Washington Attorneys with Disabilities
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www.WADAweb.org

Steven C. González , Chief Justice
Washington Supreme Court
415 12th Ave SW
Olympia, WA 98501

Mailing: PO Box 40929
Olympia, WA 98504-0929

Re: Proposed Rules Concerning Incapacity Proceedings

April 26, 2021

To Whom It May Concern:

We write to comment on the Suggested New Rules for Discipline and Incapacity ("RDI"), in particular Title 8: Incapacity Proceedings, under the Washington State Bar Association ("WSBA"). The standard for investigation and placement on incapacity inactive status: (1) poses a threat to attorneys' with disabilities ability to practice; (2) invites discrimination; and, (3) exposes the Washington State Bar Association to liability for that discrimination. RDI 8.2 *Incapacity Proceedings Based on Disciplinary Counsel's Investigation*, welcomes abuse and should be rejected, and the Washington State Supreme Court should appoint a task force to review Title 8 in light of the Americans With Disabilities Act ("ADA").

Not long ago, in 2016, the Court recognized that questions concerning mental health history create negative bias and should not color determinations for fitness to practice law. The Court adopted amendments to the Admission to Practice Rules 20-25.6 pertaining to Character & Fitness. These revisions eliminated questions regarding mental health history from the character and fitness review of bar applicants "to bring Washington's character and fitness procedures into

alignment with recent interpretations of the ADA."[1] The proposed RDI threatens to open the door to punishing based on perceived or suspected disability rather than "problematic conduct."[2]

The proposed RDI 8.2 raises due process concerns. RDI 8.2(a) states that when disciplinary counsel "obtains information that a licensed legal professional may lack the mental or physical capacity to practice law, disciplinary counsel reviews and may investigate…" The standard for placement on incapacity inactive status -- whether "[a] legal professional lacks the capacity to practice law" -- is such a broad standard that it can be used inappropriately and applied based on mere perceived or suspected diagnosis rather than conduct. Dangerously, RDI 8.2(a) grants disciplinary counsel arbitrary discretion to "obtain[] information that a licensed legal professional may lack the mental or physical capacity to practice law…" without limitation. This discretion invites abuse. Nothing prevents disciplinary counsel from fishing expeditions or due process violations. It directs scrutiny toward what is supposed to be a protected class and it allows official action based on mere suspicion.

Robust rules to protect the public already exist. The discipline process under the Rules of Professional Conduct ("RPC") serves to protect the public and provides a remedy for members of the public. Legal professionals are on equal notice that they may lose the privilege of practicing law for violating the RPC. It can be applied to attorneys indiscriminately without attempting to define what attorneys are capable of and what an attorney is. RDI 8.2 creates an unnecessary, separate process that specifically targets legal professionals with disabilities. Having a disability does not mean someone is not fit or unable to practice law. There should not be separate procedures just for people with disabilities. RDI 8.2 creates a process that is harmful, discriminatory, and fails to actually provide any meaningful additional protection to protect the needs of the public given that a system is already in place.

In spite of the proposed language change from "disability" to "incapacity," this language is insufficient to address the explicit and implicit biases as it relates to mental illnesses and mental health in the legal profession. Ultimately, lawyers can lose their licenses based on private

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[1] Suggested Amendments, Admission and Practice Rules (APR) Rules 20–25.6, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=487

[2] "The [D]epartment [of Justice] found that diagnosis and treatment, without problematic conduct, did not effectively predict future misconduct as an attorney and did not justify restrictions on admission." https://www.justice.gov/opa/pr/department-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates

conduct between mental health practitioners and patients, rather than rule violations. It is diagnoses that are being scrutinized and not violations of the code of conduct.

Attorneys with or with perceived mental illnesses will be disproportionately impacted by this process which places an undue burden on attorneys to prove that they are not within the WSBA definition of "incapacity." "Title II of the ADA prohibits public entities, including licensing entities, from imposing unnecessary eligibility criteria that tend to screen out individuals with disabilities, or ***imposing unnecessary burdens on individuals with disabilities that are not imposed on others***."[3] Like the sword of Damocles, individuals with disabilities will live with an additional burden to prove their disability does not affect their ability to practice under the constant threat of incapacity hearings that could fall at any time. Worse than being unable to sit for a bar exam after law school and its hardships, attorneys who have just earned the license to practice could be stripped of the right as a result of prejudice. Guardianship or other protective measures exist if there is truly a question of "capacity."

Even though the RDI provides for an "Authorized Panel" to review disciplinary counsel's investigative report, there is no requirement that these members be familiar with disabilities if the attorney under investigation has a particular diagnosis or disability. The definition of "Authorized Panel" under RDI 2.4(b) states that an "...Authorization Panel consists of the chair and two individuals assigned from the volunteer adjudicator pool, including an individual who has never been licensed to practice law and one member of the Bar. When practicable, the Chief Regulatory Adjudicator should assign to the Authorization Panel a member of the Bar who has the same license type as the respondent." At the very least, if an investigation reveals a diagnosis or disability, the Chief Regulatory Adjudicator could assign a member of the Bar who has the same diagnosis or disability to contribute a perspective with understanding of how a diagnosis might affect the practice of law.

In addition, RDI 8.2(d)(1) imposes a "Duty to Provide Release and Records. Within 30 days of a request by disciplinary counsel, the respondent must provide disciplinary counsel with (A) relevant medical, psychological, or psychiatric records, and (B) written releases and authorizations to permit disciplinary counsel access to medical, psychological, or psychiatric records that are reasonably related to the incapacity proceeding." This broad charge should not be used as a guide for which to submit private and privileged healthcare information. Anything

[3] Id.

under the sun could be 'reasonably related' to an incapacity hearing. Moreover, respondent cannot practically withhold records as RDI 2.12(d) requires any respondent to provide releases for "medical, psychological, or psychiatric records." There are no provisions for submission of summaries of privileged healthcare information. It flies in the face of due process that upon the first notice of potential issues, the respondent must submit private healthcare information.

There are no guarantees that anyone involved in the discipline and incapacity proceedings process would address biases rampant in the legal profession, within the psychiatric system, and society at large. There are no requirements of those on the discipline-side of the process to undergo extensive training as it relates to discrimination against people with disabilities or the intersection of multiple areas of expertise -- legal, medical/psychological, and sociological. A member with experience and expertise feels the proposed rules demonstrate a misunderstanding of the hurdles, effects, and consequences of the psychiatric system. They point out that one proposed condition of probation is the requirement that an attorney undergo psychological or psychiatric treatment. On the surface, this might seem an effective remedy, but presumes that healthcare will be affordable, readily available, and effective. Some patients experience harm within this system or find treatment crippling. The idea that the treatment would make the patient a more capable or effective attorney is a non sequitur.

These proposed changes have a chilling effect on self-reporting, seeking help during crisis, and creates an indelible stigma with regard to mental health, disability, substance-abuse, and nonconforming conditions. By stifling the discourse on disability through allegations, the proposed rules stunt the growth of disability dialogue, one that is long overdue. The legal profession prides itself on its logic, objectivity, and carefulness. By endorsing these new rules for incapacity hearings, we undercut these efforts and simply continue to perpetrate bias and stigma that are prohibited by the Americans with Disabilities Act.

We must embrace the challenge that mental health issues are prevalent in our profession, whether a condition is lifelong, episodic or circumstantial. Members of the Washington Association Attorneys with Disabilities Association (WADA) have personally experienced discriminatory behavior by fellow attorneys and the WSBA as it relates to their mental illnesses. Mental health impacts everyone--including people who struggle with stress, anxiety, expression, grief and a host of other conditions. If, in the name of "protecting our clients," we create more barriers to shame and burden on our valued colleagues, it is inevitable that more members will

opt to suffer in silence rather than seek help. This is not the way to lead. Our profession and our clients will suffer. We have a chance to treat all legal professional fairly -- to prevent further stigmatization of a protected class. We ask the Supreme Court to appoint a task force to review Title 8 with the ADA in mind and consider the disparate impact Incapacity hearings under Title 8 will have on our community.

Sincerely,

Washington Attorneys with Disabilities Association

with the undersigned Washington Minority Bar Associations and Organizations

ASIAN BAR ASSOCIATION OF WASHINGTON

SOUTH ASIAN BAR ASSOCIATION OF WASHINGTON

LOREN MILLER BAR ASSOCIATION

QLAW The LGBT Bar Association of Washington


WASHINGTON
WWL
WOMEN LAWYERS


KABA
Korean American Bar Association of Washington


WASHINGTON STATE
VETERANS
BAR ASSOCIATION


WACDA


OCLA
Office of Civil Legal Aid


Middle Eastern Legal Association of Washington
melaw


ACLU
Washington


LBAW
LATINA/O BAR ASSOCIATION OF WASHINGTON


MAMA
SEATTLE


COMMUNITIES
RISE
Partners for
Thriving Organizations

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: COMMENTS FOR RULES FOR DISCIPLINE AND INCAPACITY (RDI)
Date: Friday, April 30, 2021 2:58:41 PM
Attachments: WWL_logo216px.png
WACDA.png
lmbalogo (1).png
final letter on proposed rules.docx
image001.png
image002.png
image003.png
image004.png
image005.png
image007.png
image008.png

From: Jonathan Ko [mailto:admin@wadaweb.org]
Sent: Friday, April 30, 2021 2:57 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: COMMENTS FOR RULES FOR DISCIPLINE AND INCAPACITY (RDI)

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OCLA
Office of Civil Legal Aid

Middle Eastern Legal Association of Washington
melaw


LBAW
LATINA/O BAR ASSOCIATION OF WASHINGTON


MAMA
SEATTLE


SOUTH ASIAN
BAR ASSOCIATION OF WASHINGTON


WASHINGTON
WWL
WOMEN LAWYERS


QLAW
The LGBT Bar Association
of Washington


ABAW
ASIAN BAR
ASSOCIATION
OF WASHINGTON

ACLU Washington

WASHINGTON STATE VETERANS BAR ASSOCIATION

COMMUNITIES RISE Partners for Thriving Organizations

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