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Board on Professional Responsibility
Via email only
PhalenJ@dcbpr.org and DCBoard@dcbpr.org

REP Proposed Board Amendments
Administrative Order 2024-1

Dear Jim:

I received your office's email blast regarding AO 2024-1. I offer the following comments based on my long association with all sides of the DC Bar's disciplinary system.[1]

Disclosure of Interests.

I have been serving as Vice Chair of the DC Bar's Legal Ethics Committee since July 2023. This letter is written in my personal capacity and the comments within do not reflect the position of the LEC.

I was intending to offer comments on Board Rule 19.6, but I will refrain from doing so because the firm associated with my clients on BDN 22-BD-25 intends to file directly.

My comments on Board Rule 17 relate to issues of import to innumerable clients (past, present, and future) who face a *Catch-22* choice at the conclusion of an investigation: whether to negotiate a disposition or face contested disciplinary charges. I raised similar concerns in response to AO 2018-2.

[1] The primary focus of my practice is bar complaint defense. I was one of the defense lawyers interviewed in February of this year by the ABA's study panel on the DC Bar disciplinary system. I was a Hearing Committee Chair back when the Board Office consisted of the Executive Attorney, one secretary, and one part-time law clerk. During my time on the Hearing Committees, I was the principal author of HC reports for cases whose appellate decisions are still being cited today, including *In re Anderson*, 778 A.2d 330 (D.C. 2001), *In re Slattery*, 767 A.2d 203 (D.C. 2001), and *In re Hager*, 812 A.2d 904 (D.C. 2002). In the years following my HC service I have received appointments as a Special Bar Counsel and appointments to liquidate the practices of deceased or incapacitated lawyers.

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Negotiated Discipline Amendment – Board Rule 17.7

I have no objection to the proposed change to Board Rule 17.7. But I am disappointed that you are not concurrently proposing any changes to Board Rules 2.19 and 17.4(d), pursuant to which it has been the Board's policy to publish Negotiated Petitions to the Bar's website long before anyone knows if a Hearing Committee or the Court will ultimately accept the NP. Once published to the Bar's website, these NPs get republished by third parties and then take on an internet-based life of their own.

Lawyers contemplating entry into an NP do so for the same reasons why civil litigants settle cases and why prosecutors and defendants plead out criminal cases: to bring certainty of outcome and to preserve resources. The ability to negotiate confidentially is frequently a key element to reaching any binding resolution of a civil, criminal, or bar matter. The Board's Rules and practices for handling NPs are impeding the use of NPs as a tool that could otherwise help reduce the need of all participants to devote resources to contested cases.

My defense bar colleagues and I witness the mental gymnastics that our respondent clients experience when faced with the choice between accepting an NP or inducing ODC to file a contested case. Some respondent clients *take the plea* because the sanction being offered is reasonable and there is little or no perceived downside risk associated with the Hearing Committee or Court rejecting a particular NP. Some respondent clients *take the plea* only because they do not have the resources to defend a contested case, notwithstanding concerns about the public nature of the NP or the risk that a particular NP may be rejected. Some respondent clients, who lack the resources to defend a contested case, unilaterally consent to disbarment, per Bar Rule XI § 12(c) and its sealed records requirement, rather than enter public NPs for suspensions, because my colleagues and I cannot guarantee that the NP once published to the Bar's website will ultimately be accepted. Some respondent clients decline to enter negotiations once learning that any resulting NP will be public upon execution and we cannot guarantee that the Court will accept it. All respondent clients regret entering into an NP that gets rejected by a Hearing Committee or the Court.

I appreciate that the Board's ability to manage public access to NP cases is subject to the commands of Bar Rule XI § 12.1(c). That section dictates that the Limited Hearing be open to the public, the outcome of that hearing be a matter of public record, and a copy of the NP and supporting affidavit must be furnished to the complainant prior to the Limited Hearing. But that's all that 12.1(c) requires. . . .

> Nothing in 12.1(c) requires broadcasting of the Limited Hearing over YouTube, where anyone with modest computer skills and free software can record the proceeding and then republish the video in full or in edited formats. The 12.1(c) public hearing requirement could instead be met today the way it was met in the

past: by allowing the public to attend in person in the court room. For Limited Hearings held entirely via Zoom, the public can watch the proceedings over a television in the court room (where the audience would have no ability to copy the livestream).

Nothing in 12.1(c) requires furnishing the complainant with an electronic copy (rather than a paper copy) of the NP or supporting affidavit. Delivery of an electronic copy needlessly facilitates a complainant's ability to republish same with no effort required before uploading the NP to a social media website or when widely redistributing the NP via email.

Nothing in 12.1(c) requires publishing the NP or supporting affidavit on the Bar's website. Indeed, nothing in 12.1(c) requires making the NP or supporting affidavit available for public inspection at the Board Office. A contrary conclusion might be argued under the "All proceedings" clause of Bar Rule XI § 17(a). But the first sentence of 17(a) requires continued confidentiality until an informal admonition or a Section 8(c) petition has been filed. The NP is neither of those things. As such, I would suggest that the only public disclosures required about NPs are governed exclusively by Section 12.1(c).

It has been our experience that republishers of NPs (as well as HC Reports and Board Reports) typically include (i) some lawyers who are seeking to gain a competitive advantage over a respondent; and (ii) some clients who wish to harm a respondent's reputation beyond what would normally result from the Court's imposition of final sanction. Unless the republisher mis-states the content of an NP, a respondent may have no meaningful recourse. As to the Board's YouTube channel, yes, the livestream is stamped with a *recording prohibited* notice. But what's the recourse against someone who is not a DC Bar member? What's the recourse against an anonymous video republisher?

All of this reputational risk to respondents can be inflicted prior to the Limited Hearing, on an NP that might never reach the Court for imposition of sanction.[2] The Board should take a page from Board Rule 6.2, which precludes informing complainants of the terms of a Diversion Agreement as a means of protecting respondents from republication of information that Bar Rule XI does not require to be posted to the Bar's website, made

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[2] It should come as no surprise that I am not a fan of the Board's publication of Specifications and Answers to the Bar's website. But those publications pose less reputational risk to respondents than posting of NPs. A Specification is just a set of allegations; the Answer is an opportunity to aver that some or all of the Specification is unfounded; and neither pleading is typically claiming that a particular sanction is justified. By contrast, the NP once posted contains public admissions of fault and a concession that a particular sanction is warranted – and those admissions and concessions will never entirely disappear from the internet.

available for public inspection, or livestreamed over YouTube. I am hoping the ABA study panel will come back with recommendations for the Court to modify Bar Rule XI with further limits on premature public access to NP cases. But, pending action by the Court, I encourage the Board to act on its own to modify Board Rules 2.19 and 17.4 in line with these comments.

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Thank you for this opportunity to comment on AO 2204-1.

Respectfully submitted,

/s/ Daniel Schumack
Daniel Schumack