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July 19, 2021

Clerk of the Court
Washington State Supreme Court
415 12th Ave. SW
Olympia, WA 98501
Mailing: PO Box 40929
Olympia, WA 98054-0929

Re: Proposed Adoption of RDI Rules for Discipline and Incapacity

Dear Ms. Lennon:

As it considers the adoption of the substantive changes to the ELCs (Rules of the Enforcement of Lawyer Conduct), in the form of the proposed RDIs (Rules for Discipline and Incapacity) it may be useful for the Court to have a perspective which runs counter to some of the complaints it has received but is nevertheless well informed. While I join in the criticism by the opponents of some of the substantive recommendations, my comments to you largely address the procedure by which these rules were conceived and developed, since this seems to be at the core of the opponents' concerns.

While I was not a member of the drafting team, I did serve, as representative of the Conflict Review Officers (CRO) on the review committee which met over many months to review the work of the drafters and offer comments and suggestions to the "finished product". That committee was made up of 14 individuals representing virtually every facet of the discipline system and beyond. Representatives included a member of the WSBA Board of Governors, respondents' counsel, representatives from the other two additional Washington state legal license types, the LLLTs and LPOs, representative of the ODC, the Chief Hearing Officer, the Supreme Court Clerk (at the time Susan Carlson), General Counsel's office and even a lay member.

The present RDIs were the product of five years of work by ODC staff. As the Court is aware, several years ago it approved a new license type, the Limited License Legal Technician (LLLT) and it became clear that with the new license type, an additional schema for a set of disciplinary and enforcement rules needed to also be developed. With two license types already extant in Washington, lawyers, and limited practice officers (LPOs), it was a natural next step to think about some way to streamline and make uniform many aspects of the existing disciplinary systems, rather than laboring under the redundancy of three sets of rules.

From this conception of creating a uniform set of procedures, it was an easy next step in logic to think about undertaking a full review of the current rules to see where tightening up, clarifying, and somewhat reorganizing the rules might be useful as they had not been so reviewed in many years. And yes, such a proposal also provided an opportunity to explore innovations in the disciplinary system as a whole; witness the inclusion in the proposed RDIs of a professionalized adjudicative system.

The opponents complain bitterly about the fact that this rule writing process did not first go through the Board of Governors. As a former governor, I can attest that, in general, state-wide rule changes or amendment proposals of all types have historically gone through a committee of the BOG and ultimately that committee returns its work to the BOG which approves it (or not) and then sends it to the Court for consideration. Indeed, this is the process followed in considering civil and criminal rule changes, changes to the RPCs, evidence rules, admission to practice, judicial discipline and virtually all other rules governing the courts and judiciary in Washington. The reason for this is that, normally, when discreet, focused areas of rulemaking are under consideration, the BOG is uniquely situated to appoint a committee of outside experts or WSBA member volunteers to examine and create such limited amendments. Such focused work is manageable by this type of committee or task force reasonably promptly. As a former governor I personally chaired and participated in such task forces and committees.

The present RDIs were not given to this process for a simple reason. This undertaking was highly substantive and technical. The very subject matter of the work was one requiring deep substantive knowledge and experience of the discipline system and procedures and specific expertise in legal ethics. Undertaking an entire re-vamping of the discipline procedural rules was believed to be best handled by ODC given it had the staff, resources, and knowledge base to produce the best ultimate product. As it is, it took five years to produce the compendium of rules you now have before you.

Second, as the Court is aware, at multiple stages during the process of developing these rules, then Executive Director Paula Littlewood, Chief Disciplinary Counsel Doug Ende and former Chief Regulatory/General Counsel Jean McElroy met with the Court to update the Court on the progress of the rules. Analogizing to a funnel, initially the Court was presented with the overall, broad conception of what the re-vamp would look like and at incremental stages in the process, they met repeatedly with the Court to update you, in ever narrowing detail, on how the rules were progressing, including substantive discussion of the innovative areas under consideration. At no time, and under no circumstances were creative, conceptual, or drafting efforts or ideas ever “kept secret” or hidden from anyone. Indeed, it was the Court’s own decision that this re-write of the ELCs be directed to its attention directly.

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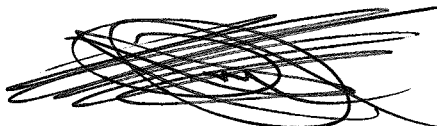
Once a “final draft” was complete, a review committee, such as I have described, was formed of all the relevant stakeholders to review ODC’s draft. The committee offered substantive comment and critique, some of which the drafters adopted and some of which they did not. Ultimately the Court received the “final” product now before you for review and public comment.

To be sure there are substantive areas the drafters included which I personally oppose. For example, I believe that when a lawyer makes a mistake and receives an admonition, that discipline in time should disappear. A lawyer, often young and less experienced, should not be tattooed permanently with a negative label where the offense was not grave and where corrections and an improved understanding have been achieved. Similarly, the drafters’ choice to add military JAG Corp discipline to the list of “reciprocal discipline” sources is deeply questionable to me since the system of military justice, including burdens of proof, are entirely different from our system. And shifting the burden to the respondent lawyer to rebut an allegation by ODC of incapacity to me is contrary to due process. On the other hand, I heartily support the establishment of a professionalized adjudicative office. Having served for three years on and chaired the Disciplinary Board, having been a hearing officer for five years, a Conflict’s Review Officer for three years, and having served as Special Disciplinary Counsel to ODC, I have seen the discipline system at close range and can attest to the improvement I believe a professional adjudicative system would bring to the disciplinary system.

However, I believe the Court can take cognizance of areas subject to challenge and demand further review, re-work and even the convening of yet another review committee to address specific areas. My purpose in writing is to advocate for the methodology and process by which the RDIs were conceived and created. To me the procedure which was used was entirely fair, reasonable, and substantively appropriate given the scope of the project. The Court should not abandon this effort based upon procedural criticism.

Thank you for your consideration.

Very sincerely yours,

A handwritten signature in black ink, appearing to read "Marc L. Silverman", with some overlapping and scribbled lines.

Marc L. Silverman

C: Steven C. Gonzalez, Chief Justice

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: Proposed Adoption of RDI Rules
Date: Monday, July 19, 2021 2:49:35 PM
Attachments: [WA State Supreme Ct - RDI Rules.pdf](#)

From: Marc L Silverman [mailto:marc@silvermanlaw.com]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Dear Ms. Lennon:

Enclosed please find my personal letter of comment upon the proposed Rules for Discipline and Incapacity (RDIs). Please also forward to Chief Justice Gonzalez. Thanks for your attention to this. Marc L. Silverman

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From: Liz Kruse <liz@silvermanlaw.com>
Sent: Monday, July 19, 2021 11:04 AM
To: Marc L Silverman <marc@silvermanlaw.com>
Subject: Proposed Adoption of RDI Rules

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