



WSBA

OFFICE OF DISCIPLINARY COUNSEL

Minority Report of the Office of Disciplinary Counsel Regarding Recommendations of the ELC Drafting Task Force July 2011

The Office of Disciplinary Counsel (ODC) has worked diligently with the ELC Drafting Task Force. As both the investigating agency and the prosecutor in the lawyer discipline system, we recognized that any effort to revise the procedural rules for lawyer discipline would have a significant and direct effect on ODC and our ability to meet the duty delegated to the Bar Association to “[a]dminister an effective system of discipline of its members.” GR 12.1(b)(6). Maintaining an effective and efficient discipline system is essential to the health and viability of the Bar Association.

Like participation in any such task force, our participation in the ELC Task Force (the Task Force) has been an exercise in compromise. By involving representatives of all the major stakeholders in lawyer discipline, ideas were generally well vetted. While a great many of ODC’s proposals were accepted as proposed, many were modified, and we dare say improved, by the Task Force process. In a number of areas, very substantial differences between ODC and respondent’s counsel were resolved by significant compromises that we believe will benefit all parties in the discipline system. Chief among these are the very significant revisions to ELC 5.4 – 5.6 to effect a better balance between the need of ODC to obtain information in investigations and the privilege concerns of respondent lawyers and their clients. As a package, the proposed changes recommended by the ELC Task Force will provide substantial improvements to the lawyer discipline system. With only the handful of exceptions discussed below, we fully support the package of proposed rule changes.

This Minority Report focuses on three issues that merit careful consideration by the Board of Governors. Two of these are needed to maintain and improve the efficiencies of the system. The third is needed to provide the public more transparency as to a lawyer’s disciplinary history. These issues are:

- The rules for interim suspension upon a felony conviction should not be amended to provide for a new show cause procedure. [ELC 7.1(e)]
- The misleading distinction between sanctions and admonitions should be eliminated. [ELC 13.1].
- Lawyers who refuse to participate in the disciplinary process and allow a default to be taken should be subject to disbarment. [ELC 10.6]

1. The rules for interim suspension upon a felony conviction should not be amended to provide for a show cause procedure.

Since at least 1975, the disciplinary rules have provided for the automatic interim suspension of a lawyer upon a felony conviction, without any show cause procedure at the Court. (See former RLD 3.1 and former DRA 9.1(a)). Under the guise of a change in the procedural provisions of ELC 7.1(e), the recommendation of the Task Force actually proposes a change in the substantive law, to allow a felony convicted respondent a show cause hearing to avoid interim suspension if “the respondent’s continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, or be contrary to the public interest.” Heretofore, that has never been an issue. Under the current rule, upon conviction of a felony, interim suspension has been automatic. The procedure proposed by the Task Force recommendation will make available a new series of show cause hearings at the Court. Show cause hearings at the Court usually take one to two months to be scheduled, which will automatically allow the convicted lawyer at least one or two more months to practice law while the public asks, why is a lawyer who has already been convicted of a felony allowed to continue to practice? Those matters, often involving high-profile felony convictions, will surely damage the public’s view of the integrity of the lawyer discipline system.

Furthermore, show cause hearings such as this will be hard fought, and will require not insubstantial use of ODC resources. Maintaining the current system of automatic interim suspensions upon felony convictions will require the expenditure of no such additional resources, and will help maintain the current efficiencies of the discipline system.

Some have expressed concern about what to do for the truly remarkable or unusual case where the particular circumstances or the particular felony offense (e.g. illegal commercial fishing) make for a sympathetic case to allow the convicted lawyer to remain practicing during the disciplinary proceedings. The rule has always had a provision to allow a respondent to petition to terminate the interim suspension upon a recommendation from the Disciplinary Board. We have proposed changes to ELC 7.1(g) to streamline this process and to allow such a respondent to go immediately to the Court to seek such relief without the need to go through the Disciplinary Board.

The amendments to accomplish the ODC proposal are attached as Appendix A. These are presented first in a “Super Redline” version, showing all of the various changes recommended by the Task Force to ELC 7.1 in ordinary ~~cross-out~~ and underline, and the additional changes of the ODC proposal in ~~double-cross-out~~ and double underline. They are presented a second time in a more easily read “clean copy” version. Please note that the ODC proposal only relates to subsections (e) and (g) of the rule.

2. The misleading distinction between sanctions and admonitions should be eliminated. [ELC 13.1].

Currently the list of available sanctions and remedies in ELC 13.1 includes only disbarment, suspension and reprimand as ‘sanctions.’ Admonitions are placed in a category by themselves as neither a ‘sanction’ nor a ‘remedy.’ At one time, that distinction made some sense. Prior to 1997, admonitions were not public, whereas the sanctions were public. Also, prior to the current proposed rule changes, admonitions were not permanent, but the changes now recommended by the Task Force make admonitions permanent disciplinary records. With the currently proposed changes, an admonition is just as permanent and just as public as any of the sanctions. There is no longer a legitimate reason for making a distinction between sanctions and admonitions, and to continue the distinction can be misleading.

We propose that the non-sanction distinction of admonitions be eliminated. Both the ABA Model Rules for Lawyer Disciplinary Enforcement (Rule 10) and the ABA Standards for Imposition of Lawyer Sanctions (Sec. III(B)) list admonitions as a sanction. The ABA Model Rules recognize that to leave the admonition, which is a finding of misconduct, off the list of sanctions is misleading. This is so *even though* under the ABA Model Rules and sanction standards an admonition is a non-public form of discipline. Here in Washington, where admonitions are public, it makes no sense at all to leave them off the list of sanctions.

Leaving admonitions off the list of sanctions allows a respondent lawyer who has received an admonition to make technically true but misleading representations, such as, “I’ve never been sanctioned by the Bar.” Some have suggested that the distinction is still useful since underwriting questionnaires, judicial evaluation forms, and the like, sometimes just ask whether a lawyer has been sanctioned, allowing the respondent lawyer to not reveal admonitions. That is not a reason for maintaining the distinction. Indeed, such sly prevarications are the reason to eliminate the distinction. Given that admonitions will be public and permanent disciplinary action, they should be disclosed on such questionnaires and forms. And most underwriters and many judicial evaluators no doubt assume that an admonition will be disclosed since the ABA Model Rules all include admonitions as a sanction. Maintaining the current distinction will only invite further confusion and obfuscation.

In addition to eliminating the distinction between sanctions and admonitions in ELC 13.1, we propose cleaning up the rule by deleting the reference to the rule number for suspensions and the rule number for admonitions from the rule, as there are no corresponding references to the rule numbers for the other sanctions and remedies. The inclusion of those rule numbers for suspensions and admonitions appears to be an anomaly. Please also note that because the term “sanctions and admonitions” is used throughout the ELC, a number of conforming entries will need to be made to reflect the change. The rule change to eliminate the distinction is attached as Appendix B. This is presented first in a “redline” version, and then in a more easily read “clean copy” version.

3. Lawyers who refuse to participate in the disciplinary process and allow a default to be taken should be recommended for disbarment.

We propose that Washington adopt the type of system recently implemented by the California Bar whereby a lawyer's failure to answer a formal complaint and failure to respond to the resulting default motion results in a recommendation of disbarment to the Supreme Court. California State Bar Procedure Rule 5.80(A)(3) provides that a default motion must prominently state (in relevant part) that:

If you do not file a response with the State Bar Court within 10 days of service of this motion, the Court will enter your default, [and] deem the facts in the notice of disciplinary charges admitted by you. . . . If your default is entered, and you fail to timely move to set it aside, this Court will enter an order recommending your disbarment without further hearing or proceeding.

California took this action in an effort to streamline their disciplinary process in light of the limited resources available for lawyer discipline. A similar system has been in place in Missouri since 2002. Rules Governing the Missouri Bar and Judiciary, § 5.13.

Failure of a lawyer to answer a formal complaint is in itself a dereliction of professional responsibility and should not be tolerated. Indeed, it is grounds for discipline. ELC 10.5(a). The proposal we have drafted requires that a statement similar to the above notice must be served twice on the respondent. Once in the notice to answer that must be served with the formal complaint, and a second time as part of the notice of motion of default. Any respondent lawyer who is excusably caught unawares by the disciplinary proceeding (an unlikely occurrence) has ample opportunity to set aside the default and put the matter back on track for a disciplinary hearing. See ELC 10.6(c). Additionally, the final decision on disbarment will, as always, rest with the Supreme Court, which can always impose a lesser sanction if disbarment is inappropriate.

Under the current default rule, ELC 10.6, even though a respondent lawyer completely ignores the notice to answer and the default motion, disciplinary counsel must still hold a hearing, which entails preparing a hearing brief and making a sanction argument to the hearing officer. Unless the matter is resolved by the hearing officer recommending an admonition or reprimand, the matter must be reviewed by the Disciplinary Board, where it is again briefed. This degree of procedure consumes scarce disciplinary counsel resources that could be better spent elsewhere.

Implementing a default disbarment procedure requires changes to several rules. We have proposed changes to ELC 10.4(a) to amend the Notice to Answer to reflect that a summary disbarment will follow a default. We propose substantial changes to the default rule itself, ELC 10.6, to implement this change, including requiring a second notice that failure to respond will result in disbarment. We propose that upon entry of a default order, no hearing is to be held, since all of the formal complaint allegations and violations are established and a disbarment recommendation is required. The only issue to

be considered by the hearing officer would be the matter of restitution, and we propose that this be accomplished by disciplinary counsel filing a statement as to any restitution that is requested along with supporting documentation. The hearing officer would then enter the findings and recommendation of disbarment and provide for the restitution as may have been established by disciplinary counsel's statement. Since the sanction of disbarment would not be discretionary, we provide that the matter be directly forwarded to the Supreme Court without Disciplinary Board review. We also propose amendments to ELC 13.9(c) to provide for costs in such matters and a conforming amendment to ELC 10.13(d). These proposed amendments are set forth at Appendix C, which presents the changes first in a "redline" version, and then in a "clean copy" version.

Appendix A

Rule Proposal to Maintain Lack of Show Cause Hearings When Lawyers Convicted of Felonies

[Recommendations of ELC Task Force are show with underline and ~~cross out~~. The proposed changes of the ODC Minority Report are shown by double underline and ~~double cross out~~. **Please Note: that the ODC proposal only relates to changes in subsections (e) and (g) of the rule.**]

(Super Redline Version)

RULE 7.1 INTERIM SUSPENSION FOR CONVICTION OF A CRIME

(a) Definitions.

(1) "Conviction" for the purposes of this rule occurs upon entry of a plea of guilty, unless the defendant affirmatively shows that the plea was not accepted or was withdrawn, or upon entry of a finding or verdict of guilty, unless the defendant affirmatively shows that judgment was arrested or a new trial granted.

(2) ~~"Serious crime" includes any:~~

~~(A) felony;~~

~~(B) crime a necessary element of which, as determined by its statutory or common law definition, includes any of the following:~~

- ~~• interference with the administration of justice;~~
- ~~• false swearing;~~
- ~~• misrepresentation;~~
- ~~• fraud;~~
- ~~• deceit;~~
- ~~• bribery;~~
- ~~• extortion;~~
- ~~• misappropriation; or~~
- ~~• theft; or~~

~~(C) attempt, or a conspiracy, or solicitation of another, to commit a "serious crime".~~

"Felony" includes any crime denominated as a felony in the jurisdiction in which it is committed.

(b) ~~Court Clerk To Advise Association~~Reporting of Conviction. When a lawyer is convicted of a ~~crime~~felony, the clerk of the court must ~~advise the Association of the conviction, and on request provide the Association with certified copies of any order or other document showing the conviction~~lawyer must report the conviction to disciplinary counsel within 30 days of the conviction as defined by this rule.

(c) Disciplinary Procedure upon Conviction.

(1) If a lawyer is convicted of a felony, disciplinary counsel must file a formal complaint regarding the conviction. Disciplinary counsel must also petition the Supreme Court for an order suspending the respondent lawyer during the pendency

of disciplinary proceedings. The petition for suspension may be filed before the formal complaint.

- (2) ~~If a lawyer is convicted of a crime that is not a felony, disciplinary counsel may refer the matter to a review committee to determine whether the crime is a serious crime. If so, disciplinary counsel proceeds in the same manner as for a felony.~~
- (3) If a lawyer is convicted of a crime that is neither not a felony nor a serious crime, the review committee may considers a report of the conviction in the same manner as any other report of possible misconduct by a lawyer.

(d) Petition. A petition to the Supreme Court for suspension under this rule must include a copy of any available document establishing the fact of conviction. ~~If the crime is not a felony, the petition must also include a copy of the review committee order finding that the crime is a serious crime.~~ Disciplinary counsel may also include additional facts, statements, arguments, affidavits, and documents in the petition. A copy of the petition must be personally served on the respondent, and proof of service filed with the Court.

(e) Immediate Interim Suspension. Upon the filingservice filing of a petition for suspension under this rule, ~~the Court determines whether the crime constitutes a serious crime as defined in section (a), respondent may request a hearing to show why the respondent should not be suspended during the pendency of the disciplinary proceeding. Any request must be filed with the Clerk of the Supreme Court within 15 days after the service of the petition on respondent.~~

- (1) ~~If the crime is a felony, no timely request for a hearing is filed, the~~ The Court must enter an order immediately suspending the respondent from the practice of law.
- (2) ~~If the crime is not a felony, timely request for a hearing is filed, the Court conducts a show cause proceeding under rule 7.2(b) to determine if the crime is a serious crime. If the Court determines the crime is a serious crime, the Court must enter an order immediately suspending the respondent from the practice of law. If the Court determines that the crime is not a serious crime, upon being so advised, the Association processes the matter as it would any other grievance. The respondent must be suspended absent an affirmative showing that the respondent's continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, or be contrary to the public interest.~~
- (3) ~~If~~ Upon suspension, the respondent must comply with title 14.
- (4) Suspension under this rule occurs:
 - (A) whether the conviction was under a law of this state, any other state, or the United States;
 - (B) whether the conviction was after a plea of guilty, nolo contendere, not guilty, or otherwise; and
 - (C) regardless of the pendency of an appeal.
- (4) On or before the date established for the entry of the order of interim suspension the respondent may assert to the Court any jurisdictional deficiency that establishes that the suspension may not properly be ordered, such as that the crime did not constitute a felony or that the respondent is not the individual convicted.

(f) Duration of Suspension. A suspension under this rule must terminate when the disciplinary proceeding is fully completed, after appeal or otherwise. A copy of the final decision, stipulation or order terminating the disciplinary proceeding will be provided to the Court.

(g) Termination of Suspension.

- (1) ~~*Petition and Response.* A respondent may at any time petition the Board Court to recommend termination of an interim suspension. Disciplinary counsel may file a response to the petition. ~~The Chair may direct disciplinary counsel to investigate as appears appropriate. If disciplinary counsel recommends that the suspension should be terminated, the Clerk will transfer the petition and response to the Court for its consideration.~~~~
- (2) ~~*Board Recommendation.* If either party requests, the Board must hear oral argument on the petition at a time and place and under terms as the Chair directs. The Board may recommend termination of a suspension only if the Board makes an affirmative finding of good cause to do so. There is no right of appeal from a Board decision declining to recommend termination of a suspension.~~
- (3) ~~*Court Action.* The Court determines the procedure for its consideration of a recommendation petition to terminate a suspension.~~

~~**(h) Notice of Dismissal to Supreme Court.** If disciplinary counsel has filed a petition for suspension under this rule, and the disciplinary proceedings based on the criminal conviction are dismissed, the Supreme Court must be provided a copy of the decision granting dismissal whether or not the respondent is suspended at the time of dismissal.~~

(Clean Copy Version)

RULE 7.1 INTERIM SUSPENSION FOR CONVICTION OF A CRIME

(a) Definitions.

- (1) "Conviction" for the purposes of this rule occurs upon entry of a plea of guilty, unless the defendant affirmatively shows that the plea was not accepted or was withdrawn, or upon entry of a finding or verdict of guilty, unless the defendant affirmatively shows that judgment was arrested or a new trial granted.
- (2) "Felony" includes any crime denominated as a felony in the jurisdiction in which it is committed.

(b) Reporting of Conviction. When a lawyer is convicted of a felony, the lawyer must report the conviction to disciplinary counsel within 30 days of the conviction as defined by this rule.

(c) Disciplinary Procedure upon Conviction.

- (1) If a lawyer is convicted of a felony, disciplinary counsel must file a formal complaint regarding the conviction. Disciplinary counsel must also petition the Supreme Court for an order suspending the respondent lawyer during the pendency of disciplinary proceedings. The petition for suspension may be filed before the formal complaint.

- (2) If a lawyer is convicted of a crime that is not a felony, the review committee may consider a report of the conviction in the same manner as any other report of possible misconduct by a lawyer.

(d) Petition. A petition to the Supreme Court for suspension under this rule must include a copy of any available document establishing the fact of conviction. Disciplinary counsel may also include additional facts, statements, arguments, affidavits, and documents in the petition. A copy of the petition must be personally served on the respondent, and proof of service filed with the Court.

(e) Immediate Interim Suspension. Upon the filing of a petition for suspension under this rule:

- (1) The Court must enter an order immediately suspending the respondent from the practice of law.
- (2) Upon suspension, the respondent must comply with title 14.
- (3) Suspension under this rule occurs:
 - (A) whether the conviction was under a law of this state, any other state, or the United States;
 - (B) whether the conviction was after a plea of guilty, nolo contendere, not guilty, or otherwise; and
 - (C) regardless of the pendency of an appeal.
- (4) On or before the date established for the entry of the order of interim suspension the respondent may assert to the Court any jurisdictional deficiency that establishes that the suspension may not properly be ordered, such as that the crime did not constitute a felony or that the respondent is not the individual convicted.

(f) Duration of Suspension. A suspension under this rule must terminate when the disciplinary proceeding is fully completed, after appeal or otherwise. A copy of the final decision, stipulation or order terminating the disciplinary proceeding will be provided to the Court.

(g) Termination of Suspension.

- (1) *Petition and Response.* A respondent may at any time petition the Court to terminate an interim suspension. Disciplinary counsel may file a response to the petition.
- (2) *Court Action.* The Court determines the procedure for its consideration of a petition to terminate a suspension.

Appendix B

Rule Proposal to Eliminate Distinction Between Sanctions and Admonitions

(Redline Version):

ELC 13.1 SANCTIONS AND REMEDIES

Upon a finding that a lawyer has committed an act of misconduct, one or more of the following may be imposed:

(a) Sanctions.

- (1) Disbarment;
- (2) Suspension under rule 13.3; or
- (3) Reprimand; or

~~(b) Admonition.~~ (4) An admonition under rule 13.5.

(c) Remedies.

- (1) Restitution;
- (2) Probation;
- (3) Limitation on practice;
- (4) Requirement that the lawyer attend continuing legal education courses;
- (5) Assessment of costs; or
- (6) Other requirements consistent with the purposes of lawyer discipline.

(Clean Copy Version):

ELC 13.1 SANCTIONS AND REMEDIES

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- (4) Requirement that the lawyer attend continuing legal education courses;
- (5) Assessment of costs; or
- (6) Other requirements consistent with the purposes of lawyer discipline.

Dated this _____ day of _____, 20____.

WASHINGTON STATE BAR ASSOCIATION

By _____

Disciplinary Counsel, Bar No.

Address: _____

Telephone: _____

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ELC 10.6 DEFAULT PROCEEDINGS

(a) Entry of Default.

- (1) *Timing.* If a respondent lawyer, after being served with a notice to answer as provided in rule 10.4, fails to file an answer to a formal complaint or to an amendment to a formal complaint within the time provided by these rules, disciplinary counsel may serve the respondent with a written motion for an order of default.
- (2) *Motion.* Disciplinary counsel must serve the respondent with a written motion for an order of default and a copy of this rule at least five days before entry of the order of default. The motion for an order of default must include the following:
 - (A) the dates of filing and service of the notice to answer, formal complaint, and any amendments to the complaint; ~~and~~
 - (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; and
 - (C) notice that a default will result in the allegations and violations in the formal complaint being admitted and established, and a recommendation to the Court for the respondent lawyer's disbarment and such restitution as may be established by disciplinary counsel.
- (3) *Entry of Order of Default.* If the respondent fails to file a written answer with the Clerk within five days of service of the motion for entry of an order of default, the hearing officer, or if no hearing officer ~~or panel~~ has been assigned, the chief hearing officer, on proof of proper service of the motion, enters an order finding the respondent in default.
- (4) *Effect of Order of Default.* Upon entry of an order of default, the allegations and violations in the formal complaint and any amendments to the complaint 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) Proceedings After Entry of an Order of Default.

- (1) *Service.* The Clerk serves the order of default and a copy of this rule under rule 4.2(b).
- (2) *No Further Notices.* After entry of an order of default, no further notices must be served on the respondent except for copies of the decisions of the hearing officer ~~or hearing panel~~ and the Board.

- (3) *Disciplinary Proceeding.* Within ~~60~~ 20 days of the filing of the order of default, the hearing officer must conduct a disciplinary proceeding to recommend disciplinary action based on the allegations and violations established under section (a). ~~At the discretion of the hearing officer or panel, these proceedings may be conducted by formal hearing, written submissions, telephone hearing, or other electronic means. Disciplinary counsel may present additional evidence including, but not limited to, requests for admission under rule 10.11(b), and depositions, affidavits, and declarations regardless of the witness's availability. disciplinary counsel must file a statement of any requested restitution sought under rule 13.7, together with any supporting documentation. Within 60 days of the filing of the order of default the hearing officer must enter an order finding the allegations and violations of the formal complaint, and any amendments to the complaint, as established and recommending the respondent lawyer's disbarment and such restitution as may be established by disciplinary counsel's statement.~~
- (4) *Supreme Court Action.* Upon filing of the hearing officer's order, the matter is not subject to review under Title 11, and the Clerk will forward the order to the Supreme Court for review and entry of an appropriate order.

(c) Setting Aside Default.

- (1) *Motion To Vacate Order of Default.* A respondent may move to vacate the order of default and any decision of the hearing officer or panel or Board arising from the default on the following grounds:
- (A) mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining the default;
 - (B) erroneous proceedings against a respondent who was, at the time of the default, incapable of conducting a defense;
 - (C) newly discovered evidence that by due diligence could not have been previously discovered;
 - (D) fraud, misrepresentation, or other misconduct of an adverse party;
 - (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.* The motion must be made within a reasonable time and for grounds (A) and (C) within one year after entry of the default. If the respondent's motion is based on allegations of incapability of conducting a defense, the motion must be made within one year after the disability ceases.
- (3) *Burden of Proof.* The respondent bears the burden of proving the grounds for setting aside the default. If the respondent proves that the default was entered as a result of a disability which made the respondent incapable of conducting a defense, the default must be set aside.
- (4) *Service and Contents of Motion.* The motion must be filed and served under rules 4.1 and 4.2 and be accompanied by a copy of respondent's proposed answer to each formal complaint for which an order of default has been entered. The proposed answer must state with specificity the respondent's asserted de-

fenses and any facts that respondent asserts as mitigation. The motion to vacate the order of default must be supported by an affidavit showing:

- (A) the date on which the respondent first learned of the entry of the order of default;
- (B) the grounds for setting aside 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 ten days of filing and service of the motion to vacate, disciplinary counsel may file and serve a written response.
- (6) *Decision.* The hearing officer or panel decides a motion to vacate the order of default on the written record without oral argument. If the proceedings have been concluded, the chief hearing officer assigns a hearing officer or panel to decide the motion. Pending a ruling on the motion, the hearing officer or panel may order a stay of proceedings not to exceed 30 days. In granting a motion to vacate an order of default, the hearing officer or panel has discretion to order appropriate conditions.
- (7) *Appeal of Denial of Motion.* A respondent may appeal to the Chair a denial of a motion to vacate an order of default by filing and serving a written notice of appeal stating the arguments against the hearing officer or panel's decision. The respondent must file the notice of appeal within ten days of service on the respondent of the order denying the motion. The appeal is decided on the written record without oral argument. Pending a ruling on the appeal, the Chair may order a stay of proceedings not to exceed 30 days. In granting a motion to vacate an order of default, the Chair has discretion to order appropriate conditions.
- (8) *Decision To Vacate Is Not Subject to Interim Review.* An order setting aside an order of default is not subject to interim review.

(d) Order of Default Not Authorized in Certain Proceedings. The default procedure in this rule does not apply to a proceeding to inquire into a lawyer's capacity to practice law under title 8 except as provided in that title.

ELC 10.13 DISCIPLINARY HEARING

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(d) Witnesses. Except as provided in subsection (b)(2) and ~~rule 10.6~~, witnesses must testify under oath. Testimony may also be submitted by deposition as permitted by CR 32. Testimony must be recorded by a court reporter or, if allowed by the hearing officer, by tape recording. The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.

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ELC 13.9 COSTS AND EXPENSES

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(c) Expenses Defined. "Expenses" for the purposes of this rule means a reasonable charge for attorney fees and administrative costs. Expenses assessed under this rule may equal the actual expenses incurred by the Association, but in any case cannot be less than the following amounts:

- (1) for an admonition that is accepted under rule 13.5(a), \$750;
- (2) for a matter that becomes final without review by the Board, including those matters resolved by a final order under rule 10.6(b)(4), \$1,500;
- (3) for a matter that becomes final following Board review, without appeal to the Supreme Court, a total of \$2,000;
- (4) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review but not requiring briefing, a total of \$2,500; and
- (5) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review in which briefing is required, a total of \$3,000.

(d) Statement of Costs and Expenses, Exceptions, and Reply.

- (1) *Timing.* Disciplinary counsel must file a statement of costs and expenses with the Clerk within 20 days from any of the following events:
 - (A) an admonition is accepted;
 - (B) the decision of a hearing officer or panel or the Board imposing an admonition or a sanction becomes final;
 - (C) a notice of appeal from a Board decision is filed and served; ~~or~~
 - (D) the Supreme Court accepts or denies discretionary review of a Board decision; or
 - (E) the Supreme Court enters a final order on a default disbarment under rule 10.6(b)(4).
- (2) *Content.* A statement of costs and expenses must state with particularity the nature and amount of the costs claimed and also state the expenses requested. Disciplinary counsel must sign the statement, and this signature constitutes a certification that all reasonable attempts have been made to insure the statement's accuracy.
- (3) *Service.* The Clerk serves a copy of the statement on the respondent.
- (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 ten days from service of any exceptions.

(e) Assessment. The Chair enters an order assessing costs and expenses after the expiration of the time for filing exceptions or replies.

(f) Review of Chair's Decision.

- (1) *Matters Reviewed by Court.* In matters reviewed by the Supreme Court under title 12, the Chair's decision is subject to review only by the Court.
- (2) *All Other Matters.* In all other matters, including those resolved under rule 10.6(b)(4), the following procedures apply:
 - (A) Request for Review by Board. Within 20 days of service on the respondent of the order assessing costs and expenses, either party may file a request for Board review of the order.
 - (B) Board Action. Upon the timely filing of a request, the Board reviews the order assessing costs and expenses, based on the Association's statement of costs and expenses and any exceptions or reply, the decision of the hearing officer or panel or of the Board, and any written statement submitted by either party within the time directed by the Chair. The Board may approve or modify the

order assessing costs and expenses. The Board's decision is final when filed and not subject to further review.

(g) Assessment in Matters Reviewed by the Court. When a matter is reviewed by the Court as provided in title 12, any order assessing costs and expenses entered by the Chair under section (e) 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 by the Court imposing a sanction or admonition, costs and expenses may be assessed in favor of the Association under the procedures of RAP Title 14, except that "costs" as used in that title means any costs and expenses allowable under this rule.

(Clean Copy Version):

ELC 10.4 NOTICE TO ANSWER

(a) Content. The notice to answer must be substantially in the following form:

BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

In re) NOTICE TO ANSWER;
) NOTICE OF HEARING OFFICER;
_____,) NOTICE OF DEFAULT PROCEDURE
Lawyer.)

To: The above named lawyer:

A formal complaint 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 complaint *within 20 days of the date of service on you*, by filing the original of your answer with the Clerk to the Disciplinary Board of the Washington State Bar Association, [insert address] and by serving one copy on the hearing officer if one has been assigned and one copy on disciplinary counsel at the address[es] given below.

Notice of default procedure: Your default may be entered for failure to file a written answer to this formal complaint within 20 days of service as required by rule 10.6 of the Rules for Enforcement of Lawyer Conduct. The entry of an order of default will result in the allegations and violations in the formal complaint being admitted and established and your disbarment recommended to the Supreme Court together with such restitution as may be established by disciplinary counsel. 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 rule 10.6(c) of the Rules for Enforcement of Lawyer Conduct. The entry of an order of default means that you will receive no further notices regarding these proceedings except those required by rule 10.6(b)(2).

The hearing officer assigned to this proceeding is: [insert name, address, and telephone number of hearing officer].

Dated this _____ day of _____, 20____.

WASHINGTON STATE BAR ASSOCIATION

By _____

Disciplinary Counsel, Bar No.

Address: _____

Telephone: _____

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ELC 10.6 DEFAULT PROCEEDINGS

(a) Entry of Default.

- (1) *Timing.* If a respondent lawyer, after being served with a notice to answer as provided in rule 10.4, fails to file an answer to a formal complaint or to an amendment to a formal complaint within the time provided by these rules, disciplinary counsel may serve the respondent with a written motion for an order of default.
- (2) *Motion.* Disciplinary counsel must serve the respondent with a written motion for an order of default and a copy of this rule at least five days before entry of the order of default. The motion for an order of default must include the following:
 - (A) the dates of filing and service of the notice to answer, formal complaint, and any amendments to the complaint;
 - (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; and
 - (C) notice that a default will result in the allegations and violations in the formal complaint being admitted and established, and a recommendation to the Court for the respondent lawyer's disbarment and such restitution as may be established by disciplinary counsel.
- (3) *Entry of Order of Default.* If the respondent fails to file a written answer with the Clerk within five days of service of the motion for entry of an order of default, the hearing officer, or if no hearing officer has been assigned, the chief hearing officer, on proof of proper service of the motion, enters an order finding the respondent in default.
- (4) *Effect of Order of Default.* Upon entry of an order of default, the allegations and violations in the formal complaint and any amendments to the complaint are deemed admitted and established and the respondent may not participate further in the proceedings unless the order of default is vacated under this rule.

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

- (1) *Service.* The Clerk serves the order of default and a copy of this rule under rule 4.2(b).
- (2) *No Further Notices.* After entry of an order of default, no further notices must be served on the respondent except for copies of the decisions of the hearing officer or hearing panel and the Board.

- (3) *Disciplinary Proceeding.* Within 20 days of the filing of the order of default, disciplinary counsel must file a statement of any requested restitution sought under rule 13.7, together with any supporting documentation. Within 60 days of the filing of the order of default the hearing officer must enter an order finding the allegations and violations of the formal complaint, and any amendments to the complaint, as established and recommending the respondent lawyer's disbarment and such restitution as may be established by disciplinary counsel's statement.
- (4) *Supreme Court Action.* Upon filing of the hearing officer's order, the matter is not subject to review under Title 11, and the Clerk will forward the order to the Supreme Court for review and entry of an appropriate order.

(c) Setting Aside Default.

- (1) *Motion To Vacate Order of Default.* A respondent may move to vacate the order of default and any decision of the hearing officer or panel or Board arising from the default on the following grounds:
 - (A) mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining the default;
 - (B) erroneous proceedings against a respondent who was, at the time of the default, incapable of conducting a defense;
 - (C) newly discovered evidence that by due diligence could not have been previously discovered;
 - (D) fraud, misrepresentation, or other misconduct of an adverse party;
 - (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.* The motion must be made within a reasonable time and for grounds (A) and (C) within one year after entry of the default. If the respondent's motion is based on allegations of incapability of conducting a defense, the motion must be made within one year after the disability ceases.
- (3) *Burden of Proof.* The respondent bears the burden of proving the grounds for setting aside the default. If the respondent proves that the default was entered as a result of a disability which made the respondent incapable of conducting a defense, the default must be set aside.
- (4) *Service and Contents of Motion.* The motion must be filed and served under rules 4.1 and 4.2 and be accompanied by a copy of respondent's proposed answer to each formal complaint 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 respondent asserts as mitigation. The motion to vacate the order of default must be supported by an affidavit showing:
 - (A) the date on which the respondent first learned of the entry of the order of default;
 - (B) the grounds for setting aside 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 ten days of filing and service of the motion to vacate, disciplinary counsel may file and serve a written response.
- (6) *Decision.* The hearing officer or panel decides a motion to vacate the order of default on the written record without oral argument. If the proceedings have been concluded, the chief hearing officer assigns a hearing officer or panel to decide the motion. Pending a ruling on the motion, the hearing officer or panel may order a stay of proceedings not to exceed 30 days. In granting a motion to vacate an order of default, the hearing officer or panel has discretion to order appropriate conditions.
- (7) *Appeal of Denial of Motion.* A respondent may appeal to the Chair a denial of a motion to vacate an order of default by filing and serving a written notice of appeal stating the arguments against the hearing officer or panel's decision. The respondent must file the notice of appeal within ten days of service on the respondent of the order denying the motion. The appeal is decided on the written record without oral argument. Pending a ruling on the appeal, the Chair may order a stay of proceedings not to exceed 30 days. In granting a motion to vacate an order of default, the Chair has discretion to order appropriate conditions.
- (8) *Decision To Vacate Is Not Subject to Interim Review.* An order setting aside an order of default is not subject to interim review.

(d) Order of Default Not Authorized in Certain Proceedings. The default procedure in this rule does not apply to a proceeding to inquire into a lawyer's capacity to practice law under title 8 except as provided in that title.

ELC 10.13 DISCIPLINARY HEARING

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(d) Witnesses. Except as provided in subsection (b)(2), witnesses must testify under oath. Testimony may also be submitted by deposition as permitted by CR 32. Testimony must be recorded by a court reporter or, if allowed by the hearing officer, by tape recording. The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.

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ELC 13.9 COSTS AND EXPENSES

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(c) Expenses Defined. "Expenses" for the purposes of this rule means a reasonable charge for attorney fees and administrative costs. Expenses assessed under this rule may equal the actual expenses incurred by the Association, but in any case cannot be less than the following amounts:

- (1) for an admonition that is accepted under rule 13.5(a), \$750;
- (2) for a matter that becomes final without review by the Board, including those matters resolved by a final order under rule 10.6(b)(4), \$1,500;
- (3) for a matter that becomes final following Board review, without appeal to the Supreme Court, a total of \$2,000;

- (4) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review but not requiring briefing, a total of \$2,500; and
- (5) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review in which briefing is required, a total of \$3,000.

(d) Statement of Costs and Expenses, Exceptions, and Reply.

- (1) *Timing.* Disciplinary counsel must file a statement of costs and expenses with the Clerk within 20 days from any of the following events:
 - (A) an admonition is accepted;
 - (B) the decision of a hearing officer or panel or the Board imposing an admonition or a sanction becomes final;
 - (C) a notice of appeal from a Board decision is filed and served;
 - (D) the Supreme Court accepts or denies discretionary review of a Board decision; or
 - (E) the Supreme Court enters a final order on a default disbarment under rule 10.6(b)(4).
- (2) *Content.* A statement of costs and expenses must state with particularity the nature and amount of the costs claimed and also state the expenses requested. Disciplinary counsel must sign the statement, and this signature constitutes a certification that all reasonable attempts have been made to insure the statement's accuracy.
- (3) *Service.* The Clerk serves a copy of the statement on the respondent.
- (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 ten days from service of any exceptions.

(e) Assessment. The Chair enters an order assessing costs and expenses after the expiration of the time for filing exceptions or replies.

(f) Review of Chair's Decision.

- (1) *Matters Reviewed by Court.* In matters reviewed by the Supreme Court under title 12, the Chair's decision is subject to review only by the Court.
- (2) *All Other Matters.* In all other matters, including those resolved under rule 10.6(b)(4), the following procedures apply:
 - (A) Request for Review by Board. Within 20 days of service on the respondent of the order assessing costs and expenses, either party may file a request for Board review of the order.
 - (B) Board Action. Upon the timely filing of a request, the Board reviews the order assessing costs and expenses, based on the Association's statement of costs and expenses and any exceptions or reply, the decision of the hearing officer or panel or of the Board, and any written statement submitted by either party within the time directed by the Chair. The Board may approve or modify the order assessing costs and expenses. The Board's decision is final when filed and not subject to further review.

(g) Assessment in Matters Reviewed by the Court. When a matter is reviewed by the Court as provided in title 12, any order assessing costs and expenses entered by the Chair under section (e) and the statement of costs and expenses and any excep-

tions or reply filed in the proceeding are included in the record transmitted to the Court. Upon filing of an opinion by the Court imposing a sanction or admonition, costs and expenses may be assessed in favor of the Association under the procedures of RAP Title 14, except that "costs" as used in that title means any costs and expenses allowable under this rule.