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Memorandum

Date: June 10, 2024

To: The Board on Professional Responsibility

From: Hamilton P. Fox, III, Disciplinary Counsel

Re: Administrative Order 2024-1: Disciplinary Counsel's Comments Concerning Proposed Amendments to the Board's Rules

Disciplinary Counsel appreciates the opportunity to comment on the proposed revisions to the Board Rules. In general, Disciplinary Counsel supports the proposed revisions and the Board's reasons for them. However, Disciplinary Counsel strongly opposes the proposed requirement to redact the names of clients in all filings as a matter of course unless they are the complainant in a matter or have given consent. That proposal would impose an enormous burden in a great many cases without any appreciable benefit. Disciplinary Counsel also suggests an additional revision to Board Rule 7.6(e) to correct an inaccuracy in the current rule, and several modifications to the proposed amendments to Board Rule 11.4.

Disciplinary Counsel's specific comments on and suggestions for revisions to the proposed rule modifications are described in detail below.

1. Proposed revisions to Board Rule 7.6(e):

Disciplinary Counsel supports the proposed revisions to Rule 7.6(e), which more accurately reflects the current practice when a respondent has violated practice conditions ordered by the Board.

In that same spirit, Disciplinary Counsel suggests a revision to the last sentence of Rule 7.6(e), which states that after receiving a hearing committee's report on the violation of practice conditions:

> The Board shall consider whether to order the suspension of respondent until final disposition of the disciplinary proceeding.

The current wording suggests that the Board itself can "order the suspension" of an attorney, which is incorrect. When the Board issues a report concluding that a respondent has violated practice conditions, the Court of Appeals considers it to be a petition for a disability suspension under Section 13(c) of D.C. Bar Rule XI. *See In re Harris*, 241 A.3d 243, 244 (D.C. 2020). To reflect the Court's practice, the last sentence of Rule 7.6(e) should be revised to state:

> The Board shall consider whether to ~~order~~ file a petition in the Court of Appeals under Section 13(c) of D.C. Bar Rule XI for the suspension of respondent until final disposition of the disciplinary proceeding.

The proposed revision would also clarify the posture of such cases in the Court of Appeals. Currently, respondents may incorrectly believe they must file exceptions to a Board report finding the violation of practice conditions. In practice, exceptions are not necessary because the Court provides respondents with the opportunity to respond in an order to show cause why the Board's recommendation should not be adopted.

2. Proposed revisions to Board Rule 11.4:

In recognition that remote testimony has become more common, the Board proposes several revisions to Rule 11.4 to simplify the process for providing notice that a witness will testify remotely. Disciplinary Counsel supports the goal of the proposed revisions. However, as described below, Disciplinary Counsel believes that the process could be simplified even further and that some of the proposed language would introduce ambiguity.

Subsection (a): Disciplinary Counsel supports the proposed revision to eliminate the requirement that a party separately provide notice of remote testimony at least 21 days before the hearing and replace it with a requirement to provide notice in the witness list. As the Board suggests, that change will simplify the process for remote testimony.

The proposed revision to the last sentence of subsection (a), however, does not advance that goal. It requires a party who fails to provide notice in the witness list to file a motion pursuant to subsection (b)(ii), but that requirement is ambiguous in two ways. First, subsection (b)(ii) does not contemplate such a motion. Second, under the proposed revisions, a motion under subsection (b)(ii) requires a greater showing ("good cause shown in compelling circumstances") than a motion under subsection (b)(i) ("good cause"). It appears that the two standards were intended as incentive (when a motion for remote testimony is required) to file the motion before the 14-day deadline in subsection (b)(i). But it is not clear why the more demanding standard should apply simply because a party fails to note that a witness will testify remotely in the witness list. Indeed, if the witness list is due more than 21 days before the hearing, the revision would make the process for remote testimony more onerous than the current rule.

Disciplinary Counsel does not believe a motion should be necessary at all if the party provides timely notice of the remote testimony. In addition, Disciplinary Counsel believes that when a motion is required, it should be granted on a showing of good cause. Witnesses sometimes change plans at the last minute without alerting Disciplinary Counsel or a respondent. Our experience with remote testimony in the past several years has not resulted in problems or gamesmanship that would justify maintaining the "compelling circumstances" standard, even when there is a change of plans close to the hearing date.

Accordingly, Disciplinary Counsel suggests the following revision to the proposal for subsection (a):

> A party that fails to ~~meet the twenty-one-day deadline~~ include such notice in their witness list or otherwise provide notice of the remote testimony at least 14 days before the hearing must file a motion for permission to present remote testimony, which will be granted upon a showing of good cause ~~pursuant to subsection (b)(ii)~~.

The proposed language would permit a party who neglects to provide notice of remote testimony in their witness list to do so separately within a reasonable time before the hearing. After that, the party would be required to show good cause why the testimony should be permitted.

Subsection (b): In subsection (b)(i), the Board proposes two changes to the requirements for motions to present (1) remote video testimony of a witness who can be compelled to attend in person through a subpoena, and (2) remote testimony by means other than live video. The proposed revisions extend the deadline for such motions to 14 days before the hearing and eliminate the requirement to show compelling circumstances. The compelling circumstances standard is retained in subsection (b)(ii).

As currently worded, the proposed revisions create an ambiguity about the standard to be applied to motions filed after the 14-day deadline. Subsection (b)(i) permits the Hearing Committee Chair to "otherwise approve" such a motion, in which case the "good cause" standard stated in that section would presumably apply. But subsection (b)(ii) retains the more onerous "good cause shown in compelling circumstances" standard for a motion filed after the 14-day deadline.

For the reasons described above, Disciplinary Counsel suggests that the "good cause" standard should apply to motions to present live video testimony both before and after the 14-day deadline. Recent experience has shown that preparing for remote video testimony does not typically impose a significant burden on the disciplinary system, and evaluating a party's motion to present such testimony is typically straightforward. Accordingly, Disciplinary Counsel suggests that the Board dispense with the requirement to show compelling circumstances after the 14-day deadline. This does not require any change to the proposed revision to subsection (b)(i) because that section already permits the Hearing Committee Chair to "otherwise approve" the filing of a motion within 14 days of the hearing. The Chair will therefore retain the ability to prevent parties from engaging in improper gamesmanship through last-minute motions.

At the same time, however, the widespread adoption of technologies which permit remote interaction through live video have made the prospect of presenting testimony through a means *other than* live video less compelling by comparison. Unlike video testimony, testimony without video has not become more common and the disciplinary system does not have significantly more experience with such testimony than before the pandemic. In addition, hearing testimony without video would limit the hearing committee's ability to evaluate a witness's demeanor and credibility. Disciplinary Counsel therefore proposes that the Board retain the "compelling circumstances" standard to approve such testimony, regardless of when a motion seeking such testimony is filed. In line with the comments above, Disciplinary Counsel suggests the following revisions to the Board's proposal for subsection (b):

(b) Submission of Motions

(i) A written motion requesting permission to present remote testimony ~~(1) by any means other than contemporaneous video transmission; or (2)~~ from a witness who can be compelled to testify ~~but is unable to do so for other reasons, such as disability,~~ must be filed at least ~~twenty-one~~ fourteen days prior to the first day of the hearing, unless otherwise approved ~~or ordered~~ by the Hearing Committee Chair, and will be granted for good cause ~~in compelling circumstances~~, subject to the safeguards set forth in subsection (d).

(ii) A motion requesting permission to present remote testimony by any means other than contemporaneous video transmission ~~or for permission to present video testimony less than twenty-one~~ fourteen ~~days before the hearing~~ will be granted for good cause shown in compelling circumstances.

3. Proposed revisions to Board Rule 19.8(g)

Disciplinary Counsel opposes the proposed amendment to Board Rule 19.8(g). The proposal presumes that the names of non-complainant clients are "secrets" within the meaning of Rule 1.6(b) and requires that they be redacted unless the party obtains the client's consent. Disciplinary Counsel agrees with the Board's goal of protecting client secrets, but the proposed redaction requirement would not further that goal because the premise that client names are necessarily secret is incorrect. Although client names may sometimes be considered secrets under Rule 1.6(b), there is no reason to believe that all or even most clients would regard the fact that they were represented by a particular attorney as a secret, much less to impose a default rule on that basis. To the extent such clients exist, their attorneys have exclusive knowledge of that circumstance and have the obligation to protect it under Rule 1.6. Thus, in rare cases when a respondent knows that one or more clients would regard their names as secret, it is the respondent's obligation to seek a protective order to avoid disclosing the secret. The respondent should also be responsible for redacting client names when it is necessary.

The Board's proposal appears to arise from two recent cases in which the respondents claimed that all their clients' names were secrets. But those cases demonstrate why a default reaction rule is not warranted. In one case, Disciplinary Counsel believes the claim was not made in good faith. In the other, an order requiring the redaction of client names imposed an extraordinary burden. Before those cases, respondents have rarely, if ever, made similar claims. At the same time, the proposed redaction requirement would impose a major administrative burden in many cases, particularly those involving misappropriation or commingling, where it is necessary to identify the source of funds contained in the respondent's trust or operating accounts. That showing often requires large amounts of documentary evidence containing client names.

In a recent opinion, the Court of Appeals held that "[t]he identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege." *In re Doman*, No. 22-BG-0578 (May 16, 2024). A client's name thus does not amount to confidential information which is forbidden from disclosure under Rule 1.6(b). In some circumstances, the client's identity could qualify as a "secret" under Rule 1.6(b) because that term is broadly defined

to include "information gained in the professional relationship that the client has requested be held inviolate." For example, a spouse might wish to keep secret the fact that he or she is consulting a divorce lawyer. But there is no reason to believe that is the usual case. We are aware of no empirical data to support a claim that most clients request their lawyers to keep their identities confidential, and it seems nonintuitive to assume that they do. Many law firms list the names of their clients or the names of matters that identify their clients on their websites and matters that wind up in litigation typically identify the lawyer and client in public filings.

Even in the rare case that a client's name qualifies as a secret, "secrets" are not entitled to the same protection as privileged information. For confidences and privileged information, an attorney is forbidden from voluntarily disclosures and must resist compulsory process. For secrets, however, the lawyer's only obligation is to refuse voluntarily disclosure; the client's desire to keep such information kept secret is not a ground to resist compulsory process. Thus, if a grand jury subpoenas privileged information, a lawyer must assert the privilege and may not disclose that information. But if the grand jury subpoenas non-privileged information that the client has requested be held inviolate or that would be embarrassing or detrimental to the client, the lawyer must comply.

The recent cases in which respondents sought to redact client names do not support the proposed rule change. In one case, the respondents claimed the names of their firm's clients were secrets. We do not believe this claim was made in good faith. The respondents in that case were trying to justify extreme restrictions that they imposed on their departing lawyer-employees as necessary in order to preserve secrets of the firm—not the clients. These restrictions included classifying as firm secrets contact information about clients, thereby preventing departing lawyers from taking that information when they departed. In that context, they claimed that the names of their clients themselves were secrets. But no evidence was offered that the clients regarded their identities as secrets or requested that the firm not disclose that it was representing them, and it would appear unlikely that they did since most of them were parties to public litigation. When the hearing committee report was issued, it referred to virtually no information that required redaction because the respondents' claims about the secrecy of client contact information were not relevant to the issues in the case.

In a second case, the respondent made a vague claim that pleadings and evidence contained client confidences and secrets. The Board accepted this claim at face value and required Disciplinary Counsel to comb through thousands of pages of documentary evidence to redact client names. Even this was deemed insufficient, requiring this office to guess whatever other information might be considered a secret, something for which we were not in a position to do. As a result, nearly the entire hearing was conducted under seal. Not only did this result in a proceeding that violated the basic rule that disciplinary hearings are public, but it did a disservice to the clients. The respondent mishandled the funds of many clients, but by hiding the names of those clients, none could become aware of that fact or take appropriate action.

Before those cases, we are unaware of any case in which the purported secrecy of client names was an issue, though the names of non-complainant clients have regularly been made part of the record in a great many cases without redactions. That happens most frequently in cases involving commingling or misappropriation. When a respondent has failed to keep adequate financial records—as frequently occurs—Disciplinary Counsel must introduce hundreds or

thousands of documents to establish which clients have funds being held in trust and the amount of those funds in comparison to the trust account balance. These documents include retainer agreements, invoices to clients, settlement sheets, and bank records. In many instances, it is impossible to determine from the face of a document whether a named individual (such as the payor or payee on a check) is a client. Some respondents also respond to subpoenas with "document dumps" leading to exhibits that are thousands of pages long. In those cases, the proposed rule would require an extraordinary and unworkable burden with no apparent benefit. Other than the case discussed above, we are aware of no other "money" cases in which a respondent claimed that clients' identities or financial records constitute client secrets. And we are not aware of any case whatsoever in which a client believed a secret was revealed or that they were harmed because their name was included in the record of a disciplinary case.

Disciplinary Counsel agrees that the disciplinary system exists to protect clients and that client secrets should be preserved to the extent possible. But Rule 1.6 places the onus on lawyers to identify their client's secrets and protect them. The attorney who is part of the attorney-client relationship is uniquely in the position to know what information a client regards as secret. Neither Disciplinary Counsel nor the Board's Rules can determine that innocuous information like a client's name is categorically a client secret in all cases. Accordingly, in the rare instances when a client's name is in fact a secret under Rule 1.6(b), it should be the respondent's responsibility to come forward with that information and seek a protective order. That is how Rule 1.6(b) works in other contexts; there is no reason for a different rule in disciplinary proceedings. Moreover, the bare assertion that all client names are secret should not suffice to overcome the presumption that disciplinary proceedings are matters of public record. A respondent should be required to make a plausible showing. There is little risk that any purportedly secret information would be disclosed before a hearing because exhibits are no longer made public pre-hearing. Requiring respondents to seek a protective order permits the hearing committee and the Board to make a considered determination as to whether the material is truly a protected secret and fashion a protective order to afford appropriate protection. Moreover, in most instances, the respondent should be responsible for making the redactions; Disciplinary Counsel should not be required to guess what matters the respondent's clients might regard as secret.