Minutes – January 14, 2010 ELC Drafting Task Force

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

Call to Order

The Chair called the meeting to order at 8:40.

Preliminary Matters

The Chair called for corrections to the draft minutes from the November 5, 2009 meeting. Hearing none, the Chair deemed the minutes approved as circulated.

Consent Calendar: Subcommittee B

Mr. Fine explained that Subcommittee B's items on the consent calendar, in the materials at pp. 614–19, represent clarifications rather than substantive changes. The Chair opened the floor for requests to withdraw any items from the subcommittee's list. No requests were made. Ms. Turner moved for approval of the items as submitted; the Chair seconded. There being no objections, the consent calendar items from Subcommittee B were approved unanimously.

Subcommittee B's Request for Guidance Regarding ELC 5.4(b)

Mr. Fine explained that the subcommittee's request for guidance arises from the issue presented in Mr. Bulmer's memo proposing that lawyers be allowed to assert their clients' attorney-client privilege in responding to grievances, materials pp. 612–13, and ODC's response memo, materials pp. 608-610. Mr. Bulmer questioned the Supreme Court's authority to contravene the attorney-client privilege granted by the legislature. He opined that the Supreme Court has no authority to waive the client's privilege, as the Court has no authority over the client. He presented the hypothetical of a criminal defense lawyer who has in his file a communication from a client that amounts to a confession to a crime responding to a grievance filed by someone other than the client. Mr. Bulmer stated that a request from ODC in this situation puts the defense lawyer in the untenable position of breaking his client's privilege to protect himself. He pointed out that WSBA is a large enterprise with many employees and observed that WSBA is not "leak-proof." Mr. Bulmer also expressed doubt that ODC or WSBA could resist disclosure of the file in the face of a federal subpoena. He opined

that the sole justification for the rule is to make investigations easier for ODC and that this justification insufficient.

At the Chair's invitation, Mr. Ende presented ODC's position. Mr. Ende reminded the Task Force that this debate was had by the Discipline 2000 Task Force and that the issues were discussed, evaluated, and resolved. Further, the Discipline 2000 Task Force's recommendation was reviewed the BOG and then by the Supreme Court, which decided to retain the rule. The rule implements the Supreme Court's authority to regulate the profession and protect the public, and is in keeping with the purposes of lawyer discipline. He explained that the Court has the authority to enact such a rule under its plenary power and its relationship to the profession, as reflected in the requirements under RPC 1.6(b) to disclose certain information covered by the attorney-client privilege. Mr. Ende expressed deep concern about any proposal that turns investigations of lawyer conduct into a process of civil discovery. He was concerned that this transformation would impair the efficiency of the discipline process. He stated that the rule is not merely a rule of convenience; investigations depend on it. He noted that the process has been working well for decades. ODC has investigated thousands of grievances, and a high proportion of its files contain privileged materials. The burden of protecting the privilege is on both the discipline system and respondent ODC has an affirmative obligation under the rules not to disclose privileged information that it has honored for decades. Mr. Ende encouraged the Task Force to view the whole picture.

Mr. Bulmer countered that the exceptions in RPC 1.6(b)(1) merely expresses the existing crime-fraud exception. He did not remember the issues being discussed in Discipline 2000, but opined that even so the time has come to revisit them. Mr. Bulmer reiterated his contention that the rule is merely one of convenience.

The Chair opened the floor for discussion of Mr. Bulmer's suggestion.

Mr. Fine, speaking as an individual rather than subcommittee chair, noted that Mr. Bulmer was unable to identify a single case where a client has come to harm from a respondent lawyer's disclosure to disciplinary counsel. Concerned that the proposal provides a method for stonewalling a bar investigation, Mr. Fine rejected the broad brush approach of eliminating ELC 5.4(b) and suggested that the Task Force look at smaller areas where the rule could be tightened.

Ms. Balazs voiced concern for the situation in which a lawyer receives a bar complaint from a pro se opponent, allowing the opposing party to place the lawyer in conflict with her own client and perhaps to gain privileged information not otherwise available.

Mr. Johnson shared the concern about cases where the grievant is not the client, whose filing of the grievance would be a waiver of the privilege. He did not share the concern for the separation of powers.

Mr. Wiggins, sharing his concerns about eliminating ELC 5.4(b), counseled that the group should craft any exceptions very narrowly.

Mr. Carpenter recognized the Supreme Court's authority to regulate lawyers, but advocated for crafting an exception for the client to affirmatively exercise the client's own privilege. He also shared the concern for leaks in the organization.

Mr. Danielson suggested implementing a very narrowly available in camera review, but was concerned that respondent lawyers would use such review as a tactical device.

Mr. Sheldon shared his concern about grievances filed by prosecuting attorneys against defense counsel. In some cases the respondent's client may be willing to waive the privilege, but not in all cases. Mr. Sheldon opined that because there was no agreement in the subcommittee to carve out a narrow exception to the current rule, eliminating the rule would be the simplest solution. He opined that the situation would not come up frequently.

Mr. Ende countered that nearly 100% of investigations involve privileged information in the lawyer's file. In cases where the respondent is represented, the privilege issue is worked out. But many respondents are motivated to assert the privilege to delay the investigation. Mr. Ende also observed that the discussion had operated under the assumption that giving information to the bar in an investigation operates as a waiver. Mr. Ende assured the group that this is not the case. ODC is acting as an arm of the Supreme Court under an obligation of confidentiality. Disciplinary counsel's examination of material in a lawyer's file is the equivalent of in camera review and serves the same purpose. Mr. Ende also noted that the potential for information to slip through the cracks exists everywhere, not just ODC. He opined that this potential is not an argument for so radically changing the system.

Mr. Beitel provided a historical perspective, having been the reporter for the Discipline 2000 Task Force. Most of the issues discussed in this meeting had been discussed at Discipline 2000 and had been addressed by adding ELC 3.2(b), setting out the obligation of ODC to keep privileged information confidential—with the bar in full agreement.

The Chair identified three positions distilled from the discussion: (1) ELC 5.4(b) should be eliminated; (2) No change is needed; and (3) Some refinement is needed. The Chair polled the Task Force on each position separately. The results were 2 in favor of eliminating ELC 5.4(b), 5 in favor of no change, and 6 (including the 2 in favor of eliminating the rule) in favor of refining the rule. Noting the very slim majority for seeking refinement, the Chair sent the issue back to Subcommittee B for discussion. Ms. Shankland commented that one possible to refinement would be to specify that forced disclosure is not a waiver,

as had been suggested in ODC's memo in the materials at p. 608. Mr. Fine solicited specific proposals for refinement as soon as possible and requested that the language of the proposals be as detailed as possible.

The Chair introduced the next item: Proposals recommended for rejection by Subcommittee B at p. 627. The first such proposal was the addition of "accurate" to the ELC 5.3(e)(1) requirement that a lawyer make a full and complete response to a grievance. Mr. Bulmer asked whether a good faith mistake is disciplinable. He opined that to demand an accurate response adds a level of assuredness that a respondent cannot give. Mr. Danielson moved to reject the addition of accurate. Mr. Sheldon seconded. With a poll of 10 in favor, the motion passed.

Next, Subcommittee B recommended rejecting ODC's proposal, located at p. 372 of the materials, that the respondent stipulate to the sanction to be imposed in the event of breach when entering into the diversion program. Mr. Fine moved to reject the proposal; Mr. Sheldon seconded. The Chair called for discussion.

Mr. Beitel explained that the purpose of the proposal was to make diversion more attractive both to disciplinary counsel and to respondents. In the event of a breach, respondents would gain certainty, and disciplinary counsel would not have to prosecute the case. This would result in more diversions being offered.

Mr. Sheldon countered that the idea of diversion is to get the lawyer help rather than go through prosecution. This proposal would make diversion less palatable because it removes the opportunity to argue mitigation in the event of a breach.

Mr. Bulmer noted that the proposal amounts to a confession of judgment, while the stipulation to misconduct is merely a confession of wrongdoing. He noted that the subcommittee's opposition was merely to the confession of judgment and not to other proposals in the same memo from ODC.

After more some discussion, the Chair polled the group. With 8 in favor and 3 opposed, the motion to reject the proposal passed.

Next, Subcommittee B recommended that the Task Force reject ODC's proposed addition to ELC 7.3, located at p. 502 in the materials. ELC 7.3 provides for immediate interim suspension when a lawyer asserts incapacity to conduct a proper defense to a disciplinary proceeding. The proposal would extend the provision to lawyers who assert incapacity to practice law. The subcommittee had voted 5-1 to reject the proposal as overbroad. Mr. Fine moved to accept the subcommittee's recommendation to reject the proposal. The Chair seconded.

Two opposing views emerged from the discussion of the proposal: (1) the proposal is overbroad and could be unfairly applied where a lawyer asserts a temporary inability to practice, like illness or exhaustion; and (2) there is no harm

in the proposed revision because it would never be invoked where the asserted inability is temporary, and if it were, it would not be approved by the Court.

By a vote of 6 in favor and 5 opposed, the motion to reject the proposed change carried. The Chair assured the Task Force that there would be an opportunity for the minority opinion to be shared with the BOG.

The Task Force moved on to discuss Subcommittee B's recommendation for adoption of proposed ELC 5.1(e), at p. 619, regarding vexatious grievants. Mr. Sheldon moved that the Task Force adopt the recommendation; the Chair seconded.

Mr. Beitel moved to amend the proposal to provide that the decision maker should be the Chief Hearing Officer (CHO) rather than the Chair of the Disciplinary Board. He opined that motions to declare vexatious grievants would be rare, and because the Chair changes every year, the Chair would not develop sufficient familiarity with the issue. The CHO, on the other hand, serves a term of years and thus has a chance to develop more familiarity with the issue. Mr. Beitel also opined that the CHO more likely to be timely in ruling on motions than the Chair.

Mr. Danielson moved to table discussion of who should rule on vexatious grievant motions until the current CHO is present to join the discussion. The Task Force Chair tabled discussion on who should make vexatious grievant rulings, clarified that the motion before the Task Force was whether to adopt a vexatious grievant rule, and called for discussion.

Mr. Sheldon observed that both ODC and respondents' counsel agree that the problem of vexatious grievants must be dealt with and that debate in the subcommittee centered on narrowly defining "vexatious grievant." Mr. Wiggins, Mr. Johnson, and Mr. Carpenter also expressed agreement with the proposed rule.

Mr. Fine acknowledged that vexatious grievants exist and that frivolous grievances are filed. However, allowing lawyers to bring motions to identify a grievant as vexatious will result in cross harassment of grievants. The process already disposes of vexatious grievances by allowing for dismissals without requiring a response from the respondent lawyer. Mr. Fine warned that the proposed solution may create a bigger problem than the one it is meant to solve.

Ms. Turner opined that the power to file the motion should be reserved to disciplinary counsel. This opinion encountered vigorous opposition from respondents' counsel. Mr. Sheldon said that the definition provided in the rule would prevent the abusive use of vexatious grievant motions. Mr. Bulmer noted that filing the motion would not stay the disciplinary investigation. Mr. Ende observed that allowing the respondent to petition would open the door to a

petition in response to an isolated grievance against a single lawyer, which is not the situation that the rule was meant to address.

The Chair polled the members on the motion to adopt the language as proposed, reserving the issue of who the decision maker should be. With 8 in favor, 3 in opposition, and 1 abstention, the motion carried.

Further discussion of Subcommittee B's proposals for adoption was set over to the February meeting. The Chair also proposed adding a meeting in March.

Next Meetings

Thursday, February 11, 2010 10:00 a.m. to 12:00 noon Consent Calendar: entries from Subcommittee C Deadline for Materials: Tuesday, February 2, 2010

March: Date to be determined

Thursday, April 8, 2010 10:00 a.m. to 12:00 noon Consent Calendar: to be determined Deadline for Materials: Tuesday, March 30, 2010

Adjournment

The Chair adjourned the meeting at 10:40.

Minutes Respectfully Submitted by

Scott Busby Disciplinary Counsel Task Force Staff Reporter