

April 30, 2021

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

Re: Respondents' Counsel Roundtable
Comments on Proposed Rules for Discipline and Incapacity

Dear Honorable Members of the Washington State Supreme Court:

We are a group of lawyers who have regularly represented respondents in legal professional discipline matters. We believe the proposed Rules for Discipline and Incapacity ("RDI") are unwise and will unfairly penalize bar members, especially those who are most vulnerable. The proposed rules are the result of an unprecedented process that gave WSBA employees sole control over the content of the proposed rules, resulting in an enormous delegation of authority to the Office of Disciplinary Counsel (ODC).

We respectfully request that the Court reject these rules and instead, establish a taskforce with representatives of all participants in the discipline process to craft a more balanced set of rules.

Rules were drafted by and for ODC

ODC, along with other WSBA employees, spent three years drafting these rules. They alone controlled the content. Two of our members participated in the "stakeholder review" process and both saw it as a fig leaf designed simply to create an illusion of input from others in the disciplinary process. Respondent counsel's feedback was largely ignored. Contrary to the promise of a "transparent" process, the documents relating to the stakeholder process are not available as they were in previous rule revisions proposed by a special committee. Instead, when one of us submitted a records request for these documents, it took over two months and cost \$540 to obtain them. We question why the stakeholder meetings were not open to the public, why the stakeholder comments are not available on WSBA's website and why input was not sought from a broader group. This process has had no transparency.

Because ODC and other WSBA employees created the proposed rules, it should come as no surprise that the proposal greatly increases ODC's power and discretion. Currently, a committee selects hearing officers and disciplinary board members. But under the proposed rules, WSBA chooses the most important person in the new system, the Chief Regulatory Adjudicator, who hires all other adjudicators. *See* RDI 2.3(c). Since there is no restriction on which WSBA employees make the selection, ODC could be authorized to choose the Chief Regulatory Adjudicator. And since the rules eliminate the current right of parties to remove a hearing officer without cause, respondent lawyers will have no ability to avoid an adjudicator who always rules in ODC's favor.

ODC has also rewritten the rules to remove numerous provisions limiting its authority or permitting review of its decisions. The proposed rules eliminate or greatly curtail the review committee process that currently provides checks and balances for ODC's decision to dismiss a grievance or proceed to hearing. The proposed rules limit the authority of the review panel so that it serves no purpose, as it duplicates a motion to dismiss. Other changes removing oversight from ODC and giving it more discretion include rules that allow ODC to reopen grievances at any time,

eliminate the current rights to appeal decisions on whether to defer an investigation and decisions on whether to withhold information, remove a respondent's ability to appeal if ODC refuses to destroy a file, give ODC sole authority to decide to file interim suspension petitions and eliminate a provision that subjects disciplinary counsel to a contempt proceeding for wrongful release of information. All of these provisions should be replaced with the corresponding provision under the ELCs.

Currently, there is virtually no oversight of ODC or the lawyer discipline system and no opportunity for input from other stakeholders in the system, such as respondent counsel. The Disciplinary Advisory Round Table ("DART") was created to provide needed oversight and to provide a forum for respondent counsel and others to provide input. A number of our members have served on DART and in our opinion, it has proven to be ineffective. The rules should instead create a more robust process for overseeing the lawyer disciplinary system. ODC gets by far the largest share of the licensing fees, yet there is no analysis of whether those funds are being spent efficiently or fairly.

We recommend that the rules create an oversight committee like Colorado's Advisory Committee, which is tasked *inter alia* with reviewing "the productivity, effectiveness, and efficiency of the Supreme Court's attorney regulation system including that of the Presiding Disciplinary Judge and peer assistance programs and report its findings to the Supreme Court." CRCP 251.34(b)(3); *see also* Colorado proposed rule 242.3.

Sanctions will be harsher

The proposed rules continue a trend that began decades ago of eliminating the lower forms of discipline, resulting in public discipline for even minor errors with the ensuing loss of reputation, income and potentially career. Unlike many other states and the ABA Standards for Imposing Lawyer Discipline, Washington no longer allows for any form of nonpublic discipline. The proposed rules will make admonitions a sanction and eliminate advisory letters, two ways minor mistakes can be handled currently. ODC already has unfettered discretion in whether to offer diversion to a lawyer in lieu of public discipline. Under the new rules, more lawyers will also be sanctioned because the new rules eliminate procedures, like the review committees, that offer some oversight over ODC's decisions to pursue discipline. We recommend that the rules be revised to permit review of ODC's decision to deny diversion, allow for private admonitions consistent with the ABA Standards for Imposing Lawyer Discipline, and continue to allow advisory letters as currently permitted under ELC 5.8.

It is well-known that lawyers suffer from mental health and addiction issues at far greater rates than the general public. As respondent counsel, we too often see the toll depression and anxiety take on lawyers. These proposed rules will make it even harder for such lawyers to get help and instead will lead them to be publicly humiliated and removed from the profession. The taskforce we propose should not only craft a more balanced set of rules but also come up with proposals to assist practitioners with mental health and addiction issues to avoid disciplinary complaints.

Fewer volunteer opportunities

By getting rid of volunteer hearing officers and assigning a paid adjudicator as chair of any review panel, the new rules greatly curtail the opportunities for lawyers to serve in volunteer roles in the

lawyer discipline system. This both deprives those who would have served as volunteer hearing officers of valuable adjudicative experience and harms the system as a whole since having fewer participants will mean less diversity in backgrounds and practice areas.

Conclusion

We have other concerns about the proposed rules, including limits on discovery, short time frames that burden respondents with no corresponding requirement that ODC investigate in a timely fashion, removal of use of the civil rules as guidance, permitting interim suspensions without any argument or hearing, forcing respondents from Eastern Washington to travel to Seattle for hearings, and essentially making ODC a collection agency that obtains judgments on behalf of former clients. The problems with the proposed RDI cannot be fixed with minor redrafting. We urge the Court to reject these rules and instead begin a fair and transparent process of rulemaking.

Sincerely,

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Dear Clerk's Office,

Please circulate the attached letter from the Respondents' Counsel Roundtable, with regard to the proposed RDI rules from the WSBA.

Thank you.

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