

**Minutes – March 17, 2011**  
**ELC Drafting Task Force**

Present: Geoff Gibbs, Chair, Erika Balazs (phone), Randy Beitel, Kim Boyce, Kurt Bulmer, Ron Carpenter (phone), Doug Ende, Seth Fine, Joseph Nappi, Jr. (phone), Julie Shankland, Patrick Sheldon, Elizabeth Turner, Norma Linda Ureña (phone), and Scott Busby, Reporter

---

**Call to Order/Approval of Minutes**

The Chair called the meeting to order at 9:05 a.m. Mr. Beitel submitted corrections to the minutes from the February 3, 2011 meeting. The Chair called for further corrections; hearing none, he deemed the minutes approved as corrected.

**Fine-Bulmer Memo (p. 1048)**

Mr. Fine summarized the “aura of unfairness” that some members of the Task Force perceived in the hearing officer asking for proposed findings without first giving a tentative ruling. Mr. Beitel offered ODC’s proposed amendments (p. 1070). Mr. Beitel said that ODC had no objection in principle, but wanted to preserve the right to present argument in the form of proposed findings. Mr. Nappi concurred with the ODC amendments, but proposed a clarifying amendment. Mr. Bulmer proposed striking “at any time” from the first sentence; Mr. Beitel accepted the proposal as a friendly amendment. Mr. Bulmer moved adoption of ODC’s proposal as amended. With none opposed, the proposed language was adopted as amended.

**Subcommittee C**

Mr. Beitel presented Subcommittee C’s recommendations for discussion.

**ELC 12.3 & 12.4 - (Right of Appeal in ODC) (p. 1049)**

Mr. Sheldon asked that the Task Force revisit its approval of the proposed changes to ELC 12.3 & 12.4 concerning ODC’s right of appeal. Mr. Sheldon opined that giving ODC a right of appeal would add an expense that his clients could not afford. Mr. Ende reminded the group that this issue has been fully debated, from the task force level up to the BOG. Mr. Beitel noted that ODC is unlikely to appeal a suspension recommendation simply to change a one-year suspension to a two-year suspension due to (1) lack of resources and (2) concern for the creation of bad law. Mr. Bulmer noted that ODC is not in the same position of risk as respondent lawyers who face losing the ability to make a living. The Chair expressed his intention to bring highly contested issues like this one to the BOG’s attention in his report, and to give a full opportunity for minority

reports. The Chair reminded the group that the ultimate decision is the BOG's. He said that he did not intend to re-open the issue for a vote, unless there was a strong objection.

### **ELC 13.9 (Costs & Reciprocal Discipline) (pp. 1049-1050)**

Mr. Beitel introduced the subcommittee's proposal clarifying that costs can be imposed in reciprocal discipline only in cases requiring briefing before the Supreme Court. Mr. Sheldon opined that the proposed language is too broad and would impose costs where a respondent lawyer successfully argued that disbarment in another jurisdiction would not be appropriate in Washington, but was ordered to receive a reprimand instead. Mr. Beitel noted that costs in disciplinary proceedings are not awarded on a "prevailing party" basis, and that the situation outlined by Mr. Sheldon is addressed by the anti-boomerang provisions already approved by the task force. Mr. Fine reminded that group that costs are discretionary. The Chair called for a vote on the subcommittee's proposed amendments. With 7 in favor and 2 opposed, the amendments were adopted.

### **ELC 13.1 (Sanctions & Remedies) (pp. 1051-1052)**

Mr. Beitel reported the subcommittee's recommendation that the task force reject ODC's proposal eliminating the distinction between an admonition and a sanction. He argued that since the task force had approved the proposed amendment making admonitions permanent as well as public, there was no longer a reason to make that distinction. Mr. Bulmer opined that there is a distinction because (1) under the ABA Standards for Imposing Lawyer Discipline an admonition is private, and (2) a review committee can order an admonition without notice and an opportunity to be heard. A respondent lawyer's only option in that case is to reject the admonition and force a hearing. Mr. Ende opined that the current structure maintains a distinction without a difference. Mr. Sheldon said that in the health care field, the availability of non-formal discipline allows greater flexibility in negotiating resolutions. Mr. Beitel noted that in lawyer discipline a non-formal resolution is an advisory letter. Mr. Carpenter agreed that an admonition should be considered a sanction and that the reason for the distinction no longer applies. Ms. Shankland agreed with Mr. Carpenter, but objected to characterizing an advisory letter as non-formal discipline. The Chair called for a vote on the subcommittee's proposal that no changes be made. With 5 in favor and 4 opposed, the proposal carried and no changes were adopted.

### **ABA Recommendation 24 (Administration of Reprimands) (pp. 1052-1053)**

Mr Beitel reported that the subcommittee recommended no change to the current procedure by which the President of the WSBA administers a reprimand, even though the BOG had approved the ABA's recommendation that the Supreme

Court do so. Mr. Bulmer noted that the current procedure dates from when reprimands were administered in person. He wondered whether a signed reprimand document was even necessary given that the process has moved away from the idea of public shaming. Mr. Ende agreed with Mr. Bulmer and suggested that the group should address the idea of eliminating the signed reprimand document. Ms. Shankland agreed. Mr. Carpenter opined that reprimands should not come to the Court, where it would necessarily come before all nine justices de novo. The Chair noted his hesitation to draft language at the task force meeting. Mr. Beitel will draft proposed language that reflects the group's discussion and circulate his draft for comment before the next meeting.

**ELC 13.9 - (Awarding Costs to Respondent Lawyers) (pp. 1022, 1053-1056)**

Mr. Beitel directed the task force members to the subcommittee's discussion (at pp. 1022 and 1053-56) of a hearing officer's proposal that a respondent lawyer found not to have violated the RPC be allowed to recover costs. Mr. Bulmer, although he acknowledged the public policy arguments in favor of allowing the WSBA to recover costs, argued that the current system punishes poor lawyers more severely than rich ones. He noted that costs actually recovered from respondents are a small part of the WSBA's budget. Mr. Bulmer moved to amend the subcommittee's report to a recommendation to delete ELC 13.9 in its entirety.

Mr. Carpenter opposed the motion for the reasons given in his comments to the subcommittee's report (pp. 1054-1056). Mr. Ende pointed out that Washington's procedure for assessing costs only against a respondent lawyer is similar to that in most other states. He also reminded the group that costs are discretionary with the Board, which has the ability to address any injustice caused by a cost assessment. Mr. Fine asked how much the WSBA spends to collect costs. Mr. Ende and the Chair responded that very little is spent to collect costs. Ms. Boyce expressed concern that poor respondents don't have as much opportunity to be heard as either ODC or rich respondents. Mr. Bulmer noted that the imbalance has the greatest effect on stipulations, because a respondent will often agree to discipline in order to avoid the high cost of going to hearing.

The Chair called for a vote on Mr. Bulmer's motion to amend the subcommittee's recommendation. With 5 in favor, 4 opposed, and 1 abstaining, the amendment carried. The Chair deemed that the subcommittee's recommendation as amended—that ELC 13.9 be eliminated and conforming amendments be made to other ELC as necessary—had become the recommendation of the task force.

**ELC 11.13 - (Board Sanctions) (p. 1056)**

Mr. Beitel reported that that the subcommittee recommended that the task force not adopt proposed changes to ELC 11.13 that would apply RAP 18.9 to matters

before the Board. Mr. Fine expressed his concern that a lack of authority in the Board to sanction respondent's counsel would result in sanctions against respondents due to counsel's failings. Mr. Beitel noted that the rule as written has been interpreted to allow the Board to sanction respondent's counsel. Mr. Bulmer agreed that the current rule works in this situation, noting his own experience in having been sanctioned under the existing rule. The Chair called for a vote on the subcommittee's recommendation to make no substantive changes to ELC 11.13. With none opposed, the motion carried.

**Subcommittee B Memo re: 7.1(e) (Interim Suspension on Conviction of a Crime) (pp. 1057-1059)**

Mr. Fine presented Subcommittee B's proposal to allow a show cause proceeding in an interim suspension following a criminal conviction on the request of a respondent. Mr. Beitel noted that summary interim suspension based on a felony conviction has been part of Washington's lawyer discipline system since at least 1975. He introduced ODC's alternate proposal (pp. 1060-1062) that retains automatic suspension but provides a safety valve for respondent lawyers to raise jurisdictional issues, and streamlines the process for termination of interim suspension. The Chair called for a vote on adoption of the subcommittee's proposed amendment to ELC 7.1(e). With 6 in favor and 3 opposed, the motion carried.

**ODC Memos**

**ELC 3.4(j) (Clarifying Access for Other Association Counsel) (p. 1063)**

Mr. Beitel introduced ODC's proposal that would allow disclosure of otherwise confidential disciplinary information to persons who require such information to perform the functions of the lawyer disciplinary system or to represent the WSBA in other matters. Mr. Bulmer asked for clarification that the proposal would allow disclosure to such persons but other rules would still govern the use or further disclosure of the information. Mr. Beitel confirmed Mr. Bulmer's interpretation. Mr. Sheldon moved for adoption of the proposed amendment. The Chair deemed the motion seconded and called for a vote. With none opposed, the amendment to ELC 3.4(j) was adopted.

**ELC 9.2(c) (Reciprocal Discipline) (p. 1064)**

Mr. Beitel explained that this proposal is a technical correction to remove reference to a certified copy of another state's discipline and conform ELC 9.2(c) with the proposed amendment to ELC 9.2(b). The Chair called for a vote and with none opposed, the amendment was adopted.

**ELC 14.2 (Lawyer to Discontinue Practice) & RPC 5.8 (Misconduct Involving Disbarred, Suspended, Resigned, and Inactive Lawyers) (pp. 1065-1069)**

Mr. Beitel introduced the revised proposal for amendments to ELC 14.2 and RPC 5.8 (text and comments) to clarify that lawyers who have been transferred to disability inactive status may not be employed to practice law, but may be engaged as independent mediators or consultants not involved in the practice of law. Mr. Ende opined, and Ms. Turner confirmed, that the task force may recommend amendments to the RPC without first referring the matter to the RPC committee. The Chair called for a vote on the proposed amendments to ELC 14.2 and RPC 5.8. With none opposed, the amendments were adopted.

**Next Meeting**

May 19, 2011, 9:00 a.m. to 12:00 noon  
Materials Deadline: Tuesday, May 10, 2011

Tentative, if needed: June 30, 2011, 9:00 a.m. to 12:00 noon  
Materials Deadline: Tuesday, June 21, 2011

**Adjournment**

The Chair noted that the tentatively scheduled July meeting, to be held only if necessary, was rescheduled to June 30, 2011. In response to an inquiry from Ms. Turner, the Chair clarified that any further proposed amendments to 7.1(g) could be brought forward at the next meeting.

The Chair adjourned the meeting at 11:20 a.m.

Minutes Respectfully Submitted by

Scott Busby  
Disciplinary Counsel  
Task Force Staff Reporter