

Minutes – February 3, 2011
ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Randy Beitel, Kurt Bulmer, Doug Ende, Seth Fine, Bruce Johnson (phone), Joseph Nappi, Jr. (phone), Patrick Sheldon, Scott Busby, Reporter, and Nan Sullins, AOC/Supreme Court Liaison

Call to Order/Approval of Minutes

The Chair called the meeting to order at 9:10 a.m. Mr. Beitel submitted a correction to the minutes from the December 16, 2010 meeting. The Chair called for further corrections and, hearing none, deemed the minutes approved.

Subcommittee C - Consent Items

Mr Beitel introduced the consent items from Subcommittee C: an amendment to ELC 12.3 regarding how and when to pay fees for appeals; an amendment to ELC 13.4 clarifying the DBoard's role when a respondent appeals reprimand language; and technical, conforming amendments to ELC 14.1. The Chair called for a vote. With none opposed, the changes were adopted.

Subcommittee C - July 13, 2010 memo re: Discussion Items

Mr. Beitel introduced the subcommittee's discussion items.

ELC 14.2 - (Lawyer to Discontinue Practice) (pp 1016-1019) (including companion changes to RPC 5.8)

The subcommittee's proposed changes to ELC 14.2 and corresponding changes to RPC 5.8 arose from the BOG's approval of the ABA recommendation that the rules be amended to clarify that a lawyer disbarred, suspended, or on disability inactive status cannot work in a law office or as a paralegal. Mr. Beitel explained that the amendments ensure that both rules apply to lawyers who have been suspended/disbarred or transferred to disability status and lawyers who have resigned in lieu of discipline. The operative language of the prohibition remains in RPC 5.8. Mr. Bulmer objected (1) to the inclusion of lawyers who have transferred to disability inactive status and (3) that the terms "employ" and "hire" in the comments are too broad because they might apply to mediators, computer consultants, or other business consultants who are not involved in the delivery of legal services. Mr. Sheldon also strongly objected to the inclusion of lawyers on disability inactive status: there are many reasons to resign due to disability that do not have to do with dishonesty. Mr. Ende informed the group that transfers to disability status are rare. He noted that the rule would not apply to retired or resigned lawyer (who did not resign in lieu). Because most transfers disability inactive are stipulated, Mr. Ende posited that the stipulated order could provide

otherwise than the rule. Mr. Fine agreed that the rule should not apply to lawyers on disability inactive status. Mr. Bulmer asked if there was any support for his objection to the employee/hire language. Mr. Beitel agreed that the proposed language for the comments could be re-worked to address Mr. Bulmer's concerns. The Chair, in light of the light attendance, suggested referring the item back to the subcommittee. Mr. Beitel will circulate new draft language before the next meeting.

Subcommittee B - ELC 7.1, 1.5, & RPC 8.4 (Suspension on Conviction of Certain Crimes) (pp. 1023-1025)

Mr. Fine presented Subcommittee B's proposed changes regarding interim suspension triggered by conviction of certain crimes. Currently a lawyer may be suspended on conviction of a "serious crime," the definition of which included felonies and crimes of dishonesty. The subcommittee's goals were to (1) better define the crimes meriting suspension by replacing "serious crime" with felony and (2) clarify how the ODC is notified of convictions by requiring a convicted lawyer to self report the conviction. The current rule puts the burden of reporting on the superior court clerks, who often do not do so. After some discussion, it became clear that the group agreed in general that only felonies should trigger the rule and that reporting of conviction should be mandatory for the convicted lawyer, but disagreed as to the mechanics of imposing and/or challenging the suspension. The Chair noted the areas of agreement and suggested that the subcommittee continue work on the rest. Mr. Fine will take the remaining issue back to the subcommittee.

ODC Memos

Mr. Beitel introduced three memos from ODC.

ELC 2.6 - (Hearing Officer Conduct) (pp. 1026-1027)

Mr. Beitel noted that the proposed amendments to ELC 2.6 conformed the ELC to recent changes to the Code of Judicial Conduct (CJC). Mr. Bulmer stated that he had no objections. The Chair called for a motion to adopt the proposed changes. Mr. Sheldon so moved and the Chair called for a vote. With none opposed, the amendments were adopted.

ELC 15.5 - (Trust Account Declaration) & 1.2 (Violations of Duties Imposed by the Rules) (pp. 1028-1030)

Mr. Beitel noted that the proposed changes to ELC 15.5 & 1.2 removes disciplinary action for failure to file a trust account declaration, making the ELC consistent with recent amendments to the by-laws, which provide for administrative suspension for failure to file the declaration. Mr. Fine moved to strike the final provision—that supplying false information in the declaration

would subject the lawyer to discipline—as superfluous. The Chair called for a vote. With 2 in favor, 1 opposed, and 1 abstaining, the motion passed. The Chair called for a vote to adopt the proposed changes as amended. With none opposed, the changes were adopted as amended.

ELC 8.3 - (Disability Proceedings During the Course of the Disciplinary Process; ELC 3.3(b) - (Application to Disability Proceedings); ELC 5.3 - (Investigation of Grievance); ELC 8.5 - (Stipulated Transfer to Disability Inactive); & 8.8 - (Reinstatement to Active Status) (pp. 1032-1033)

Mr. Beitel noted that the proposed changes clarify the effect of disability proceedings on open disciplinary proceedings: formal proceedings are stayed, while open investigations may be, but are not required to be, deferred. Mr. Bulmer had no objection to the ODC gathering information on open grievances, but expressed concern about a lawyer in supplemental proceedings, who has asserted incapacity, being subpoenaed to an investigatory deposition. Mr. Ende noted that ODC would be unlikely to subpoena a respondent who might be incompetent to testify, but pointed out previously approved procedures for seeking a protective order. Accepting Mr. Ende's suggestion as fair, Mr. Bulmer next moved to strike the work "indefinitely" from the proposed changes to ELC 8.3(d)(2) as superfluous. The Chair called for a vote; with none opposed the amendment passed. The Chair called for a vote on ODC's proposed changes as amended. With none opposed, the changes as amended were adopted.

Fine-Bulmer Memo (p. 1034)

Mr. Fine introduced the recommendation for changes to ELC 10.16(b) regarding submission of proposed findings. Mr. Nappi expressed his concern that the proposed changes seemed to require a separate hearing regarding proposed findings. Mr. Sheldon moved to adjust the proposed language to address Mr. Nappi's concern. The Chair called for a vote; with none opposed, the adjustment carried. After further discussion, Mr. Ende suggested that the item be held to a meeting with larger attendance. Mr. Beitel so moved and the Chair called for a vote. With one opposed, the motion carried.

Subcommittee C - discussion items held over from June 2010

Noting the foundational nature of these items, The Chair deferred discussion of them to the next meeting where they could receive a more full discussion among a greater number of task force members.

Announcements

The Chair announced his plan for presentment of the Task Force's work to the BOG:

- March 17, 2011 - the Task Force will meet and finalize all remaining proposed changes to the ELC. [A red-line copy of proposed changes adopted through the February 3, 2011 meeting will be distributed well in advance of the March meeting.]
- March 18-19, 2011 BOG Meeting: the Chair will introduce the work, give the BOG background on the work, and submit the task force's proposed changes through the February 3, 2011 meeting for a first reading.
- May 19, 2011 - the Task Force will meet to review all of the adopted proposed changes.
- July 22-23, 2011 BOG Meeting: The complete set of proposed changes will be presented to the BOG for a second reading and action.

Next Meeting

March 17, 2011, 9:00 a.m. to 12:00 noon

Materials deadline: Tuesday, March 8, 2011

May 19, 2011, 9:00 a.m. to 12:00 noon

Materials deadline: Tuesday, May 10, 2011

Adjournment

The Chair adjourned the meeting at 11:00 a.m.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter