

WSR 21-23-023
RULES OF COURT
STATE SUPREME COURT
[November 5, 2021]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO) NO. 25700-A-1384
RULES FOR ENFORCEMENT OF)
LAWYER CONDUCT (ELC) 3.4, 4.1,)
4.3, 5.1, 5.3, 5.7, 7.2, 14.3, AND 15.1)

The Washington State Bar Association, having recommended the suggested amendments to Rules for Enforcement of Lawyer Conduct (ELC) 3.4, 4.1, 4.3, 5.1, 5.3, 5.7, 7.2, 14.3, and 15.1, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2022.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2022. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 5th day of November, 2021.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET
Suggested Amendments to

RULES FOR ENFORCEMENT OF LAWYER CONDUCT (ELC)
ELC 3.4, 4.1, 4.3, 5.1, 5.3, 5.7, 7.2, 14.3, 15.1

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C. Purpose

These amendments to the Rules for Enforcement of Lawyer Conduct (ELC) are suggested to implement and institutionalize COVID-related electronic service and communication protocols to create efficiencies in the discipline and disability system and support electronic processes. A second, unrelated amendment will clarify ODC obligations when dealing with certain confidential information from grievants.

These suggested amendments do not replace or supersede the recently proposed disciplinary procedural rules for Washington State's discipline and incapacity system, the Rules for Discipline and Incapacity (RDI), now pending before the Court. See *In re Suggested New Rule Classification: Rules for Discipline and Incapacity (RDI)*, Amended Order No. 25700-A-1328 (Dec. 11, 2020). Rather, the amendments are intended for expeditious adoption to facilitate efficient communication processes under the current rules, the ELC.

D. History

In response to the COVID-19 public health crisis, on March 24, 2020, the Court entered Order No. 25700-B-609, authorizing among other things "the Chief Hearing Officer and the Disciplinary Board Chair to issue sua sponte emergency administrative orders relating to discipline and disability matters." Specifically, the Court granted the Chief Hearing Officer and Disciplinary Board Chair authority to modify the manner of "filing, service, and delivery of other papers by the clerk ..., and transmission of other documents, papers, and communications authorized or required under the ELC."

Consistent with the Court's Order, on March 24, 2020, the Chief Hearing Officer and Disciplinary Board Chair entered a joint Administrative Order in Response to Public Health Emergency in the State of Washington (Administrative Order). Among other activities, the Administrative Order permitted and promoted the following actions for participants in the discipline and disability system until such time as the order was amended or rescinded:

1. Electronic service of papers under Title 4 of the ELC unless personal service is required.
2. Electronic transmittal of all documents, papers, and communications authorized under the ELC.

The purpose of the Administrative Order was to facilitate timely, safe communications and to allow for remote work during the COVID-19 health crisis. The Administrative Order was subsequently revised and extended twice on April 21, 2020, and May 6, 2020, and remains in effect today.

Since March 24, 2020, the discipline and incapacity systems have operated under these two orders. Once both the Court Order and Administrative Order are lifted, certain ELC as drafted would prohibit electronic service and communications. These ELC amendments are intended to institutionalize on an ongoing basis the use of electronic means of service and communication. This will bring the rules more in line with modern day practice and communication methods and the reality that the meaning of "business as usual" has changed under COVID. Greater flexibility in where and how work is done and how services are accessed is now necessary and appropriate.

Generally, these suggested amendments (1) allow for electronic service unless personal service is required and for electronic transmittal of documents, (2) delete references to "mail" or "mailing" where appropriate, and (3) replace certain terms with the term "transmit" or "transmittal" to provide more flexibility in how papers and documents are sent under the ELC.

Additionally, an unrelated revision to ELC 3.4(b) is suggested in order to clarify ODC obligations when dealing with certain confidential information from grievants.

E. Suggested Amendments

The following are summaries and explanations of each suggested amendment:

- **ELC 3.4 (b)**. This suggested amendment is the only suggested amendment unrelated to permitting electronic service and communications. The suggested amendment to ELC 3.4(b) includes two changes: (1) the addition of a clause clarifying that "otherwise confidential information" includes relevant information from related grievances filed by a single grievant; and (2) an amendment to allow disclosure of otherwise confidential information as necessary to conduct a review, in addition to an investigation. Both changes are technical in nature and conform to current practice.

It is sometimes the case that a grievant files separate but related grievances against multiple respondent lawyers or files a single grievance naming multiple respondent lawyers, which may result in the opening of separate grievance files. In these situations and analogous circumstances, disclosing relevant information from related grievances, such as the identities of related respondent lawyers or pertinent allegations, may be necessary to conduct a proper review or investigation of the matters. Additionally, disclosing such information may provide a respondent lawyer with a more complete factual picture of the grievance and allow joint respondents to assess the potential for joint representation. While the existing ELC may arguably be interpreted to preclude such disclosures, it is already within disciplinary counsel's discretion to make such disclosures under existing ELC 3.4(b). The suggested changes merely serve as a clarification and are consistent with ODC's current and longstanding practice of providing such information to respondents (which the grievant will have consented to under ELC 5.1(b)).

- **ELC 4.1 (a) (1)**. ELC 4.1 (a) (1), regarding service, has been simplified to provide that whenever service is required under the ELC, it must be accomplished in accordance with the procedures specified in ELC 4.1 or as agreed to by the parties. This revision would provide more flexibility to parties in determining the best method of service and to agree in advance to a preferred method. This is a corollary to new suggested ELC 4.1 (b) (4), which would provide for electronic service as a new means of service available under the ELC.
- **ELC 4.1 (a) (2)**, ELC 4.1 (a) (2), regarding transmission of materials, clarifies that documents that are not required to be served may be transmitted by postage prepaid mail, electronic means including email, or personally delivered.
- **ELC 4.1 (b)**. ELC 4.1(b), regarding methods of service, includes several suggested amendments, the most significant of which is the addition in section (b) (4) of a new provision providing for electronic service and detailing its procedural requirements. Currently electronic service is not permitted under the ELC, although in practice parties often agree to electronic service. The amendment would allow parties to elect to use electronic service in all circumstances unless the ELC require personal service. The other two revisions seek to avoid ambiguity (suggested ELC 4.1 (b) (1) (A)) and to clarify how proof of service may be made depending on the chosen method of service (suggested ELC 4.1(c)).

- **ELC 4.1(d)**. ELC 4.1(d), regarding proof of service, simplifies the prior rule and clarifies that if service is made electronically, that proof of service can be made by certificate of service.
- **ELC 4.3**. The suggested amendments to ELC 4.3, regarding the form of papers, reflect the move toward accepting papers and documents in electronic form. The language was drawn in part from GR 14(a), which requires that papers be "legibly written or printed." The suggested revision is more concise and reflective of current practice as to the form of papers that are accepted by ODC and the Clerk to the Disciplinary Board.
- **ELC 5.1 (c) (3) (B)**. Suggested amendments to ELC 5.1 (c) (3) (B), regarding challenges to disclosure decisions, was revised to clarify that a disciplinary counsel decision regarding a request to withhold a portion of a grievance or response may be sent by methods other than mailing. Currently, the rule requires that a grievant or respondent challenge a withholding decision within 20 days of mailing of the decision by disciplinary counsel. The rule has been revised to omit the word "mailing" and replace it with "transmittal" to provide flexibility in the means of sending such a decision to a grievant or respondent, which may include transmittal by electronic means. Another amendment to the rule clarifies that parties do not "file" but instead "transmit" challenges to disciplinary counsel since filing has a specific meaning in the context of proceedings under ELC Title 4.
- **ELC 5.1 (e) (4)**. The suggested amendment to ELC 5.1 (e) (4), regarding vexatious grievants, removes as unnecessary reference to service by first class mail as a possible method of service a respondent may use when serving a motion to declare an individual a vexatious grievant, since these suggested amendments allow for alternate methods of service. See suggested amendments to ELC 4.1.
- **ELC 5.3(d)**. ELC 5.3(d), regarding deferral decisions by disciplinary counsel, clarifies that a grievant or respondent may request review of a deferral decision either by depositing the request for review in the mail or by transmitting a written request to disciplinary counsel. The option for mailing remains in the rule to provide clear guidance on when the period to request review expires if one chooses to mail the request. Language allowing the individual to transmit the request is intended to provide flexibility in the means of requesting review, consistent with the other suggested amendments. See ELC 5.7(b) for similar revisions.
- **ELC 5.3(i)**. ELC 5.3(i), regarding objections to investigative inquiries, was revised to replace the term "service" with "transmittal." The suggested amendment clarifies existing practice that disciplinary counsel does not "serve" investigative inquiries on lawyers as provided in ELC 4.1, "serve" being a term of art, but instead simply transmits the inquiries to lawyers via means that may include electronic means.
- **ELC 5.7(b)**. ELC 5.7(b), regarding request for review of dismissal decisions, clarifies that a grievant may request review of a dismissal decision either by depositing the request for review in the mail or by transmitting a written request to disciplinary counsel. The option for mailing remains in the rule to provide clear guidance on when the period to request review expires if one chooses to mail the request. Language allowing the individual to transmit the request is intended to provide flexibility in the

means of requesting review, which may include by electronic means. See ELC 5.3(d) for similar revisions.

- **ELC 7.2 (b) (1)**. ELC 7.2 (b) (1), regarding petitions for interim suspension, is amended to explicitly provide for electronic service on the day of filing. The rule currently limits service on the day of filing to mail service. It was important to clarify the means by which disciplinary can serve the petition on the day of filing in order to make this suggested amendment consistent with the other suggested amendments. Personal service of the petition no later than the date of the show cause order will still be required.
- **ELC 14.3**. ELC 14.3, regarding affidavits of compliance with Title 14, is amended to require respondents to provide an email address in addition to a mailing address where communications can be directed. Requiring both an email address and mailing address is consistent with APR 13, which requires lawyers to provide both mailing and email addresses of record to the Bar Association. It further provides additional means of reaching respondents who may move or relocate after suspension or disbarment.
- **ELC 15.1 (e) (2)**. ELC 15.1 (e) (2), regarding review committee action in random examinations, is revised to clarify that a lawyer's request for review of a selection for random examination should be requested within 30 days of transmittal of the selection notice. Currently, the rule requires that a lawyer or law firm challenge a notice of selection within 30 days of mailing of the notice to the law firm. The rule has been revised to omit the word "mailing" and replace it with "transmittal" to provide flexibility in the means of sending such a notice to a lawyer or law firm, which may include by electronic means.

F. Hearing:

A hearing is not requested.

G. Expedited Consideration:

Expedited consideration is requested to ensure electronic service and communications may continue after the Supreme Court Order and Administrative Order are lifted and prior to implementation of the RDI should the Court adopt the proposed RDI.

Reviser's note: The typographical errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

SUGGESTED AMENDMENTS TO THE RULES FOR ENFORCEMENT OF LAWYER CONDUCT

Redline Version

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

(a) [Unchanged].

(b) **Investigative Disclosure.** The Association may disclose otherwise confidential information, including relevant information from related grievances filed by the same grievant, as necessary to conduct the a review or investigation, recruit counsel, or to keep a grievant advised of the status of a matter except as prohibited by rule 5.4(b) or 5.1 (c) (3), a protective order under rule 3.2(e), other court order, or other applicable law.

(c) - (n) [Unchanged].

ELC 4.1 SERVICE OF PAPERS

(a) **Service Required; Transmittal of Other Documents.**

(1) Whenever these Rules require service of papers or documents, service must be accomplished as provided in this Rule, or as otherwise agreed to in writing by the parties. Every pleading, every paper re-

lating to discovery, every written request or motion other than one which may be heard *ex parte*, and every similar paper or document issued by disciplinary counsel or the respondent lawyer under these rules must be served on the opposing party. If a hearing is pending and a hearing officer has been assigned, except for discovery, the party also must serve a copy on the hearing officer.

(2) Every written request or other paper or document issued under these Rules, which these Rules do not require to be served, may be transmitted by postage prepaid mail, electronic means including email, or personally delivered.

(b) Methods of Service.

(1) *Service by Mail.*

(A) Unless personal service is required ~~or these rules specifically provide otherwise~~, service may be accomplished by postage prepaid mail. If properly made, service by mail is deemed accomplished on the date of mailing and is effective regardless of whether the person to whom it is addressed actually receives it.

(B) - (C) [Unchanged].

(2) - (3) [Unchanged].

(4) *Electronic Service.*

(A) Unless personal service is required, service may also be accomplished by electronic service of all papers or documents. 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 provided in writing 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 writing by respondent or respondent's counsel.

(C) The email address specified in section (b)(4)(B) of this Rule must be sufficient to receive electronic transmission of information and electronic documents.

(c) [Unchanged].

(d) Proof of Service.

(1) If service is accomplished electronically, by mail, or by other means authorized by this Rule, 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. If personal service is required, proof of service may be made by affidavit of service, sheriff's return of service, or a signed acknowledgment of service. In other cases, proof of service may also be made by certificate of a lawyer similar to that allowed by CR 5

(b)(2)(B), which certificate must state the form of mail used. Proof of service in all cases must be filed but need not be served on the opposing party.

ELC 4.3 PAPERS

All pleadings or other papers must be legibly type written or printed, ~~double spaced,~~ on good quality 8 1/2 by 11-inch paper or the electronic equivalent. The use of letter-size copies of exhibits is encouraged if it does not impair legibility.

ELC 5.1 GRIEVANTS

(a) - (b) [Unchanged].

(c) **Grievant Rights.** A grievant has the following rights:

(1) - (2) [Unchanged].

(3) to receive a copy of any response submitted by the respondent, subject to the following:

(A) [Unchanged].

(B) Challenge to Disclosure Decision. Either the grievant or the respondent may ~~file~~ transmit a written challenge to disciplinary counsel's decision to withhold or not withhold all or a portion of a grievance or response within 20 days of the date of ~~mailing~~ transmittal of the decision by disciplinary counsel. The challenge shall be resolved by a review committee, unless the matter has previously been dismissed under rule 5.7(d) or the time period for submitting a request for review of a dismissal has expired under rule 5.7(b).

(4) - (8) [Unchanged].

(d) **Duties.** [Unchanged].

(e) **Vexatious grievants.**

(1) - (3) [Unchanged].

(4) The moving party must serve a copy of the motion on the grievant. If the motion is filed by a respondent lawyer, the motion must also be served on disciplinary counsel. ~~Service may be made by first class mail.~~

(5) - (8) [Unchanged].

ELC 5.3 INVESTIGATION OF GRIEVANCE

(a) - (c) [Unchanged].

(d) **Deferral by Disciplinary Counsel.**

(1) [Unchanged].

(2) Disciplinary counsel must inform the grievant and respondent of a decision to defer or a denial of a request to defer and of the procedure for requesting review. A grievant or respondent may request review of a decision on deferral. If review is requested, disciplinary counsel refers the matter to a review committee for reconsideration of the decision on deferral. To request review, the grievant or respondent must ~~deliver or~~ deposit in the mail or transmit a written request for review to disciplinary counsel no later than 45 days after disciplinary counsel ~~mails~~ transmits the notice regarding deferral. If the request for review is deposited in the mail, it must be postage pre-paid.

(e) - (h) [Unchanged].

(i) **Objections.** Within 30 days of ~~service~~ transmittal of an investigative inquiry under section (g) of this rule, a lawyer may serve a written objection on disciplinary counsel. An objection is reviewed by motion as provided in rule 5.6.

ELC 5.7 DISPOSITION OF GRIEVANCE

(a) [Unchanged].

(b) **Review of Dismissal.** A grievant may request review of dismissal of the grievance by ~~delivering or~~ depositing in the mail or transmitting a written request for review to disciplinary counsel no later than 45 days after disciplinary counsel ~~mails~~ transmits the no-

tice of dismissal. If the request for review is deposited in the mail, it Mailing requires must be postage prepaid first class mail. If review is requested, disciplinary counsel may either reopen the matter for investigation or refer it to a review committee. If no timely request for review is made, the dismissal is final and may not be reviewed. Disputes regarding timeliness may be submitted to a review committee. A grievant may withdraw in writing a request for review, but thereafter the request may not be revived.

(c) - (f) [Unchanged].

ELC 7.2 INTERIM SUSPENSION IN OTHER CIRCUMSTANCES

(a) [Unchanged].

(b) Procedure.

(1) *Petition.* A petition to the Court under this rule must set forth the acts of the lawyer constituting grounds for suspension, and if filed under subsection (a)(2) must include a copy of the Board's decision. The petition may be supported by documents or affidavits. The Association must serve the petition by mail or electronic service as provided in ELC 4.1 on the day of filing. In addition, a copy of the petition must be personally served on the lawyer no later than the date of service of the show cause order.

(2) - (6) [Unchanged].

ELC 14.3 AFFIDAVIT OF COMPLIANCE

Within 25 days of the effective date of a lawyer's disbarment, suspension, or transfer to disability inactive status, the lawyer must serve on disciplinary counsel an affidavit stating that the lawyer has fully complied with the provisions of this title. The affidavit must also provide a mailing address and email address where communications to the lawyer may thereafter be directed. The lawyer must attach to the affidavit copies of the form letters of notification sent to the lawyer's clients and opposing counsel or parties and copies of letters to any court, together with a list of names and addresses of all clients and opposing counsel or parties to whom notices were sent. The affidavit is a confidential document except the lawyer's mailing address and email address are ~~is~~ treated as a changes of ~~mailing~~ address under APR 13 (b) and (c).

ELC 15.1 RANDOM EXAMINATION OF BOOKS AND RECORDS

(a) - (d) [Unchanged].

(e) Review Committee Action. In reviewing matters under this rule, a review committee has the following authority:

(1) [Unchanged].

(2) A review committee may review a challenge to the selection of a lawyer or law firm in section (b) of this rule if review is requested by a lawyer or law firm within 30 days of mailing transmittal of the notice of selection.

(3) [Unchanged].