PAUL CHESSIN, ESQ.
Denver, Colorado

September 10, 2020

BY EMAIL

Cheryl Stevens, Clerk of the Supreme Court
2 East 14th Avenue
Denver, Colorado 80203

Re: Proposed Rule Changes, Colorado Rules of Procedure Regarding Attorney Discipline

Dear Ms. Stevens:

Pursuant to the Colorado Supreme Court's Notice of Request for Comments to the above proposed rule changes, I respectfully submit these comments.

Introduction

Transparency and accountability are popular buzzwords these days. And for good reason: as recent events have shown, the public demands them, whether from our police departments, politicians, public health systems, or other institutions of our democracy. Transparency and accountability promote the public's trust and confidence in these institutions. Conversely, opaqueness and unbridled power and discretion breed mistrust and cynicism.

The legal profession - my profession - is one such institution. And because we are self-regulating, we carry a special responsibility to make sure that we regulate ourselves with the public's interest as our highest priority.

To fulfill that responsibility, we have created the Office of Attorney Regulation Counsel (OARC). The OARC is our regulatory agency. Among other things, it enforces the rules by which we are to conduct ourselves ethically, honestly, and with integrity. In executing its enforcement mission, OARC is "committed to protecting the public . . . and promoting the public's interests." OARC website, *available at* https://bit.ly/2YERUiG (visited Aug. 24, 2020).

OARC, in turn, is bound by procedural rules that govern the mechanics by which it executes its enforcement role. In order to instill the public's trust and confidence that, in executing this role, OARC is, indeed, protecting and promoting

the public's interest, OARC must be transparent and accountable. These two principles should ooze from OARC's procedural rules' every pore.

In my view, the proposed procedural rules, C.R.C.P. 242, *et seq.* (Rules), fall far short of this goal. My comments focus on four aspects in particular: the scope of Regulation Counsel's intake discretion; the meaning of "if proved" in the context of Regulation Counsel's intake decisions; the ability to obtain review of Regulation Counsel's intake determinations; and the confidentiality of OARC attorney disciplinary proceedings.

I. Proposed Rule 242.13(b)'s Intake Procedures Should Be Clarified to Expressly Constrain Regulation Counsel's Intake Discretion

First, I propose modifying proposed Rule 242.13(b)'s intake procedures to make it clear that, once Regulation Counsel determines that a request for investigation falls within its regulatory jurisdiction, its discretion on how to handle that request is limited. My changes (marked by cross-outs and italics) are:

> (b) Preliminary Investigation.
> (1) On receiving a request for investigation under subsection (a) above, the Regulation Counsel must conduct a preliminary investigation to decide:
> (A) Whether the lawyer is subject to C.R.C.P. 242.1(a)*; and*
> *(B)* ~~and~~ ~~w~~*W*hether an allegation has been made that, if proved, would constitute grounds for discipline.~~; and i~~
> *If* so, *then Regulation Counsel must either* ~~(B) Whether to~~ formally investigate the matter under C.R.C.P. 242.14, or ~~to~~ address the matter by means of a diversion program under C.R.C.P. 242.17.

To put my changes in context, I start with current Rule 251.9, the rule that 242.13 would replace. In pertinent part, current Rule 251.9(b) provides:

> **(b) Determination to Proceed.** Immediately upon receipt of a request for investigation, a report made by a judge, or a motion made by the committee, as provided in subsection (a) of this Rule, the matter shall be referred to the Regulation Counsel to determine:
> (1) If the attorney in question is subject to the disciplinary jurisdiction of the Supreme Court;
> (2) If there is an allegation made against the attorney in question which, if proved, would constitute grounds for discipline; and

> (3) If the matter should be investigated as provided by C.R.C.P. 251.10 or addressed by means of an alternative to discipline as provided by C.R.C.P. 251.13.

Rule 251.9(b) governs Regulation Counsel's jurisdictional screening process. That is, just as any regulatory agency screens incoming consumer complaints to determine whether they fall within the agency's regulatory jurisdiction, so, too, Regulation Counsel screens, at intake, the requests for investigation it receives. As was argued in *Chessin v. Office of Attorney Regulation Counsel*, 2020 CO 9, 458 P.3d 888, this screening process requires Regulation Counsel to make

> two threshold determinations: whether the attorney is subject to the [Colorado Supreme] Court's disciplinary jurisdiction, and if the request for investigation involves a disciplinary matter. *See* Rule 251.9(b)(1) and (2).
>
> If [Regulation Counsel] checks "yes" to these two boxes, it moves on to the next step, Rule 251.9(b)(3). This provides [Regulation Counsel] with two choices: either to refer the matter to a Rule 251.10 investigation, or to address it via diversion under Rule 251.13.

Resp. to Rule to Show Cause, at 22-23, *Chessin*, *supra* (Case No. 2019SA118, Aug. 5, 2019).

Proposed Rule 242.13(b) apparently adopts in large measure Rule 251.9(b)'s interpretation advanced in *Chessin*. Specifically, it says that Regulation Counsel first must determine whether the attorneys named in and the allegations of a request for investigation satisfy the two jurisdictional screening prongs of 242.13(b)(1)(A): that of jurisdiction over the attorney and over the subject matter of the allegations (i.e., whether those allegations state a disciplinary rule violation). If these two prongs are met, then 242.13(b)(1)(B) gives Regulation Counsel but two choices: it must either investigate or refer the matter to diversion.

But my concern is that the proposed Rule still leaves Regulation Counsel with wiggle room to choose neither of 242.13(b)(1)(B)'s two options. And this is precisely what happened in the disciplinary matter underlying *Chessin*. That matter arose out of high profile litigation brought by the Colorado Attorney General's Office involving a purported Native American tribal internet payday lending enterprise. *See Cash Advance v. Colo. ex rel. Suthers*, 242 P.3d 1099 (Colo. 2010); *see also Chessin*, *supra*, ¶3, 458 P.3d at 889 (describing underlying litigation).

It was undisputed that the respondent attorneys named in the matter's request for investigation all were subject to the supreme court's jurisdiction. And

Regulation Counsel acknowledged and determined that the request's allegations implicated grave disciplinary rule violations by those attorneys, including suborning perjury. In other words, the request satisfied both prongs of current Rule 251.9(b)(1) and (2). But rather than investigating or diverting the request pursuant to Rule 251.9(b)(3), Regulation Counsel instead *dismissed* the matter at intake. *See* Resp. to Rule to Show Cause, *supra*, at 1-2, 23-24.

And in *Chessin*, the supreme court effectively upheld Regulation Counsel's dismissal. It stated: "At the intake stage, Regulation Counsel has *broad discretion* in determining whether to investigate an attorney." *Id.*, at ¶14, 458 P.3d at 891 (emphasis added). Thus, despite Regulation Counsel's apparently binary choice to either investigate or divert a jurisdictionally sound and facially meritorious request, the court nevertheless found unobjectionable Regulation Counsel's decision to *dismiss* such requests without any further proceedings.

At the intake stage, Regulation Counsel's discretion should not be so broad. To give Regulation Counsel unfettered discretion to dismiss at intake a well-pleaded request subjects it to accusations that it acts arbitrarily and capriciously, and to charges that it plays favorites. This undermines the public's trust and confidence that Regulation Counsel is looking out for the *public's* interest.

The data bear out these fears. According to OARC's 2018 Annual Report (*available at* https://bit.ly/2YsmeSB), in 2018 Regulation Counsel received 3,586 requests for investigation. *See id.*, Table 6, p. 62. Of those 3,586 requests, it referred only 265 for investigation. *See id.*, Table 8, p. 63. Excluding the 40 matters it diverted at intake, *see id.*, Table 9, this means that Regulation Counsel disposed of 3,281 complaints at the intake stage - over 91% - without holding any attorney accountable.

Regulation Counsel's 2019 numbers are comparable: it received 3,400 requests, referred 276 for investigation, and diverted at intake 31 matters. *See* OARC's 2019 Annual Report, Tables 6, 8, 9, pp. 64, 65 (*available at* https://bit.ly/319WhGZ). I.e., Regulation Counsel again dismissed some 91% of requests at intake, without any investigation.

Further, according to a recent study, OARC is among the least effective of all state attorney regulatory agencies. *See* Jason Damm and James E. McNulty, "Which States Most Effectively Discipline Attorneys? New Measures of State Corruption within the United States" (May 2019, revised Aug. 2020)(*available at* https://ssrn.com/abstract=3381763, visited Aug. 24, 2020). This study posits that a key indicator of an attorney regulation agency's effectiveness is the ratio of the number of formal proceedings, or charges, an agency brings to the number of

requests for investigation, or complaints, it receives. This charge/complaint ratio "may capture the effectiveness of attorney discipline." Damm, *supra*, p. 26.

OARC's numbers are embarrassing. Despite having the fifth largest budget per licensed attorney among the forty-nine states' attorney regulation agencies studied - nearly twice the median budget - and a lighter than median caseload per staff attorney (ranking 16th), it brings charges in only 2.2% of the requests for investigation it receives. This is less than half the median, ranking OARC a woeful 41st in this metric. *See id.*, Tables 1, 2, pp. 46, 48-49.

Perhaps, then, it is no wonder that, at least anecdotally, attorneys do not trust OARC to be fair or evenhanded. There is a perception among some that Regulation Counsel only goes after the low hanging fruit and the small fry attorney; it won't take on the tough fights, and Big Law is given a pass. And if *attorneys* have this perception, then we cannot expect the *public's* trust in OARC to be any better.

Accordingly, Regulation Counsel's discretion at intake should be limited to the binary choice of either investigating or diverting a request that passes jurisdictional muster, and nothing else. But as worded, it is unclear whether proposed Rule 242.13(b)'s intent is to so circumscribe that discretion; in other words, whether it abrogates *Chessin's* "broad discretion" under current Rule 251.9(b). If so, then that intent should be made crystal clear so as to leave no doubt. My suggested changes do just that.

If, however, the proposed Rule's intent is to maintain Regulation Counsel's "broad discretion" to dismiss facially meritorious requests, then that is a mistake. It will only exacerbate negative perceptions about OARC, the legal profession, and the profession's ability to self-regulate.

II. The Proposed Rule 242.13(b)(1)(A)'s "If Proved" Standard Should Be No Different Than C.R.C.P. 12(b)(5)'s "Failure to State a Claim" Standard

The second prong of Regulation Counsel's jurisdictional intake screening requires it to determine whether a request for investigation's allegations, "if proved, would constitute grounds for discipline." Proposed Rule 242.13(b)(1)(A). This provision carries over current Rule 252.9(b)(2)'s "if proved" standard. But it should be made absolutely clear that this standard is equivalent to - and certainly no more stringent than - C.R.C.P. 12(b)(5)'s "failure to state a claim" requirement.

That is, under this standard Regulation Counsel should assume at intake that a request's plausible allegations are true. So assuming, Regulation Counsel's sole determination should be whether those allegations state a disciplinary rule violation. If so, then this jurisdictional screening prong is satisfied.

In other words, this standard should be interpreted the same as, and no more stringently than, C.R.C.P. 12(b)(5) under *Warne v. Hall*, 2016 CO 50, ¶¶9-24, 373 P.3d 588, 591-595. Indeed, there, the supreme court observed that it previously dismissed a complaint for failure to state a claim under Rule 12(b)(5) because the complaint did not allege facts "which, *if proved*, would satisfy the elements of the claim." *Id.*, ¶18, 373 P.3d at 594 (emphasis added)(citing *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011)).

Thus, as *Warne* recognizes, there is no substantive difference between proposed Rule 242.13(b)(1)(A)'s (and current Rule 251.9(b)(2)'s) "if proved" language and Rule 12(b)(5)'s "failure to state a plausible claim" standard. They are the same. Regulation Counsel should interpret and apply this second jurisdictional screening prong using Rule 12(b)(5)'s same and well-known standards. Given the vast body of law under Rule 12(b)(5), doing so would also promote ease of application and uniformity. *See, e.g.*, *Warne*, *supra*, ¶¶12, 15, 24, 373 P.3d at 592, 593, 595.

To make this clear, I suggest that a comment be added to the proposed Rule expressly stating that the "if proved" language is equivalent to Rule 12(b)(5), and is to be so interpreted and applied.

My concern here is not merely academic. Regulation Counsel has misapplied current Rule 251.9(b)(2)'s "if proved" requirement. Absent express clarification of "if proved's" meaning, it may continue to do so under the proposed Rule's equivalent requirement, and it may dismiss facially meritorious requests at intake, without investigating their merits. This is what happened with the request for investigation underlying *Chessin*.

As mentioned above, pp. 3-4, despite Regulation Counsel's acknowledgment that the request's allegations implicated a number of egregious disciplinary violations, it nevertheless dismissed the request *at intake*, without conducting *any* investigation whatsoever into the facts underlying those allegations. *See* Resp. to Rule to Show Cause, *supra*, at 1-2. It did so *not* because the allegations, "if proved," did not state claims of possible disciplinary rule violations, but because it concluded "there [was] not *clear and convincing evidence*" *proving* the violations. Letter from Jill Perry Fernandez, Assistant Regulation Counsel, to Paul Chessin (Nov. 13, 2018), at 1, 3 (emphasis added)(copy appended hereto).

In response, Regulation Counsel was reminded that Rule 251.9(b)(2) does not require "clear and convincing" proof at intake, and, by prematurely concluding there was no such proof *before* it conducted an investigation, it "put[ ] the cart before the horse." Letter from Paul Chessin to Jill Perry Fernandez, Assistant Regulation Counsel (Dec. 4, 2018), at 2, 3 (copy appended hereto). After all, an investigation's purpose is to discover and *marshal* the evidence. Only then can it be determined whether the evidence, so amassed, supports the request's allegations and satisfies Regulation Counsel's ultimate "clear and convincing" burden of proof. *See id.*, at 3 (citing C.R.C.P. 251.12(e)(1)(determination after investigation) and 251.18(d) (burden of proof on merit's hearing)).

But in the matter underlying *Chessin*, Regulation Counsel nevertheless stood by its dismissal. It erred. It should not be allowed to so err again.[1]

Accordingly, I propose adding an express comment to proposed Rule 242.13 to the effect that the "if proved" part of Rule 242.13(b)(1)(A) means no more than that Regulation Counsel is to assume a request's allegations are true and, assuming their truth, whether those allegations state a disciplinary rule violation.

The proposed Rule's "preliminary investigation" requirement also warrants discussion. Specifically, proposed Rule 242.13(b)(1) *requires* Regulation Counsel to "conduct a preliminary investigation to decide" (1) whether the request satisfies Rule 242.13(b)(1)(A)'s two jurisdictional prongs and, if so, (2) whether to formally investigate or divert the matter. This is a change from current Rule 251.9(b), which as pertinent provides that Regulation Counsel "may make inquiry" into the request's underlying facts and circumstances.

---

[1] Tellingly, at least one of the respondent attorneys named in *Chessin's* underlying request was indicted as a conspirator in the illegal tribal lending enterprise; he essentially confessed to suborning perjury, defrauding the Colorado courts, and other misconduct. *See* Supplement to Resp. to Rule to Show Cause, at 2-4 and Exs. A and B, *Chessin, supra* (Case No. 2019SA118, Aug. 22, 2019). Further, in recently affirming the lending enterprise's kingpin's conviction, the appellate court discussed at length the "[u]ncontradicted evidence" of the "spectacularly successful" "sham illusion" facilitated by the attorneys' submission of "false affidavits that materially misrepresented the role of the Tribes in the lending business." *U.S. v. Grote*, 961 F.3d 105, 112-113, 117 (2nd Cir. 2020). And, by special interrogatory, the *Grote* jury found beyond a reasonable doubt that the tribes were not the lenders. *See id.*, at 113. This verdict confirms that the request's respondent attorneys, by the false affidavits they submitted and misrepresentations they made in the Colorado litigation that the tribes *were* the lenders, perpetrated a fraud on the Colorado courts. Regulation Counsel itself could have found this "overwhelming evidence," *id.*, at 117; had it "only chosen to investigate." Supplement, *supra*, at 5.

The proposed Rule does not explain the change in terminology from "inquiry" to "preliminary investigation," nor is "preliminary investigation" defined. Further, the Rule does not state what "preliminary investigative" powers Regulation Counsel may have (e.g., subpoena power, compelling testimony under oath, and the like), or just how extensive this investigation should be. Regardless, whatever the scope may be of a "preliminary investigation," under no circumstances should it be a substitute for proposed Rule 242.14's formal investigation nor provide Regulation Counsel with the means to dismiss or otherwise dispose of a jurisdictionally sound request and circumvent the binary choice of either investigating or diverting these facially meritorious requests.

Instead, the "preliminary investigation" should have but three very narrow purposes: to (1) aid in determining whether a respondent attorney is subject to jurisdiction under proposed Rule 242.1(a) - the first jurisdictional prong; (2) clarify a complainant's allegations to determine whether they state a disciplinary rule violation (such as, for example, lending clarity to and helping an unsophisticated consumer better articulate his request) - the second jurisdictional prong; and (3) perhaps most importantly, determine whether a matter is eligible for diversion or instead must proceed to a formal investigation - the binary choice.

But I stress that the "preliminary investigation" should *not* be used to allow Regulation Counsel to disregard a request's sufficiency under a Rule 12(b)(5)/*Warne* analysis. In particular, Regulation Counsel should not be allowed to conclude, based upon its "preliminary investigation," that it lacks the evidence to *prove* a request's well-taken allegations, whether because it has not looked for that evidence or otherwise. Such a "summary judgment"-type conclusion should only be made, *at the earliest*, after a full-fledged, complete, and thorough formal investigation. *See* proposed Rules 242.14, 242.15(a). Otherwise, Regulation Counsel will be subject to the same accusations of arbitrariness and favoritism; the public's trust and confidence that Regulation Counsel is faithfully protecting the public will be eroded.

III. There Should Be a Meaningful Right of Meaningful Judicial Review of Regulation Counsel's Intake Decisions

To increase Regulation Counsel's accountability to the public, and thereby further promote the public's trust and confidence in Colorado's attorney discipline system, there needs to be a meaningful right of meaningful judicial review of Regulation Counsel's intake decisions.

Current Rule 251.9(b) apparently precludes any such review. In pertinent part, it provides that "[t]he decision of the Regulation Counsel shall be final, and the complaining witness shall have no right to appeal."[2]

Proposed Rule 241.13(b)(3) seems to relax somewhat this prohibition. Although it, too, provides that Regulation Counsel's decision under proposed Rule 241.13(b)(1) "is final," it states only that the "complaining witness is not entitled to the *Regulation Committee's review* of that decision" (emphasis added). Thus, it appears to leave open an avenue of *judicial* review.

But when read in conjunction with proposed Rules 241 and 242.33(a), the proposed Rules do not. That is, because the latter provides for appeals only from "final decisions" ("[a] party may seek appellate review by the supreme court of any final decision as defined in C.R.C.P. 241"), and because the former does not include Regulation Counsel's decisions under proposed Rule 242.13(b) within the definition of "final" decisions, together these proposed Rules seemingly would preclude *any* review - judicial or otherwise - of Regulation Counsel's intake decisions.

Absent such review, Regulation Counsel will not be held accountable for those decisions. This does nothing to promote the public's trust, faith, or confidence in the attorney discipline system. Further, by closing the courthouse doors to an aggrieved person - *including* the complainant[3] - the proposed Rules may be unconstitutional.

First, as the data above show, in both 2018 and 2019 Regulation Counsel dismissed at intake over 90% of the requests for investigation it received. It strains credulity that *none* of those dismissed requests satisfied jurisdictional screening or otherwise were wholly facially unmeritorious. But without any review, Regulation Counsel is not accountable for those dismissals. This will only foster the perception, stated above, that Regulation Counsel's decisions are arbitrary and that it plays favorites.

Second, although OARC is staffed by well-meaning and dedicated public servants, they are only human and can make mistakes. For example, a mistake

---

[2] Regulation Counsel so contended in *Chessin*, *supra*. *See, e.g.*, Pet. under C.A.R. 21, at 1, 22-23, *Chessin*, *supra* (Case No. 2019SA118, June 3, 2019); *see also Chessin*, *supra*, ¶¶15, 21, 458 P.3d at 891, 892 (Rule 251.9(b) precludes district court review of Regulation Counsel's intake decisions).

[3] Only the aggrieved complainant would seek review of his or her wrongfully dismissed investigation request. Certainly, neither Regulation Counsel nor the dismissed respondent attorney would do so.

may be made to divert a matter ineligible for diversion. *See* Rule 251.13(b)(criteria for determining diversion eligibility); proposed Rule 242.17(b)(same). Or an attorney may be mistakenly thought to be not subject to jurisdiction.

Third, Regulation Counsel may abuse its discretion by misapplying the Rules and those Rules' standards by which it is to make its intake decisions. *See, e.g., Freedom Info. Colo., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008)(misapplication of law is an abuse of discretion).

For example, Regulation Counsel may misconstrue the second "if proved" prong of its jurisdictional screening: instead of applying a Rule 12(b)(5)/*Warne* analysis to a request's allegations, it may require at intake "clear and convincing proof" of a disciplinary rule violation. Absent such proof, it may dismiss the request before it even investigates it (as it did with the request underlying *Chessin*).

Or it may abuse its discretion by simply ignoring the Rules. For example, Regulation Counsel may dismiss a well-supported and meritorious request despite proposed Rule 242.13(b)(1)(B)'s apparent constraints on its discretion limiting it to the binary choice of either investigating or diverting such requests.

Absent the ability to obtain judicial review, these and other types of Regulation Counsel's errors and abuses will go uncorrected. This will undermine the public's confidence that Regulation Counsel is fulfilling its mission to protect the public. Instead, it will foster the perception that it acts arbitrarily and capriciously.

In this regard, the supreme court's reserved plenary authority to oversee Regulation Counsel's decisions, *see* current Rule 251.1(d) and proposed Rule 242.2 (both reserving to the supreme court the "plenary power" to "review any determination made" in a disciplinary proceeding); *see also Chessin, supra*, ¶¶16, 17, 458 P.3d at 892 ("the check on [Regulation Counsel's] power rests with this court" and "we are the only court authorized to review the case"); has so far not proven to be an adequate avenue for meaningful judicial review of Regulation Counsel's intake decisions. Not only do the Rules not provide for any mechanism or procedure for how an aggrieved person - including the complainant - invokes this plenary power, but as far as I have been able to determine *not once* has the court reviewed Regulation Counsel's intake decisions.

If any case deserved such review, it was the request involved in *Chessin*. That request, it should be remembered (*see* pp. 3-4, 7 n.1, above) involved *inter alia* perjury and its subornation. Although the supreme court was implored to exercise

its plenary review power, *see* Resp. to Rule to Show Cause, *supra*, at 33-34; Pet. for Reh'g, 1-2, 5, *Chessin*, *supra* (Case No. 2019SA118, March 6, 2020); it did not.[4]

No doubt, the concern may be raised that allowing judicial review will open the floodgates to "potentially thousands of [Regulation Counsel's] intake determinations." Pet. under C.A.R. 21, *supra*, at 23. But this concern is not a compelling reason to deprive an aggrieved complainant of her day in court. *See Lyons v. Nasby*, 770 P.2d 1250, 1252 (Colo. 1989)(rejecting trial court's concern that allowing intoxicated persons to sue taverns would "open the floodgates of litigation and create an unmanageable quantity of litigation"), *superseded by statute as recognized in Westin Operator, LLC v. Groh*, 2015 CO 25, ¶34, 347 P.3d 606, 614.

Further, experience shows that this concern is unfounded. For example, current Rule 251.11 (and proposed Rule 242.15(b)) allows an aggrieved complainant to appeal (to the Regulation Committee) Regulation Counsel's dismissal of an *investigated* matter. Since 2011, Regulation Counsel investigated 2,931 matters, of which it dismissed 1,080 after investigation. *See* 2019 Annual Report, *supra*, pp. 38, 65, Table 8; 2018 Annual Report, *supra*, pp. 37, 63, Table 8; 2017 Annual Report, Table 6, p. 88 (*available at* https://bit.ly/3jn63LY; visited Aug. 27, 2020). Of those 1,080 dismissed matters, complainants sought review in *only 13* of them. *See* 2019 Annual Report, *supra*, Table 11, p. 68; 2018 Annual Report, *supra*, Table 11, p. 66. This appeal right hardly has "opened the floodgates."[5]

Nor does possible judicial review apparently interfere with the functioning of the scores of other Colorado state agencies that regulate scores of other professions and occupations. *See generally* Title 12, C.R.S. 2019. Generally (absent any agency's organic act's specific provision), these agencies are governed by the State Administrative Procedure Act, §24-4-101, *et seq.*, C.R.S. 2019 (APA). The APA allows "any person adversely affected or aggrieved by any agency action" to seek judicial review of that action. APA §24-4-106(4); *see also* §24-4-102(1)(defining "action" to include "the whole or part of any agency . . . order, interlocutory order, . . . relief, or the equivalent or denial thereof, or *failure to act*"; emphasis

---

[4] Regulation Counsel itself offered that the court could review the request's dismissal via its plenary power. *See* Pet. under C.A.R. 21, *supra*, at 24-25; Reply to Pet. under C.A.R. 21, at 19, 24-25, *Chessin*, *supra* (Case No. 2019SA118, Sept. 27, 2019).

[5] Notably, the Regulation Committee did not reverse Regulation Counsel's dismissal in a *single one* of the 13 appeals it considered. *See* 2019 Annual Report, *supra*, Table 11, p. 68; 2018 Annual Report, *supra*, Table 11, p. 66. This suggests that these appeals are futile, and creates the perception that Regulation Committee is merely a rubber stamp - the opposite of meaningful review.

added). Thus, the APA's plain language arguably allows an adversely affected or aggrieved complainant to obtain review of an agency's dismissal of or refusal to investigate her complaint. There is no good policy or other compelling reason why the OARC, and the legal profession it regulates, should be singled out for special treatment different from these other regulatory agencies.

Regardless, the proposed Rules must yield to the federal and state constitutional rights to petition the government. As stated in *Protect Our Mountain Env't, Inc. v. Dist. Ct.*, 677 P.2d 1361, 1365 and n.5 (Colo. 1984), both the First Amendment and Colo. Const. art. II, §§6 and 24, recognize that

> the right to petition the government for redress of grievances necessarily includes the right of access to the courts. . . . Access to the courts is often the only method by which a person or a group of citizens may seek vindication of federal and state rights and ensure accountability in the affairs of government.

Thus, the Rules, by apparently precluding an appeal from Regulation Counsel's intake decisions - and closing the courthouse doors to an aggrieved complainant - may be unconstitutional.

But whatever may be the constitutionality, to deny a complainant's ability to appeal Regulation Counsel's intake decisions simply is bad policy, especially if Regulation Counsel's discretion at intake is "broad": a lack of judicial review, coupled with unfettered discretion, enables Regulation Counsel to play favorites and act arbitrarily and capriciously.

Stated another way, a meaningful right of meaningful judicial review at intake is part and parcel of ensuring Regulation Counsel's transparency and accountability to the public it serves. This right of review will heighten the public's faith and confidence in the honesty and integrity of the legal profession.

Indeed, because Regulation Counsel is committed to protecting the public, it should welcome the increased transparency and accountability that review of its intake decisions brings. This increased transparency and accountability will demonstrate that Regulation Counsel properly is performing its public protection duties, and will help to dispel the negative perceptions that it is more interested in protecting its own.

Accordingly, I propose that the Rules provide an adversely affected or aggrieved person, and in particular the complaining witness, a meaningful right of meaningful judicial review of Regulation Counsel's intake determinations. A simple way to do this is to expressly provide that the APA applies to the OARC.

IV. Public Access and Public Disclosure Should Be the Rule, Not the Exception

It is axiomatic that without transparency, there can be no accountability. Accordingly, the general rule should be that *all* attorney disciplinary matters, regardless of the matter's phase or disposition, and all records of those matters should be public. Only if a compelling need for secrecy exists should a particular matter or record of that matter be non-public.

But the proposed Rules, and in particular proposed Rule 242.41, come from the opposite direction. Proposed Rule 242.41 starts with the premise that all files and records of all proceedings are confidential. It then provides that public disclosure of those files and records may be available only *after* the occurrence of a specific triggering event (or some other exception applies). *See* proposed Rule 242.41(a)(specifying five events that trigger public disclosure); 242.41(b)(1)(absent a 242.41(a) triggering event, files and records remain non-public); 242.41(f)(listing certain other exceptions). And it specifies that matters that are dismissed prior to a formal complaint are confidential. *See* proposed Rule 242.41(b)(2). This would include Regulation Counsel's intake and post-investigation dismissals.[6]

In short, absent a triggering event or other exception, the Rule's operation effectively seals attorney disciplinary matters from public view. According to the Rule's proposed comment, by doing so the Rule

> seeks to strike a balance between protecting lawyers against publicity predicated upon unfounded accusations and protecting clients, prospective clients, and the effective administration of justice from harm caused by lawyers who do not fulfill their professional obligations.

But the philosophy the Rule and its comment reflect harkens back to a time when lawyers were more interested in protecting their reputations than in protecting the public. *See Pet. of Colo. Bar Ass'n*, 137 Colo. 357, 367, 325 P.2d 932, 937 (1958)(disciplinary proceeding's confidentiality "protect[s] the attorney from possible unjust public criticism until guilt is established"). This anachronistic

---

[6] For simplicity, I limit my discussion to proposed Rule 242.41. But my discussion applies equally to *all* Rules that may provide for a proceeding's confidentiality. *See, e.g.*, proposed Rules 242.22(f), 242.23(e); 242.24(e). Further, my discussion also applies to whatever necessary conforming changes should be made to Rule 2, Public Access to Administrative Records of the Judicial Branch.

paradigm must yield to modern demands for transparency and accountability. *See New York Times Co. v. Sullivan*, 376 U.S. 274, 305 (1964)(Goldberg, J., concurring) ("'sunlight is the most powerful of all disinfectants'").

Indeed, if an attorney is arrested for a possible crime, as a general rule that arrest is a matter of public record, even if the arrest is later determined to be unfounded and no charges brought. *See* §§24-72-302(7), -303(1), C.R.S. 2019 ("official action" includes "arrest"; official actions open to public inspection). It would seem that the stigma attached to an unfounded arrest is no less than the "possible unjust criticism" arising from a request for investigation.

Accordingly, the general rule should be that the files and records of all attorney disciplinary matters, from intake to ultimate disposition, should be open to the public.[7] I propose importing the presumption codified in C.R.C.P. 121 §1-5 to disciplinary matters. Alternatively, the Colorado Open Records Act, §24-72-201, *et seq.*, C.R.S. 2019 (CORA), should be made expressly applicable to these matters.

> We begin with the fundamental proposition that it is the responsibility of judges to avoid secrecy, in camera hearings and the concealment of the judicial process from public view. . . . Courts are public institutions which exist for the public to serve the public interest. Even a superficial recognition of our judicial history compels one to recognize that secret court proceedings are anathema to a free society.

M.M. v. Zavaras, 939 F.Supp. 799, 801 (D. Colo. 1996). In the Supreme Court's words, "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)(footnotes omitted).

Public access to court records is vital to ensure the public's confidence in the judicial process and "respect for the legal system." *Peru v. T-Mobile USA, Inc.*, 2010 WL 2724085, *1 (D. Colo. 2010); *see, e.g., Pappas v. Frank Azar & Assocs.*, 2007 WL 1549037, *6 (D. Colo. 2007)("It is critical that the public be able to review the factual basis of this Court's decisions and evaluate the Court's rationale so that it may be confident that the Court is functioning as a neutral arbiter").

Colorado courts similarly recognize that there exists a "strong presumption in favor of public access to court records." *Anderson v. Home Ins. Co.*, 924 P.2d 1123,

---

[7] I include any proceedings before the Regulation Committee, which should be made expressly subject to Colorado's Open Meetings Law, §24-6-401, *et seq.*, C.R.S. 2019. Increasing the Committee's transparency may dispel any negative perceptions about it, such as those alluded to above, p. 11, n.5).

1127 (Colo. App. 1996); *accord, e.g., Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001)(recognizing the "strong presumption in favor of public access to court records"); *see also Office of the State Ct. Adm'r v. Background Info. Servs., Inc.*, 994 P.2d 420, 429 (Colo. 1999)(stating the "general premise that individual case files are open to public inspection upon request").

Rule 121 §1-5 codifies this presumption. It governs the very limited circumstances when a court may seal its files by "creat[ing] a presumption that court files will be open to the public unless a court order provides otherwise." *State Ct. Adm'r, supra*, 994 P.2d at 429. As *Anderson, supra*, 924 P.2d at 1126, states:

> the rule creates a presumption that all court records are to be open; it allows a court to limit access in only one instance and for only one purpose (when the parties' right of privacy outweighs the public's right to know); and it grants to every member of the public the right to contest the legitimacy of any limited access order.

Further, Rule 121 §1-5 "squarely places the burden upon the party seeking to limit access to a court file to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files." *Id.*; *see also Peru, supra*, 2010 WL 2724085 at *2 ("A strong showing that privacy interests outweigh the public interest is required to ensure public confidence in the judicial process"). Accordingly, a court may not seal its records or limit access "except upon a finding that the harm to the privacy of a person in interest outweighs the public interest." *Doe, supra*, 26 P.3d at 544.

In this regard, a claim that a file "contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file." *Id.* And as particularly pertinent, insufficient to overcome the strong presumption favoring public access is "*prospective injury to reputation*, an inherent risk in almost every lawsuit." *Id.* (emphasis added).

Thus, "only in the rarest of cases is the sealing of documents appropriate - for example, cases involving intensely personal issues such as abortion or birth control, or cases pertaining to the welfare of abandoned or illegitimate children." *Pappas, supra*, 2007 WL 1549037 at *6; *see, e.g., id.* (it is only "in circumstances where the parties' need for secrecy is so compelling, relative to the public's interest in access to the factual underpinnings of the Court's decisions, that sealing will be permitted"); *Anderson, supra*, 924 P.2d at 1127 (illustrating the "limited instances" in which "a heightened expectation of privacy or confidentiality in court records has been found to exist").

Matters of attorney discipline should be no different. Indeed, because the legal profession is self-governing and largely autonomous, it has a special responsibility "to assure that its regulations are conceived in the *public interest* and not in furtherance of parochial or self-interested concerns of the bar." Colo. RPC, Preamble [12] (emphasis added). The public has a right to know whether we are effectively policing ourselves; the public's interest lies in OARC's transparency. *See, e.g., Peru, supra,* 2010 WL 2724085 at *2 (transparency ensures public confidence).

But under the proposed (and current) Rules, the *vast majority* of attorney discipline matters are secret. Regulation Counsel's intake decisions highlight the problem. As shown above, p. 4, Regulation Counsel dismisses at intake *over 90%* of the requests for investigation it receives. It is inconceivable that *all* of these several thousand requests are wholly unmeritorious and do not pass jurisdictional muster.

But we will never know. The public will never know Regulation Counsel's reasons for dismissing these thousands of requests (and the hundreds more it dismisses after investigation). Rather than being confident that Regulation Counsel "is functioning as a neutral arbiter," *Pappas, supra,* *6; this secrecy will only engender public cynicism in the profession's ability to police itself. My profession's proclamation - that we self-regulate "in the public interest" - will ring hollow. The public will instead perceive that my profession puts our "parochial [and] self-interested concerns" ahead of the public's.

Accordingly, I propose that, instead of proposed Rule 242.41 (and all other Rule references to confidentiality), there should be in its place a simple statement to the effect that Rule 121 §1-5 governs public access to all files and records of all attorney disciplinary matters.

In the alternative, I suggest that CORA apply to disciplinary matters. I realize that a lot of sweat, blood, and tears went into drafting proposed Rule 242.41. And no doubt, much thought was given to CORA and tracking its principles, if not its language. Nevertheless, I think that CORA is a more appropriate and alternative model than is proposed Rule 242.41.

First, CORA starts from the premise that all records are public. *See* CORA §24-72-201 (declaring Colorado's public policy that "all public records shall be open for inspection by any person"); *see, e.g., City of Westminster v. Dogan Constr. Co.,* 930 P.2d 585, 589 (Colo. 1997)(exceptions to CORA's broad, general policy of public access should be narrowly construed). From there, it carves out certain exceptions to access, and provides instructions to records custodians regarding when they may, or must, deny public access. *See* CORA §§24-72-203(1)(a), -204(1)-(3).

Proposed Rule 242.41, however, starts from the opposite direction. It presumes that all records are confidential, and remain that way unless made public via a specific triggering event or other confidentiality exception. Thus, whether the Rule's intent is to arrive at the same ultimate destination vis-a-vis public access as CORA is unclear.

If the Rule's intent is to have the same level of public access as CORA, then why reinvent the wheel? Simply make CORA applicable to OARC disciplinary matters. Doing so also will prevent any unintended consequences that may arise from the Rule's very different starting point and language that may make the Rule's actual operation, and end result, very different from CORA's.

Of course, if the Rule's intent is *not* to provide the same, or substantially the same, level of public access as CORA, then that, I believe, is a mistake.

Second, a wide and well-established body of law has developed under CORA. Its operation is known; there is certainty in the expectations of both records custodians and those seeking access. But there is no body of law under proposed Rule 242.41 (or, for that matter, its predecessor). It may take time-consuming and expensive litigation to parse out the proposed Rule's many nuances. Thus, adopting CORA promotes the salutary effects of certainty, predictability, and uniformity.

Third, and perhaps most importantly, the scores of other Colorado regulatory agencies, and the disciplinary proceedings of the professions and occupations they regulate (*see* p. 11, above), are subject to CORA (absent an organic act's specific exception).

Our profession should be treated no differently. There is no compelling reason why the legal profession's disciplinary matters should be entitled to special secrecy privileges to which those of other professions and occupations are not.

Further, giving ourselves these special secrecy privileges can only elevate the public's suspicions that, rather than looking out for the public's interest, we are looking out for our own. If we are to be, and remain, self-governing, we cannot so betray the public's trust.

For these reasons, and in the alternative, OARC attorney disciplinary matters should be made subject to CORA.

Conclusion

The rule of law and others of our democratic institutions have been under attack. *See, e.g.*, Mark A. Cohen, *2020 Vision: Focus on Defending the Rule of Law*

(Forbes, Jan. 7, 2020)(*available at* https://www.forbes.com/sites/markcohen1/2020/01/07/2020-vision-focus-on-defending-the-rule-of-law/#197274393b9b; visited Aug. 27, 2020); Mark A. Cohen, *The All-Out Assault on the Rule of Law* (Forbes, Feb. 20, 2017)(*available at* https://www.forbes.com/sites/markcohen1/2017/02/20/the-all-out-assault-on-the-rule-of-law/#6bad81ff77af; visited Aug. 27, 2020). It is up to us - the legal profession - to "take the lead" in defending these institutions and restore the public's trust and confidence in them. *2020 Vision*, *supra*.

Shakespeare may have said it best when he wrote, "The first thing we do, let's kill all the lawyers." William Shakespeare, *The Second Part of King Henry the Sixth*, act 4, sc. 2. Rather than an anti-lawyer comment on the legal profession, perhaps to Shakespeare lawyers stood as the guardians of freedom and the rule of law. *See* Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal* 28 (Princeton Univ. Press 1994).

But if the public is to trust us to defend these institutions, we first have to demonstrate to it that our own house is in order. We must apply, fairly and equally to all of us, the rules of law that govern our profession. And we must be completely open, transparent, and accountable about it. Otherwise, we are hypocrites, and we will not deserve the public's faith or confidence in the honesty, ethics, or integrity of our profession.

Respectfully submitted,

s/ Paul Chessin

Appended:

Letter from Jill Perry Fernandez, Assistant Regulation Counsel, to Paul Chessin (Nov. 13, 2018)

Letter from Paul Chessin to Jill Perry Fernandez, Assistant Regulation Counsel (Dec. 4, 2018)

Attorney Regulation Counsel
Jessica E. Yates

Chief Deputy Regulation Counsel
Margaret B. Funk

Deputy Regulation Counsel
April M. McMurrey

Deputy Regulation Counsel
Dawn M. McKnight

Deputy Regulation Counsel
Gregory G. Sapakoff

COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL

Attorneys' Fund for Client Protection
Unauthorized Practice of Law

Assistant Regulation Counsel
Jane B. Cox
Jill Perry Fernandez
Kim E. Ikeler
Erin Robson Kristofco
Bryon M. Large
Justin P. Moore
Geanne R. Moroye
Alan C. Obye
Lisa E. Pearce
Matt Ratterman
Catherine S. Shea
Jacob M. Vos
Rhonda White-Mitchell
E. James Wilder
Professional Development Counsel
Jonathan P. White

November 13, 2018

Mr. Paul Chessin
8095 E. Colorado Ave., #8
Denver, CO 80231

Re: Your request for investigation of Conly J. Schulte, #18-1271

Dear Mr. Chessin:

As you know, following your request for a review of my initial dismissal of your request for investigation against Mr. Schulte, this matter was re-opened for the limited purpose of asking Mr. Schulte specific questions regarding (1) possible knowingly misrepresentations made by him regarding certain tribal affidavits presented to the Colorado courts and (2) whether Mr. Schulte may have engaged in conflicted representation given his apparent simultaneous representation of Mr. Tucker and various Indian tribes.

I wrote to Mr. Schulte about these specific concerns in June. He responded to my inquiry, through counsel, in July. In August, you filed a reply. I have carefully reviewed all of the materials submitted and have discussed this request for investigation in detail with Deputy Regulation Counsel April M. McMurrey, Deputy Regulation Counsel Gregory G. Sapakoff, and Regulation Counsel Jessica E. Yates.

Mr. Schulte alleges that your complaint is barred by the applicable statute of limitations set forth in C.R.C.P. 251.32(i). Mr. Schulte alleges that you knew, or should have known, about this purported misconduct more than five years ago and thus your complaint is time barred. You have acknowledged that you believed that the affidavits in question were important to the Colorado courts' determination in the cases when you were prosecuting these matters between 2005 and 2012. However, you argue that no one knew the affidavits were false until 2016, when the tribes entered into non-prosecution agreements in which they admit that they "overstated the involvement of the tribes" in the operation of the various loan businesses. You have also argued that the statue to limitations does not bar these allegations as Mr. Schulte engaged in fraud. Because we have concluded that there is not clear and convincing evidence to support a finding that Mr. Schulte violated any of the Rules that we enforce, we have not found it necessary to reach a determination of this issue.

With respect to the tribal affidavits, I believe that this office can establish by clear and convincing evidence that certain of the information contained in the affidavits was inaccurate based upon the admissions made by the affiants in 2016. However, we still lack clear and convincing evidence that Mr. Schulte knew that the affidavits were inaccurate at the time they were presented to the court or that these affidavits were material to the courts' determination in the underlying matters. Mr. Schulte has acknowledged that various associate attorneys he supervised prepared the affidavits after specifically conferring with the affiants (and in the case of the Miami tribes, with their independent legal counsel) about the content of the affidavits. Mr. Schulte points out that the affiants made changes to the proposed affidavits before they were signed and additionally points out that the "falsity" that the tribes ultimately admitted to was not material to the Colorado courts' findings.[1] Given our high burden of proof, it is the opinion to this office that we lack sufficient evidence to establish an 8.4(c) violation by Mr. Schulte with respect to the submission of the tribal affidavits.

With respect to the possible conflicts of interest identified in your request for investigation, Mr. Schulte points out that his clients have not raised this issue with us. He argues that this significantly undercuts this portion of your complaint, particularly in light of the circumstances here, where Mr. Schulte's clients have been embroiled in criminal and regulatory actions for years involving these same transactions.

Mr. Schulte reports that he never represented the individual interests of Mr. Tucker, although his prior law firm did represent UMS (a company in which Mr. Tucker was 'a principal') between 2004 and 2006. Mr. Schulte reports that he represented the legal interests of the Miami Tribe (and its subsidiaries) between 2004 and 2014. His primary contacts for this client were the tribe's CEO, its chief and its two general legal counsel (not Mr. Tucker). Mr. Schulte further explains that he was paid out of the tribe's general budget and out of revenues derived from servicing loan portfolios owned by tribal entities (not by Mr. Tucker). Mr. Schulte reports that the tribes were fully aware of how and who was paying for these legal services. Mr. Schulte admits that between 2008 and 2012 Mr. Tucker signed some of the checks his law firm received, but Mr. Schulte explains that this was because Mr. Tucker was duly authorized by the Miami Tribe to make this payment out of the above-noted tribal funds. We do not have clear and convincing evidence that Mr. Schulte was acting without authority or in conflict with the Miami Tribe's wishes.

Mr. Schulte reports that when he joined his former law firm in 2005, that law firm had already been representing the Sioux Tribe for more than twenty years. The law firm's representation of the tribe continued after Mr. Schulte left the firm in

[1] Mr. Schulte argues that the Colorado courts were focused on who owned the tribal entities rather than the question of who owned the Tucker entities.

January of 2018. Mr. Schulte reports that his primary contacts for this client were the tribal chairman, tribal business manager and two tribal treasurers (not Mr. Tucker). Mr. Schulte reports that he was paid out of the tribe's general budget and out of revenues derived from servicing loan portfolios owned by tribal entities. Mr. Schulte indicates that the Sioux Tribe was fully aware of how and who was paying for these legal services. Mr. Schulte does admit that between 2007 and 2012 Mr. Tucker signed some of these checks, but says this was because Mr. Tucker was duly authorized by the Sioux Tribe to make this payment out of the above-noted tribal funds.

Mr. Schulte reports that his law firm did represent parties on both sides of a loan serving contract between a Sioux tribal subsidiary and UMS in a deal in in either 2004 or 2005. Mr. Schulte says that both clients signed written disclosures and waivers of potential conflicts of interest related to this transaction and he has provided this office with copies of these documents.

There is simply not clear and convincing evidence of a prohibited conflict of interest in Mr. Schulte's representation of the Miami tribal entities, the Sioux tribal entities and UMS.

Having carefully reviewed your allegations, Mr. Schulte's responses, and the information you submitted in reply we conclude there is not clear and convincing evidence Mr. Schulte violated the Rules of Professional Conduct, and therefore, there is no basis for our office to take further action regarding these investigations. This determination is final pursuant to C.R.C.P. 251.9.

In your reply brief, you have asked us to re-open our investigation into the other respondents about whom you originally complained. Based upon the information we have received and reviewed to date, we find no reason to do so.

Thank you for participating in our process.

Sincerely,

Jill Perry Fernandez
Assistant Regulation Counsel

JPF/aj
cc: Jeffrey S. Pagliuca, Esq.

Paul Chessin, Esq.
Denver, Colorado

December 4, 2018

BY HAND

Jill Perry Fernandez, Assistant Regulation Counsel
Office of Attorney Regulation Counsel
1300 Broadway, Suite 500
Denver, Colorado 80203

Re: Request for Investigation, dated November 15, 2017, Case No. 18-1271

Dear Ms. Fernandez:

Thank you for your letter, dated November 13, 2018 (Letter), regarding the above matter. And I hope you had a happy Thanksgiving.

I must confess, your letter perplexes me. It does so for several reasons. (I would have responded sooner, but I was out of town for most of November, and just got back for good last week.)

First, I am perplexed by your conclusion that "there is not clear and convincing evidence Mr. Schulte violated the Rules of Professional Conduct." Letter, at 3. Yet as you acknowledge you base this conclusion solely on "[h]aving . . . reviewed" my Request, Mr. Schulte's attorney's response, and my reply, dated August 9, 2018 (Reply). *Id.* In other words, you come to your conclusion without having conducted *any investigation whatsoever* into the misconduct that I have alleged.

Here, as I glean from your letter, among other things your office has not: reviewed the trial transcript of the federal criminal trial referred to in my Request and Reply, a trial, it bears repeating, in which Mr. Schulte testified; reviewed any of the other proceedings in that matter; inquired of or sought from the U.S. Attorney's Office the evidence that it amassed during its own investigation; similarly, sought any information from the Federal Trade Commission regarding its own investigation and prosecution of the underlying payday lending scheme, including what it may have uncovered regarding Mr. Schulte's involvement; interviewed anyone from the tribes or the tribal corporations,

including the affiants who submitted false testimony, employees who testified at the criminal trial, and, as revealed in the Netflix documentary, taped conversations with tribal members, including the affiants; interviewed Mr. Tucker or Mr. Muir; talked with any of Mr. Schulte's co-counsel, junior attorneys or associates; subpoenaed any of Mr. Schulte's records, including emails; and, last but certainly not least, interviewed Mr. Schulte himself, let alone question him under oath.

Instead, you take on faith Mr. Schulte's attorney's denials of wrongdoing. Based on those denials, you conclude that you do not have "clear and convincing evidence" or "clear and convincing proof" that he, for example, "knew that the [tribal] affidavits were inaccurate." Letter, at 2. (Of course, nowhere does he deny any such knowledge, a point I made. *See* Reply, at 5.)

In my 17 years of prosecuting cases on behalf of the State of Colorado, I cannot recall an instance when either I or any of my colleagues accepted without question an opposing party's denials of wrongdoing, and, based solely on those denials, decided not to prosecute a matter. To the contrary, we would not make a decision without conducting some investigation into the matter. Indeed, if every prosecutor accepted every defendants' attorneys' professions of their clients' innocence, no doubt our nation's prison overcrowding crisis would be easily eliminated. But that is not what prosecutors do. Instead, they investigate the facts and independently verify the truth.

Here, by concluding, without any investigation whatsoever, that you lack and do not have "clear and convincing evidence" to prove any misconduct, you define putting the cart before the horse and prejudge the matter.

Second, and as I have shown elsewhere, your reliance upon the "clear and convincing" standard is misplaced. Rather, at this stage of the matter all that need be shown is whether "there is an allegation made against the attorney in question which, if proved, would constitute grounds for discipline." C.R.C.P. 251.9(b)(2). (That Mr. Schulte is subject to OARC's jurisdiction, *see* C.R.C.P. 251.9(b)(1), is not in issue. And, once the conditions of both 251.9(b)(1) and (2) have been met, then 251.9(b)(3) provides the OARC with two choices: either conduct an investigation, or refer the matter to diversion. By the Rule's plain terms, dismissal is not an option.)

Here, you acknowledge that Rule 251.9 is the applicable Rule - you cite it in dismissing this matter. *See* Letter, at 3. You thereby recognize that Rule 251.9 provides the applicable standards. But significantly, *nowhere* does Rule 251.9 mention "clear and convincing" or use that standard in determining whether requests for investigation should be dismissed.

Instead, the first time "clear and convincing" appears in the Rules is in C.R.C.P 251.12(e)(1); even then, it is used only in connection with "the conclusion of an investigation" (and, I note, with what is essentially a probable cause determination for whether a formal complaint should be filed). C.R.C.P. 251.12. And, as C.R.C.P. 251.18(d) makes clear, the "clear and convincing" standard applies only as the burden of proof in hearings on the merits.

Further, you have effectively acknowledged that I have made allegations "which, if proved, would constitute grounds for discipline." Specifically, in your May 18, 2018, letter to Mr. Schulte, you state that the "facts and circumstances set forth" in my Request "implicate" a number of the Rules of Professional Conduct, including R.P.C. 1.8(f), 3.3, 3.4, 5.4(c), 8.4(c), and 8.4(d).

Despite your recognition that my Request satisfies Rule 251.9's standards, your office nevertheless refuses to conduct an investigation into the Request's allegations. This boggles my mind.

Third, your letter is internally inconsistent. For example, you acknowledge that, as I showed, the tribal affidavits "were important" to the trial court's decision. Letter, at 1; *see also* Reply, at 2-3 (showing that the affidavits were "crucial" to the trial court, which extensively relied on them). Nevertheless, you assert that Mr. Schulte "points out" that the affidavits were "*not* material to the Colorado courts' findings." Letter, at 2 (emphasis added). And, you apparently credit Mr. Schulte's claim.

I have searched Mr. Schulte's attorney's response to find where he "points out" the immateriality of the tribal affidavits. I have done so in vain; it is not there. I would appreciate it if you could inform me as to where you found support for your assertion.

In any event, to contend that the tribal affidavits were immaterial to the trial court's decision is to ignore the obvious. I suggest you re-read my Reply, pp. 2-3, and those portions of the trial court's order to which I there refer. The trial court's order belies any notion that the affidavits were not material. In fact, those affidavits were the *only* evidence before the court upon which it based several of its key findings.

Similarly, you assert that Mr. Schulte's attorney "points out" that Mr. Schulte's clients - I assume you mean his tribal "clients" - "have not raised this issue [of conflicts of interest] with us." Letter, at 2. Again, I have reviewed Mr. Schulte's attorney's response, but I cannot find any support for your assertion.

Regardless, this assertion is (1) irrelevant, and (2) overlooks the obvious. First, I am unaware of any provision in the Rules of Professional Conduct, and in particular R.P.C. 1.7 and 5.4(c), that requires that the *client* complain before the OARC may act on a potential violation. To the contrary, C.R.C.P. 251.9(a) makes clear that "*any* person" may file a request for investigation (emphasis added). Indeed, as you no doubt are aware, R.P.C. 8.3 imposes upon *attorneys* - who by definition would not be the clients - the *obligation* to report misconduct. Further, certain conflicts cannot be consented to or waived. Accordingly, that the tribes may not have complained to OARC is wholly beside the point.

Second, as should be obvious - certainly, it was obvious to the FTC, the U.S. Attorney's Office, the media that covered this matter, and others - it was Mr. Tucker who was Mr. Schulte's real client, and the one who directed and controlled the entire payday lending enterprise, including the litigation with the State; the tribes were but facades behind which Mr. Tucker hid. And why would either Mr. Tucker or the tribes complain to OARC? They would not. They were all in this scheme together, and along with Mr. Schulte and the other attorneys, conspired to perpetrate a massive fraud upon the courts.

To say that I am disappointed in the way OARC has handled this matter would be an understatement; I am outraged. Some of my more cynical colleagues say to me, "What did you expect?" They say that the OARC only goes after the low hanging fruit. They say it pursues only easily prosecutable matters, such as attorneys convicted of DUI's, or who convert client funds, or

who have sex with their clients, or who fail to communicate with or abandon their clients. They say that my expectations that OARC would do otherwise than what it has done here are only a reflection of my idealism, if not naiveté.

Perhaps the high station of some of the attorneys involved has colored OARC's judgment. I am certain that this would not surprise my cynical colleagues. But I need not remind the OARC that we are a nation of laws, bound by the rule of law. Even those who occupy the highest positions and offices can falter. And when they do, they must be held fully accountable for their malfeasances. To do otherwise would erode the public's confidence in our institutions that comprise the pillars of our democracy, and do violence to the motto, "equal justice under law."

I must confess, the way in which the OARC has handled this matter to date has already shaken my faith and confidence in its willingness and ability to do the job that this matter demands. How can I, or my fellow professionals, have any assurance that the OARC will properly and appropriately regulate and police our profession and uphold the highest ethical standards to which we must abide? Instead, it seems to me that it has abdicated its obligations and responsibility.

And, while this matter may require a bit more effort to prosecute than the run of the mill DUI, conversion, and the like matters that make up most of OARC's docket, nevertheless I believe the misconduct I have alleged is readily provable, if only the OARC would put in some elbow grease and investigate. The reward for doing so is in a very real sense much greater than those run of the mill matters. For at stake here is not just conduct that affects only the attorney, or perhaps one or two clients, but undermines the very foundations of our justice system - committing fraud on the courts, including suborning perjury.

As you may be aware, the case out of which my Request arises has attracted national media attention and scrutiny. No doubt, those who have reported on it also may be willing to scrutinize the conduct of the attorneys involved in the matter, and the agencies that are charged with enforcing the ethical rules to which the attorneys are held.

Accordingly, I respectfully request two things. First, because you say that you discussed this matter with Regulation

Counsel Yates and Deputy Regulation Counsels McMurrey and Sapakoff, I have copied them on this letter. (I also considered copying Chief Justice Coats, but for now have refrained from doing so.) I would like to meet with the four of you sometime in the next few weeks. In advance of that meeting, I request that each of you, individually and independently, review in detail the various submissions in this matter, including my Request, Reply, and all of the exhibits that I included therewith. Second, I request that the OARC fulfill its obligations that this matter demands, and investigate this matter fully, thoroughly, and completely.

Respectfully submitted,

Paul Chessin

Paul Chessin

cc: Regulation Counsel Jessica E. Yates
Deputy Regulation Counsel April M. McMurrey
Deputy Regulation Counsel Gregory G. Sapakoff

HAMMER LAW

Karen A. Hammer, Esq., LL.M.
Principal
hammer@hammer-law.com

Offices in:
Boulder and Denver, CO
303.204.4447

Barbara K. Brown, Ph.D.
Sr. Strategy Advisor (not a lawyer)
bkbrown@hammer-law.com

September 15, 2020

VIA EMAIL

The Honorable Chief Justice
and Justices of the Colorado Supreme Court
c/o Ms. Cheryl Stevens
Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Proposed Changes to Unauthorized Practice of Law Rules 232, 232.1, and 232.2

Your Honors and Ms. Stevens:

I plan to testify at any hearing on published proposed changes to the above Rules reflecting my experiences that include both litigation and complex financial transactions of over $2 billion.

In my practice, I have seen recurring instances of entities which are not law firms selling or reselling services involving the exercise of legal judgment. While impressive, the proposed changes do not adequately address such situations. Additional technical changes are also appropriate to ensure that any exercise of legal judgment that relates to the substantive and procedural laws of Colorado through the application of conflict of laws provisions is considered the practice of law (not technically addressed to date in the proposed changes).

Regards,
/s/
Karen A. Hammer, LL.M.

Rule 232. Rules Governing Unauthorized Practice of Law Proceedings

Preamble

In prohibiting the unauthorized practice of law in Colorado in the public interest, the supreme court's regulatory and policy objectives include:

(1) Protecting the public by ensuring that persons who assist others in their legal affairs have sufficient competence to avoid harming the liberty interests and property rights of those they assist;

(2) Safeguarding the system of justice and avoiding the waste of limited judicial resources by ensuring that only qualified persons assist others before tribunals;

(3) Educating the public about the activities that constitute the unauthorized practice of law; ~~and~~

(4) Providing the public with access to the justice system at a reasonable cost by permitting nonlawyers to provide legal representation of limited scope in certain circumstances~~.~~; and

(5) Supporting these regulatory policies and goals through enforcement systems, including, without limitation, systems for (i) monitoring, (ii) accepting requests for investigation, (iii) investigating, (iv) resolving, (v) prosecuting, (vi) enforcing, and (vii) supervising unauthorized practice of law issues and allegations.

~~(4)~~

Part I. Terminology and Jurisdiction

Rule 232.1. Terminology

For purposes of this rule, the following definitions and abbreviations apply:

"Advisory Committee" refers to the Supreme Court Advisory Committee on the Practice of Law, as identified in C.R.C.P. 232.4.

"Civil injunction" and derivatives of that term generally refer to a proceeding brought under

C.R.C.P. 232.14 through C.R.C.P. 232.20 to enjoin a respondent from the unauthorized practice of law.

"Complaining witness" means a person who submits a request for investigation to the Regulation Counsel under C.R.C.P. 232.9(a)(1).

"Contempt" refers to a proceeding brought under C.R.C.P. 232.22 through C.R.C.P. 232.24 to hold in contempt a respondent who is alleged to have engaged in the unauthorized practice of law in contravention of a previous injunction.

"Costs" are those costs made available in civil cases and may include travel expenses incurred by witnesses, fees for court reporters, and fees for expert witnesses. "Costs" may also include expenses incurred during an investigation.

"Exercise of legal judgment" and derivatives of that phrase mean the application of actual or purported knowledge or understanding of the law and related judicial systems, beyond that of the ordinary citizen, to a particular set of facts or type of facts.

"Expunge" and "expungement" refer to the destruction of all files, records, and other items of any type in a given proceeding.

[MOVED FROM SUBSTANTIVE TEXT IN 232.2]

"In Colorado, when used to describe the practice of law relating to any issue, includes ~~occurs "in Colorado" if the~~ situations (i) to which the substantive or procedural laws of Colorado apply; (ii) for which applicable conflict of laws principles would reasonably suggest the application of substantive or procedural laws of Colorado, (iii) relating to any action, issue, dispute, or property ~~nonlawyer takes the actions at issue~~within the geographic boundaries of Colorado if the recipient or subject of legal services was in Colorado at the time of the actions, or if the actions involve a tribunal located in Colorado (other than a tribunal involving federal or tribal jurisdiction in a proceeding to which no substantive or procedural state, or local law of Colorado reasonably applies; unless any of the actions otherwise constituting the practice of law are controlled by or supervised by a lawyer duly licensed to practice law in Colorado.

"Including" means including but not limited to.

"Injunction," "enjoin," and derivatives of those terms refer to a court order prohibiting a nonlawyer from engaging in the unauthorized practice of law.

"Mail" and "mailing" means the sending of a document or other item through the U.S. Postal Service, through a commercial delivery service, or by electronic means.

"Notice," "notify," and derivatives of those terms are addressed in C.R.C.P. 232.29.

"Nonlawyer" means a person (i) who is not licensed, authorized, or otherwise certified to practice law in Colorado by the supreme court~~,~~ (including a disbarred lawyer) or (ii) who supervises, manages, or otherwise controls a person practicing law in Colorado.

"Person" includes an individual, a trust, or an entity, which includes a firm, association, corporation, partnership, or limited liability company.

[MOVED FROM SUBSTANTIVE TEXT IN 252.2]

"Practice of law" includes the following (unless such action is being actively supervised and controlled by a lawyer duly licensed to practice law in Colorado who has total responsibility and/or liability therefore):

(1)Protecting, defending, negotiating, or enforcing the legal rights or duties of another person;

(2)Representing another person before any tribunal or, on behalf of another person, drafting pleadings or other papers for any proceeding before any tribunal or involving any transaction or asset in Colorado;

(3) Counseling, advising, or assisting another person in connection with (i) the legal rights or duties of that person~~'s legal rights or duties~~ or (ii) the substantive or procedural laws of Colorado;

~~(2)~~(4) Exercising legal judgment in preparing, negotiating legal aspects of, interpreting the legal implications of, or otherwise communicating about the legal effect of Colorado law;~~for another person;~~

~~(3)~~(5)

Any other activity the supreme court determines to constitute the practice of law; and

(6) Any other activity that controlling legal authority reasonably suggests constitutes the practice of law.

"Proceeding" means any investigative or judicial proceeding under C.R.C.P. 232, including preliminary investigations under C.R.C.P. 232.9.

[MOVED FROM SUBSTANTIVE TEXT IN 252.2]

"Prohibited Activities" or any variation thereof means the unauthorized practice of law by a nonlawyer and includes the following:

(1) Exercising, controlling or directing another person in the exercise of legal judgment to advise a third party ~~another person~~ about the legal effect of a proposed action, decision, or legal issue;

(2) Exercising legal judgment to advise another person about legal remedies or possible courses of legal action available to that person or a third person;

~~(1)~~(3) Exercising legal judgment to select a legal document for another person or to prepare a legal document for another person, other than solely as a typist or scrivener;

(4) Exercising legal judgment when representing or advocating for another person in a negotiation, settlement conference, mediation, or alternative dispute resolution proceeding unless the person exercising such judgment is also simultaneously doing so on its own behalf;

~~(2)~~(5) Exercising legal judgment to represent or advocate for another person in a hearing, trial, or other legal proceeding before a tribunal;

(6) Advertising or holding oneself out, either directly or impliedly, as an attorney, a lawyer, "Esquire," a legal consultant, or a legal advocate, or in any other manner that conveys capability or authorization to provide unsupervised (or inadequately supervised) services involving the exercise of legal judgment;

~~(3)~~(7) Owning or controlling an ~~for-profit~~ entity that is not authorized under C.R.C.P. 265 and that provides services involving the exercise of legal judgment;

~~(4)~~(8) Soliciting, sharing in, or accepting receipt of any fees for services involving the exercise of legal judgment;

(9) Owning or controlling (other than for purposes of technical support) a website, application, software, bot, or other technology that interactively offers or provides services involving the exercise of legal judgment; and

(10) Performing any other activity that constitutes the practice of law as set forth ~~in subsection (b) above~~herein.

"Regulation Committee" refers to the Legal Regulation Committee, as identified in C.R.C.P. 232.5.

"Regulation Counsel" refers to the Attorney Regulation Counsel, as identified in C.R.C.P. 232.6.

"Respondent" means a nonlawyer in a civil injunctive or contempt proceeding under this rule.

"Restitution" means the return of fees, money, or other things of value that were paid or entrusted to a nonlawyer in exchange for performing or promising to perform prohibited UPL activities.

"Supreme court" refers to the Colorado Supreme Court.

"This rule" means all sections of C.R.C.P. 232.

"This section" means a single section of this rule, for example C.R.C.P. 232.2.

"This subsection" means a portion of a section of this rule, for example C.R.C.P. 232.2(a) or

C.R.C.P. 232.2(b)(1).

"Tribunal" means a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when, after the party or parties are given the opportunity to present evidence or legal argument, a neutral official renders a binding legal judgment directly affecting a party's interests in a particular matter.

"UPL" means "unauthorized practice of law," (i) as set forth ~~in~~herein ~~C.R.C.P. 232.2(b) (c).~~) or under any other controlling legal authority or (ii) that otherwise constitutes the practice of law.

Rule 232.2. Jurisdiction and Prohibited UPL Activities

~~(b)~~(a) Jurisdiction. Jurisdiction exists under this rule over any nonlawyer who engages or attempts to engage in the practice of law in Colorado~~. The~~ , otherwise receives compensation for the practicing of or reselling of services that are the practice of law ~~occurs "~~in Colorado~~" if the nonlawyer takes the actions at issue within~~, or otherwise communicating an intention to influence judicial proceedings or to direct the ~~geographic boundaries of Colorado, if the recipient~~exercise of legal ~~services was~~judgment by another in Colorado ~~at the time of the actions, or if the actions involve a tribunal located in Colorado.~~

~~(c)~~(b) Prohibition on the Unauthorized Practice of Law. Unless authorized by supreme court

case law, federal law, tribal law, or other valid law, a nonlawyer may not engage in the practice of law. ~~"Practice of law" includes the following:~~

~~(1) Protecting, defending, or enforcing the legal rights or duties of another person;Representing another person before any tribunal or, on behalf of another person, drafting pleadings or other papers for any proceeding before any tribunal;~~

~~(2) Counseling, advising, or assisting another person in connection with that person's legal rights or duties;~~

~~(3) Exercising legal judgment in preparing legal documents for another person; and~~
~~(4) .~~

~~(d) Prohibited Activities. The unauthorized practice of law by a nonlawyer includes the following:~~

~~(1) Exercising legal judgment to advise another person about the legal effect of a proposed action or decision;~~

~~(2) Exercising legal judgment to advise another person about legal remedies or possible courses of legal action available to that person;~~

~~(3) Exercising legal judgment to represent or advocate for another person in a negotiation, settlement conference, mediation, or alternative dispute resolution proceeding;~~

~~(4) services involving the exercise of legal judgment;~~

~~(5) Owning or controlling a for-profit entity that is not authorized under C.R.C.P. 265 and that provides services involving the exercise of legal judgment;~~

~~(6) Soliciting any fees for services involving the exercise of legal judgment;~~

~~(7) Owning or controlling a website, application, software, bot, or other technology that interactively offers or provides services involving the exercise of legal judgment; and~~

~~(8) Performing any other activity that constitutes the practice of law as set forth in subsection (b) above.~~

~~(d)~~(c) Invalid Defenses. Invalid defenses to civil injunctive or contempt claims under this rule include:

(1) That the respondent was acting pursuant to a power of attorney;

(2) That the respondent did not directly charge or receive a fee therefor or that such fee is

otherwise mingled with fees not directly charged for the exercise of legal judgment; and

(3) That the respondent, in the course of engaging in an activity prohibited under subsections (c)(1)-(5) or (7)-(10) above, did not hold herself or himself out as authorized to practice law.

~~(e)~~ (d) No Implied Limitation on Authority or Jurisdiction. Nothing in this rule shall be construed as a limitation on the authority or jurisdiction of any tribunal to punish for contempt a nonlawyer who engages or attempts to engage in the practice of law in Colorado in a matter within the jurisdiction of that tribunal. Nor shall this rule be construed as a limitation on any civil remedy or criminal proceeding that may otherwise exist.

From: Susan Harris
To: stevens, cheryl
Subject: Proposed UPL rules
Date: Tuesday, July 21, 2020 3:29:17 PM

Ms. Stevens,

I think we need to add in the language somewhere and specifically that preparation of estate planning documents by nonlawyers (including people selling canned trusts/wills/transfer documents that do not comply with Colorado law and procedures, and people preparing estate planning documents who are not licensed in Colorado) is UPL, as is an attorney assisting nonlawyers who are preparing estate planning documents. You have a section that provides examples of nonlawyers preparing legal documents. Please add an estate planning example.

We very often are called by clients to fix a horrible estate planning mess caused by people and companies pitching multistate estate planning trusts and other schemes (even Suze Orman was doing this! I had to tell a client that a California trust she sold en masse was a disaster for that Colorado resident! The client paid over $2,000 for the forms, classes, and transfers of assets to the trust. Not happy to hear from me that it was not money well spent).

See, for example, *People v. Laden*, 893 P2d 771 (Colo. 1995; *People v. Volk*, 805 P.2d 1116; 19 Colo. Lawyer 1793 (1990) (CBA Ethics Committee Formal Opinion on Collaboration with

Nonlawyers in the Preparation and Marketing of Estate Planning Documents).

I even think that our Supreme Court ought to go after Legalzoom! I make good money cleaning up Legalzoom will messes after people die. . . . .they are fibbing when they say they are not dispensing legal advice along with the documents they sell.

Susan R. Harris
Susan R. Harris & Associates, LLC
5600 Greenwood Plaza Blvd., Suite 255
Greenwood Village, CO 80111
Phone 303-741-4776
Fax 303-741-4669

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments and enclosures) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party who is not the original addressee of this communication any transaction or matter addressed herein.
CONFIDENTIALITY NOTICE: This e-mail transmission, and any documents, files or previous e-mail messages attached to it may contain information that is confidential or legally privileged. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are notified that you must not read this transmission and that any disclosure, copying, printing, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. If you have received this transmission in error, please immediately contact the sender by telephone or return e-mail and delete the original transmission and any attachments without reading or saving in any manner. Thank you.