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April 29, 2021

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

Re: Comment on Title 8 of the Proposed Rules for Discipline and Incapacity

Dear Honorable Members of the Washington State Supreme Court:

I am submitting a separate comment about Title 8 (Incapacity) of the proposed Rules for Discipline and Incapacity (RDI) because it raises unique concerns. Proposed Title 8 mostly tracks Title 8 of the Rules for Enforcement of Lawyer Conduct (ELC). Those rules in turn were derived from procedures that have been in place for decades. *See, e.g.,* Title 10 of former Rules for Lawyer Discipline. Unfortunately, in the intervening years, no consideration has been given to whether the disability (or incapacity) procedures comply with the Americans with Disabilities Act or are necessary given the harm they cause to respondents alleged to have disabilities. As you are most likely aware, the Admissions and Practice Rules (APR) were amended in 2016 "to bring Washington's character and fitness procedures into alignment with recent interpretations of the Americans with Disability Act (ADA), as it relates to bar admissions, by the United States Department of Justice (DOJ) ..." GR 9 Cover Sheet.[1] Those changes greatly limit the ability of WSBA and the Character and Fitness Board to obtain documents or ask questions about an applicant's drug or alcohol dependence, health diagnosis, or treatment for either. APR 22.1(e), (f). With these changes, an applicant cannot be asked about mental health or addiction issues unless the applicant voluntarily disclosed information about the condition or raised the condition as an explanation for conduct to a third party.

Yet once the applicant is admitted, ODC can open a disability (or under the proposed rules, incapacity) investigation and require signed releases allowing ODC to obtain medical, psychological and psychiatric records regardless of whether the respondent has voluntarily raised the health condition as an explanation or defense. ELC 2.13(c), proposed RDI 2.12(d). ODC can and has done so in the absence of a grievance alleging misconduct. ODC can and has used information from medical records so obtained to have both a hearing ordered and the lawyer suspended on an interim basis even though the lawyer was never charged with any RPC violation.

This is illegal under the ADA. This Court has already found that Title II of the ADA, 42 U.S.C. § 12131 *et seq*, applies to lawyer discipline proceedings. It is axiomatic that a person's disability cannot be used to deny that person access to a job or career. That is why the APR was amended to prevent use of health conditions to deny admission.

[1] https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=487

If a legal licensed professional does something that is unethical, ODC can pursue discipline regardless of whether the conduct is caused by a disability. If the evidence shows that the practitioner presents a serious risk of harm to the public, ODC can also seek an interim suspension on that basis. ELC 7.2(a)(1)(A), proposed RDI 7.2(a). It does not add any additional protections to the public to remove a practitioner based on an alleged disability. Rather, the disability/incapacity process appears to be based on long-standing prejudices against those suffering from mental illness or addiction.

It is well-known that lawyers suffer from addiction, depression and other mental health issues at significantly higher rates than the general public. *See, e.g.,* Krill, Patrick R., Johnson, Ryan & Albert, Lind, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,* 10 JOURNAL OF ADDICTION MEDICINE 46 (2016). Instead of punishing practitioners by taking away their ability to practice based on disabilities, the discipline system should be providing treatment and an opportunity for rehabilitation.

Because the RDI were developed by WSBA staff with no opportunity for anyone to provide policy suggestions, there was never any consideration about whether the disability rules should be revised to mirror the changes to the APR. As far as I can tell, no one involved in the revisions to the APR was asked to provide input. This has resulted in a set of rules that fail to consider the requirements of the ADA or the harm Title 8 can cause to lawyers with disabilities.

The proposed RDI are more punitive towards those with disabilities than the existing rules in that proposed RDI 8.2(c) puts the burden of proof on the respondent to avoid losing his or license on an interim basis. The only other time a respondent has the burden of proof in a proceeding is for an interim suspension following an appeals board disbarment decision. Proposed RDI 7.2(b). In that instance, the respondent has had a full hearing and a right to appeal, with misconduct proved by a clear preponderance of the evidence, before the burden of proof is shifted. In contrast, the allegedly incapacitated practitioner has had no hearing, just 15 days to submit a response to ODC's request to a review panel, which is required to grant ODC's request if there is "reasonable cause" to do so. RDI 8.2(b), 5.10(b).

As discussed in my more general comments, I am requesting that the Court not adopt the proposed RDI but instead form a taskforce to consider what policy changes should be made to the existing discipline system and then draft rules based on those policy decisions. This taskforce should make recommendations to improve the procedure for allegations that a licensed legal professional lacks the capacity to practice law or defend a proceeding and consider the approaches taken by other states. In Oregon, for example, there is no "incapacity inactive" or "disability inactive' status. Rather, a lawyer who is found to be incapable of practicing law or defending a proceeding due to a disability is transferred to inactive practice. OSB Rules of Procedure 3.2(a)(1), 3.2(b)(2)(E), 3.2(c)(1) (2020). Oregon also does not remove a lawyer's license during the pendency of an inquiry into capacity to practice unless the lawyer fails to appear for an examination. *Id.,* Rule 3.2(b)(2)(C). A taskforce should consider if Washington's rules are overly harsh in light of the approaches taken by other states.

If the Court instead decides to adopt the RDI, I respectfully request that it not adopt RDI 8.2. That rule permits an incapacity proceeding to be ordered based solely on the legal licensed professional's health diagnosis.

RDI 8.4 requires amendment. If the finding is that the legal licensed professional lacks the capacity to defend the proceeding without counsel, the practitioner should be given the option of having counsel appointed without the need for an intrusive process requiring disclosure of health records and an independent medical examination. Only if the practitioner refuses to accept appointed counsel should the remaining processes apply. If counsel is appointed, the remaining provisions should apply only if counsel indicates that the respondent is incapable of assisting with the defense. RDI 8.4(a) should be amended as follows:

> **(a) Order by Regulatory Adjudicator or Supreme Court.** Unless Rule 8.2 applies, on motion by disciplinary counsel or on its own initiative, the Supreme Court or a regulatory adjudicator must appoint counsel to represent the respondent ~~order an incapacity proceeding~~ if it determines that there is reasonable cause to believe that the respondent lacks the mental or physical capacity to respond to a disciplinary investigation or defend a disciplinary proceeding~~, or to assist counsel in responding to a disciplinary investigation or defending a disciplinary proceeding~~. If the Respondent unreasonably refuses to accept the appointment of counsel, or if at any time during the proceedings, counsel asserts that Respondent lacks the mental or physical capacity to assist with responding to a disciplinary investigation or defending a disciplinary proceeding, sections (b) through (i) apply When a regulatory adjudicator is serving as a settlement officer, Rule 10.11(h)(4)(D) rather than this Rule applies. If the Court issues the order, it refers the matter to the ORA for further proceedings under this Rule.

The Court should also amend proposed RDI 2.12(d) as follows to make it consistent with APR 22.1(e) and (f):

> **(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).

Sincerely,

Anne I. Seidel

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment re: Title 8 of the proposed RDI
Date: Thursday, April 29, 2021 4:54:49 PM
Attachments: Seidel RDI Title 8 comment.pdf

From: Anne Seidel [mailto:anne@anneseidel.com]
Sent: Thursday, April 29, 2021 4:52 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment re: Title 8 of the proposed RDI

I'm attaching a comment about Title 8 of the Proposed Rules of Disability and Incapacity.

Thank you.

Anne Seidel

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