

Minutes – November 1, 2011 ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Erika Balazs (telephone), Randy Beitel, Kurt Bulmer, Ron Carpenter Balazs (telephone), Doug Ende, Bruce Johnson (telephone), Joseph Nappi, Jr. (telephone), Julie Shankland, Nan Sullins, Elizabeth Turner, and Scott Busby, Reporter.

Call to Order / Introduction

The Chair called the meeting to order at 9:05 a.m. The Chair outlined the issues for consideration in light of the action taken by the Board of Governors at their September 22-23, 2011 meeting. Those issues were: (1) should admonitions be maintained? (2) If so, should they be public or non-public? (3) If public, in what form and for how long?

The Proposals Previously Adopted by the Task Force

At the Chair's request, Mr. Ende outlined the current status of admonitions and the changes that would occur as a result of the proposed rule changes previously adopted by the Task Force. Mr. Ende noted that admonitions are less common now than in the years before the diversion rules were adopted. He noted that, in addition to diversion, there are other actions short of an admonition that can be taken to address less serious misconduct: review committee advisory letters and informal disciplinary counsel advisory letters. Finally, Mr. Ende described the problems created by the current rules, which require the WSBA to "pretend" that an admonition that once was public is nonexistent.

Should Admonitions Be Maintained?

The Chair invited discussion on the issue of whether admonitions should be maintained.

Ms. Shankland noted that because the Supreme Court has adopted the ABA Standards, which provide a framework in which admonitions play an essential role, it would be impossible to do away with them without significantly altering the framework that the Supreme Court has put in place. Mr. Bulmer noted that the ABA Standards were created on the assumption that admonitions are non-public, and he opined that when they were made public in Washington the distinction between admonitions and reprimands disappeared. Mr. Nappi said that admonitions were an important tool for hearing officers who would otherwise have no alternative other than dismissal or reprimand in a case of less serious misconduct. He added that in his view there should be a procedure for expunging admonitions upon some affirmative showing by the respondent lawyer.

The Chair polled the Task Force on the question of whether admonitions should be maintained. The Task Force voted seven to one in favor of maintaining admonitions.

Should Admonitions Be Public?

Next, the Chair invited discussion on the issue of whether admonitions should be public.

Mr. Beitel began by drawing a distinction between two issues: (1) whether admonitions should be public and (2) the manner and means by which they are made public. He then introduced two alternative proposals intended to address some of the concerns expressed at the September 22-23, 2011 Board of Governors meeting. He emphasized, however, that it remained ODC's view that admonitions should be both public and permanent, as they are in the proposals previously adopted by the Task Force. Under "Option A" [Meeting Materials at 1219-20], a notice in the *Bar News* or on the WSBA's website concerning an admonition would not provide any identifying information about the respondent lawyer. Under "Option B" [Meeting Materials at 1221-23], there would be a procedure for removing the notice of an admonition from the WSBA Website. In response to questions from Mr. Carpenter, Mr. Beitel explained (1) that under either option admonitions would still be public information and (2) that neither option affects the proposed rules (e.g., 2.3, 2.5) concerning the qualifications for holding an office under Title 2.

Mr. Nappi asked why admonitions could not be made non-public. Mr. Beitel noted that to do so would, in effect, be a return to the pre-1997 rule. Mr. Ende noted that the ABA Model Rules for Lawyer Discipline Enforcement were adopted in 1993, last amended in 1999, and are currently being reviewed by the ABA, which may well opt for a public-admonition approach. He opined that reversing the trend toward more openness by returning to the pre-1997 rule would be regressive and bad policy from the standpoint of public protection.

Ms. Shankland objected to rules that would create a distinction between the public disciplinary information available through the WSBA website and the public disciplinary information available through other means, such as a telephone inquiry to the WSBA. She believed that, notwithstanding the concerns expressed at the Board of Governors meeting about the effect of a public admonition on the admonished lawyer, keeping admonitions public was necessary to maintain the public's respect for the regulatory system.

Mr. Beitel added that making more changes to what is public disciplinary information and what is not would create confusion and make it more difficult for the WSBA to respond appropriately to inquiries from the public.

Mr. Carpenter said he was in favor of keeping admonitions public because, in his view, protection of the public and maintaining respect for the regulatory system

outweighed the admonished lawyer's interest in the non-disclosure of disciplinary information.

The Chair polled the Task Force on the question of whether admonitions should be public. The Task Force voted seven to one in favor of keeping admonitions public.

In What Form and for How Long Should Admonitions Be Public?

Next, the Chair invited discussion on the issues of (a) the means by which admonitions should be publicized and (b) how long they should remain public.

On the first issue, Mr. Ende noted that ODC still supports the proposed rules previously adopted by the Task Force, under which notices of admonitions would be published in the *Bar News* and on the WSBA website. "Option A" and "Option B" were intended as possible ways to address some of the concerns expressed at the Board of Governors meeting.

The Chair polled the Task Force concerning Option A and Option B. Option A had only one supporter; Option B had none.

Discussion turned to the question of whether there is a meaningful distinction between admonitions and reprimands. Mr. Bulmer opined that there is no meaningful distinction unless there is a distinction in terms of public vs. non-public. Mr. Beitel opined that significant distinctions remained even if both were public and permanent. Among them were that, unlike reprimands, admonitions could be ordered by a review committee, that admonitions could be accepted or agreed to by the respondent lawyer with relatively little expense, and that hearing officers give substantially more weight to a prior reprimand than to a prior admonition.

Should an Admonition Preclude One from Holding Office under Title 2?

Next, the Chair invited discussion on the issues raised by Mr. Fine's memo [Meeting Materials at 1224-25] concerning whether an admonition should preclude one from holding office under Title 2.

Mr. Fine, who was not present, noted in his memo that proposed ELC 2.3(b)(2), 2.5(b), and 2.9(b), read together with proposed ELC 3.1(b)(11) and 13.5(d), would permanently preclude a lawyer from holding office under Title 2 if he or she has received an admonition. Mr. Fine proposed amending proposed ELC 13.5(d) by adding the following: "An admonition shall not preclude the respondent from holding any office under Title 2 of these rules." Mr. Beitel proposed an alternative amendment stating as follows: "An admonition shall not preclude the respondent from holding any office under Title 2 of these rules if more than five years has passed since the admonition was final."

Mr. Bulmer supported Mr. Fine's proposed amendment, stating that, in his view, a lawyer should not be permanently precluded from holding office due to a negligent error made in the early years of his or her practice.

Mr. Nappi said that he would like to see a procedure whereby a lawyer could "restore" himself or herself to pre-admonition status through some affirmative action on the lawyer's part.

Mr. Carpenter opined that Mr. Beitel's proposed alternative amendments should be further amended so that a lawyer with multiple admonitions would be precluded from holding office under Title 2. Ms. Shankland expressed her agreement with Mr. Carpenter. Mr. Carpenter then moved the Task Force to adopt of the following proposed amendments to ELC 13.5(d):

13.5(d) Effect. An admonition is a permanent discipline record and is admissible in subsequent disciplinary or disability proceedings involving the respondent. ~~Rule 3.6(b) governs destruction of file material relating to an investigation or hearing concluded with an admonition including the admonition.~~ A first time admonition shall not preclude the respondent from holding any office under Title 2 of these rules if more than five years has passed since the admonition was final.

The motion carried by a vote of 8-0.

Adjournment

After some discussion about scheduling, the Chair adjourned the meeting at 10:16 a.m.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter