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James A. Hansen, Chair
Illinois Supreme Court Rules Committee
via email: RulesCommittee@illinoiscourts.gov

Re: Proposal 22-10

Dear Members of the Rules Committee:

We appreciate this opportunity to comment on the proposed amendments to Supreme Court Rules 753, 761 and 763 included in the above proposal.

For purposes of these rules, our current perspective is as counsel for lawyers facing discipline investigations and prosecutions as well as for lawyers seeking to avoid disciplinary entanglements. We also all share the perspective of having formerly been counsel for the ARDC, for a combined total of 49 years.

Based upon our collective experience on both sides of the discipline process, we offer some technical suggestions concerning the proposed amendments to Rule 761. That same experience causes us to strongly oppose amending Rule 763 to give discipline ordered by federal courts or federal agencies or states in which a lawyer is not licensed conclusive reciprocal effect and to strongly oppose amending Rule 753 to give preclusive effect to findings of fact by other jurisdictions for the purpose of allowing the Administrator to seek a more severe sanction than that imposed by the other jurisdiction.

Rule 761(a): Notification of Criminal Dispositions

We agree that if the Supreme Court wishes to require the reporting of misdemeanor cases that result in orders of supervision or some other form of deferred judgment it would be useful to clarify Rule 761(a). By definition, orders of supervision and deferred judgments do not constitute convictions under the criminal statutes of Illinois. But precedent establishes that for purposes of attorney discipline, a disposition of supervision should be deemed dispositive of the conduct which the offender committed even though there has been no judgment of conviction because supervision can be ordered only if the criminal defendant pleads guilty or agrees to a finding of guilt. *In re Rolley,* 121 Ill.2d 222 (1988). It is the plea or finding of guilt that matters, not the precise form of disposition that follows.

Consistent with that rationale and because this rule is intended to apply to dispositions ordered in any state, not just Illinois, where nomenclature might be different, we suggest that rather than giving the term "conviction" a special meaning for purposes of

attorney discipline, the rule be amended to change the description of what has to be reported. Thus we would recommend that the current rule be amended as follows:

Rule 761. Conviction of Crime

(a) Notification. It is the duty of an attorney admitted in this State who is convicted in any court of a felony or misdemeanor, or who pleads guilty or is found guilty of a felony or misdemeanor and sentenced to a disposition that does not include a judgment of conviction, to notify the Administrator of the conviction or plea or finding of guilt in writing within 30 days of the entry of the judgment of conviction or other disposition. The notification is required:

(1) whether ~~a~~the conviction results from a plea of guilty or of nolo contendere or from a judgment after trial;

(2) regardless of the particular statutory designation of a disposition without conviction imposed pursuant to a plea or finding of guilt; and

(~~2~~3) regardless of the pendency of an appeal or other post-conviction proceeding.

Alternatively, we suggest that the language proposed by the ARDC be amended to limit the reporting obligation to its intended scope. The proposal suggests defining conviction as "any disposition including a finding of guilty, an order of court supervision or a deferred judgment." As drafted, the proposal would require reporting "any finding of guilty" whether or not followed by a disposition. That could include a jury's verdict of guilt where the judge subsequently grants judgment notwithstanding the verdict, or a bench finding of guilt which the trial judge later reverses in response to a post-trial motion. We suggest that the ARDC language be amended as follows:

For purposes of this rule, a conviction is any disposition following ~~including~~ a finding of guilty, including an order of court supervision or a deferred judgment.

Rule 761(d)(2): Defining Appellate Process

We understand and do not disagree with the proposal to replace the phrase "appellate process" with the phrase "direct appeal process" for purposes of defining when an automatic stay of the proceedings before the hearing board will terminate. The reliance upon a judgment of conviction as dispositive proof of a lawyer's misconduct is based upon the principle of collateral estoppel. Under that doctrine, a judgment can become binding on a party to a proceeding upon the conclusion of the process of *direct* appeal, not to include avenues of collateral attack. *Ballweg v. City of Springfield,* 114 Ill.2d 107 (1986).

The question we raise is whether it is wise to try to define "direct appeal process" so that its significance will be clear regardless of the jurisdiction in which the criminal process is occurring. We have not researched the appellate procedures in all states and do not purport to know what language might accurately encompass all intended options, but we suggest that it may be more practical to recognize that the phrase "direct appeal process" is a term of art that is defined state by state and leave it at that.

Alternatively, we believe that the language proposed by ARDC does not accurately define the conclusion of the direct appeal process under Illinois law. The proposed language includes "the first appeal from the conviction and if sought, the denial of leave to appeal from the affirmance of the first appeal." The definition should include the possibility of leave to appeal (discretionary review) being granted, and it should leave room for discretionary review by way of a petition for certiorari to the United States Supreme Court where the Illinois Supreme Court has stayed the issuance of its mandate. An option might be as follows:

> (2) . . . For purposes of this rule, the direct appeal process is the first appeal as of right from the conviction and if sought, the denial ~~of leave to appeal from the affirmance of the first appeal~~ or conclusion of discretionary review by any higher court with jurisdiction.

Rule 761(e): Time of Hearing

We agree that the present 60-day rule is impractical. In our experience, it is never met. We agree it should be eliminated as obsolete and that the proposed alternative of "as soon as reasonably practical" is preferable.

Rule 763(a): Reciprocal Effect for Disability Determinations

We have no objection to the proposal to extend reciprocal impact to the determination of a lawyer's disability by another jurisdiction that licenses lawyers for the general practice of law.

Rule 763(b): Reciprocal Effect for Discipline Imposed by Federal Courts or Agencies

We have grave concerns about the fairness of imposing reciprocal discipline upon a lawyer licensed by the Illinois Supreme Court based upon discipline imposed by a federal court or federal agency or discipline entered against an attorney in a state where the attorney is not licensed.

Current Rule 763 provides a procedure whereby the Administrator may invoke a final order of discipline of another jurisdiction in which an Illinois lawyer is also licensed to secure the same discipline of that lawyer in Illinois. The lawyer is precluded from contesting the

factual findings inherent to the other jurisdiction's order of discipline unless the lawyer can show that the procedure in the other jurisdiction was so lacking in notice or opportunity to be heard as to constitute a denial of due process. Also, the attorney can challenge the sanction to be imposed only on grounds that substantially less discipline is warranted under Illinois law.

The current proposal seeks to extend this presumptively conclusive effect to discipline imposed by a federal court or agency or by a jurisdiction in which the lawyer is not licensed. We submit that in light of the significant differences in the impact of discipline imposed by a court or agency which has not conferred a general license to practice law as well as significant differences in the procedures governing discipline in such matters, adoption of the proposal would be inconsistent with current Illinois law governing the doctrine of collateral estoppel, both in general and as that doctrine has been applied to attorney discipline. The proposal invites unjust results for no compelling purpose and should be rejected.

In general, the doctrine of collateral estoppel can be invoked to preclude a party from relitigating an issue decided against the party in another proceeding where the party had a full and fair opportunity to be heard, even if the party invoking the doctrine was not a participant in the prior proceeding. *LaHood v. Couri,* 236 Ill.App.3d 641 (1992). Collateral estoppel is an equitable doctrine, subject to equitable principles, and should be applied only as justice and fairness require. *American Family Mutual Insurance Co. v. Savickas,* 193 Ill.2d 378, 388 (2000). The doctrine will not be applied where the burden of proof is not the same for both the prior and current proceeding. *LaHood,* 263 Ill.App.3d at 646-647. Even where the burden of proof is the same, a party will not be precluded from relitigating an issue if the consequences of the prior proceeding were sufficiently less onerous so as to lessen the party's motivation to defend. *In re Owens,* 125 Ill.2d 390 (1988); *Van Milligan v. Board of Fire and Police Com'rs of Village of Glenview*, 158 Ill.2d 85 (1994).

In the specific context of attorney discipline, collateral estoppel is carefully limited by those general doctrines. In *Owens,* supra, the Court rejected the Administrator's argument that a civil judgment for fraud should be treated the same as a criminal conviction for purposes of conclusively establishing an attorney's misconduct. The Court acknowledged that the burden of proof in civil fraud is clear and convincing evidence and so equivalent to the burden in attorney discipline. However, emphasizing its ultimate responsibility for attorney discipline and its hesitation to relegate fact-finding to adjudicators outside the discipline system which it oversees, the Court observed that because of the high burden of proof in a criminal case and the gravity of the consequences of a criminal conviction, the Court could assume that an attorney found guilty of a criminal offense had made every reasonable effort to cast doubt on his guilt, and thus that the conviction rested on accurate fact finding. The Court held that it could not accord the same deference to a civil fraud action. While serious, the gravity of a civil fraud judgment does not compare to that of a criminal charge, both in terms of damage to one's reputation and threat to one's liberty and livelihood, so that "[t]he risk of unfairly imposed discipline is too great, and the economy to be gained

too minimal, to warrant such an abridgement of the disciplinary process." *Owens,* 125 Ill.2d at 401.[1]

Unless the Court is prepared to depart from *Owens,* the current proposal must be rejected. Without question, the impact of a discipline order of a federal court or agency or a state in which the lawyer is not licensed does not compare with the significance of discipline imposed upon a lawyer's general license to practice. The license conferred by a state or the District of Columbia authorizes an attorney to practice law in any capacity within the jurisdiction where the license has been awarded. It allows a lawyer to appear for clients in any court or administrative agency of that jurisdiction, it is the basis for seeking permission to appear before a tribunal of another jurisdiction, and it is required for all transactional practice within the jurisdiction or beyond as may be authorized under the Rules of Professional Conduct. Losing that license separates a lawyer from the practice of law altogether.

Federal courts and agencies, on the other hand, do not confer general licenses to practice law. They authorize one who has a valid state or DC general license to represent litigants or applicants before the particular federal court or agency. Any discipline they impose impacts only the lawyer's ability to practice in the particular federal district or before the particular federal agency, resulting in a significantly reduced motivation to avidly defend. That impact is not merely hypothetical. We have encountered several instances where lawyers facing federal discipline proceedings chose to default or enter into settlements because they did not wish to practice in the forum in the future and did not wish or could not afford to incur the expense of defending. The same is true for lawyers facing discipline in a state where they are not licensed. Perhaps they appeared *pro hac vice* in a handful of matters, or even a single matter, where their conduct was challenged. Perhaps they perceive that their primary offense was taking business from the local bar. Their motivation to fight against discipline that will impact only their ability to return to the unfriendly jurisdiction would be low.

The differing impact of discipline imposed by federal courts and agencies or by a state in which the lawyer is not licensed also affects the decision of what level of discipline is warranted. A federal court or agency has no reason to consider an attorney's general fitness to practice law or to weigh the impact of the discipline it will impose upon the attorney's overall ability to earn a living by practicing law. Compare, e.g., *In re Levy,* 115 Ill.2d 395, 401 (1987). The differing impact can affect not only sanction decisions, but also the question of whether discipline is warranted at all. We have had several clients who were disciplined by

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[1] See also, *Van Milligan v. Board of Fire and Police Com'rs of Village of Glenview*, 158 Ill.2d 85 (1994). (Supreme Court declined to give preclusive effect to a civil judgment finding that a police officer violated an arrestee's civil rights for purposes of a disciplinary proceeding seeking the officer's termination. While acknowledging that the threshold requirements of collateral estoppel appeared to be satisfied, the Court found that the "officer's substantial interest in a full hearing, where the grounds for any discipline imposed will be *fully* and *fairly* litigated, militate against the application of principles of offensive collateral estoppel in this case." *Van Milligan,* 158 Ill.2d at 97 (emphasis in original).

a federal court or the USPTO where, after conducting an independent investigation, the Administrator determined not to pursue disciplinary charges at all.

In addition, many if not most federal court or agency discipline orders that would be given preclusive effect under the proposal would not meet the general criteria for application of offensive collateral estoppel. Procedures for imposition of discipline by federal courts vary widely and are rarely equivalent to the process afforded to respondents in a state disciplinary proceeding. By way of example, the rules of the United States District Court for the Northern District of Illinois do not afford respondents an evidentiary hearing as a matter of right, and instead, a hearing will occur only when the Executive Committee determines to order one. U.S.D.C., N.D.Ill., Local Rule 83.28(e). The rule includes no guidance or criteria for when a hearing should be ordered, nor does it afford a respondent an avenue for contesting a decision that a hearing will not be held.

Federal courts rarely have professional staff responsible for any part of the disciplinary process. For the Northern District of Illinois, there is no provision for an independent investigation or for an advocate responsible for proving charges. The Executive Committee determines whether charges should be brought based upon the complaint submitted to the Committee and a response from the attorney. The rules provide no authorization for a respondent to conduct discovery. Where a hearing has not been ordered, the Executive Committee which initiated the charges will determine what conduct occurred and what sanction should be imposed based upon the respondent's written answer to a rule to show cause. When there is a hearing, the District Judge to whom the matter was assigned determines whether the conduct charged by that judge's colleagues occurred and what sanction is warranted. There is no rule or precedent identifying what burden of proof governs the findings of fact, and the decision of either the Executive Committee or the assigned judge is final. No appeal is available.

We cite to the Northern District's rules because the Northern District would be the primary source of orders to be given reciprocal effect under this proposal. We have not done a comprehensive survey of federal court and agency discipline procedures, but we would be surprised if any provided the level of process afforded by jurisdictions that confer general licenses to practice law.

Rule 753(e)(7). For similar and additional reasons, we object to the proposed amendment to Rule 753 which would give conclusive effect to "a final adjudication by another jurisdiction as defined in Rule 763(b) (including resignation in lieu of discipline or the equivalent)" for purposes of establishing the attorney's misconduct in any reciprocal case which the Supreme Court has remanded for a hearing and in any case where the Administrator proceeds under Rule 753 rather than Rule 763 in order to secure a harsher sanction than that imposed by the other jurisdiction.

First, we suggest that this proposal will impact only matters where the Administrator proceeds under Rule 753 rather than seeking reciprocal discipline under Rule 763. The

Supreme Court has not ordered a remand for hearing in a reciprocal case since 1994. It seems unlikely that that trend is about to change. In any event, the requirements of the proposed Rule 753(e)(7) are already imbedded in Rule 763(c) so that the proposal would not change anything for a case initiated under Rule 763.

For purposes of matters in which the final adjudication was made by a federal court or agency or another state jurisdiction in which the lawyer is not licensed, the proposal has all the defects discussed above with additional opportunity for injustice. Very much contrary to the Court's decision in *Owens,* the adjudication would have occurred in a matter where the lawyer did not have the same motivation to defend and, in many instances, under procedures less rigorous than those required in Illinois, and it is being used to preclude the subject lawyer from litigating facts where the very purpose of the proceeding is to subject the lawyer to more severe consequences than the lawyer faced in the other proceeding.

The feature of having lesser motivation to defend extends to matters in which the final adjudication was made by a jurisdiction in which the lawyer is also licensed to practice generally. The proposal would render conclusive adjudications where lawyers agreed not to contest charges in return for the promise of a reduced sanction or where lawyers chose not to appeal findings they initially opposed because the sanction imposed was minimal. It is one thing to give conclusive effect to such adjudications for purposes of imposing comparable discipline, and quite another to do so for purposes of imposing a harsher sanction.

The proposal also includes cases in which a lawyer has resigned in lieu of discipline as ones in which the final adjudication would be deemed conclusive proof of misconduct. Resignation in lieu of discipline is an option available in several jurisdictions whereby a lawyer will be precluded from any future practice in the state without admitting misconduct and with no adjudication of contested facts. See e.g., Supreme Court Rules for the Government of the Bar of Ohio, Rule VI, Section 11. It is unclear what misconduct would be conclusively established by such an adjudication since the adjudication requires no finding or admission of facts. Generally speaking, the party seeking to invoke collateral estoppel bears a heavy burden of showing with clarity and certainty what was determined by the prior judgment. *Gale v. Transamerica Corp.*, 65 Ill.App.3d at 558, 22 Ill.Dec. at 96, 382 N.E.2d at 416 (1978). This proposal would appear to evade any such requirement for purposes of attorney discipline.

Resource and Institutional Impact

To our knowledge, the proposed amendments to Rule 763(b) and 753(e)(7) address no pressing concern. For both, the advantage to adoption would be to save the Administrator's resources in independently investigating and proving misconduct which has been sanctioned by another jurisdiction, without regard to whether the procedures of the other jurisdiction meet criteria for invoking collateral estoppel and without regard to whether the respondent lawyer had lesser cause to contest the action of the other jurisdiction. Currently, there is nothing that impedes the Administrator's ability to proceed

against the misconduct if, after investigation, the Administrator deems that to be appropriate. The amendment would simply obviate the need for an independent assessment and proof of the misconduct.

In our experience, when the Administrator has decided not to seek discipline for conduct sanctioned by a federal court or agency, the reason has not been related to limited resources and has instead been based upon the Administrator's independent judgment that the conduct does not warrant discipline. We are aware of no unusual strains on the Administrator's resources that would warrant shortcutting the process to obviate the exercise of that independent judgment. To the contrary, the Administrator's caseload has dropped significantly over the last several years. The number of investigations initiated in 2021 (3881) was just 60% of the number initiated ten years before in 2012, and the number of complaints filed by the Administrator charging misconduct in 2021 (48) was only 40% of what it was in 2012 (118).

There is this additional concern. Illinois has a unique lawyer population. We have the fifth highest number of lawyers of all U.S. jurisdictions. (American Bar Association, 2022 Profile of the Legal Profession, p. 23) We are home to the third most populous US city and we have one of the more diverse populations by state in the U.S. The range of clientele in need of the services of an Illinois-licensed lawyer is vast. It includes multi-national enterprises and their employees, agricultural conglomerates and family-owned farms, major philanthropic organizations, major academic institutions, urban poor and rural poor.

Discipline procedures and outcomes in jurisdictions with less sophisticated bars, less diverse populations, and less expansive legal practices are not equivalent to those that serve the consumers and providers of legal services in Illinois. Since the mid-1970's, Illinois has been renowned for the structure and funding of its attorney discipline system, but increasingly, because of the reliance on current Rule 763, the practices and outcomes for noncomparable jurisdictions are shaping Illinois discipline precedent. For 2019 through 2021, more than a third of the discipline orders entered by the Illinois Supreme Court were based on petitions for reciprocal discipline.[2]

The proposed amendments to Rule 763 would amplify the trend by giving reciprocal effect to new categories of disciplinary decisions, decisions made in the very different context of impacting only an attorney's ability to appear in a particular forum and made pursuant to less rigorous procedures.

We submit that there exists no cause for departing from the Supreme Court's decision in *Owens,* and, in particular, the Court's hesitation to relegate the fact-finding function to proceedings outside of the Court's own formal disciplinary process. The instant proposals

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[2] Data per year:

Total Sanction Orders	Reciprocals	Per Cent
96	31	32%
81	28	34%
84	35	42%

warrant the same observation made by the Court in declining to give civil fraud judgments conclusive effect in attorney discipline proceedings. "The risk of unfairly imposed discipline is too great, and the economy to be gained too minimal, to warrant such an abridgement of the disciplinary process." *Owens,* 125 Ill.2d at 401.

Thank you for this opportunity to comment. We have high regard for the work of the Committee and appreciate the Committee's acceptance of our submission.

Respectfully,

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