WASHINGTON STATE
BAR ASSOCIATION

Board of Governors
Kyle D. Sciuchetti, President

April 29, 2021

Susan L. Carlson, Clerk
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Re: WSBA Member Comment re: Suggested Rules for Discipline & Incapacity

Dear Ms. Carlson:

Please see the attached WSBA Member comments in reference to Order number 25700-A-1328: Suggested Rules for Discipline & Incapacity, for the court's consideration. I am sending these along at the request of the Board of Governors.

Sincerely,

Kyle D. Sciuchetti
President, Washington State Bar Association

cc: Terra K. Nevitt, WSBA Executive Director

500 Broadway Street, Suite 400 | Vancouver, WA 98908 | 360.619.7033 (office) | 360.694.6413 (fax) | kyle.s@millernash.com | www.wsba.org

Paris Eriksen

From: susanuuvoices@gmail.com <skirkpatrick032@gmail.com>
Sent: Thursday, March 11, 2021 2:27 PM
To: Board Feedback
Subject: Recommendations regarding the disciplinary rules & policies.

Follow Up Flag: Follow up
Flag Status: Completed

I have experience with the Disciplinary Committee as a grievant and offer the following proposals based on my experience and the probable applicability to other grievants and situations. By way of background, I believe that our local county prosecutor has engaged in illegal surveillance for an extended period of time through email hacking and that a settlement negotiated on my behalf and deposited into a trust account was ultimately removed from the trust account and distributed to others, including the attorney who negotiated the settlement. I am not asking anyone to judge the credibility of my statements. What I want to offer is the benefit of my experience to offer proposed changes to the disciplinary rules and/or policies. Incidentally, I am an attorney with more than 30 years of experience. My concerns about the fairness of the disciplinary process are both personal and professional.

1. ALL ALLEGED TRUST ACCOUNT VIOLATIONS SHOULD REQUIRE AN AUDIT.

It is my belief that an audit was not conducted, possibly because of the source of the Second Recommendation.

2. THE NAMING OF PROMINENT ATTORNEYS IN A RESPONSE TO A GRIEVANCE SHOULD BE CONSIDERED A RED-FLAG AND INVESTIGATED FOR POSSIBLE INTIMIDATION.

I felt intimidated by the naming of these other prominent attorneys (who also practice in the same county) and the knowledge that the process was not being kept confidential.

3. THE RESULTS OF THE INVESTIGATION BY THE INVESTIGATOR SHOULD BE TAKEN SERIOUSLY AND FOLLOWED UNLESS CLEARLY MISGUIDED.

In my case, the investigator agreed that certain people should be contacted. One was a professor emeritus at the Seattle University School of Law who serves the Disciplinary Committee in an adjunct role and was so concerned about the county prosecutor's conduct that he endorsed his opponent in his reelection campaign. The other person was the owner of the computer forensics firm I believe to be the one that handles the county prosecutor's surveillance activities.
It is my belief that those people were not contacted. I was not given a reason for the failure to contact these people.

4. CONFLICT OF INTEREST RULES SHOULD BE DEVELOPED FOR DISCIPLINARY COMMITTEE MEMBERS.

Such rules should include a prohibition against a member from the same county taking a role in the disciplinary process regarding another member(s) of the same county. I suppose an exception will need to be made in larger counties but in ours, people in our local legal community know each other.

5. INVESTIGATIVE POWERS.

In addition to having auditors on board, it would be helpful if the Disciplinary Committee had a relationship with a computer forensics expert or firm which could conduct at least a preliminary scan to determine if a comprehensive investigation should be conducted.

6. CITIZEN MEMBERS OF THE COMMITTEE SHOULD BE FREE OF INFLUENCE BY THE ATTORNEYS ON THE COMMITTEE IN ORDER TO BE FULLY REPRESENTATIVE AND EFFECTIVE.

I would assume that citizen representative would defer to the attorneys most of the time. Perhaps they need training and information about their particular roles.

7. GRIEVANTS SHOULD BE ALLOWED TO MAKE AN IN-PERSON PRESENTTION TO THE DISCLIPLINARY COMMITTEE FOR A SET PERIOD OF TIME (1 HOUR?) ONCE AN INVESTIGATION IS STARTED.

Appearing in person would have provided me the opportunity to explain why contacting the people I suggested and agreed to by the investigator was important. It would have counteracted any secret conversations and established me as a flesh and blood person and not just a name on a piece of paper.

8. THERE SHOULD BE A MEANS BY WHICH ALLEGATIONS ABOUT IMPROPER PROCESS IN THE DISCIPLINARY PROCESS CAN BE HEARD.

I had and have no way to get my legitimate concerns addressed. That would be true of other grievants. That situation should be changed.

I am offering my experience on the assumption that my experience as a grievant is shared by other grievants, at times. It would be almost impossible for grievants who are not attorneys to discern any misconduct. I believe that the recommendations above would reinforce the integrity of the disciplinary system, and ultimately the legal profession and its practitioners.

I am willing to make myself available if there is any interest in talking to me further for the purposes of these Recommendations.

Susan Kirkpatrick WSBA No. 11004
360-970-1965

March 15, 2020

Board of Governors
Washington State Bar Association
1325 Fourth Ave, Ste 600
Seattle, WA 98101

Re: Proposed Rules for Discipline and Incapacity

Dear Board of Governors:

We are a group of lawyers who regularly represent 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 a power grab by the Office of Disciplinary Counsel ("ODC") made possible by the unprecedented process that gave WSBA employees sole control over the content of the proposed rules.

The Board of Governors ("BOG") should ask the Court to reject these rules and instead, establish a committee with representatives of all participants in the discipline process to craft a more balanced set of rules.

The BOG can and should comment on the proposed rules

The WSBA repeatedly said that the BOG would review the proposed rules before they were submitted to the Court, including in ODC's Washington Disciplinary System 2019 Annual Report at 16, the March 19, 2020 Executive Director's Report, and in the introductory memorandum to the Volunteer Reviewers who participated in the stakeholder process.

There is nothing in the current rules that prohibits the BOG from weighing in on proposed changes to the procedural rules for the disciplinary system. The only prohibited activity is involvement in individual disciplinary cases. ELC 2.2(b). Members of our group have served on several prior committees that recommended either a new set of procedural rules or changes to the existing rules and all of those proposals were submitted to the BOG before going to the Court. The proposed rules will have a significant -- yet undetermined -- effect on the bar's budget, making review by the BOG more critical. If adopted, these rules will create an unfunded mandate for paid adjudicators and may require bar dues to be increased.

We do not believe a fair or just set of rules can be drafted unless all of those involved in the lawyer discipline process have a say. Because attorneys who represent respondents were not involved in drafting the proposed rules, our ideas for improving the disciplinary system were not even considered.

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, WSBA said it would take up to two months and cost almost $600 to obtain them. We question why the stakeholder meetings were not open to the public and why the stakeholder comments are not available on WSBA's website. 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 boils down to a power grab by ODC. 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.

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 our bar dues, 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 or 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.

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.

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 urge the BOG to act on behalf of all of its members and ask the Court to reject these rules and instead begin a fair and transparent process of rulemaking.

Sincerely,

David Allen

Rita L. Bender

Kurt M. Bulmer

Thomas M. Fitzpatrick

Timothy K. Ford

Kenneth S. Kagan

Todd Maybrown

Leland G. Ripley

Anne I. Seidel

Patrick C. Sheldon

Stephen C. Smith

John A. Strait

Elizabeth Turner

Paris Eriksen

From: Edward Dunkerly <edward.dunkerly@mcaleerlaw.net>
Sent: Saturday, March 13, 2021 9:32 PM
To: Board Feedback
Subject: Proposed Rules for Discipline and Incapacity

Follow Up Flag: Follow up
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Absolutely opposed, the rules are not in the interest of the bar, lawyers, or the public. It would not be an improvement especially having an "in house" hearing officer, too much bureaucracy. Having hearing officers with real law experience, real practice experience, and no ties to the disciplinary office, however tenuous, works.

I served as a hearings officer for a few years and it was a satisfying learning experience and made me feel more a part of the bar than I otherwise would have and it promoted my respect for those in inside the offices knowing that any lawyer can and should be able to part of the disciplinary process. Independent and volunteer hearings officers serves as a check and oversight of the disciplinary office.

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Paris Eriksen

From: Edgar Hall <edgar@wadebtlaw.com>
Sent: Thursday, March 11, 2021 5:16 AM
To: Board Feedback
Subject: Commentary RE proposed amendments to disciplinary procedures

Follow Up Flag: Follow up
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In our politically charged climate, vesting powers into a single individual is fraught with peril (as Ann Seidel's article points out).

The lack of oversight and amount of discretion vested into the ODC is problematic at best.

Much like the criminal justice system, poverty (and race) makes the likelihood of justice go down. Those with the money to fully defend against an ODC's claims will be fine and continue to do whatever it is they are doing. The brunt of this will fall on solo practitioners who are disproportional female and minority compared to the well funded big law population.

If SCOTUS were composed of a single individual, the chance of extreme political decisions would be assured (not to say that is not already the case, but at least there is a smoothing effect across nine justices).

Moving from a review board with more power spread across 8 volunteers that has a limiting effect on the ODC reduces the possibility of any potential bias or disparate impact in charging.

In the bar news, I already see three to ten attorneys a month being disbarred, censored, admonished, etc. How many more do you want? Further, what would happen if there is a political, racial, or genderist motivation behind the accusation and how would that news play out in the general media? It would not be a good look. Likewise if there is a disparate impact, how would that play? And unfortunately the only way to solve a disparate impact is to disbar or charge more until the equities balance or to charge less until the same.

The proposed rule changes do not promote more justice, but less.

I would ask that the rule changes not be implemented. If they are to be implemented, I would suggest the process be slowed down and more commentary allowed to flesh the rules out and to provide better checks and balances.

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Paris Eriksen

From: edward <ehiskes@gmail.com>
Sent: Wednesday, April 7, 2021 5:28 PM
To: Main@draw.groups.io
Cc: Bar Leaders; supreme@courts.wa.gov; B Tollefson
Subject: Re: [DRAW] Proposed disciplinary rule changes -

Follow Up Flag: Follow up
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There are problems with the hearing officer system, even without new rules to make it worse.

In 2013 the Snohomish County Prosecutor and a County Official filed a bar complaint against XXXXX, who operates a news website covering Snohomish County government issues. Her offense? She published things on the website that were critical of Snohomish County government. Although the complaint was unrelated to the practice of law or XXXXX's status as a WSBA member, the WSBA decided to issue an investigatory subpoena anyway.

Under then and current rules, the WSBA Chief Hearing Officer assigns a hearing officer to handle any particular case. Per the rule, this assignment may not be questioned, by way of an affidavit of prejudice or otherwise.

So what hearing officer was picked for XXXXX's case? It turns out that this person was the subject of several bar complaints concerning his/her/their practice as a guardian, and was eventually sanctioned and terminated as a guardian by a Superior Court judge, and also sanctioned by the Supreme Court Guardianship Board.

The potentially disturbing thing is that the WSBA might have known about these problems at the time of the hearing officer appointment, but then proceeded to appoint this hearing officer anyway, failing to give notice to XXXXX about the officer's problems. A cynical person might infer that they wanted a hearing officer who had reason to be afraid of the WSBA discipline department. Also of concern is that, despite the sanction by a Superior Court judge, and the adverse action of the Guardianship Board, the WSBA never imposed discipline on that hearing officer for the guardianship misfeasance. One might infer that they were protecting one of their own. (I stress the words "might" and "infer", since I am not an eyewitness to these events, but merely a reader of documents. I would be grateful to receive comments from those at the WSBA who could provide authoritative reassurances.)

The XXXXX case illustrates a problem with the system. There is no "firebreak" against bias or cronyism. In Superior Court one can file an affidavit of prejudice against a particular judge, and also elect to have a jury trial. These devices tend to keep the decision-makers at arms-length from the prosecutor. The WSBA system provides no such distance. Discipline counsel are under the direct supervision of political actors such as the Executive Director, and the Disciplinary Board is populated with political patronage appointees. Between the Executive director, discipline counsel, and the Disciplinary Board, political strings are hanging out everywhere. One might reasonably fear that these could be pulled, whether this has actually happened or not.

A good reform would allow discipline respondents to elect a trial in Superior Court, in lieu of WSBA trial. I believe this is done in California. Another reform would be for the WSBA to maintain an independent cadre of defense lawyers. Inside counsel would help level the playing field against specialist prosecutors, and would be of particular help to minority and disadvantaged defendants.

evh

On Wed, Apr 7, 2021 at 12:39 PM Noah Davis <nd@inpacta.com> wrote:

> With the approaching 4/30 deadline for comments to the Supreme Court on the proposed changes to the rules lawyer discipline, will DRAW take a position on the proposed changes? I've reattached Anne Seidel's 3/1 article that had been shared with us before.
>
> Many, many complaints against lawyers are against solo and small firm practitioners and many are in the realm of family law.
>
> My personal belief?
>
> I would agree with Anne that these rules are designed to speed up the process/efficiencies for the WSBA while further limiting/restricting an accused's rights. Of course they are, the administrative agency rarely proposes rule changes that help the licensee that they are taking action against.
>
> But before such material changes are made to the disciplinary process, shouldn't there be real input from the stakeholders? Shouldn't there be an opportunity to propose rules that provide the accused with exculpatory evidence? With a requirement that discovery that the Bar has obtained prior to filing charges be turned over?
>
> Shouldn't the respondent have at least 20 days to hire a lawyer and respond to a formal charge (not 15)? The Bar wants to treat the rules as more civil then criminal but then don't want to give even the 20 days that a civil respondent/defendant would have to answer a complaint.

And shouldn't the default process provide additional safeguards as opposed to a hearing on the 16th day and a "conviction" when the lawyer doesn't appear. Shouldn't there be additional safeguards against default?

Doug, sorry if this should be on "socializing".

Noah Davis | IN PACTA PLLC

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From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Subject:	FW: Comments re: Order number 25700-A-1328
Date:	Wednesday, April 28, 2021 4:33:53 PM
Attachments:	image001.png image004.png 2021-04-29 Letter to Court Re Rules for Discipline Incapacity Member Comment.pdf Kirkpatrick.Susan.pdf Respondent counsel RDI letter multiple signatures.pdf Dunkerly.Edward.pdf Hall.Edgar.pdf Hiskes.Edward.pdf

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From: Shelly Bynum [mailto:Shellyb@wsba.org]
Sent: Wednesday, April 28, 2021 4:29 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Terra Nevitt <terran@wsba.org>; Sara Niegowski <Saran@wsba.org>
Subject: Comments re: Order number 25700-A-1328

Please see the attached letter from WSBA President Kyle Sciuchetti and WSBA Member comments regarding Order number 25700-A-1328.
Thank you,
Shelly Bynum

Shelly Bynum | Executive Administrator I
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