

Minutes – February 10, 2012
ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Erika Balazs (telephone), Randy Beitel, Kurt Bulmer, Ron Carpenter (telephone), James Danielson (telephone), Doug Ende, Seth Fine, Joseph Nappi, Jr. (telephone), Julie Shankland, Nan Sullins, Elizabeth Turner (telephone), Norma Linda Ureña, and Scott Busby, Reporter.

Call to Order/Introduction

The Chair called the meeting to order at 1:02 p.m. The Chair apologized for the rescheduling of the meeting and outlined the primary issues for consideration at the meeting: (1) the removal of the public admonition from the ELC and (2) options for a non-public disciplinary action in its place.

Outline of the BOG Decision

Mr. Nappi requested a report on the BOG meeting at which the decision to eliminate public admonitions was made. Mr. Gibbs explained that BOG members did not want public disclosure of low-level violations of the RPC and that they wished to consider some non-public alternative(s) to replace the public admonition. Mr. Ende added that some BOG members perceived little or no difference between a reprimand and a public admonition.

Discussion of BOG Decision & Task Force Response

Mr. Gibbs opened discussion of how to respond to the BOG decision to eliminate public admonitions.

Mr. Fine noted that admonitions are in an odd position between a reprimand and an advisory letter, and he expressed his personal opposition to non-public disciplinary action. Mr. Carpenter was also opposed to non-public disciplinary action. He noted that the goal of lawyer discipline is to protect the public, not to protect lawyers, and opined that non-public disciplinary action does not accomplish that purpose. He questioned whether it was the Task Force's job to implement the BOG's view. He suggested that the Task Force simply make its recommendation to the BOG, and that it was up to the BOG to accept or reject that recommendation.

Mr. Danielson concurred with Mr. Carpenter. He further noted that the removal of admonitions from the ELC would require changes to the Supreme Court's use of the ABA Standards for Imposing Lawyer Sanctions. Mr. Ende pointed out that the removal of admonitions would leave

a gap in the system of sanctions that the Supreme Court has adopted, and that something would have to be done to address that gap.

Mr. Nappi expressed concern that hearing officers would lose a tool used to address less-serious conduct, and that in such cases hearing officers would have no alternative but to (a) dismiss a case or (b) order a reprimand. Mr. Bulmer responded that an alternative would be to dismiss with a finding of misconduct but without the imposition of a sanction. He suggested that such a finding could be used in future disciplinary proceedings against the same respondent.

Mr. Fine asked whether the rules should be amended to allow a hearing officer to issue an advisory letter after a hearing. Currently, only a review committee can issue an advisory letter. Mr. Danielson pointed out the difficulty of issuing a non-public advisory letter based on a public disciplinary proceeding.

Mr. Bulmer requested clarification of the draft rule change proposals in the February 8, 2012 meeting materials. The Reporter explained that they were intended as a starting point for discussion and that there were many different ways, with different consequences, to implement the broad goal of removing public admonitions from the ELC. Mr. Bulmer suggested that the Task Force simply inform the BOG that the Task Force's recommendation remains the same. Mr. Bulmer opined that the Supreme Court will not accept the elimination of public admonitions anyway.

Ms. Shankland noted the problems created by any proposed rule change that would depart from the ABA Standards. Mr. Beitel noted that the ELC provide for stipulations at any point in the proceedings, but the draft rule change proposals in the meeting materials would not permit a stipulated admonition after a matter has been ordered to hearing. Mr. Fine asked what would happen in cases that would otherwise be resolved with an admonition. Mr. Ende noted that hearing officers may not be comfortable dismissing a case, and that Mr. Bulmer's proposed solution is not expressly provided for in the rules.

Mr. Gibbs said it was his sense is that the BOG was willing to consider other non-public forms of discipline in lieu of admonition. The problem is in determining what will happen in cases that are ordered to hearing, and therefore public, which currently might be resolved by a public admonition. Mr. Bulmer noted that the ABA Standards provide that probation can be imposed alone, without admonition, reprimand, or suspension, and he analogized this to a finding of misconduct without the imposition of a public sanction.

Mr. Fine moved that the Task Force present the BOG with an option whereby (1) admonitions are eliminated entirely from the ELC, (2) hearing officers are authorized to issue advisory letters, and (3) a reprimand would be the presumptive sanction in any case where the ABA Standards

provide that an admonition is the presumptive sanction. Mr. Fine added that under his proposal, an advisory letter issued by a hearing officer would be in the public file and would be permanent, but there would be no published discipline notice and no associated costs, probation, or restitution.

Mr. Danielson suggested an alternative whereby the Task Force would recommend to the BOG that it adopt the rule revisions previously suggested (including public admonitions) but would provide an alternative along the lines suggested by Mr. Fine for the BOG to consider if it rejected the Task Force's recommendation. Mr. Fine withdrew his motion in favor of Mr. Danielson's suggestion.

Mr. Gibbs asked the Task Force whether there was anyone opposed to recommending to the BOG that it adopt the rule revisions previously suggested, but providing an alternative if the BOG rejected that recommendation. There was no opposition. Mr. Gibbs believed that it was the Task Force's responsibility to present a draft without public admonitions. Mr. Danielson wished to recommend strongly to the BOG that it retain public admonitions, but to provide an alternative if the BOG chose to ignore that recommendation.

Mr. Gibbs suggested forming a subcommittee to draft language for an alternative to be presented to the BOG. He also suggested postponing the presentation of this alternative to the April BOG meeting. The Task Force then discussed scheduling issues. There was consensus that a drafting subcommittee should be formed, and that presentation of an alternative draft should be postponed to the April BOG meeting.

ELC 9.2 Issue

Mr. Ende presented a memo regarding ELC 9.2 that was prompted by a very recent communication from the Supreme Court. The members were generally agreed that more time was needed to review the issue before taking it up for discussion. Mr. Gibbs moved the discussion of the issue to the Task Force's next meeting.

Adjournment

The meeting was adjourned at 2:15 p.m., with the date and time of the next meeting to be determined.