

Minutes – October 28, 2010
ELC Drafting Task Force

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

Call to Order/Preliminary Matters

The Chair called the meeting to order at 9:05 a.m. and began with introductions for the benefit of new Chief Hearing Officer Joseph Nappi, Jr. The Chair noted that Mr. Nappi's appointment as a voting member of the task force would be before the BOG at its October meeting. The Chair also informed the task force that the BOG had approved a one year extension of the task force charter. While the Chair does not intend to use the entire additional year, four more meetings will be scheduled. The Chair intends to submit the full text of the task force's recommended rule changes for a first reading at the March 2011 BOG meeting and for a second reading at the June 2011 BOG meeting.

Approval of Minutes

The Chair called for changes and/or corrections to the minutes from the August 12, 2010 meeting. Hearing none, he deemed the minutes approved as submitted.

Subcommittee A - Final Report

Mr. Johnson continued the discussion from the August 12, 2010 meeting about suggested amendments to ELC 3.4 regarding who may authorize release of confidential information. He moved that the task force accept the subcommittee's suggested change: removing both the Board of Governors and the President from the list. The Chair deemed the motion seconded. The Chair, having discussed the issue with the Executive Director and the President, expressed their view that the President should be retained, but made it clear that their view was not binding on the task force. Ms. Shankland asked if counsel appointed under ELC 8.3 should be added to the list of recipients of confidential information. The subcommittee accepted removing the specific reference to "special disciplinary counsel"—thereby allowing disclosures as necessary to "recruit counsel"—as a friendly amendment. The Chair called for a vote, and Subcommittee A's proposed changes to ELC 3.4 were approved.

ELC 3.2(e)(2) – (Confidential Disciplinary Information: Protective Orders) (pp. 880 - 886)

Mr. Johnson introduced the subcommittee's new proposals for changes to ELC 3.2(e)(2) to replace the proposal adopted at the August meeting. Mr. Fine had requested that the subcommittee revisit the provision in 3.2(e)(2) for an "automatic gag order" on filing of a motion for protective order. He submitted two suggestions for amendments (Options A & B) and ODC submitted a third (Option C). Mr. Fine told the group that on reflection he endorsed ODC's suggested language. Mr. Johnson noted that Option C puts the burden on the proponent of a protective order and is clearer than the version adopted at the August meeting. Ms. Turner moved to further amend ELC 3.2 by replacing the adopted language for ELC 3.2(e)(2) with Option C. The Chair deemed the motion seconded. Mr. Beitel, while strongly supporting Option C, directed the task force's attention to Mr. Bulmer's objections on p. 889 of the materials.¹ With one opposed, the further amendment to ELC 3.2(e)(2) was adopted.

ELC 3.4 – (Release or Disclosure of Otherwise Confidential Information) (pp. 890-892)

Mr. Johnson moved for adoption of the subcommittee's proposal to amend ELC 3.4 (as modified earlier in the meeting). The Chair deemed the motion seconded. Mr. Sheldon asked Mr. Beitel to summarize Mr. Bulmer's objections to this rule. Mr. Beitel related that Mr. Bulmer is opposed to discretionary releases generally. Ms. Shankland added that Mr. Bulmer also objected to any release of the information without notice to the respondent lawyer. The Chair called for a vote. With none opposed, the proposed changes (as modified) were adopted.

ELC 3.5 – (Notice of Disciplinary Action or Transfer to Disability Inactive Status) (pp. 893-894)

Mr. Johnson introduced the subcommittee's proposed changes to ELC 3.5. Mr. Beitel noted that the proposals conform the rule to current practice and technology. Ms. Shankland asked why not give notice of administrative suspensions and transfers to inactive status, which, like interim suspensions, are not disciplinary actions. Mr. Ende suggested that administrative suspensions and transfers to inactive status were not included because they are authorized under the APR rather than the ELC. Ms. Turner suggested changing the caption to "Notice of Action Under the ELC." Mr. Carpenter suggested adding "Interim Suspension" to the caption. Mr. Johnson moved to adopt Mr. Carpenter's suggestion. The Chair deemed the motion seconded and with none opposed, the amendment carried. Mr. Johnson moved to adopt the changes to ELC 3.5 with the amended caption. The Chair deemed the motion seconded, and with none opposed, the motion carried.

¹ Mr. Bulmer was not present during the discussion of ELC 3.2 and 3.4.

ELC 3.6 – (Maintenance of Records) & 13.5 – (Admonition) (pp. 895-896)

Mr. Johnson noted that the proposed amendment making the record of admonitions permanent was a recognition that notices of admonitions printed in the *Bar News* would not physically disappear after five years. Ms. Turner added that the accompanying proposed change to ELC 13.5 would make an admonition a permanent disciplinary action. Adoption of the proposed changes was moved and deemed seconded. Ms. Shankland, noting that an admonition may be ordered by a Review Committee (RC), asked if the RC records would therefore become part of the public record. Mr. Beitel said that under the proposed changes, RC records pertaining to admonitions would be treated in the same way as RC records of reprimands. Mr. Johnson moved that the proposed changes to ELC 3.6 & 13.5 be adopted. The Chair deemed the motion seconded; with one opposed, the changes were adopted.

ELC 4.1 – (Service of Papers) (pp. 897-898)

Proposed changes to ELC 4.1 provide specific direction for service on hearing officers and modify the language regarding service where there are issues of mental competence to comply with current statutes and usage. Mr. Johnson moved that the proposed changes be adopted; the Chair deemed the motion seconded. With none opposed, the changes were adopted.

ELC 4.2 – (Electronic Filing) (p. 899)

Mr. Johnson introduced the proposed change to ELC 4.2 that would allow for electronic filing with the Clerk to the Disciplinary Board via email. Ms. Turner expressed the Disciplinary Board's view that originals with signatures should be filed. Mr. Fine shared said while he was Chair, the Board strongly favored the filing of signed originals to satisfy security and authenticity concerns. Mr. Summers said while he was Chief Hearing Officer the usual practice was for orders and decisions to be filed by email. Ms. Boyce said that as a hearing officer her practice was to file signed paper original Findings, Conclusions and Recommendations and to file other orders by email. She felt that it would burdensome to require the filing of paper originals of all orders.

Mr. Fine moved to strike the first clause of the last sentence of proposed ELC 4.2(c) (making the sentence read "A paper original of documents filed under this subsection (c) should thereafter be filed as well."). The group discussed the nature of an "original" and the relative ease with which both inked and electronic signature may be falsified. Mr. Beitel wondered why not simply adopt a rule that allows electronic filing in accordance with GR 30, noting that the discipline system is already behind technologically. Mr. Ende said that the discipline system in Washington needs to move toward an electronic filing system. While

agreeing with Mr. Ende on the need for an electronic filing system, Ms. Shankland expressed her concerns about the authenticity of filed documents. The Chair called for a vote on Mr. Fine's amendment. With six in favor and five opposed, the amendment carried. Adoption of the proposed changes, as amended, were moved and deemed seconded. With none opposed and four abstentions, the changes were adopted as amended.

ELC 4.10 – (Redaction - NEW RULE) (p. 900)

Adoption of the proposed new Rule 4.10 relating to redaction of personal identifiers, as identified in GR 15, 22, and 31, was moved and deemed seconded. With none opposed, the new rule was adopted.

ELC 8.1 – (Action on Adjudication of Incompetency or Incapacity) (p. 901)

Ms. Turner introduced the subcommittee's proposed changes to ELC 8.1 that would (1) add involuntary commitment for more than 14 days under RCW 71.05 to the events that would trigger a transfer to disability inactive status and (2) require that a lawyer's guardian ad litem, if any, be served. Ms. Turner moved that the proposed changes be adopted; the Chair deemed the motion seconded. With one opposed, the changes were adopted.

ELC 8.2 – (Determination of Incapacity to Practice Law) (pp. 902-903)

Ms. Turner introduced the proposed changes to ELC 8.2. The proposed changes would require that a lawyer be notified of ODC's intent to ask an RC for an order authorizing a disability proceeding; make the case caption comply with GR 31; require that an appointed attorney be in active status; and clarify the appeals procedure. Ms. Turner moved for adoption of the proposed changes. The Chair deemed the motion seconded.

There followed a discussion of the appointment of attorneys in emeritus status. APR 8(e) allows attorneys in emeritus status to represent clients on a pro bono basis, but only through a qualified legal services provider. Because ELC 8.2 refers only to attorneys appointed by the Association, which does not qualify as a legal services provider under APR 8(e), emeritus attorneys are not eligible for appointment under ELC Title 8.

Mr. Beitel expressed concern about providing a complete copy of disciplinary counsel's report to respondents in so far as the report relates to confidential sources. Mr. Fine suggested that disciplinary counsel could redact confidential sources from the RC report. Ms. Turner noted that the intent was to give the respondent lawyer everything that the RC has. Mr. Beitel said that disciplinary counsel inform confidential sources that confidentiality is not guaranteed because, under ELC 5.2, the RC can order that the confidential source's identity

disclosed. Mr. Bulmer objected to using any information in the decision process that is not shared with the respondent.

After further discussion, Mr. Ende suggested beginning the sentence in proposed ELC 8.2(a) requiring disclosures to respondents with “Subject to Rule 5.2,” noting that ELC 5.2 allows the respondent to request disclosure. Mr. Carpenter moved to amend the subcommittee’s proposed language per Mr. Ende’s suggestion, and the Chair deemed the motion seconded. Mr. Sheldon echoed Mr. Bulmer’s concern about using information that is not shared with the respondent. Ms. Turner pointed out that the only information withheld under ELC 5.2 is the confidential source’s identity. Mr. Bulmer opined that the confidential source’s identity might be used to enhance his or her credibility. The Chair called for a vote on the amendment. With 6 in favor and 5 opposed, Mr. Ende’s amendment to Subcommittee A’s proposed changes to ELC 8.2(a) passed.

Ms. Turner moved that the task force adopt the subcommittee’s changes to ELC 8.2 as amended. Mr. Bulmer renewed his objection to ELC 8.2(c)(3) (mandatory release for health records) and ELC 8.2(d)(2)(B) (waiver of provider-patient privilege). The Chair called for a vote on adoption of the proposed language for ELC 8.2 as amended. With 2 abstentions, the motion passed and the proposed language for ELC 8.2 was adopted as amended.

ELC 8.3 – (Disability Proceedings During the Course of Disciplinary Proceedings) (pp. 904-906)

Ms. Turner introduced the subcommittee’s proposed changes to ELC 8.3. The proposal codifies the current practice of appointing a different hearing officer for a disability proceeding commenced during a disciplinary proceeding. She moved to adopt the subcommittee’s proposed changes; the Chair deemed the motion seconded. Mr. Fine moved to remove the reference in ELC 8.3(d)(6) to the procedure under rule 8.10(d) because rule 8.10(d) deals with an entirely different situation. The Chair deemed the motion seconded. With none opposed the amendment carried.

The Chair asked what triggers appointment of counsel. Ms. Shankland explained that if no counsel appears for the respondent within 20 days, counsel must be appointed and noted that under the new proposal this requirement is clearer. Mr. Bulmer renewed his previously noted objection to the mandatory release of health information. Mr. Johnson accepted on behalf of the subcommittee Mr. Beitel’s suggestion that “different hearing officer” be substituted for “new hearing officer” in proposed ELC 8.3(a). The Chair called for a vote on the proposed changes to ELC 8.3, as amended. With none opposed, the changes were adopted.

ELC 8.5 – (Stipulated Transfer to Disability Inactive Status) (pp. 907-908)

Ms. Turner introduced the proposed changes to ELC 8.5, which require that a respondent who stipulates to disability status must be represented by counsel. Ms. Turner then moved that the changes be adopted. Ms. Shankland inquired whether a rejected stipulation to disability status becomes public or is it covered by other rules making rejected stipulations non-public. The Chair noted that this question can be addressed later in relation to other rules. Mr. Ende inquired whether proposed new rule 8.10 would cover the situation in which counsel is appointed for the stipulation process but the respondent is no longer amenable to stipulation. Ms. Turner believed that it would. The Chair called for a vote on Subcommittee A's proposed changes to ELC 8.5. With none opposed, the changed were adopted.

ELC 8.6 – (Costs in Disability Proceedings) (p. 908)

Ms. Turner noted that the subcommittee presented ELC 8.6 simply for reference, with no proposed amendments. Mr. Bulmer stated that he would have input when costs are discussed later.

ELC 8.7 – (Burden and Standard of Proof) (p. 909)

Ms. Turner noted that the proposed language for ELC 8.7 sets forth amendments previously approved on consent, as well as a housekeeping change. She moved for adoption of the changes, and the Chair deemed the motion seconded. With none opposed, the changes were adopted.

ELC 8.8 – (Reinstatement to Active Status) (pp. 910-911)

Ms. Turner explained that the only proposed change to ELC 8.8 was to change the time limit to file a notice of appeal from 15 to 30 days. This change is consistent with other rule changes previously adopted. The Chair deemed adoption of the subcommittee's changes to ELC 8.8 moved and seconded. With none opposed, the changes were adopted.

ELC 8.9 – (Petition for Limited Guardianship) (pp. 912-913)

Ms. Turner presented the subcommittee's proposed changes to ELC 8.9. The proposed changes provide an opportunity for parties to respond to a request for authorization to file a guardianship petition before a review committee renders its decision. Ms. Turner moved for adoption of the subcommittee's proposed changes, and the Chair deemed the motion seconded.

Mr. Ende asked who were the "parties" who could respond under 8.9(b). Ms. Turner said that the term refers to persons listed in 8.9(a) except the hearing

officer, who is not a party. Mr. Johnson accepted, on behalf of the subcommittee, a friendly amendment that changed “any party” to “all parties” in new 8.9(b). The Chair called for a vote on the proposed changes to ELC 8.9 as amended. With none opposed, the changes as amended were adopted.

New Rule ELC 8.10 – (Appointment of Counsel for Respondent) (p. 914)

Ms. Turner introduced the proposed new ELC 8.10, which sets forth when and how counsel is appointed for respondents in disability proceedings. Ms. Turner moved for its adoption, and the Chair deemed the motion seconded. Mr. Fine raised concerns about a respondent losing the ability to practice due to failure to cooperate with his or her lawyer. He recommended that the rule track criminal procedures whereby appointed counsel may only withdraw on good cause shown. After further discussion, Mr. Fine proposed a friendly amendment to 8.10(c), removing the language between “showing of” and “good cause.” Mr. Johnson accepted the amendment on behalf of the subcommittee. Mr. Nappi expressed concern over the wording of proposed 8.10(b). Ms. Turner explained that the language is drawn from the guardianship statute. The Chair called for a vote on proposed new rule 8.10 with the friendly amendment. With none opposed, the new rule was adopted as amended.

Next Meetings

December 16, 2010, 9:00 a.m. to 12:00 noon
Materials Deadline: Tuesday, December 7, 2010

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

Adjournment

The Chair adjourned the meeting at noon, noting that the task force would take up Subcommittee A’s proposed changes to Title 10 at the next meeting, followed by the items from Subcommittees B & C that had been held over from the June 10, 2010 meeting.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter