

**WASHINGTON STATE**  
**B A R A S S O C I A T I O N**

**Board of Governors Meeting**  
**Late Meeting Materials**

**April 16-17, 2021**  
**The Historic Davenport Hotel, Spokane, WA**  
**Zoom, Webcast and Teleconference**

<b>BOARD OF GOVERNORS MEETING</b> <b>Late Materials</b> <b>April 16-17, 2021</b> <b>The Historic Davenport Hotel, Spokane, WA</b> <b>Zoom, Webcast and Teleconference</b>	
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**TO:** WSBA Board of Governors  
**FROM:** Executive Director Terra Nevitt  
**DATE:** April 12, 2021  
**RE:** Executive Director's Report – Additional

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COVID-19 Legal Needs Checklist

Attached is a resource created by the Access to Justice Board's COVID-19 Work Group. This tool is designed to help people identify COVID-19-related problems that might benefit from legal assistance. Tools like this are critical in addressing one of the key findings of the 2015 Civil Legal Needs Study; that nearly 50 percent of low-income households are not aware that the problems they are facing have a legal component and therefore do not seek legal help. The tool has been shared with organizations making up the Alliance for Equal Justice and the Access to Justice Board will be working to get it out to social service providers and community organizations that are providing direct services to people. Please share widely in your own communities.

Meeting with the Washington Supreme Court

On April 7, President Sciuchetti, Human Resources Director & Chief Culture Officer Glynnis Klinefelter Sio, Jeff Turner, and I met the Washington Supreme Court to discuss WSBA's recent climate survey, which was designed and executed by Jeff Turner of Praxis HR. Jeff Turner presented the survey results and his recommendations. President Sciuchetti and I presented on the steps WSBA is taking to address the findings and carry out the recommendations.

Attachments

COVID-19 Legal Needs Checklist







# COVID-19 LEGAL NEEDS CHECKLIST




Many people in our communities are struggling because of COVID-19, and it can be difficult to know if you have a problem that a lawyer can help you with. If you answer yes to any of the questions below, you may benefit from assistance of a lawyer.

## What Kind of Problem Are You Facing?

		YES	NO
<b>ESSENTIAL NEEDS</b>  	<ul style="list-style-type: none"> <li>Are you unable to pay your bills each month?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Do you need help getting benefits or cash assistance, like disability benefits, unemployment insurance, child support, or veteran's benefits?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Has your landlord told you to move or are you worried that you may lose your housing?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
<b>EMPLOYMENT</b>  	<ul style="list-style-type: none"> <li>Have you lost your job or had your hours cut because of COVID-19?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Is your employer making you work even though you feel unsafe, or are you a High-Risk Individual* with questions about if you have to go back to work?</li> </ul> <p><small>*A High-Risk Individual is defined by the Centers for Disease Control and Prevention as someone who is 65 years of age or older, or a person of any age with underlying medical conditions, particularly if not well controlled.</small></p>	<input type="checkbox"/>	<input type="checkbox"/>
<b>ACCESS AND INFORMATION</b>  	<ul style="list-style-type: none"> <li>Are you or your child having problems with school, healthcare, or assistance programs because of language, disability, or a lack of necessary technology (for example, phone, computer, or internet)?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Are you being treated unfairly by your employer, landlord, school, or other service provider because of your race, sex, sexual orientation, age, disability, etc?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Are you afraid of going to the doctor or asking for help from community organizations because of your immigration status?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Have you missed court or are you due in court but don't know what the local court policies about COVID-19 are?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Do you have unpaid traffic citations, or are you struggling to get photo ID or become licensed/re-licensed because offices are closed during COVID-19?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>

		YES	NO
<b>FAMILY AND PERSONAL NEEDS</b>  	<ul style="list-style-type: none"> <li>Is a family member or loved one hurting you or someone else in your household, or are you afraid they may hurt you?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Are you under 18 and need someone other than your parents to take care of you or do you need help taking care of yourself?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Has the pandemic affected whether you can pay or collect child support, or impacted your child custody or visitation schedule?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Do you need a will or other plan for your children and property if something were to happen to you?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Has a loved one passed away and do you need to make decisions and handle their affairs?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Do you need a legal document for someone to make healthcare decisions for you if you can't?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
	<ul style="list-style-type: none"> <li>Have you or a family member been denied needed mental-health treatment?</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>

<b>RESOURCES</b>	If you know your issue is about housing, unemployment, or immigration status, here are some resources you can contact directly. If you are unsure, please see the next section ( <i>Get Help</i> ).	
<b>Housing-Eviction Moratorium Complaints</b>	Do you need to file a complaint about a violation of the Governor's Eviction Moratorium? Contact the Washington State Attorney General's Office <ul style="list-style-type: none"> <li>Phone: <b>800-551-4636</b>. Washington State Relay Service for hearing impaired: <b>800-833-6388</b></li> <li>Online complaint form: <a href="https://fortress.wa.gov/atg/formhandler/ago/COVID19EvictionComplaintForm.aspx">https://fortress.wa.gov/atg/formhandler/ago/COVID19EvictionComplaintForm.aspx</a></li> </ul>	
<b>Unemployment Issues</b>	Are you having issues with your claim for unemployment insurance? <ul style="list-style-type: none"> <li>Unemployment Law Project Telephone Helpline: <b>206-441-9178</b> or toll free <b>888-441-9178 ext. 0</b>.</li> </ul>	
<b>Immigration Issues</b>	Do you need to report ICE or CBP activity, or need other resources related to immigration assistance? <ul style="list-style-type: none"> <li>Washington Immigrant Solidarity Network, Hotline: <b>844-724-3737</b></li> </ul>	
<b>Discrimination Issues</b>	Do you need to file a complaint about discrimination against you? <ul style="list-style-type: none"> <li>Washington State Human Rights Commission at <b>800-233-3247</b>, or <a href="https://www.hum.wa.gov/">https://www.hum.wa.gov/</a>.</li> <li>If the discrimination you are facing is related to your housing, you can also contact the Northwest Fair Housing Alliance at <b>800-200-FAIR (3247)</b> or <a href="http://nwfairhouse.org/">http://nwfairhouse.org/</a></li> </ul>	
<b>GET HELP</b>	If you are a low-income person in Washington and you answer yes to any of the questions, you can get help by calling these numbers:	
	<ul style="list-style-type: none"> <li>Outside King County: Call CLEAR Hotline at <b>888-201-1014</b></li> <li>Inside King County: Call <b>2-1-1</b></li> <li>Seniors (age 60 and over): Call CLEAR Senior at <b>888-387-7111</b></li> <li>Online: <a href="https://nwjustice.org/apply-online">https://nwjustice.org/apply-online</a></li> <li>Legal Information and Forms: <a href="https://www.washingtonlawhelp.org/">https://www.washingtonlawhelp.org/</a></li> </ul>	

**TO:** WSBA Board of Governors  
**FROM:** Daniel D. Clark, WSBA Treasurer & 4<sup>th</sup> District Governor  
**DATE:** April 16<sup>th</sup>, 2021  
**RE:** Treasurer's Report April 2021

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**DISCUSSION** : Report on Results Through February 2021

The Washington State Bar Association FY 2021 Budget that was passed by the Board of Governors in September 2020 calls for an anticipated use of \$202,782 in reserves for expenses over anticipated revenue. So far through February, which is the latest WSBA financial audited reports available which represent 5/12 months of the Year in revenue and Expenditures for FY 2021, WSBA had generated \$1,115,011 in revenue over expenses, which represents a positive net change in the WSBA unrestricted General Fund Balance. Considering the Board of Governors passed the FY 2021 budget calling for use of \$202,782 in reserves to cover operations for FY 2021, this is really great news, and continues to represent a positive \$1,317,793.00 in positive net gain to the unrestricted fund balance. The ending net fund balance continues to grow every month the first five months into FY 2021.

However, this positive news needs to be really tempered with some major caution flags and warnings that as WSBA Treasurer it is my duty to inform us all about. The proposed FY 2021 Budget Reforecast if adopted by the BOG will call for creating of 2 new positions and the filling of a current vacant position for 3 total positions. This added cost will be an added strain to the FY 2021 Budget as well as the FY 2022 Budget and beyond to the tune of over 200k annually. While these extra positions have been determined and declared by the Executive Director and WSBA Executive team to be necessary to maintain operations, the simple fact is that they will cost us additional money.

In addition, the second half of the year typically has far greater expenses than the first half of the year, so a lot of the current net increase to the WSBA reserves will likely be eroded during the remaining months of the year due to normal expenditures that occur more heavily during the back half of the year. This is very important to note because with these several expenses the current significant net increase to the WSBA General Fund is actually anticipated by WSBA staff to end up still forcing us to look to use reserves by the end of the year if the BOG passes the budget reforecast.

It is important to note that WSBA staff anticipate that we will beat the (\$202,782) negative reserve budget for FY 2021, but they anticipate that it will only be beaten by less than \$100,000, and that if we do approve the budget reforecast, with the additional expenditures for various other WSBA operations and new budgeted positions, it will require that we use current Unrestricted reserves to finish out FY 2021.

As Treasurer it is my job to try to be transparent and communicate to you as fellow Governors what we have going on. The Board of Governors has made a strong commitment to members that we are going to keep license fees at \$458 dollars. We actually have our revenue down in late filing fees about \$375,000 which is really eaten into the cost savings during the first half of FY 2021 that we haven't traveled for Covid restrictions. As we start to re-open up, we're going to incur significant additional costs, so the benefits we enjoyed during most of FY 2020 and first half of FY 2021 will be lost as far as saving on costs for travel. As we move forward, if we transition to hybrid zoom meetings, while we may save some on travel, the savings won't be nearly as robust as we have saw when we do all virtual Zoom meetings in terms of travel, per diem meals, and hotel reimbursements for Governors and guests that attend the meetings in person.

In short, there are many competing ideas, services and cost centers for our financial resources and in the four (4) years that I've had the honor of serving on the Board of Governors, I've not seen the BOG or WSBA be very inclined to look to freeze, reduce, or eliminate any program or action that WSBA does. So as we move forward into starting the FY 2022 budget process, I strongly believe that we as a Board of Governors are going to really need to look to start to prioritize expenditures moving forward.

In any event, I will continue to monitor this situation for you, but unlike last year where we ended up with a \$742,000 fund balance, if all calculations work out based on the WSBA financial teams estimates, we should be looking at much higher expenditures and a much less favorable ending ultimately net fund balance, or even a fund deficit which require reserves.

What needs to be remembered is that for every new and innovative program, committee, work group, and/or task force that the BOG implements, these use staff time, and financial resources. We don't have many opportunities to increase our revenue, so we really do need to be very prudent with what we choose to spend our fixed revenue on as an organization.

Conclusion:

I will continue to monitor the financial situation for WSBA and continue to work collaboratively and respectfully with CFO Jorge Perez and his financial team as we continue to move forward into the FY 2021 year. Currently, without these extra expenses that we anticipate in the back half of FY 2021, the current through February 2021 outlook of WSBA finances looks very positive. With considering WSBA's \$742,500

profit for FY 2020, and the \$1,115,000 current net fund balance for FY 2021, so far we are at a positive net gain to the WSBA unrestricted general fund of \$1,857,500.00 the last 17 months. It should be noted though that this figure is anticipated to start to erode the last half of FY 2021.

It remains and continues to be a tremendous honor to serve as the current WSBA Treasurer. Thank you and please contact me if you have any questions regarding this report, and/or as we move into starting to develop the FY 2022 WSBA Budget.

Respectfully,

Dan Clark



# WASHINGTON STATE BAR ASSOCIATION

## Board of Governors

**TO:** WSBA Board of Governors  
**FROM:** Brett A. Purtzer & Carla J. Higginson  
Ad-Hoc Committee on Proposed Disciplinary Rule Changes  
**DATE:** April 10, 2021  
**RE:** Proposed changes to Rules for Discipline & Incapacity

**ACTION/DISCUSSION:** Recommend resolution requesting the Supreme Court extend the comment period on the proposed disciplinary rules changes.

### BACKGROUND:

President Sciuchetti created an ad hoc committee on March 29, 2021 to consider and recommend a position to the Board at its April 19, 2021 meeting on the proposed changes to the Rules for Discipline & Incapacity that are pending before the Supreme Court, with the comment period to end April 30, 2021. Some Sections have commented in opposition to the proposed changes, but the majority of stakeholders have not provided comments to the proposed changes. Part of the reason may be that most attorneys were not aware of the proposed changes, or they do not have a position on the proposed changes as they have never faced a lawyer discipline issue. Additionally, it is not clear that lawyers who wanted details on the background about the proposed changes knew where to look to find that information. It is clear, however, that Anne Seidel's comments and critique published in March 2021 in the King County Bar Bulletin garnered attention. Her position, along with the other respondent lawyers who regularly practice on lawyer discipline cases, suggests that the proposed changes are not in the best interests of the members nor helpful to the public. Conversely, the proponents of the changes urge that such changes streamline the process, eliminate disparate results by using a professional adjudicator as opposed to volunteers, who oftentimes have varying degrees of experience with the discipline process, and create a unified system of discipline. Clearly, both the proposal for and the comments and critique against need to be better understood so that the Board of Governors can make a reasoned decision. As representatives of our members, our individual position as a governor should reflect our respective members' position. At this time, it is impossible to know our members' position as we have not heard from them to any extent. As such, for the membership to be fully advised so that meaningful comments can be made, we need to urge that the Supreme Court extend the comment period so that such comments can be received after being fully advised.

President Sciuchetti had suggested that the ad hoc committee contact stakeholders (the WSBA members) for comment on the proposed rule changes. The ad hoc committee agrees with this suggestion but given the short amount of time between the assignment and the Board meeting, reaching the majority of the members to disseminate information and receive meaningful comments is not feasible. Rather, the ad hoc committee believes extending the comment period from April 30, 2021 to a date in the future will ensure sufficient time to provide our members the information surrounding the proposed changes and receive their meaningful comment

**RECOMMENDATION:**

We recommend adoption of the following resolution:

**We, the Board of Governors of the WSBA, urge the Supreme Court extend the comment period from April 30, 2021 to a date in the future so that all stakeholders have a meaningful opportunity to receive information about the proposed rule changes and to provide meaningful comments in response. The ad hoc committee shall prepare the request for comment which shall then be sent verbatim to all WSBA members in a Take Note announcement. Each individual governor may also solicit comments from their members and other groups as they wish, and the WSBA staff shall facilitate such communication upon request of a governor.**

**GR 9 COVER SHEET**  
**Suggested**

**RULES FOR DISCIPLINE AND INCAPACITY**

**A. Proponent**

Terra Nevitt, Executive Director

Washington State Bar Association

**B. Spokespersons**

Douglas J. Ende, Chief Disciplinary Counsel  
Washington State Bar Association

Julie Shankland, General Counsel  
Washington State Bar Association

**C. Purpose**

The proponent recommends adoption of procedural rules for Washington State’s discipline and incapacity system, to be known as the Rules for Discipline and Incapacity (RDI). If adopted, the suggested RDI would supersede and rescind the current disciplinary procedural rules, the Rules for Enforcement of Lawyer Conduct (ELC). The rules would also supersede and rescind the Rules for Enforcement of Limited License Legal Technician Conduct (ELLTLC)<sup>[1]</sup> and the Rules for Enforcement of Limited Practice Officer Conduct (ELPOC).

**I. OVERVIEW**

The ELC have been in effect since October 1, 2002; they replaced the Rules for Lawyer Discipline, adopted in 1983. The ELC have been amended from time to time since 2002, with the most substantial amendments effective on January 1, 2014.<sup>[2]</sup> The suggested RDI represent the most substantial reexamination of the functioning of the discipline system in Washington State since enactment of the ELC in 2002.

The suggested RDI were drafted by staff from the Washington State Bar Association’s (WSBA) Office of Disciplinary Counsel (ODC), Office of General Counsel (OGC), and Regulatory Services Department (RSD), with the goal of identifying and recommending modifications to the discipline system intended to create efficiencies and improve outcomes.

As approved in concept by the Washington Supreme Court in June 2017, the WSBA drafting work group developed a model of a single-portal, multi-license-type discipline and appeals system. During the preliminary drafting phase of the project, substantial effort was made to

streamline the rules and create system efficiencies while retaining meaningful volunteer involvement in disciplinary procedures. Key drafting objectives included establishing a professionalized adjudicative system<sup>[3]</sup> and creating one set of disciplinary procedural rules for all license types.<sup>[4]</sup> The ELC served as the template for rule drafting, and much of the language and structure of the suggested RDI is drawn from the ELC. However, the rules have been substantially rewritten to improve efficiency of processes and ease of use. During development of the RDI, the drafting work group met with and updated regulatory boards and discipline-system entities, including the Disciplinary Board, the hearing officer panel, the Limited License Legal Technician Board, the Limited Practice Board, the Character and Fitness Board, and the Disciplinary Advisory Round Table. A first comprehensive draft RDI was completed by the WSBA drafting work group in early February 2020.

Shortly thereafter, the WSBA drafting work group convened discipline-system stakeholder representatives to review and provide feedback on the RDI draft. The volunteer reviewers were selected from among stakeholder groups and entities involved in the discipline process in Washington, including the Washington Supreme Court, the Disciplinary Board, hearing officers, the Board of Governors, the Disciplinary Advisory Round Table, the Limited Licensee Legal Technician Board, the Limited Practice Board, conflicts review officers, and lawyers who represent respondents. During the months of March to June 2020 and over the course of three meetings, the stakeholders provided substantive feedback both in person and in writing. The drafting work group then considered and incorporated that feedback into the final draft of the suggested RDI.

This purpose statement is a high-level overview of the RDI. A comprehensive, rule-by-rule explanation of the rule set is provided in Appendix A, which includes citations to specific provisions in the ELC from which the rule was drawn, if applicable, and explanation of any deviations from the ELC.

## **II. SUGGESTED RULES: KEY CONCEPTS AND INNOVATIONS**

The suggested RDI reflect the key concepts and innovations summarized below. This summary is intended to serve as a roadmap for many of the substantive rule revisions and departures from the ELC.

1. Creating a comprehensive adjudicative entity composed of both professional and volunteer adjudicators.

The suggested RDI create an adjudicative entity—the Office of the Regulatory Adjudicator (ORA)—staffed by one or more professional adjudicators who would conduct disciplinary hearings for licensed legal professionals. Transitioning to professional adjudication is consistent with developments in a number of other jurisdictions, such as Arizona, Colorado, and Oregon. The current Washington lawyer discipline hearings system includes approximately 44 volunteers, including hearing officers and members of the Disciplinary Board, acting in various adjudicative capacities. For LLLTs and LPOs, hearing officers and each license type’s respective all-volunteer regulatory board is responsible for carrying out the adjudicative functions for that license.<sup>[5]</sup> The RDI system would instead create a single, smaller pool of volunteers, the

Volunteer Adjudicator Pool, who would perform meaningful, though more limited, adjudicative roles. The Volunteer Adjudicator Pool would include members from all license types and public members. Members of the pool, administered by the professional ORA adjudicator(s), would serve on two types of adjudicative panels:

**Authorization Panel.** Authorization panels would consider ODC requests, following an investigation, that disciplinary or incapacity proceedings commence by the ordering of the matter to hearing. Under the RDI, these are called requests for an order authorizing “the filing of a statement of charges” or “the initiation of incapacity proceedings,” respectively.

**Appeal Panel.** Appeal panels would hear and decide intermediate disciplinary and incapacity appeals and matters on interlocutory review.

The ORA panels would be composed of a single professional adjudicator and two to four volunteers drawn from the pool. This approach is designed to (1) ensure that volunteer members of the matching license type are assigned to the adjudicative panels (when practicable), (2) include public participation, and (3) create efficiencies over the current all-volunteer system.

## 2. Simplifying disposition and dismissal-review options.

To create additional efficiencies within the discipline system, the suggested RDI eliminate certain grievance disposition and review options, as follows:

**Review/Discipline Committee Admonitions.** As described below, the RDI would sunset committees of the three regulatory boards for the three license types in favor of ORA Authorization Panels. The authority of regulatory boards to issue admonitions without a hearing is eliminated. Admonitions under the RDI may be imposed following a hearing or by stipulation.

**Advisory Letters.** ODC routinely includes educational language in dismissal letters in an effort to bring problematic but not necessarily unethical conduct to the attention of a licensee. This approach serves the same purpose and achieves the same result as advisory letters currently issued by a review or discipline committee, but the latter requires a far more cumbersome process. The suggested RDI would therefore eliminate review and discipline committee advisory letters.

**External/Adjudicative Dismissal Review.** Review of dismissal decisions (called “closures” in the suggested RDI) by review or discipline committees rarely results in a different outcome,<sup>[6]</sup> yet the current review process consumes an extraordinary amount of staff and volunteer time to administer and carry out. Elimination of the current dismissal review process would not materially impair the public protection function of discipline, but it would save substantial resources, which, from a public protection standpoint, would be more productively spent pursuing provable and serious cases of ethical misconduct. ODC would still have the internal authority to reopen a grievance in appropriate circumstances, such as when a grievant provides additional, significant information.

3. Maintaining the distinction between confidential versus public disciplinary information but reorganizing the ELC Title 3 rules for clarity.

In an effort to clarify and simplify what has become a balkanized and difficult-to-comprehend area of disciplinary procedure, the drafting work group reorganized and consolidated ELC Title 3 into a number of provisions; it also severed certain components into separate, stand-alone rules. In particular, ELC Title 3 in its current form contains multiple independent provisions scattered throughout the title regarding releases of information, each with its own terminology and applicable processes. A major innovation in the RDI redraft of Title 3 is the consolidation of those provisions into two rules: one regarding release without notice, and another regarding release with notice.

Notably, however, the basic distinction between what is confidential disciplinary information and what is public disciplinary information is unchanged. Instead, RDI Title 3 is designed to make it easier to identify public versus confidential information. In general, most grievance information will remain confidential, and a matter will only become public after an Authorization Panel authorizes the filing of a statement of charges.

4. Reframing the role of grievants.

Under current disciplinary procedural rules, grievants are the equivalent of parties to the investigative stage of the process, with express rights to intercede during the course of an investigation, obtain confidential disciplinary information, and object to the dismissal of grievances. Experience and statistics show that this has created an overabundance of process, incentivized submission of voluminous, unsolicited documentation, and prolonged the final disposition of grievances. To ameliorate these lengthy, resource-intensive processes, the RDI reorient the role of a grievant (called a “complainant” in the suggested rules). Under the RDI, a complainant is simply an individual who brings information about potential misconduct to the attention of ODC and sometimes serves as a witness during the course of a proceeding. The role of complainants under the RDI would be analogous to the role of consumer complainants who submit complaints to the Attorney General’s Office.

5. Improving and clarifying processes for incapacity proceedings.

The rules governing disability proceedings have been revised and restructured substantially for clarity and to streamline procedures. The suggested rules replace the term “disability” with “incapacity,” as the latter more accurately describes the inability to perform the functions of a licensed legal professional. The suggested rules further simplify the decision matrix for the hearing adjudicator following an incapacity hearing and make clear that an incapacity determination is not a form of discipline.

6. Requiring Supreme Court review and approval of all adjudicated matters.

Currently, if a matter is not appealed, the Supreme Court reviews only suspension and disbarment recommendations; other adjudicated dispositions, such as reprimands, admonitions, and dismissals, are sent to the Court informationally. In light of the Court’s

plenary authority and its role as final arbiter of disciplinary and incapacity matters, under the suggested RDI, the Supreme Court would conduct final review of all matters in which there is a recommendation for or stipulation to a disciplinary sanction or the placement of a legal professional's license in incapacity inactive status. This proposed change in the RDI better reinforces the Court's status as the state actor actively supervising disciplinary processes.<sup>[7]</sup>

### **III. SUGGESTED RDI SYSTEM**

In the RDI system, a matter would proceed as follows:

**ODC Intake and Investigation.** ODC would review and/or investigate all grievances (called "complaints" in the RDI) involving all license types. Disposition options would include closure, diversion, or recommendation for the filing of a statement of charges. Closure decisions would not be subject to adjudicative review. Upon receipt of new or additional post-closure information from a complainant, ODC would have the authority to reopen a complaint in appropriate circumstances.

**Authorization Panels.** An ODC request that a matter be ordered to a hearing would be considered by a three-person ORA Authorization Panel, composed of a professional adjudicator accompanied by volunteers from the pool, including one public member and, where practicable, one practitioner of the same license type. An Authorization Panel would have authority to order the filing of a statement of charges or the initiation of incapacity proceedings or to deny such requests.

**Hearing Stage.** An ORA hearing adjudicator would conduct and preside over all disciplinary and incapacity hearings. ORA adjudicators would also approve all stipulations, subject to final Supreme Court approval. Volunteer lawyers on the Volunteer Adjudicator Pool may also serve as settlement officers to assist in the resolution of matters by stipulation.

**WASHINGTON STATE**  
**BAR ASSOCIATION**  
Office of Disciplinary Counsel

Douglas J. Ende  
Chief Disciplinary Counsel  
Direct line: 206-733-5917  
E-mail: douge@wsba.org

**SENT BY EMAIL ONLY**

July 17, 2020

Re: Revised draft of Rules for Discipline and Incapacity

Dear Volunteer Reviewer:

Thank you for your help with the review process for the draft disciplinary procedural rules for Washington State's discipline and incapacity system: the Rules for Discipline and Incapacity (RDI).

As you will recall, from March through June 2020 and over the course of three meetings (and one orientation session), stakeholder representatives provided feedback both in person and in writing on the RDI draft. The WSBA staff drafting team reviewed all of the feedback and incorporated changes into the suggested RDI that will be submitted to the Washington Supreme Court for its consideration.

Enclosed is a copy of the comprehensive revised draft RDI for your information. See Appendix A. Additionally, enclosed as Appendix B is a detailed summary of the changes, both substantive and technical, that resulted from the stakeholder review process. We have not prepared a redline of the recent changes, but if you have specific questions, please email Thea Jennings at [theaj@wsba.org](mailto:theaj@wsba.org).

The RDI are still in draft form, and there may yet be some minor housekeeping revisions as we prepare the draft for submission to the Supreme Court.

We truly appreciate your time and effort in making this a better and more complete set of rules.

Sincerely,



Douglas J. Ende  
Chief Disciplinary Counsel

Enclosures: DRAFT Revised Rules for Discipline and Incapacity (dated July 17, 2020)  
Summary of Revisions (dated July 17, 2020)





# APPENDIX A

# RULES FOR DISCIPLINE AND INCAPACITY (RDI)

(July 17, 2020)

## TABLE OF RULES

### TITLE 1 – SCOPE, JURISDICTION, DEFINITIONS, AND DUTIES

- 1.1 Scope of Rules
- 1.2 No Statute of Limitation
- 1.3 Definitions
- 1.4 Acronyms
- 1.5 Words of Authority
- 1.6 Duties Imposed by These Rules

### TITLE 2 – ORGANIZATION AND STRUCTURE

- 2.1 Washington Supreme Court
- 2.2 Washington State Bar Association
- 2.3 Office of the Regulatory Adjudicator
- 2.4 Adjudicative Panels
- 2.5 Volunteer Selection Board
- 2.6 Volunteer Adjudicator Pool
- 2.7 Diversity
- 2.8 Regulatory Adjudicator Conduct
- 2.9 Office of Disciplinary Counsel
- 2.10 Special Conflicts Disciplinary Counsel
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## TITLE 1 – SCOPE, JURISDICTION, DEFINITIONS, AND DUTIES

### RULE 1.1 SCOPE OF RULES

**(a) Purpose.** These Rules are adopted by the Washington Supreme Court to govern the discipline and incapacity procedures and related processes for licensed legal professionals.

**(b) Persons Subject to These Rules.** The following persons are subject to these Rules regardless of the person’s residency or authority to practice law in this jurisdiction:

- (1) any licensed legal professional admitted, licensed, or authorized to practice law in this jurisdiction regardless of where the licensed legal professional’s conduct occurs;
- (2) any licensed legal professional admitted, licensed, or authorized to practice law in any other jurisdiction who provides or offers to provide any legal services in this jurisdiction; and
- (3) any person previously admitted, licensed, or authorized to practice law as a licensed legal professional in this jurisdiction if the conduct occurred while admitted, licensed, or authorized to practice law.

**(c) Exception for Judges.** A lawyer serving as a judge or justice is subject to these Rules only to the extent provided by Rule 8.5(c) of the Rules of Professional Conduct.

**(d) Disciplinary Authority.** A licensed legal professional is subject to discipline for violations of the rules of professional conduct applicable to that licensed legal professional’s license type.

**(e) Authority; Multiple Jurisdictions.** A licensed legal professional may be subject to the rules governing disciplinary and incapacity matters of both this jurisdiction and another jurisdiction for the same conduct.

### RULE 1.2 NO STATUTE OF LIMITATION

No statute of limitation or other time limitation restricts submitting a complaint, initiating an investigation, or commencing a proceeding under these Rules, but the passage of time since an act of misconduct occurred may be considered in determining what if any sanction or remedy is warranted.

### RULE 1.3 DEFINITIONS

Unless the context clearly indicates otherwise, terms used in these Rules have the following meanings:

**(a)** “Bar” means the Washington State Bar Association.

**(b)** “Bar counsel” means a staff lawyer, other than disciplinary counsel, employed by the Bar.

**(c)** “Clerk” when used alone means the Clerk to the Office of the Regulatory Adjudicator.

**(d)** “Clerk’s file” means the pleadings, motions, rulings, decisions, and other documents filed with or by the Clerk in a proceeding or investigation under these Rules, which may include public and nonpublic information.

**(e)** “Complainant” means a person or entity who submits a complaint under Title 5 of these Rules, except for a confidential source under Rule 5.2(d).

**(f)** “Conviction” means a finding of a defendant’s guilt of a crime in any jurisdiction, regardless of the pendency of an appeal, either (1) upon entry of a plea of guilty or nolo contendere, unless the defendant affirmatively shows that the plea was not accepted or was withdrawn; or (2) upon entry of a finding or verdict of guilty, unless the defendant affirmatively shows that judgment was arrested or a new trial granted.

**(g)** “Counsel” when used as a noun means a lawyer authorized to practice law in Washington State.

**(h)** “Hearing transcript” means a verbatim report of proceedings from a disciplinary or incapacity hearing.

**(i)** “Licensed legal professional” means a lawyer, limited license legal technician, limited practice officer, or other individual, who is admitted, licensed, or authorized to practice law in Washington State or any other jurisdiction.

**(j)** “Party” means the Office of Disciplinary Counsel or respondent, unless these Rules specify otherwise.

**(k)** “Supreme Court” or “Court” when used alone means the Washington Supreme Court.

(l) “Suspension” means a court-ordered temporary loss of authorization to practice law.

#### **RULE 1.4 ACRONYMS**

Acronyms used in these Rules have the following meanings:

- (a) “APR” means the Admission and Practice Rules adopted by the Washington Supreme Court.
- (b) “CR” means the Superior Court Civil Rules adopted by the Washington Supreme Court.
- (c) “GR” means the General Rules adopted by the Washington Supreme Court.
- (d) “LLLT” means limited license legal technician.
- (e) “LLLT RPC” means the Limited License Legal Technician Rules of Professional Conduct adopted by the Washington Supreme Court.
- (f) “LPO” means limited practice officer.
- (g) “LPORPC” means the Limited Practice Officer Rules of Professional Conduct adopted by the Washington Supreme Court.
- (h) “ORA” means the Office of the Regulatory Adjudicator.
- (i) “RAP” means the Rules of Appellate Procedure adopted by the Washington Supreme Court.
- (j) “RCW” means the Revised Code of Washington.
- (k) “RPC” means the Rules of Professional Conduct for lawyers adopted by the Washington Supreme Court.

#### **RULE 1.5 WORDS OF AUTHORITY**

- (a) “May” means “has discretion to” or “is permitted to.”
- (b) “Must” means “is required to.”
- (c) “Should” means recommended but not required.

#### **RULE 1.6 DUTIES IMPOSED BY THESE RULES**

A licensed legal professional must comply with the duties imposed by these Rules. Failure to comply may subject the licensed legal professional to discipline for violating RPC 8.4(l), LLLT RPC 8.4(l), or LPORPC 1.10(f) or may be considered an aggravating factor in determining the appropriate sanction for misconduct in any disciplinary proceeding. Duties imposed by these Rules include but are not limited to the following duties:

- (a) furnish authorization for release of medical records, Rule 2.12(d);
- (b) comply with orders, Rule 2.12(c), 10.1(d);
- (c) maintain confidentiality, Rule 3.1(d);
- (d) respond to any inquiries or requests made under Title 5;
- (e) comply with any subpoenas from disciplinary counsel under these Rules;
- (f) pay noncooperation costs, Rule 5.9;
- (g) report being convicted of a felony, Rule 7.2(d);
- (h) comply with conditions of a stipulation, Rule 9.1(j);
- (i) report being disciplined, placed in incapacity inactive status or its equivalent, or resigning in lieu of discipline or its equivalent, in another jurisdiction, Rule 9.3(a);
- (j) file an answer to a statement of charges or to an amended statement of charges, Rule 10.5(a);
- (k) cooperate with discovery, Rule 10.10(f);
- (l) attend a hearing and bring materials requested by disciplinary counsel, Rule 10.12;
- (m) respond to subpoenas and comply with orders enforcing subpoenas, Rule 10.12(g);
- (n) comply with conditions of probation, Rule 13.6;
- (o) pay restitution, Rule 13.7;
- (p) pay costs and expenses, Rule 13.8;
- (q) notify clients and others of inability to act, Rule 14.1;

- (r) discontinue practice, Rule 14.2;
- (s) serve a declaration of compliance, Rule 14.3;
- (t) cooperate with an examination of books and records, Rule 15.2; and
- (u) notify the Office of Disciplinary Counsel of a trust account overdraft, Rule 15.4(d).

## **TITLE 2 – ORGANIZATION AND STRUCTURE**

### **RULE 2.1 WASHINGTON SUPREME COURT**

The Washington Supreme Court has exclusive responsibility to administer the Washington discipline and incapacity system for licensed legal professionals and has inherent power to maintain appropriate standards of professional conduct and to dispose of individual discipline and incapacity cases. Persons carrying out the functions set forth in these Rules act under the Supreme Court's authority and supervision.

### **RULE 2.2 WASHINGTON STATE BAR ASSOCIATION**

**(a) Function.** The Washington State Bar Association:

- (1) through the Bar's Executive Director, provides administrative and managerial support to enable the Office of Disciplinary Counsel, the Office of the Regulatory Adjudicator, and other Bar staff and appointees under these Rules to perform the functions specified by these Rules; and
- (2) performs other functions and takes other actions necessary and proper to carry out the duties specified in these Rules or delegated by the Supreme Court.

**(b) Limitation of Authority.**

- (1) The Bar officers, Executive Director of the Bar, Board of Governors, LLLT Board, and Limited Practice Board have no authority to direct the investigations, prosecutions, appeals, or discretionary decisions made under these Rules, or to alter the decisions or recommendations of regulatory adjudicators or adjudicative panels.
- (2) The Chief Disciplinary Counsel or Chief Regulatory Adjudicator must report a violation or attempted violation of this section to the Chief Justice of the Supreme Court. If the person is a licensed legal professional, the violation may also be grounds for discipline.

**(c) Restrictions.** Bar officers, the Executive Director, and Board of Governors members cannot serve as regulatory adjudicators or special conflicts disciplinary counsel during their terms or until three years have expired after departure from office.

**(d) Independence.** In discharging their responsibilities under this Rule and in carrying out duties specified elsewhere in these Rules, the Bar and its Executive Director ensure that the Bar's discipline and incapacity systems are organized and structured to:

- (1) safeguard the decision-making independence of the Office of the Regulatory Adjudicator and to appropriately separate its adjudicative processes from the investigative and prosecutorial functions delegated to the Office of Disciplinary Counsel and
- (2) ensure the limitations of authority set forth in section (b)(1) are respected.

### **RULE 2.3 OFFICE OF THE REGULATORY ADJUDICATOR**

**(a) Function.** The Office of the Regulatory Adjudicator (ORA) performs the adjudicative functions set forth in these Rules, delegated by the Supreme Court, or necessary and proper to carry out its duties.

**(b) Regulatory Adjudicator.** Regulatory adjudicators, or regulatory adjudicators pro tempore, are lawyer members of the Bar who act as adjudicators on all matters under these Rules and perform other duties as authorized by these Rules or as delegated by the Chief Regulatory Adjudicator.

**(c) Chief Regulatory Adjudicator and Staff.** The Bar must employ or contract with a suitable lawyer member of the Bar to serve as the Chief Regulatory Adjudicator and employ or contract with other suitable individuals, including regulatory adjudicators pro tempore or settlement officers, as necessary to carry

out the functions of the ORA.

**(d) Emergency Orders.** In the event of an emergency affecting the discipline system, as a result of a natural or other major disaster, the Chief Regulatory Adjudicator may issue sua sponte emergency administrative orders relating to discipline and disability matters, except for those matters before the Washington Supreme Court, to ensure the continued administration of lawyer discipline and incapacity systems while protecting the health and safety of participants.

**(d) Hearing Adjudicator.** A regulatory adjudicator is referred to as the hearing adjudicator when assigned to preside over disciplinary hearings under Title 10 or incapacity hearings under Title 8.

**(e) Volunteer Adjudicator.** Volunteer adjudicators are members of the Bar or the public appointed to the volunteer adjudicator pool under Rule 2.6. Individual volunteer adjudicators are selected to serve, without compensation and as needed, on the adjudicative panels or as settlement officers in specific matters.

#### **RULE 2.4 ADJUDICATIVE PANELS**

**(a) Panels in General.** The Chief Regulatory Adjudicator convenes and administers adjudicative panels and assigns adjudicative matters under these Rules to the appropriate panel as required by these Rules. A regulatory adjudicator must serve as chair of each adjudicative panel. The Chief Regulatory Adjudicator assigns volunteer adjudicators from the volunteer adjudicator pool to fill the remaining positions of each panel.

**(b) Authorization Panel.** An Authorization Panel considers, and orders appropriate action on, matters assigned to it under these Rules including but not limited to requests for orders authorizing disciplinary counsel to file a statement of charges or to initiate incapacity proceedings. 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.

**(c) Appeal Panel.** An Appeal Panel adjudicates appeal and review proceedings as specified in these Rules. An Appeal Panel consists of the chair and four individuals assigned from the volunteer adjudicator pool, including an individual who has never been licensed to practice law and three members of the Bar. When practicable, the Chief Regulatory Adjudicator should assign to the at least one member of the Bar who has the same license type as the respondent.

#### **RULE 2.5 VOLUNTEER SELECTION BOARD**

**(a) Duties.** The Volunteer Selection Board makes recommendations to the Supreme Court for the appointment and removal of volunteer adjudicators, and special conflicts disciplinary counsel. Information about the conduct or performance of a volunteer adjudicator, or special conflicts disciplinary counsel received by the Volunteer Selection Board, and deliberations of the Volunteer Selection Board, are confidential.

**(b) Composition.** The Volunteer Selection Board consists of five voting members and the Chief Regulatory Adjudicator as a non-voting member. The voting members are appointed by the Supreme Court and must include four active members of the Bar and one individual who has never been licensed to practice law. Voting members serve staggered three-year terms ending on September 30 of the applicable year. The Supreme Court appoints one of the voting members of the Board to serve as chair. No member may be appointed to serve more than two consecutive full terms.

**(c) Restrictions.** Volunteer Selection Board members cannot serve as regulatory adjudicators or special conflicts disciplinary counsel until three years have expired after departure from office.

**(d) Expenses.** The Bar reimburses Volunteer Selection Board members for actual, necessary, and reasonable expenses according to the Bar's expense policy.

## **RULE 2.6 VOLUNTEER ADJUDICATOR POOL**

**(a) Function.** The volunteer adjudicator pool consists of volunteers who perform the functions of the adjudicative panels and of settlement officers as set forth in these Rules.

(1) *Adjudicative Function.* The Chief Regulatory Adjudicator assigns volunteer adjudicators to one or more of the adjudicative panels.

(2) *Settlement Officer Function.* The Chief Regulatory Adjudicator may assign volunteer adjudicators to serve as settlement officers under Rule 10.11(h).

**(b) Composition.** The volunteer adjudicator pool consists of at least 15 lawyer members of the Bar, three LLLT members of the Bar, three LPO members of the Bar, and three individuals who have never been licensed to practice law. The Supreme Court, upon recommendations from the Volunteer Selection Board, appoints individuals to the volunteer adjudicator pool.

**(c) Terms.** Appointments to the volunteer adjudicator pool are for staggered three-year terms ending on September 30 of the applicable year.

**(d) Qualifications.** Members of the Bar serving as volunteer adjudicators must be active members of the Bar, have no record of public discipline, have no disciplinary or incapacity proceeding pending, have no disciplinary proceedings pending or imminent, and have no other active role in Washington's discipline and incapacity system.

**(e) Expenses.** The Bar reimburses volunteer adjudicators for actual, necessary, and reasonable expenses according to the Bar's expense policy.

## **RULE 2.7 DIVERSITY**

Diversity must be considered when volunteers are appointed under these Rules, including but not limited to diversity in gender, ethnicity, disability status, sexual orientation, geography, area of practice, and practice experience.

## **RULE 2.8 REGULATORY ADJUDICATOR CONDUCT**

**(a) Application of Code of Judicial Conduct.** The integrity and fairness of the adjudicative system established by these Rules requires that regulatory adjudicators, including volunteer adjudicators, observe high standards of conduct. The Code of Judicial Conduct (CJC) applies to a regulatory adjudicator and volunteer adjudicator to the same extent as the CJC applies to a judge pro tempore as set forth in the CJC Application section III, except that a regulatory adjudicator must comply with CJC 3.3 (Acting as a Character Witness), and need not comply with CJC 2.14 (Disability and Impairment) or CJC 2.15 (Responding to Judicial and Lawyer Misconduct).

**(b) Restriction on Reviewing Own Decision.** A regulatory adjudicator is prohibited from reviewing the regulatory adjudicator's own decision or order in any matter under these Rules, except for motions for reconsideration permitted under these Rules.

## **RULE 2.9 OFFICE OF DISCIPLINARY COUNSEL**

**(a) Definition and Function.** The Office of Disciplinary Counsel consists of the Chief Disciplinary Counsel and other staff employed under section (c) of this Rule. The Office of Disciplinary Counsel and its staff perform investigative, prosecutorial, and other functions under these Rules.

**(b) Disciplinary Counsel.** Disciplinary counsel acts as counsel on all matters under these Rules and performs other duties as authorized by these Rules or as delegated by the Chief Disciplinary Counsel.

**(c) Chief Disciplinary Counsel and Staff.** The Bar must employ a suitable lawyer member of the Bar as Chief Disciplinary Counsel and suitable lawyer members of the Bar as disciplinary counsel and employ other suitable staff as necessary to perform the functions and duties set forth in these Rules.



## **RULE 2.10 SPECIAL CONFLICTS DISCIPLINARY COUNSEL**

**(a) Function.** When a matter is referred to special conflicts disciplinary counsel, special conflicts disciplinary counsel performs the duties of disciplinary counsel under these Rules.

**(b) Referral of Matters.**

- (1) The Chief Disciplinary Counsel refers a matter to be handled by a special conflicts disciplinary counsel when the respondent is one of the following: a licensed legal professional employed by the Bar; a judicial officer of, or licensed legal professional employed by, the Supreme Court; a governor or governor-elect of the Board of Governors; a regulatory adjudicator; a volunteer adjudicator; an adjunct disciplinary counsel; a special conflicts disciplinary counsel; or counsel appointed under Title 8.
- (2) The Chief Disciplinary Counsel may refer a matter to be handled by a special conflicts disciplinary counsel when in the Chief Disciplinary Counsel's discretion it appears appropriate to promote the appearance of impartiality or to serve the ends of justice.

**(c) Appointment, Qualifications, and Assignments.**

- (1) The Supreme Court, upon recommendation from the Volunteer Selection Board, appoints individuals to a pool to serve as special conflicts disciplinary counsel but does not assign matters to special conflicts disciplinary counsel in particular cases except as specified in section (3) of this Rule. Special conflicts disciplinary counsel are appointed for staggered three-year terms ending on September 30 of the applicable year.
- (2) Special conflicts disciplinary counsel must be active lawyer members of the Bar, have no record of public discipline, have no disciplinary or incapacity proceedings pending or imminent, and have no other active role in Washington's discipline and incapacity system or regulatory system.
- (3) When a matter is referred to special conflicts disciplinary counsel under section (b) of this Rule, the Chief Regulatory Adjudicator has discretion to select a particular individual from the pool of special conflicts disciplinary counsel to handle the matter. If the Chief Regulatory Adjudicator is unable to make the assignment or elects not to because of a disqualifying conflict or another legal or ethical restriction, the assignment is made by the Chief Justice or the Chief Justice's designee.

**(d) Independence.** It is the responsibility of a special conflicts disciplinary counsel to make decisions about the objectives for and appropriate disposition of an assigned matter, independently of the Office of Disciplinary Counsel and the Bar. A special conflicts disciplinary counsel may consult with disciplinary counsel or bar counsel about disciplinary and incapacity processes and procedural matters.

**(e) Access to Disciplinary Information.** Special conflicts disciplinary counsel have access to any confidential disciplinary information necessary to perform the duties required by these Rules. Special conflicts disciplinary counsel must return any files and documents to the Bar promptly upon completion of the duties required by these Rules and must not retain copies.

**(f) Expenses.** The Bar reimburses special conflicts disciplinary counsel for actual, necessary, and reasonable expenses according to the Bar's expense policy.

**(g) Compensation.** The Bar may provide compensation to special conflicts disciplinary counsel at a level established by the Bar.

**(h) Restriction on Representing or Advising Respondents or Complainants.** Special conflicts disciplinary counsel are subject to the restrictions set forth in Rule 2.14(c).

## **RULE 2.11 ADJUNCT DISCIPLINARY COUNSEL**

**(a) Function.** When a matter is assigned to adjunct disciplinary counsel, adjunct disciplinary counsel performs the duties of disciplinary counsel under these Rules as directed by disciplinary counsel.

**(b) Assignment of Matters.** The Chief Disciplinary Counsel assigns adjunct disciplinary counsel to any matter under these Rules when in the Chief Disciplinary Counsel's discretion it appears the appointment

will assist the Office of Disciplinary Counsel in performing its duties under these Rules.

**(c) Appointment and Qualifications.**

- (1) Upon the recommendation of the Chief Disciplinary Counsel, the Executive Director appoints individuals to a pool to serve as adjunct disciplinary counsel. Adjunct disciplinary counsel are appointed for staggered three-year terms ending on September 30 of the applicable year.
- (2) The Chief Disciplinary Counsel has discretion to appoint an individual to serve as an adjunct disciplinary counsel pro tem for purposes of a particular matter when it would advance the just and efficient administration of the discipline system.
- (3) Adjunct disciplinary counsel must be active lawyer members of the Bar, have no record of public discipline, have no disciplinary or incapacity proceedings pending or imminent, and have no other active role in Washington's discipline and incapacity system or regulatory system.

**(d) Access to Disciplinary Information.** Adjunct disciplinary counsel have access to any confidential disciplinary information necessary to perform the duties required by these Rules. Adjunct disciplinary counsel must return any files and documents to the Bar promptly upon completion of the duties required by these Rules and must not retain copies.

**(e) Expenses.** The Bar reimburses adjunct disciplinary counsel for actual, necessary, and reasonable expenses according to the Bar's expense policy.

**(f) Restriction on Representing or Advising Respondents or Complainants.** Adjunct disciplinary counsel are subject to the restrictions set forth in Rule 2.14(d).

#### **RULE 2.12 RESPONDENT**

**(a) Respondent.** A respondent is a licensed legal professional who is the subject of a complaint, investigation, or proceeding under these Rules.

**(b) Representation by Counsel.** A respondent may be represented by counsel during any stage of a complaint, investigation, or proceeding under these Rules.

**(c) Duty to Comply with Orders.** A respondent must comply with all orders issued by the ORA or the Court.

**(d) Duty to Provide Authorization for Release of Medical Records.** If requested, a respondent must provide written releases and authorizations to permit disciplinary counsel access to medical, psychological, or psychiatric records that are reasonably related to the investigation or proceedings, subject to a motion to the ORA to limit the scope of the requested releases and authorizations for good cause shown. In proceedings under Title 8, this duty is governed by Rules 8.2(d), 8.3(f), 8.4(e), and 8.11(a)(2).

**(e) Restriction on Charging Fee to Respond to Complaint.** A respondent may not seek to charge a complainant a fee or recover costs from a complainant for responding to a complaint.

#### **RULE 2.13 PRIVILEGES**

**(a) Communications Privileged.** Communications to the Court, Bar, Board of Governors, adjudicative panels, regulatory adjudicators, Clerk, disciplinary counsel, special conflicts disciplinary counsel, adjunct disciplinary counsel, Bar staff, or any other individual or entity acting under authority of these Rules are absolutely privileged, and no lawsuit predicated thereon may be instituted against any complainant, witness, or other person providing information.

**(b) Attorney-Client Privilege and Duty of Confidentiality.** A licensed legal professional may not assert the attorney-client privilege or other prohibitions on revealing information relating to the representation of a client as a basis for refusing to provide information that the licensed legal professional is obligated to provide under these Rules, including information made confidential by any applicable rules of professional conduct, except as permitted by Rules 5.6(b) and 5.7(c). Providing information to disciplinary counsel or a regulatory adjudicator under these Rules is not prohibited by RPC 1.6 or 1.9 or LLLT RPC 1.6 or 1.9 and does not waive any attorney-client privilege.

**(c) Bar's Duty of Confidentiality.**

- (1) If a licensed legal professional provides and identifies specific information that is privileged and requests that it be treated as confidential under these Rules, the Bar must maintain the confidentiality of the information.
- (2) Disciplinary counsel receives, reviews, and holds attorney-client privileged and other confidential client information provided by a licensed legal professional under and in furtherance of the Supreme Court's authority to regulate the practice of law.
- (3) No information identified as confidential under this Rule may be disclosed or released under Title 3 absent authorization under section (f) of this Rule unless the client or former client consents, which includes consent under Rule 5.2(a).

**(d) Licensed Legal Professional's Own Confidential Information.** Nothing in these Rules waives or requires waiver of a licensed legal professional's own privilege or other protection as a client against the disclosure of information relating to the representation.

**(e) Privilege Against Self-Incrimination.** A licensed legal professional's duty to cooperate and testify under these Rules is subject to the licensed legal professional's proper exercise of the privilege against self-incrimination.

**(f) Disclosure of Confidential Information.**

- (1) Disciplinary counsel may move for authorization to disclose information identified as confidential client information under this Rule or Rule 3.1(b). The motion must clearly state the information that has been identified as confidential and the use for which disciplinary counsel seeks authorization. The procedures set forth in Rule 10.8 apply to motions under this Rule.
- (2) In considering a motion to authorize disciplinary counsel to disclose information identified as confidential client information under this Rule, the regulatory adjudicator should consider factors including:
  - (A) the relevance and necessity of the disclosure of the information;
  - (B) the sensitivity of the information and potential impact on the client of the disclosure, including the client's right to effective assistance of counsel; and
  - (C) the expressed desires of the client.
- (3) When deemed necessary by the regulatory adjudicator considering the motion, the regulatory adjudicator may conduct an in camera review of confidential client information.
- (4) The regulatory adjudicator may grant or deny the motion in whole or in part, and may establish terms or conditions for the use of specific information. A ruling may take the form of, or may accompany, a protective order under Rule 3.4.
- (5) Review of a ruling under this Rule may be sought under Rule 11.10.

**RULE 2.14 RESTRICTIONS ON REPRESENTING OR ADVISING INDIVIDUALS UNDER THESE RULES**

**(a) Current Bar Officials and Adjudicators.** Bar officers, the Bar Executive Director, Board of Governors members, regulatory adjudicators, and volunteer adjudicators cannot knowingly advise or represent individuals regarding pending or likely matters under these Rules, other than advising a person of the availability of complaint procedures or to secure the services of a lawyer.

**(b) Former Bar Officials.** After leaving office, Bar officers, the Bar Executive Director, and Board of Governors members cannot represent individuals in pending or likely matters under these Rules until three years have expired after departure from office.

**(c) Special Conflicts Disciplinary Counsel.** Special conflicts disciplinary counsel are subject to the restrictions on advising and representing individuals set forth in this Rule during the term of their appointment.

**(d) Adjunct Disciplinary Counsel.** Adjunct disciplinary counsel are subject to the restrictions on advising and representing individuals set forth in this Rule only while assigned to a matter under Rule 2.11.

## **RULE 2.15 REMOVAL OF APPOINTEES**

The power granted by this Title to any person or entity to make any appointment includes the power to remove the person appointed whenever that person appears unwilling or unable to perform the duties of the appointment, or for any other cause, and to fill the resulting vacancy.

## **TITLE 3 – DISCIPLINARY AND INCAPACITY INFORMATION**

### **RULE 3.1 CONFIDENTIALITY**

**(a) General.** Matters and information made confidential under these Rules are held by the Bar under the authority of the Supreme Court. Confidential information must not be disclosed or released except as authorized by these Rules. The complainant, respondent, or any witness may disclose any information in their possession regarding a disciplinary or incapacity matter except as prohibited by Rule 3.4, court order, or other law.

**(b) Client Information.** When a licensed legal professional provides information to the Bar and identifies that information as privileged or confidential client information under Rule 2.13(c), that information may not be released under this Title unless the client consents, including consent under Rule 5.2(a), or disciplinary counsel obtains an order authorizing such disclosure under Rule 2.13(f).

**(c) Information Not Subject to Subpoena.** Information made confidential under these Rules is not subject to a subpoena or order requiring disclosure in any civil, criminal, or other proceeding except by leave of the Supreme Court upon a showing of compelling need.

**(d) Wrongful Release.** Disclosure or release of information made confidential by these Rules, except as permitted by these Rules, is strictly prohibited. If the person is a licensed legal professional, wrongful disclosure or release may be grounds for discipline.

### **RULE 3.2 PUBLIC AND CONFIDENTIAL EVENTS**

**(a) Open to the Public.** Except as otherwise provided in these Rules or as ordered by a regulatory adjudicator or the Supreme Court, the following events in disciplinary proceedings are open to the public:

- (1) hearings and motion hearings; and
- (2) oral arguments before an Appeal Panel.

**(b) Closed to the Public.** Except as otherwise provided in these Rules or as ordered by the Supreme Court, all events that are not open to the public under section (a) of this Rule are closed to the public, including but not limited to the following:

- (1) ORA adjudicative panel deliberations;
- (2) Volunteer Selection Board deliberations;
- (3) hearings, motions, and conferences before a regulatory adjudicator in incapacity proceedings;
- (4) oral arguments before an Appeal Panel in incapacity proceedings;
- (5) motion hearings and oral arguments on interlocutory review prior to an order authorizing the filing of statement of charges;
- (6) review of material breach determination in diversion matters;
- (7) oral presentations regarding a stipulation;
- (8) motion hearings appointing custodian;
- (9) settlement conferences; and
- (10) any event or portion of an event subject to a protective order.

**(c) Supreme Court Proceedings.** Except as otherwise provided in these Rules or by order of the Supreme Court, Supreme Court proceedings are public to the same extent as other Supreme Court proceedings. Upon motion of a party in an incapacity proceeding under Title 8, the Supreme Court may take additional measures to ensure the confidentiality of information.

### **RULE 3.3 PUBLIC AND CONFIDENTIAL INFORMATION**

**(a) Public Information.** The following information is public, subject to limitation by protective order, other provisions in these Rules, other applicable laws, order of a regulatory adjudicator, or court order:

- (1) statements of concern and any related filed documents made public under Rule 3.7;
- (2) orders of an Authorization Panel authorizing the filing of a statement of charges;
- (3) pleadings, orders, notices, and documents filed with the Clerk in disciplinary proceedings;
- (4) after a stipulation under Title 9 is approved by the ORA, (A) the record submitted to the ORA, (B) the order approving the stipulation, and (C) the stipulation;
- (5) resignations in lieu of discipline under Rule 9.2;
- (6) pleadings, orders, and documents filed with the Supreme Court, except in incapacity proceedings or information identified as confidential under Rules 7.3(c) and 7.4;
- (7) orders appointing and discharging custodians under Rule 16.1, including the appointed custodian's name and contact information;
- (8) the fact that a complainant has been determined to be a vexatious complainant and the order under Rule 5.5(g);
- (9) the fact that a proceeding under Title 8 is pending or that a disciplinary proceeding has been stayed pending the outcome of a proceeding under Title 8;
- (10) the fact that a licensed legal professional's license has been placed in incapacity inactive status or interim incapacity inactive status;
- (11) the fact that a licensed legal professional's license has been suspended on an interim basis under Title 7;
- (12) the fact that a matter has been diverted from disciplinary proceedings after an Authorization Panel has authorized the filing of a statement of charges; and
- (13) the fact that a sanction or remedy has been imposed under Title 13.

**(b) Confidential Information.** All information not defined as public under section (a) of this Rule is confidential, including but not limited to:

- (1) information made confidential by a protective order, other provisions in these Rules, other applicable laws, an order of a regulatory adjudicator, or a court order;
- (2) discipline imposed under prior rules of this state that was confidential when imposed. A record of confidential discipline may be kept confidential during proceedings under these Rules, or in connection with a stipulation under Rule 9.1, through a protective order under Rule 3.4;
- (3) information identified by a licensed legal professional under Rule 2.13(c) to the Bar as privileged or confidential client information, unless disciplinary counsel obtains an order authorizing disclosure under Rule 2.13(f) or the client consents;
- (4) information regarding matters under Title 5, except as identified in section (a) of this Rule;
- (5) information regarding incapacity proceedings under Title 8, except as identified in section (a) of this Rule; and
- (6) information regarding vexatious complainant proceedings under Rule 5.5, except as identified in section (a) of this Rule.

### **RULE 3.4 PROTECTIVE ORDERS**

**(a) Purpose.** To protect a compelling interest and for good cause shown, upon motion, a regulatory adjudicator may enter a protective order prohibiting or limiting disclosure or release of specific information, documents, or pleadings and directing other actions necessary to implement the order.

**(b) Motion.** A motion for a protective order must comply with the procedures for written motions under Rule 10.8.

**(c) Review.** An Appeal Panel reviews decisions granting or denying a protective order or relief from a

protective order if a written request for review is filed and served within five days of service of the decision. When a written request for review is filed, the Chief Regulatory Adjudicator assigns the matter to an Appeal Panel and establishes the timeline and terms for any additional briefing and oral argument.

**(d) Relief from a Protective Order.** A regulatory adjudicator may grant specific relief from a protective order on a showing of compelling need, provided the individual seeking relief establishes that reasonable efforts have been made to notify any person affected by the order.

**(e) Disclosure Prohibited While Motion Pending.** The filing of a motion for a protective order prohibits disclosure or release of the materials or information sought to be protected until an order deciding the motion is final. An order deciding the motion is final after the time for filing a request for review has expired or after a decision on review is filed and served.

### **RULE 3.5 RELEASE OF CONFIDENTIAL INFORMATION WITHOUT NOTICE**

**(a) Release upon Written Waiver.** Upon written waiver by the licensed legal professional, the Bar may, without further notice to the licensed legal professional, release confidential disciplinary or incapacity information to any person or entity authorized by the licensed legal professional to receive the information.

**(b) Investigative Release.** Except as otherwise prohibited by these Rules, an order entered under Rule 3.4, court order, or other applicable law, the Bar may, without notice to a licensed legal professional, release confidential disciplinary and incapacity information as reasonably necessary to conduct an investigation, recruit counsel, or to keep a complainant advised of the status of a matter. When providing information to a complainant about the status of an incapacity matter, the information must be limited to the fact that a matter is under investigation or has been stayed or deferred.

**(c) Other Release.** Except as otherwise prohibited by these Rules, an order entered under Rule 3.4, court order, or other applicable law, when it appears the information will assist the recipient in performing the recipient's duties, the Bar may release confidential disciplinary or incapacity information related to a licensed legal professional or respondent without notice to that person as follows:

- (1) to the Client Protection Board;
- (2) to the Practice of Law Board;
- (3) to the Character and Fitness Board;
- (4) to other counsel performing duties under these Rules, including special conflicts disciplinary counsel, adjunct disciplinary counsel, and appointed incapacity counsel;
- (5) to custodians appointed under Rule 16.1;
- (6) to the Volunteer Selection Board;
- (7) to the Bar's Board of Governors or officers, as deemed reasonably necessary by Chief Disciplinary Counsel;
- (8) to any state, federal, or tribal court judicial officer if the information is relevant to the licensed legal professional's conduct before the court or to a judicial officer's reporting obligation under the Code of Judicial Conduct or other law;
- (9) to authorities in any jurisdiction authorized to investigate alleged unlawful activity;
- (10) to authorities in any jurisdiction authorized to investigate judicial or licensed legal professional misconduct or incapacity; or
- (11) to any lawyer representing the Bar in any matter.

**(d) Duty to Maintain Confidentiality.** Any recipient of information under sections (c)(1)-(7) of this Rule must maintain the confidentiality of that information. Any recipient of information under sections (c)(8)-(11) must be notified of the Bar's confidentiality obligations under these Rules.

### **RULE 3.6 RELEASE OF CONFIDENTIAL INFORMATION WITH NOTICE**

**(a) Discretionary Release.** Except as prohibited by Rule 3.4, the Chief Disciplinary Counsel may authorize

the general or limited release of any confidential information when it appears necessary to:

- (1) protect the interests of clients or other persons, the public, or the integrity of the disciplinary process or the Bar;
- (2) respond to specific inquiries about matters that are in the public domain; or
- (3) correct a false or misleading public statement.

**(b) Notice.** A respondent must be given notice of a decision to release information under this Rule before its release unless the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public or would be detrimental to the integrity of the disciplinary process or the Bar. Notice must be given seven days before release and must include a description of the information that will be released.

**(c) Finality.** A respondent may serve and file a motion for protective order under Rule 3.4 before the information is released. Otherwise, a decision to release information under this Rule is not subject to further review.

**(d) Inability to Act.** When the Chief Disciplinary Counsel is unable to act, or upon the request of the Chief Disciplinary Counsel, decisions under this Rule will be made by the Executive Director or a special conflicts disciplinary counsel assigned to the matter.

### **RULE 3.7 PUBLIC STATEMENT OF CONCERN**

**(a) Authority.** To protect members of the public from a substantial threat, the Chief Disciplinary Counsel may file a proposed statement of concern with the Clerk based on information from a pending investigation into a respondent's apparent ongoing serious misconduct not otherwise made public by these Rules. The proposed statement must not disclose information protected by Rule 3.4.

**(b) Procedure.**

- (1) A copy of the proposed statement of concern must be served on the respondent who is the subject of the statement of concern.
- (2) The respondent may file an objection with the Clerk within seven days of the service of the proposed statement of concern. The respondent must serve the objection on the Office of Disciplinary Counsel.
- (3) If a timely objection is filed, the Chief Regulatory Adjudicator determines the procedure for prompt consideration of the objection. The proposed statement of concern becomes a public statement of concern only if the Chief Regulatory Adjudicator so orders. The Chief Regulatory Adjudicator's decision is not subject to further review.
- (4) If no timely objection is filed, the proposed statement of concern becomes a public statement of concern seven days after service.

**(c) Withdrawal.** The Chief Disciplinary Counsel may withdraw a public statement of concern at any time by filing a notice of withdrawal with the Clerk. The respondent may at any time request that the Chief Regulatory Adjudicator order the public statement of concern withdrawn. The Chief Regulatory Adjudicator determines the procedure for prompt consideration of the request. If withdrawn, the public statement of concern is removed from the website maintained by the Bar for public information.

**(d) Confidentiality.** A proceeding under this Rule, including a proposed statement of concern and any documents filed in the proceeding, is confidential unless the proposed statement of concern is made public under section (b)(3) or (b)(4).

### **RULE 3.8 NOTICE OF DISCIPLINARY ACTION, RESIGNATION IN LIEU OF DISCIPLINE, INTERIM SUSPENSION, OR PLACEMENT IN INCAPACITY INACTIVE STATUS**

**(a) Notices.** The Clerk must notify and send appropriate documentation to the following entities of the imposition of a disciplinary sanction, a placement of the respondent's license in incapacity inactive status, a resignation in lieu of discipline, or the filing of a statement of concern made public under Rule 3.7:

- (1) the Supreme Court and the discipline authority or highest court in any jurisdiction where the licensed legal professional is believed to be admitted to practice law;
- (2) the chief judge of each federal district court in Washington State and the chief judge of the United States Court of Appeals for the Ninth Circuit, as appropriate for the license type;
- (3) the presiding judge of the superior court of the county in which the licensed legal professional maintained a practice, as appropriate for the license type; and
- (4) the American Bar Association National Lawyer Regulatory Data Bank.

**(b) Bar Publication and Website Notice.**

- (1) *Notice.* Notice of the imposition of any disciplinary sanction, resignation in lieu of discipline, interim suspension, information ordered published under Rule 9.3(b)(3), placement of a respondent's license in incapacity inactive status, or a statement of concern made public under Rule 3.7 must be published in the official publication of the Bar and on a website maintained by the Bar for public information. Notices should include sufficient information to adequately inform the public and the members of the Bar about any misconduct found, rules violated, and disciplinary sanction imposed. For a placement of a respondent's license in incapacity inactive status, no reference may be made to the specific incapacity. For an interim suspension, the basis of the interim suspension must be stated.
- (2) *Publication.* Notices published in the official publication of the Bar and posted on the Bar website may not be removed following publication, unless ordered by the Supreme Court or otherwise set forth in these Rules.

**RULE 3.9 MAINTENANCE OF RECORDS**

**(a) Permanent Records.** The Clerk's file, admitted exhibits, and transcripts of the proceedings are permanent records in any matter in which:

- (1) the filing of a statement of charges was authorized,
- (2) an incapacity proceeding was authorized or commenced,
- (3) a sanction was imposed,
- (4) a placement of a respondent's license in incapacity inactive status was ordered,
- (5) the respondent resigned in lieu of discipline under Rule 9.2,
- (6) a statement of concern was made public under Rule 3.7, or
- (7) a custodian was appointed under Rule 16.1.

**(b) Retention and Destruction of Complaint and Investigative Files.** Except as specified below, file materials that are not permanent records under section (a) of this Rule may be destroyed three years after the matter is closed. File materials on a matter closed after a diversion may be destroyed no sooner than five years after the closure. File materials that are not permanent records must be destroyed on the schedule set forth above on the respondent's request unless the file materials are being used in an ongoing investigation or other good cause exists for retention. File materials related to records made permanent under section (a) of this Rule, including investigative files, may be retained indefinitely in disciplinary counsel's discretion.

**(c) Retention and Destruction of Random Examination Files.** In any random examination matter under Rule 15.1 that was concluded without an investigation being ordered, the file materials relating to the matter may be destroyed three years after the matter was concluded. For any random examination matter resulting in an ordered investigation, the materials related to the random examination matter will be made part of the disciplinary investigative file. A record, limited to the name of the lawyer, LLLT, LPO, law firm, or closing firm examined or re-examined under Rule 15.1, together with the date the examination or re-examination was concluded, will be maintained for a period of seven years for the purpose of determining prior examinations under Rule 15.1(c).



### **RULE 3.10 NO RETROACTIVE EFFECT**

These Rules do not modify the public or confidential nature of information or pleadings made public or confidential under disciplinary or incapacity procedural rules in effect prior to enactment of these Rules.

## **TITLE 4 – GENERAL PROCEDURAL RULES**

### **RULE 4.1 SERVICE OF PAPERS**

**(a) General.** Whenever these Rules require service of papers or documents, service must be accomplished as provided in this Rule.

**(b) Methods of Service.**

(1) *Electronic Service.*

(A) The parties may consent in writing to electronic service of all papers or documents unless these Rules specifically provide for a different means of service. Electronic service is complete on transmission when made prior to 5:00 p.m. Pacific Time on a day that is not a Saturday, Sunday, or legal holiday. Service made on a Saturday, Sunday, legal holiday, or after 5:00 p.m. Pacific Time on any other day is deemed complete on the first day thereafter that is not a Saturday, Sunday, or legal holiday. If properly made, electronic service is presumed effective.

(B) The address for electronic service is as follows:

(i) If service is on the Office of Disciplinary Counsel, to the assigned disciplinary counsel's email address on file with the Bar, unless a different email address is designated by disciplinary counsel;

(ii) If service is on respondent or any lawyer representing the respondent, to the email address on file with the Bar, unless a different email address is provided in an answer to a statement of charges or in a notice of appearance by counsel.

(C) If a party agrees to electronic service under this Rule, the email address specified in section (b)(1)(B) of this Rule must be sufficient to receive electronic transmission of information and electronic documents.

(D) Consent to electronic service does not preclude service by other means.

(2) *Service by Mail.*

(A) If the parties do not consent to electronic service under section (b)(1) of this Rule, all papers and documents must be served by mail unless these Rules specifically provide for a different means of service. Service by mail may be accomplished by postage-prepaid mail. If properly made, service by mail is complete on the date of mailing. Service by mail is effective regardless of whether the person to whom it is addressed actually receives it.

(B) Service by mail may be by first class mail or by certified or registered mail, return receipt requested.

(C) The address for service by mail is as follows:

(i) If service is on the Office of Disciplinary Counsel, directed to the assigned disciplinary counsel at the address of the Bar, unless a different address is designated;

(ii) If service is on respondent or any lawyer representing the respondent, to the address on file with the Bar, unless a different address is provided in an answer to a statement of charges or in a notice of appearance by counsel.

(3) *Service by Delivery.* If service by mail is permitted, service may instead be accomplished by leaving the document at the address for service by mail.

(4) *Personal Service.* If personal service is required under these Rules, it must be accomplished as follows:

(A) if the respondent is found in Washington State, by personal service in the manner required for personal service of a summons in a civil action in the superior court;

- (B) if the respondent cannot be found in Washington State, service may be made either by:
  - (i) leaving a copy at the respondent's place of usual abode in Washington State with a person of suitable age and discretion then resident therein; or
  - (ii) mailing by registered or certified mail, postage prepaid, a copy addressed to the respondent at the respondent's last known place of abode, office address maintained for the practice of law, post office address, or address on file with the Bar, or to the respondent's resident agent whose name and address are on file with the Bar under APR 13(f).
- (C) if the respondent is found outside of Washington State, then by the methods of service described in (A) or (B) above.

**(c) Service on Guardian.** If there is a court-appointed guardian or guardian ad litem for a respondent, service under sections (a) and (b) of this Rule above must also be made on the guardian or guardian ad litem.

**(d) Proof of Service.**

- (1) If service is accomplished electronically or by mail, proof of service may be made by a certificate of service.
- (2) If personal service is required, proof of service may be made by affidavit or declaration of service, sheriff's return of service, or a signed acknowledgment of service.
- (3) Proof of service in all cases must be filed but need not be served.

#### **RULE 4.2 FILING; ORDERS**

**(a) Filing Generally.** Except in matters before the Supreme Court, whenever filing is required under these Rules, the document must be filed with the Clerk. Filing of documents for matters before the Supreme Court is governed by the Rules of Appellate Procedure.

- (1) *Timing.* Any document is timely filed only if it is received by the Clerk within the time permitted for filing. A document received by the Clerk after 5:00 p.m. Pacific Time or on a Saturday, Sunday, or legal holiday is deemed filed on the first day thereafter that is not a Saturday, Sunday, or legal holiday.
- (2) *Signing.* Documents filed with the Clerk must be signed by the party or person filing the document or the attorney of record for the party or person filing the document.
- (3) *Electronic Filing.* The parties should file electronically. Electronic filing may be accomplished by email or an electronic system approved by the Clerk.
- (4) *Refusal by Clerk.* The Clerk may refuse to accept for filing any document not in compliance with these Rules and must notify the parties of the refusal and the reason for the refusal.

**(b) Filing of Orders.** Any written order, decision, or ruling of the ORA must be filed with the Clerk.

**(c) Service of Orders.** The Clerk must serve any written order, decision, or ruling of the ORA on disciplinary counsel and the respondent or any lawyer representing the respondent. Unless the ORA orders otherwise, service by the Clerk should be made electronically as set forth in Rule 4.1(b)(1)(B).

**(d) Respondents Who Are Not Bar Members.** If a respondent is not licensed to practice law in Washington and does not have a mailing address or an email address on file with the Bar, the respondent must provide the disciplinary counsel or the Clerk with a mailing address and an email address to receive service of papers. In the absence of a mailing address or email address provided by the respondent, disciplinary counsel or the Clerk may serve the respondent at any reasonably ascertainable address where it appears the respondent receives mail or email.

#### **RULE 4.3 PAPERS AND DOCUMENTS IN PROCEEDINGS**

Except as otherwise provided in Titles 11 or 12, all pleadings, documents, or other papers filed in proceedings must be legibly written or typed using no smaller than 12-point font and prepared on 8½ by 11 inch paper or the electronic equivalent.

#### **RULE 4.4 COMPUTATION OF TIME**

CR 6(a) and (e) govern the computation of time under these Rules.

#### **RULE 4.5 EXTENSION OR REDUCTION OF TIME IN PROCEEDINGS**

In any proceeding, except for notices of appeal or matters pending before the Supreme Court, the ORA may, on its own initiative or on motion of a party, enlarge or shorten the time within which an act must be done in a particular case for good cause.

#### **RULE 4.6 SUBPOENA UNDER THE LAW OF ANOTHER JURISDICTION**

Upon a showing of good cause, disciplinary counsel or a regulatory adjudicator may issue a subpoena to compel the attendance of witnesses or production of documents in this state for use in disciplinary or incapacity proceedings in another jurisdiction. The person seeking the subpoena must certify that the subpoena has been approved or authorized under the law or disciplinary rules of the other jurisdiction. Service, enforcement, and challenges to a subpoena issued under this Rule are governed by the provisions of these Rules.

#### **RULE 4.7 ENFORCEMENT OF SUBPOENAS**

Any person who fails, without adequate excuse, to obey a subpoena served upon that person under these Rules may be deemed in contempt of the Washington Supreme Court. To enforce subpoenas issued under these Rules, a party must file a petition for an order to show cause with the Supreme Court. The petition must (1) be accompanied by a copy of the subpoena and proof of service; (2) state the specific manner of the lack of compliance; and (3) specify the relief sought. The person subject to the subpoena may file an answer to the petition within seven days of service. The Court considers the petition and any answer and issues an order granting or denying the relief sought.

#### **RULE 4.8 SERVICE AND FILING BY AN INMATE CONFINED IN AN INSTITUTION**

Service and filing of papers under these Rules by an inmate confined in an institution must conform to the requirements of GR 3.1.

#### **RULE 4.9 REDACTION OR OMISSION OF PERSONAL IDENTIFIERS**

The filing party is responsible for redacting or omitting from all publicly filed exhibits, documents, and pleadings the following personal identifiers: social security numbers, financial account numbers, and driver's license numbers. When it is not feasible to redact or omit a personal identifier, the filing party must seek a protective order under Rule 3.4 to have the document filed under seal.

### **TITLE 5 – REVIEW, INVESTIGATION, AND COMPLAINT PROCEDURES**

#### **RULE 5.1 INVESTIGATIVE AUTHORITY**

**(a) Authority.** Disciplinary counsel may take appropriate steps to investigate any alleged or apparent misconduct by, or incapacity to practice law of, a licensed legal professional whether disciplinary counsel learns of it by complaint or otherwise.

**(b) Submitting a Complaint.** Any person or entity may submit to the Office of Disciplinary Counsel a written complaint concerning the misconduct or incapacity to practice law of a licensed legal professional. Disciplinary counsel must review the information to determine whether an investigation or further action is warranted.

#### **RULE 5.2 COMPLAINANT CONSENT TO DISCLOSURE AND EXCEPTIONS**

**(a) Consent to Disclosure.** By submitting a complaint, the complainant consents to the following:

- (1) all information the complainant submits may be disclosed to the respondent or to any person eligible to receive information under these Rules; and
- (2) the respondent or any other licensed legal professional contacted by the complainant may disclose to disciplinary counsel any information relevant to the investigation.

**(b) Consent Does Not Extend to Other Forums.** Consent to disclosure under this Rule does not constitute a waiver of any privilege or restriction against disclosure in any other forum.

**(c) Withholding Information.** Disciplinary counsel has discretion to withhold information in whole or in part from the respondent or an individual otherwise eligible to receive it when disciplinary counsel deems it necessary to protect a privacy, safety, or other compelling interest of a complainant or other person.

**(d) Confidential Source.** If a person or entity submits a complaint and asks to be treated as a confidential source, the person's identity may not be disclosed during an investigation or proceeding unless ordered by a regulatory adjudicator as necessary for the respondent to conduct a proper defense. A confidential source is not entitled to the notification required under Rule 5.12.

### **RULE 5.3 REQUEST FOR PRELIMINARY RESPONSE**

Disciplinary counsel may request a written preliminary response from a respondent to information obtained under Rule 5.1. If disciplinary counsel requests only the respondent's written preliminary response and does not request specific information or specific records, files, or accounts, the request is not subject to objection under Rule 5.6(b).

### **RULE 5.4 DEFERRAL BY DISCIPLINARY COUNSEL**

**(a) Deferral.** Disciplinary counsel may defer action under Rule 5.1(b) or investigation under this Title:

- (1) if it appears that the allegations are related to pending civil or criminal litigation;
- (2) if it appears that the respondent lacks the physical or mental capacity to respond;
- (3) if an incapacity proceeding under Title 8 is pending; or
- (4) for other good cause.

When making a deferral decision, disciplinary counsel considers whether deferral will endanger the public.

**(b) Notice and Review.** Disciplinary counsel must inform the respondent and may inform the complainant of a deferral decision. A deferral decision is not subject to review.

### **RULE 5.5 VEXATIOUS COMPLAINANTS**

**(a) Definition.** A "vexatious complainant" is a complainant who has engaged in a frivolous or harassing course of conduct relating to the submission of complaints that so departs from a reasonable standard of conduct as to render the complainant's conduct abusive to the disciplinary system or participants in the disciplinary system.

**(b) Motion.** Either disciplinary counsel or a respondent may file a motion with the ORA to declare the complainant vexatious. The filing of a motion does not suspend a respondent's duties under these Rules. The moving party may request a temporary order stating that disciplinary counsel need not accept, acknowledge, review, or investigate complaints from the alleged vexatious complainant.

**(c) Requirements of Motion.** The motion must set forth with particularity the facts establishing that the complainant's conduct is vexatious and identify the relief sought.

**(d) Service.** The moving party must serve a copy of the motion on the complainant. If the motion is filed by a respondent, the motion must also be served on disciplinary counsel. Disciplinary counsel may notify any current or former respondent against whom a complaint has been filed by the alleged vexatious complainant of the motion.

**(e) Response to Motion.** The complainant or disciplinary counsel may file a written response no later than 20 days after service of the motion.

**(f) Temporary Order.** During the pendency of the motion, the ORA may issue a temporary order stating

that disciplinary counsel need not accept, acknowledge, review, or investigate complaints from the alleged vexatious complainant.

**(g) Order.** If the ORA finds that the complainant's conduct is vexatious, the ORA must issue findings of fact and a separate order relieving disciplinary counsel of the obligation to accept, acknowledge, review, or investigate complaints from the vexatious complainant and any other necessary and proper relief. The relief ordered must be no broader than necessary to prevent the harassment and abuse found. If the ORA finds that the complainant's conduct is not vexatious, the ORA must issue an order denying the motion.

**(h) Confidentiality.** The fact that a complainant has been determined to be a vexatious complainant and the order are public information. All other proceedings and documents related to a motion under this Rule are confidential.

**(i) Review by Court.** The moving party, the complainant, or disciplinary counsel may seek review of the ORA's order by filing a petition for discretionary review under the procedures set forth in Rule 12.4. No other appeal of the order is allowed. Information made confidential under these Rules remains confidential in any Supreme Court proceeding.

### **RULE 5.6 INVESTIGATIVE INQUIRIES AND OBJECTIONS**

**(a) General Investigative Inquiries.** Upon inquiry or request by disciplinary counsel, any licensed legal professional must:

- (1) furnish in writing, or orally if requested, a full and complete response to inquiries and questions;
- (2) permit inspection and copying of requested records, files, and accounts;
- (3) furnish copies of requested records, files, and accounts;
- (4) furnish written releases or authorizations if needed to obtain documents or information from third parties, including requests directed to a respondent under Rule 2.12(d); and
- (5) comply with investigatory subpoenas under Rule 5.7.

**(b) Objections.** Within 30 days of service of a written investigative inquiry or request under section (a) of this Rule, a licensed legal professional may serve a written objection on disciplinary counsel. An objection is reviewed by the ORA under Rule 5.8.

### **RULE 5.7 INVESTIGATIVE SUBPOENAS AND DEPOSITIONS**

**(a) Procedure.** Before filing a statement of charges, disciplinary counsel may issue a subpoena for a deposition or to obtain documents without a deposition. CR 30 and 31 provide guidance for depositions under this Rule. The respondent need not be given notice of a subpoena issued under section (b) of this Rule.

**(b) Subpoenas.** Disciplinary counsel may issue a subpoena to compel a respondent or a witness to (1) attend a deposition; (2) produce books, documents, or other evidence at a deposition; or (3) produce books, documents, or other evidence without a deposition. CR 45 provides guidance for subpoenas issued under this Rule, but the notice required by CR 45(b)(2) need not be given. Subpoenas may be enforced as set forth in Rule 4.7.

**(c) Objections to Subpoenas and Deposition Requests or Inquiries.**

- (1) *Objections.* For good cause, the subject of a subpoena may object to an investigative subpoena or a request or inquiry by disciplinary counsel during a deposition under this Rule. Any such objection must be in writing or on the record and is reviewed under Rule 5.8.
- (2) *Timeliness of Objections.* An objection to a subpoena under this Rule is timely if made prior to the date specified for production or the date of the deposition. An objection to a request or inquiry made by disciplinary counsel during the course of a deposition is timely only if made in response to the request or inquiry during the deposition. A timely objection suspends any duty to respond to the subpoena or to the request or inquiry until a ruling has been made.

## **RULE 5.8 REVIEW OF OBJECTIONS**

**(a) Review Authorized.** On motion, the ORA may hear the following matters:

- (1) Objections to written investigative inquiries under Rule 5.6 and
- (2) Objections to investigative subpoenas or disciplinary counsel inquiries or requests made at a deposition under Rule 5.7.

**(b) Procedure.**

- (1) The person objecting must file a motion seeking review of the objection within 15 days of the date of the objection. If no motion is filed within 15 days, the objection is deemed abandoned.
- (2) A motion seeking review of an objection must clearly and specifically set out what is being objected to and the basis for the objection.
- (3) In considering an objection to a written investigative inquiry, subpoena, or disciplinary counsel inquiry or request made at a deposition under this Rule, the ORA should consider the following factors:
  - (A) the relevance and necessity of the information to the investigation;
  - (B) whether the information requested by the inquiry is likely to lead to information relevant to the investigation;
  - (C) the availability of the information from other sources;
  - (D) the sensitivity of the information and potential impact on a client, including the client's right to effective assistance of counsel;
  - (E) the expressed desires of a client;
  - (F) whether the objection was made before the due date of the request or inquiry; and
  - (G) whether the burden of producing the requested information outweighs the likely utility of the information to the investigation.
- (4) In ruling on an objection under this Rule, the ORA may deny the objection, or sustain the objection in whole or in part, and may establish terms or conditions under which specific information may be withheld, provided, maintained, or used. When appropriate, a ruling may take the form of, or may accompany, a protective order under Rule 3.4.
- (5) Review of a ruling under this Rule may be sought under Rule 11.10.

## **RULE 5.9 COOPERATION**

**(a) Duty to Respond.** A licensed legal professional, whether or not a respondent as defined in Rule 2.12(a), must promptly respond to requests, inquiries, and subpoenas from disciplinary counsel, subject to Rules 2.13, 5.6, and 5.7.

**(b) Noncooperation Deposition.** If a licensed legal professional has not complied with any request made under this Title for more than 30 days from the date of the request, disciplinary counsel may notify the licensed legal professional that failure to comply within 10 days may result in the licensed legal professional's deposition or subject the licensed legal professional to interim suspension under Rule 7.2. Ten days after this notice, disciplinary counsel may serve the licensed legal professional with a subpoena for a deposition. Any deposition conducted after the 10-day period and necessitated by the licensed legal professional's continued failure to cooperate may be conducted at any place in Washington State.

**(c) Costs and Expenses.**

- (1) A licensed legal professional who has been served with a subpoena under this Rule is liable for the actual costs of the deposition, including but not limited to service fees, court reporter fees, travel expenses, the cost of transcribing the deposition if ordered by disciplinary counsel, and a reasonable attorney fee of \$750.
- (2) The procedure for assessing costs and expenses is as follows:
  - (A) Disciplinary counsel applies to the ORA by itemizing the costs and expenses and stating the

reasons for the deposition.

(B) The licensed legal professional has 10 days to respond to disciplinary counsel's application.

(C) The ORA by order assesses appropriate costs and expenses. The order assessing costs and expenses is not subject to further review.

**(d) Grounds for Discipline.** A licensed legal professional's failure to cooperate fully and promptly with any requests, inquiries, or subpoenas as required by these Rules is also grounds for discipline.

#### **RULE 5.10 REPORTING INVESTIGATIONS TO AN AUTHORIZATION PANEL**

**(a) Request to an Authorization Panel.** Disciplinary counsel may file a request for an order authorizing the filing of a statement of charges or the initiation of incapacity proceedings. The request must set forth the basis for the disciplinary or incapacity proceeding. Disciplinary counsel must file the request with the Clerk and serve the request on the respondent.

**(b) Response.** A respondent may file with the Clerk a written response to disciplinary counsel's request within 15 days of service of the request. The respondent must serve any response on disciplinary counsel.

**(c) Reply.** Disciplinary counsel may file with the Clerk a reply to the respondent's response within five days of service of the response. Disciplinary counsel must serve any reply on the respondent.

**(d) Standard.** An Authorization Panel must authorize the filing of a statement of charges if, based on existing law or a good faith argument for an extension of existing law, sufficient information exists whereby a reasonable trier of fact could find one or more of the alleged rule violations by a clear preponderance of the evidence, even if that evidence is disputed. The standard for authorization to initiate incapacity proceedings is set forth in Rule 8.2(a).

**(e) Order.** After considering materials filed by disciplinary counsel and the respondent under this Rule, an Authorization Panel issues an order:

- (1) authorizing the filing of a statement of charges or the initiation of incapacity proceedings, as requested by disciplinary counsel;
- (2) denying the request to file a statement of charges, with prejudice; or
- (3) denying the request to file a statement of charges or to initiate incapacity proceedings, without prejudice to the filing of a subsequent request based on the presentation of additional information.

An order denying the request must include an explanation of the reasons for the denial and the determination on prejudice. Any order denying the request with prejudice must be transmitted by the Clerk to the Court, where it will be circulated among the justices for informational purposes.

**(f) Finality.** The Authorization Panel's order is not subject to review.

#### **RULE 5.11 CLOSURE BY DISCIPLINARY COUNSEL**

**(a) Closure Without Investigation.** Disciplinary counsel may close a complaint after a determination that no investigation or further action is warranted.

**(b) Closure of Investigation.** Disciplinary counsel may close an investigation and any related complaints after a determination that no further action is warranted.

**(c) Finality.** Closure under section (a) or (b) of this Rule is not subject to review. If disciplinary counsel receives information about a closed matter, disciplinary counsel may consider that information to determine what, if any, action is appropriate.

**(d) Closure Not Required.** None of the following alone requires disciplinary counsel to close a complaint or investigation: the unwillingness of a complainant to cooperate with disciplinary counsel, the withdrawal of a complaint, a compromise between the complainant and the respondent, or restitution by the respondent.

## **RULE 5.12 NOTIFICATION**

**(a) Closing.** Disciplinary counsel must notify the respondent and complainant after a complaint or an investigation has been closed under Rule 5.11.

**(b) Other Notification.** Disciplinary counsel must notify the respondent and complainant after the results of an investigation have been reported to an Authorization Panel under Rule 5.10(a). Disciplinary counsel must notify the respondent and may notify the complainant that a matter has been deferred under Rule 5.4. Disciplinary counsel must notify the complainant after a matter has been diverted under Title 6 or resolved without a hearing under Title 9.

## **TITLE 6 – DIVERSION**

### **RULE 6.1 GENERAL**

**(a) Definition.** Diversion is a process that may resolve a matter without further investigation or proceedings and without a public disciplinary sanction. Disciplinary counsel may offer diversion to a respondent who commits a less serious violation of the applicable rules of professional conduct. Disciplinary counsel and respondent enter into a contract setting forth conditions that respondent must satisfy. Successful completion of a diversion contract results in closure of a matter with no further action.

**(b) Timing.** Disciplinary counsel may offer diversion to a respondent at any time but no later than 60 days after serving a statement of charges.

### **RULE 6.2 LESS SERIOUS MISCONDUCT**

Less serious misconduct is conduct not warranting a sanction that restricts a respondent's license to practice law. Conduct is not ordinarily considered less serious misconduct if the misconduct:

- (a)** involves the misappropriation of funds;
- (b)** results in or is likely to result in substantial prejudice to a client or other person;
- (c)** is of the same nature as misconduct for which the respondent has been sanctioned or admonished in the last five years;
- (d)** involves dishonesty, deceit, fraud, or misrepresentation;
- (e)** constitutes a felony as defined in Rule 1.3(f);
- (f)** is part of a pattern of similar misconduct; or
- (g)** involves knowing and repeated practice outside the scope of the respondent's license to practice law.

### **RULE 6.3 FACTORS FOR DIVERSION**

If the misconduct is less serious misconduct under Rule 6.2, disciplinary counsel considers the following factors in determining whether to offer diversion to a respondent:

- (a)** whether the sanction for the alleged violations is likely to be no more severe than a reprimand;
- (b)** whether participation in diversion is likely to improve the respondent's future professional conduct and protect the public; and
- (c)** whether the respondent previously participated in diversion.

### **RULE 6.4 DIVERSION CONTRACT**

**(a) Negotiation.** Disciplinary counsel and the respondent negotiate a diversion contract, the terms of which are tailored to the individual circumstances.

**(b) Requirements.** A diversion contract must:

- (1) be signed by the respondent and disciplinary counsel;
- (2) set forth the terms and conditions of the plan for the respondent and, if appropriate, identify the use of a monitor and the monitor's responsibilities. If a monitor is assigned, the contract must



include respondent's limited waiver of confidentiality permitting the monitor to make appropriate disclosures to fulfill the monitor's duties under the contract;

- (3) include a statement in substantially the following form: "This diversion contract is a compromise and settlement of one or more disciplinary matters. Except as specifically authorized by the Rules for Discipline and Incapacity or by agreement, it is not admissible in any court, administrative, or other proceedings. It may not be used as a basis for establishing liability to any person who is not a party to this contract";
- (4) provide for oversight of fulfillment of the contract terms. Oversight includes reporting any alleged breach of the contract to disciplinary counsel;
- (5) provide that the respondent will pay all costs incurred in connection with the contract. The contract may also provide that the respondent will pay the costs associated with the matter to be diverted;
- (6) include a specific acknowledgment that a material violation of a term of the contract may result in termination of the contract under Rule 6.7(b); and
- (7) include a specific acknowledgment that the diversion contract and the supporting declaration are subject to release under Rule 3.6.

**(c) Optional Terms.** Diversion may include:

- (1) fee arbitration;
- (2) arbitration;
- (3) mediation;
- (4) office management assistance;
- (5) assistance programs for licensed legal professionals;
- (6) psychological and behavioral counseling;
- (7) monitoring;
- (8) restitution;
- (9) continuing legal education programs;
- (10) a plan for the respondent to transition out of practice;
- (11) ethics consultation; or
- (12) any other program or corrective course of action agreed to by disciplinary counsel and the respondent to address the respondent's misconduct.

**(d) Limitations.** A diversion contract does not create any enforceable rights, duties, or liabilities in any person not a party to the diversion contract or create any such rights, duties, or liabilities outside of those stated in the diversion contract or provided by this Title.

**(e) Amendment.** The contract may be amended at any time by written agreement of the respondent and disciplinary counsel.

#### **RULE 6.5 DECLARATION SUPPORTING DIVERSION**

A diversion contract must be supported by a declaration approved by disciplinary counsel and signed by the respondent setting forth the respondent's misconduct related to the matter or matters to be diverted.

#### **RULE 6.6 STATUS OF INVESTIGATION OR PROCEEDINGS DURING DIVERSION**

After the respondent and disciplinary counsel execute a diversion contract, the investigation or proceeding is stayed pending completion of diversion.

#### **RULE 6.7 COMPLETION OR TERMINATION OF DIVERSION**

**(a) Successful Completion.** Upon disciplinary counsel's determination that diversion has been successfully completed, any investigation that was stayed pending completion of diversion must be closed under Rule 5.11. Any proceeding that was stayed pending completion of diversion must be dismissed by order

of a regulatory adjudicator upon notice from disciplinary counsel that the diversion was successfully completed. A proceeding dismissed under this Rule becomes final without entry of a final order under Rule 13.1(a). A respondent who successfully completes diversion cannot be disciplined based solely on the same facts and violations set forth in the diversion contract and respondent's declaration.

**(b) Termination for Material Breach.** If disciplinary counsel determines that a respondent has materially breached the contract, disciplinary counsel may terminate the diversion. Disciplinary counsel must notify the respondent of termination from diversion. Unless review is sought under section (c) of this Rule, disciplinary counsel resumes any matter that was stayed.

**(c) Review by the ORA.** A regulatory adjudicator reviews disputes about fulfillment or material breach of the terms of the contract on the request of the respondent or disciplinary counsel. The request must be filed with the Clerk within 15 days of notice to the respondent of the determination for which review is sought. A timely request for review stays further action on the matter until the regulatory adjudicator rules on the request. Determinations by a regulatory adjudicator under this section are not subject to further review.

## **RULE 6.8 CONFIDENTIALITY**

Absent consent of the respondent, the fact of diversion and the diversion documents are confidential and must not be disclosed except as follows:

**(a) Notification to Complainant.** After disciplinary counsel and the respondent execute a diversion contract, disciplinary counsel must notify the complainant that a matter has been diverted.

**(b) Notification to Persons Providing Services under the Contract.** The diversion contract and declaration may be disclosed to individuals or entities who will provide services or administration in connection with the diversion contract.

**(c) Following Material Breach.** If diversion is terminated due to a material breach, the diversion contract and declaration are admissible into evidence in any disciplinary or incapacity proceeding regarding the matter that had been diverted.

**(d) Discretionary Release.** Release of the diversion contract and supporting declaration may be authorized under Rule 3.6 provided that the respondent is given notice of the decision to make a discretionary release and a reasonable opportunity to seek a protective order under Rule 3.4.

## **TITLE 7 – INTERIM SUSPENSION**

### **RULE 7.1 DEFINITION**

An interim suspension is a suspension for an indefinite period of time for one or more of the reasons set forth in Rule 7.2. An interim suspension remains in effect until terminated as provided in Rule 7.5. An interim suspension is not a disciplinary sanction.

### **RULE 7.2 GROUNDS FOR INTERIM SUSPENSION**

**(a) Risk to Public.** During the pendency of any disciplinary investigation or proceeding, disciplinary counsel may petition the Court for, and the Court may order, an interim suspension if it appears that a respondent's continued practice of law poses a substantial threat of serious harm to the public.

**(b) Recommendation for Disbarment.** Following entry of an Appeal Panel decision recommending a respondent's disbarment, disciplinary counsel must petition the Court for an interim suspension. However, if the decision recommending disbarment is not appealed and becomes final or if the respondent is otherwise suspended, disciplinary counsel need not file the petition or may withdraw a petition already filed. In ruling on the petition, the Court must order an interim suspension unless the respondent shows by a clear preponderance of the evidence that the respondent's continued practice of law will not be detrimental to the purposes of ensuring the integrity of the legal profession and protecting the public.

**(c) Failure to Cooperate.** When a licensed legal professional has failed, without good cause, to comply with an obligation to appear or provide information or documents under Rules 5.3, 5.6, 5.7, 5.9, 8.2(d), 8.2(f)(6), 8.4(e), 8.4(f)(6), or 15.2, disciplinary counsel may petition the Court for an interim suspension. The Court may order an interim suspension if it finds that the respondent has so failed to comply. If a timely objection under Rule 5.8 to an inquiry, request, or subpoena has been asserted or a timely motion for review of an objection is pending, a petition for interim suspension under this section may not be filed until the decision is final.

**(d) Conviction of a Felony.** If a licensed legal professional is convicted of a felony, disciplinary counsel must petition the Court for an interim suspension. A petition to the Supreme Court for interim suspension under this Rule must include a copy of any available document establishing the fact of the conviction. The Court must order an interim suspension unless the Court finds that the crime did not constitute a felony or that the respondent is not the individual convicted.

(1) *Definition of Conviction.* Conviction for the purposes of this section is defined in Rule 1.3(f).

(2) *Definition of Felony.* Felony means (A) any crime denominated as a felony in the jurisdiction in which it is committed or (B) any crime that would be classified as a felony in Washington State even if not denominated as a felony in the jurisdiction where the crime was committed.

(3) *Reporting of Felony Conviction.* When a licensed legal professional is convicted of a felony, the licensed legal professional must report the conviction to the Office of Disciplinary Counsel within 30 days of the conviction.

(4) *Statement of Charges.* Disciplinary counsel must also file a statement of charges regarding the licensed legal professional's felony conviction. A petition for interim suspension under this section may be filed before the statement of charges.

**(e) Failure to Comply with Probation.** When a licensed legal professional has failed, without good cause, to comply with an obligation imposed by a probation order under Rule 13.6, disciplinary counsel may petition the Court for an interim suspension. The Court may order an interim suspension if it finds that the respondent has so failed to comply.

### **RULE 7.3 INTERIM SUSPENSION PROCEDURE**

**(a) Petition.** An interim suspension proceeding commences when disciplinary counsel files a petition for interim suspension with the Court. A petition must set forth the grounds for the interim suspension and may be supported by argument, documents, and declarations filed with the petition. A petition may be based on one or more of the grounds set forth in Rule 7.2. A copy of the petition must be personally served on the respondent and proof of service filed with the Court.

**(b) Answer to Petition and Reply.** The respondent may file an answer to the petition. An answer may be supported by argument, documents, and declarations filed with the answer. The answer must be filed with the Court and served on disciplinary counsel within 10 days of service of the petition. Disciplinary counsel's reply, if any, must be filed with Court and served on the respondent within 7 days of service of the answer. Proof of service must be filed with the Court.

**(c) Confidentiality.** When a party identifies information or documents that are otherwise confidential under these Rules, the Court must take measures to maintain the confidentiality of the information or documents in accordance with the confidentiality provisions of Rule 3.3(b).

**(d) Consideration.** The Supreme Court decides a petition without oral argument, unless the Court orders otherwise. Either party may request oral argument at the time the petition or answer is filed. If a request for oral argument is granted, the Supreme Court Clerk will notify disciplinary counsel and the respondent. The argument will be held on the date and time directed by the Supreme Court Clerk.

**(e) Expedited Review.** Petitions seeking interim suspension under this Title receive expedited consideration, ordinarily no later than seven days from the deadline for filing of a reply or, if oral argument is ordered under section (d) of this Rule, the date set for an oral argument.

**(f) Procedure During Court Recess.** When a petition seeking interim suspension under this Title is filed during a recess of the Supreme Court, the Chief Justice, the Associate Chief Justice, or the senior Justice under SAR 10 may rule on the petition for interim suspension, subject to review by the full Court on motion for reconsideration.

**(g) Order.** The Court decides a petition by an order granting or denying an interim suspension. An order granting interim suspension must state the section of Rule 7.2 that forms the basis for the interim suspension. An interim suspension is effective on the date set by the Supreme Court's order, which will ordinarily be seven days after the date of the order. If no date is set, an interim suspension is effective seven days after the date of the Court's order.

**(h) Duties on Interim Suspension.** A licensed legal professional whose license is suspended under this Rule is subject to all the duties and restrictions in Title 14 of these Rules.

#### **RULE 7.4 STIPULATION TO INTERIM SUSPENSION**

At any time, a respondent and disciplinary counsel may stipulate to an interim suspension of the respondent's license during the pendency of any investigation or proceeding. A stipulation must set forth a factual basis for the interim suspension for one or more of the reasons set forth in Rule 7.2. A stipulation is filed with the Supreme Court for expedited consideration and entry of an appropriate interim suspension order. Stipulations under this Rule are public upon filing with the Court except that information or documents identified as confidential under these Rules remain so and the Court must take measures to maintain the confidentiality of the information or documents.

#### **RULE 7.5 TERMINATION OF INTERIM SUSPENSION**

**(a) Motion by Respondent.**

(1) *Motion and Answer.* A respondent may at any time file a motion to terminate an interim suspension. The motion should make a showing that the basis for the interim suspension no longer exists or for other good cause to terminate the interim suspension.

(2) *Court Action.* The procedures for filing, service, and consideration of a motion to terminate an interim suspension are governed by RAP 17.4.

**(b) Notification from Disciplinary Counsel.** Upon notice from disciplinary counsel that the conditions for termination of the interim suspension have been satisfied or that the basis for the interim suspension no longer exists, the Court may issue an order terminating the interim suspension.

**(c) Agreed Terminations.** If the respondent and disciplinary counsel agree to termination of an interim suspension, the Court may issue an order terminating the interim suspension upon the filing of a joint motion for termination.

**(d) Order of Termination.** The Court's order terminating an interim suspension must state that reinstatement is conditioned upon compliance with the procedures for reinstatement from suspension as set forth in the Bar's Bylaws or applicable court rules.

### **TITLE 8 – INCAPACITY PROCEEDINGS**

#### **RULE 8.1 INCAPACITY INACTIVE STATUS**

**(a) Definition.** A respondent's license may be placed in incapacity inactive status following an adjudicative determination that a respondent lacks the mental or physical capacity to practice law, respond to a disciplinary investigation, or defend a disciplinary proceeding, or for any of the reasons specified in Rule 8.5. Placement in incapacity inactive status is not discipline.

**(b) Supreme Court Final Order.** The Supreme Court's final order in an incapacity proceeding is an order or opinion that places a respondent's license in incapacity inactive status, dismisses the matter, or otherwise concludes the proceeding. Except as otherwise provided in these Rules, upon entry of the Court's

final order, the matter is not subject to further review under these Rules. A placement of a respondent's license on incapacity inactive status is effective on the date of the Supreme Court's order or opinion. After the final order is issued, the ORA or the Court may hear and decide post-judgment issues authorized by these Rules. A motion for reconsideration under Rule 12.9 does not stay the judgment or delay the effective date of a final order unless the Court enters a stay.

## **RULE 8.2 INCAPACITY PROCEEDINGS BASED ON DISCIPLINARY COUNSEL'S INVESTIGATION**

**(a) Incapacity Proceedings Ordered by Authorization Panel.** Unless Rule 8.5 applies, 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 matter. If, after an investigation, there is evidence sufficient to warrant an adjudicative determination of the respondent's capacity to practice law, then disciplinary counsel reports the matter to an Authorization Panel using the procedures set forth in Rule 5.10. Subject to Rules 5.2(d) and 3.4, the respondent and any guardian or guardian ad litem appointed for the respondent must be provided with a complete copy of disciplinary counsel's report. The Authorization Panel must issue an order authorizing disciplinary counsel to initiate an incapacity proceedings if it appears there is reasonable cause to believe that the respondent lacks the mental or physical capacity to practice law. Any pending disciplinary investigations may be deferred under Rule 5.4.

### **(b) Initial Pleadings.**

- (1) *Statement of Alleged Incapacity.* Disciplinary counsel files a statement of alleged incapacity with the Clerk after the Authorization Panel issues an order authorizing the initiation of incapacity proceedings. The statement of alleged incapacity must set forth facts sufficient to inform the respondent of the basis for the allegation of incapacity and state that the issue to be decided is whether the respondent lacks the mental or physical capacity to practice law. The incapacity proceedings commence upon the filing of the statement of alleged incapacity. The statement of alleged incapacity must be personally served on the respondent or any guardian or guardian ad litem.
- (2) *Response to Statement of Alleged Incapacity.* Any response to the statement of alleged incapacity must be filed within 30 days after service or after counsel is appointed under Rule 8.6, whichever is later.

### **(c) Placement in Interim Incapacity Inactive Status.**

- (1) *Procedure.* When an Authorization Panel authorizes the initiation of incapacity proceeding, disciplinary counsel must file with the Supreme Court a petition to place the respondent's license in interim incapacity inactive status unless the respondent's license has already been placed in this status. The procedures of Rule 7.3 govern the proceedings under this section, except that the respondent must be represented by counsel as provided by Rule 8.6.
- (2) *Standard.* The Court must order that the respondent's license be placed in interim incapacity inactive status unless the respondent shows by a clear preponderance of the evidence that the respondent's continued practice of law will not be detrimental to the purposes of ensuring the integrity of the legal profession and protecting the public.
- (3) *Duration of Interim Incapacity Inactive Status.* Unless the Supreme Court orders otherwise, when a respondent's license is placed in interim incapacity inactive status under this Rule, the license remains in that status until a hearing decision becomes final under Rule 8.1(b) or until after all appellate proceedings have concluded, whichever is later.

### **(d) Health Records, Releases, and Examination.**

- (1) *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.

(2) *Order Limiting Scope or Extending Time.* Upon motion by respondent, the hearing adjudicator may issue an order limiting the scope of the releases or authorizations or extend the time for providing the releases or authorizations for good cause shown.

(3) *Independent Medical Examination.* Upon motion by disciplinary counsel, the hearing adjudicator may order a respondent to submit to examinations of the respondent's physical or mental health condition. Examinations are conducted by a physician or by a mental health professional, as defined by RCW Title 71. Unless waived by the parties, an examiner must submit a written report of the examination, including the results of any tests administered and any diagnoses, to disciplinary counsel and the respondent's counsel. The report is admissible at the incapacity hearing. The Bar pays the expenses of independent medical examinations and reports ordered under this Rule.

**(e) Failure to Appear or Cooperate.** If a respondent fails to appear or cooperate with any order or duty under this Rule, disciplinary counsel may petition the Supreme Court for the respondent's interim suspension under Rule 7.2(c). The procedures of Title 7 apply subject to the confidentiality provisions of Rule 3.3(b)(5).

**(f) Procedures for Incapacity Hearing.**

(1) *Not Disciplinary Proceedings.* Incapacity proceedings under this Title are not disciplinary proceedings.

(2) *Procedural Rules.* Except as specified or when inconsistent with the purposes of this Title, proceedings under this Rule are conducted using the procedural rules for disciplinary proceedings.

(3) *Case Caption.* The respondent's initials are to be used in the case caption rather than the respondent's full name.

(4) *Scheduling Conference.* By order entered on the initiative of the hearing adjudicator or on motion of a party, the hearing adjudicator may order a scheduling conference to consider the setting of the hearing date and appropriate prehearing deadlines, the entry of a prehearing scheduling order, and other matters that may aid in the disposition of the proceeding.

(5) *Burden and Standard of Proof.* Disciplinary counsel has the burden of proof by a clear preponderance of the evidence.

(6) *Duty to Appear.* The respondent must appear at the incapacity hearing. Failure to attend the hearing, without good cause, may be grounds for interim suspension.

**(g) Hearing Decision.** A hearing adjudicator's decision must be in the form of written findings of fact, conclusions of law, and recommendation. If the hearing adjudicator finds that the respondent lacks the capacity to practice law, the hearing adjudicator recommends that the respondent's license be placed in incapacity inactive status. If the hearing adjudicator finds the evidence is insufficient to prove the respondent lacks the capacity to practice law, the hearing adjudicator recommends dismissal of the incapacity proceeding. Except as specified in this Rule, the hearing decision is governed by the procedures of Rule 10.15.

**(h) Transmittal to the Court.** If no party files a notice of appeal of a hearing decision under section (g) within the time permitted by Rule 8.7, the Clerk transmits a copy of the hearing decision to the Supreme Court for entry of a final order under Rule 8.1(b) or other appropriate order.

**RULE 8.3 INCAPACITY PROCEEDINGS BASED ON RESPONDENT'S ASSERTION**

**(a) Incapacity Proceeding Ordered after Respondent's Assertion.** If, during the course of a disciplinary investigation or proceeding, a respondent asserts a lack of mental or physical capacity to respond to the disciplinary investigation or defend the disciplinary proceeding, or to assist counsel in responding to the

disciplinary investigation or defending the disciplinary proceeding, a regulatory adjudicator or the Supreme Court must order the initiation of incapacity proceedings. If the Court issues the order, it refers the matter to the ORA for further proceedings under this Rule.

**(b) Method of Assertion.** The respondent must serve a written assertion on disciplinary counsel or make the assertion on the record at a deposition or hearing. The assertion must be filed with the Clerk or, if the matter is pending before the Supreme Court, with the Court.

**(c) Contents of Order; Advisement; Effective Date; Notice.**

- (1) *Contents of Order.* The order under section (a) of this Rule must state that the issues to be determined are whether the respondent has the mental or physical capacity to respond to a disciplinary investigation or defend a disciplinary proceeding, or to assist counsel in responding to a disciplinary investigation or defending a disciplinary proceeding.
- (2) *Advisement.* The order must include a written advisement substantially in the following form:
  - (A) that making the assertion will result in placement of the respondent's license in interim incapacity inactive status on the effective date of the order and the respondent will be ineligible to practice law;
  - (B) that the respondent will be required to provide medical documentation to support the assertion within 30 days of the effective date of the order for incapacity proceedings;
  - (C) that the respondent may be required to furnish written releases and authorizations for additional medical, psychological, or psychiatric records relevant to the assertion;
  - (D) that the respondent may be required to submit to an independent medical examination;
  - (E) that the respondent will have the burden of proving by a preponderance of the evidence the incapacity in the proceeding;
  - (F) that any disciplinary proceeding pending against the respondent will be stayed during the incapacity proceeding;
  - (G) that disciplinary counsel has the discretion to defer any pending disciplinary investigation;
  - (H) that counsel will be appointed for the respondent for the incapacity proceeding and any disciplinary investigation that is not deferred while incapacity proceedings are pending, and that the respondent will be deemed to have consented to appointment of counsel at the Bar's expense; and
  - (I) that the respondent's failure to appear or cooperate with any order or duty under this Rule, or failure to cooperate with counsel, may result in disciplinary counsel filing a dismissal motion as provided in Rule 8.3(g).
- (3) *Effective Date of Order.* An order commences the incapacity proceeding and is effective seven days after the date of the order, unless the Court or regulatory adjudicator orders an earlier effective date.
- (4) *Notice to Respondent.* The order serves as notice to respondent of the issues to be adjudicated. Disciplinary counsel need not file a statement of alleged incapacity.

**(d) Effect of Incapacity Proceeding on Pending Disciplinary Matters.** Pending the outcome of the incapacity proceeding, the regulatory adjudicator or the Supreme Court must stay any disciplinary proceeding pending against the respondent. Disciplinary counsel may defer action as provided in Rule 5.4.

**(e) Interim Incapacity Inactive Status.**

- (1) *Immediate Placement.*
  - (A) *Order Entered by Regulatory Adjudicator.* When a regulatory adjudicator orders an incapacity proceeding, disciplinary counsel must transmit the order to the Supreme Court after the order becomes effective under section (c)(3) of this Rule. On receipt of the order, the Court must order that the respondent's license be placed in interim incapacity inactive status.
  - (B) *Order Entered by Supreme Court.* When the Supreme Court orders an incapacity proceeding, it also must order that the respondent's license be placed in interim incapacity inactive status

as of the effective date of the order.

- (2) *Duration of Interim Incapacity Inactive Status.* Unless the Supreme Court orders otherwise, a respondent whose license is placed in interim incapacity inactive status under this Rule remains in that status until the incapacity proceeding is terminated under section (g) of this Rule, a hearing decision becomes final under Rule 8.1(b).

**(f) Health Records, Releases, and Examination.**

- (1) *Duty to Provide Records within 30 Days.* The respondent must provide disciplinary counsel with medical, psychological, or psychiatric records sufficient to reasonably support the assertion within 30 days of the effective date of the order for incapacity proceedings.
- (2) *Duty to Provide Release and Records on Request.* 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.
- (3) *Order Limiting Scope or Extending Time.* Upon motion by respondent, the hearing adjudicator may issue an order limiting the scope of the releases or authorizations or extend the time for providing the releases or authorizations for good cause shown.
- (4) *Independent Medical Examination.* Upon motion by disciplinary counsel, the hearing adjudicator may order a respondent to submit to examinations of the respondent's physical or mental health condition. Examinations are conducted by a physician or by a mental health professional, as defined by RCW Title 71. Unless waived by the parties, an examiner must submit a written report of the examination, including the results of any tests administered and any diagnoses, to disciplinary counsel and the respondent's counsel. The report is admissible at the incapacity hearing. The Bar pays the expenses of independent medical examinations and reports ordered under this Rule.

**(g) Failure to Appear or Cooperate.** If the respondent fails to appear or cooperate with any order or duty under this Rule, disciplinary counsel may file a motion to dismiss the incapacity proceeding and resume any disciplinary proceedings that have been stayed. The hearing adjudicator must grant the motion absent compelling justification for the failure to appear or cooperate. An order granting the motion is without prejudice to initiation of incapacity proceedings under Rules 8.2(a) or 8.4(a).

**(h) Procedures for Incapacity Hearing.**

- (1) *Not Disciplinary Proceedings.* An incapacity proceeding under this Title is not a disciplinary proceeding.
- (2) *Procedural Rules.* Except as specified or when inconsistent with the purposes of this Title, proceedings under this Rule are conducted using the procedural rules for disciplinary proceedings.
- (3) *Case Caption.* The respondent's initials are to be used in the case caption rather than the respondent's full name.
- (4) *Scheduling Conference.* By order entered on the initiative of the hearing adjudicator or on motion of a party, the hearing adjudicator may order a scheduling conference to consider the setting of the hearing date and appropriate prehearing deadlines, the entry of a prehearing scheduling order, and other matters that may aid in the disposition of the proceeding.
- (5) *Burden and Standard of Proof.* Respondent has the burden of proof by a preponderance of the evidence.
- (6) *Duty to Appear.* The respondent must appear at the incapacity hearing. Failure to attend the hearing, without good cause, may be grounds for dismissal of the incapacity proceeding under section (g) of this Rule.

**(i) Hearing Decision.**



- (1) *Respondent Has Capacity to Respond or Defend.* If the hearing adjudicator finds that the respondent has the capacity to respond to the disciplinary investigation or defend the disciplinary proceeding without the assistance of counsel, the hearing adjudicator recommends that the incapacity proceedings be dismissed and that any pending disciplinary investigations or proceedings resume without appointment of counsel.
- (2) *Respondent Requires the Assistance of Counsel.* If the hearing adjudicator finds that the respondent has the capacity to respond to the disciplinary investigation or defend the disciplinary proceeding but requires the assistance of counsel, the hearing adjudicator recommends that (A) the respondent's license be placed in incapacity inactive status, (B) any pending disciplinary investigations or proceedings resume, and (C) counsel be appointed for any pending disciplinary investigation or proceedings.
- (3) *Respondent Lacks Capacity to Respond or Defend and Lacks the Capacity to Assist Counsel.* If the hearing adjudicator finds that the respondent lacks the capacity to respond to the disciplinary investigation or defend the disciplinary proceeding and lacks the capacity to assist counsel, the hearing adjudicator recommends that (A) the respondent's license be placed in incapacity inactive status, (B) any pending disciplinary proceedings be stayed, and (C) any pending disciplinary investigations be deferred.

**(j) Transmittal to the Court.** If no party files a notice of appeal of a hearing decision under section (i) within the time permitted by Rule 8.7, the Clerk transmits a copy of the hearing decision to the Supreme Court for entry of a final order under Rule 8.1(b) or other appropriate order.

#### **RULE 8.4 INCAPACITY PROCEEDINGS BASED ON REGULATORY ADJUDICATOR OR SUPREME COURT ORDER**

**(a) Order by Regulatory Adjudicator or Supreme Court.** Unless Rule 8.2 applies, on motion by disciplinary counsel or on its own initiative, the Supreme Court or a regulatory adjudicator must order an incapacity proceeding if it determines that there is reasonable cause to believe that the respondent lacks the mental or physical capacity to respond to a disciplinary investigation or defend a disciplinary proceeding, or to assist counsel in responding to a disciplinary investigation or defending a disciplinary proceeding. When a regulatory adjudicator is serving as a settlement officer, Rule 10.11(h)(4)(D) rather than this Rule applies. If the Court issues the order, it refers the matter to the ORA for further proceedings under this Rule.

**(b) Contents of Order; Statement of Alleged Incapacity; Response.**

- (1) *Contents.* The order must state that the issues to be determined are whether the respondent has the mental or physical capacity to respond to a disciplinary investigation or defend a disciplinary proceeding, or to assist counsel in responding to a disciplinary investigation or defending a disciplinary proceeding. It must also set forth the factual basis for the determination under section (a) of this Rule that an incapacity proceeding is warranted.
- (2) *Statement of Alleged Incapacity.* Disciplinary counsel files a statement of alleged incapacity after the order under section (a) of this Rule. The statement of alleged incapacity must set forth facts sufficient to inform the respondent of the basis for the allegation of incapacity and state that the issue to be decided is whether the respondent has the mental or physical capacity to respond to a disciplinary investigation or defend a disciplinary proceeding, or to assist counsel in responding to a disciplinary investigation or defending a disciplinary proceeding. The incapacity proceeding commences upon the filing of the statement of alleged incapacity. The statement of alleged incapacity must be personally served on the respondent or any guardian or guardian ad litem.
- (3) *Response to Statement of Alleged Incapacity.* Any response to the statement of alleged incapacity must be filed within 20 days after service or after counsel is appointed under Rule 8.6, whichever is later.

**(c) Effect of Incapacity Proceeding on Pending Disciplinary Matters.** Pending the outcome of the incapacity proceeding, the regulatory adjudicator or the Supreme Court must stay any disciplinary proceeding pending against the respondent. Disciplinary counsel may defer action as provided in Rule 5.4.

**(d) Interim Incapacity Inactive Status.**

(1) *Procedure.*

(A) *Order Entered by Regulatory Adjudicator.* When a regulatory adjudicator orders incapacity proceedings under this Rule, disciplinary counsel must file with the Supreme Court a petition to place the respondent's license in interim incapacity inactive status unless the respondent's license has already been placed in this status. Unless the Court orders otherwise, Rule 7.3 governs the proceedings under this section, except that the respondent must be represented by counsel as provided by Rule 8.6.

(B) *Order Entered by Supreme Court.* When the Supreme Court orders incapacity proceedings under this Rule, the Court must issue an order to show cause why respondent's license to practice law should not be placed in interim incapacity inactive status. The order will set the schedule for filing an answer and reply to the show cause order. The Supreme Court decides the matter without oral argument, unless the Court orders otherwise. Either party may request oral argument at the time the answer or reply is filed. If a request for oral argument is granted, the Supreme Court Clerk will notify disciplinary counsel and the respondent. The argument will be held on the date and time directed by the Supreme Court Clerk. The respondent must be represented by counsel in the show cause proceeding as provided by Rule 8.6.

(2) *Standard.* The Court must order that the respondent's license be placed in interim incapacity inactive status under this Rule unless the respondent shows by a clear preponderance of the evidence that the respondent's continued practice of law will not be detrimental to the purposes of ensuring the integrity of the legal profession and protecting the public.

(3) *Duration of Interim Incapacity Inactive Status.* Unless the Supreme Court orders otherwise, a respondent's license that is placed in interim incapacity inactive status under this Rule remains in that status until a hearing decision becomes final under Rule 8.1(b).

**(e) Health Records, Releases, and Examination.**

(1) *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.

(2) *Order Limiting Scope or Extending Time.* Upon motion by respondent, the hearing adjudicator may issue an order limiting the scope of the releases or authorizations or extend the time for providing the releases or authorizations for good cause shown.

(3) *Independent Medical Examination.* Upon motion by disciplinary counsel, the hearing adjudicator may order a respondent to submit to examinations of the respondent's physical or mental health condition. Examinations are conducted by a physician or by a mental health professional, as defined by RCW Title 71. Unless waived by the parties, an examiner must submit a written report of the examination, including the results of any tests administered and any diagnoses to disciplinary counsel and the respondent's counsel. The report is admissible at the incapacity hearing. The Bar pays the expenses of independent medical examinations and reports ordered under this Rule.

**(f) Failure to Appear or Cooperate.** If a respondent fails to appear or cooperate with any order or duty under this Rule, disciplinary counsel may petition the Supreme Court for the respondent's interim suspension under Rule 7.2(c). The procedures of Title 7 apply subject to the confidentiality provisions of Rule

3.3(b)(5).

**(g) Procedures for Incapacity Hearing.**

- (1) *Not Disciplinary Proceedings.* An incapacity proceeding under this Title is not a disciplinary proceeding.
- (2) *Procedural Rules.* Except as specified or when inconsistent with the purposes of this Title, proceedings under this Rule are conducted using the procedural rules for disciplinary proceedings.
- (3) *Case Caption.* The respondent's initials are to be used in the case caption rather than the respondent's full name.
- (4) *Scheduling Conference.* By order entered on the initiative of the hearing adjudicator or on motion of a party, the hearing adjudicator may order a scheduling conference to consider the setting of the hearing date and appropriate prehearing deadlines, the entry of a prehearing scheduling order, and other matters that may aid in the disposition of the proceeding.
- (5) *Burden and Standard of Proof.* Disciplinary counsel has the burden of proof by a clear preponderance of the evidence.
- (6) *Duty to Appear.* The respondent must appear at the incapacity hearing. Failure to attend the hearing, without good cause, may be grounds for interim suspension.

**(h) Hearing Decision.**

- (1) *Respondent Has Capacity to Respond or Defend.* If the hearing adjudicator finds that the respondent has the capacity to respond to the disciplinary investigation or defend the disciplinary proceeding without the assistance of counsel, the hearing adjudicator recommends that the incapacity proceedings be dismissed and that any pending disciplinary investigations or proceedings resume without appointment of counsel.
- (2) *Respondent Requires the Assistance of Counsel.* If the hearing adjudicator finds that the respondent has the capacity to respond to the disciplinary investigation or defend the disciplinary proceeding but requires the assistance of counsel, the hearing adjudicator recommends that (A) the respondent's license be placed in incapacity inactive status, (B) any pending disciplinary proceedings resume, and (C) counsel be appointed for any pending disciplinary investigation or proceedings.
- (3) *Respondent Lacks Capacity to Respond or Defend and Lacks the Capacity to Assist Counsel.* If the hearing adjudicator finds that the respondent lacks the capacity to respond to the disciplinary investigation or defend the disciplinary proceeding and lacks the capacity to assist counsel, the hearing adjudicator recommends that (A) the respondent's license be placed in incapacity inactive status, (B) any pending disciplinary proceedings be stayed, and (C) any pending disciplinary investigations be deferred.

**(i) Transmittal to the Court.** If no party files a notice of appeal of a hearing decision under section (h) within the time permitted by Rule 8.7, the Clerk transmits a copy of the hearing decision to the Supreme Court for entry of a final order under Rule 8.1(b) or other appropriate order.

**RULE 8.5 PLACEMENT IN INCAPACITY INACTIVE STATUS BASED ON ADJUDICATED GROUNDS**

**(a) Adjudicated Grounds.** The Court must order that a licensed legal professional's license to practice law be placed in incapacity inactive status upon receipt from the Bar of a certified copy of the judgment, order, or other appropriate document demonstrating that the licensed legal professional currently lacks the mental or physical capacity to practice law because the person:

- (1) was found to be incapable of assisting in the person's own defense in a criminal action;
- (2) was acquitted of a crime based on insanity;
- (3) has a guardian, but not a limited guardian, appointed for the person's estate or person on a judicial finding of incapacity; or
- (4) was involuntarily committed to a mental health facility for more than 14 days under RCW 71.05.

**(b) Notice.** The Court must notify the incapacitated licensed legal professional and any guardian or guardian ad litem of the order that the respondent's license be placed in incapacity inactive status. Notice must also be provided under Rule 3.8.

#### **RULE 8.6 REPRESENTATION BY COUNSEL**

**(a) Representation by Counsel.** All respondents in incapacity proceedings under Rules 8.2, 8.3, 8.4, and 8.11 must be represented by counsel throughout the proceeding and for purposes of compliance with Title 14.

**(b) Appointment of Counsel.** Upon entry of an order under Rule 8.2(a), 8.3(a), 8.4(a), or 8.11(b), the Chief Regulatory Adjudicator must promptly appoint an active lawyer member of the Bar as counsel for the respondent in any proceeding ordered under this Title and any disciplinary matters that are not deferred while the incapacity proceeding is pending. An order appointing counsel under this Rule constitutes authority to act on behalf of the respondent in any incapacity or related proceeding whether or not the respondent expressly consents to the representation. If other counsel appears, the appointment will be rescinded.

**(c) Compensation of Counsel.** The Bar administers compensation for counsel appointed under this Rule.

**(d) Withdrawal of Appointed Counsel.** Counsel appointed under this Rule may withdraw only upon authorization from the Chief Regulatory Adjudicator upon a showing of good cause, or when substitute counsel has appeared. If the Chief Regulatory Adjudicator authorizes appointed counsel to withdraw for good cause and substitute counsel has not appeared, the Chief Regulatory Adjudicator must appoint new counsel unless section (e) applies.

**(e) When Appointment of New Counsel Found Futile.**

- (1) *Application.* This section applies to counsel appointed to represent respondents in proceedings under Rules 8.2 and 8.4.
- (2) *Findings and Order Required.* If the Chief Regulatory Adjudicator determines that appointment of counsel would be futile because there is no reasonable chance that other counsel will be able to effectively represent the respondent, the Chief Regulatory Adjudicator may issue an order recommending that the respondent's license be placed in interim incapacity inactive status and that any proceeding under this Title be stayed. The proceeding will be stayed until such time as counsel appears or can be appointed. The order must be accompanied by findings with a factual basis to support the conclusion that appointment of counsel would be futile.
- (3) *Review by Appeal Panel.* An Appeal Panel must review the Chief Regulatory Adjudicator's order without further briefing or argument based solely on the record before the Chief Regulatory Adjudicator. It may affirm the order, direct that new counsel be appointed and that the proceeding not be stayed, set conditions for the appointment of new counsel in the future, or enter any other appropriate order.
- (4) *Transmittal to Supreme Court.* If the Appeal Panel affirms the order of the Chief Regulatory Adjudicator, the Clerk must transmit the order to the Supreme Court. On receipt of the order, if the respondent's license is not already in interim incapacity inactive status, the Court must order that the respondent's license be placed in interim incapacity inactive status.
- (5) *Duration of Interim Incapacity Inactive Status.* Unless the Supreme Court orders otherwise, when a respondent's license is placed in interim incapacity inactive status under this Rule, the license remains in that status until the incapacity proceeding has been concluded.

**(f) Protective Action under RPC 1.14.** Nothing in this Title precludes respondent's counsel from taking reasonably necessary protective action under RPC 1.14.

#### **RULE 8.7 APPEAL TO AN APPEAL PANEL**

**(a) Procedures for Appeal.** Either party may appeal a hearing decision under Rule 8.2(g), 8.3(i), or 8.4(h)

by filing a notice of appeal with the Clerk within 30 days of service of the hearing decision. There is no right of appeal of other orders or decisions entered under Title 8, except as specified in Rule 8.11. For procedural purposes, the provisions of Title 11 govern the appeal. Interlocutory review of orders or decisions not appealable as a matter of right under this Rule is governed by Rule 11.10.

**(b) Transmittal to Court.** If no party files a notice of appeal or petition for discretionary review of an appellate decision within the time permitted by Rule 8.8, or upon the Supreme Court's denial of a petition for discretionary review, the Clerk transmits a copy of the appellate and hearing decisions to the Supreme Court for entry of a final order under Rule 8.1(b) or other appropriate order.

#### **RULE 8.8 APPEAL TO THE SUPREME COURT**

**(a) Procedures for Appeal.** Either party may appeal an order of the Appeal Panel under Rule 8.7 to the Supreme Court within 30 days of service of the Appeal Panel's decision. There is no other right of appeal. The procedures of Title 12 that are applicable to an appeal of disciplinary suspension or disbarment recommendations govern the appeal.

**(b) Petition for Interim Incapacity Inactive Status.** If a respondent appeals the decision of the Appeal Panel, disciplinary counsel must petition the Supreme Court for an order that the respondent's license be placed in interim incapacity inactive status for the duration of the proceedings. The Court must order that the respondent's license be placed in interim incapacity inactive status unless the respondent shows by a clear preponderance of the evidence that the respondent's continued practice of law will not be detrimental to the purposes of ensuring the integrity of the legal profession and protecting the public. If the Panel's decision is not appealed and becomes final, or if the respondent's license is already in interim incapacity inactive status, the petition need not be filed or, if filed, may be withdrawn. The procedures of Rule 7.3 govern such a petition, except that the respondent must be represented by counsel.

**(c) Petition for Discretionary Review.** Respondent or disciplinary counsel may seek discretionary review of Appeal Panel decisions under Rule 8.7 not subject to appeal under section (a) of this Rule. The procedures of Rule 12.4 apply to petitions under this Rule.

#### **RULE 8.9 STIPULATIONS**

**(a) Parties May Stipulate.** At any time, the parties may stipulate that the respondent's license be placed in incapacity inactive status. Stipulations to interim incapacity inactive status are governed by section (i) of this Rule. The parties should endeavor to include evidence sufficient for the regulatory adjudicator to make a determination regarding the existence of the incapacity.

**(b) Respondent Must Be Represented by Counsel.** Respondent must be represented by counsel to negotiate and enter into a stipulation under this Rule. If the respondent is not represented by counsel, disciplinary counsel must file a motion to appoint counsel for the respondent for the purpose of negotiating and entering into the stipulation. The provisions of Rule 8.6 apply to appointed counsel under this Rule.

**(c) Requirements for Stipulations to Incapacity Inactive Status.** Stipulations to placement of a respondent's license in incapacity inactive status must:

- (1) state that the stipulation is not binding on the parties as a statement of all existing facts relating to the incapacity of the respondent and that any additional existing facts may be proved in a subsequent incapacity proceeding;
- (2) fix any costs and expenses and any interest thereon to be paid by the respondent;
- (3) include the signature of the respondent, respondent's counsel, and disciplinary counsel;
- (4) state the nature of the respondent's incapacity, supported by medical, psychological, or psychiatric evidence; and
- (5) state the nature of any pending disciplinary proceedings that will be stayed and any disciplinary

investigation that will be deferred as a result of the placement of a respondent's license in incapacity inactive status.

**(d) Review of Stipulations to Incapacity Inactive Status.**

- (1) *Process.* Stipulations to incapacity inactive status under this Rule must be reviewed by a regulatory adjudicator. A regulatory adjudicator reviews a stipulation based solely on the record agreed to by the parties and enters an appropriate order.
- (2) *Standards.* A regulatory adjudicator must approve a stipulation where the stipulated facts provide a factual basis for the stipulated resolution.
- (3) *Possible dispositions.* A regulatory adjudicator may approve or reject a stipulation. An order rejecting a stipulation must state the reason for the rejection.

**(e) Reconsideration.** Within 14 days of service of an order rejecting a stipulation, the parties may file a joint motion for reconsideration, which may include a request to make an oral presentation in support of the motion.

**(f) Effect of Rejection.** A rejected stipulation has no force or effect and neither it nor the fact of its execution is admissible in evidence in any proceeding under these Rules.

**(g) Transmittal to Court.** After the stipulation is approved by a regulatory adjudicator, the Clerk transmits the stipulation, together with all materials that were submitted to the regulatory adjudicator, to the Supreme Court for entry of a final order under Rule 8.1(b) or other appropriate order.

**(h) Applicability to Respondents Only.** This Rule applies only to respondents as defined by Rule 2.12(a). Placement in incapacity inactive status for licensed legal professionals who are not respondents as defined by Rule 2.12(a) is governed by APR 30.

**(i) Stipulations to Interim Incapacity Inactive Status.** At any time, a respondent and disciplinary counsel may stipulate to placement of the respondent's license in interim incapacity inactive status during the pendency of any incapacity proceeding. Stipulations to placement of a respondent's license in interim incapacity inactive status must state that an incapacity proceeding has been ordered and that the respondent's license will remain in interim incapacity inactive status until the incapacity proceeding is final absent other order from the Court. A stipulation to interim incapacity inactive status is filed with the Supreme Court for expedited consideration and entry of an appropriate order.

#### **RULE 8.10 COSTS IN INCAPACITY PROCEEDINGS**

When a proceeding under this Title is final, costs and expenses may be assessed in accordance with the procedures set forth in Rule 13.8.

#### **RULE 8.11 RETURN FROM INCAPACITY INACTIVE STATUS**

**(a) Petition.** To return to a different license status, a licensed legal professional whose license was placed in incapacity inactive status under this Title or APR 30 must file a petition with the Clerk and serve it on disciplinary counsel. This Rule does not apply to interim incapacity inactive status ordered under this Title.

- (1) *Content of Petition.* The petition must be in writing and include the following information:
  - (A) a signed statement by a physician or by a mental health professional as defined by RCW Title 71 that specifically (i) identifies the basis for the placement of the respondent's license in incapacity inactive status and addresses how the incapacity has been resolved and (ii) expresses that the respondent has the current capacity to practice law. The statement must be signed by the physician or mental health professional no more than three months before the date the petition is filed;
  - (B) a list of all physicians and mental health professionals as defined by RCW Title 71 who have treated or evaluated the respondent for the incapacity since the date of the placement; and
  - (C) copies of the written authorizations referenced in section (a)(2) of this Rule.
- (2) *Waiver of Privilege and Authorization for Release of Records.* By filing a petition, the respondent:

- (A) waives any privilege as to any medical, psychological, or psychiatric treatment, information, or records reasonably related to the respondent's capacity or incapacity to practice law; and
- (B) must provide a written authorization for each physician and mental health professional as defined by RCW Title 71 who treated or evaluated the respondent for the incapacity since the placement, or within the last five years, whichever is shorter, to provide information and records reasonably related to the respondent's capacity or incapacity to practice law.

**(b) Appointment of Counsel.** On receipt of a petition, the Chief Regulatory Adjudicator must appoint counsel for the respondent in accordance with the procedures set forth in Rule 8.6 unless counsel has already appeared.

**(c) Review and Action by the Chief Regulatory Adjudicator.** The Chief Regulatory Adjudicator reviews the petition to determine whether it contains the information required under section (a) of this Rule. If the petition does not contain the required information, the Chief Regulatory Adjudicator enters an order dismissing the petition or requesting additional information from respondent's counsel. If the petition does contain the required information, the Chief Regulatory Adjudicator:

- (1) orders that a hearing be held on whether the respondent has the current capacity to practice law; and
- (2) assigns a hearing adjudicator to conduct the hearing.

**(d) Stipulation.**

- (1) *Parties May Stipulate.* After counsel appears or is appointed for the respondent, disciplinary counsel and the respondent may enter into a stipulation that the petition be granted. Any stipulation must be supported by medical, psychological, or psychiatric evidence that the respondent has the current capacity to practice law.
- (2) *Review of Stipulations.*
  - (A) *Review by a Regulatory Adjudicator.* A regulatory adjudicator reviews the stipulation based solely on the record agreed to by the parties.
  - (B) *Possible Dispositions.* The regulatory adjudicator may either approve or reject the stipulation. An order rejecting a stipulation must state the reason for the rejection and should set forth any changes to the stipulation that would result in the stipulation's approval.
  - (C) *Effect of Rejection.* A rejected stipulation has no force or effect and neither it nor the fact of its execution is admissible in evidence in any proceeding under these Rules.
- (3) *Transmittal to Court.* After the stipulation is approved by a regulatory adjudicator, the Clerk transmits the stipulation, together with all materials that were submitted to the regulatory adjudicator, to the Supreme Court for entry of an order approving or rejecting the stipulation or providing other appropriate relief.

**(e) Hearing on Petition.**

- (1) *Not Disciplinary Proceedings.* A proceeding under this Title is not a disciplinary proceeding.
- (2) *Procedural Rules.* Except as specified or when inconsistent with the purposes of this Title, proceedings under this Rule are conducted using the procedural rules for disciplinary proceedings.
- (3) *Case Caption.* The respondent's initials are to be used in the case caption rather than the respondent's full name.
- (4) *Scheduling Conference.* On the initiative of the hearing adjudicator or on motion of a party, the hearing adjudicator may order a scheduling conference to consider the setting of the hearing date and appropriate prehearing deadlines, the entry of a prehearing scheduling order, and other matters that may aid in the disposition of the proceeding.
- (5) *Burden and Standard of Proof.* Respondent has the burden of proof by a preponderance of the evidence.
- (6) *Independent Medical Examination.* Upon motion by disciplinary counsel, the hearing adjudicator may order a respondent to submit to examinations of the respondent's physical or mental health

condition. Examinations are conducted by a physician or by a mental health professional, as defined by RCW Title 71. Unless waived by the parties, an examiner must submit a written report of the examination, including the results of any tests administered and any diagnoses to disciplinary counsel and the respondent's counsel. The report is admissible at the hearing under this Rule. The Bar pays the expenses of an independent medical examination and reports ordered under this Rule.

- (7) *Failure to Appear or Cooperate.* If the respondent fails to appear or cooperate with any order or duty under this Rule, disciplinary counsel may file a motion to dismiss the proceedings on the petition. The hearing adjudicator must grant the motion absent compelling justification for the failure to appear or cooperate.
- (8) *Hearing Decision.* The hearing adjudicator determines whether the respondent has the current capacity to practice law.
  - (A) *Current Capacity Proven.* If the hearing adjudicator finds that the respondent has the current capacity to practice law, the hearing adjudicator must enter an order recommending that the petition be granted.
  - (B) *Current Capacity Not Proven.* If the hearing adjudicator finds that the respondent does not have the current capacity to practice law, the hearing adjudicator must enter an order recommending that the petition be denied and the proceeding be dismissed.
- (9) *Transmittal to the Court.* If no party files a notice of appeal of a hearing decision under this Rule within the time permitted by Rule 11.2, the Clerk transmits a copy of the hearing decision to the Supreme Court for entry of an order approving or rejecting the hearing decision or another appropriate order.

**(f) Appeal to an Appeal Panel.** Either party may appeal a hearing decision under section (e)(8) of this Rule by filing a notice of appeal with the Clerk within 30 days of service of the hearing decision. For procedural purposes, the provisions of Title 11 govern the appeal. Interlocutory review of orders or decisions not appealable as a matter of right under this Rule is governed by Rule 11.10.

**(g) Appeal to the Court.** Either party may appeal an order of the Appeal Panel under section (f) of this Rule to the Supreme Court within 30 days of service of the Appeal Panel's order. There is no right of appeal to the Supreme Court of other orders or decisions entered under this Rule. The procedures of Title 12 that are applicable to appeal of disciplinary suspension or disbarment recommendations govern the appeal.

**(h) Transmittal to Court.** If no party files a notice of appeal or petition for discretionary review of an appellate decision within the time permitted by Rules 12.3 and 12.4, or upon the Supreme Court's denial of a petition for discretionary review, the Clerk transmits a copy of the appellate and hearing decisions to the Supreme Court for entry of an order approving or rejecting the appellate decision or another appropriate order.

**(i) Petition Granted.** Following a final order granting a petition or approving a stipulation and the respondent's compliance with the procedures for status changes as set forth in the Bar's Bylaws, applicable court rules, and section (j) of this Rule, the Bar restores the respondent's license to its most recent status other than incapacity inactive status. If a respondent's most recent license status was active, then the license status may be changed to inactive status at the respondent's request. If a disciplinary proceeding has been stayed or a disciplinary investigation has been deferred because of the placement of the respondent's license in incapacity inactive status, the proceeding or investigation resumes.

**(j) Client Protection Fund Certification.** If the Client Protection Fund paid an applicant based on the respondent's conduct, the respondent must obtain a certification from Bar counsel that respondent has paid restitution to the Client Protection Fund or is current with a periodic payment plan. Disputes regarding payment plans are resolved under the procedures set forth in Rule 13.7(c)(2).



## TITLE 9 – RESOLUTIONS WITHOUT HEARING

### RULE 9.1 STIPULATIONS

**(a) Scope and Timing.** Any disciplinary matter or proceeding may be resolved by stipulation at any time subject to approval under section (d) or (g) of this Rule.

**(b) Form.** A stipulation must include the following:

- (1) the respondent's current license status;
- (2) sufficient stipulated facts about the respondent's particular acts or omissions to permit a regulatory adjudicator or the Court to make a determination under section (d) or (g) of this Rule;
- (3) the respondent's prior record of discipline or its absence;
- (4) an analysis of the sanction using the American Bar Association *Standards for Imposing Lawyer Sanctions*, including the presumptive sanction for the misconduct and the effect of any aggravating and mitigating factors;
- (5) the stipulated disposition or discipline, and for stipulations to disciplinary suspension or disbarment, any conditions for reinstatement;
- (6) a statement that the stipulation is not binding on either party as a statement of facts about the respondent's conduct, and that additional facts may be proved in a subsequent disciplinary proceeding;
- (7) any costs, expenses, and restitution and any interest thereon to be paid by the respondent; and
- (8) terms of probation or other provisions, if appropriate.

The stipulation also may include other terms as agreed to by the parties.

**(c) Stipulation to Allegations in Lieu of Admissions.** With consent of disciplinary counsel, a respondent may agree to stipulate to alleged facts or violations in lieu of admitting to facts or violations. A respondent who enters into such a stipulation must agree that (1) there is a substantial likelihood that disciplinary counsel would be able to prove the alleged facts and violations by a clear preponderance of the evidence, and (2) the facts and violations will be deemed proved in any subsequent disciplinary proceeding in any jurisdiction.

**(d) Review of Stipulations.**

- (1) *Process.* Except as provided in section (g) of this Rule, all stipulations under this Rule must be reviewed by a regulatory adjudicator. A regulatory adjudicator reviews a stipulation based solely on the record agreed to by the parties. The parties may jointly request, or the regulatory adjudicator may order, an oral presentation regarding the stipulation.
- (2) *Standards.* A regulatory adjudicator must approve a stipulation where the stipulated facts provide a factual basis for the agreed violation(s) and the agreed sanction or resolution is consistent with the *ABA Standards for Imposing Lawyer Sanctions* and Rules 13.1-13.5.
- (3) *Possible Dispositions.* A regulatory adjudicator may approve or reject a stipulation. An order rejecting a stipulation must state the reason for the rejection and should set forth any changes to the sanction or remedies that would result in the stipulation's approval.

**(e) Reconsideration.** Within 14 days of service of an order rejecting a stipulation, the parties may file a joint motion for reconsideration, which may include a request to make an oral presentation in support of the motion.

**(f) Transmittal to Court.** After the stipulation is approved by a regulatory adjudicator, the Clerk transmits the stipulation, together with all materials that were submitted to the regulatory adjudicator, to the Supreme Court for entry of a final order under Rule 13.1(a) or other appropriate order.

**(g) Matters Pending Before the Supreme Court.** When a matter is pending before the Court, any stipulation to resolve the matter must be submitted to the Court. The Court will consider the stipulation and enter an order approving or rejecting the stipulation.

**(h) Effect of Rejection.** A rejected stipulation has no force or effect and neither it nor the fact of its

execution is admissible in evidence in any proceeding under these Rules.

**(i) Costs.** A final order approving a stipulation is deemed a final assessment of the costs and expenses agreed to in the stipulation for the purposes of Rule 13.8 and is not subject to further review.

**(j) Failure to Comply.** A respondent's failure to comply with the terms of an approved stipulation may be grounds for discipline.

#### **RULE 9.2 RESIGNATION IN LIEU OF DISCIPLINE**

**(a) Grounds.** A respondent who chooses not to contest or defend against allegations of misconduct may, with disciplinary counsel's approval, permanently relinquish the respondent's license to practice law and permanently resign from the practice of law in Washington in lieu of further disciplinary proceedings. If a disciplinary investigation or proceeding is pending, resignation in lieu of discipline under this Rule is the only available means to resign from the practice of law.

**(b) Process.** Respondent notifies disciplinary counsel that the respondent seeks to resign in lieu of discipline. If disciplinary counsel approves, disciplinary counsel prepares a statement of alleged misconduct, a declaration of costs, and a proposed resignation form. After receiving the statement and the declaration of costs, if any, the respondent may resign by signing and submitting to disciplinary counsel the resignation form prepared by disciplinary counsel, sworn to or affirmed under oath, which must include the following:

- (1) Disciplinary counsel's statement of alleged misconduct.
- (2) Respondent's statement that the respondent is aware of the allegations in the statement of alleged misconduct and that, rather than defend against the allegations, the respondent chooses to relinquish permanently the respondent's license to practice law and permanently resign from the practice of law in Washington.
- (3) Respondent's acknowledgment that the resignation is permanent, including the statement:  
"I understand that my resignation is permanent and that I can never apply for admission or reinstatement to the practice of law in Washington. If the Washington Supreme Court changes this Rule or an application is otherwise permitted in the future, it will be treated as an application by one who has been disbarred for ethical misconduct, and that, if I submit an application, I will not be entitled to a reconsideration or reexamination of the facts, complaints, allegations, or instances of alleged misconduct on which this resignation was based."
- (4) Respondent's agreement:
  - (A) to notify all other jurisdictions in which the respondent is or has been licensed to practice law of the resignation in lieu of discipline;
  - (B) to seek to resign permanently from the practice of law in any other jurisdiction in which the respondent is licensed;
  - (C) to acknowledge that the resignation could be treated as a disbarment by all other jurisdictions;
  - (D) to refrain from seeking a license to practice law in any other jurisdiction;
  - (E) to notify all other professional licensing agencies in any jurisdiction from which the respondent has a professional license that is predicated on the respondent's license to practice law of the resignation in lieu of discipline;
  - (F) to seek to relinquish any professional license that is predicated on the respondent's license to practice law;
  - (G) to disclose the resignation in lieu of discipline when applying for any employment or license in response to any question regarding disciplinary action or the status of the respondent's license to practice law;
  - (H) to pay expenses under Rule 13.8(c) in the amount of \$3,000 or consent to entry of an order assessing expenses in the amount of \$3,000 under Rule 13.8(e);

- (I) to pay any restitution or costs and any interest thereon as agreed or as ordered by a regulatory adjudicator under section (f) of this Rule;
- (J) to be subject to all restrictions that apply to a disbarred licensed legal professional under Title 14; and
- (K) to provide disciplinary counsel with copies of any notifications required under this Rule and any responses.

**(c) Public Filing.** A resignation that meets the requirements set forth above and that is approved by disciplinary counsel will be filed by disciplinary counsel with the Clerk as a public and permanent record of the Bar. The Clerk must notify the Supreme Court of a resignation under this Rule.

**(d) Effect.** A resignation under this Rule is effective upon its filing with the Clerk and becomes final without entry of a final order under Rule 13.1(a). Upon filing, the respondent's license to practice law is terminated. All disciplinary proceedings against the respondent terminate, although disciplinary counsel has the discretion to continue any investigations deemed appropriate under the circumstances in order to create a record of the respondent's conduct. Upon filing of the resignation, the respondent must comply with the same duties as a disbarred licensed legal professional under Title 14 and comply with all restrictions that apply to a disbarred licensed legal professional. The notices under Rule 3.8 must be made for resignations in lieu of discipline.

**(e) Resignation Is Permanent.** Resignation under this Rule is permanent. A respondent who has resigned under this Rule will never be eligible for any license to practice law in Washington.

**(f) Order for Costs and Restitution.** Within one year of filing of the resignation, disciplinary counsel or Bar counsel may file with the Chief Regulatory Adjudicator any claims for restitution or for costs not resolved by agreement under section (b) of this Rule. Within 30 days of service of the claim upon the respondent, a respondent may file a written objection and serve it on counsel who filed the claim. An objection is reviewed as provided in Rule 13.8(f). The Chief Regulatory Adjudicator's order is not subject to further review, is the final assessment of restitution or costs for the purposes of Rules 13.7 and 13.8, and may be enforced as any other order for restitution or costs. The record before the ORA is public information under Rule 3.3(a).

### **RULE 9.3 RECIPROCAL DISCIPLINE, RECIPROCAL RESIGNATION IN LIEU OF DISCIPLINE, AND RECIPROCAL PLACEMENT IN INCAPACITY INACTIVE STATUS**

**(a) Duty to Self-Report, Timing.** Within 30 days of being publicly disciplined, resigning in lieu of discipline or its equivalent, placement of a license in incapacity inactive status or its equivalent in another jurisdiction, or revocation of military certification, a licensed legal professional admitted to practice in this state must inform the Office of Disciplinary Counsel of the public discipline, resignation in lieu of discipline, placement of the license in incapacity inactive status, or revocation of military certification. For purposes of this Rule:

- (1) "Public discipline" means a public order of discipline or probation in another jurisdiction.
- (2) "Jurisdiction" means any court or body authorized to conduct disciplinary proceedings against licensed legal professionals in the United States or any other country, including any state, province, territory, or commonwealth of the United States or any other country; any federal court; the District of Columbia; any administrative agency or tribal government; or the United States Armed Forces.

**(b) Reciprocal Discipline, Reciprocal Placement of a License in Incapacity Inactive Status, or Publication**

- (1) Reciprocal discipline may be imposed whenever a licensed legal professional has been disbarred or suspended in another jurisdiction unless the period of disciplinary suspension is fully stayed. For purposes of this Rule, resignation in lieu of discipline or its equivalent in another jurisdiction is treated as an order of disbarment from that jurisdiction. For purposes of this Rule, a disciplinary suspension is fully stayed when there is no period of actual suspension.

(2) Reciprocal placement of a license in incapacity inactive status may be imposed when a license has been placed in incapacity inactive status or its equivalent in another jurisdiction.

(3) For all other public discipline, including fully stayed suspensions or probation, the Court may order that information about the discipline in the other jurisdiction be published under Rule 3.8(b).

**(c) Obtaining and Filing Order.** Upon notification from any source that a licensed legal professional admitted to practice in Washington State was publicly disciplined or resigned in lieu of discipline or its equivalent, or whose license was placed in incapacity inactive status or its equivalent in another jurisdiction, disciplinary counsel must obtain a copy of the order or resignation. Disciplinary counsel files the order or resignation with the Supreme Court except in circumstances set forth in section (l) of this Rule.

**(d) Consent to Reciprocal Discipline or Publication.** Notwithstanding the procedures set forth below, a respondent may consent to the imposition of reciprocal discipline under section (b)(1) of this Rule or publication of information under section (b)(3) of this Rule without the need for an order to show cause under section (e). The respondent must communicate such consent to the Court and disciplinary counsel in writing and, if applicable, may include a motion for concurrent suspension under section (j)(2) of this Rule. If that occurs, the Court enters an appropriate order.

**(e) Order to Show Cause.** Upon receipt of a copy of an order demonstrating that a respondent has been subject to public discipline, a resignation in lieu of discipline or its equivalent, or an order of placement of the respondent's license in incapacity inactive status or its equivalent in another jurisdiction, the Court issues an order to show cause. Disciplinary counsel must personally serve the following on the respondent under Rule 4.1(b)(4): the order to show cause, a copy of the order or resignation from the other jurisdiction, and a copy of this Rule.

(1) For disbarments, disciplinary suspensions other than fully-stayed suspensions, and placement of a respondent's license in incapacity inactive status or its equivalent in another jurisdiction, the order directs the respondent to show cause why the Court should not impose the same or equivalent sanction or suspension or placement of the respondent's license in incapacity inactive status.

(2) For resignations in lieu of discipline or its equivalent in another jurisdiction, the order directs the respondent to show cause why the Court should not impose the sanction of disbarment.

(3) For all other cases, the order directs the respondent to show cause why the Court should not order publication of information about the discipline under section (b)(3) of this Rule.

(4) Notwithstanding the above, on the request of disciplinary counsel, the order may direct disciplinary counsel to show cause why the sanction imposed should be greater than that imposed in the other jurisdiction.

**(f) Response to Order to Show Cause.** The party responding to the order to show cause must respond within 30 days of service of the order. If applicable, when a respondent is responding to an order to show cause regarding a sanction of suspension, the respondent may include a motion for concurrent suspension under section (j)(2) of this Rule.

**(g) Reply.** The other party may reply to the response to the order to show cause within 30 days of service of the response.

**(h) Burden.** The burden is on the party seeking a different result in Washington State to demonstrate that imposing the same or equivalent sanction or suspension under section (b)(1), ordering the equivalent placement in incapacity inactive status under section (b)(2) of this Rule, or ordering publication under section (b)(3) of this Rule, is not appropriate given the factors set forth in sections (i)(1) or (i)(2) of this Rule.

**(i) Supreme Court Action.**

(1) The Court must enter an order imposing reciprocal discipline or reciprocal placement of a respondent's license in incapacity inactive status, or order for publication as set forth in section (b) of this Rule, unless the Court finds that it clearly appears on the face of the record on which the

public discipline or placement of a respondent's license in incapacity inactive status is based that:

- (A) the procedure so lacked notice or opportunity to be heard that it denied due process;
- (B) the proof of misconduct or incapacity was so infirm that the Court is clearly convinced that it cannot, consistent with its duty, accept the finding of misconduct or incapacity;
- (C) the imposition of the same or equivalent discipline or placement in incapacity inactive status would result in grave injustice;
- (D) the established misconduct warrants substantially different discipline in this state;
- (E) the reason for the original placement of the respondent's license in incapacity inactive status or its equivalent no longer exists; or
- (F) appropriate discipline has already been imposed in Washington State for the misconduct.

(2) For resignations in lieu of discipline or their equivalent, the Court enters an order disbarring the respondent unless the Court finds that disbarment would result in grave injustice and a disposition other than disbarment will not place the public at risk.

(3) If the Court determines that any of the factors under sections (i)(1) or (i)(2) of this Rule exist, it enters an appropriate order.

(4) If the Court orders further proceedings to determine if the respondent's license should be placed in incapacity inactive status, the provisions of Rule 8.6 as to appointment of counsel will apply.

**(j) Effective Date.**

(1) *Generally.* The effective date of the reciprocal discipline or placement of the respondent's license in incapacity inactive status is the date set by the Court's order, which ordinarily will be seven days after the date of the order. If no date is set, the effective date is seven days after the date of the Court's order.

(2) *Motion for Concurrent Suspension.*

(A) When the reciprocal discipline sanction is suspension, a respondent may file a written motion, served on disciplinary counsel, asking the Court to order that the reciprocal suspension run concurrently with the suspension ordered by the other jurisdiction.

(B) The Court may grant such a motion only if the respondent timely self-reported the discipline under section (a) of this Rule and the motion is accompanied by the respondent's declaration, under penalty of perjury, that the respondent has not practiced law in Washington State at any time following the effective date of the suspension ordered by the other jurisdiction.

(C) When a motion under this section is granted by the Court, the effective date of the reciprocal suspension is the same as provided for under section (j)(1) of this Rule. Notwithstanding the effective date of the reciprocal suspension, the respondent is eligible for reinstatement under Rule 13.3(c) at the conclusion of the term of suspension ordered in the other jurisdiction.

**(k) Conclusive Effect.** Except as this Rule otherwise provides or the Court orders, a final adjudication in another jurisdiction that a respondent committed misconduct or that the respondent's license should be placed in incapacity inactive status or its equivalent conclusively establishes the misconduct or the incapacity for purposes of a disciplinary or incapacity proceeding in Washington State.

**(l) Prior Matter in Washington.** No action will be taken against a licensed legal professional under this Rule when the licensed legal professional has been the subject of discipline, resignation in lieu of discipline, placement of the licensed legal professional's license in incapacity inactive status, or other final disposition of a complaint, disciplinary proceeding, or incapacity proceeding in Washington State arising out of the same circumstances that are the basis for discipline, resignation in lieu of discipline, or placement of the licensed legal professional's license in incapacity inactive status in another jurisdiction.

**(m) Expenses.** In any matter under this Rule resulting in reciprocal discipline and requiring briefing at the Supreme Court, costs and expenses may be assessed in favor of the Bar under the procedures of RAP Title 14, except that "costs" as used in that Title means any costs and expenses allowable under Rule 13.8.

Expenses assessed under this Rule may equal the actual expenses incurred by the Bar, but in any case

cannot be less than \$3,000.

## TITLE 10 – HEARING PROCEDURES

### RULE 10.1 GENERAL PROCEDURE

**(a) Commencement of Proceedings.** A disciplinary proceeding commences when the statement of charges is filed.

**(b) Hearing Adjudicator Authority.** In addition to the powers specifically provided in these Rules, the hearing adjudicator may make any ruling that appears necessary and appropriate to ensure a fair and orderly proceeding. In making any ruling, the hearing adjudicator should consider that disciplinary proceedings are neither civil nor criminal but are sui generis proceedings governed by these Rules. If appropriate and not inconsistent with these Rules, the Superior Court Civil Rules (CR) may provide guidance.

**(c) Cooperation of the Parties.** All parties and their counsel should reasonably cooperate with each other and the ORA in all matters. These Rules should be construed and administered consistently with this principle to secure the just, speedy, and inexpensive determination of every action.

**(d) Failure to Comply with Hearing Adjudicator Orders.** The parties must comply with all orders made by a hearing adjudicator. A hearing adjudicator may draw adverse inferences as appear warranted by any failure to comply.

### RULE 10.2 HEARING ADJUDICATOR ASSIGNMENT

**(a) Assignment.** The Chief Regulatory Adjudicator assigns a hearing adjudicator from those eligible under Rule 2.3.

**(b) Disqualification.**

- (1) *Disqualification for Cause.* Either party may move to disqualify any assigned hearing adjudicator for good cause. A motion under this section must be filed and served promptly after the party knows, or in the exercise of due diligence should have known, of the basis for the disqualification.
- (2) *Decision.* The Chief Regulatory Adjudicator decides all disqualification motions unless the hearing adjudicator whose disqualification is sought is the Chief Regulatory Adjudicator. In such a case, another regulatory adjudicator decides the motion. The decision on a motion to disqualify is not subject to interlocutory review. After disqualification of the assigned hearing adjudicator, the adjudicator deciding the motion assigns a replacement.

### RULE 10.3 FILING OF CHARGES

**(a) Statement of Charges.**

- (1) *Filing.* Disciplinary counsel files a statement of charges with the Clerk after the Authorization Panel issues an order authorizing the filing of a statement of charges.
- (2) *Service.* Disciplinary counsel must personally serve the statement of charges on the respondent with a notice to answer in the form prescribed by Rule 10.4.
- (3) *Content.* The statement of charges must state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the charges and counts of misconduct, which must include one or more charged rule violations. Disciplinary counsel must sign the statement of charges, but it need not be verified.

**(b) Consolidation, Joinder, and Severance.**

- (1) *Consolidation.* After disciplinary counsel has filed statements of charges in two or more proceedings against the same respondent, a party may move for the proceedings to be consolidated.
- (2) *Joinder.* After disciplinary counsel has filed statements of charges in proceedings against two or more respondents and the matters arise from the same or related underlying facts, a party may move for the proceedings to be joined into a single proceeding.

- (3) *Severance.* After disciplinary counsel has filed a statement of charges, a party may move for separate hearings on counts of misconduct alleged in the statement of charges.
- (4) *Consideration of Motion.* The Chief Regulatory Adjudicator considers motions for consolidation, joinder, or severance under this section and should grant a motion if, in the Chief Regulatory Adjudicator's discretion, it will promote a fair and efficient determination of the issues or is necessary to avoid prejudice to a party.
- (5) *Effect of Order.* An amended statement of charges resulting from any consolidation, joinder, or severance ordered under this Rule is not subject to a motion to strike under Rule 10.7(c).

**RULE 10.4 NOTICE TO ANSWER**

The notice to answer must be substantially in the following form:

BEFORE THE OFFICE OF THE REGULATORY ADJUDICATOR  
 UNDER THE WASHINGTON SUPREME COURT'S  
 RULES FOR DISCIPLINE AND INCAPACITY

In re                    ) NOTICE TO ANSWER;  
                               ) NOTICE OF DEFAULT PROCEDURE  
 \_\_\_\_\_, )  
 [license # and type].)

To: The above named respondent:

A[n] [amended] statement of charges has been filed against you, a copy of which is served on you with this notice. You are notified that you must file your answer to the [amended] statement of charges within 20 days of the date of service on you, by filing the original of your answer with the Clerk to the Office of the Regulatory Adjudicator, [insert address] and by serving a copy on disciplinary counsel at the address[es] given below. Requirements for the answer are set forth in Rule 10.5 of the Rules for Discipline and Incapacity (RDI). Failure to file an answer may result in the entry of an order of default under RDI 10.6 and the imposition of disciplinary sanctions or remedies against you.

**Notice of default procedure: Your default may be entered for failure to file a written answer to this [amended] statement of charges within 20 days of service as required by RDI 10.6. THE ENTRY OF AN ORDER OF DEFAULT WILL RESULT IN THE ALLEGED FACTS AND COUNTS OF MISCONDUCT IN THE [AMENDED] STATEMENT OF CHARGES BEING DEEMED ADMITTED AND ESTABLISHED and sanctions and remedies being imposed or recommended based on the admitted counts of misconduct. If an order of default is entered, you will lose the opportunity to participate further in these proceedings unless and until the order of default is vacated on motion timely made under RDI 10.6(c). The entry of an order of default means that you will receive no further notices regarding these proceedings except those required by RDI 10.6(b)(2).**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
 Disciplinary Counsel, Bar No.  
 Address: \_\_\_\_\_

Telephone: \_\_\_\_\_  
Email: \_\_\_\_\_

#### **RULE 10.5 ANSWER; RESPONDENT'S MOTION TO DISMISS**

**(a) Time to Answer.** Within 20 days of service of a statement of charges or amended statement of charges and a notice to answer, the respondent must file and serve an answer. Failure to file an answer to a statement of charges or amended statement of charges may be grounds for discipline or for an order of default under Rule 10.6. The filing of a motion to dismiss under section (d) of this Rule stays the time for filing an answer until the motion is decided.

**(b) Content of Answer.** The answer must contain:

- (1) a specific denial or admission of each alleged fact and count of misconduct in the statement of charges in a manner similar to that described in CR 8(b). Alleged facts and counts of misconduct in the statement of charges are admitted when not denied in the answer;
- (2) a statement of any matter or facts constituting a defense, affirmative defense, or justification, in ordinary and concise language without repetition;
- (3) a statement as to whether respondent consents to service by email under Rule 4.1; and
- (4) an address or, if respondent consents to service by email, an email address at which all further pleadings, notices, and other documents in the proceeding may be served on the respondent when personal service is not required under these Rules.

**(c) Filing and Service of Answer.** The answer must be filed and served under Rules 4.1 and 4.2.

**(d) Motion to Dismiss on Face of Statement of Charges.**

- (1) *Grounds for Motion.* A respondent may move to dismiss one or more charged rule violations in a statement of charges on grounds that the facts alleged in the statement of charges, if deemed to be true, would be insufficient to establish the charged rule violations.
- (2) *Timing.* A motion to dismiss under this section must be filed within the time for filing of the answer to a statement of charges or amended statement of charges, and may be filed in lieu of filing an answer.
- (3) *Procedure.* Rule 10.8 applies to motions under this Rule. No factual materials outside the statement of charges may be presented or considered.
- (4) *Partial Dismissal.* If the hearing adjudicator dismisses one or more but not all of the charged rule violations, either party may request review within 10 days of service of the order. If review is requested under this section, the Chief Regulatory Adjudicator must assign the matter to an Appeal Panel for review, specify the issue or issues as to which review is granted, and establish the timeline and terms for any additional briefing and oral argument.
- (5) *Dismissal of All Counts.* If the hearing adjudicator dismisses all counts, the order of dismissal is treated as a hearing decision under Rule 10.15.
- (6) *Filing Answer After Decision.* If the motion does not result in the dismissal of all counts of misconduct, the respondent must file and serve an answer to the remaining alleged facts and counts of misconduct within 10 days of service of the ruling on the motion, unless either party has requested review under section (d)(4) of this Rule or filed a motion for interlocutory review under Rule 11.10 of an order denying the motion. After review, the respondent must file and serve an answer to any remaining alleged facts and counts of misconduct within 10 days of service of the Appeal Panel's decision.

#### **RULE 10.6 DEFAULT**

**(a) Entry of Default.**

- (1) *Timing.* If a respondent, after being served with a notice to answer as provided in Rule 10.4 or 10.7, fails to file an answer to a statement of charges or an amended statement of charges within



the time provided by these Rules, disciplinary counsel may file a motion for an order of default.

- (2) *Motion*. The motion for an order of default must be served on the respondent and must include the following:
  - (A) the dates of filing and service of the notice to answer, the statement of charges, and any amended statement of charges;
  - (B) disciplinary counsel's statement that the respondent has not timely filed an answer as required by Rule 10.5 and that disciplinary counsel seeks an order of default under this Rule;
  - (C) notice that upon entry of an order of default, the alleged facts and counts of misconduct in the statement of charges and any amended statement of charges will be deemed admitted and established, and sanctions and remedies may be imposed or recommended based on the admitted facts and rule violations; and
  - (D) a copy of this Rule.
- (3) *Entry of Order of Default*. If the respondent fails to file a written answer to the statement of charges or amended statement of charges within seven days of service of the motion for entry of an order of default, the hearing adjudicator, on proof of service of the motion, must enter an order finding the respondent in default.
- (4) *Effect of Order of Default*. Upon entry of an order of default, the alleged facts and counts of misconduct in the statement of charges and any amended statement of charges are deemed admitted and established for the purpose of imposing discipline, and the respondent may not participate further in the proceedings unless the order of default is vacated under this Rule.

**(b) After Entry of an Order of Default.**

- (1) *Service*. The Clerk serves the order of default under Rule 4.2(c).
- (2) *No Further Notices*. Notwithstanding any other provision of these Rules, after entry of an order of default, no further notices, motions, documents, papers, or transcripts need be served on the respondent except for copies of the decisions of the hearing adjudicator, the Appeal Panel, and the Court.
- (3) *Hearing Adjudicator Decision on Default*. Within 20 days after entry of the order of default, disciplinary counsel may present additional evidence and briefing relevant to the sanction, restitution, or other remedies. Within 60 days of the filing of the order of default, the hearing adjudicator must enter findings of fact, conclusions of law, and recommendation based on the facts and rule violations established under section (a) of this Rule and any additional evidence submitted.

**(c) Vacating the Order of Default.**

- (1) *Motion To Vacate Order of Default*. Subject to the limitations in section (c)(2) of this Rule, a respondent may move to vacate the order of default and any decision of the hearing adjudicator arising from the default on the following grounds:
  - (A) mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining the default;
  - (B) a proceeding against a respondent who was, at the time of the default, incapable of conducting a defense due to incapacity;
  - (C) newly discovered evidence that by due diligence could not have been previously discovered;
  - (D) fraud, misrepresentation, or other misconduct in connection with the underlying disciplinary proceeding;
  - (E) the order of default is void;
  - (F) unavoidable casualty or misfortune preventing the respondent from defending; or
  - (G) any other reason justifying relief from the operation of the default.
- (2) *Time*. For grounds (c)(1)(A) and (C), the motion must be made within one year after entry of the default. For ground (c)(1)(B), the motion must be made within one year after the incapacity ceases. For all other grounds, the motion must be made within a reasonable time. If a matter is pending with or has been decided by the Supreme Court, the respondent must obtain leave from

the Court before moving to vacate the order of default. A respondent seeking leave from the Court must provide notice to disciplinary counsel.

- (3) *Burden of Proof.* The respondent bears the burden of proving the grounds for vacating the order of default by a clear preponderance of the evidence.
- (4) *Service and Contents of Motion.* The motion to vacate the order of default must be filed and served under Rules 4.1 and 4.2 and be accompanied by a copy of the respondent's proposed answer to each statement of charges for which an order of default has been entered. The proposed answer must state with specificity the respondent's asserted defenses and any facts that the respondent asserts as mitigation. The motion must be supported by a declaration showing:
  - (A) the date on which the respondent first learned of the entry of the order of default;
  - (B) the grounds for vacating the order of default; and
  - (C) an offer of proof of the facts that the respondent expects to establish if the order of default is vacated.
- (5) *Response to Motion.* Within 10 days of filing and service of the motion to vacate the order of default, disciplinary counsel may file and serve a written response.
- (6) *Decision.* A hearing adjudicator decides a motion to vacate the order of default on the written record without oral argument. Pending a ruling on the motion, the hearing adjudicator may order a stay of proceedings not to exceed 30 days. In granting a motion to vacate an order of default, the hearing adjudicator has discretion to order appropriate conditions. If the respondent proves that the order of default was entered as a result of a mental or physical incapacity that made the respondent incapable of conducting a defense, the order of default must be vacated.
- (7) *Review of Decision.* A party may seek review of a decision under this Rule using the procedures of Rule 11.10. If review under Rule 11.10 is denied, there is no further review.

**(d) Order of Default Not Authorized in Incapacity Proceedings.** The default procedure in this Rule does not apply to incapacity proceedings under Title 8.

#### **RULE 10.7 AMENDMENT OF STATEMENT OF CHARGES**

- (a) Amending the Statement of Charges.** Disciplinary counsel may file an amended statement of charges at any time.
- (b) Service.** Disciplinary counsel serves an amended statement of charges and the notice to answer on the respondent as provided in Rule 4.1. An amended statement of charges need not be personally served.
- (c) Motion to Strike.** The respondent may, within 10 days of service of the amended statement of charges, file a motion to strike any amendments to the statement of charges. A hearing adjudicator will consider the motion under the procedure provided by Rule 10.8. Such motions should only be granted upon a clear showing of prejudice to the respondent.
- (d) Answer.** The respondent must file an answer to the amended statement of charges under the procedures of Rule 10.5. Any part of a previous answer may be incorporated by reference. A timely filed motion under section (c) of this Rule stays the time for filing the answer until the motion is decided. Regardless of whether the respondent has filed an answer to any previous statement of charges, failure to file an answer to an amended statement of charges may be grounds for discipline or for an order of default of the entire proceeding under Rule 10.6.

#### **RULE 10.8 GENERAL RULES FOR MOTIONS**

- (a) Definition.** A motion is an application to the hearing adjudicator for an order or other relief. The motion, unless made during a hearing, must be in writing and state with particularity the grounds for the motion and the relief sought.
- (b) Filing and Service.** Motions must be filed and served as required by Rules 4.1 and 4.2.
- (c) Response.** The opposing party has 10 days from service of a motion to respond, unless the time is

altered by the hearing adjudicator for good cause.

**(d) Reply.** The moving party has seven days from service of the response to reply unless the time for reply is altered by the hearing adjudicator for good cause.

**(e) Consideration of Motion.** Upon expiration of the time for reply, the hearing adjudicator should promptly rule on the motion, with or without argument at the hearing adjudicator's discretion. Argument on a motion may be heard by conference call or by other electronic means. At the request of a party or at the discretion of the hearing adjudicator, any hearing on the motion may be recorded as provided in Rule 10.12(h).

**(f) Ruling.** A ruling on a written motion must be in writing and filed with the Clerk.

**(g) Motion for Reconsideration.** Either party may file a motion for reconsideration of a hearing adjudicator's ruling on a motion. The motion must be filed and served no later than 10 days after service of the ruling on the moving party. Sections (a) through (f) of this Rule apply to motions for reconsideration. A party may not file a motion for reconsideration of a ruling that has already been reconsidered at the request of that party.

**(h) Chief Regulatory Adjudicator Authority.** Before the assignment of a hearing adjudicator, the Chief Regulatory Adjudicator may rule on any prehearing motion.

#### **RULE 10.9 SPECIFIC MOTIONS**

**(a) Motion for Finding of Misconduct on the Pleadings.** Within 30 days of the filing of the answer to a statement of charges or amended statement of charges, disciplinary counsel may move for an order finding misconduct based on the pleadings. No factual materials outside the statement of charges or amended statement of charges and the answer(s) may be presented or considered. In ruling on this motion, the hearing adjudicator may find that all or some of the charged rule violations in the statement of charges are established. A hearing will be held to determine any facts or violations not established and to determine the appropriate sanction.

**(b) No Summary Judgment.** A party may not move for summary judgment.

**(c) Collateral Estoppel.** Either party may move at any time for an order determining the collateral estoppel effect of a judgment in another proceeding.

**(d) Voluntary Dismissal.** Disciplinary counsel may move to dismiss the proceeding at any time. A hearing adjudicator must enter an order dismissing the proceeding without prejudice unless the hearing adjudicator finds good cause to dismiss with prejudice. An order of dismissal with prejudice is treated as a hearing decision under Rule 10.15.

**(e) Procedure.** Rule 10.8 applies to motions under this Rule.

#### **RULE 10.10 DISCOVERY AND PREHEARING PROCEDURES**

**(a) General.** The parties should reasonably cooperate in the mutual informal exchange of relevant non-privileged information to facilitate the expeditious, economical, and fair resolution of the case.

**(b) Discovery.**

(1) *Requests for Admission.* After a statement of charges is filed, the parties may request admissions in the manner provided by CR 36. Under appropriate circumstances, the hearing adjudicator may apply the sanctions in CR 37(c) for improper denial of requests for admission.

(2) *Other Discovery.* Formal discovery, other than requests for admission, is available only by order of the hearing adjudicator or stipulation of the parties. Absent a stipulation, after a statement of charges is filed either party may file a motion under Rule 10.8 seeking authorization to conduct one or more of the methods of discovery available under CR 27-31 and 33-35. The hearing adjudicator has discretion to grant or deny the motion and must consider the following factors:

(A) the necessity of the information sought and whether it is available by other means;

(B) the nature and complexity of the case;

- (C) the seriousness of the charges;
- (D) the formal and informal discovery that has already occurred;
- (E) the burden on the party or witness from whom the information is sought;
- (F) the possibility of unfair surprise;
- (G) the risk of undue expense or delay;
- (H) the effect of the requested discovery on the orderly and prompt conduct of the proceeding; and
- (I) the interests of justice.

(3) *Limitations.* The hearing adjudicator may impose conditions or limitations on discovery or requests for admission to assure an expeditious, economical, and fair proceeding

**(c) Discovery of Hearing Preparation Materials.** When discovery has been authorized under section (b) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including a party's lawyer, investigator, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the hearing adjudicator must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a lawyer or other representative of a party concerning the litigation. In interpreting the provisions of this section, CR 26(b)(4) may be looked to for guidance.

**(d) Subpoenas.** When necessary to obtain discovery authorized under section (b) of this Rule, subpoenas may be issued as under CR 45. Subpoenas may be enforced under Rule 4.7.

**(e) Depositions Outside of State.** A certified copy of the order of a hearing adjudicator is sufficient to authorize a deposition outside Washington State.

**(f) Duty to Cooperate.** Parties must respond to authorized discovery requests and comply with the hearing adjudicator's orders regarding discovery. The hearing adjudicator may draw adverse inferences as appear warranted by the failure of either party to respond to authorized discovery.

#### **RULE 10.11 SCHEDULING OF HEARING**

**(a) Hearing Location.** Absent agreement of all parties and the hearing adjudicator, all disciplinary hearings must be held in Washington State, with a presumption that hearings will be held at the Bar offices. The ORA must make the arrangements for the hearing facilities.

**(b) Scheduling Conference.** No later than 30 days after the filing of the respondent's answer, the hearing adjudicator must convene an initial scheduling conference of the parties to discuss:

- (1) the hearing date, which must be within 180 days of the date of the initial scheduling conference unless good cause is shown to set the hearing at a later date or unless the hearing adjudicator has granted a motion under section (e) of this Rule;
- (2) any necessary prehearing deadlines;
- (3) the location of the hearing;
- (4) the expected length of the hearing;
- (5) the parties' expected discovery requests;
- (6) whether a settlement conference would be useful in resolving the matter;
- (7) whether the parties consent to electronic service; and
- (8) any other relevant issues.

**(c) Scheduling Order.** The hearing adjudicator must enter an order setting the date, time, and place of the hearing. The scheduling order should include any prehearing deadlines the hearing adjudicator deems required by the complexity of the case, as well as a determination regarding a settlement conference under section (h) of this Rule. The Scheduling Order generally should be in the following form with the

following timelines:

**SETTLEMENT CONFERENCE DETERMINATION:**

[ ] The hearing adjudicator finds that this case may benefit from a settlement conference, and a settlement officer should be appointed.

**ELECTRONIC SERVICE:**

[ ] The parties consent to electronic service of papers or documents under Rule 4.1(b).

**IT IS ORDERED** that the hearing is set to begin at [time] on [Hearing Date (H)] and each day thereafter until adjourned by the hearing adjudicator, at [location], and the parties must comply with prehearing deadlines as follows:

1. **Witnesses.** A preliminary list of primary witnesses, including addresses and phone numbers, and a designation of whether the witness is a fact witness, character witness, or expert witness, must be filed and served by [H-12 weeks].
2. **Discovery.** Discovery authorized under Rule 10.10(b), if any, must be completed by [H-6 weeks].
3. **Motions.** Prehearing motions, other than motions to bifurcate under Rule 10.14, must be served by [H-4 weeks]. Absent agreement of the parties, an exhibit not ordered or stipulated admitted may not be attached to a motion or otherwise transmitted to the hearing adjudicator unless the motion concerns the exhibit's admissibility. The hearing adjudicator will advise the parties whether oral argument is necessary, and, if so, the date and time of the argument.
4. **Exhibits.** Lists of proposed exhibits must be exchanged by [H-3 weeks].
5. **Service of Exhibits.** Copies of proposed exhibits must be exchanged by [H-2 weeks]. The parties should redact the following personal identifiers from the proposed hearing exhibits: Social Security numbers, financial account numbers, and driver's license numbers
6. **Final Witness List.** A final witness list, including a final summary of the expected testimony of each witness, must be exchanged by [H-2 weeks]. A copy of the final witness list, excluding the summary of expected testimony, must be filed and served by [H-2 weeks].
7. **Objections.** Objections to proposed exhibits, including grounds other than relevancy, must be exchanged by [H-1 week].
8. **Briefs.** Any hearing brief must be filed and served by [H-1 week]. Exhibits not ordered or stipulated admitted may not be attached to a hearing brief or otherwise transmitted to the hearing adjudicator before the hearing.

**(d) Failure to Comply with Scheduling Order.** If a party fails to comply with a provision of the scheduling order, the hearing adjudicator may exclude witnesses, testimony, exhibits, or other evidence, and take such other action as may be appropriate.

**(e) Motion for Hearing within 120 Days.** A respondent may move for a hearing date within 120 days of the initial scheduling conference under section (b) of this Rule. Such a motion may be made no later than the date of the initial scheduling conference convened under section (b) of this Rule. A motion under this Rule must be granted unless disciplinary counsel shows good cause for setting the hearing at a later date. Rule 10.8 applies to motions under this Rule, except that the motion may be made orally during the initial scheduling conference.

**(f) Notice.** Service of an order setting a date, time, and place for the hearing constitutes notice of the hearing.

**(g) Continuance.** Either party may move for a continuance of the hearing date. The hearing adjudicator has discretion to grant the motion for good cause shown.

**(h) Settlement Conference Process.**

- (1) **Order.** In all disciplinary proceedings under this Title, the hearing adjudicator should order a settlement conference unless it appears that such a conference would not be helpful. Settlement

conferences may not be ordered in incapacity proceedings under Title 8.

- (2) *Assignment of Settlement Officer.* Following a hearing adjudicator's order for a settlement conference, the Chief Regulatory Adjudicator must assign a settlement officer to conduct the settlement conference. The Chief Regulatory Adjudicator may assign a regulatory adjudicator under Rule 2.3 or volunteer adjudicator under Rule 2.6(a)(2) to serve as a settlement officer. Following a settlement conference, the settlement officer who conducted the settlement conference may not serve as an adjudicator in the same disciplinary proceeding without the consent of all parties.
- (3) *Timing.* Unless agreed to by the parties, a settlement conference if ordered must be held no later than 45 days prior to the hearing date.
- (4) *Confidentiality*
  - (A) *Conference and Communications Confidential.* Settlement conferences are closed to the public. Except as provided in section (h)(4)(C) of this Rule, all communications relating to the settlement conference, whether oral or written and including pre- and post-settlement conference conversations and exchanges of information, are confidential and may not be disclosed or released unless specifically authorized by the Chief Regulatory Adjudicator on a showing of compelling need and following notice to the participants. Statements of child or elder abuse or threats to commit future crimes or cause serious bodily injury are not subject to the foregoing restrictions on disclosure or release.
  - (B) *Evidentiary Use of Settlement Conference Information.* Any statements or admissions made during the course of the settlement conference, or documents prepared solely for purposes of the settlement conference process, will not be admissible in evidence or used for impeachment in any disciplinary or other proceeding. Neither the parties nor the settlement officer may be subpoenaed or otherwise compelled to testify or produce information regarding the settlement conference in any disciplinary or other proceeding except as specifically authorized by the Chief Regulatory Adjudicator on a showing of compelling need and following notice to the participants.
  - (C) *Settlement Agreement.* Any stipulation resulting from a settlement conference is subject to approval under Rule 9.1 and, if approved, becomes public under Rule 3.3. If the parties agree to the respondent's resignation in lieu of discipline following a settlement conference, Rule 9.2 governs the resignation. A resignation in lieu of discipline is public under Rule 3.3.
  - (D) *Information Indicating Potential Incapacity.* Notwithstanding the provisions of sections (h)(4)(A) and (B), a settlement officer who has reasonable cause to believe that the respondent lacks the mental or physical capacity to defend a disciplinary proceeding or to assist counsel in defending a disciplinary proceeding must provide information from the settlement conference to the Chief Regulatory Adjudicator for further proceedings under Rule 8.4(a).

## **RULE 10.12 HEARING**

**(a) Representation.** The respondent may be represented by counsel.

**(b) Respondent Must Attend.** A respondent given notice of a hearing under Rule 10.11(f) must attend the hearing. Failure to attend the hearing, without good cause, may be grounds for discipline. A respondent who fails to attend the hearing, without good cause, forfeits any right to appeal the hearing decision except as to the issue of good cause.

**(c) Procedures If Respondent Fails to Attend.** If a respondent given notice of a hearing under Rule 10.11(f) fails to attend the hearing without good cause, the hearing may proceed, and the hearing adjudicator:

- (1) may draw an adverse inference from the respondent's failure to attend as to any questions that might have been asked of the respondent at the hearing; and

- (2) must admit testimony by deposition regardless of the deponent's availability. An affidavit or declaration is also admissible if:
  - (A) the facts stated are within the witness's personal knowledge;
  - (B) the facts are set forth with particularity; and
  - (C) the affidavit or declaration shows affirmatively that the witness could testify competently to the stated facts.

**(d) Respondent Must Testify if Called**

- (1) *Testimony Required.* A respondent given notice of a hearing under Rule 10.11(f) must testify if called as a witness by disciplinary counsel.
- (2) *Consequences of Refusal.* If a respondent refuses to testify, the hearing adjudicator may:
  - (A) draw an adverse inference from the respondent's refusal to testify as to any questions that might have been asked of the respondent; and
  - (B) consider the refusal an aggravating factor in determining the appropriate sanction for any misconduct found.
- (3) *Subpoena Optional.* Disciplinary counsel may, but is not required to, issue a subpoena to compel the respondent's testimony.
- (4) *Privilege Against Self-Incrimination.* This rule does not preclude the respondent's proper exercise of any privilege against self-incrimination.

**(e) Respondent Must Bring Requested Materials.** Disciplinary counsel may request that the respondent bring to the hearing any documents, files, records, or other written materials or things previously requested in accordance with these Rules. The request must be in writing and served on the respondent at least three days before the hearing.

**(f) Witnesses at Hearing.** Except as provided in section (c)(2) of this Rule, witnesses must testify under oath. Testimony may be submitted by deposition, in the hearing adjudicator's discretion as guided by CR 32. If ordered by the hearing adjudicator, testimony may be taken by telephone or other contemporaneous electronic means. The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.

**(g) Subpoenas.** The parties may subpoena witnesses, documents, or things under the terms of CR 45. A witness must promptly comply with all subpoenas issued under this Rule and with all lawful orders made by the hearing adjudicator under this Rule. Subpoenas may be enforced under Rule 4.7.

**(h) Hearing Record.** Disciplinary hearings must be recorded in writing by a court reporter or recorded by electronic means. The ORA must make arrangements for recording the hearing. A court reporter must prepare and certify a hearing transcript and submit it to the Clerk. The Clerk files the hearing transcript and serves it on the parties. The hearing transcript is the official record of the hearing.

**(i) Prior Disciplinary Record.** The respondent's record of prior discipline, or the fact that the respondent has no prior discipline, must be made a part of the hearing record before the hearing adjudicator files a recommendation.

**RULE 10.13 EVIDENCE AND BURDEN OF PROOF**

**(a) Proceedings Not Civil or Criminal.** Hearing adjudicators should be guided in their evidentiary and procedural rulings by the principle that disciplinary proceedings are neither civil nor criminal but are sui generis proceedings to determine if a respondent's conduct should have an impact on the respondent's license to practice law.

**(b) Burden of Proof.** Disciplinary counsel has the burden of establishing a charged rule violation by a clear preponderance of the evidence.

**(c) Proceeding Based on Criminal Conviction.** If a statement of charges alleges an act of misconduct for which the respondent has been convicted in a criminal proceeding, the court record of the conviction is

conclusive evidence at the disciplinary hearing that (1) the respondent is guilty of the crime, (2) the respondent violated the statute on which the conviction was based, and (3) all essential elements of the crime of which the respondent was convicted have been established.

**(d) Evidentiary Rules.** Except as provided in section (d)(4) of this Rule, the Washington Rules of Evidence (ER) do not apply, but the hearing adjudicator may consider them as guidance in making evidentiary rulings. The following evidentiary rules apply during disciplinary hearings:

- (1) evidence, including hearsay evidence, is admissible if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs;
- (2) evidence may be excluded if it is irrelevant, immaterial, or unduly repetitious;
- (3) documents may be admitted in the form of copies or excerpts; and
- (4) a hearing adjudicator may take judicial notice of adjudicative facts as described in ER 201.

#### **RULE 10.14 BIFURCATED HEARINGS**

**(a) When Allowed.** Upon written motion filed no later than 60 days before the hearing date, either party may request that the disciplinary proceeding be bifurcated. The hearing adjudicator must weigh the reasons for bifurcation against any increased cost and delay, inconvenience to participants, duplication of evidence, and any other factors, and may grant the motion only if it appears necessary to ensure a fair and orderly hearing because of the respondent's record of prior disciplinary sanction or because either party would suffer significant prejudice or harm.

**(b) Procedure.**

(1) *Violation Hearing.*

(A) A bifurcated proceeding begins with an initial violation hearing to make factual determinations and legal conclusions as to the charged rule violations, including the mental state necessary for the violations. During the violation hearing, evidence of a prior disciplinary record is not admissible to prove the respondent's character or to impeach the respondent's credibility. However, evidence of prior acts of misconduct may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(B) Following the violation hearing, the hearing adjudicator files findings of fact and conclusions of law.

(i) If no violation is found, the hearing adjudicator enters findings of fact, conclusions of law, and a recommendation for dismissal, and the sanction hearing is canceled.

(ii) If any violation is found, after the expiration of the time for a motion to amend under Rule 10.15(b), or after ruling on that motion, the findings of fact and conclusions of law as to those violations are not subject to reconsideration by the hearing adjudicator.

(2) *Sanction Hearing.* If any violation is found, a sanction hearing is held to determine the appropriate sanction recommendation. During the sanction hearing, evidence of the existence or lack of any prior disciplinary record is admissible. No evidence may be admitted to contradict or challenge the findings of fact and conclusions of law as to the violations found under section (b)(1)(B)(ii) of this Rule. At the conclusion of the sanction hearing, the hearing adjudicator files findings of fact and conclusions of law as to sanction and a recommendation, which, together with the previously filed findings of fact and conclusions of law, is the hearing decision of the hearing adjudicator.

(3) *Timing.* If a motion for bifurcation is granted, the violation hearing is held on the date previously set for hearing. Upon granting a motion to bifurcate, the hearing adjudicator must set a date and place for the sanction hearing that should be no later than 60 days after the date set for the commencement of the violation hearing.



## **RULE 10.15 HEARING DECISION**

**(a) Hearing Decision.** A hearing adjudicator’s decision must be in the form of written findings of fact, conclusions of law, and recommendation. The hearing decision should be filed with the Clerk within 30 days after the hearing transcript is filed. Either party may file proposed findings of fact, conclusions of law, and recommendation within 20 days after the disciplinary hearing is concluded or as otherwise ordered by the hearing adjudicator.

**(b) Amendment.**

(1) *Timing of Motion.* Either party may move to modify, amend, or correct the hearing decision as follows:

(A) In a proceeding not bifurcated, within 15 days of service of the hearing decision;

(B) In a bifurcated proceeding, within 15 days of service of:

(i) the findings of fact and conclusions of law regarding violations; or

(ii) the sanction recommendation, but this motion may not seek to modify, amend, or correct the violation findings of fact or conclusions of law.

(2) *Procedure.* Rule 10.8 governs this motion. The hearing adjudicator should rule on the motion within 15 days after the filing of a timely reply or after the period to file a reply under Rule 10.8(c) has expired. The ruling may deny the motion or may amend, modify, or correct the hearing decision.

(3) *Effect of Failure to Move.* Failure to move for modification, correction, or amendment does not affect any subsequent appellate review.

**(c) Appeal.** Rule 11.2 governs notices of appeal of a hearing decision.

**(d) Transmittal to Court.** If no party files a notice of appeal of a hearing decision within the time permitted by Rule 11.2, the Clerk transmits a copy of the hearing decision to the Supreme Court for entry of a final order under Rule 13.1(a) or other appropriate order.

## **TITLE 11 – APPEAL TO THE APPEAL PANEL**

### **RULE 11.1 SCOPE OF TITLE**

This Title provides the procedure for appeals of a hearing decision and interlocutory review of acts or rulings of a regulatory adjudicator. For purposes of this Title, the term “party” includes individuals seeking or responding to review under Rule 3.4. The Rules of Appellate Procedure serve as guidance for review under this Title except as to matters specifically dealt with in these Rules.

### **RULE 11.2 DECISIONS SUBJECT TO APPEAL**

**(a) Decision.** For purposes of this Title, “hearing decision” means:

(1) the hearing adjudicator’s findings of fact, conclusions of law, and recommendation under Rules 8.2(g), 8.3(i), 8.4(h), and 10.15. If either party properly files a motion to amend under Rule 10.15(b), the “hearing decision” includes the ruling on the motion;

(2) a decision dismissing all counts under Rule 10.5(d);

(3) a decision dismissing the proceeding with prejudice under Rule 10.9(d); or

(4) the hearing adjudicator’s decision on a petition to return from incapacity inactive status under Rule 8.11(e)(8).

**(b) Time to File Notice.** A notice of appeal must be filed with the Clerk within 30 days of service of the hearing decision on the parties.

**(c) Cross Appeal.** If a party files a timely notice of appeal and the other party wants relief from the hearing decision, the other party must file a notice of appeal with the Clerk within the later of (1) 14 days after service of the notice filed by the other party, or (2) within the time set forth in section (b) of this Rule for filing a notice of appeal.

### **RULE 11.3 RECORD ON APPEAL, DESIGNATION, AND PREPARATION**

**(a) Terminology.** By analogy to the RAP, the Appeal Panel is considered the appellate court, the Clerk is considered the trial court clerk, and documents in the Clerk's file are considered the clerk's papers.

**(b) Record on Appeal.** The record on appeal consists of documents from the Clerk's file designated by the parties, exhibits designated by the parties, the hearing decision, and the hearing transcript.

**(c) Designation of Record.** A party must file its designation at or before the time it files its first brief.

**(d) No Additional Evidence.** Evidence not presented to the hearing adjudicator must not be designated by the parties or presented to the Appeal Panel.

**(e) Preparation of Record.** The Clerk prepares the record on appeal and distributes it to the Appeal Panel. The Clerk provides the parties with a copy of the index of the Clerk's file documents and a cover sheet listing the exhibits.

### **RULE 11.4 BRIEFS**

**(a) Caption of Briefs.** The parties should caption briefs as follows:

[Name of Party] Opening Brief

[Name of Party] Response

[Name of Party] Reply

**(b) Content of Briefs.**

(1) *Opening Brief.* The opening brief should contain under appropriate headings and in the order here indicated:

(A) *Title Page.* A title page, which is the cover.

(B) *Tables.* A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where cited.

(C) *Introduction.* A concise introduction. This section is optional. The introduction need not contain citations to the record or authority.

(D) *Statement of the Case.* A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(E) *Argument.* The argument section must identify the issues for review and present argument in support of the issues, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The parties should include a concise statement of the standard of review as to each issue.

(F) *Conclusion.* A short conclusion stating the precise relief sought.

(G) *Appendix.* An appendix to the brief if deemed appropriate by the party filing the brief. An appendix may not include evidence not presented to the hearing adjudicator.

(2) *Response.* The response should conform to section (b)(1) of this Rule and answer the opening brief.

(3) *Reply.* A reply brief should conform with sections (A), (B), (E), (F), and (G) of section (b)(1) of this Rule and be limited to a response to the issues in the response brief.

**(c) Timing of Briefs.**

(1) *Opening Brief.* The party filing the notice of appeal must file an opening brief within 45 days of service on the parties of a copy of the transcript by the Clerk or the filing of the notice of appeal, whichever is later. Failure to file an opening brief within the required period constitutes an abandonment of the appeal.

(2) *Response.* Any response of the opposing party must be filed within 30 days from service of the opening brief.

(3) *Reply*. Any reply of the appealing party must be filed within 30 days of service of the response.

**(d) Procedure When Both Parties Appeal.** When both parties file notices of appeal, the party filing first is considered the appealing party. In these situations, the responding party may raise its own issues on appeal, and the appealing party has an additional five days to file the reply permitted by section (b)(3) of this Rule.

**(e) References to the Record.** Briefs filed under this Rule must specifically refer to the record if available, using the designations TR for transcript, EX for exhibit, and CF for Clerk's file document.

**(f) Formatting Requirements and Length of Briefs.** Briefs must conform with the formatting requirements of RAP 18.17, except that (1) the opening and response briefs must not exceed 8,750 words (word processing software) or 35 pages (typewriter or hand-written), and (2) the reply brief must not exceed 2,500 words (word processing software) or 10 pages (typewriter or hand-written). For compelling reasons, the Appeal Panel may grant a motion to file an over-length brief. The Clerk must return over-length briefs presented for filing without a motion. The Clerk must provide a copy of this Rule to the party with the original unfiled brief.

#### **RULE 11.5 SUPPLEMENTING THE RECORD**

The record on appeal may be supplemented in the following ways:

**(a) As of Right.** A party may supplement its designation of the record before or with the filing of the party's last brief.

**(b) On Motion.** After a party files its last brief, a party may file a motion with the Appeal Panel to supplement the record. Leave to supplement the record should be freely granted.

**(c) Sua Sponte.** With notice to the parties, the Appeal Panel may supplement the record with any portion of the record before the hearing adjudicator.

#### **RULE 11.6 REQUEST FOR THE TAKING OF ADDITIONAL EVIDENCE**

**(a) Timing and Content of Request.** Any time prior to the deadline for filing of the party's last brief, a party by written motion may request the taking of additional evidence based on newly discovered evidence. The motion must be supported by a declaration describing in detail the additional evidence and any reasons why it was not presented at the hearing and must address the factors listed in section (b) of this Rule.

**(b) Remedy Limited.** The Appeal Panel may direct that additional evidence on the merits of the case be taken prior to the decision of the case on appeal if:

- (1) additional proof of facts is needed to fairly resolve the issues on appeal,
- (2) the additional evidence would probably change the hearing decision being appealed,
- (3) it is equitable to excuse a party's failure to present the evidence to the hearing adjudicator,
- (4) the appellate remedy of granting a new hearing is inadequate or unnecessarily expensive, and
- (5) it would be inequitable to decide the case solely on the evidence already taken by the hearing adjudicator.

**(c) Where Taken.** The Appeal Panel will ordinarily direct the hearing adjudicator to take additional evidence and find the facts based on that evidence.

**(d) Effect on Pending Appeal.** The pending appeal will be stayed if the Appeal Panel directs that additional evidence be taken.

#### **RULE 11.7 APPELLATE DECISION**

**(a) Basis for Appellate Decision.** The Appeal Panel considers the hearing decision, the parties' briefs filed under Rule 11.4, and the record on appeal. Except as provided in section (b) of this Rule, the Appeal Panel will decide a case only on the basis of issues set forth by the parties in their briefs.

**(b) Issues Raised by the Appeal Panel.** If the Appeal Panel concludes that an issue that is not set forth in

the briefs should be considered to properly decide a case, it may notify the parties and give them an opportunity to present written argument on the issue raised by the Appeal Panel.

**(c) Standards of Review.** The Appeal Panel reviews findings of fact for substantial evidence. It reviews conclusions of law and recommendations de novo. Evidence not presented to the hearing adjudicator cannot be considered by the Appeal Panel.

**(d) Oral Argument.**

- (1) *Request by Party or Panel.* The Appeal Panel hears oral argument if requested by a party who has filed a brief or if ordered by the Panel.
- (2) *Timing of Request.* A party's request must be filed no later than the deadline for that party to file its last brief, including a response or reply, under Rule 11.4.
- (3) *Setting and Notice of Argument.* Notice of oral argument issued by the Clerk sets the date, time, place, and terms for oral argument. The Clerk serves notice on the parties no later than 30 days before the scheduled argument.
- (4) *Rescheduling.* A request to reschedule oral argument must be made by motion filed with the Clerk within 15 days of receipt of the notice setting the date for oral argument, except upon a showing of good cause.
- (5) *Procedure.* Each party has 15 minutes to present oral argument. For compelling reasons, the Appeal Panel may grant a motion for additional oral argument time. The motion should be filed with the request for oral argument. If either party fails to appear for argument at the scheduled time, the Appeal Panel may consider the case without oral argument.
- (6) *Record.* Arguments before the Appeal Panel must be recorded in writing by a court reporter or by electronic means. The ORA must make arrangements for recording the argument. Within 15 days of the conclusion of the argument, a verbatim report of proceedings must be prepared and certified by a court reporter and filed with the Clerk, who will serve it on the parties. The verbatim report is the official record of the argument.

**(e) Action by the Appeal Panel.** Consistent with the standards of review in section (c) of this Rule, the Appeal Panel may reverse, affirm, or modify the hearing decision on appeal and take any other action as the merits of the case and the interest of justice may require.

**(f) Appellate Decision.** The Appeal Panel must file an appellate decision in the form of a written order or opinion stating the reasons for its decision. The appellate decision must set forth the result favored by each panel member. Any dissent must set forth the result favored by the dissenting panel member(s). The Clerk serves the appellate decision on the parties.

**(g) Appeal or Review.** Rules 12.3 and 12.4 govern notices of appeal or petitions for discretionary review of appellate decisions.

**(h) Transmittal to Court.** If no party files a notice of appeal or petition for discretionary review of an appellate decision within the time permitted by Rules 12.3 and 12.4, or upon the Supreme Court's denial of a petition for discretionary review, the Clerk transmits a copy of the appellate and hearing decisions to the Supreme Court for entry of a final order under Rule 13.1(a) or 8.1(b), or other appropriate order.

#### **RULE 11.8 MODIFICATION OF REQUIREMENTS**

Upon written motion filed with the Clerk by a party for good cause shown, or on its own initiative, the ORA may modify the time periods in Title 11 and make other orders as appear appropriate to ensure fair and orderly consideration of the appeal. However, the time period for filing a notice of appeal in Rule 11.2(b) may not be extended or altered.

#### **RULE 11.9 MOTIONS**

**(a) Content of Motion.** A motion must include (1) a statement of the name and designation of the person filing the motion, (2) a statement of the relief sought, (3) reference to or copies of parts of the record

relevant to the motion, and (4) a statement of the grounds for the relief sought, with supporting argument.

**(b) Filing and Service.** Motions for matters pending with the Appeal Panel must be in writing and filed with the Clerk. The motion and any response or reply must be served as required by Rule 4.1.

**(c) Response.** A party may file a written response to the motion. A response must be served and filed within 10 days of service of the motion, unless the time is modified by the Chair of the Appeal Panel for good cause.

**(d) Reply.** The moving party may file a reply to a response. A reply must be served and filed within seven days of service of the response, unless the time for reply is modified by the Chair of the Appeal Panel for good cause.

**(e) Length of Motion, Response, and Reply.** A motion, response, and reply must conform with the formatting requirements of RAP 18.17, except that (1) the motion and response must not exceed 2,500 words (word processing software) or 10 pages (typewriter or hand-written), and (2) the reply must not exceed 1,250 words (word processing software) or 5 pages (typewriter or hand-written). For good cause, the Chair of the Appeal Panel may grant a motion to file an over-length motion, response, or reply.

**(f) Consideration of Motion.** Upon expiration of the time for reply, the Chair of the Appeal Panel must promptly rule on the motion or refer the motion to the full Panel for decision. A motion will be decided without oral argument, unless the Chair of the Appeal Panel directs otherwise.

**(g) Ruling.** A motion is decided by written order filed with and served by the Clerk under Rule 4.2.

**(h) No Appeal Panel Convened.** When a motion is filed before an Appeal Panel is convened, the Chief Regulatory Adjudicator may perform all functions of the Chair under this Rule.

#### **RULE 11.10 INTERLOCUTORY REVIEW**

**(a) General.** Unless these Rules provide otherwise, a party may file a motion seeking interlocutory review by the Appeal Panel of any act or ruling of a regulatory adjudicator that is not appealable as a matter of right.

**(b) Considerations Governing Acceptance of Review.** Interlocutory review may be granted only in the following circumstances:

- (1) A regulatory adjudicator has committed an obvious error that would render further proceedings useless;
- (2) A regulatory adjudicator has committed probable error and the ruling of the hearing adjudicator substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) A regulatory adjudicator has so far departed from the accepted and usual course of disciplinary proceedings as to call for review by the Appeal Panel; or
- (4) A regulatory adjudicator has certified, or all the parties have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate resolution of the proceedings.

**(c) Procedure.**

- (1) *Motion.* A party seeks interlocutory review by motion under the procedures of Rule 11.9, except that the Chief Regulatory Adjudicator decides the motion. The motion must include a copy of the ruling that the party wants reviewed, a copy of any order granting or denying motions made with respect to that ruling, and a copy of parts of the record relevant to the act or ruling.
- (2) *Timing and Service.* The motion must be filed with the Clerk and served on the opposing party within the later of (A) 15 days of the act or ruling that the party wants reviewed, or (B) 15 days of entry of an order deciding a timely motion for reconsideration under Rule 10.8(g).
- (3) *Proceedings Not Stayed.* A party's motion for interlocutory review does not stay the regulatory adjudicator's act or ruling, any proceedings, or any pre-hearing deadlines unless the regulatory

adjudicator or the Chief Regulatory Adjudicator issues a stay or the Chief Regulatory Adjudicator grants review.

**(d) Effect of Denial of Interlocutory Review.** The denial of interlocutory review does not affect the right of a party to obtain later review of the act or ruling or the issues pertaining to it.

**(e) Acceptance of Review.** Upon accepting interlocutory review, the Chief Regulatory Adjudicator assigns the matter to an Appeal Panel, specifies the issue or issues as to which review is granted, and establishes the timeline and terms for any additional briefing and oral argument.

## **TITLE 12 – REVIEW BY SUPREME COURT**

### **RULE 12.1 APPLICABILITY OF RULES OF APPELLATE PROCEDURE**

The Rules of Appellate Procedure serve as guidance for review under this Title except as to matters specifically dealt with in these Rules. For purposes of this Title, the term “party” includes individuals seeking or responding to review under Rule 3.4.

### **RULE 12.2 METHODS OF SEEKING REVIEW**

**(a) Two Methods for Seeking Review of Appeal Panel Decision.** The methods for seeking Supreme Court review of an Appeal Panel decision entered under Rule 11.7(f) are: (1) review as a matter of right, called “appeal,” and (2) review with Court permission, called “discretionary review.” Both “appeal” and “discretionary review” are called “review.”

**(b) Power of Court Not Affected.** This Rule does not affect the Court’s power to review any decision by an Appeal Panel or regulatory adjudicator and to exercise its inherent and exclusive jurisdiction over the discipline and incapacity system.

### **RULE 12.3 APPEAL**

**(a) Right to Appeal.** The respondent or disciplinary counsel has the right to appeal an Appeal Panel decision recommending disciplinary suspension or disbarment. There is no other right of appeal except as specified in Title 8.

**(b) Notice of Appeal; Timing.** The appealing party must file a notice of appeal within 30 days of service of the Appeal Panel’s decision.

**(c) Where to File Notice of Appeal; Service.** A party files the notice of appeal with the ORA Clerk and must serve the other party.

**(d) Filing Fee.** A party filing a notice of appeal must, at the time the notice is filed, either pay the statutory filing fee to the ORA Clerk by check made payable to the Washington Supreme Court, or by appropriate motion apply to the Clerk of the Supreme Court for a waiver of the filing fee based upon a showing of indigency.

**(e) Cross Appeal.** If a party files a timely notice and the other party wants relief from the Appeal Panel decision, the other party must file a notice of appeal with the ORA Clerk within 14 days after service of the first notice of appeal. A party filing a cross notice of appeal must serve the other party but need not pay a filing fee.

### **RULE 12.4 DISCRETIONARY REVIEW**

**(a) Decisions Subject to Discretionary Review.** Respondent or disciplinary counsel may seek discretionary review of Appeal Panel decisions or orders not subject to appeal under Rule 12.3. The Court accepts discretionary review only if:

- (1) the Appeal Panel’s decision or order is in conflict with a Supreme Court decision;
- (2) a significant question of law is involved;
- (3) there is no substantial evidence in the record to support a material finding of fact on which the

Appeal Panel's decision or order is based; or

(4) the petition involves an issue of substantial public interest that the Court should determine.

**(b) Petition for Discretionary Review; Timing.** A party may seek discretionary review by filing a petition for discretionary review with the ORA Clerk within 30 days of service of the Appeal Panel's decision or order.

**(c) Where to File Petition for Discretionary Review; Service.** A party files a petition for discretionary review with the ORA Clerk and must serve the other party.

**(d) Filing Fee.** A party filing a petition for discretionary review must, at the time the petition is filed, either pay the statutory filing fee to the ORA Clerk by check made payable to the Washington Supreme Court, or by appropriate motion apply to the Clerk of the Supreme Court for a waiver of the filing fee based upon a showing of indigency.

**(e) Content of Petition; Answer; Service; Decision.** A petition for discretionary review should conform substantially to RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in RAP 13.4 to the Court of Appeals are considered references to the Appeal Panel. The appendix to the petition or an appendix to an answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d) – (h) governs answers and replies to petitions for discretionary review and related matters including service and decision by the Court.

**(f) Form and Length.** The petition for review, answer, or reply must comply with the form requirements of RAP 13.4(e) and the length limits of RAP 13.4(f).

**(g) Cross Petition.** If a party files a timely petition for discretionary review and the other party wants relief from the Appeal Panel's decision, the other party must file a petition for discretionary review with the ORA Clerk within the later of (1) 14 days after service of the first petition, or (2) the time for filing a petition under section (b) of this Rule. A party filing a cross petition must serve the other party but need not pay a filing fee. The form and length requirements of RAP 13.4(e) and RAP 13.4(f) apply.

**(h) Acceptance of Review.** The Court accepts discretionary review of an Appeal Panel decision by granting a petition for discretionary review. Upon acceptance of review, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

#### **RULE 12.5 RECORD TO SUPREME COURT**

**(a) Transmittal.** The ORA Clerk should transmit the record, including the filing fee, to the Supreme Court within 30 days of the filing of the notice of appeal, service of the order accepting review, or filing of the transcript of oral argument before the Appeal Panel, if any. Notwithstanding these deadlines, the ORA Clerk should not transmit the record to the Supreme Court prior to payment of the filing fee or receipt of proof that the Supreme Court has waived the filing fee.

**(b) Content.** The record transmitted to the Court consists of:

- (1) the notice of appeal, if any;
- (2) the Appeal Panel's decision or order;
- (3) the record before the Appeal Panel;
- (4) the transcript of any oral argument before the Appeal Panel; and
- (5) any other portions of the record before the ORA, including clerk's papers or exhibits, that the Court deems necessary for full review.

**(c) Notice to Parties.** The ORA Clerk serves each party with a list of the portions of the record transmitted.

**(d) Transmittal of Cost Orders.** Within 10 days of entry of an order assessing costs under Rule 13.8(e), the ORA Clerk should transmit the order to the Court as a separate part of the record, together with the supporting statements of costs and expenses and any exceptions or reply filed under Rule 13.8(d).

**(e) Additions to Record.** A party may request that the ORA Clerk transmit additional portions of the

record to the Court prior to or with the filing of the party's last brief. The party must file a copy of any such request with the Court. Thereafter, a party may move the Court for an order directing the transmittal of additional portions of the record to the Court.

**(f) Confidentiality.** When a party identifies information or documents that are otherwise confidential under these Rules, the Court must take measures to maintain the confidentiality of the information or documents.

#### **RULE 12.6 BRIEFS**

**(a) Brief Required.** The party seeking review must file a brief stating the party's objections to the Appeal Panel's decision or order.

**(b) Time for Filing.** The brief of the party seeking review must be filed with the Supreme Court within 30 days of service under Rule 12.5(c) of the list of portions of the record transmitted to the Court, unless the Court directs otherwise.

**(c) Answering Brief.** Any answering brief of the other party must be filed with the Court within 30 days after service of the brief of the party seeking review.

**(d) Reply Brief.** Any reply brief of a party seeking review must be filed with the Court 20 days after service of the answering brief. A reply brief must be limited to a response to the issues in the answering brief.

**(e) Briefs When Both Parties Seek Review.** When both the respondent and disciplinary counsel seek review of an Appeal Panel decision or order, the respondent is deemed the party seeking review for the purposes of this Rule. In that case, disciplinary counsel may file a surreply to the respondent's reply brief. The surreply brief must be filed with the Court within 20 days after service of the respondent's reply brief.

**(f) Form of Briefs.** Unless otherwise ordered by the Court, briefs filed under this Rule must conform to the requirements of RAP 10.3 and 10.4. Documents filed with the ORA Clerk are known as Clerk's file documents and should be abbreviated CF, the transcript or partial transcript of the hearing should be abbreviated TR, and exhibits should be abbreviated EX.

**(g) Reproduction and Service of Briefs by Supreme Court Clerk.** The Supreme Court Clerk reproduces and distributes briefs as provided in RAP 10.5.

#### **RULE 12.7 ARGUMENT**

**(a) Rules Applicable.** Oral argument before the Supreme Court is conducted under RAP Title 11, unless the Court directs otherwise.

**(b) Priority.** Disciplinary and incapacity proceedings have priority and are set upon compliance with the above Rules.

#### **RULE 12.8 ENTRY OF ORDER OR OPINION**

Following consideration of a matter by the Court, the Court enters a final order under Rule 13.1(a) or 8.1(b), or another appropriate order.

#### **RULE 12.9 MOTION FOR RECONSIDERATION**

A motion for reconsideration may be filed as provided in RAP 12.4, but the motion does not stay the judgment or delay the effective date of a an order or opinion under Rule 12.8 unless the Court enters a stay.

#### **RULE 12.10 VIOLATION OF RULES**

The Court may sanction a party under RAP 18.9 for violation of Rules in this Title.



## TITLE 13 – SANCTIONS AND REMEDIES

### RULE 13.1 FINAL ORDER; SANCTIONS AND REMEDIES

**(a) Supreme Court Final Order.** The Supreme Court's final order in a disciplinary proceeding is an order or opinion that imposes sanctions or remedies under this Rule, declines to impose sanctions or remedies under this Rule, dismisses the matter, or otherwise concludes the proceeding. Except as otherwise provided in these Rules, upon entry of the Court's final order, the matter is not subject to further review under these Rules and any sanctions or remedies are imposed on the effective date as set forth in this Title. After the final order is issued, the ORA or the Court may hear and decide post-judgment issues authorized by these Rules. A motion for reconsideration under Rule 12.9 does not stay the judgment or delay the effective date of a final order unless the Court enters a stay.

**(b) Sanctions.** Upon an adjudication or stipulation under these Rules that a respondent has committed an act of misconduct, the Court may impose one or more of the following public sanctions:

- (1) Disbarment;
- (2) Disciplinary suspension;
- (3) Reprimand; or
- (4) Admonition.

The American Bar Association *Standards for Imposing Lawyer Sanctions* are used to determine the appropriate sanction.

**(c) Remedies.** Upon imposition of a sanction, the Court may impose one or more of the following public remedies:

- (1) Probation;
- (2) Restitution;
- (3) Limitation on practice;
- (4) Continuing legal education;
- (5) Assessment of costs; or
- (6) Other requirements consistent with the purposes of protecting the public and maintaining the integrity of the legal profession.

### RULE 13.2 DISBARMENT

**(a) Definition.** A sanction of disbarment is the revocation of a respondent's license to practice law in this state.

**(b) Effective Date.** Disbarment is effective on the date set by the Supreme Court's order or opinion, which will ordinarily be seven days after the date of the order or opinion. If no date is set, disbarment is effective seven days after the date of the Court's order or opinion.

**(c) Reinstatement from Disbarment.** A person who is disbarred may seek reinstatement under APR 25.

### RULE 13.3 DISCIPLINARY SUSPENSION

**(a) Definition.** A disciplinary suspension is a suspension imposed as a sanction under these Rules. A disciplinary suspension is for a fixed period of time not to exceed three years.

**(b) Effective Date.** A disciplinary suspension is effective on the date set by the Supreme Court's order or opinion, which will ordinarily be seven days after the date of the order or opinion. If no date is set, a disciplinary suspension is effective seven days after the date of the Court's order or opinion.

**(c) Reinstatement from Disciplinary Suspension.**

- (1) A respondent may apply to reinstate the respondent's license to practice law to either active status or inactive status.
- (2) A respondent must file an application for reinstatement with the Bar and comply with applicable court rules and the Bar's Bylaws for reinstatement from disciplinary suspension.

- (3) A respondent may not be reinstated without disciplinary counsel's certification that the respondent has complied with any pre-conditions to reinstatement or other specific conditions ordered.
- (4) If the Client Protection Fund paid an applicant due to a respondent's misconduct, the respondent must obtain a certification from Bar counsel establishing that the respondent has paid restitution to the Client Protection Fund or is current with any restitution payment plan.
- (5) A respondent may ask the ORA to review an adverse determination by disciplinary counsel or Bar counsel regarding compliance with the conditions for reinstatement, payment of costs or restitution, or compliance with a costs or restitution payment plan. On review, the ORA may modify the terms of the payment plan if warranted. The ORA determines the procedure for this review. The ORA's ruling is not subject to further review.
- (6) When the respondent has complied with all conditions for reinstatement and the term of disciplinary suspension is complete, the Bar files a recommendation for reinstatement with the Supreme Court for entry of an appropriate order.

#### **RULE 13.4 REPRIMAND**

**(a) Definition.** A reprimand is a sanction that declares that the respondent violated the rules of professional conduct. A reprimand does not restrict the respondent's authorization to practice law. Unless otherwise ordered by the Court, a reprimand must include a term of probation under Rule 13.6.

**(b) Effective Date of Reprimand.** A reprimand is effective on the date of the Supreme Court's order or opinion.

#### **RULE 13.5 ADMONITION**

**(a) Definition.** An admonition is a sanction that declares that the respondent violated the rules of professional conduct. An admonition does not restrict the respondent's authorization to practice law and is imposed when a sanction less than reprimand is appropriate.

**(b) Effective Date of Admonition.** An admonition is effective on the date of the Supreme Court's order or opinion.

#### **RULE 13.6 PROBATION**

**(a) Definition.** An order imposing a sanction under Rule 13.1 may include a term of probation for a fixed period of two years or less that includes complying with specific conditions ordered under section (b) of this Rule.

**(b) Conditions of Probation.** Conditions of probation may include, but are not limited to:

- (1) alcohol or drug treatment;
- (2) continuing legal education;
- (3) medical treatment;
- (4) psychological or psychiatric treatment;
- (5) practice monitoring;
- (6) professional office practice or management counseling;
- (7) periodic audits or reports; or
- (8) any other program or corrective course of action to address the respondent's misconduct.

**(c) Failure to Comply.** Failure to comply with a condition of probation may be grounds for an interim suspension under Rule 7.2 and may be grounds for discipline.

**(d) Public Information.** The fact that a respondent is or was on probation, the length of probation, and the conditions of probation are public information subject to Rule 3.3(a). All other information and documents related to the supervision of probation are not public information. In any proceeding under section (c) of this Rule, information relating to the probation is admissible into evidence in any ensuing disciplinary proceeding.

## **RULE 13.7 RESTITUTION**

**(a) Restitution May Be Required.** A respondent sanctioned under Rule 13.1 may be ordered to make restitution to the Client Protection Fund or to persons or entities financially injured by the respondent's conduct.

**(b) Payment of Restitution.** A respondent ordered to make restitution, including restitution to the Client Protection Fund, must do so within 90 days of the date on which the decision requiring restitution becomes final, unless the decision provides otherwise or the respondent enters into a periodic payment plan.

**(c) Periodic Payment Plan.**

(1) Disciplinary counsel, or Bar counsel on behalf of the Client Protection Fund, may enter into an agreement with a respondent for a reasonable periodic payment plan if the respondent demonstrates in writing a present inability to pay restitution. A decision to enter into a periodic payment plan and the determination of the payment plan's terms are made after consideration of the following factors:

- (A) whether the respondent promptly requested a reasonable periodic payment plan;
- (B) whether, to date, the respondent has made a good faith effort to make payments;
- (C) whether the respondent has or sought other sources for payment of the restitution; and
- (D) whether the suggested payment plan will allow for restitution to be paid in full in a reasonable amount of time.

(2) A respondent may file a motion with the ORA to request review of an adverse determination by disciplinary counsel regarding specific conditions for a periodic payment plan. The Chief Regulatory Adjudicator directs the procedure for this review. The regulatory adjudicator's ruling is not subject to further review.

**(d) Interest.** The respondent must pay interest on any amount not paid within 90 days of the date on which the restitution order is final at the maximum rate permitted under RCW 19.52.020. Any payment plan entered into under this Rule must provide for interest at the maximum rate permitted under RCW 19.52.020.

**(e) Failure to Comply.** A respondent's failure to make restitution when ordered to do so, or to comply with the terms of a periodic payment plan, may be grounds for discipline.

**(f) Restitution in Other Cases.** Determination of the amount of restitution and any interest thereon in discipline cases resolved by stipulation is governed by Rule 9.1. Determination of the amount of restitution and any interest thereon in discipline cases resolved by resignation in lieu of discipline is governed by Rule 9.2.

**(g) Money Judgment for Restitution.** No sooner than 90 days after a restitution order is final, a restitution beneficiary, including the Client Protection Fund, may apply to the Supreme Court Clerk or commissioner for a money judgment if the respondent has failed to pay restitution and interest thereon as provided by this Rule. The beneficiary must obtain a declaration from disciplinary counsel stating that the restitution order is final and that the respondent has failed to pay all or part of the restitution or is not current on a periodic payment plan. The beneficiary must serve the application for a money judgment and declaration of disciplinary counsel on the respondent and on disciplinary counsel under Rule 4.1. The respondent may file an objection with the Supreme Court Clerk or commissioner within 20 days of service of the application. The objection must be served on the beneficiary and disciplinary counsel under Rule 4.1. The sole issue to be determined by the Supreme Court Clerk or commissioner is whether the respondent has complied with the duty to make restitution, including compliance with the terms of a periodic payment plan, under this Rule. The Supreme Court Clerk or commissioner may enter a money judgment in compliance with RCW 4.64.030 on the order for restitution if the respondent has failed to pay the restitution as provided by this Rule. The Supreme Court Clerk or commissioner notifies the beneficiary,

the respondent, and disciplinary counsel of the judgment. Upon entry of the judgment, the Supreme Court Clerk or commissioner transmits the judgment to the clerk of the superior court in any county selected by the beneficiary and notifies the respondent of the transmittal. The clerk of the superior court files the judgment as a judgment in that court without payment of a filing fee.

#### **RULE 13.8 COSTS AND EXPENSES**

**(a) General.** A respondent may be required to pay the Bar's costs and expenses as provided in this Rule.

**(b) Costs Defined.** The term "costs" for the purposes of this Rule includes all monetary obligations, except attorney fees, reasonably and necessarily incurred by the Bar in the performance of its duties under these Rules, whether incurred before or after the filing of a statement of charges. Costs include, by way of illustration and not limitation:

- (1) court reporter charges for attending and transcribing depositions, hearings, and oral arguments;
- (2) process server charges;
- (3) necessary travel expenses of regulatory adjudicators, disciplinary counsel, adjunct disciplinary counsel, special conflicts disciplinary counsel, investigators, and witnesses;
- (4) expert witness charges;
- (5) costs of conducting an examination of books and records;
- (6) costs of supervising or monitoring probation imposed under Rule 13.6;
- (7) fees, costs, and expenses of a lawyer appointed under Title 8; and
- (8) costs of copying materials.

**(c) Expenses Defined.** "Expenses" for the purposes of this Rule means a charge for the Office of Disciplinary Counsel's attorney and staff time, in the following amounts:

- (1) in a matter without review by an Appeal Panel, \$3,000;
- (2) in a matter with review by an Appeal Panel under Title 11, without appeal to the Supreme Court, \$4,000; and
- (3) in a matter in which a notice of appeal or petition for discretionary review was filed with the Supreme Court under Title 12, \$6,000.

**(d) Statement of Costs and Expenses, Exceptions, and Reply.**

- (1) *Timing.* Disciplinary counsel must file and serve a statement of costs and expenses with the Clerk no later than 45 days from the date of entry of a hearing decision if no appeal is filed under Rule 11.2. If an appeal is filed under Rule 11.2, disciplinary counsel must file and serve a statement of costs and expenses with the Clerk no later than 45 days from the date of entry of the Appeal Panel's decision.
- (2) *Clerk's Certification of Costs.* The Clerk must file and serve a certification of adjudicative costs itemizing the costs incurred by the ORA under section (b) of this Rule no later than 35 days from the date of entry of a hearing decision if no appeal is filed under Rule 11.2. If an appeal is filed under Rule 11.2, the Clerk must file and serve a certification of adjudicative costs no later than 35 days from the date of entry of the Appeal Panel's decision.
- (3) *Content.* A statement of costs and expenses must state with particularity the nature and amount of the costs claimed by the Bar and also state the expenses requested. The statement of costs and expenses may incorporate by reference the Clerk's certification of costs.
- (4) *Exceptions.* The respondent may file exceptions no later than 20 days from service of the statement of costs and expenses.
- (5) *Reply.* Disciplinary counsel may file a reply no later than 10 days from service of any exceptions.

**(e) Assessment.** The hearing adjudicator, or other regulatory adjudicator as assigned by the Chief Regulatory Adjudicator, enters an order assessing costs and expenses after the expiration of the time for filing exceptions or replies.

**(f) Review of Costs Order.**

- (1) *Request for Review by Chief Regulatory Adjudicator.* Within 20 days of service on the respondent of the order assessing costs and expenses, a party may file a request for review of the order by the Chief Regulatory Adjudicator.
- (2) *Action by Chief Regulatory Adjudicator.* Upon the timely filing of a request, the Chief Regulatory Adjudicator reviews the order assessing costs and expenses based on disciplinary counsel's statement of costs and expenses and any exceptions or reply, the decision of the regulatory adjudicator, and any written statement filed by either party. The Chief Regulatory Adjudicator may approve or modify the order assessing costs and expenses. The Chief Regulatory Adjudicator's decision is not subject to further review.

**(g) Assessment in Matters Reviewed by the Court.** When a matter is reviewed by the Court under Title 12, any order assessing costs and expenses under section (e) of this Rule and the statement of costs and expenses and any exceptions or reply filed in the proceeding are included in the record transmitted to the Court. Upon filing of an opinion or order by the Court imposing a sanction, costs and expenses may be assessed in favor of the Bar under the procedures of RAP Title 14, except that "costs" as used in that Title means any costs and expenses allowable under this Rule.

**(h) Assessment Discretionary.** Assessment of any or all costs and expenses may be denied if the respondent demonstrates by a preponderance of the evidence that it would be in the interests of justice to do so.

**(i) Payment of Costs and Expenses.** A respondent ordered to pay costs and expenses must do so within 90 days of the date on which the assessment becomes final, unless the order assessing costs and expenses provides otherwise or the respondent enters into a periodic payment plan with disciplinary counsel.

**(j) Periodic Payment Plan.**

- (1) Disciplinary counsel may enter into an agreement with a respondent for a reasonable periodic payment plan if the respondent demonstrates in writing a present inability to pay assessed costs and expenses. A decision to enter into a periodic payment plan and the determination of the payment plan's terms are made after consideration of the following factors:
  - (A) whether the respondent promptly requested a reasonable periodic payment plan;
  - (B) whether, to date, the respondent has made good faith efforts to make payments;
  - (C) whether the respondent has or sought other sources for payment of the assessment; and
  - (D) whether the suggested payment plan will allow for costs and expenses to be paid in full in a reasonable amount of time.
- (2) A respondent may file a motion with the ORA to request review of an adverse determination by disciplinary counsel regarding specific conditions for a periodic payment plan. The Chief Regulatory Adjudicator directs the procedure for this review. The regulatory adjudicator's ruling is not subject to further review.

**(k) Interest.** The respondent must pay interest on any amount not paid within 90 days of the date on which the order assessing costs and expenses is final at the maximum rate permitted under RCW 19.52.020. Any payment plan entered into under this Rule must provide for interest at the maximum rate permitted under RCW 19.52.020.

**(l) Failure to Comply.** A respondent's failure to pay costs and expenses when ordered to do so or to comply with the terms of a periodic payment plan may be grounds for discipline.

**(m) Expenses in Other Cases.** Determination of the amount of expenses assessed and any interest thereon in other matters is governed as follows:

- (1) for discipline cases resolved by stipulation, by Rule 9.1;
- (2) for discipline cases resolved by resignation in lieu of discipline, by Rule 9.2;
- (3) for reciprocal discipline cases, by Rule 9.3;
- (4) for incapacity cases resolved by stipulation, by Rule 8.9; and
- (5) for a respondent's failure to cooperate, by Rule 5.9(c).

**(n) Money Judgment for Costs and Expenses.** No sooner than 90 days after an assessment of costs and

expenses is final, including an assessment resulting from a proceeding as identified in section (m) of this Rule, disciplinary counsel may apply to the Supreme Court Clerk or commissioner for a money judgment if the respondent has failed to pay the costs and expenses as provided by this Rule. Disciplinary counsel must serve the application for a money judgment on the respondent under Rule 4.1. The respondent may file an objection with the Supreme Court Clerk or commissioner within 20 days of service of the application. The sole issue to be determined by the Supreme Court Clerk or commissioner is whether the respondent has complied with the duty to pay costs and expenses, including compliance with the terms of a periodic payment plan, under this Rule. The Supreme Court Clerk or commissioner may enter a money judgment in compliance with RCW 4.64.030 if the respondent has failed to pay the costs and expenses as provided by this Rule. The Supreme Court Clerk or commissioner notifies disciplinary counsel and the respondent of the judgment. Upon entry of the judgment, the Supreme Court Clerk or commissioner transmits the judgment to the clerk of the superior court in any county selected by disciplinary counsel and notifies the respondent of the transmittal. The clerk of the superior court files the judgment as a judgment in that court without payment of a filing fee.

**(o) Action to Enforce Judgment for Costs and Expenses.** At any time following the entry of a judgment under section (n) of this Rule, the Bar is authorized to commence a judicial action to enforce and collect the judgment. Upon recommendation of the Chief Disciplinary Counsel, the Executive Director may engage the services of lawyer to represent the Bar in efforts to collect a judgment entered under section (n) or this rule or a collection action authorized by this Rule.

## **TITLE 14 – DUTIES ON DISBARMENT, RESIGNATION IN LIEU, SUSPENSION FOR ANY REASON, OR INCAPACITY INACTIVE STATUS**

### **RULE 14.1 NOTICE TO CLIENTS AND OTHERS; PROVIDING CLIENT PROPERTY**

**(a) Providing Client Property.** A respondent who has been suspended from the practice of law, has been disbarred, has resigned in lieu of discipline, or whose license has been placed in incapacity inactive status must, upon request, provide each client or the client's substituted licensed legal professional with the client's assets, files, and other documents in the respondent's possession, regardless of any possible claim of lien under RCW 60.40.

**(b) Required Notices.** A respondent who has been suspended from the practice of law, has been disbarred, has resigned in lieu of discipline, or whose license has been placed in incapacity inactive status must within 10 days of the effective date of the disciplinary suspension, disbarment, resignation, or status change:

- (1) notify every current client in writing of the following:
  - (A) the respondent's suspension, disbarment, resignation in lieu of discipline, or status change to incapacity inactive status;
  - (B) the respondent's inability to practice law and the advisability of seeking legal services elsewhere; and
  - (C) if the client is involved in litigation or administrative proceedings, the advisability of seeking the prompt substitution of another licensed legal professional.
- (2) notify the Court or agency of the respondent's inability to practice law if a client is involved in litigation or administrative proceedings;
- (3) notify any co-counsel or licensed legal professional assisting the respondent in providing legal services to a current client of the respondent's inability to practice law; and
- (4) notify any licensed legal professional for each adverse party in pending litigation or administrative proceedings, and any unrepresented adverse party, of the respondent's suspension, disbarment, resignation in lieu of discipline, or status change and the respondent's inability to practice law.

**(c) Address of Client.** When providing the notices required by this Rule, a respondent must, to the extent

consistent with the interests of the client and subject to the limitations of RPC 1.6 and 1.9 or LLLT RPC 1.6 and 1.9, take steps to ensure that adverse parties, co-counsel, courts, and agencies have information sufficient to effect service on the client.

#### **RULE 14.2 RESPONDENT TO DISCONTINUE PRACTICE**

**(a) Discontinue Practice.** After the effective date of the suspension, disbarment, resignation in lieu of discipline, or a status change to incapacity inactive status, respondents must:

- (1) not practice law,
- (2) not hold themselves out as authorized to practice law in Washington State, and
- (3) take whatever steps necessary to avoid any reasonable likelihood that anyone will rely on them as authorized to practice law.

**(b) Continuing Duties to Former Clients.** A respondent who has been suspended from the practice of law, has been disbarred, has resigned in lieu of discipline, or whose license has been placed in incapacity inactive status is not precluded from disbursing assets to clients or other persons or providing information on the facts, theory, and status of a case to a succeeding licensed legal professional, but the respondent cannot be involved in any discussion regarding matters occurring after the effective date of the suspension, disbarment, resignation in lieu of discipline, or status change to incapacity inactive status. The respondent must provide this information on request and without charge.

#### **RULE 14.3 DECLARATION OF COMPLIANCE**

Within 25 days of the effective date of a respondent's disbarment, suspension, resignation in lieu of discipline, or status change to incapacity inactive status under these Rules or the APR, the respondent must serve on disciplinary counsel or Bar counsel a declaration stating that the respondent has fully complied with the provisions of this Title. The declaration must also provide a mailing address where communications to the respondent may thereafter be directed. The respondent must attach to the declaration copies of the form letters of notification sent to the respondent's clients and opposing licensed legal professionals or parties and copies of letters to any court or tribunal, together with a list of names and addresses of all clients and opposing licensed legal professionals or parties to whom notices were sent. The declaration is confidential information except the respondent's mailing address is treated as a change of mailing address under APR 13(b).

#### **RULE 14.4 RESPONDENT TO KEEP RECORDS OF COMPLIANCE**

A respondent who has been suspended from the practice of law, has been disbarred, has resigned in lieu of discipline, or whose license has been placed in incapacity inactive status must maintain written records of the steps taken by the respondent under this Title, so that proof of compliance will be available in any subsequent proceeding.

### **TITLE 15 –RANDOM EXAMINATIONS, OVERDRAFT NOTIFICATION, AND IOLTA**

#### **RULE 15.1 RANDOM EXAMINATION OF BOOKS AND RECORDS**

**(a) Authorization.** The Office of Disciplinary Counsel is authorized to examine and reexamine the books and records of any lawyer, LLLT, LPO, law firm, or closing firm to determine whether the lawyer, LLLT, LPO, law firm, or closing firm is complying with RPC 1.15A and 1.15B, or LLLT RPC 1.15A and 1.15B, or LPORPC 1.12A and 1.12B and other rules of professional conduct referencing those rules. An examination or reexamination of the books and records of a closing firm must be limited as described in section (c)(2) of this Rule.

**(b) Definitions.**

- (1) As used in this Title, “law firm” has the same meaning as defined in RPC 1.0A(c) except that lawyers employed in the legal department of a closing firm are not considered a law firm under these Rules.
- (2) As used in this Title, “closing firm” means any bank, depository institution, escrow agent, title company, or other business, whether public or private, that employs, or contracts for the services of, a lawyer or LPO for the purpose of providing real or personal property closing services for a transaction. For purposes of this section, the term “other business” does not include law firms.

**(c) Selection.**

- (1) *Method.* The selection of lawyers, LLLTs, and LPOs to be examined will be limited to those whose licenses are on active status and will utilize the principle of random selection by license number.
- (2) *Law Firms and Closing Firms.* If the license number randomly selected is that of a lawyer, LLLT, or LPO who is an employee or member of a law firm, the entire law firm is subject to examination or reexamination under Rule 15.1(d). If the license number randomly selected is that of a lawyer or LPO who is an employee or member of a closing firm, only those books and records relating to transactions in which the randomly selected lawyer or LPO provided real or personal property closing services are subject to examination or reexamination.
- (3) *Exclusions.*
  - (A) A lawyer, LLLT, or LPO will not be subject to a random examination when the lawyer, LLLT, or LPO is one of the following at the time of the random selection: employed by the Bar; a justice or staff lawyer of the Supreme Court; a governor or governor-elect of the Board of Governors; a regulatory adjudicator; a volunteer adjudicator; an adjunct disciplinary counsel; a special conflicts disciplinary counsel; an appointed counsel under these Rules; or a respondent in a disciplinary or incapacity investigation or proceeding. An exclusion under this section is not imputed to any other lawyer, LLLT, or LPO even if an employee or member of the same law firm or closing firm as a lawyer, LLLT, or LPO who would be excluded under this Rule.
  - (B) If the lawyer, LLLT, LPO, law firm, or closing firm has been randomly examined under this Rule within seven years preceding the current random selection, the lawyer, LLLT, LPO, law firm, or closing firm will not be subject to random examination.
- (4) *Notice of Random Selection.* The Office of Disciplinary Counsel must provide written notification of the selection to the lawyer, LLLT, LPO, law firm, or closing firm.
- (5) *Challenges.* Within 30 days of the date of the notice of selection, the lawyer, LLLT, LPO, law firm, or closing firm may file with the Clerk a written request that a regulatory adjudicator review the selection. A regulatory adjudicator’s decision under this Rule is not reviewable.

**(d) Examination and Reexamination.** An examination denotes the initial review following the random selection of a lawyer, LLLT, or LPO. A reexamination denotes a further examination as provided for in sections (e)(2) or (f)(2) of this Rule. Examinations and reexaminations under this Rule will entail a review and testing of the internal controls and procedures used by the lawyer, LLLT, LPO, law firm, or closing firm to receive, hold, disburse, and account for money or property as required by RPC 1.15A, LLLT RPC 1.15A, or LPORPC 1.12A, and a review of the records of the lawyer, LLLT, LPO, law firm, or closing firm as required by RPC 1.15B, LLLT RPC 1.15B, or LPORPC 1.15B.

**(e) Conclusion.** At the conclusion of an examination or reexamination, the Office of Disciplinary Counsel must do one of the following:

- (1) Issue a report to the lawyer, LLLT, LPO, law firm, or closing firm summarizing the findings and taking no further action;
- (2) Issue a report to the lawyer, LLLT, LPO, law firm, or closing firm summarizing the findings, recommending corrective action and requiring a reexamination of the books and records to commence within one year; or
- (3) Issue a report to the lawyer, LLLT, LPO, law firm, or closing firm summarizing the findings and



recommending an investigation under Title 5. The lawyer, LLLT, LPO, law firm, or closing firm may submit a response to the recommendation within 10 days of the issuance of the report.

**(f) Regulatory Adjudicator Action on Report.** The Office of Disciplinary Counsel must transmit a report under section (e)(3) and any response to the ORA for entry of an order. A regulatory adjudicator must do one of the following:

- (1) order closure of the matter;
- (2) order corrective action and a reexamination to commence within one year; or
- (3) order an investigation under Title 5.

The action of a regulatory adjudicator under this Rule is not reviewable.

## **RULE 15.2 COOPERATION WITH EXAMINATION**

**(a) Cooperation Required.** A lawyer, LLLT, and LPO must cooperate with an examination or reexamination under this Title, subject only to the proper exercise of any privilege against self-incrimination, by:

- (1) producing promptly all evidence, books, records, and papers requested for the examination or reexamination;
- (2) furnishing promptly any explanations required for the examination or reexamination; and
- (3) producing written authorization, directed to any bank or depository, authorizing the Office of Disciplinary Counsel to examine trust and general accounts, safe deposit boxes, and other forms of maintaining trust property by the lawyer, LLLT, LPO, law firm, or closing firm in the bank or depository.

**(b) Failure to Cooperate.**

- (1) *Noncooperation Deposition.* If a lawyer, LLLT, or LPO has not complied with any request made under this Rule for more than 30 days, the Office of Disciplinary Counsel may notify the lawyer, LLLT, or LPO that failure to comply within 10 days may result in a deposition for failure to cooperate or interim suspension under Rule 7.2. Ten days after this notice, the Office of Disciplinary Counsel may serve the lawyer, LLLT, or LPO with a subpoena for a deposition. Any deposition conducted after the 10-day period and necessitated by the lawyer's, LLLT's or LPO's continued failure to cooperate may be conducted at any place in Washington State.

(2) *Costs and Expenses.*

(A) Regardless of the underlying matter's ultimate disposition, a lawyer, LLLT, or LPO who has been served with a subpoena under this Rule is liable for the actual costs of the deposition, including but not limited to service fees, court reporter fees, travel expenses, the cost of transcribing the deposition if ordered by disciplinary counsel, and a reasonable attorney fee of \$750.

(B) The procedure for assessing costs and expenses is as follows:

- (i) The Office of Disciplinary Counsel applies to the ORA by itemizing the costs and expenses and stating the reasons for the deposition.
  - (ii) The lawyer, LLLT, or LPO has 10 days to respond to the Office of Disciplinary Counsel's application.
  - (iii) A regulatory adjudicator by order assesses appropriate costs and expenses.
  - (iv) Rule 13.8(f) governs review of the order assessing costs and expenses.
- (3) *Grounds for Discipline.* A lawyer's, LLLT's, or LPO's failure to cooperate fully and promptly with an examination as required by this Rule is also grounds for discipline.

## **RULE 15.3 CONFIDENTIALITY**

**(a) Maintaining Client Confidentiality.** In the course of conducting examinations and reexaminations under this Title, the Office of Disciplinary Counsel receives, reviews, and holds attorney-client privileged and other confidential client information under and in furtherance of the Supreme Court's authority to

regulate the practice of law. Providing information to the Office of Disciplinary Counsel or a regulatory adjudicator under these Rules is not prohibited by RPC 1.6 or 1.9 or LLLT RPC 1.6 or 1.9 and does not waive any attorney-client privilege. If the lawyer, LLLT, or LPO provides and identifies specific client information that is privileged and requests that it be treated as confidential, the Office of Disciplinary Counsel must maintain the confidentiality of the information unless the client consents to disclosure. Nothing in these Rules waives or requires waiver of any lawyer's, LLLT's, or LPO's own privilege or other protection as a client against the disclosure of information relating to the representation.

**(b) Examination Confidential.** All information related to an examination or reexamination under Rule 15.1, including any record maintained under Rule 3.9(c), is confidential and is held by the Office of Disciplinary Counsel and the ORA under the authority of the Supreme Court. Information related to examinations or reexaminations under Rule 15.1 is available only to the Office of Disciplinary Counsel; the lawyer, LLLT, LPO, law firm, or closing firm examined or reexamined; and the ORA. When a disciplinary investigation is ordered under Rule 15.1, the release provisions of Title 3 apply to all examination and reexamination information that relates to the disciplinary investigation. Disciplinary counsel may make a motion under Rule 2.13(f) for authorization to disclose other confidential information.

#### **RULE 15.4 TRUST ACCOUNT OVERDRAFT NOTIFICATION**

**(a) Overdraft Notification Agreement Required.** To be authorized as a depository for trust accounts referred to in RPC 1.15A(i), LLLT RPC 1.15A(i), or LPORPC 1.12A(i), a financial institution, bank, credit union, savings bank, or savings and loan association must file with the Legal Foundation of Washington an agreement, in a form provided by the Washington State Bar Association, to report to the Washington State Bar Association if any properly payable instrument is presented against such a trust account containing insufficient funds, whether or not the instrument is honored. The agreement must apply to all branches of the financial institution and cannot be canceled except on 30 days' notice in writing to the Legal Foundation of Washington. The Legal Foundation of Washington must provide copies of signed agreements and notices of cancellation to the Washington State Bar Association upon request.

**(b) Overdraft Reports.**

- (1) The overdraft notification agreement must provide that all reports made by the financial institution must contain the following information:
  - (A) the identity of the financial institution;
  - (B) the identity of (i) the lawyer, LLLT, or law firm, or (ii) the LPO or closing firm;
  - (C) the account number; and
  - (D) either:
    - (i) the amount of overdraft and date created; or
    - (ii) the amount of the returned instrument(s) and the date returned.
- (2) The financial institution must provide the information required by the notification agreement within five banking days of the date the item(s) was paid or returned unpaid.

**(c) Institution Costs.** Nothing in these Rules precludes a financial institution from charging a particular lawyer, LLLT, LPO, law firm, or closing firm for the reasonable cost of producing the reports and records required by this Rule, but those charges may not be a transaction cost charged against funds payable to the Legal Foundation of Washington under RPC 1.15A(i)(1), LLLT RPC 1.15A(i)(1), LPORPC 1.12A(i)(1), and Rule 15.5(e).

**(d) Duty to Notify the Office of Disciplinary Counsel.** Every lawyer, LLLT, LPO, law firm, or closing firm that receives notification that any instrument presented against a trust account of the lawyer, LLLT, LPO, law firm, or closing firm was presented against insufficient funds, whether or not the instrument was honored, must promptly notify the Office of Disciplinary Counsel of the information required by section (b) of this Rule. The lawyer, LLLT, LPO, law firm, or closing firm must include a full explanation of the cause of the overdraft.

## RULE 15.5 TRUST ACCOUNTS AND THE LEGAL FOUNDATION OF WASHINGTON

**(a) Legal Foundation of Washington.** The Legal Foundation of Washington (Legal Foundation) was established by Order of the Washington Supreme Court to administer distribution of Interest on Lawyer's Trust Account (IOLTA) funds to civil legal aid programs.

- (1) *Administrative Responsibilities.* The Legal Foundation is responsible for assessing the products and services offered by financial institutions operating in the state of Washington and determining whether such institutions meet the requirements of this Rule and Rule 15.4. The Legal Foundation must maintain a list of financial institutions authorized to establish IOLTA accounts and publish the list on a website maintained by the Legal Foundation for public information. The Legal Foundation must provide a copy of the list to any person upon request.
- (2) *Annual Report.* The Legal Foundation must prepare an annual report to the Washington Supreme Court that summarizes the Foundation's income, grants, and operating expenses, implementation of its corporate purposes, and any problems arising in the administration of the IOLTA program.

**(b) Definitions.** The following definitions apply to this Rule:

- (1) *United States Government Securities.* United States Government Securities are defined as direct obligations of the United States Government, or obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof, including United States Government-Sponsored Enterprises.
- (2) *Daily Financial Institution Repurchase Agreement.* A daily financial institution repurchase agreement must be fully collateralized by United States Government Securities and may be established only with an authorized financial institution that is deemed to be "well capitalized" under applicable regulations of the Federal Deposit Insurance Corporation and the National Credit Union Association.
- (3) *Money Market Funds.* A money market fund is an investment company registered under the Investment Company Act of 1940, as amended, that is regulated as a money market funder under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act, and at the time of the investment, has total assets of at least five hundred million dollars (\$500,000,000). A money market fund must be comprised solely of United States Government Securities or investments fully collateralized by United States Government Securities.
- (4) *IOLTA.* As used in these Rules, the term IOLTA means interest on lawyer's trust accounts, interest on LLLT's trust accounts, and interest on LPO's trust accounts, as set forth in RPC 1.15A, LLLT RPC 1.15A, and LPORPC 1.12A, respectively, and Title 15 of these Rules.

**(c) Authorized Financial Institutions.** Any bank, savings bank, credit union, savings and loan association, or other financial institution that meets the following criteria is eligible to become an authorized financial institution under this Rule:

- (1) is insured by the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Administration;
- (2) is authorized by law to do business in Washington;
- (3) complies with all requirements set forth in section (d) of this Rule and Rule 15.4; and
- (4) if offering IOLTA accounts, complies with all requirements set forth in section (e) of this Rule.

The Legal Foundation determines whether a financial institution is an authorized financial institution under this section. Upon a determination of compliance with all requirements of this Rule and Rule 15.4, the Legal Foundation must list a financial institution as an authorized financial institution under section (a)(1) of this Rule. At any time, the Legal Foundation may request that a listed financial institution establish or certify compliance with the requirements of this Rule or Rule 15.4. The Legal Foundation may remove a financial institution from the list of authorized financial institutions upon a determination that the financial institution is not in compliance.

**(d) Requirements of All Trust Accounts.** All trust accounts established pursuant to RPC 1.15A(i), LLLT RPC 1.15A(i), or LPORPC 1.12A(i) must be insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration up to the limit established by law for those types of accounts or be backed by United States Government Securities. Trust account funds must not be placed in stocks, bonds, mutual funds that invest in stock or bonds, or similar uninsured investments.

**(e) IOLTA Accounts.** To qualify for Legal Foundation approval as an authorized financial institution offering IOLTA accounts, in addition to meeting all other requirements set forth in this Rule, a financial institution must comply with the requirements set forth in this section.

- (1) *Interest Comparability.* For accounts established pursuant to RPC 1.15A, LLLT RPC 1.15A, or LPORPC 1.12A, authorized financial institutions must pay the highest interest rate generally available from the institutions to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the highest interest rate generally available to its non-IOLTA customers, authorized financial institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. An authorized financial institution may satisfy these comparability requirements by selecting one of the following options:
  - (A) Establish the IOLTA account as the comparable interest-paying product; or
  - (B) Pay the comparable interest rate on the IOLTA checking account in lieu of actually establishing the comparable interest-paying product; or
  - (C) Pay a rate on IOLTA equal to 75% of the Federal Funds Targeted Rate as of the first business day of the month or IOLTA remitting period, or .75%, whichever is higher, and which rate is deemed to be already net of allowable reasonable service charges or fees.
- (2) *Remit Interest to Legal Foundation of Washington.* Authorized financial institutions must remit the interest accruing on all IOLTA accounts, net of reasonable account fees, to the Legal Foundation monthly, on a report form prescribed by the Legal Foundation. At a minimum, the report must show details about the account, including but not limited to the name of the lawyer, LLLT, LPO, law firm, or closing firm for whom the remittance is sent, the rate of interest applied, the amount of service charges deducted, if any, and the balance used to compute the interest. Interest must be calculated on the average monthly balance in the account, or as otherwise computed in accordance with applicable state and federal regulations and the institution's standard accounting practice for non-IOLTA customers. The financial institution must notify each lawyer, LLLT, LPO, law firm, or closing firm of the amount of interest remitted to the Legal Foundation on a monthly basis on the account statement or other written report.
- (3) *Reasonable Account Fees.* Reasonable account fees may only include items deposited charges, per deposit charges, per check charges, a fee in lieu of minimum balances, sweep fees, deposit insurance assessment fees, and a reasonable IOLTA account administration fee. No service charges or fees other than the allowable, reasonable fees may be assessed against the interest or dividends on an IOLTA account. Any service charges or fees other than allowable reasonable fees must be the sole responsibility of, and may be charged to, the lawyer, LLLT, LPO, law firm, or closing firm maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account must not be deducted from interest or dividends earned on any other account or from the principal.
- (4) *Comparable Accounts.* Subject to the requirements set forth in sections (d) and (e) of this Rule, an IOLTA account may be established as:
  - (A) A business checking account with an automated investment feature, such as a daily bank repurchase agreement or a money market fund; or

- (B) A checking account paying preferred interest rates, such as a money market or indexed rates; or
  - (B) A government interest-bearing checking account such as an account used for municipal deposits; or
  - (D) An interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, business checking account with interest; or
  - (E) Any other suitable interest-bearing product offered by the authorized financial institution to its non-IOLTA customers.
- (5) Nothing in this Rule precludes an authorized financial institution from paying an interest rate higher than described above or electing to waive any service charges or fees on IOLTA accounts.

## TITLE 16 – COURT-APPOINTED CUSTODIANS

### RULE 16.1 COURT-APPOINTED CUSTODIANS

**(a) General.** The Court may appoint one or more lawyers authorized to practice law in Washington State as custodian to protect clients' interests as set forth in this Rule.

**(b) Procedure.** Upon ex parte motion by Bar counsel, the Court may appoint a custodian whenever (1) a licensed legal professional who has resigned in lieu of discipline, or has been suspended, disbarred, or whose license has been placed in incapacity inactive status fails to carry out the obligations of Title 14 or fails to protect the clients' interests; (2) a licensed legal professional disappears, dies, or abandons practice; or (3) it reasonably appears that the licensed legal professional is otherwise incapable of meeting the licensed legal professional's obligations to clients.

**(c) Custodianship Order.** The order authorizes the custodian to obtain and review all records relevant to the custodianship and take one or more of the actions set forth below:

- (1) *Files, Records, and Property.* The custodian takes possession of the necessary files, records, and property and takes action to protect the clients' interests as required by the Court's order or these Rules, including, but not limited to, returning files, records, and property to the client. Upon motion by the custodian, the Court may order destruction of files, records, or property as appropriate.
- (2) *Trust Accounts.* If ordered by the Court, the custodian assumes control of client trust accounts. Any bank or other person honoring the authority of the custodian as granted by the Court is exonerated from any resulting liability. In determining ownership of funds in the trust account, including by subrogation or indemnification, the custodian should act as a reasonably prudent lawyer maintaining a client trust account. If the client trust account does not contain sufficient funds to meet known client balances, the custodian may disburse funds on a pro rata basis. Any unclaimed trust funds may be dealt with under the Uniform Unclaimed Property Act, Chapter 63.29 RCW.
- (3) *Other.* The Court may enter orders to carry out the provisions and purposes of this Rule.

**(d) Confidentiality.**

- (1) *Attorney-client Privilege and Duty of Confidentiality.* A custodian receives and holds attorney-client privileged and other confidential client information under and in furtherance of the Supreme Court's authority to regulate the practice of law. A custodian's possession of a client's file or other information does not waive the client's attorney-client privilege or other protections from disclosure of information. A custodian must maintain the confidentiality of information received under this Rule.
- (2) *Disclosure to Disciplinary Counsel Permitted.* Notwithstanding the provisions of section (d)(1) of this Rule, a custodian must comply with requests and subpoenas from disciplinary counsel under these Rules.

(3) *Other Disclosure.* Other than the disclosure permitted in section (d)(2) of this Rule, the custodian must obtain an order from the Court before making any disclosure of the client's file or information relating to the client's representation.

**(e) Discharge.** On motion by Bar counsel or the custodian, the Court may discharge the custodian from further duties.

**(f) Costs.** The Bar pays reasonable costs incurred by the custodian. Payment of any costs incurred or reimbursed by the Bar under this Rule may be required as a condition of reinstatement from disbarment or disciplinary suspension, ordered as restitution to the Bar in a disciplinary proceeding, or claimed against the estate of a deceased or adjudicated incapacitated licensed legal professional.

**(g) Records.** The public or confidential nature of records or proceedings under this Rule is governed by Title 3. The Bar maintains a record of the custodianship permanently. The custodian maintains files and papers obtained as custodian until otherwise ordered by the Court.

## **TITLE 17 – EFFECT OF THESE RULES ON PENDING MATTERS**

### **RULE 17.1 EFFECT ON PENDING MATTERS**

**(a) Initial Enactment of the Rules for Discipline and Incapacity.** These Rules in their entirety will apply to pending matters on the effective date as ordered by the Supreme Court with the following exceptions:

- (1) if a matter is pending before a review committee of the Disciplinary Board or a discipline committee of the Limited License Legal Technician (LLLT) Board or the Limited Practice (LP) Board;
- (2) if a hearing has been held or is in progress and no hearing decision has been filed by the hearing officer; and
- (3) if a matter has been briefed or argued to the Disciplinary Board, LLLT Board, the LP Board, or to the Chair of any of these boards and no decision has been filed.

Under the above exceptions and under the supervision of the Supreme Court, the person or entity will continue in its responsibilities under the Rules for Enforcement of Lawyer Conduct, the Rules for Enforcement of Limited License Legal Technician Conduct, or the Rules for Enforcement of Limited Practice Officer Conduct until such time as the pending decision has been filed.

**(b) Resolution of Disagreements.** Except in matters pending before the Supreme Court, in the event of a disagreement about which rules apply, the Chief Regulatory Adjudicator will determine the appropriate procedure and has authority to enter orders as necessary and appropriate to ensure a fair and orderly proceeding.

**(c) Subsequent Amendments.** Any subsequent amendments to these Rules will apply to pending matters in their entirety on the effective date as ordered by the Supreme Court.

**(d) Matters Pending Before the Court.** Unless the Supreme Court orders otherwise, if a matter is pending before the Supreme Court, these Discipline and Incapacity Rules and any subsequent amendments apply as of their effective date.

# APPENDIX B

**MEMO**

To: Volunteer Reviewers  
From: Chief Disciplinary Counsel Douglas J. Ende  
Date: July 17, 2020  
Re: Summary of Revisions to Rules for Discipline and Incapacity

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What follows is a detailed summary of the substantive and technical changes that came from the volunteer review and feedback process. Thank you for your contributions.

**SUMMARY OF REVISIONS TO THE RDI BASED ON VOLUNTEER REVIEWER FEEDBACK**

**Title 2**

- Rule 2.2(b). Limitation of Authority. Section (b) was divided into two sections and no longer indicates the Court may hold individuals in contempt for attempting to direct the investigations, prosecutions, appeals, or discretionary decisions. Section (b)(1)'s restriction on Board of Governors involvement in disciplinary decision-making is unchanged. **NEW** section (b)(2) requires that the Chief Disciplinary Counsel or Chief Regulatory Adjudicator report any violations of section (b)(1) to the Chief Justice, rather than requiring a contempt action.
- **NEW** Rule 2.2(d). Independence. Given that the ORA will be administered by the Bar, a new section (d) was added to emphasize the independence of the ORA in its adjudicative decision-making and to underscore the separation between the adjudicative versus the investigative and prosecutorial functions.
- Rule 2.3(b). Regulatory Adjudicator. Based on reviewer concerns regarding what qualifications are required for regulatory adjudicators, the language was changed to make clear that regulatory adjudicators are lawyer members of the Bar. See also RDI 2.3(c), 2.9(c).
- Rule 2.3(c). Chief Regulatory Adjudicator and Staff. Based on reviewer concerns regarding what qualifications are required for regulatory adjudicators, the language was changed to mirror the language in current ELC 2.8(b) that requires the Bar to hire *suitable* lawyer members to the post of disciplinary counsel. Such language provides a standard but also leaves the Bar with some flexibility to decide the appropriate qualifications based on the organization's experience with such hiring decisions. See also RDI 2.3(b), 2.9(c).
- **NEW** Rule 2.3(d). Emergency Order. New section (d) provides the Chief Regulatory Adjudicator authority to issue emergency administrative orders in the event of an emergency affecting the discipline system.



- **NEW** Rule 2.3(e). Volunteer Adjudicator. New section (e) clarifies and defines the role of volunteer adjudicators as appointed individuals, who are selected to serve, without compensation and as needed, on adjudicative panels or as settlement officers.
- Rule 2.9(c). Chief Disciplinary Counsel and Staff. Consistent with current ELC 2.8(b), section (d) now requires that the Bar employ *suitable* lawyer members to act disciplinary counsel and *suitable* staff to perform other functions under the RDI. Such language provides a standard but also leaves the Bar with some flexibility to decide the appropriate qualifications based on the organization's experience with such hiring decisions. See also RDI 2.3(c), 2.3(d).
- Rule 2.10(c). Appointment, Qualifications, and Assignments. Section (c)(1) was revised to clarify that the Court makes appointments to the pool of special conflicts disciplinary counsel (SCDC) but does not make assignments in individual cases except in rare circumstances. **NEW** section (c)(3) provides that the Chief Regulatory Adjudicator selects an SCDC when a matter is referred to the SCDC pool except where the Chief Regulatory Adjudicator has a disqualifying conflict or other ethical restriction, in which case the Chief Justice would make the assignment.
- Rule 2.11(c). Appointments and Qualifications. In an effort to make clear that the Board of Governors does not have a role in the discipline system, section (c) was revised to provide that the Bar's Executive Director appoints individuals to the adjunct disciplinary counsel pool rather than the Board of Governors.

### **Title 3**

- Rule 3.1(d). Wrongful Release. Section (d) was revised to provide that wrongful release of information is strictly prohibited rather than providing that such a release may subject an individual to a contempt action.
- Rule 3.2(c). Supreme Court Proceedings. Section (c) now provides that upon motion of a party in an incapacity proceeding, the Supreme Court may take additional measures to ensure the confidentiality of information in Supreme Court proceedings.
- Rule 3.5(b). Investigative Release. Section (b) was revised to clarify the limited information that may be provided in an investigative release to a complainant about the status of an incapacity matter.

### **Title 4**

- Rule 4.7. Enforcement of Subpoenas. The rule was revised to clarify the procedure before the Court when a party files a petition for a show cause order when a person fails to comply with a subpoena under the RDI.

## **Title 5**

- Rule 5.5(b). Motion. Section (b) of the rule on vexatious complainants was revised to clarify that requests for temporary orders come before the ORA on a motion from a party.
- Rule 5.10(e). Order. Section (e) was revised to clarify that when an order is transmitted to the Court after an authorization panel enters an order denying a request to authorize the filing of a statement of charges or the initiation of incapacity proceedings with prejudice, the Court then circulates that order among the justices for informational purposes.

## **Title 6**

- Rule 6.1(b). Timing. Section (b) was revised to clarify the timing for an offer of diversion from disciplinary counsel.

## **Title 7**

- Rule 7.2(b). Recommendation for Disbarment. Section (b) includes new language clarifying that disciplinary counsel need not file a petition for an interim suspension or may withdraw a petition where the decision recommending disbarment becomes final or the where the respondent is already suspended.
- Rule 7.2(c). Failure to Cooperate. Section (c) was revised to require that the Court order an interim suspension when the respondent has failed to comply with an obligation under RDI 5.3, 5.6, 5.7, 5.9, 8.2(d), 8.2(f)(6), 8.4(e), 8.4(f)(6), or 15.2, rather than requiring that the Court order interim suspension pending compliance with an unfulfilled obligation. RDI 7.3(g) also now requires that an order granting interim suspension state the basis for the interim suspension. See also RDI 7.2(e), 7.3(g).
- Rule 7.2(e). Failure to Comply with Probation. Section (f) was revised to require that the Court order an interim suspension when the respondent has failed to comply with a probation obligation, rather than requiring that the Court order interim suspension pending compliance with an unfulfilled probation obligation. RDI 7.3(g) also now requires that an order granting interim suspension state the basis for the interim suspension. See also RDI 7.2(c), 7.3(g).
- Rule 7.3(c). Confidentiality. Section (c) was revised to cross-reference RDI 3.3(b) to direct parties to the information considered confidential under RDI 3.3.
- Rule 7.3(g). Order. Section (g) was revised to clarify that an order granting interim suspension must state the basis for the interim suspension rather than the conditions for termination. The section also now includes new language that the effective date of an interim suspension order is ordinarily seven days after the date of the order to conform more closely with effective-date provisions in other rules. See also RDI 7.2(c), 7.2(e).

- Rule 7.5(a). Motion by Respondent. Section (a) was revised to clarify that a respondent may file a motion, rather than a petition, to terminate the interim suspension, which will be granted on a showing that the basis for the suspension no longer exists or for other good cause. See also RDI 7.5(c)c
- Rule 7.5(c). Agreed Terminations. Section (c) was revised to refer to a joint motion to terminate rather than a petition to terminate. See also RDI 7.5(a).

## **Title 8**

- Rule 8.1(b). Supreme Court Final Order. Section (b) was revised to clarify that a motion for reconsideration does not stay a judgment or delay the effective date of a final Supreme Court order in an incapacity proceeding. See also RDI 13.1(a) for a similar provision for final Supreme Court orders in disciplinary proceedings.
- Rule 8.2(a). Incapacity Proceedings Ordered by Authorization Panel. Section (a) now clarifies that following an order authorizing disciplinary counsel to initiate incapacity proceedings, disciplinary counsel may defer any pending disciplinary investigations under RDI 5.4.
- Rule 8.2(b). Initial Pleadings. Section (b)(1) now makes clear that the statement of alleged incapacity is filed with the Clerk. Section (b)(2) expands the time to respond to the statement of alleged incapacity from 20 to 30 days.
- Rule 8.2(c). Placement in Interim Incapacity Inactive Status. Section (c) now includes a cross-reference to RDI 8.6, which is the rule regarding the appointment of counsel in incapacity proceedings. See also RDI 8.4(d).
- Rule 8.2(d). Health Records, Releases, and Examination. Section (d)(2) now permits the hearing adjudicator to enter an order extending the time for providing a medical release. See also RDI 8.3(f)(3), 8.4(e)(2).
- Rule 8.2(e). Failure to Appear or Cooperate. In order to address concerns regarding the confidentiality of the proceedings when a petition for interim suspension has been filed for a failure to cooperate, section (e) now cross-references RDI 3.3(b)(5), which makes clear the confidentiality of incapacity proceedings. See also RDI 8.4(f).
- Rule 8.3(a). Incapacity Proceeding Ordered after Respondent's Assertion. For clarity, section (a) now states that if the respondent makes the assertion at the Supreme Court, the Court orders incapacity proceedings and then refers the matter to the ORA for further proceedings. See also RDI 8.4(a).
- Rule 8.3(c). Contents of Order; Advisement; Effective Date; Notice. Under section (c)(2), the advisement now states that the respondent's burden of proof is a preponderance of the evidence. See RDI 8.3(c)(2)(E). The section also includes a new advisement that failing to appear or cooperate, or to cooperate with counsel, may result in dismissal. See **NEW** RDI 8.3(c)(2)(I).

- Rule 8.3(f). Health Records, Releases, and Examination. Section (f)(3) now permits the hearing adjudicator to enter an order extending the time for providing a medical release. See also RDI 8.2(d)(2), 8.4(e)(2).
- Rule 8.4(a). Order by Regulatory Adjudicator or Supreme Court. For clarity, section (a) now states that if the Supreme Court orders an incapacity proceeding on motion by disciplinary counsel or on its own initiative, the Court then refers the matter to the ORA for further proceedings. See also RDI 8.3(a).
- Rule 8.4(d). Interim Incapacity Inactive Status. Sections (d)(1)(A) and (B) now both include cross-references to RDI 8.6, which is the rule regarding the appointment of counsel in incapacity proceedings. See also RDI 8.2(c). Section (d)(1)(B) was also revised to establish show cause procedures.
- Rule 8.4(e). Health Records, Releases, and Examination. Section (e)(2) now permits the hearing adjudicator to enter an order extending the time for providing a medical release. See also RDI 8.2(d)(2), 8.3(f)(3).
- Rule 8.4(f). Failure to Appear or Cooperate. In order to address concerns regarding the confidentiality of the proceedings when a petition for interim suspension has been filed for a failure to cooperate, section (e) now cross-references RDI 3.3(b)(5), which makes clear the confidentiality of incapacity proceedings. See also RDI 8.2(e).
- Rule 8.9(a). Parties May Stipulate. Section (a) was revised to clarify that the evidence provided in support of a stipulation to incapacity inactive status should be sufficient for the regulatory adjudicator to make a determination regarding the existence of the incapacity.

## **Title 9**

- Rule 9.1(g). Matters Pending Before the Supreme Court. Section (g) now states that when a stipulation to discipline is entered into when the matter is pending before the Court, the Court enters an order either approving or rejecting the stipulation.
- Rule 9.3(a). Duty to Self-Report, Timing. Section (a) on reciprocal discipline was revised to add to the list of required reporters any individual whose military certification as been revoked.
- Rule 9.3(d). Consent to Reciprocal Discipline or Publication. RDI 9.3 was revised in several places to clarify how concurrent suspensions operate when a respondent has self-reported and has requested that the suspension run concurrently in the other jurisdiction. Section (d) now clarifies that a consent to reciprocal discipline may include a motion for concurrent suspension. See also RDI 9.3(f), 9.3(j).
- Rule 9.3(f). Response to Order to Show Cause. RDI 9.3 was revised in several places to clarify how concurrent suspensions operate when a respondent has self-reported and has requested that the suspension run concurrently in the other jurisdiction. Section (f) now clarifies that a response to an order show cause regarding a sanction

of suspension may include a motion for concurrent suspension. See also RDI 9.3(d), 9.3(j).

- Rule 9.3(j). Effective Date. RDI 9.3 was revised in several places to clarify how concurrent suspensions operate when a respondent has self-reported and has requested that the suspension run concurrently in the other jurisdiction. Section (j)(2) now clarifies that a respondent may file a motion to ask the Court to order that the reciprocal suspension run concurrently with the suspension ordered by the other jurisdiction. **NEW** section (d)(2)(C) explains that notwithstanding the effective date of the reciprocal suspension in Washington, if the motion is granted the respondent is eligible for reinstatement at the conclusion of the term of suspension in the other jurisdiction. See also RDI 9.3(d), 9.3(f).

## **Title 10**

- Rule 10.10(b). Discovery. Section (b) was divided into three subsections with new language added to one subsection to restore the availability of requests for admission. **NEW** section (b)(1) now allows requests for admission as a matter of right, while other forms of discovery require hearing adjudicator approval, consistent with the current approach under ELC 10.11. Section (b)(2) provides criteria for a hearing adjudicator to consider when granting permission for additional discovery. Section (b)(3) authorizes the hearing adjudicator to impose conditions or limitations on discovery or requests for admission to assure an expeditious, economical, and fair proceeding.

## **Title 12**

- Rule 12.3(d). Filing Fee. Section (d) was revised to clarify that checks for filing fees are made payable to the Washington Supreme Court. See also RDI 12.4(d).
- Rule 12.4(d). Filing Fee. Section (d) was revised to clarify that checks for filing fees are made payable to the Washington Supreme Court. See also RDI 12.3(d).
- **NEW** Rule 12.4(f). Form and Length. New section (f) clarifies that a petition for review, answer, or reply must comply with the form requirements of RAP 13.4(e) and the length limits of RAP 13.4(f). See also RDI 12.4(g).
- Rule 12.4(g). Cross Petition. Section (g), formerly section (f), now clarifies that the form and length requirements of RAP 13.4(e) and (f) apply. See also RDI 12.4(f).
- Rule 12.5(e). Additions to Record. Section (f) now provides that any party filing a request with the ORA Clerk to transmit additional portions of the record to the Court prior to or with the filing of the party's last brief must file a copy of that request with the Court.
- **NEW** Rule 12.5(f). Confidentiality. New section (f) provides that when a party identifies information or documents that are otherwise confidential under the RDI,

the Court must take measures to maintain the confidentiality of the information or documents.

- Rule 12.6(d). Reply Brief. Section (d) was revised to delete the option of filing a reply brief with the Court 14 days before oral argument. Instead, reply briefs must be filed 20 days after service of the answering brief.
- Rule 12.6(e). Briefs When Both Parties Seek Review. Section (e) was revised to clarify that when both parties seek review, disciplinary counsel may file a surreply to the respondent's reply brief within 20 days after service.
- Rule 12.10. Violation of Rules. The rule was revised to remove reference to finality since finality is addressed elsewhere in the RDI.

### **Title 13**

- Rule 13.1(a). Supreme Court Final Order. Section (a) was revised to clarify that a motion for reconsideration does not stay a judgment or delay the effective date of a final Supreme Court order in a disciplinary proceeding. See also RDI 8.1(b) for a similar provision for final Supreme Court orders in incapacity proceedings.

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 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.

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 Maybrow

Leland G. Ripley

Anne I. Seidel

Patrick C. Sheldon

Stephen C. Smith


John A. Strait

Elizabeth Turner

# BAR BULLETIN

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## Losing Your License Will Be Easier Under Proposed Rule Changes

 March 1, 2021 | in [General](#)

### MARCH 2021 BAR BULLETIN

By **Anne Seidel**

Proposed new rules that will substantially change the procedures for lawyer discipline are currently pending before the Supreme Court with a comment period ending April 30. These changes will make it more difficult for those unfortunate enough to be accused of unethical behavior to avoid the financial and reputational consequences of public discipline.

**Development of rules.** The Office of Disciplinary Counsel (“ODC”), along with other employees of the Washington State Bar Association, drafted the proposed rules, called the Rules for Discipline and Incapacity (RDI).<sup>1</sup> Even though this is the “most substantial reexamination of the functioning of the discipline system in Washington” in almost two decades, the rules were drafted without any input from practicing attorneys or those of us who represent lawyers accused of misconduct.

The stated goal of the revisions was “to create efficiencies and improve outcomes.”<sup>2</sup> The drafting process was akin to having new criminal procedural rules drafted solely by prosecutors with input from court administrators. The bar then solicited “feedback” from a hand-picked group of “stakeholders,” resulting in only minor revisions to the proposed rules.<sup>3</sup>

A March 10, 2020, WSBA Executive Director’s Report stated that “it is anticipated the rules will be presented to the BOG (Board of Governors) in spring 2020 ...”<sup>4</sup> That did not happen. Instead, at the BOG’s June 2020 meeting, Supreme Court Justice Mary Yu informed the BOG that because

the Court exclusively oversees the lawyer discipline process, the rules would be submitted directly to the Court. Yet, at the very same meeting, the BOG approved proposed amendments to the Rules of Professional Conduct, the substantive rules enforced through the lawyer discipline system.

**Impact.** Lawyers in small or solo practices are disproportionately subject to discipline. Because WSBA has failed to study racial or other inequities, there are no readily available statistics on whether nonwhite or immigrant attorneys are more likely to be a respondent (the subject of a grievance).

However, a study in California found that Black male attorneys were disbarred or resigned at almost four times the rate of white male attorneys.<sup>5</sup> An unscientific review of Washington public discipline from 2020 shows a possible disproportionate number of nonwhite attorneys subject to discipline. While we don't have good statistical information, it remains important to keep in mind which groups of lawyers may be most likely to be affected by an unfair set of procedures.

**Elimination of volunteer hearing officers.** Currently, all hearing officers, except the Chief Hearing Officer, are volunteers. This system benefits both the hearing officers, who are able to gain adjudicative experience that is helpful for future careers as judges or ALJs, and also provides a panel of adjudicators with a breadth of experience with the potential for racial, geographic, firm size and practice area diversity.

Under the new proposal, there will be possibly one paid adjudicator presiding over all hearings.<sup>6</sup> That gives an enormous power to at most a few individuals who are likely to feel beholden to ODC to remain in that position.

Notably, while volunteers are selected by a Volunteer Selection Board appointed by the Supreme Court, the Bar gets to select the Chief Regulatory Adjudicator, who then can choose any other adjudicators. RDI 2.5; RDI 2.3(c). Currently, a respondent may have an assigned hearing officer removed without cause (similar to an affidavit of prejudice). ELC 10.2(b)(1). That will not be available under the proposed rules.

Although the GR 9 cover sheet states that the proposed system is consistent with developments in Arizona, Colorado and Oregon, in those states hearings are conducted by a panel consisting of a paid adjudicator and two volunteers.<sup>7</sup>

**ODC discretion substantially increased.** The proposed rules remove much of the current oversight of ODC's decisions. For example, they significantly increase ODC's discretion in filing formal charges. Although ODC still has to obtain authorization to do so, the proposed rules require that ODC be given authorization unless a reasonable finder of fact could not find an alleged rule violation. Currently, a review committee can deny ODC's request to bring formal charges if the alleged violation is too insignificant to merit public discipline.

This change will make the review process meaningless in the vast majority of cases, leading to more lawyers in formal disciplinary proceedings. In addition, the proposal gives the respondent only 15 days to respond to ODC's request to file formal charges, even though it may have taken ODC a year or longer to issue that request. RDI 5.10(b). Often the respondent does not retain counsel until receiving the notice that ODC wants to pursue discipline, making a timely objection unlikely for many.

Other proposed changes that remove oversight of ODC's decisions include the following:

- Eliminate a grievant's appeal of a dismissal. ELC 5.7(b). While ODC is correct that eliminating that right will increase efficiencies, it also removes a safeguard that helps create consistent outcomes.
- Give ODC unfettered discretion to reopen any grievance that it found to be without merit. Rather than dismissing grievances, ODC will "close" them (RDI 5.11), leaving respondent attorneys without finality.
- Eliminate the right to appeal ODC's decisions on whether to defer an investigation pending related civil or criminal litigation. ELC 5.3(d)(2).
- Eliminate a respondent's ability to contest ODC's refusal to destroy files, giving it the authority to keep any file indefinitely, which will appear on a discipline report required for bar admission in another state, and also allowing old, dismissed files to be used against the lawyer in a subsequent grievance. ELC 3.6(d)(e); RDI 3.9(b).
- Remove the appeal process for ODC's decision on whether to withhold information from a grievant or respondent. ELC 5.1(c)(3)(B). This often arises when a respondent provides personal information, such as a spouse's health condition, to explain conduct mentioned in a grievance, but does not want the grievant to be aware of those circumstances.

- Eliminate a provision that would subject disciplinary counsel to a contempt proceeding for wrongful release of information. RDI 3.1(d); ELC 3.2(f).
- Give ODC sole discretion to seek an interim suspension of a lawyer's license based on alleged risk to the public. RDI 7.2(a); ELC 7.2(a)(1)(A).
- Allow ODC to seek costs in incapacity proceedings without first obtaining authorization to do so. RDI 8.10; ELC 8.6.

**Increased sanctions.** The proposed rules remove the authority of review committees to issue advisory letters or admonitions instead of granting ODC's request to file formal charges. Advisory letters accompany a dismissal but caution the lawyer to avoid similar conduct in the future. ELC 5.8.

Currently, a review committee can issue an admonition, which the respondent can reject. That process, eliminated under the proposed rules, allowed a respondent to avoid the time and expense of hearing. Admonitions are not currently a sanction but will be under the new rules. ELC 13.1; RDI 13.5(a). In short, it will be more difficult for a lawyer who has committed an isolated minor rule violation to escape being sanctioned.

**Incapacity.** The current and proposed rules both permit a lawyer to be removed from practice based on an allegation of incapacity. The issues under the Americans with Disabilities Act raised by taking action against someone based on a medical diagnosis rather than on conduct are beyond the scope of this article, but should have been considered when the proposed rules were drafted.

One notable change is that to avoid an interim prohibition against practicing law, the respondent will bear the burden of proving, by a clear preponderance, that continued practice of law will not be detrimental. RDI 8.2(c)(2), 8.4(d)(2). Currently, only a lawyer who has had a disbarment recommendation after a full hearing has such a burden. ELC 7.2(a)(2).

By contrast, the burden of proof will be on lawyers accused of incapacity even though they have not had a hearing but instead, were at most given 15 days to respond to ODC's submission to a review panel. RDI 8.2(c)(2); 5.10(b).

**Changes not made.** Had there been a process that involved all participants in the lawyer discipline system, as there was when the current set of rules (Rules for Enforcement of Lawyer Conduct) was developed, proposals to increase fairness for accused attorneys could have been considered.

For example, the lowest levels of discipline in many states are private, while in Washington, even an admonition is public and permanently listed on the bar's website. When Washington eliminated private admonitions in the 1990s, the effect was less severe because potential clients could not use the internet to discover attorney discipline. Now a small error can be career-ending, particularly for less-established solo practitioners.

Diversion is the only way a lawyer can avoid the negative publicity of discipline, but only ODC can offer diversion and there is no oversight of ODC's decisions to deny diversion to a lawyer. A better system would permit respondents to appeal denials of diversion or, as in Arizona, allow diversion to be offered by hearing officers and review panels,<sup>8</sup> thereby making consistent outcomes more likely.

The lopsided nature of discovery should also be corrected. Before formal charges are filed, ODC can issue subpoenas, take depositions and require lawyers to produce documents and information. A respondent is entitled to no discovery other than requests for admission without an agreement of the parties or on motion.

In Oregon, by contrast, both parties can take depositions and issue requests for production. OSB Rules of Procedure 4.5(b)(1). Oregon also allows an award of costs to the prevailing party (OSB Rules of Procedure 10.7(b)), unlike our rule which permits costs only to ODC. ELC 13.9; RDI 13.8. A rule such as Oregon's would disincentivize bringing unsupportable charges.

Finally, it is well known that lawyers suffer from mental health and addiction issues at a far greater frequency than the general public.<sup>9</sup> A better process would have led to changes that would provide more support for these attorneys to get treatment instead of punishing them with public discipline.

**Bottom Line.** The current rules disfavor respondents but if the proposed rules are enacted, there will be an increased likelihood of permanent public sanctions.

*Anne Seidel limits her practice to legal ethics issues, including defense of bar grievances. She can be reached at 206-284-2282 or [anne@anneseidel.com](mailto:anne@anneseidel.com).*

*1 GR 9 cover sheet. The proposed rules and the GR 9 cover sheet are available*

*at [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRule](https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRule)*

*Display&ruleId=5807. The proposed rules also apply to LLLTs and LPOs and use the term "licensed legal professionals." This article only addresses lawyer discipline.*

2Id.

3 This statement is based on a comparison of the draft rules sent to the “stakeholders” and the set published for comment by the Court.

4 Materials for 3/19/20 Board of Governors Meeting at 18, available at [https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2019-2020/board-of-governors-meeting-materials-march-2020.pdf?sfvrsn=969a0ef1\\_6](https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2019-2020/board-of-governors-meeting-materials-march-2020.pdf?sfvrsn=969a0ef1_6).

5 <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf>. The disbarment/resignation rate for Black males was 3.9% versus 1.0% for white males.

6 GR 9 cover sheet, section II.1.

7 Mark A. Turner, *The Adjudicator’s First Year*, 79 *Oregon State Bar Bulletin* (July 2019) at 9, available at <https://www.osbar.org/bulletin/issues/2019/2019July/index.html?page=9>; *Ariz.R.S. Sup. Ct. Rules, Rule 52(b)*; *Colo. R.C.P. 251.18(b)*; see also *Proposed Colo.R.C.P. 242.7(c)*.

8 *Ariz.R.S. Sup. Ct. Rules, Rule 56(b)*.

9 See, e.g., Krill, Johnson, & Albert, *The Prevalence of Substance Use and Other Mental Health Concern Among American Attorneys*, 10 *Journal of Addiction Medicine* 46 (2016).

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### KING COUNTY BAR ASSOCIATION

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# WASHINGTON STATE BAR ASSOCIATION

## WSBA Feedback Report

April 12, 2021 (*Late Materials*)

The following feedback was sent to [BoardFeedback@wsba.org](mailto:BoardFeedback@wsba.org) and [BarLeaders@wsba.org](mailto:BarLeaders@wsba.org) focuses on the topic of **Pending Resolution before the WSBA Board of Governors to Support the Administration of a Bar Exam**, as of **Monday, April 12, 2021**. The **sixteen (16)** messages are presented in the order in which they were received. Contact information may be redacted if it differs from what is publicly available on the [WSBA Legal Directory](#).

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<b>1</b>	<p>[Dated: April 9, 2021]</p> <p>To: Bar Leaders</p> <p>I fully support the resolution as presented by the WSB: <b>NOW, THEREFORE, BE IT RESOLVED THAT</b></p> <ol style="list-style-type: none"><li>1. In order to ensure a competent, ethical and diverse legal profession, the WSBA supports the continued requirement of passing a bar exam before admission to the WSBA.</li><li>2. The WSBA discourages diploma privilege as an alternative to a bar exam.</li><li>3. The WSBA encourages a review of, and possible change to, the format and content of the bar exam to both strengthen and improve the bar exam as a tool to ensure the competent and ethical practice of law and to ensure there is no discriminatory effect on examinees of color and first generation examinees.</li></ol> <p>I strongly believe that for the protection of the public and the integrity of our profession, a proficiency exam like the Bar Exam is crucial. Put differently, a client needs to feel confident that in hiring an attorney, that attorney has met the rigorous standards necessary to competently represent that person. As with the medical profession, there can be no lesser-than standard.</p> <p>Carrie Selby</p>
<b>2</b>	<p>[Dated: April 9, 2021]</p> <p>To: Bar Leaders</p> <p>I have been admitted to the bar since 1983, the same year I graduated from the law school formerly known as University of Puget Sound. My practice is heavily weighted toward litigation. I have served as special disciplinary counsel for the Bar Association in the past. I have also served as a practice monitor/mentor for an attorney that had encountered difficulty with compliance with the rules of professional conduct. Despite having graduated from an elite Ivy League University and a Top Ten law school, this attorney was clueless about the practical</p>

**WASHINGTON STATE  
BAR ASSOCIATION**

aspects of the law. I worked with him for two years improving his office practices and his ability to spot ethical issues related to the practice of law. I have not seen his name in the disciplinary notices in the years since I worked with him and know he is currently practicing in my community.

In my firm we have hired attorneys from top tier law schools, middle tier schools and lower tier schools, as well as, graduates who were cum laude, and magna cum laude and others like myself who graduated sans cum laude. There is a definite difference in the legal ability of those from higher ranked schools and those graduating with honors over the rest. The former group has a markedly better grasp of the law, its practice and its role in society. The lower tier law school graduate only lasted six months and was very hard to coach. Yet it was a top tier graduate that I had to mentor at the request of the Bar Association. So graduation from an accredited law school alone is not an indicator of fitness to practice law.

The Bar Association is right to continue to support the requirement for a bar examination to evaluate an individual's fitness to practice law. Without this check on basic competency the public and profession are at risk. I would much rather have a highly skilled attorney on the other side of a legal dispute than an attorney who is clueless. With a skilled opposition the case is more efficient and you focus on what matters in the dispute. With less skilled advocate you spend a great deal of time beating back issues that have no place in the dispute. Often times the idea is so far-fetched, yet clearly unsupportable, that it is hard to find case authority to support why the position is legally unsupportable.

The admission of unqualified attorneys to the bar drives up the cost of legal services for everyone who crosses their path. Their clients are not well served. Often tremendous legal effort has to be expended to undo the damage they have done due to their lack of understanding of the impacts of their action and advice.

Lastly, the crucible of the bar exam has a unifying effect for the members of the bar. It would cause great and unforeseen adverse consequences if the bar examination were eliminated. These consequences would not be good for the bar association or the public.

Regards,  
Richard H. Wooster  
Kram & Wooster, P.S.  
1901 South I. Street  
Tacoma, WA 98405  
(253) 572-4161 (voice)  
(253) 572-4167 (fax)

**3** [dated: April 9, 2021]

To: Bar Leaders

Friends:

**WASHINGTON STATE  
BAR ASSOCIATION**

I am writing in response to Mr. Brett Purtzer's invitation to comment on the future of the Bar Examination. I strongly favor keeping an examination requirement.

I have been in practice since 1985. I have taken and passed three bar exams (Washington, Montana and Hawaii). My practice focus is insurance law, and I represent insurance companies in coverage and "bad faith" matters. I advise them, and litigate on their behalf. Over the course of my career, especially the past two decades, I have hired, mentored, promoted, and sometimes fired, lawyers into and from my practice group.

In the past decade or so, I have been shocked by the low level of practice competency and professionalism among many of my opposing counsel. If my work product was as bad as what I've seen, I would be fired and have no clients. This incompetence is so obvious that even my newest associates can see it. I cannot determine whether these lawyers are incompetent, lazy, or simply don't care about the quality of their representation. Here are some examples.

- Copying and pasting pleadings obtained from association brief banks, without even changing the parties' names.
- Ignorantly asserting legal theories that had been rejected by published, binding appellate decisions from years earlier; sometimes even *decades* earlier.
- Inability to respond to the most basic objections during trial (it was clear that opposing counsel did not understand what hearsay was, or that there were exceptions to the exclusion rule).

So, I am in support of reasonable steps by the Bar to ensure that incompetent candidates do not become lawyers. The examination may be an imperfect tool, but law school is certainly not weeding out the incompetent, so "diploma privilege" won't protect the public. Nor will it protect the courts and opposing counsel and their clients, whose costs and annoyance are increased by incompetent lawyers.

Finally, the glacial pace of the Bar Association's discipline against bad lawyers is astonishing. Last spring, I noticed that the Bar had asked the Supreme Court for an interim suspension of one of my opposing counsel. Nothing has happened in a year. Yes, a *year*; if he was such a danger to the public that the Bar sought an "immediate suspension", why hasn't anything been done? In the meantime, he continues to file maddeningly inane pleadings on a regular basis. And, sadly, he filed a bar complaint against my co-counsel over a trial that occurred *six years ago*. I suppose I will be next.

Thank you for your time.

Joe Hampton

**Joseph D. Hampton**

**Shareholder**

*Admitted in WA and MT*

Betts, Patterson & Mines P.S.

One Convention Place

701 Pike Street, Suite 1400

Seattle, WA 98101-3927

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	<p>D [REDACTED]   F 206.343.7053 <a href="http://www.bpmlaw.com">www.bpmlaw.com</a></p>
4	<p>[dated: April 9, 2021]</p> <p>To: Bar Leaders</p> <p>The BAR owes the public proper evaluation of potential lawyers before sending them out among the people. Despite the modern philosophy “Not everyone gets a trophy”. The reciprocity between states for licensing attorneys demands a level of competency that requires a rigorous assessment. The Montana model puts too much reliance on Law Schools as opposed to individuals. Keep the Bar Exam and any multi-state options that are available. Thanks for considering my input. James F. Leggett, WSBA 6630</p>
5	<p>[dated: April 9, 2021]</p> <p>To: Bar Leaders</p> <p>I fully support the WSBA Resolution In Support of a Bar Exam to Ensure a Competent, Ethical and Diverse Legal Profession.</p> <p>I do believe it is important to have a threshold proficiency examination. Simply gaining a diploma, even from an accredited law school, does not guarantee an applicant actually has gained the knowledge to practice. In order to protect the public, I think a comprehensive examination is a sound and prudent practice.</p> <p>Patrick C. Sheldon WSBA# 11398</p> <p><b>Patrick C. Sheldon</b> Shareholder</p> <p><b>Forsberg &amp; Umlauf, P.S.</b> 901 Fifth Avenue, Suite 1400 Seattle, WA 98164 DIRECT 206-689-8573</p> <p>OFFICE 206-689-8500</p> <p>FAX 206-689-8501</p> <p>EMAIL <a href="mailto:PSheldon@FoUmLaw">PSheldon@FoUmLaw</a></p>
6	<p>[dated: April 9, 2021]</p> <p>To: Bar Leaders</p>

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	<p>I passed the bar exam in 1968. I served as a bar examiner in the days when attorneys wrote and graded the questions. It was an eye-opening experience. There were candidates who had obviously graduated from law school, who could barely write a coherent English sentence. One candidate attached to his answer to my question a plea: "please be easy".</p> <p>Candidates who cannot write clearly, (often an indication of an inability to think clearly), should not be foisted onto the public as qualified to practice merely because they have slipped through law school. It is not my impression that academic standards have gotten more rigorous in the last 50 years, neither in high school, college nor law school.</p> <p>A failure to vigorously exam whether standards have been met by all candidates is no way to protect the profession and the public from decline.</p> <p>Del Miller Van Kampen &amp; Crowe PLLC 1001 Fourth Avenue, Suite 4050 Seattle, Washington 98154 <i>Direct:</i> (206) 903-8082 <i>Fax:</i> (206) 405-2825 <i>Email:</i> <a href="mailto:DMiller@VKClaw.com">DMiller@VKClaw.com</a></p>
<b>7</b>	<p>[dated: April 9, 2021]</p> <p>To: Bar Leaders</p> <p>As an active member of the Washington state bar association for 49 years I am submitting my position that I totally support the proposition that a licensing mechanism, at least similar To what is currently utilized be continued. In my opinion it is right of passage that is important to the profession PATBROCK. #1642</p> <p>Sent from my iPhone</p>
<b>8</b>	<p>[dated: April 9, 2021]</p> <p>To: Bar Leaders</p> <p>Greetings to the BOG,</p> <p>I support the WSBA's resolution and position that passing a rigorous bar exam should remain a requirement for legal practice licensure.</p> <p>The societal role of our legal system is foundational, and it requires the best and brightest.</p>

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	<p>With respect to bar licensing, the #1 social role and responsibility of the bar and its ultimate regulator, the Supreme Court, is to ensure that only candidates who are competent to practice law and are of good character are licensed to practice and adjudicate.</p> <p>Speaking of best and brightest, the WBLTF Chairs should consider reaching out to Rita Irvin to inquire as to whether she has an interest in serving as a member of the task force. Rita is a first-generation Mexican American from a low-income immigrant family of nine children whose parents had no education and spoke only Spanish. Rita is also a founder and the CEO of <a href="#">McKinley Irvin</a>. Over the past 29 years, she has evaluated, employed, and influenced the development of over a hundred young lawyers. Through McKinley Irvin, Rita has funded scholarship programs at both SU and UW law schools. She recently initiated a firm-wide mentoring program for African American law students. She is an experienced practitioner and served as a family law Commissioner Pro Tem for many years. She has years of experience as an engaged and effective director on non-profit boards.</p> <p>Respectfully, Sands McKinley</p>
9	<p>[dated: April 9, 2021]</p> <p>To: Bar Leaders</p> <p>I went to law school in Miami florida. Our school was very diverse and included a pre summer training for minorites to assist them in adjusting to law school.</p> <p>There were additional accomodations for the perceived disparities in circumstances based on ones race, sexual orientation or gender.</p> <p>There were no similar accomodations for white students if any gender or sexual orientation that may have suffered the same limiting circumstances.</p> <p>As unfortunate as it may be , law school is likely not an option for anyone that has grown up with limiting circumstances.</p> <p>The vast majority of law students, including the minorites at my school, a private university, were not disadvantaged .</p> <p>There was no accomodations for anyone regardless of gender, race, sexual orientation, or other limiting circumstance when taking the bar exam. If one isn't able to pass the exam they don't become lawyers until they do.</p> <p>Having to study, learn many areas of law, use analytical thinking in problem solving and writing are skills that a lawyer must have to be effective. These skills permit a new lawyer the luxury of learning the actual practice of law and provides a foundation for thinking and problem solving that has been established and tested. It brings a law student pride to pass a required prerequisite to be considered able to obtain a license to practice law.</p>

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	<p>We all know passing a bar exam does not automatically make a smart and ethical lawyer. But it does at least wean out those that don't have the foundational skills to limit these issues.</p> <p>America is often at the forefront of dumbing requirements down for our people's sense of entitlement and lack of work ethic to earn what you have. To permit students to become lawyers without an exam, doctors of the law, would be akin to permitting surgeons to practice medicine without one.</p>
<b>10</b>	<p>[dated: April 9, 2021]</p> <p>To: Bar Leaders Cc: <a href="mailto:carla@higginsonbeyer.com">carla@higginsonbeyer.com</a></p> <p>Ladies and Gentlemen,</p> <p>I support the <b>RESOLUTION IN SUPPORT OF A BAR EXAM TO ENSURE A COMPETENT, ETHICAL AND DIVERSE LEGAL PROFESSION</b>. I am very much opposed to granting diploma privilege as an option.</p> <p>Respectfully,</p> <p><i>Dewey W. Weddle</i></p> <p>Law Office of Dewey W. Weddle, PLLC 909 7th Street Anacortes, WA 98221 Telephone: 360-293-3600 Fax 360-293-3700</p>
<b>11</b>	<p>[dated: April 12, 2021]</p> <p>To: Bar Leaders</p> <p>I support the need to take a bar exam to practice law. Not only is this an important right of passage, but an exam is what sets our professional career apart from others. It is just like engineers and doctors that need that extra test – without such a step our profession would be diluted and weakened. Plus, think about the clients who want to have some level of certainty that we know what we are doing – it might not be a life or death situation like doctors, but our work affects their livelihood. The test was started for a reason and I don't think it should be tossed aside merely because some cannot pass. That is the whole point of it. Whether it need</p>



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	<p>to be restructured or modified somehow, that is a different question – so long as it does not become some meaningless step.</p> <p>Thank you, Lisa Nickel #31221</p>
<b>12</b>	<p>[dated: April 12, 2021]</p> <p>To: Bar Leaders</p> <p>All Washington attorneys should be required to have passed the bar exam, both substantive and ethics, as it was administered up until 2020. Period.</p>
<b>13</b>	<p>[dated: April 12, 2021]</p> <p>From: Francis Eugenio To: Bar Leaders</p> <p>----- Forwarded message ----- From: <b>Laney, John S.</b> &lt;<a href="mailto:john.laney@stoel.com">john.laney@stoel.com</a>&gt; Date: Mon, Apr 12, 2021 at 12:45 PM Subject: RE: FLOW - WSBA Board of Governors Liaison To: Matthew Dresden &lt;<a href="mailto:matthew.dresden@harrisbricken.com">matthew.dresden@harrisbricken.com</a>&gt; Cc: Gail Manuguid (CELA) &lt;<a href="mailto:gamanugu@microsoft.com">gamanugu@microsoft.com</a>&gt;, Francis Eugenio &lt;<a href="mailto:fxeugenio@gmail.com">fxeugenio@gmail.com</a>&gt;</p> <p>Dear Matthew:</p> <p>The Advocacy Committee of the Filipino Lawyers of Washington has looked at the proposed Resolution in Support of a Bar Exam to Ensure a Competent, Ethical and Diverse Legal Profession (the “Resolution”) and the Task Force Charter. Members of our Advocacy Committee also viewed the video of the March BOG meeting and reviewed the materials from that meeting.</p> <p>After discussing the Resolution, the Task Force Charter and related materials,</p> <p style="text-align: center;">The Filipino Lawyers of Washington <u>DOES NOT SUPPORT</u> the Resolution at this time.</p> <p>We feel that it is unfair for the BOG to pass this Resolution before the Task Force completes its study and makes its recommendation. We further believe that there should be an opportunity for minority bar association participation in the Task Force’s study. Therefore, we encourage the BOG to table this Resolution until after the Task Force completes its work.</p> <p>Best regards,</p>

**WASHINGTON STATE  
BAR ASSOCIATION**

	<p>John Laney, President, Filipino Lawyers of Washington</p> <p><b>John S. Laney</b>   Partner <b>STOEL RIVES LLP</b>   600 University Street, Suite 3600   Seattle, WA 98101 Direct: (206) 386-7559   [REDACTED] <a href="mailto:john.laney@stoel.com">john.laney@stoel.com</a>   <a href="#">Bio</a>   <a href="#">vCard</a>   <a href="http://www.stoel.com">www.stoel.com</a></p>
<p><b>14</b></p>	<p>[dated: April 12, 2021]</p> <p>To: Bar Leaders; <a href="mailto:brett@hesterlawgroup.com">brett@hesterlawgroup.com</a> Cc: Lee Ann Matthews</p> <p>Board of Governors and Mr. Purtzer:</p> <p>The attached letter [<i>Attachment LM-1</i>] is submitted in support of the proposed WSBA resolution supporting passage of a bar exam as a prerequisite to practicing law in the state of Washington.</p> <p>Thank you.</p> <p><b>James Kirkham (Kirk) Johns</b> LAWYER • ARBITRATOR • MEDIATOR • NEUTRAL JOHNS DISPUTE RESOLUTION SERVICES <b>P.O. Box 11313</b> <b>Bainbridge Island, WA 98110</b> <b>Telephone: (206) 842-2121</b> [REDACTED] <b>Fax: (206) 842-5373</b> <b>E-Mail: <a href="mailto:kjohns@johnsadr.com">kjohns@johnsadr.com</a></b> <b>Web: <a href="http://www.johnsadr.com">www.johnsadr.com</a> (pending)</b></p>
<p><b>15</b></p>	<p>[dated: April 12, 2021]</p> <p>To: Bar Leaders</p> <p>I do not support law school graduates taking a virtual bar exam or no bar exam. I took the exam in 2003 that was essay only and was at the time the easiest bar exam to pass we were told. That one would be better than virtual or none. Per the Above the Law blog takers of online bar exams were confirmed to have cheated. No longer requiring an in-person “real” bar exam in an era of online schools would degrade this profession. I understand the perception that students of color need help unlike President Obama who went to Harvard Law and passed the bar. However, if these students don’t succeed and end up coping by borrowing from client funds who will help them? Firms won’t make them partner so sole practitioner with its stresses and problems will be their main option. The passing of a bar exam, universally known to be difficult and a mark of success, defines our profession as distinct from the MBA holder. The bar exam marks the profession of law as requiring more than just the degree. In an era of online law schools this is important. Further, with the multi state version it is more readily transferable. I support only a</p>

**WASHINGTON STATE  
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	resolution that continues to require an in-person bar exam. Removing that requirement is not the way to help diversify the attorney ranks. Mona Williams 33645.
<b>16</b>	<p><b>From:</b> Brett Purtzer &lt;<a href="mailto:brett@hesterlawgroup.com">brett@hesterlawgroup.com</a>&gt; <b>Sent:</b> Monday, April 12, 2021 10:30 AM <b>To:</b> Terra Nevitt &lt;<a href="mailto:terran@wsba.org">terran@wsba.org</a>&gt; <b>Subject:</b> Resolution</p> <p>Here are some additional comments from District 6 members, Rich Vroman,(email response) and Jim Schacht (attachment):</p> <p>I support the Resolution.</p> <p>Rich Vroman</p> <p>Brett A. Purtzer Hester Law Group, Inc., P.S. 1008 S. Yakima Avenue, Suite 302 Tacoma, WA 98405</p> <p>Office (253) 272-2157 Fax (253) 572-1441</p> <p>Email: <a href="mailto:brett@hesterlawgroup.com">brett@hesterlawgroup.com</a></p>

**JAMES KIRKHAM (KIRK) JOHNS**  
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◇ ————— ◇

April 12, 2021

VIA E-MAIL (as .PDF Attachment)

Board of Governors  
WASHINGTON STATE BAR ASSOCIATION  
c/o Brett A. Purtzer  
District 6 Governor  
Hester Law Group  
1008 South Yakima Ave.; Suite 302  
Tacoma, WA 98405

Re: Proposed WSBA Resolution Supporting Passage of Bar Exam

Dear Board of Governors and Mr. Purtzer:

I write in favor of the proposed WSBA resolution supporting passage of a bar exam as a prerequisite to practicing law in the state of Washington.

Simply put, passage of that standardized and objective exam reliably demonstrates competence to practice law. Is the exam process perfect? Of course not. Disciplinary proceedings and malpractice suits bear witness otherwise. And can the process be improved? Probably. But standardized bar exams have served us well as the most reliable method for demonstrating competence to practice law that earnest minds over many years have been able to develop. And if not that, what? And without that, wither the standards and stature of our profession, and the confidence of the public we serve.

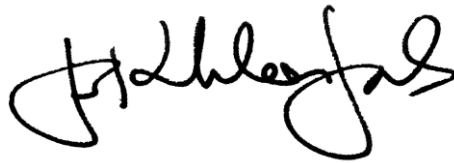
If the bar exam is shown to have discriminatory or disproportionate effects upon certain examinees, it is right to address the nature and causes of those effects. But no such effort should seize upon the expedient of compromising the integrity of the bar exam as a remedy, as the solutions to those problems lie in preparation for the bar exam, rather than in the bar exam process itself, and a lessening of standards for the practice of law should not do service for correcting shortcomings that lie elsewhere in our society and education system.

WSBA Board of Governors  
c/o Brett A. Purtzer, District 6 Governor  
April 12, 2021  
Page 2

Finally, the notion of equivalency between obtaining a law degree and competence to practice law is misguided and dangerous -- as demonstrated by failure rates in every state, every year. Any admission procedure predicated on that notion will mean that a high percentage of admittees every year will be unqualified to practice law -- and we won't know who they are, or what damage they may cause, until the public to whom we owe a duty of care -- the punctilio of an honor the most sensitive -- has suffered harm.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "James Kirkham (Kirk) Johns". The signature is fluid and cursive, with the first name "James" being the most prominent.

James Kirkham (Kirk) Johns

JKJ:ae



# FY 2021 REFORECAST

Board Of Governors Meeting

April 17<sup>th</sup>, 2021

# REFORECAST FY 2021 FUND BALANCES

FY 21 Reforecast	General Fund	CPF Fund	CLE	Sections
<b>Fund Balances 9/30/2020</b>	<b>3,478,234</b>	<b>4,193,130</b>	<b>469,241</b>	<b>1,210,209</b>
<b>Revenue Reforecast</b>	<b>20,227,365</b>	<b>533,402</b>	<b>1,353,029</b>	<b>585,779</b>
Licensing Revenue	16,218,638			
Other Revenue	4,008,727			
<b>Expenses</b>	<b>20,341,457</b>	<b>651,922</b>	<b>1,609,791</b>	<b>865,168</b>
Indirect Expenses	17,896,722	158,569	376,803	0
Direct Expenses	2,444,735	493,352	1,232,988	865,168
<b>Net Income/Loss Reforecast Balances</b>	<b>-114,092</b>	<b>-118,520</b>	<b>-256,762</b>	<b>-279,389</b>
<b>FY 21 Budgeted Balance</b>	<b>3,275,472</b>	<b>4,064,571</b>	<b>407,082</b>	<b>930,821</b>
<b>Variance</b>	<b>88,670</b>	<b>10,039</b>	<b>-194,603</b>	<b>-1</b>
Restricted Funds				
Op Reserve Fund	1,500,000			
Facilities Fund	550,000			
			<b>Total Cash Impact (Net Income) Impact is -95,895</b>	

# KEY ISSUES IMPACTING REFORECAST

- CLE Revenue Reduced by \$487K
  - 2020 MCLE Extension
  - COVID – 19
    - In person programs
    - Seminars
    - In person programs
- Partial Offset CLE expenses Reduced by \$292K
- General Fund Net Income Positive \$89K
- CPF Net Income Positive \$10K



# GENERAL FUND NET INCOME ANALYSIS

	Original FY21 Budget	Reforecast FY2021	FY 21 Ref vs Budget F/(U)	% of change F/(U)
<b>General Fund</b>				
Revenue	20,603,129	20,227,365	(375,764)	-2%
Expenses	20,805,908	20,341,457	464,452	2%
Net Income	(202,779)	(114,092)	88,687	44%

- Late fees are lower by **\$-372K** assumed 30% vs 15% actual
- Offsetting expenses mostly driven by
  - Salaries \$273K Open Position
  - Staff Travel and Parking \$54K
  - Speakers & Program Dev. \$45K
  - Facilities \$214K

# CLE FUND NET INCOME ANALYSIS

	Original FY21 Budget	Rerecast FY2021	FY 21 Ref vs Budget F/(U)	% of change F/(U)
<b>CLE FUND</b>				
Revenue	1,840,000	1,353,029	(486,971)	-26%
Expenses	1,902,159	1,609,791	292,368	15%
Net Income	(62,159)	(256,762)	(194,603)	-313%

- To be addressed by Director Plachy



# CLE REFORECAST FY21

# IMPACTS ON FINANCIAL RESULTS

- MCLE Certification Extension for 2020 – reporting group for 2020 doesn't need to complete CLE reporting until end of 2021
- COVID – no in person programs including Midyears
- The last two months of the year (November/December) are the highest on-demand revenue months. Generally we earn around \$365k in those two months but this year earnings were \$58k. That is a \$307k shortfall in two months.
- Live Seminar revenue is trending downward by \$175k overall
- On-Demand revenue is trending downward by \$277k overall
- CLE was budgeted to earn \$107k but is now forecasted to lose \$65k.

# ACTIONS TAKEN TO MITIGATE IMPACTS

- Additional on-demand “sales campaigns” to spur sales of on-demand products
- February and May
  - February “Winter Sale” resulted in approximately \$100k increase of on-demand sales
  - We expect the May “Spring” sale to result in the similar increases.
- Direct costs in live seminar development cost center decreased by \$270k driven by
  - savings associated with facilities
  - speakers and program development
  - print marketing costs.
- We were able to negotiate out of five fairly large venue contracts with no penalties.
- Keeping production of seminars going in the remote environment to keep inventory built up for future on-demand sales.
- Hiring freeze for an open position in CLE through August.

# CLE FUND BALANCE AND OPPORTUNITIES TO REBUILD

## CLE Fund

- CLE Fund balance is currently \$390k
- CLE Fund is budgeted to lose \$266k
- The CLE Fund is doing what it was intended to do – buffer the CLE operation from market fluctuations and uncontrollable external impacts (i.e. COVID Pandemic)

## Opportunities to Rebuild:

- Pent up demand
  - We will have a market of two reporting groups in FY22 so we expect on-demand and live registration to be higher than normal next year.

# NET 2 NEW POSITIONS

COST CENTER	TITLE	ANNUAL SALARY	BENEFITS (30%)	TOTAL	FISCAL START MONTH	2001 IMPACT	\$
							(\$)
IT	Developer II	80,000	24,000	104,000	9	26,000	
MAP	Member Wellness Program Lead*	70,000	21,000	91,000	10	15,167	
MCLE	MCLE Analyst	50,000	15,000	65,000	7	27,083	
		200,000	60,000	260,000		68,250	
Administration	Office Services	(40,685)	(12,206)	(52,891)	0	(52,891)	
Total		159,315	47,795	207,110		15,360	

## \* Additional \$43K Offset via elimination of WSBA Connect Contract in 2022 for Member Wellness

- **IT Developer:** The additional position is needed to fill gaps and to get the original FY21 project moving forward again with more capacity on the development team as a result of various ongoing efforts around Outlook 365 and Cyber Security
- **MWP Clinician:** As requested by the BOG to enhance the member benefit services currently offered and set an established redundancy in a key membership facing position.
- **MCLE Analyst:** An additional MCLE Analyst FTE to be hired with a start date in July 2021. The additional analyst is based on the increase in workload, the regulatory duty to ensure the timely and accurate review and management of the MCLE requirements for all license types.
- One offset position Office Services

# MITIGATING STRATEGIES

## Outsource Deskbooks

- WSBA Communications staff in response to previous B & A discussions related to the continued costs of Deskbooks has procured an arrangement with Lexus/Nexus where WSBA will reduce publishing costs, obsolescence of Deskbooks and overall costs of the Deskbooks CC. The contract is meant to mitigate the costs of producing this service for members.
- Director Niegowski will present the details



# WASHINGTON STATE BAR ASSOCIATION

## MEMO

**To:** Board of Governors

**From:** Andrea Jarmon and Gov. Sunitha Anjilvel, Co-Chairs of the WSBA Diversity Committee

**Date:** April 13, 2021

**Re:** Proposal to Sign on as a Partner to the Joint Minority Mentorship program

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**ACTION/DISCUSSION:** Approve the WSBA as a formal partner of the Washington Joint Minority Mentorship program.

The WSBA has been invited to sign on to the Washington Joint Minority Mentorship (JMM) program as a formal partner. Through the partnership of a growing number of Minority Bar Associations including the South Asian Bar Association of Washington, the Korean American Bar Association, Latina/o Bar Association, Washington Attorneys with Disabilities Association, Washington Women Lawyers, NW Indian Bar Association, and the Middle Eastern Legal Association of Washington and some law firms like Foster Garvey, JMM aims to pair law students and new lawyers (who self-identify as being from any and all historically marginalized or underrepresented groups) with mentor attorneys and judges (from all walks of life, including allies) to support mentees as they prepare to enter and navigate their legal careers.

Once a year, participants are selected and formally matched. At the mandatory kick-off event, pairs meet to create their own agreement regarding discussion topics, meetings, and follow-up activities. This year's formal program will last through 2021 although the hope is for relationships will continue beyond the year.

The WSBA is being asked to join as a partner organization which involves assisting with recruiting mentors and helping with planning events and spreading the word. Partner organizations are listed in promotional materials and their logos are included. There is no financial obligation to becoming a partner.

Some members of the WSBA Diversity Committee have already volunteered to serve as mentors and volunteered to help with some events. The Diversity Committee supports JMM and respectfully requests that the Board of Governors approve the WSBA become a partner.



April 13, 2021

Dear Board of Governors:

The Diversity Committee writes to express its great concern about the premature nature of the Bar Resolution proposed by Governors Russell Knight and Hunter Abell.

Our Washington State Supreme Court (WSSC) has structured a workgroup that is tasked with evaluating and assessing the efficacy of the Washington state bar licensure requirement for licensing lawyers. This task force will also consider alternatives to the current licensure requirements and analyze potential alternatives. This is the verbatim stated language of the Order.

The Charter for the task force goes into even more detail as to the specific inquiries, data collection, and research that will be conducted. They are noted as follows:

- Review past studies conducted on the efficacy of bar exams.
- ***Study and report on the history of the bar exam, both nationally and within the state of Washington, particularly with regard to the purpose of the bar exam at its inception.***
- Analyze whether the bar exam as currently given serves the purpose of licensing competent lawyers.
- ***Compare Washington bar exam passage rates with other states, and if such data exists, compare rates of bar passage for examinees of color and first generation examinees.***
- Research whether there is data demonstrating competency or lack thereof when lawyers are licensed through means other than a bar exam.
- If possible, seek input from those who were admitted via 2020 diploma privilege regarding their preparedness for practice, as well as input from attorneys supervising them.

Finally, after the collection, review, and most likely very robust discussions and debates, the task force will:

- Make recommendations to the WSSC regarding the bar exam and licensing new attorneys in Washington state.

Of great significance is that the work of the task force has an expiration date of December 31, 2022. That time frame, again, speaks to the depth and breadth of the research and work that the task force anticipates will be done to meet the objectives.

Among the members of the task force, are relevant and material individuals from the legal community, legal institutions, the court, and public:

- Deans (or their designees) of each of the Washington law schools (including Co-chair)
- Two admissions committee members from any Washington law school
- One member from the WSBA Board of Governors
- One member from the National Conference of Bar Examiners
- WSBA General Counsel or Chief Regulatory Counsel
- One student member from each of the Washington law schools
- One member from the Young Lawyers Section of the WSBA
- Two licensed lawyer members of the Washington State Bar Association, including a member with experience as an employer
- Two public members, who are not licensed legal professionals
- One member from the Minority and Justice Commission
- One member from the Gender and Justice Commission
- Additional ex officio members as determined by the Co-Chairs

Despite the extensive nature of the work to be done by the task force, despite the diversity of expertise that will be involved, and despite the projected time frame, the BOG has put forward a resolution that presupposes a definitive outcome. The resolution is entitled, "Resolution in support of a bar exam to ensure a competent, ethical, and diverse legal profession." Yet, this resolution defies its own title. It is internally and inherently conflicting in that while it purports to support a diverse legal profession, it declares, without the findings of the work group, that it will maintain the status quo. It does so without any input from the very members of the legal community that it purports to be invested in—marginalized and underrepresented communities.

It is striking that the BOG completely disregards that one of the central areas of inquiry for the task force is the history of the bar exam and whether there are issues of disproportionality. This resolution is manipulative and disingenuous in that it seeks to have the WSBA take a pre-determined position on the very issues that the task force has been constructed to examine and present recommendations on. Even as the resolution acknowledges that "stakeholders have expressed concern that the bar exam has a discriminatory effect on examinees of color and first-generation examinees" and even as the resolution also acknowledges that the task force, among other things, will "assess disproportionate impacts on examinees of color and first-generation examinees," it nonetheless goes on to essentially have the bar declare that the bar exam requirement should remain.

This BOG should be aware that many minority students, practitioners, and minority bar associations have long raised issues about the continued historical barriers that impact the path to the legal profession by minority and first-generation students. Finally, we have the opportunity to have a long awaited constructive and focused dialogue about these issues. That process should not be thwarted or undermined by a foregone conclusion, which is exactly what this resolution seeks to do.

Therefore, we respectfully, urge that you abandon this resolution in its entirety. Let the task force complete its work; receive the recommendations; and then take a position on the recommendations. The task force is going to be uniquely situated to examine the licensure requirements and make recommendations. In many ways, supporting, without condition, the work of the task force is an opportunity for the BOG to demonstrate its commitment to principles of diversity and inclusion as expressed in GR 12 (a) (6) which states:

*The Washington State Bar Association strives to promote diversity and equality in the courts and the legal profession.*

In perhaps a more profound sense, it is another opportunity for this BOG to demonstrate its commitment to responding to the Washington State Supreme Court's call to action in its letter of June 2020. In that letter, our Supreme Court Justices spoke to the urgent need of those in the legal community to take responsibility for the injustices in our system and take steps to address it.

Undoubtedly, supporting the work of the task force in examining the history of the bar exam and issues of disproportionality is one small effort that this bar association can make. Our Washington State Bar Association is more than 125 years old. One need not guess at who was and was not allowed to practice and based upon what measures.

Lastly, this BOG has represented to its members of color and underrepresented groups that it takes seriously our voices and concerns. To that end, many of us are speaking directly and loudly and asking that this resolution be abandoned.

Respectfully submitted,

Sunitha Anjilvel  
Co-Chair  
Diversity Committee

Andrea S. Jarmon  
Co-Chair  
Diversity Committee

# WASHINGTON STATE BAR ASSOCIATION

## MEMO

**To:** Washington State Supreme Court

**From:** Andrea Jarmon and Gov. Sunitha Anjilvel, Co-Chairs of the WSBA Diversity Committee

**Date:** April \_\_, 2021

**Re:** Comment to Washington State Supreme Court in Support of MCLE Board's Suggested Amendments to Admission to Practice Rule 11

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The Washington State Bar Association Diversity Committee respectfully submits the following comments in support of the MCLE Board's proposed amendments to Admission to Practice Rule 11.

On October 15, 2020, the WSBA Board of Governors submitted to the Washington State Supreme Court support for the proposed amendment to Admission to Practice Rule (APR) 11, which would require licensed legal professionals to devote a minimum of one of their six mandated ethics credits per reporting period to the topic of "equity, inclusion, and the mitigation of bias in the legal profession and practice of law."

The Diversity Committee advocates within the Bar Association and its leadership for meaningful commitment to diversity, inclusion, and equity in the legal profession in Washington State. The [WSBA Diversity and Inclusion Plan](#) outlines the Committee's purpose.

We view our mission as a multi-channel effort. The Diversity Committee works with our law schools to strengthen the pipeline to law school and the practice of law for diverse students, offering support to our Minority Bar Associations, providing scholarships, and creating mentorship and networking opportunities. We offer our practicing members access to resources for learning about diversity, systemic racism in the legal profession, understanding unconscious bias, and creating anti-racist organizations and systems. We offer CLE programming, Beyond the Dialogue town halls, and other opportunities for our members to learn and reflect on how we can do better individually and as a bar.

We see this work as critical to our effort. But it represents one component of what is required to make headway. As anyone who studies and works on diversity, inclusion, and equity will tell you, any organization can talk about change. True systemic change requires not only education, resources, goals, and plans – but changing the rules of the system (written and unwritten) – to reflect the desired outcomes.

We ask that you help us do just that, by taking the action uniquely within your power: We ask that you adopt a requirement for members of the bar to carefully reflect and take individual responsibility to address systemic racism in the legal profession. This Court made a plea for action to the legal community in its letter last summer, "We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism." For the legal profession, the rules are

everything. We beseech the Court to approve the change to our rules and help us continue to make our effort more than a goal – but a reality.

We ask that the Court adopt the proposed amendment to APR 11.

DRAFT