. A respondent should be required to bring only materials the respondent was previously required to produce. The current phrasing could be read to mean that if ODC requests that the respondent voluntarily provide materials under RDI 10.10(a), the respondent is required to bring those materials to the hearing with only three days notice. That is not the intent of this provision and it needs to be rephrased to prevent such a potentially burdensome impact on respondents.

RDI 10.14

BIFURCATED HEARINGS

(b) Procedure.

(1) *Violation Hearing.*

(A) A bifurcated proceeding begins with an initial violation hearing to make factual determinations and legal conclusions as to the charged rule violations, including the mental state necessary for the violations. During the violation hearing, evidence of a prior disciplinary record is not admissible to prove the respondent's character or to impeach the respondent's credibility. However, evidence of prior acts of misconduct may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(B) Following the violation hearing, the hearing adjudicator files findings of fact and conclusions of law.

(i) If no violation is found, the hearing adjudicator enters findings of fact, conclusions of law, and a recommendation for dismissal, and the sanction hearing is canceled.

(ii) If any violation is found, after the expiration of the time for a motion to amend under Rule 10.15(b), or after ruling on that motion, the findings of fact and conclusions of law as to those violations are not subject to reconsideration by the hearing adjudicator.

(2) *Sanction Hearing.* If any violation is found, a sanction hearing is held to determine the appropriate sanction recommendation. During the sanction hearing, evidence of the existence or lack of any prior disciplinary record is admissible. No evidence may be admitted to contradict or challenge the findings of fact and conclusions of law as to the violations found under section (b)(1)(B)(ii) of this Rule. At the conclusion of the sanction hearing, the hearing adjudicator files findings of fact and conclusions of law as to sanction and a recommendation, which, together with the previously filed findings of fact and conclusions of law, is the hearing decision of the hearing adjudicator.

(3) *Timing.* If a motion for bifurcation is granted, the violation hearing is held on the date previously set for hearing. Upon granting a motion to bifurcate, the hearing adjudicator must set a date and place for the sanction hearing that should be no later than ~~60~~ 120 days after the ~~date set for the commencement~~filing of the findings of fact and conclusions of law following ~~of~~ the violation hearing.

EXPLANATION:

It is impossible to hold the sanction hearing only 60 days following the violation hearing. The hearing officer has thirty days after the transcript is filed to file the initial decision. The parties cannot prepare for the violation hearing until they know what violations the hearing officer has found. After that happens, the parties should be given time to file witness and exhibit lists for the violation hearing.

RDI 13.4

REPRIMAND

(a) Definition. A reprimand is a sanction that declares that the respondent violated the rules of professional conduct. A reprimand does not restrict the respondent's authorization to practice law. ~~Unless otherwise ordered by the Court, a reprimand must~~ and may include a term of probation under Rule 13.6.

EXPLANATION:

There is no need for probation for every proceeding in which a respondent receives a reprimand. Probation should be determined, as it is now, on a case-by-case basis. This was added only to distinguish admonitions from reprimands. Admonitions are currently differentiated from reprimands because they are not sanctions and that should remain the distinction. In addition, as discussed above, admonitions should be nonpublic.

RDI 14.1

NOTICE TO CLIENTS AND OTHERS; PROVIDING CLIENT PROPERTY

(a) Providing Client Property. A respondent who has been suspended from the practice of law, has been disbarred, has resigned in lieu of discipline, or whose license has been placed in incapacity inactive status must, upon request, provide each client or the client's substituted licensed legal professional with the client's assets, files, and other documents in the respondent's possession, regardless of any possible claim of lien under RCW 60.40.

(b) Notice if Suspended for 60 Days or Less. A respondent who has been suspended for 60 days or less under rule 13.3 must within 10 days of the effective date of the suspension:

(1) notify every client involved in litigation or administrative proceedings, and counsel for each adverse party (or the adverse party directly if not represented by counsel), of the suspension, that the suspension is a disciplinary suspension, and of the respondent's consequent inability to act after the effective date of the suspension, and advise each of these clients to seek prompt substitution of counsel. If the client does not substitute counsel within 10 days of this notice, the respondent must advise the court or agency of the respondent's inability to act; and

(2) notify all other clients of the suspension and consequent inability to act during the suspension. The notice must advise the client to seek legal advice elsewhere if needed during the suspension.

(cb) Required Notices in Other Situations. A respondent who has been suspended from the practice of law for more than 60 days, has been disbarred, has resigned in lieu of discipline, or whose license has been placed in incapacity inactive status must within 10 days of the effective date of the disciplinary suspension, disbarment, resignation, or status change:

(1) notify every current client in writing of the following:

(A) the respondent's suspension, disbarment, resignation in lieu of discipline, or status change to incapacity inactive status;

(B) the respondent's inability to practice law and the advisability of seeking legal services elsewhere; and

(C) if the client is involved in litigation or administrative proceedings, the advisability of seeking the prompt substitution of another licensed legal professional.

(2) notify the Court or agency of the respondent's inability to practice law if a client is involved in litigation or administrative proceedings unless the client obtains substitute counsel within 10 days;

(3) notify any co-counsel or licensed legal professional assisting the respondent in providing legal services to a current client of the respondent's inability to practice law; and

(4) notify any licensed legal professional for each adverse party in pending litigation or administrative proceedings, and any unrepresented adverse party, of the respondent's suspension, disbarment, resignation in lieu of discipline, or status change and the respondent's inability to practice law.

(~~d~~e) **Address of Client.** When providing the notices required by this Rule, a respondent must, to the extent consistent with the interests of the client and subject to the limitations of RPC 1.6 and 1.9 or LLLT RPC 1.6 and 1.9, take steps to ensure that adverse parties, co-counsel, courts, and agencies have information sufficient to effect service on the client.

EXPLANATION:

Addition of new RDI 14.1(b): This addition is based on ELC 14.1(b) and (c), which distinguish between suspensions up to 60 days and over 60 days. The GR 9 cover sheet does not explain why that distinction should not remain. Requiring clients in nonlitigation matters to obtain new counsel due to short suspensions unduly burdens the clients. The distinction in ELC 14.1 between suspensions up to 60 days and over 60 days has been in the procedural rules since at least 1983. *See* RLD 8.1(c).

Change to current RDI 14.1(b): ELC 14.1 does not require respondents to notify the court if the client obtains substitute counsel within 10 days. The proposal will lead to confusion as the new counsel may file an appearance before the respondent is required to notify the court, leading the court to unnecessarily believe the client is without representation. The GR 9 cover sheet also contains no explanation for why this change was made.

RDI 17.1

EFFECT ON PENDING MATTERS

(a) Initial Enactment of the Rules for Discipline and Incapacity. These Rules in their entirety will apply to pending matters on the effective date as ordered by the Supreme Court except as would not be feasible, would work an injustice, or as~~with the following exceptions~~:

(1) if a matter is pending before a review committee of the Disciplinary Board or a discipline committee of the Limited License Legal Technician (LLLT) Board or the Limited Practice (LP) Board;

(2) if a hearing has been held or is in progress and no hearing decision has been filed by the hearing officer; and

(3) if a matter has been briefed or argued to the Disciplinary Board, LLLT Board, the LP Board, or to the Chair of any of these boards and no decision has been filed.

Under the above exceptions and under the supervision of the Supreme Court, the person or entity will continue in its responsibilities under the Rules for Enforcement of Lawyer Conduct, the Rules for Enforcement of Limited License Legal Technician Conduct, or the Rules for Enforcement of Limited Practice Officer Conduct until such time as the pending decision has been filed.

(b) Resolution of Disagreements. Except in matters pending before the Supreme Court, in the event of a disagreement about which rules apply, the Chief Regulatory Adjudicator will determine the appropriate procedure and has authority to enter orders as necessary and appropriate to ensure a fair and orderly proceeding.

~~**(c) Subsequent Amendments.** Any subsequent amendments to these Rules will apply to pending matters in their entirety on the effective date as ordered by the Supreme Court.~~

(~~d~~c) Matters Pending Before the Court. Unless the Supreme Court orders otherwise, if a matter is pending before the Supreme Court, these Rules for Discipline and Incapacity and any subsequent amendments apply as of their effective date.

EXPLANATION:

RDI 17.1(a) should include the language about the rules not applying to pending matters if not feasible or would work an injustice, as currently provided in ELC 16.1.

RDI 17.1(c) should be deleted. The applicability of a subsequent amendment to pending cases should be determined at the time the rules are amended. It may be impractical to apply the amendments to pending cases.

EXHIBIT A

JRPOSE STATEMENT

To develop recommendations for:

- Reinforcing the Washington Supreme Court's active supervision of the disciplinary and regulatory systems.
- Efficient, effective and streamlined handling of regulatory processes for all legal professional licenses authorized by the Washington Supreme Court and delegated to the Bar for administration.
- A single portal system to handle the investigation and prosecution of professional misconduct by or incapacity of legal professionals as delegated by the Washington Supreme Court.
- An adjudicative component that includes professional adjudicators for discipline, incapacity, and other regulatory proceedings.

EXHIBIT B

WASHINGTON STATE
BAR ASSOCIATION

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January 9, 2018

Mr. Kim Risenmay
The Risenmay Law Firm PLLC
10103 167th Pl NE
Redmond, WA 98052

Re: Request for assistance with informal review of draft changes to discipline system

Dear Mr. Risenmay:

In late 2015, the Washington State Bar Association (WSBA) initiated efforts to coordinate disciplinary and regulatory proceeding systems for all licenses to practice law (lawyer, limited practice officer, limited license legal technician) authorized by the Washington Supreme Court and administered by the WSBA. In addition to coordination of the three systems, a core concept of the initiative is the creation of a professionalized adjudicative system for all disciplinary and regulatory hearings. The Supreme Court has reviewed and approved in concept a model of the coordinated system, and a workgroup of WSBA staff from the Office of Disciplinary Counsel (ODC), the Office of General Counsel (OGC), and the Regulatory Services Department (RSD) is in the process of drafting coordinated disciplinary and regulatory proceeding rules.

Once the initial drafts are ready, the WSBA would like to receive preliminary feedback from core stakeholders. It is our hope that stakeholder feedback will help us anticipate any concerns, address oversights, and ensure the continuing integrity of Washington's disciplinary and regulatory proceeding processes. With that in mind, based on your involvement in disciplinary/regulatory work as Governor on the Board of Governors, we invite you to participate as a volunteer reviewer. We anticipate this will involve working with WSBA staff at several feedback sessions in the coming months.

Let us know if you are able to assist us in this effort or have questions. Please email your response to Thea Jennings at theaj@wsba.org. We hope to hear from you regarding your willingness to participate by **January 30, 2018.**

Sincerely,

Jean McElroy
Chief Regulatory Counsel

Douglas J. Ende
Chief Disciplinary Counsel

EXHIBIT C

From: Doug Ende
Sent time: 08/30/2017 12:56:32 PM
To: Bobby Henry; Kevin Bank; Thea Jennings; Ben Attanasio; Felice Congalton; Jean McElroy; Joanne Abelson; Julie Shankland; Sean Davis
Subject: RE: Coordinated Discipline System Workgroup - Stakeholder Consultants

Someone from the LP Board discipline committee would be ideal, I think, not necessarily an LPO.

Douglas J. Ende | Chief Disciplinary Counsel | Office of Disciplinary Counsel
Washington State Bar Association | ☎ 206.733.5917 | douge@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

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From: Bobby Henry
Sent: Wednesday, August 30, 2017 8:53 AM
To: Kevin Bank; Doug Ende; Thea Jennings; Ben Attanasio; Felice Congalton; Jean McElroy; Joanne Abelson; Julie Shankland; Sean Davis
Subject: RE: Coordinated Discipline System Workgroup - Stakeholder Consultants

I am assuming we want a LPO and LLLT, so I would suggest LLLT Jennifer Peterson who is going to be on the LLLT Board for FY 18. I asked a few LPOs on the LP Board if they were interested and got radio silence. Let me know if it is just a preference for a LPO or if anyone from LP Board would be OK.

~Bobby

From: Kevin Bank
Sent: Tuesday, August 29, 2017 4:04 PM
To: Doug Ende; Thea Jennings; Ben Attanasio; Bobby Henry; Felice Congalton; Jean McElroy; Joanne Abelson; Julie Shankland; Sean Davis
Subject: RE: Coordinated Discipline System Workgroup - Stakeholder Consultants

Silverman is certainly very experienced and has worked at all levels of the system so he seems a logical choice. For C&F, incoming chair David Ruzumna is a solo practitioner and pro tem judge and would be a good choice. If he can't do it, the incoming Vice-Chair, Russ Hermes, would also be good as would outgoing Chair Elizabeth Rene, [redacted]. For Respondent's counsel, we may want to have one representative who can distribute the draft to the Respondent's roundtable as I am sure they all will want to comment. For a representative of the public (not listed below), maybe Julie Anderson, former C&F member if she is available. Another option would be Merri Hartse, recently retired law librarian from Gonzaga Law School, who has been on the C&F Board for one year. The current public members of the DBoard don't seem to be great fits.

From: Doug Ende
Sent: Tuesday, August 29, 2017 3:23 PM
To: Thea Jennings <theaa@wsba.org>; Ben Attanasio <benjamina@wsba.org>; Bobby Henry <roberth@wsba.org>; Felice Congalton <felicec@wsba.org>; Jean McElroy <jeanm@wsba.org>; Joanne Abelson <joannea@wsba.org>; Julie Shankland <julies@wsba.org>; Kevin Bank <kevinb@wsba.org>; Sean Davis <Seand@wsba.org>
Subject: Coordinated Discipline System Workgroup - Stakeholder Consultants

As I mentioned at Monday's meeting, we are planning to convene a group of representatives from various stakeholder groups to work with us to review and provide feedback on initial drafts of the Coordinated ELLPC. Below I have listed the stakeholder groups I can think of, with a few ideas for candidates appended.

Please (1) propose any candidate ideas you might have, and (2) let me know if there are any stakeholder groups that I've missed, bearing in mind, of course, we do not want to the group to become unmanageably large. Thanks for your help!

EXHIBIT D

From:	Doug Ende
Sent time:	07/01/2020 04:38:01 PM
To:	Yu, Justice Mary (Mary.Yu@courts.wa.gov) <Mary.Yu@courts.wa.gov>
Cc:	Lawrence, Christine <Christine.Lawrence@courts.wa.gov>
Subject:	Draft Rules for Discipline and Incapacity (RDI)
Attachments:	2020-07-01 Clean Final Draft Rules for Discipline and Incapacity.pdf

Dear Justice Yu:

Following up on our discussion earlier today, I am providing a complete copy of the draft Rules for Discipline and Incapacity (RDI) for informational purposes only. This is not the official submission to the Court, which will be forthcoming in the form required by GR 9. It is possible that we may yet make minor revisions and copyediting corrections as we discover them, but this is very close to the final draft that will be submitted to the Court. We plan to make that submission on or before the GR 9(i)(1) October 15 deadline. Considering the current state of drafting, we should have it to the court well before that deadline.

As another item of follow up, here is the list of stakeholder representatives who were asked to assist in the review of the draft:

- David T. Bastian, Chair, Limited Practice Board
- Hunter Abell, Governor, WSBA Board of Governors
- Janice Wang, Chair, Disciplinary Board and member of Disciplinary Advisory Round Table
- Jeffrey Gates, Vice Chair, Disciplinary Board and member of Disciplinary Advisory Round Table
- Jennifer L. Petersen, Limited License Legal Technician Board
- Julie Anderson, public representative
- Kevin Bank, Respondent's Counsel
- Lee Ripley, Respondent's Counsel and member of Disciplinary Advisory Round Table
- Marc L. Silverman, Conflicts Review Officer
- Mark J. Fucile, Respondent's Counsel
- Randolph O. Petgrave, Chief Hearing Officer and member of Disciplinary Advisory Round Table
- Susan L. Carlson, Washington Supreme Court Clerk

Thank you again for your thoughtful guidance on this process. Let me know if you have questions.

Douglas J. Ende | Chief Disciplinary Counsel | Office of Disciplinary Counsel
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Most WSBA employees are working remotely.
Thank you for your patience and understanding.

EXHIBIT E

From: Doug Ende
Sent time: 04/02/2020 04:23:50 PM
To: Joanne Abelson; Thea Jennings
Subject: RE: Agenda and Revised Chart: For your review

- I agree with Joanne's suggestion about setting out the high-level list of discussion topics by Title plus General.
- I wasn't clear about the basis for the order of the questions in the Excel document. I guess it's alphabetical by topic, but maybe organize by Title.
- Rephrase as many of the very pointed questions to be more open-ended. Question 9 is a good example of this. It begins "Explain the decision to . . . ."

  So, for example

  Should a respondent be able to conduct discovery without seeking permission when an order authorizing the filing of a statement of charges has been issued? Explain.

  Could become

  What was the rationale for requiring the parties to seek an order permitting conduct discovery rather than authorizing discovery generally?

  Are the work product provisions under Rule 10.10(c) too broad?

  Could become

  What was the basis for the Rule 10.10(c) work product provisions?

I am working remotely.

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From: Joanne Abelson <joannea@wsba.org>
Sent: Thursday, April 2, 2020 4:06 PM
To: Thea Jennings <theaj@wsba.org>; Doug Ende <douge@wsba.org>
Subject: RE: Agenda and Revised Chart: For your review

Thanks Thea. I think it would be useful under #2 to list the order in which we are going to discuss the Titles.

I am working remotely.

Joanne S. Abelson | Managing Disciplinary Counsel | Office of Disciplinary Counsel
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1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

EXHIBIT F

From:	Doug Ende
Sent time:	04/03/2020 01:13:44 PM
To:	Thea Jennings; Joanne Abelson
Subject:	RE: RDI Agenda and Chart Take 2

The questions and agenda look great. The only one I am concerned about is:

> What was the rationale behind the structure of this stakeholder review process? Should the review be more policy-oriented before any individual rules are discussed? Should the stakeholder review process include a title-by-title review?

I think this topic is the one most likely to derail the dialogue. And there's not actually a great answer to these questions.

What if we confined it as follows?

What was the rationale behind the structure of this stakeholder review process as opposed to the task force approach used for prior rewrites of rule sets?

I am working remotely.

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The WSBA is committed to full access and participation by persons with disabilities. If you have questions about accessibility or require accommodation please contact caa@wsba.org.

From: Thea Jennings <theaj@wsba.org>
Sent: Friday, April 3, 2020 11:28 AM
To: Doug Ende <douge@wsba.org>; Joanne Abelson <joannea@wsba.org>
Subject: RDI Agenda and Chart Take 2

How's this? I tried to incorporate both of your comments. Please read the chart carefully for the tone of questions.

Chart
Agenda

If it is easier to talk over the phone, feel free to call me. Thanks!

I am working remotely.

Thea Jennings | Disciplinary Program Manager | Office of Disciplinary Counsel
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EXHIBIT G

NEWS RELEASE

Arizona Supreme Court
Administrative Office of the Courts

Contact: Aaron Nash
Phone: 602-452-3656
Email: anash@courts.az.gov

February 26, 2021

Comments Sought on Candidates for Presiding Disciplinary Judge Position

PHOENIX – The Arizona Supreme Court seeks public input on four candidates for the position of Presiding Disciplinary Judge. The vacancy was created by Judge William J. O'Neil's retirement.

The candidates are:

- Margaret H. Downie
- Stephen Little
- Jeffrey Messing
- Patricia A. Sallen

The candidates' resumes can be viewed online at https://www.azcourts.gov/jnc/Vacancy-Applications. A hiring committee will interview the candidates. After the interviews, the finalists' names will be submitted to the full Court for final selection.

All comments must be received by 1:00 pm on March 10, 2021. Anonymous comments cannot be considered, and comments received will be retained as public records. Submit comments by email to ywong@courts.az.gov or by U.S. mail to:

Arizona Supreme Court
c/o Yvonne Wong
PDJ Applicant Comment
1501 W. Washington, Suite 221
Phoenix, AZ 85007

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