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June 10, 2024

DC Board on Professional Responsibility
430 E Street, NW, Suite 138
Washington, DC, 20001

RE: Administrative Order 2024-1 – Public Feedback Requested on Proposed Amendments to the Rules of the Board.

Dear Board:

In accordance with the Administrative Order 2024-1, issued by the District of Columbia Bar Association (hereinafter "DC Bar"), Board on Professional Responsibility (hereinafter "the Board") issued May 20, 2024, I hereby submit the following comments for consideration by the Board. While I am not a member of the DC Bar, I recently represented this firm's interests in connection with confidentiality issues within your jurisdiction's disciplinary prosecution against Messrs. Tully and Rinckey, DDNs 2017-D030, 2016-D371, and 2018-D052 and I would hope my observations and opinions would be helpful to you as you consider these proposed rule changes.

I. *Background and Comparative Analysis*

Board Rule 19.6's breadth appears to be uncommon in other jurisdictions[1] and does not appear to be derived from the ABA Model Rules for Lawyer Disciplinary Enforcement.[2] Many other jurisdictions treat the service of attorneys in the disciplinary system as being controlled by their Rule 1.12 of the Rules of Professional Conduct (hereinafter "RPC")[3]. Additionally, professional staff service such as that of the Disciplinary Counsel or Executive Attorney in other jurisdictions are subject to RPC 1.13 compliance, and the applicable collateral Rules 1.6-1.10 of the Rules of Professional Conduct.

[1] For comparison of a similar rule that is very narrow from a neighboring jurisdiction See VSB Rule 13-13 online at: https://www.vsb.org/Site/about/rules-regulations/part6-sec4.aspx

[2] *See generally* ABA Model Rules for Lawyer Disciplinary Enforcement online at: https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/

[3] Model Rule 1.12 was not adopted word for word in the District as "other adjudicative officer" was expressly deleted by the Court when it was adopted. By deleting this reference that would have clearly covered members of the Board and their Hearing Committee members it could be argued that the Court expressly wanted to forbid any restriction on the volunteers in the disciplinary system from obtaining or seeking employment after their volunteer duty was complete. For a comparative state by state analysis of Model Rule 1.12 visit: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-12.pdf.

As it currently stands, it seems that RPC 1.6 and the inherent preservation of a client's secrets delineated by said rule, is sufficient to keep the inner workings of the disciplinary system confidential without imposing a restriction on a person's ability to practice law after their service in the disciplinary system. In the alternative, the Board could require a confidentiality agreement for its lawyers and non-lawyer volunteers, as well as professional staff, that would limit an individual's ability to disclose any confidential or proprietary information after separation, which would be less severe than imposing a restriction on their ability to earn a living in their chosen profession if the rationale for this Rule is to preserve confidences and secrets learned while serving within the disciplinary system.

It would be helpful if the Board explained its rationale, authority, and need for Rule 19.6 given that the Court expressly deleted the applicability of Model Rule 1.12[4] to its attorney disciplinary proceedings. The Board should also consider publishing not only what other attorney disciplinary entities have enacted a similar Rule to the Districts, but also information to determine whether the rule was self-imposed, like in the District of Columbia; imposed by the Court in the equivalent of a Rule XI; or, part of a general statewide revolving door rule applicable to all attorneys employed by the State (*i.e.*, similar to how all federal attorneys are subject to a revolving door ban under 18 U.S.C §207).

The apparent purposeful omission of "other adjudicative officer" in RPC 1.12 creates an unlawful restriction on the practice of law for members of the attorney disciplinary system. The Court could have included the Attorney Disciplinary System when dealing with employment restrictions in RPC 1.12 by leaving in the model rule wording of "other adjudicative officer," but it deliberately and intentionally became one of only two jurisdictions[5] in the United States who expressly excluded the attorney disciplinary system from such employment prohibitions. It would seem Board Rule 19.6 is inconsistent with other Rules of the Court (specifically the RPC under the 'omitted case canon' theory of statutory/regulatory construction).

Furthermore, the Court could have included prohibitions on employment in the Attorney Disciplinary System similar to Board Rule 19.6 by placing those restrictions in Rule XI like it expressly did at Section 6(b) and Section 7(c) but the Court did not place employment restrictions on anybody but those two people/positions. The 'negative implication canon' supports the proposition that the Court knew how to place employment prohibitions on certain positions within the Attorney Disciplinary System and purposefully chose not to place those restrictions on certain other positions (such as those covered by Board Rule 19.6). The Board should be on notice that not once but at least twice the Court could have done but deliberately did not do what the Board is

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[4] It should be undisputed that members of the Board on Professional Responsibility as appointees of the Court are 'para judicial officers.' By deleting the term "adjudicative officer" which the Model Rules in Model Comment #1 defines as "such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges." The Court allowed adjudicative officers to be able to be retained by members of the Public to provide them legal assistance. The model comments can be found online here: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_12_former_judge_arbitrator_mediator_or_other_third_party_neutral/comment_on_rule_1_12/#:~:text=The%20term%20%22adjudicative%20officer%22%20includes%20such%20officials%20as,and%20also%20lawyers%20who%20serve%20as%20part-time%20judges.

[5] Texas did not adopt the Model Rule, the District deleted "other adjudicative officer," and while New York State doesn't use the terms "other adjudicative officer" it uses an analogous phrase of "the lawyer has acted in a judicial capacity" in its rule.

now trying to do under this proposed Rule. In addition to the deliberate and intentional deletion of employment restrictions on members of the attorney disciplinary system and the express inclusion of an outright ban on post-employment restrictions in RPC 5.6(a), recent changes to the District's Code ban "non-compete agreements."[6] While the 2020 and 2022 changes to the DC Code are not applicable to the Court system,[7] this local law should be telling that those who work in Ivory Towers should be the ones who lead by example especially when they are tasked with enforcing the rules on others, yet they appear to be 'above those rules' themselves.[8]

II. *Concerns About the "Revolving Door Ban"*

To consider Rule 19.6 as a "revolving door ban" that fosters the Public's trust that decisions are being made without regard to employment opportunities is an egregious misrepresentation of what is and is not banned by this rule. Generally, a "revolving door ban" is meant to prevent the appearance of an official personally profiting from their official duty. The proposed amendment to Rule 19.6 is not sufficient to ensure that no issues of impropriety are taking place.

Recently, the applicability of Board Rule 19.6 came directly into play in a real case scenario. My understanding is a Hearing Committee Chair rendered a decision in favor of the Office of Disciplinary Counsel (hereinafter "ODC") and in such a way that the Respondents were unable to appeal it in an efficient manner for the Board to review that decision. I believe the cascading impacts of this decision prevented the Respondents in the action from raising issues regarding whether their involvement in the post arrest litigation of the District's Disciplinary Counsel was the reason why he was engaged in his highly unusual and/or unprecedented litigation against these Respondents, why he was using inflammatory language, why a diversion agreement was being denied by ODC despite the facts of the case meeting the criteria for such under Rule XI and whether the denial of such a diversion agreement amounted to an abuse of discretion, and whether Disciplinary Counsel was engaged in a retaliatory action for his arrest related litigation that involved the Respondents when he brought the Disciplinary action instead of agreeing to a diversion as the offensive conduct was long ago ended with no client prejudiced.

Shortly after the decision was rendered in favor of ODC by this Hearing Committee Chair, the Hearing Committee Chair became a Senior Assistant Disciplinary Counsel with ODC. Certainly, an inference can be made that there might be a potential violation of RPC 1.12(b) or 1.12(c)(2) if the wording from the Model Rules were applicable and if ODC was treated like a

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[6] https://code.dccouncil.gov/us/dc/council/code/titles/32/chapters/5B

[7] While the Ban on Non-Compete Provisions in workplace policy's may not be applicable to the District's Judicial System just like the Judicial System is exempt from the District's Human Rights Law, whether the Board and its employees are or are not covered by these laws is a question of law that I am unable to opine on at this time. If the Board as an Employer is required to comply with DC Law because it is not an instrumentality of District Government or otherwise exempt from DC laws applicable to law firms and other employers within the District, it would seem that Board Rule 19.6 may not just be a spiritual violation but an actual letter of the law violation of the District's non-compete provision ban law but as I am not a DC licensed attorney I provide no opinion on such.

[8] In addition to the local law banning non-compete provisions like Board Rule 19.6 the Federal Trade Commission has also implemented a non-compete ban but I take no position nor have any opinion on whether that agency has any authority over your private association of learned professionals. See Generally: https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes

law firm instead of a government agency.[9] Based on the aforementioned, it seems that Rule 19.6 gives ODC an unfair advantage as Board Rule 19.6 does not prevent ODC from hiring Hearing Committee Chairs who provide them favorable rulings whereas those same Board volunteers are precluded from serving the general public or being hired by Respondents who they provide favorable rulings too.

Any ban on employment should apply to all parties with litigation pending before this Tribunal. As it stands now, perceived 'ODC friendly' Board Members can turn their history of favorable rulings into lucrative post Board employment with ODC. Such a scenario is not unthinkable or outrageous given the Curriculum Vitae of the current Disciplinary Counsel. While I would hope no such impropriety exists, the mere appearance of such should not be tolerated. An amendment to Board Rule 19.6 as the one being proposed by the Board is not sufficient to protect the public's interest to fairness and transparency in disciplinary matters nor does it guarantee Respondents rights to due process from fair and impartial adjudicative officers who are not trying to be hired by ODC. Even the appearance of trading favorable rulings for a full-time job within the disciplinary system should be banned to ensure public trust in the Board's operations. Additionally, the proposed amendment to Rule 19.6 as it stands is not sufficient in narrowing its scope, as it appears that the current enactment of Rule 19.6 violates RPC 5.6(a). Quite simply, the proposed Rule 19.6 is overbroad to the extent its scope exceeds what is required under RPC 1.6 and 1.11 (which has no time period like one year in Board Rule 19.6) as well as the employment prohibitions contained in Rule XI at Section 6(b) and Section 7(c), therefore it is violative of RPC 5.6(a).

The Board's Rules are terms of employment for its members, professional staff, and volunteers (if not also the equivalent of an operating agreement) that must be agreed upon before the start of employment and compliance with such rules are a condition of continued employment with the consequences for any violation not merely termination of employment but possible disbarment for violating RPC 3.4(c). The wording of RPC 5.6(a) is not narrow and restrictive but as the Court held in *Jacobson Holman*, broad and expansive to include not just direct restrictions on employment like Board Rule 19.6 imposes on its attorneys but even indirect restrictions on employment. *Jacobson Holman PLLC v. Gentner*, 244 A.3d 690 (D.C. 2021)

In Rule XI, the Court has not exempted the Board from any employment practices that are applicable to other employers of Attorneys. The Board is no different as an employer of attorneys than a law firm except that it should be held to a higher ethical standard in its employment practices not a lower standard especially when it comes to post employment restrictions that are expressly banned under RPC 5.6. The public's trust in institutions is eroded when they issue edicts of, "do as we say not as we do." The rules are rules for a reason and the rule banning post-employment restrictions on the Attorney's right to practice should apply to the Board just as much as the Board applies that rule upon members of the bar. How can something be unethical for one member of the profession, but the exact same conduct is ethical for another member of the profession based solely on who their employer is? Should the determination of what is and isn't ethical conduct be controlled by who employs the attorney but by what the attorney actually did or didn't do? What

[9] "Law Firm" is defined in Rule 1.0(c) but I am uncertain if the Office of Disciplinary Counsel is treated as a "legal department" of an "organization" or is it treated as a government agency for RPC purposes, I presume its treated as a "Law Firm" in that it is the legal department of the Board and the Board is part of an unincorporated organization (the DC Bar). I am unaware of any caselaw that addresses this point but it would be helpful if the Board clarified this issue and the applicability of DC Human Rights Law protections to its employees.

is the justification for saying that something is ethical if it is done by the Board (imposing a post-employment restriction on the right to practice law) but the exact same conduct is unethical if it is done by a private law firm across the street from the Board – is the conduct ethical solely because certain people are in a position of power who say its ethical while others are unethical because they aren't in a position of power? Shouldn't the people in power be subject to a higher standard of ethical conduct instead of the other way around to avoid even the appearance of a power imbalance in the application of ethical rule enforcement?

Although the wording on RPC 5.6 seems to be directly intended to control the terms of a lawyer's right to practice law, the history of the rule reveals that its stated primary purpose is to ensure the clients are free to choose their own counsel. Thus, it seems that RPC 5.6 is intended to serve the public interest by ensuring a client's maximum choice among available lawyers is protected, not to ensure attorneys can maximize their compensation at the expense of their clients. This is especially true and most necessary in niche or specialized areas of law like ethics where the supply of available lawyers is limited, especially in the District. Some of those attorneys who practice in this niche area of law are often employed "in house" or are otherwise not available for hire by members of the public (*e.g.*, Justice Department's Office of Professional Responsibility, this Board's professional staff, professors/educators, etc.). Thus, there is a limited availability of attorneys who specialize in legal ethics and are in private practice. Then, Rule 19.6 further limits the availability of said attorneys based on their previous involvement with the Board. Additional attorneys are prevented from representing clients in front of the Board due to RPC 1.10, which reduces even more a client's ability to secure legal representation. There is no basis for the Board to impose extra restrictions in conflict with RPC 5.6(a), and therefore in conflict with Rule XI delegation of rulemaking authority. Further, in a potential case with numerous witnesses who have retained similarly situated counsel, it is possible that no attorney is available to represent a client before the Board. I am personally aware of two Respondents who have been prejudiced in their selection of counsel before the Board because of this Rule thus prejudice to the Public has happened under the current Rule and will continue to happen under the proposed Rule.

Rule 19.6 as it stands has significant, irreversible impacts on a party's ability to retain legal counsel to represent them in disciplinary matters, which clearly contradicts the alleged purpose and intention of RPC 5.6 therefor Board Rule 19.6 is inconsistent with RPC 5.6. Rule 19.6 also has the impact of keeping attorneys who are available to assist Respondents out of the disciplinary system because of the huge negative financial consequences it will have on them and their law partners (under RPC 1.10). Therefore Rule 19.6 benefits ODC and prejudices Respondents by excluding respondent friendly attorneys from serving in the disciplinary system thereby impairing the due process rights of the accused by 'stacking the deck' in favor of ODC at every step in the process. While this ODC supporting bias may not be overt and intentional it may be unconscious in the form of "conformity bias" (or one of a dozen other types of non-intentional biases) thereby unfairly prejudicing the accused without the people involved even aware. The issue of bias by a homogeneous group with similar backgrounds should not be understated or dismissed simply because the current Board members may not feel they are biased in favor of ODC (despite what the statistics show the odds of success for Respondents are within the disciplinary system).

III. *Constitutionality of Rule 19.6 and Legal Concerns*

There might be some constitutionality challenges that the Board should take into consideration in reference to Rule 19.6 as the overbroad limitations on an individual's ability to

practice law may be outside of the Board's vested power for the reasons previously stated. While the District's Court of Appeals has vested the Board with the power to adopt rules, procedures, and policies, not inconsistent with Rule XI, or any other rules of the District's Court of Appeals.[10]

It is not clear whether such power was intended to allow the Board to impose overly broad restrictions on the practice of law like those in Rule 19.6 which ban a volunteer from doing something as simple as advising a witness about Board procedure while volunteering to help the Board and for one year after they stop volunteering for the Board. Since no law expressly authorizes the Board's authority to impose restrictions on the practice of law, there may be a significant question as to whether the Court intended to delegate this authority to the Board, especially through Rule 19.6. This issue may require judicial clarification if this proposed rule is contested. Alternatively, the Board should consider requesting the Court amend Rule XI to include whatever restrictions the Court deems necessary to solve whatever problem the Board believes is solved by the proposed Board Rule 19.6.

Whether the Board can unilaterally impose restrictions on a lawyer's ability to earn a living without the existence of any express law or authority to do so, will be an issue of first impression for the Court if it is raised either directly by a current or former Board member who is being denied the opportunity to practice law or more likely in collateral litigation alleging due process violations or equal protection violations by an attorneys accused of less egregious restrictions on the practice of law than those contained in Rule 19.6.

IV. *Conclusion*

The amendment of Rule 19.6 as it stands is not sufficient to protect the public's interest in fairness because it doesn't forbid the trading of favorable decisions for employment with ODC. The amendment of Rule 19.6 is still too broad in its post-employment restrictions on the practice of law and too restrictive in its application in violation of RPC 5.6. Instead of amending this Rule, the Board should repeal Rule 19.6 altogether. In the alternative, if the Board believes that Rule 19.6 should not be repealed, the Board should make it applicable to the Office of Disciplinary Counsel. Nonetheless, given the history and goals of RPC 5.6, the Board's intention of protecting the public, and the Board's efforts to avoid ethical violations, the repeal of Rule 19.6 instead of its amendment may be the wiser course of action. By doing so, the Board would also prevent any appearance of self-dealing while still keeping the public's best interest in mind.

Accordingly, I submit the following recommendations for the Board to consider when making a final decision:

1. The Board should provide a detailed explanation of the historical context and justification for Rule 19.6. This would include outlining the specific issues that the rule was designed to address and whether those issues persist today;

2. The Board should conduct a thorough comparative analysis of how similar issues are handled in other jurisdictions. This should include an examination of alternative measures that have been successfully implemented elsewhere;

[10] *See* Rule XI Section 4(e) of the Rules Governing the District of Columbia Bar.

3. The Board should consider the amendments' broader impact on the availability and cost of legal services in the District;

4. The Board should implement enhanced disclosure requirements and transparency measures to prevent conflicts of interest and maintain the public's trust in the disciplinary process; and,

5. The Board should seek judicial review and clarification on the Board's authority to impose such restrictions, so as to ensure that any rule changes are legally and constitutionally sound while also not making the Board members above the rules that they are entrusted to enforce upon others.

Respectfully Submitted,

/ s / Michael W. Macomber

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