

Minutes – December 16, 2010
ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Erika Balazs (phone), Randy Beitel, Kim Boyce, Kurt Bulmer, Ron Carpenter (phone), James Danielson (phone), Doug Ende, Seth Fine, Bruce Johnson, Joseph Nappi, Jr. (phone), Julie Shankland, Patrick Sheldon, Elizabeth Turner, Charlie Wiggins (phone), Scott Busby, Reporter, and Nan Sullins, AOC/Supreme Court Liaison

Call to Order/Approval of Minutes

The Chair called the meeting to order at 9:08 a.m. Ms. Turner submitted corrections to p. 942 of the minutes from the October 28, 2010 meeting. The Chair called for further corrections. There being none, the minutes from the October 28, 2010 meeting stood approved as corrected.

Subcommittee A - Final Report

The Chair, having been called away temporarily, asked Mr. Johnson and Mr. Busby to continue the meeting with the remainder of Subcommittee A's final report.

ELC 10.2 – (Hearing Officer Assignment) (pp. 947-948)

Mr. Johnson introduced Subcommittee A's proposed changes to ELC 10.2. Ms. Shankland noted that under ELC 7.1(c)(1) or 7.1(c)(2) disciplinary counsel files a formal complaint without an order to hearing. Consequently, a hearing officer would be appointed without a matter having been "ordered to hearing" as provided in ELC 10.2(a). After some discussion of alternative language, Mr. Johnson accepted a friendly amendment deleting the language following "under rule 2.5" from proposed ELC 10.2(a).

Mr. Nappi voiced his concern that, under proposed ELC 10.2(b)(4), the chief hearing officer would be forced to wait until he had identified a new hearing officer before removing one. Mr. Beitel suggested that the appointment of a new hearing officer need not be simultaneous with removal of a hearing officer. Mr. Nappi asked if "upon" could be replaced with "after" in the last sentence of proposed ELC 10.2(b)(4). Mr. Johnson, on behalf of the subcommittee, accepted Mr. Nappi's suggestion as a friendly amendment.

Mr. Nappi shared his concerns regarding the change from "request" to "motion" in proposed ELC 10.2(b). Ms. Shankland explained that in the past, requests for removal have taken the form of informal letters that did not make it to the chief hearing officer. Mr. Nappi suggested that a requirement to file the request with the clerk would solve that problem. Mr. Johnson, on behalf of the subcommittee,

accepted a friendly amendment to retain the means of initiating a removal without cause in ELC 10.2(b)(1) as a “request” while clarifying that the means of initiating disqualification for cause in ELC 10.2(b)(2) is by “motion.” Mr. Johnson called the question and with none opposed, the subcommittee’s proposed changes to ELC 10.2 as amended were adopted.

ELC 10.3 – (Commencement of Proceedings) (p. 949)

Ms. Turner reported that the proposal to give the hearing officer assigned to a case the power to sever charges ordered joined by the review committee generated spirited discussion in the subcommittee, and that the subsequent vote was close. The objection raised in the subcommittee was that it is not appropriate for a hearing officer to overrule the review committee’s order. Mr. Fine noted that the hearing officer is given broad authority under the rules to issue orders regarding the conduct of a hearing. Mr. Bulmer opined that the change, proposed by Mr. Summers, clarified the hearing officer’s power in that regard, expressing a hearing officer’s power to hear argument from the parties on a motion to sever. Mr. Beitel pointed out that the proposed change does not require argument by the parties, but gives a hearing officer the power to sever counts sua sponte. Ms. Shankland opined that the hearing officer should not be in a position to create a situation where multiple sanctions could issue instead of one.

Mr. Bulmer presented Mr. Summers’ reason for suggesting the change: a three week hearing that could have been much shorter if only the most serious offenses had been tried. The group discussed the efficiencies of trying the “lesser counts” in a long formal complaint. Mr. Beitel reminded the group of the bar’s duty as a self-regulating profession to protect the public. In this regard, the “lesser counts” often involve grievants who have a legitimate interest in the proceedings. Mr. Ende proposed a compromise: vest the authority to sever counts that have been consolidated in the chief hearing officer rather than the assigned hearing officer. Mr. Fine suggested that the proposed changes be amended to change “separate formal complaints” to “separate hearings.” Mr. Danielson opined that hearing officers already have the power to control how a matter is heard and the order in which charges are tried without this change to ELC 10.3. Mr. Johnson entertained a motion to change “formal complaints” to “hearings.” With 10 in favor and 2 abstentions the motion to amend passed. Mr. Johnson then called for a vote on the subcommittee’s proposed changes to ELC 10.3 as amended. With 5 in favor and 8 opposed, the proposed changes failed. Consequently, as noted by Ms. Turner, the only change to be made to ELC 10.3 was the removal of “or panel” in ELC 10.3(c), conforming this rule to the previously approved change eliminating hearing panels.

ELC 10.4 – (Notice to Answer) (pp. 950-951)

Mr. Johnson introduced the subcommittee's proposed changes to ELC 10.4, consisting of the removal of reference to hearing panels. He called for a vote and with none opposed, the proposed changes to ELC 10.4 were adopted.

ELC 10.5 – (Answer) (p. 952)

Ms. Turner introduced the proposed change to ELC 10.5—another housekeeping amendment removing references to hearing panels—and moved its adoption. Mr. Johnson called for the vote. With none opposed, the proposed changes were adopted.

ELC 10.6 – (Default Proceedings) (pp. 953-954)

Ms. Turner informed the task force that Subcommittee A does not recommend adopting ODC's proposal that a default result in disbarment (pp. 967-970). Mr. Beitel said that ODC will support its proposal, but will not waste the task force's time if there is no other support for it. Ms. Shankland asked if a respondent lawyer would get notice of a new hearing officer should a hearing officer be removed after granting the default. Mr. Bulmer noted that ELC 10.6(b)(2) trumps a motion to set aside a default, but saw no reason to write rules for that remote possibility. Mr. Bulmer moved adoption of the subcommittee's proposed changes to ELC 10.6. Mr. Johnson called for the vote. With none opposed, the changes were adopted.

ELC 10.7 – (Amendment of Formal Complaint) (p. 955)

Mr. Turner introduced the subcommittee's proposed changes to ELC 10.7—removing the chair of the disciplinary board's involvement in consolidation of charges—and moved for adoption of the changes. Mr. Johnson called for the vote. With none opposed, the changes were adopted.

ELC 10.8-10.11 – (pp. 956-958)

Ms. Turner explained that the subcommittee was not recommending any new changes to these rules, which were included in the report for reference only.

ELC 10.12 – (Scheduling of Hearing) (pp.959-961)

Ms. Turner introduced the subcommittee's proposed changes to ELC 10.12: clarifying that a hearing may be scheduled without a scheduling hearing, adding a settlement conference process similar to that used in Superior Court, clarifying the witness list requirements, and adding sanctions for failure to comply. She and moved adoption of the proposed changes.

Mr. Beitel raised ODC's concern that proposed ELC 10.12(b) requires a hearing officer to convene a scheduling conference. The task force has approved amendments to the ELC that will allow diversion of a grievance after the filing of a formal complaint; the rule as proposed allows for the possibility that a scheduling conference will be set during negotiations for diversion. Mr. Beitel suggested striking "or upon expiration of the time to file an answer." Mr. Bulmer noted that answers may be delayed for a variety of reasons and expressed no opposition to Mr. Beitel's suggested amendment. Mr. Sheldon noted that Mr. Beitel's proposed amendment would mirror the process in medical disciplinary procedures. Mr. Johnson accepted Mr. Beitel's suggestion as a friendly amendment on behalf of the subcommittee and moved adoption of the changes to ELC 10.12 as amended.

Mr. Nappi objected to the requirement in proposed ELC 10.12(c)(2) that hearing officers include a settlement conference determination because a hearing officer may not yet know the case or the parties well enough to make the determination. Mr. Wiggins explained that the proposed language was a response to a suggestion that arose from the discussions of the BOG Discipline Committee: that a settlement conference be held in every case. The Discipline Committee's goal had been to assure that the determination be made, although the Committee had proposed that the chief hearing officer make that determination. Ms. Turner explained that the subcommittee believed that the assigned hearing officer would be in a better position to make the determination. Mr. Beitel suggested that permissive rather than mandatory language would be appropriate. Mr. Sheldon opined that the scheduling order is too early in the process for a hearing officer to make the determination that a settlement conference will be helpful. He said that in medical discipline cases, the scheduling order sets a date by which a party may request a settlement conference. Mr. Bulmer opined that settlement conferences would be rare but that it is important to have a framework for a settlement conference. He moved to amend the subcommittee's proposed changes to ELC 10.12(c)(2) by changing "must" to "may". Mr. Johnson called the vote on Mr. Bulmer's motion. With none opposed, the amendment was adopted.

Mr. Beitel objected to the proposed language in the sample scheduling order contained in the rule that excepts relevancy objections from those objections to exhibits that must be raised pre-hearing. Mr. Bulmer explained that failure to object to exhibits pre-hearing has been treated as an agreement to admit those exhibits. He opined that relevancy objections are never waived and must be allowed at the hearing when an exhibit is introduced. Ms. Balazs noted that a hearing officer cannot determine relevancy until the context is clear. Mr. Beitel moved to strike "other than relevancy" from the rule as proposed. Mr. Johnson called for a second to the motion and hearing none deemed the motion failed. Mr. Johnson moved adoption of the subcommittee's proposed changes to ELC 10.12 as amended. With 1 opposed, the changes were adopted.

The Chair rejoined the meeting before the discussion of ELC 10.13.

ELC 10.13 – (Disciplinary Hearing) (pp. 962-963)

Mr. Johnson introduced the subcommittee's proposed changes to ELC 10.13—making it clear that if the respondent does not appear, the hearing goes on—and moved for their adoption. The Chair deemed the motion seconded. Mr. Bulmer supported the amendments, but opined that due process problems may arise where the respondent does not appear though no fault of his or her own.

Mr. Beitel raised ODC's objection to the added language in ELC 10.13(c) limiting the materials that disciplinary counsel may request be brought to hearing to those materials previously requested. Mr. Bulmer argued that the effect of the current rule was to make the discovery cut-off apply only to respondents and not ODC. Mr. Beitel replied that there is no complete discovery in disciplinary hearings and that a disciplinary hearing is not civil litigation between equally matched parties. Mr. Beitel moved to strike "previously requested" from the proposed changes. The Chair deemed the motion seconded and called for a vote. With 1 in favor, Mr. Beitel's propose amendment failed. The Chair then called for a vote on Mr. Johnson's motion to adopt. With 1 opposed, the subcommittee's proposed changes to ELC 10.13 were adopted.

ELC 10.16 – (Decision of Hearing Officer) (pp,964-965; 1001-1002)

Ms. Turner called the group's attention to the late materials distributed by email (added to the materials as pp. 1001-1002), and moved that the proposed amendment to the subcommittee's proposed changes—allowing the 30-day period for a hearing officer's findings to run from the service of the transcript—be adopted. Mr. Ende opined that since the time frame for the hearing officer's decision is a "soft" deadline, there is no need to create a procedure around the deadline. Mr. Beitel noted that the amendment would encourage hearing officers to ask for a transcript before completing findings, thus adding to the expense of the process. Mr. Danielson noted that when he served as chief hearing officer, he suggested that hearing officers not order a transcript where the recommendation was likely to be less than a suspension. Ms. Turner observed that hearing officers often do not want to finalize their findings without a transcript. The Chair, having deemed Ms. Turner's motion to amend seconded, called for a vote on the amendment. With 2 opposed, the motion carried.

The Chair called for discussion of Subcommittee A's proposed changes to ELC 10.16 as amended. After some discussion of potential due process issues around the submission of proposed findings before the hearing officer has issued an oral or tentative ruling, Mr. Fine suggested that adoption of the proposed changes to ELC 10.16 be postponed and that he and Mr. Bulmer work together on draft language to address the issues. The Chair agreed, and the discussion of the subcommittee's proposed changes to ELC 10.16 was tabled to the next

meeting. Mr. Fine and Mr. Bulmer will circulate the result of their draft amendment among the task force members before the February meeting.

ELC 3.3(c) – (Proceedings When Respondent Asserts Disability)

Mr. Beitel raised ODC's proposal that disability proceedings be public where the respondent asserts incapacity. He reminded the group that a respondent with a mental disability often leaves a trail of damaged grievants who cannot be informed of the progress of their grievances when a matter is moved to disability proceedings, and that the secrecy surrounding disability proceedings does not protect the public. Mr. Beitel urged the task force to reconsider its decision to reject ODC's proposal. Mr. Bulmer expressed the concerns of Mr. Summers about the stigmatization of those with mental illness. Mr. Bulmer shared the opinion of Mr. Summers that it should be sufficient to inform a grievant that disability issues have been raised and that the respondent is suspended during the proceedings. Mr. Beitel informed the group that if there was no support for the proposal, he would not raise it for an official vote again.

Final Matters

The Chair announced that with the exception of ELC 10.16, which had been tabled, the task force had completed discussion of Subcommittee A's final report. The consent calendar items from Subcommittee C will be moved to the top of the agenda for the next meeting. The Chair confirmed that he anticipated the March 17, 2011 meeting will be the final meeting. The Chair asked for minority reports by the March meeting, noting that staff will do their best to compile the complete draft of proposed changes adopted by March 1, 2011.

Next Meetings

February 3, 2011, 9:00 a.m. to 12:00 noon
Materials Deadline: Tuesday, January 25, 2011

March 17, 2011, 9:00 a.m. to 12:00 noon
Materials Deadline: Tuesday, March 8, 2011

Adjournment

The Chair adjourned the meeting at 11:50 a.m.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter