From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera; Tracy, Mary
Subject: FW: Comments on proposed RDI
Date: Thursday, July 29, 2021 9:09:52 AM

From: Seth Fine [mailto:dpafine@yahoo.com]
Sent: Thursday, July 29, 2021 9:04 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed RDI

The proposed RDI contain a number of useful changes to the disciplinary process. There are, however, several areas that should be re-examined.

In submitting this comment, I am drawing on several areas of experience. I served almost 4½ years on the WSBA Disciplinary Board, ending as Chair. (After serving close to half of a 3-year term, I was re-appointed to a full term.) I served on the Task Force that proposed the 2014 amendments to the ELC. I currently serve as a Hearing Officer.

1. ABOLITION OF DISCIPLINARY BOARD

The proposed rules would abolish the Disciplinary Board. That Board serves two important functions. First, it places reasonability for lawyer discipline in the hands of the Bar itself. This demonstrates to both the Bar and the public that ensuring ethical conduct by lawyers is the responsibility of "us," not "them." Second, it helps ensure that disciplinary sanctions reflect the knowledge and experience of a wide segment of the Bar, not the views of a few adjudicators.

The essential functions of the Disciplinary Board should be retained. Any necessary procedural reforms can be accomplished within that structure.

2. DISQUALIFICATION OF ADJUDICATORS AND DISCIPLINAY COUNSEL WITH DISCIPLINARY RECORDS

The proposed rules would disqualify anyone with a record of "public discipline" from serving as a volunteer adjudicator (RDI 2.6(d)), special conflicts disciplinary counsel (RDI 2.10(c)(2)), or adjunct disciplinary counsel (RDI 2.11(c)(3)). Since all sanctions are public (RDI 13.1(b)), anyone who has ever been sanctioned is disqualified from serving in these roles. These rules essentially deny the possibility of rehabilitation. Any imposition of any sanction is considered a permanent stain on a lawyer's character. — even if the sanction was an admonition 20 years before.

The reality is that a lawyer who has been sanctioned might be better qualified to participate in the disciplinary system that one who has not. The lawyer might emerge from that experience with a deeper understanding of the system and the temptations that lead to ethical lapses. It depends on the nature of the offense that led to sanctions, the time since the offense occurred, and other attendant circumstances. These considerations should be left to the appointing authority. A blanket rule of

disqualification should be rejected.

3. REVIEW OF GRIEVANCE DISMISSALS

Review Committees now have the power to overturn ODC's decision to dismiss a grievance. The proposed rule would eliminate that power (RDI 5.11).

My service on Review Committees has shown me the importance of that review. ODC can conduct insufficient investigations of some kinds of complaints. In particular, allegations of ineffective assistance have often been dismissed because no court has found ineffectiveness. The problem is that a judicial determination of ineffectiveness requires proof that a pro se litigant is often unable to provide. ODC's policy can thus create a "Catch-22" — an investigation will not be conducted without proof, but proof is unavailable without investigation.

Assessing grievances that claim ineffectiveness requires a delicate balance. On the one hand, lawyers in some areas of practice are regularly subjected to baseless claims. Investigating **all** such claims would involve vast waste of resources on the part of both ODC and the lawyers themselves. On the other hand, legitimate claims of ineffectiveness should not be brushed aside because they have not yet been proved.

ODC has not consistently given these grievances the careful consideration that they deserve. Review of dismissals is an important tool for ensuring that they do.

4. "PRESUMPTION" OF HEARING LOCATION

RDI 10.11(a) would create a "presumption" that hearings will be held at the Bar offices. Washington law recognizes two kinds of presumptions: the Morgan (or burden-shifting) presumption and the Thayer (or bursting-bubble) presumption. The word "presumption" is therefore ambiguous. The rule needs to clarify what force the "presumption" has and what facts are needed to overcome it.

Beyond this, there is no reason for a presumption that hearings will be held at any particular location. The Bar offices are a convenient location for ODC, but they may not be convenient for other participants. The adjudicator should be allowed to determine what location is most convenient for both counsel, as well as witnesses and the accused lawyer.

Seth Fine