



WSBA

ELC Taskforce

(RULES FOR ENFORCEMENT OF LAWYER CONDUCT)

July 1, 2011

Chair's Memorandum to Board of Governors

Appended with this memorandum is a rather substantial "red-lined" version of the ELC's reflecting the work of your Taskforce over the last two years. The Taskforce was created and appointed by the Board of Governors to review and revise the "procedural rules" governing the disciplinary process (ELC's). There may also be one or more "minority reports" from members of the Taskforce. In this memorandum, I have attempted to highlight the major policy issues or concerns that arose during our discussions.

The members of the Taskforce were drawn not only from those directly involved in the disciplinary process at WSBA and hearing officers (including the chief hearing officer) but also included attorneys who regularly represent attorneys in disciplinary proceedings as well as representatives of the Supreme Court. It has been my goal to allow all points of view to be fairly aired and considered during this process and I must commend the members for the consideration and respect provided to opinions from other quarters. While many votes on issues were by narrow margins, most if not the majority of changes were adopted by clear majorities or "consent". I would also comment and commend the excellent "staffing" for this Taskforce by WSBA attorneys Scott Busby and Natalie Cain.

Throughout the process, the goal of the Taskforce has been to maintain first the "integrity" of the disciplinary process in Washington and the "fairness", both to the attorney responding to a grievance as well as the grievant and the WSBA core goal of protecting the public. Always present and overshadowing the considerations has been the concept of ours being a self-regulated profession and the privileges and burden that imposes upon lawyers.

Background

In 2000, the WSBA and the Supreme Court established a "Discipline 2000" Task Force to examine then current disciplinary procedures as reflected in the Rules for Lawyer Discipline and to suggest appropriate changes. The Task Force issued a 214-page report to the Board in 2001 recommending substantive and structural changes to the disciplinary procedural rules and suggesting adoption of a new codification to be known as the Rules for Enforcement of Lawyer Conduct (ELCs). After modifications were incorporated at the behest of the Board, the ELCs were submitted to the Supreme Court, which adopted the ELCs effective October 1, 2002.

After more than eight years of experience with the ELCs, it is appropriate to analyze the impact and effectiveness of the rules in light of the purposes of lawyer discipline, and determine whether any modifications and improvements are warranted. In addition, following the issuance of the ABA's Report on the Washington Lawyer Regulation System in August 2006, the BOG Discipline Committee engaged in a systematic review of the lawyer discipline and disability system as a whole. Many of the recommendations of the Committee that were adopted by the BOG required implementing amendments to the ELCs.

Task Force Purpose

- Review the current ELCs.
- Evaluate whether the rules as adopted in 2002 are functioning as intended and whether amendments are warranted.
- Review the recommendations of the BOG Discipline Committee addressing the ABA Report on the Washington Lawyer Regulation.
- Draft suggested amendments to the ELCs for presentation to the Board of Governors.
- Solicit and receive input on the suggested ELC amendments.
- Draft a final version of a set of suggested amendments to the ELCs.

Suggested Points for Discussion

Accompanying this memo is a “redline” version of proposed changes. However, those reviewing these materials should also be aware that there is an extremely complete “matrix” of all changes, the dates they were considered and action taken, source of proposal, etc. In addition, the minutes were posted on the WSBA website following each meeting and meeting materials were also posted on the website. A link to the ELC Taskforce website is <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/ELC-Drafting-Taskforce> .

In reviewing these rules, it should be kept in mind that the details are very important to the process and that balance and fairness must be maintained between the goals of integrity of the profession, protection of the public and fairness to the respondent lawyer. There will be changes to the rules not highlighted in the discussion below that will be of significance but the following is intended to direct the review by the Board of Governors to key or controversial changes or provisions.

Working Together to Champion Justice

The following is a compilation not of all but rather major “issues” that arose before the Taskforce. The issues are organized herein by the ELC rule in which they arose, not by level of importance or controversy. In preparing this report, I have tried to review the minutes of all 15 substantive meetings. I am also appending to this memorandum (in addition to the “redline version” of the ELC’s) certain other supporting material that was presented to us.

Rule 1.2 *Jurisdiction* – the changes shown would clarify that the jurisdiction of our disciplinary system extends to lawyers admitted in Washington but practicing elsewhere as well as lawyers not admitted in Washington if the lawyers is providing legal services within our state.

Rule 1.4 *Statute of Limitations* – While there are no changes being proposed to this rule, it nonetheless generated substantial discussion. No statute of limitations exists in Washington for disciplinary matters. It was felt that such a statute was not appropriate and that the passage of time could be considered as a mitigating factor.

Rule 2.2 *Selection Panel* – The changes to this and subsequent sections establish a “Selection Panel” to advise the Board of Governors on the appointment or removal of “hearing officers”, the Chief Hearing Officer and attorneys to serve as “conflict review officers”. (Conflict Review Officers handle grievances involving members of the disciplinary system, the Board of Governors, and members of the Supreme Court, for example. See Rule 2.7) There is also provision made for non-lawyer members to be included within the Selection Panel and Disciplinary Board (Rule 2.3).

Rule 2.3 *Disciplinary Board* - At a recent meeting of the B.O.G., a proposal arose to change the composition of the Disciplinary Board by increasing consideration of “diversity” issues. The issue was referred to the Taskforce and was considered at our June 30, 2011 meeting. While there was no reluctance to include “diversity” as a major criteria in the selection of the Disciplinary Board, there clearly was reluctance to completely divest the D. Board of geographic considerations as the proposal had espoused. While the proposal currently in the redlined version was adopted, the vote was by a 1-vote margin. Clearly the concern centered on representation of lawyers practicing in more rural (non-King county) areas and from smaller firms.

Working Together to Champion Justice

There was a clear feeling among some of the members that requiring geographic diversity did not necessarily have to come at the cost of other diversity considerations. While there was not broad support for maintaining the current requirement that the 9 D. Board members must come from each congressional district (or expanding that number to 10 to encompass the new political reality in the State of Washington), there was strong consideration to an amendment to add a provision that “no more than 3 members can come from a single congressional district”.

Chair’s note: More information regarding this issue may be found in the Minutes of 6/30/2011 meeting - see link to website above.

Rule 2.14 ***Restrictions on Representation*** – This rule was formerly codified in a number of different ELCs and has been centralized here. It restricts various individuals, including Governors and hearing officers, for a period of 3 years after service, from representing attorneys against whom grievances have been filed.

Rule 3.1 ***Confidentiality of Disciplinary Proceedings*** - It was noted that in some jurisdictions, including Oregon, the filing of a grievance and all proceedings in the disciplinary process are “public”. The reverse is true in Washington as codified in this section. This was the subject of debate by the Taskforce at various meetings but the clear preference was to maintain the current level of confidentiality. There are exceptions, such as when a respondent lawyer makes a false or misleading statement to the press, in which case the rules provided a limited ability to the Executive Director or Chief Disciplinary Counsel to correct such errors. See Rule 3.4(d).

Chair’s note: More information regarding this issue may be found in the Minutes of 10/28/2010 meeting - see link to website above.

Rule 3.5 ***Notice of Disciplinary Action on WSBA Website*** – In certain limited instances, the Taskforce felt it may be appropriate to at least provide an avenue to make an additional ‘corrective’ note on the website information related to discipline imposed (otherwise permanent in nature). We refer you to Rule 3.5(c)(1).

Chair’s note: More information regarding this issue may be found in the Minutes of 5/19/2011 meeting - see link to website above.

Working Together to Champion Justice

Rule 5.1(e) Vexatious Grievants – The Taskforce considered at length a rule to rein in individuals who file serial and multiple grievances against a lawyer or lawyers that are clearly intended to harass or impose the process for inappropriate purposes. The proposed rule addresses this issue at length and was intended to balance the need to protect lawyers from unwarranted investigations and still preserve the protection of the public. Triggering consideration in this area was a series of vexatious lawsuits brought against prosecutors.

Chair's note: More information regarding this issue may be found in the Minutes of 1/14/2010, 3/10/2010 and 4/8/2010 meetings - see link to website above.

Rule 5.4 Waiver of Attorney/Client Privilege Modifications were made to this rule to protect client information that is otherwise confidential but needed during the course of disciplinary proceedings. While the matter seems straightforward, there was a significant discussion regarding the changes to this rule.

Chair's note: More information regarding this issue may be found in the Minutes of 1/4/2010 meeting - see link to website above.

Rule 5.5 Investigation – This rule continues to allow, in certain instances, discovery in the investigation process at times without notice to the potential respondent lawyer. It also provides for protective orders to preserve confidentiality and challenges.

Rule 5.6 Authority of Chief Hearing Officer – This rule denominates the role of the Chief Hearing Officer to deal with certain matters throughout the disciplinary process.

Rule 6.1 et seq. Diversion – Although significant changes were not made herein, “diversion” is available for less serious misconduct. Certain rules within this section were edited for clarity and in light of the experience in the process over the last few years.

Rule 7.1 Interim Suspension – At the initial meetings of the Taskforce, a well-publicized event involving a lawyer alleged to have committed a “gross misdemeanor” child-related offense had occurred. The Taskforce invited the presentation by a citizens group that felt the lawyer in question should have been immediately suspended based upon his conduct. The Taskforce considered this question at length and appears to have reached a consensus for two changes, one, to limit the rule to felony convictions, and two, to require lawyers to self report such convictions. Still being debated is the issue of what review mechanism should be available to the convicted lawyer. The redline version

Working Together to Champion Justice

does not reflect any of these likely proposed amendments because the Task Force has not yet finalized those proposals, but will do so shortly. In addition to interim suspension upon criminal conviction, the rules provide for a procedure to petition to the Supreme Court for an interim suspension in certain other limited circumstances, notably when the public safety may be threatened. (See Rule 7.2). There is also the potential to appoint a “custodian” of the lawyer’s practice in certain situations (See Rule 7.7).

Chair’s note: More information regarding this issue may be found in the Minutes of 11/5/2009 and 2/3/2011 meetings - see link to website above.

Rule 8.1 et seq. Disability Proceedings – In the past few years, there appears to be some increase in situations involving lawyers being unable to effectively practice as a result of mental disabilities. When such cases are initiated (unlike other disciplinary proceedings in general), the responding lawyer has the right to have counsel appointed at WSBA expense. See Rule 8.10. There is a limited potential to recover such costs under Rule 8.6. The proceedings can often be contentious, difficult and expensive. (See Rule 8.2(c)(2) and 8.5(c)). The right to keep medical records private is also limited in these proceedings.

Rule 8.7 Burden of Proof - There was a very interesting debate on the subject of the “burden of proof” as it applies to ‘disability’ proceedings. So far as can be ascertained, it is the only place where the burden of proof on the respondent lawyer to prevail against a disability proceeding is by a “preponderance of the evidence” while the burden on WSBA to prevail is by a “clear preponderance”. This subject arose in our own considerations and was also discussed during a meeting of the Disciplinary Advisory Round Table (DART) chair by Justice Tom Chambers during which I represented the Taskforce. Ultimately, we determined that the “clear preponderance” language arose from a Supreme Court decision and we would leave it to the Court to address the issue.

Chair’s note: More information regarding this issue may be found in the Minutes of 10/28/2010 meeting - see link to website above.

Rule 8.10 Appointment of Counsel at WSBA Expense – Disability Proceedings
There was consideration by the Taskforce of the current requirement that counsel be appointed at WSBA expense for the respondent lawyer in disability proceedings (if the lawyer cannot afford counsel). The cost impact on WSBA was considered but it was felt by the Taskforce that this provision should remain.

Chair’s note: More information regarding this issue may be found in the Minutes of 10/28/2010 meeting - see link to website above.

Working Together to Champion Justice

Rule 9.3 *RPC Amendment Needed* - Following Rule 9.3 is language for a potential amendment to RPC 5.8 supported by the Committee that we ask be referred to the Rules of Professional Conduct Committee for immediate consideration such that changes therein can be consistent with the ELCs. The subject is when and for what purpose may a disbarred or disciplined lawyer be employed in another law office.

Rule 10.12 *ADR in Disciplinary Proceedings* - While the Taskforce had made some technical changes to this rule already, D.A.R.T. brought to us language to further emphasize the ability to engage in alternative dispute resolution through a “settlement conference”. The language proposed by D.A.R.T. was for the most part adopted unanimously in this rule. See particularly Rule 10.12(h).

Rule 12.3 *Appeal* – This rule is amended to provide that either the Respondent lawyer or WSBA may appeal a decision involving suspension or disbarment. Previously, this right was limited to the respondent lawyer. Review of decisions not involving suspension or disbarment remains subject to discretionary review.

Chair’s note: More information regarding this issue may be found in the Minutes of 3/17/2011 meeting - see link to website above.

Rule 13.9 *Recovery of “Costs” in Disciplinary Proceedings* - Initially, the Taskforce voted to eliminate in its entirety Rule 13.9, thus eliminating the issue of WSBA recovering “costs” of disciplinary proceedings from the Respondent Lawyer. This also relates to Rule 7.7(d) to some degree. However, Julie Mass presented a rather complete and substantial memo on the potential impact this might have on association resources. The Taskforce, both for economic reasons and for the reason that recovery of costs is appropriate in many disciplinary proceedings, reversed its course on this issue and proposes that Rule 13.9 be retained with only minor changes. The revenue received from such matters runs about \$75,000 to \$100,000 a year.

Chair’s note: More information regarding this issue may be found in the Minutes of 3/17/2011 and 6/30/2011 meetings - see link to website above.

Working Together to Champion Justice

Summary: The Taskforce has, I believe, been dedicated, balanced and thorough in its review of the ELCs and addressing the tasks set before it. I cannot commend the Taskforce members and WSBA staff enough for their professional approach to this project.

Respectfully submitted this 1st day of July, 2011.

G. Geoffrey Gibbs, Chair

Working Together to Champion Justice

ggibbs@andersonhunterlaw.com
2707 Colby Avenue, Suite 1001, Everett, WA 98201
425-252-5161 / fax: 425-258-3345