



WSBA

WASHINGTON STATE BAR ASSOCIATION

ELC DRAFTING TASK FORCE

Meeting Agenda

January 14, 2010

8:30 a.m. to 10:30 a.m.

**Washington State Bar Association
1325 Fourth Avenue – Suite 600
Seattle, Washington 98101**

1. **Call to Order/Preliminary Matters (8:30 a.m.)**
 - Approval of November 5, 2009 meeting minutes [pp. 596-599]
2. **New Business**
 - ODC Proposal re: Motions - ELC 11.14 [pp. 600-601]
 - ODC Proposals Recommended for Rejection [pp. 602-607]
 - ODC Memo re: ELC 5.4(b) [pp. 608-610]
 - Subcommittee B – Request for guidance re: ELC 5.4 [pp. 611-613]
3. **Consent Calendar**
 - Subcommittee B [pp. 614-619]
4. **Recommendations for Discussion**
 - From Subcommittee B [pp. 619-629]
5. **Future meeting schedule**
 - February 11, 2010, 10:00 a.m. to 12:00 noon
 - Consent Calendar: Subcommittee C
 - Materials Deadline: Tuesday, February 2, 2010
 - April 8, 2010, 10:00 a.m. to 12:00 noon
 - Materials Deadline: Tuesday, March 30, 2010
5. **Adjourn (10:30 a.m.)**

DRAFT Minutes – November 5, 2009
ELC Drafting Task Force

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

Call to Order/Approval of Minutes

The Chair called the meeting to order at 10:00 a.m. and called for corrections to the draft minutes. Ms. Turner identified two instances in which a word had been omitted. The minutes were approved subject to correction of these two errors.

Presentation from Community Watch

The Chair introduced Bethan Tuttle, director of Community Watch, an organization that is interested in the Task Force's work particularly as it relates to ELC 7.1. Ms. Tuttle explained that Community Watch is an advocacy group, national in scope but formed locally in response to a specific incident involving a lawyer convicted of misdemeanor sex crimes. The Chair related that review of ELC 7.1, including some of the concerns raised by Community Watch, is assigned to Subcommittee B, of which Mr. Fine is the chair. Ms. Tuttle outlined three points that Community Watch advocates:

- (1) When a member of the bar is charged with a "predatory crime"—misdemeanor or felony—and that charge is substantiated, notice of the charge should be publicly posted by the WSBA;
- (2) The WSBA should not need to wait for a conviction to act; and
- (3) No registered sex offender should be licensed to practice law because of the special position, privileges, and responsibilities that lawyers enjoy.

The Chair noted that while some of the concerns raised by Community Watch are on the matrix and the group would not be able to discuss them in detail today, the Task Force values hearing Community Watch's point of view. The Chair opened the floor to questions from the Task Force.

Mr. Beitel asked for a clarification of definition of "predatory crime." According to Ms. Tuttle, Community Watch defines a "predatory crime" as any crime where the defendant has gone looking for his prey, such as stalking or luring. Mr. Fine related that there is a statutory definition of the term "predatory" in the Sentencing Reform Act. (See RCWA 9.94A.030(35)).

Mr. Ende asked for clarification of the national scope of Community Watch. Ms. Tuttle confirmed that while Community Watch is incorporated in Washington

State, it is available to people nationwide. Mr. Ende asked if Ms. Tuttle had contacted the ABA regarding their model rules for lawyer discipline. Ms. Tuttle said that she has contacted the ABA. According to Ms. Tuttle, the ABA confirmed that ELC 7.1 is substantially similar to the ABA model rule in that an interim suspension is triggered by a felony conviction, but not by a conviction for a “predatory crime” that is not a felony. Ms. Tuttle said that in the particular case that brought this issue to Community Watch’s attention, the lawyer confessed to his crimes and to using his knowledge of the law to avoid being charged with a felony. Even so, there was no interim suspension and no public notice until discipline (a three-year suspension) was imposed.

Mr. Bulmer suggested that the ELC do provide for a petition for interim suspension even without a felony conviction. Mr. Beitel clarified that the rule, ELC 7.2(a)(1)(A) allows a petition for interim suspension when the lawyer’s continued practice of law poses a substantial threat of serious harm to the public. Mr. Bulmer observed that admission of a registered sex offender would be addressed by a different body: the Character and Fitness Board. Mr. Bulmer opined that a registered sex offender would it is very likely not receive approval from the Character and Fitness Board.

Mr. Beitel asked what specific action Community Watch believes that the WSBA should take before a conviction. Ms. Tuttle explained that Community Watch understands that prosecutors do not inform the WSBA when a lawyer is arrested or charged. She suggested that when the WSBA receives information that a lawyer has been charged with a predatory crime, it should be allowed to exercise discretion in determining (1) whether to seek an interim suspension and (2) whether public notice of the charge should be given.

The Chair thanked Ms. Tuttle for sharing the views of Community Watch with the Task Force.

Subcommittee A’s Request for Guidance

Mr. Johnson expressed Subcommittee A’s difficulty with the language in ELC 2.5(d) and 2.9(b) relating to diversity, which currently makes specific reference to diversity in gender, ethnicity, geography, and practice experience. Mr. Johnson referred the Task Force to Mr. Beitel’s memo at page 592 and 593 of the materials.

Mr. Johnson shared the subcommittee’s concern that while diversity is a generic concept, removing the specific language would not give sufficient policy guidance. After some discussion, Mr. Johnson moved that the Task Force adopt the following diversity language:

Diversity, including diversity in gender, ethnicity, geography, and practice experience, should be considered in making appointments.

Mr. Sheldon seconded the motion. Mr. Bulmer expressed his concern that a statement of public policy like this, focusing on gender and ethnicity, would create “super classes” of diversity, to the possible exclusion of other types of diversity. Mr. Fine stated that while he would agree if the subcommittee were drafting a new rule, removing gender and ethnicity from an existing rule might suggest a diminished commitment to these types of diversity in particular.

The Chair called for a vote on the motion. The motion passed with a vote of 7 in favor, 4 against.

Consent Calendar: Subcommittee A

Mr. Johnson submitted the ELC changes listed on page 594 of the materials for the Task Force’s consent review. Ms. Turner clarified that approving these revisions to the language of the specific rules would not preclude discussions of further changes to those rules. The Chair opened the floor for requests to withdraw any items from Subcommittee A’s list. Hearing none, the Chair declared the listed revisions adopted by consent.

For the Good of the Order

Mr. Bulmer asked how to handle cross-subcommittee items. The Chair expressed a preference for unified policy discussion in this situation. He requested that Task Force members inform Mr. Busby when items that affect more than one subcommittee arise so that the discussion can be coordinated appropriately.

Next Meetings

Thursday, January 14, 2010 at **8:30 a.m. to 10:30 a.m.** (Please note the time change.)

Consent Calendar: entries from Subcommittee B
Deadline for materials: Tuesday, January 5, 2010

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

Thursday, April 8, 2010, 10:00 a.m. to 12:00 noon

Deadline for materials: Tuesday, March 30, 2010

Adjournment

Noting that there was no further business on the agenda, the Chair adjourned the meeting at 11:00 a.m.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: November 16, 2009
RE: Motions on Disciplinary Board Matters
New ELC 11.14

Proposal:

The rules are silent as to the procedure for motions on matters pending at the Disciplinary Board. We propose a new section in Title 11 that is loosely modeled after the RAP Title 17 provisions for motions. We allow the Chair the option of deciding the motion or referring the motion to the full Board for decision, similar to RAP 17.2(b). We have numbered the new section as ELC 11.14, but recommend that it be placed at an appropriate location in the title.

Draft Rule Change:

[NEW SECTION] ELC 11.14 MOTIONS

(a) Content of Motion. A motion must include (1) a statement of the name and designation of the person filing the motion, (2) a statement of the relief sought, (3) reference to or copies of parts of the record relevant to the motion, and (4) a statement of the grounds for the relief sought, with supporting argument.

(b) Filing and Service. Motions on matters pending before the Board must be in writing and filed with the Clerk. The motion and any response or reply must be served as required by rule 4.1.

(c) Response. The opposing party may submit a written response to the motion. A response must be served and filed within ten days of service of the motion, unless the time is shortened by the Chair for good cause.

(d) Reply. The moving party may submit a reply to a response. A reply must be served and filed within seven days of service of the response, unless the time for reply is shortened by the Chair for good cause.

(e) Length of Motion, Response, and Reply. A motion and response must not exceed ten pages, not including supporting papers. A reply must not exceed five pages, not including supporting papers. For good cause, the Chair may grant a motion to file an over-length motion, response, or reply.

(f) Consideration of Motion. Upon expiration of the time for reply, the Chair must promptly rule on the motion or refer the motion to the full Board for decision. A motion will be decided without oral argument, unless the Chair directs otherwise.

(g) Ruling. A motion is decided by written order filed with and served by the Clerk under rule 4.2(b).

(h) Minor Matters. Motions on minor matters may be made by letter to the Chair, with a copy served on the opposing party and filed with the Clerk. The provisions of sections (c), (d) and (f) of this rule apply to such motions. A ruling on such a motion is decided by written order filed with and served by the Clerk under rule 4.2(b).

Memo

To: ELC Drafting Task Force

From: ODC

Date: January 7, 2010

RE: Proposals Recommended for Rejection by Subcommittee B

Seth Fine's December 29, 2009 memo on behalf of Subcommittee B cited three ODC proposals which by a contested vote the Subcommittee voted to recommend for rejection. The memo did not set forth those proposals. Because ODC believes the full Task Force should give consideration to adoption of those proposals, we have attached those proposals so that they may more easily be considered at the January 14, 2010 meeting.

Attachments

From Materials at 357:

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Respondent's Duty To Furnish an Accurate Response
ELC 5.3(e)(1)

Proposal:

ELC 5.3(e)(1) sets forth a respondent's duty to furnish "a full and complete response to inquires and questions." Implicit in a full and complete response is that the response will be accurate. We propose stating this explicitly in the rule.

Draft Rule Change:

ELC 5.3 INVESTIGATION OF GRIEVANCE

....

(e) Duty To Furnish Prompt Response. Any lawyer must promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation. Upon inquiry or request, any lawyer must:

- (1) furnish in writing, or orally if requested, a full, accurate, and complete response to inquiries and questions;
- (2) permit inspection and copying of the lawyer's business records, files, and accounts;
- (3) furnish copies of requested records, files, and accounts;
- (4) furnish written releases or authorizations if needed to obtain documents or information from third parties; and
- (5) comply with discovery conducted under rule 5.5.

....

From Materials at 372-74:

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Streamline Proceedings Following Breach of Diversion Contract
ELC 6.5, ELC 6.6, ELC 6.9, ELC 3.3(c)

Proposal:

In our experience, we find that concluding investigations or taking matters to hearing after a diversion breach is problematic. Given the intervening period of time since the matter was diverted, grievants and witnesses are often difficult to find and are no longer motivated to cooperate in the proceedings.

We propose a new summary procedure for imposing discipline by agreement in the event of a diversion breach. We propose that as part of the diversion contract and affidavit, in addition to the respondent lawyer agreeing to the facts of the misconduct, the respondent must also agree that in the event of a material breach, the agreed upon violations will be deemed to have been established, and that the respondent will receive the agreed upon disciplinary action and be ordered to pay any restitution and costs remaining unpaid from the diversion contract. We provide a summary review mechanism in ELC 6.9 for resolution of any disputes regarding a breach.

Draft Rule Change:

ELC 6.5 DIVERSION CONTRACT

(a) Negotiation. Disciplinary counsel and the respondent lawyer negotiate a diversion contract, the terms of which are tailored to the individual circumstances.

(b) Required Terms. A diversion contract must:

- (1) be signed by the respondent and disciplinary counsel;
- (2) set forth the terms and conditions of the plan for the respondent and, if appropriate, identify the use of a practice monitor and/or a recovery monitor and the monitor's responsibilities. If a recovery monitor is assigned, the contract must include respondent's limited waiver of confidentiality permitting the recovery monitor to make appropriate disclosures to fulfill the monitor's duties under the contract;
- (3) provide for oversight of fulfillment of the contract terms. Oversight includes reporting any alleged breach of the contract to disciplinary counsel;
- (4) provide that the respondent will pay all costs incurred in connection with the contract. The contract may also provide that the respondent will pay the costs and restitution associated with the grievances to be deferred; and

- (5) ~~include a specific acknowledgment provide~~ that a material violation of a term breach of the contract ~~renders the respondent's participation in diversion voidable by disciplinary counsel~~ may result in termination of the diversion; and
- (6) include an agreement that termination due to a material breach of the contract will, subject to the provisions of rule 6.9, result in the imposition of specified disciplinary action, a restitution order under rule 13.7 for any unpaid restitution, and an order for costs and expenses under rule 13.9 for any unpaid costs.

(c) Amendment. The contract may be amended on agreement of the respondent and disciplinary counsel.

ELC 6.6 AFFIDAVIT SUPPORTING DIVERSION

A diversion contract must be supported by the respondent lawyer's affidavit or declaration as approved by disciplinary counsel setting forth the respondent's misconduct related to the grievance or grievances to be deferred under this title. ~~If and setting forth the respondent lawyer's agreement as to the violations deemed established and the disciplinary action and remedies to be imposed in the event~~ the diversion contract is terminated due to a material breach, ~~the affidavit or declaration is admissible into evidence in any ensuing disciplinary proceeding.~~ Unless the diversion is terminated for material breach, so admitted, the affidavit or declaration is confidential and must not be provided to the grievant or any other individual outside the Office of Disciplinary Counsel, but ~~may be provided to a review committee or the Board considering the grievance~~ is a public document upon a final termination of diversion for material breach.

ELC 6.9 TERMINATION OF DIVERSION

....

(b) Material Breach. A material breach of the contract is cause for termination of the diversion. After a material breach,:

(1) Disciplinary counsel must notify the respondent of termination from diversion, and provide the respondent with disciplinary counsel's statement as to any unpaid restitution and costs. and disciplinary proceedings may be instituted, resumed, or reinstated

(2) Unless the chief hearing officer is requested to review a dispute as to the breach or any unpaid restitution or costs under rule 6.9(c), the termination from diversion will be final.

(3) When termination from diversion is final, the chief hearing officer enters an order imposing the disciplinary action provided for in the diversion affidavit, together with any unpaid restitution or costs.

(4) The chief hearing officer's order imposing disciplinary action, restitution and costs is final and not subject to review.

(5) Upon entry of the chief hearing officer's order, that order and the diversion affidavit are public information.

(c) Review By the Chief Hearing Officer. The Chair chief hearing officer may review disputes about fulfillment or material breach of the terms of the contract, including dis-

putes as to restitution or costs, on the request of the respondent or disciplinary counsel. The request must be filed with the ~~Board~~ Clerk within 15 days of notice to the respondent of the determination for which review is sought. Determinations by the ~~Chair~~ chief hearing officer under this section are ~~not subject to further review and are not reviewable in any proceeding.~~ subject to review by the Chair upon a filing by respondent or disciplinary counsel of a request for review with the Clerk within 15 days of service on the respondent of the chief hearing officer's determination. Decisions by the Chair under this rule are final and not subject to further review.

ELC 3.3 APPLICATION TO STIPULATIONS, DISABILITY PROCEEDINGS, AND DIVERSION CONTRACTS

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(c) Diversion Contracts. Diversion contracts and supporting affidavits and declarations under rules 6.5 and 6.6 are confidential, ~~despite rule 3.1(b)(1), unless admitted in to evidence in a disciplinary proceeding ,~~ however, a diversion affidavit made under rule 6.6 is public following a final termination of the diversion contract for material breach. When a matter that has previously become public under rule 3.1(b) is diverted by a diversion contract, that contract and the supporting documents are confidential but the fact that the matter was diverted from discipline is public information.

From Materials at 502:

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: August 4, 2009
RE: Immediate Interim Suspension When Respondent Asserts Incapacity to Practice Law
ELC 7.3

Proposal:

ELC 7.3 provides for an immediate interim suspension when a respondent lawyer in a disciplinary proceeding asserts incapacity to defend the proceeding under ELC 8.3. We believe there should a similar immediate interim suspension whenever a respondent lawyer asserts an incapacity to practice law under ELC 8.3(b)(3).

Draft Rule Change:

ELC 7.3 AUTOMATIC SUSPENSION WHEN RESPONDENT ASSERTING INCAPACITY

When a respondent lawyer asserts incapacity to conduct a proper defense to disciplinary proceedings or incapacity to practice law under title 8, upon receipt of appropriate documentation of the assertion, the respondent must be suspended on an interim basis by the Supreme Court pending the conclusion of the disability proceedings. However, if the hearing officer in the supplemental proceeding files a decision that the respondent is not incapacitated, on petition of either party, the Court may terminate the interim suspension.

Memo

To: ELC Drafting Task Force

From: ODC

Date: January 7, 2010

RE: Retention of the ELC 5.4(b) Prohibition on Assertion of Attorney-Client Privilege

ELC 5.4(b) prohibits lawyers from asserting “the attorney-client privilege or other prohibitions on revealing client confidences or secrets as a basis for refusing to provide information during the course of an investigation.” This rule facilitates the prompt and efficient review and investigation of grievances by enabling disciplinary counsel to evaluate the entirety of a matter without having to engage in piecemeal disputes over what portions of a lawyer’s file ought and ought not to be provided to the Bar, by clarifying with precision the information that a lawyer is required to produce in response to a request for information from the Bar, and by protecting the confidential status of documents entitled to such protection when read with ELC 3.2(b) and ELC 5.1(c)(3)(A).

Kurt Bulmer has distributed a December 29, 2009 memo seeking to eliminate the ELC 5.4(b). This provision has been a cornerstone of disciplinary investigations since 1983 when it was adopted as part of the former Rules for Lawyer Discipline, RLC 2.8(d). The Comments to the adoption of that provision are instructive:

Some lawyers have attempted to thwart investigations, or have expressed a not unreasonable concern, where responses to those investigations have necessitated giving access to confidential information about clients, as they almost always do. This rule recognizes that the attorney-client privilege and (CPR) DR 4-101 [now RPC 1.6] are both intended to protect the client, and should not be used for a lawyer’s self protection. The rule also recognizes, however, that the Bar must respect the confidentiality of client information to which it becomes privy during the course of an investigation.

As noted in the comments, both the attorney-client privilege and the RPC duty of confidentiality are designed to protect the client, not to be used for a lawyer’s self protection. Under our current rules, the mirror image of the duty to disclose otherwise privileged information to disciplinary counsel is disciplinary counsel’s duty to protect confidential client information. The issues now being raised by Mr. Bulmer were also considered by the Discipline 2000 Task Force. In response to Mr. Bulmer’s concerns about the possi-

bility of disciplinary counsel making a discretionary release of privileged information, the Discipline 2000 Task Force proposed new language that stated in unequivocal terms disciplinary counsel's duty to maintain the confidentiality of privileged information. This became ELC 3.2(b):

Notwithstanding any other provision of this title, no information identified or known to the Association to constitute client information that a lawyer would be required to keep confidential under RPC 1.6 may be released under rule 3.4(c) – (i) unless the client consents, including implied consent under rule 5.1(b).

This is consistent with ELC 5.1(c)(3)(A), which authorizes a respondent lawyer's response to be withheld from a grievant when "the response refers to a client's confidences or secrets to which the grievant is not privy." This provision is used quite frequently to protect information that the lawyer has identified as privileged.¹

We are concerned that Mr. Bulmer characterizes the protection given to confidential client information by the current rules as "illusory." To the contrary, ODC strives to faithfully enforce these rules to protect confidential client information and honor the attorney-client privilege. The current rules properly balance the interests of preventing lawyers from thwarting investigations by raising specious privilege claims, with the interests of protecting the legitimate confidentiality of client information. This is a delicate balance, but we believe it has worked well and withstood the test of time for over 25 years.

To simply repeal ELC 5.4(b) would open the door to lawyers who want to raise privilege claims merely to thwart an investigation of their misconduct. Furthermore, it would leave a respondent lawyer in the quandary of having to determine whether, and to what extent disclosure of particular client confidential information is "reasonably . . . necessary . . . to respond to allegations . . . concerning the lawyer's representation of the client." RPC 1.6(b)(5). Without the absolute bar of ELC 5.4(b), respondent lawyers will be left to determine how much disclosure is reasonably necessary, an unsure proposition at best. Resolving disputes over whether information sought by the Bar is being appropriately withheld will likely involve subpoenas and motions, which would increase expense to both respondent lawyers and the lawyer discipline system.

Hypothetical concerns have also been raised as to whether, when privileged matters are provided to ODC in response to a disciplinary inquiry, the privilege will be considered to have been waived in some Federal jurisdiction. If this occurs, it should be

¹ ODC has proposed amended language for ELC 5.4(b) to clarify that respondent's have a duty to identify confidential client information so that it can be protected. See Materials at 359.

dealt with in those Federal jurisdictions, and indeed ODC has proposed language for ELC 5.4(b) that meets this concern. See Materials at 359.

We believe the concept of prohibiting a lawyer from asserting the attorney-client privilege to thwart a disciplinary inquiry, when balanced with the requirement that disciplinary counsel maintain the confidentiality of the information, is sound policy that has worked well for over 25 years, and should be retained.

January 5, 2010

To: Geoff Gibbs, Chair
ELC Drafting Task Force

From: Seth Fine, Chair
Subcommittee B

Re: Request for Task Force guidance – Proposed Amendment to ELC 5.4(b)

At a Subcommittee meeting on December 29, Mr. Bulmer submitted a proposal to allow attorneys in disciplinary proceedings to assert their clients' attorney-client privilege. ELC 5.4(b) currently precludes any assertion of the privilege except for "any lawyer's own privilege or other protection as a client." A copy of Mr. Bulmer's memo is attached.

The Subcommittee decided that we need guidance from the full Task Force. We are therefore requesting instructions from the Task Force with regard to this proposal.

DATE: 12/29/09

TO: Committee B

FROM: Kurt M. Bulmer

RE: ELC 5.4(b) – Assertion of Client’s Privilege

The attorney-client privilege in Washington is statutory, RCW 5.60.060(2), and prohibits the attorney from being examined as to confidential communications between the attorney and the client. The privilege belongs to the client and the lawyer is obligated to assert it on behalf of the client. For a quick general discussion, see Karl B. Tegland, *Courtroom Handbook on Washington Evidence, 2009-2010*, at 281 – 286, (2009 Edition, West/Thomson Reuters). “The federal courts apply the state law of attorney-client privilege with respect to claims or defenses in civil actions that are governed by state law, but articulate through the ‘principles of common law’ the law of attorney-client privilege as it applies to claims and defenses governed by federal law.” Restatement (Third) of the Law Governing Lawyers, Chapter 5, Introductory Note, page 454, (2000).

RPC 1.6 prohibits the lawyer from revealing “information relating to the representation of a client....” “The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rules of confidentially established in professional ethics.” RPC 1.6, Comment [3]. Thus RPC 1.6 encompasses the attorney-client privilege but also covers a much larger scope of information as well.

ELC 5.4(b) provides that:

Attorney-Client Privilege. A lawyer may not assert the attorney-client privilege or other prohibitions on revealing client confidences or secrets as a basis for refusing to provide information during the course of an investigation, but information obtained during an investigation involving client confidences or secrets must be kept confidential to the extent possible under these rules unless the client otherwise consents. Nothing in these rules waives or requires waiver of any lawyer’s own privilege or other protection as a client against the disclosure of confidences or secrets.

Thus ELC 5.4(b) protects an accused lawyer’s attorney-client privilege but not that of the lawyer’s client.

The traditional thinking in Washington has been that the filing of a grievance by a client or former client is waiver of the privilege but that means that a client with a legitimate complaint may be constrained to report because of fears that unrelated confidential information will be released. For example, a client could have a complaint about how the handling of trust funds from a personal injury settlement but not want the lawyer to tell the WSBA that one of the issues which the client and the lawyer were concerned about coming up during the trial was a history of spousal abuse. This would be unrelated to the trust fund issues but yet Washington presumes that 100% of the attorney-client-privilege is waived.

The situation is worse when the complaint is filed by a non-grievant. In such a case, the ELCs eliminate a statutory privilege granted to the citizens of this state by the legislature and given the citizens of this country by the federal common law. If a prosecutor files a grievance against a criminal defense attorney, the ELCs eliminate the attorney-client privilege and upon pain of suspension or disbarment the criminal defense attorney must upon demand from the WSBA produce everything in the lawyer's file no matter how damning about the client. Release of information raises, I believe, serious issues of Fifth Amendment and effective assistance of counsel protections.

I have been advised but have not researched that under the Federal Rules of Evidence if attorney-client information is provided in any context it is deemed waived and, therefore, notwithstanding any other presumed protections of the Washington ELCs, for federal matters there is a serious chance that the privileged materials provided to the WSBA will no longer be protected in the civil litigation.

The protection is supposed to be ELC 3.2(b) which asserts that notwithstanding any other rule, if an attorney would be prohibited from releasing information under RPC 1.6 then the WSBA may not release it under ELC 3.4(c) – (i). Please note that RPC 1.6 is riddled with exceptions which if triggered do not prohibit the lawyer from revealing information including responding to allegations concerning the lawyer's representation of the client and in response to a court order. The presumed protections of the ELC 3.2(b) reference to RPC 1.6 are illusory.

ELC 3.4 lists some of the exceptions which permit the release of otherwise confidential information. ELC 3.4(b) – which is outside the scope of ELC 3.2 (b) - provides that the WSBA can disclose otherwise confidential information to conduct the investigation or to keep the grievant informed except what is prohibited by ELC 3.3(b) (disability proceedings information); 5.4(b) (which does not prohibit anything but rather is the rule at issue here which eliminates protections); and 5.1(c)(3) (which gives rights to clients and protects nothing). ELC 3.4(b) also says that the WSBA, during the course of an investigation, cannot reveal information protected by an ELC 3.2(e) protective order or by "other court order, or other applicable law."

Protective orders under ELC 3.2(e) are discretionary based on a balancing test of competing interests. They can be amended at anytime. No promise of continuing confidentiality can be made in reliance upon ELC 3.2(e).

In short, ELC 5.4(b) takes away a client's attorney-client privilege and offers only illusory protections in return. I am seeking elimination of the rule.

January 5, 2010

To: Geoff Gibbs, Chair
ELC Drafting Task Force

From: Seth Fine, Chair
Subcommittee B

Re: Preliminary Subcommittee B Report

Subcommittee B has completed four meetings to discuss the proposals referred to it. The Subcommittee has voted to make the recommendations set out below. Other proposed rules are still under discussion. All votes were unanimous unless otherwise indicated.

I. CONSENT CALENDAR

The subcommittee recommends that the following proposals be placed on the consent calendar for adoption:

1. ELC 5.1(a), ODC proposal at p. 285:

ELC 5.1 GRIEVANTS

....

(a) Filing of Grievance. Any person or entity may file a grievance against a lawyer ~~admitted to practice law in this state, or against a lawyer specially admitted by a court of this state for a particular case~~ who is subject to the disciplinary authority of this jurisdiction.

2. ELC 5.1(c)(2), ODC proposal at p. 350:

ELC 5.1 GRIEVANTS

....

(c) Grievant Rights. A grievant has the following rights:

....

(2) to have a reasonable opportunity to ~~spea~~ communicate with the person assigned to the grievance, by telephone, ~~or~~ in person, or in writing, about the substance of the grievance or its status;

3. ELC 5.1(c)(3)(a), 5.4(b), and 8.9(d), ODC proposal at p. 355

ELC 5.1 GRIEVANTS

....

(c) Grievant Rights. A grievant has the following rights:

....

(3) to receive a copy of any response submitted by the respondent, except:

(A) if the response refers to a ~~client's confidences or secrets~~ information protected by RPC 1.6 or RPC 1.9 to which the grievant is not privy;

ELC 5.4 PRIVILEGES

....

(b) Attorney-Client Privilege. A lawyer may not assert the attorney-client privilege or other prohibitions on revealing ~~client confidences or secrets~~ information protected by RPC 1.6 or RPC 1.9 as a basis for refusing to provide information during the course of an investigation, but information protected by RPC 1.6 or RPC 1.9 obtained during an investigation involving client confidences or secrets must be kept confidential to the extent possible under these rules unless the client otherwise consents. Nothing in these rules waives or requires waiver of any lawyer's own privilege or other protection as a client against the disclosure of ~~confidences or secrets~~ information relating to the lawyer's own representation as a client.

ELC 8.9 PETITION FOR LIMITED GUARDIANSHIP

....

(d) Action for Limited Guardianship.

....

(4) The guardianship proceedings must be sealed to the extent necessary to protect ~~confidences and secrets~~ information protected by RPC 1.6 or RPC 1.9 of the respondent's clients or on any other basis found by the Superior Court.

4. ELC 5.1(d), BOG proposal at p. 122:

ELC 5.1 GRIEVANTS

...

(d) Duties. A grievant ~~must~~ should do the following, ~~or the grievance may be dismissed:~~

5. ELC 5.3(f)(2)(b)(iv), ODC proposal at p. 358:

ELC 5.3 INVESTIGATION OF GRIEVANCE

.....

(f) Failure To Cooperate.

.....

(B) The procedure for assessing costs and expenses is as follows:

.....

(iv) Rule 13.9(e f) governs Board review of the review committee order.

6. ELC 5.6(d) and 5.7, ODC proposal at p. 366:

ELC 5.6 DISPOSITION OF GRIEVANCE

.....

(d) Authority on Review. In reviewing grievances under this rule, a review committee may:

(1) dismiss the grievance;

~~(4 2)~~ affirm the dismissal;

~~(2 3)~~ dismiss the grievance and issue an advisory letter under rule 5.7;

~~(3 4)~~ issue an admonition under rule 13.5;

~~(4 5)~~ order a hearing on the alleged misconduct; or

~~(5 6)~~ order further investigation as may appear appropriate.

ELC 5.7 ADVISORY LETTER

(a) Grounds. An advisory letter may be issued by a review committee when:

(1) a respondent lawyer's conduct constitutes a violation, but does not warrant an admonition or sanction, a hearing does not appear warranted but it appears appropriate to caution a respondent lawyer concerning his or her conduct; or

(2) a respondent lawyer's conduct does not constitute a violation but the lawyer should be cautioned.

(b) Review Committee. An advisory letter may only be issued by a review committee. An advisory letter ~~but~~ may not be issued when a grievance is dismissed following a hearing.

(c) Effect. An advisory letter ~~does not constitute a finding of misconduct,~~ is not a sanction, and is not disciplinary action, ~~and~~. An advisory letter is not public information, and may not be introduced into evidence in any subsequent disciplinary hearing.

7. ELC 7.2(a), ODC proposal at p. 383.

ELC 7.2 INTERIM SUSPENSION IN OTHER CIRCUMSTANCES

(a) Types of Interim Suspension.

- (1) ~~Review Committee Finding of Risk to Public.~~ Disciplinary counsel may petition the Supreme Court for an order suspending the respondent lawyer during the pendency of any proceeding under these rules if:
- (A) it appears that a respondent's continued practice of law poses a substantial threat of serious harm to the public and a review committee recommends an interim suspension; and or
 - (B) a review committee ~~recommends an interim suspension.~~ orders a hearing on the capacity of a lawyer to practice law under rule 8.2(d)(1); or
 - (C) when a hearing officer or hearing panel or the chief hearing officer orders supplemental proceedings on a respondent lawyer's capacity to defend a disciplinary proceeding under rule 8.3.

8. ELC 9.1, ODC proposal at p 386:

ELC 9.1 STIPULATIONS

....

(h) Costs. A final order approving a stipulation is deemed a final assessment of the costs and expenses agreed to in the stipulation for the purposes of rule 13.9, and is not subject to further review.

9. ELC 9.1(c), ODC proposal at p. 390:

ELC 9.1 STIPULATIONS

....

(c) Approval.

....

(3) By the Supreme Court.

(A) Suspension and Disbarment. All stipulations agreeing to suspension or disbarment approved by the Board, together with all materials that were submitted to the Board, must be submitted to the Court for approval. Following review, the Court issues an order regarding the stipulation.

(B) Matters Pending Before the Supreme Court. At any time a matter is pending before the Court, the parties may submit to the Court for its consideration a stipulation of the parties to resolve the matter. The Court will resolve the matter under such procedure as the Court deems appropriate.

....

10. ELC 9.3, ODC proposal at p. 398:

ELC 9.3 RESIGNATION IN LIEU OF DISBARMENT

(a) Grounds. A respondent lawyer who desires not to contest or defend against allegations of misconduct may, at any time before the answer in any disciplinary proceeding is due, or thereafter with disciplinary counsel's consent, resign his or her membership in the Association in lieu of further disciplinary proceedings.

11. ELC 5.3(3), 15.1, 15.2, and 15.3, ODC proposal at p. 406:

ELC 5.3 INVESTIGATION OF GRIEVANCE

....

(e) Duty To Furnish Prompt Response. Any lawyer must promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation. Upon inquiry or request, any lawyer must:

....

- (5) comply with discovery conducted under rule 5.5 or an examination or audit under title 15.

ELC 15.1 AUDIT AND INVESTIGATION OF BOOKS AND RECORDS

The ~~Board and its Chair have~~ Association has the following authority to examine, investigate, and audit the books and records of any lawyer to ascertain and obtain reports on whether the lawyer has been and is complying with RPC 1.15A:

(a) Random Examination. The Board may authorize examinations of the books and records of any lawyer or law firm selected at random. Only the lawyer or law firm's books and records may be examined in an examination under this section.

~~**(b) Particular Examination.** Upon receipt of information that a particular lawyer or law firm may not be in compliance with RPC 1.15A, the Chair may authorize an examination limited to the lawyer or law firm's books and records. Information may be presented to the Chair without notice to the lawyer or law firm. Disclosure of this information is subject to rules 3.1 — 3.4.~~

~~**(c b) Audit.** After an examination under section (a) or (b), if the Chair determines that further examination is warranted, the Chair may order as part of an investigation under rule 5.3, the Association may conduct an appropriate audit of the lawyer's or firm's books and records, including verification of the information in those records from available sources.~~

ELC 15.2 COOPERATION OF LAWYER

Any lawyer or firm who is subject to examination, investigation, or audit under rule 5.3 or rule 15.1 must cooperate with the person conducting the examination, investigation, or audit, subject only to the proper exercise of any privilege against self-incrimination, by:

(a) producing forthwith all evidence, books, records, and papers requested for the examination, investigation, or audit;

(b) furnishing forthwith any explanations required for the examination, investigation, or audit;

(c) producing written authorization, directed to any bank or depository, for the person to examine, investigate, or audit trust and general accounts, safe deposit boxes, and other forms of maintaining trust property by the lawyer in the bank or depository.

ELC 15.3 DISCLOSURE

The examination ~~and~~ or audit report ~~are~~ is only available to the Board, disciplinary counsel, and the lawyer or firm examined, investigated, or audited, ~~and to the Board of Governors on its request,~~ unless a disciplinary proceeding is commenced in which case the disclosure provisions of title 3 apply.

II. PROPOSALS RECOMMENDED FOR ADOPTION

The Subcommittee recommends that the following proposals be adopted after discussion:

1. ELC 5.1(e) [4-2 vote]:

[Note: This proposal deals with the general subject of vexatious grievants. It responds to the ODC proposal at p. 352 as well as the Talmadge and Turner suggestions.]

ELC 5.1 GRIEVANTS

.....

(e) Vexatious grievants.

(1) The Chair of the Disciplinary Board may enter an order declaring an individual or entity a vexatious grievant and restraining that individual from filing grievances or pursuing other rights under this rule, pursuant to the procedures set out in this subsection. A "vexatious grievant" is a person or entity who has engaged in a frivolous or harassing course of conduct that so departs from a reasonable standard of conduct as to render the grievant's conduct abusive to the disciplinary system or participants in the disciplinary system.

(2) Either disciplinary counsel or a lawyer who has been the subject of a grievance may file a motion to declare the grievant vexatious.

(3) The motion must set forth with peculiarity (A) the facts establishing that the grievant's conduct is vexatious and (B) the restrictions on the grievant's conduct that are sought.

(4) The moving party must serve a copy of the motion on the grievant. If the motion is filed by a respondent lawyer, the motion must also be served on disciplinary counsel. Service may be made by first class mail.

(5) The grievant, disciplinary counsel, and the respondent lawyer shall have 20 days to file a written response.

(6) If the Chair find that the person is a vexatious grievant, the Chair shall enter an order setting out with particularity (A) the factual basis for such finding, (B) the restrictions imposed on the grievant's

conduct, and (C) the basis for imposing such restrictions. The restrictions must be no broader than necessary to prevent the harassment and abuse found.

(7) The moving party, the grievant, and disciplinary counsel may seek review of the Chair's order by a petition for discretionary review under rule 12.4. No other appeal of the order shall be allowed.

(8) The fact that a person or entity has been determined to be a vexatious grievant and the scope of any restrictions imposed shall be public information. All other proceedings and documents related to a motion under this subsection are confidential.

2. ELC 5.1(b):

[Note: This is a modification of the ODC proposal at p. 349.]

ELC 5.1 GRIEVANTS

....

(b) Consent to Disclosure.

(1) Subject to paragraph (2), Bby filing a grievance, the grievant consents to disclosure of the content of the grievance to the respondent lawyer, or to any other person contacted during the investigation of the grievance, or all information submitted. This includes disclosure to the respondent lawyer or to any person under rules 3.1 – 3.4, ~~unless~~

(2) Disclosure may be specifically restricted, such as:

(A) when a protective order is issued under rule 3.2(e) or

(B) when the grievance was filed under rule 5.2.

(3) By filing a grievance, the grievant also agrees that the respondent or any other lawyer contacted by the grievant may disclose to disciplinary counsel any information relevant to the investigation, unless a protective order is issued under rule 3.2(e).

(4) Consent to disclosure under this rule by submitting information to disciplinary counsel does not constitute a waiver of any privilege or restriction against disclosure in any other forum.

3. ELC 5.1(c)(3), ODC proposal at p. 351:

[Note: this proposal also incorporates language from ODC proposal at p. 355. See consent item no. 3 above.]

ELC 5.1 GRIEVANTS

....

(c) Grievant Rights. A grievant has the following rights:

....

(3) to receive a copy of any response submitted by the respondent, ~~except:~~ subject to the following:

(A) Disciplinary counsel may withhold all or a portion of the response from the grievant when:

(i) if the response refers to a client's confidences or secrets information protected by RPC 1.6 or RPC 1.9 to which the grievant is not privy; or

(B) if

(ii) the response contains information of a personal and private nature about the respondent or others; or

(iii) ~~(C) if a review committee determines that~~ the interests of justice would be better served by not releasing the response.

(B) When either the grievant or respondent disputes in writing a decision by disciplinary counsel to withhold or not withhold all or a portion of a response, the matter will be forwarded to a review committee to resolve the dispute no later than when a review committee considers the matter under rule 5.6.

....

4. ELC 5.3, BOG proposal at p. 105:

[Note: Other rules should be reviewed for corresponding amendments.]

ELC 5.3 INVESTIGATION OF GRIEVANCE

(a) Review and investigation. Disciplinary counsel must review and may investigate any alleged or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to practice law, whether disciplinary counsel learns of the misconduct by grievance or otherwise. If there is no grievant, ~~the Association~~ disciplinary counsel may open a grievance in the ~~Association's~~ name of the Office of Disciplinary Counsel.

5. ELC 5.1(c)(5)

[Note: This is a modification of the Danielson proposal at p. 238.]

ELC 5.1 GRIEVANTS

....

(c) Grievant Rights. A grievant has the following rights:

....

(5) to attend any hearing conducted into the grievance, subject to these rules and any protective order issued under rule 3.2(e), except that if the grievant is also a witness, the hearing officer may order the grievant excluded during the testimony of any other witness whose testimony might affect the grievant's testimony;

....

6. Fine proposal at p. 554 [3-1 vote]:

ELC 5.3 INVESTIGATION OF GRIEVANCE

....

(g) Objections. A lawyer who receives an inquiry or request for information pursuant to this rule may object as provided in rule 5.5(d).

ELC 5.5 DISCOVERY BEFORE FORMAL COMPLAINT

....

(d) Objections.

(1) A lawyer may object to a discovery demand made pursuant to this rule or an inquiry or request for information made pursuant to RPC 5.3

(2) Any objection must be made prior to the due date for the requested information or discovery. The objection must clearly and specifically set out the challenged demand or request and the basis for the objection.

(3) The objection shall be submitted to the chief hearing officer, who may rule on it or assign it to another hearing officer. The ruling by the hearing officer shall be final.

(4) The hearing officer shall determine whether the objection and disciplinary counsel's response have a substantial basis. If the position of either party lacks a substantial basis, that party may be required to pay reasonable expenses and attorney fees resulting from the objection.

(5) On request of either party, a decision to impose costs and attorney fees shall be reviewed by the chair of the disciplinary board. If the chair determines that the request for review lacks a substantial basis, the chair may require payment of reasonable expenses and attorney fees resulting from the request for review. The decision of the chair shall not be subject to further review.

ELC 7.2 INTERIM SUSPENSION IN OTHER CIRCUMSTANCES

(a) Types of Interim Suspension.

.....

(3) Failure To Cooperate with Investigation. When any lawyer fails without good cause to comply with a request under rule 5.3(f) for information or documents, or with a subpoena issued under rule 5.3(f), or fails to comply with disability proceedings as specified in rule 8.2(d), disciplinary counsel may petition the Court for an order suspending the lawyer pending compliance with the request or subpoena. A petition may not be filed if the request or subpoena is the subject of a timely objection under rule 5.5(d) and the hearing officer has not yet ruled on that objection. If ~~(the)~~ a lawyer has been suspended for failure to cooperate and thereafter complies with the request or subpoena, the lawyer may petition the Court to terminate the suspension on terms the Court deems appropriate.

7. ELC 5.5:

[Note: This is a modification of the ODC proposal at p. 363. It also addresses the substance of the ODC proposal at p. 361. (The proposed language would need to be consolidated with the Fine proposal set out above, if both are adopted.)]

ELC 5.5 ~~DISCOVERY BEFORE FORMAL COMPLAINT~~ INVESTIGATORY SUBPOENAS

(a) Procedure. Before filing a formal complaint, disciplinary counsel may issue a subpoena for a deposition ~~depose either a respondent lawyer or a witness, or issue requests for admission to the respondent or to obtain documents without a deposition.~~ To the extent possible, CR 30 or 31 applies to depositions under this rule. ~~CR 36 governs requests for admission.~~

(b) Subpoenas for Depositions. Disciplinary counsel may issue subpoenas to compel the respondent’s or a witness’s attendance, and/or the production of books, documents, or other evidence, at a deposition or without a deposition. CR 45 governs subpoenas under this rule. ~~Subpoenas must be served as in civil cases in the superior court and may be enforced under rule 4.7.~~

(c) Notice to Respondent. In any case where CR 30, 31, or 45 would require disciplinary counsel to give notice to a party, such notice shall be given to the respondent.

(d) Challenges. Challenges to subpoenas under this rule may be made to the chief hearing officer, who may issue a protective order under rule 3.2(e).

(ee) Cooperation. Every lawyer must promptly respond to subpoenas ~~discovery~~ and requests from disciplinary counsel, subject to the provisions of rule 5.4.

8. ELC 5.6(b):

[Note: This is a modification of the ODC proposal at p. 365.]

ELC 5.6 DISPOSITION OF GRIEVANCE

....

(b) Review of Dismissal. A grievant may request review of dismissal of the grievance by delivering or depositing in the mail a request for review to the Association no later than 45 days after the Association mails the notice of dismissal. Mailing requires postage prepaid first class mail. If review is requested, disciplinary counsel may either reopen the matter for investigation or refer it to a review committee. If no request for review of the dismissal is made within the 45 days the dismissal is final and may not be reviewed. Disputes regarding the timeliness of a request for review of a dismissal may be submitted to a review committee. A grievant may withdraw in writing a request for review of a dismissal of the grievance, but thereafter the request for review may not be revived.

....

9. ELC 5.6(d), (e):

[Note: This is a modification of the ODC proposal at p. 364. (The proposed language would need to be consolidated with the ODC proposal at p. 366 [consent item no. 6], if both are adopted.)]

ELC 5.6 DISPOSITION OF GRIEVANCE

....

(d) Authority on Review. In reviewing grievances under this rule, a review committee may:

- (1) dismiss the grievance;
- (4 2) affirm the dismissal;
- (2 3) issue an advisory letter under rule 5.7;

- (3 4) issue an admonition under rule 13.5;
- (4 5) order a hearing on the alleged misconduct; or
- (5 6) order further investigation as may appear appropriate

(e) **Dismissal Final.** Dismissal under subdivision (d)(1) or (d)(2) of this rule is final and not subject to further review.

10. ELC 6.1:

[Note: This is a modification of the ODC proposal at p. 368.]

ELC 6.1 REFERRAL TO DIVERSION

In a matter involving less serious misconduct as defined in rule 6.2, ~~before filing a formal complaint~~ within 60 days of service of a formal complaint, disciplinary counsel may refer a respondent lawyer to diversion. Diversion may include

- (A) fee arbitration;
- (B) arbitration;
- (C) mediation;
- (D) law office management assistance;
- (E) lawyer assistance programs;
- (F) psychological and behavioral counseling;
- (G) monitoring;
- (H) restitution;
- (I) continuing legal education programs; or
- (J) any other program or corrective course of action agreed to by disciplinary counsel

and respondent to address respondent's misconduct.

Disciplinary counsel may negotiate and execute diversion contracts, monitor and determine compliance with the terms of diversion contracts, and determine fulfillment or any material breach of diversion contracts, subject to review under rule 6.9.

11. ELC 7.7(a):

[Note: This is a modification of the ODC proposal at p. 384.]

(a) Custodians Allowed. The Chair, on motion by disciplinary counsel or any other interested person, may appoint one or more lawyers or Association counsel as a custodian to act as counsel for the limited purpose of protecting clients' interests. A custodian may be appointed whenever a lawyer (1) has been transferred to disability inactive status, suspended, or disbarred, and fails to carry out the obligations of title 14 or fails to protect the clients' interests, or ~~whenever a lawyer (2) disappears or, dies, abandons practice, or is otherwise incapable of meeting the lawyer's obligations to clients.~~ A custodian should not be appointed if ~~unless~~ a partner, personal representative, or other responsible person appears to be properly protecting the clients' interests. The Chair may enter orders to carry out the provisions and purposes of this rule.

12. ELC 7.7(d):

[Note: This draft reflects the Turner proposal re: recovery of fees.]

(d) Fees and Costs. Payment of any fees and costs incurred by the Association under this rule may be a condition of reinstatement of a disbarred or suspended lawyer or a lawyer transferred to disability inactive status, ~~or may be ordered as restitution in a disciplinary proceeding for failure to comply with rule 14.1, or claimed against the estate of a deceased or adjudicated incapacitated lawyer.~~

13. ELC 9.1(c), (d):

[Note: This is a non-substantive modification of the BOG proposal on p. 124 and 412.]

ELC 9.1 STIPULATIONS

....

(c) Approval.

(1) *By Hearing Officer.* Subject to subsection (3), a hearing officer or panel may approve of a stipulation disposing of a matter pending before the officer or panel, unless the stipulation requires the respondent's suspension or disbarment. This approval constitutes a final decision and is not subject to further review.

(2) *By Board.* All other stipulations must be presented to the Board. The Board reviews a stipulation based solely on the record agreed to by the respondent lawyer and disciplinary counsel. The parties may jointly ask the Chair to permit them to address the Board regarding a stipulation. Such presentations are at the Chair's discretion. Subject to subsection (3), the Board may approve, conditionally approve, or reject a stipulation. Regardless of the provisions of rule 3.3(a), the Board may direct that information or documents considered in reviewing a stipulation be kept confidential.

(3) When a Stipulation Must be Approved. A hearing officer, panel, or the Board must approve a stipulation unless the stipulation results in a manifest injustice after consideration of the purposes of lawyer discipline, the ABA Standards for Imposing Lawyer Sanctions, and Washington authority.

(d) Conditional Approval. Subject to subsection (c)(3), the Board may condition its approval of a stipulation on the agreement by the respondent and disciplinary counsel to a different disciplinary action, probation, restitution, or other terms the Board deems necessary to accomplish the purposes of lawyer discipline. If the Board conditions approval of a stipulation, the stipulation as conditioned is deemed approved if, within 14

days of service of the order, or within additional time granted by the Chair, both parties serve on the Clerk written consent to the conditional terms in the Board's order.

14. ELC 9.1 (d)-(g):

[This is a modification of the ODC proposal at p. 388. (The proposed language would need to be consolidated with the BOG proposal above, if both are adopted.)]

ELC 9.1 STIPULATIONS

.....

(d) Conditional Approval.

(1) By Hearing Officer or Chief Hearing. The hearing officer or chief hearing officer may condition the approval of a stipulation on the agreement by the respondent and disciplinary counsel to a different disciplinary action, probation, restitution, or other terms the hearing officer or chief hearing officer deems necessary to accomplish the purposes of lawyer discipline, provided the terms do not involve suspension or disbarment. If the hearing officer or chief hearing officer conditions approval of a stipulation, the stipulation as conditioned is deemed approved if, within 14 days of service of the order, or within additional time granted by the hearing officer or chief hearing officer, both parties serve on the hearing officer or chief hearing officer written consent to the conditional terms in the order of the hearing officer or chief hearing officer.

(2) By Board. The Board may condition its approval of a stipulation on the agreement by the respondent and disciplinary counsel to a different disciplinary action, probation, restitution, or other terms the Board deems necessary to accomplish the purposes of lawyer discipline. If the Board conditions approval of a stipulation, the stipulation as conditioned is deemed approved if, within 14 days of service of the order, or within additional time granted by the Chair, both parties serve on the Clerk written consent to the conditional terms in the Board's order.

(e) Reconsideration. Within 14 days of service of an order rejecting or conditionally approving a stipulation, the parties may serve on the Clerk, hearing officer or chief hearing officer a joint motion for reconsideration and may ask to address the Board, hearing officer or chief hearing officer on the motion.

(f) Stipulation Rejected. ~~The Board's~~ An order rejecting a stipulation must state the reasons for the rejection. A rejected stipulation has no force or effect and neither it nor the fact of its execution is admissible in evidence in any disciplinary, civil, or criminal proceeding.

(g) Review. When the hearing officer or chief hearing officer rejects a stipulation, by agreement the parties may present the stipulation to the Board for consideration.

III. PROPOSALS RECOMMENDED FOR REJECTION

The Subcommittee recommends rejection of the following proposals:

1. ELC 5.3(c)(1), ODC proposal at p. 357 [3-1 vote].
2. ELC 5.3(f), Turner proposal.
3. ELC 6.5, 6.6, 6.9, and 3.3(d), ODC proposal at p. 372 [4-1 vote].
4. ELC 7.3, ODC proposal at p. 502 [5-1 vote].

IV. OTHER SUBCOMMITTEE ACTIONS

1. ELC 5.4:

The Subcommittee requests advice from the Task Force on whether lawyers should be allowed to assert attorney-client privilege in disciplinary proceedings. A separate report on this subject will be submitted.

2. ELC 7.1 and 1.5 and RPC 8.4:

By separate votes, the Committee recommended that the following principles be included in a rule on interim suspension:

1. Eliminate interim suspension for non-felonies [3-2 vote].
2. Allow lawyers who are convicted of felonies to show cause why they should not be suspended [3-2 vote].
3. Require self-reporting by lawyers of felony convictions [3-2 vote].
4. Eliminate any requirement that participants in the system report lawyers' criminal convictions [3-2 vote].

The following draft incorporates these principles. The Subcommittee did not, however, vote on whether to recommend adoption of this draft as a whole.

ELC 7.1 ~~INTERIM SUSPENSION FOR~~ PROCEDURE ON CONVICTION OF A CRIME

(a) Definitions.

- (1) "Conviction" for the purposes of this rule occurs upon entry of a plea of guilty, unless the defendant affirmatively shows that the plea was not accepted or was withdrawn, or upon entry of a finding or verdict of guilty, unless the defendant affirmatively shows that judgment was arrested or a new trial granted.
- (2) ~~"Serious crime" includes any:~~
 - ~~(A) felony;~~
 - ~~(B) crime a necessary element of which, as determined by its statutory or common law definition, includes any of the following:~~
 - ~~• interference with the administration of justice;~~

- false swearing;
- misrepresentation;
- fraud;
- deceit;
- bribery;
- extortion;
- misappropriation; or
- theft; or

~~(C) attempt, or a conspiracy, or solicitation of another, to commit a "serious crime".~~

"Felony" includes any crime denominated as a felony in the jurisdiction in which it is committed.

(b) ~~Court Clerk To Advise Association Reporting of Conviction.~~ When a lawyer is convicted of a crime felony, ~~the clerk of the court must advise the Association of the conviction, and on request provide the Association with certified copies of any order or other document showing the conviction~~ the lawyer must report the conviction to disciplinary counsel within 30 days of the conviction as defined by this rule.

(c) Disciplinary Procedure upon Conviction.

- (1) If a lawyer is convicted of a felony, disciplinary counsel must file a formal complaint regarding the conviction. Disciplinary counsel must also petition the Supreme Court for an order suspending the respondent lawyer during the pendency of disciplinary proceedings. The petition for suspension may be filed before the formal complaint.
- ~~(2) If a lawyer is convicted of a crime that is not a felony, disciplinary counsel may refer the matter to a review committee to determine whether the crime is a serious crime. If so, disciplinary counsel proceeds in the same manner as for a felony.~~
- ~~(3) If a lawyer is convicted of a crime that is neither not a felony nor a serious crime, the review committee may consider a report of the conviction in the same manner as any other report of possible misconduct by a lawyer.~~

(d) Petition. A petition to the Supreme Court for suspension under this rule must include a copy of any available document establishing the fact of conviction. ~~If the crime is not a felony, the petition must also include a copy of the review committee order finding that the crime is a serious crime.~~ Disciplinary counsel may also include additional facts, statements, arguments, affidavits, and documents in the petition. A copy of the petition must be personally served on the respondent, and proof of service filed with the Court.

(e) Immediate Interim Suspension.

- ~~(1) Upon the filing of a petition for suspension under this rule, the Court determines whether the crime constitutes a serious crime felony as defined in section (a).~~
- ~~(1) If the crime is a felony, the Court must enter an order immediately suspending the respondent from the practice of law.~~
- ~~(2) If the crime is not a felony, the Court conducts a show cause proceeding under rule 7.2(b) to determine if the crime is a serious crime. If the Court determines the crime is a serious crime, the Court must enter an order immediately suspending the respondent from the practice of law. The respondent must be~~

suspended absent an affirmative showing that the respondent's continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, or be contrary to the public interest.

(3) If the Court determines that the crime is not a ~~serious crime~~ felony, upon being so advised, the Association processes the matter as it would any other grievance.

(34) If suspended, the respondent must comply with title 14.

(45) Suspension under this rule occurs:

(A) whether the conviction was under a law of this state, any other state, or the United States;

(B) whether the conviction was after a plea of guilty, nolo contendere, not guilty, or otherwise; and

(C) regardless of the pendency of an appeal.

(f) Duration of Suspension. A suspension under this rule must terminate when the disciplinary proceeding is fully completed, after appeal or otherwise. A copy of the final decision, stipulation or order terminating the disciplinary proceeding will be provided to the Court.

(g) Termination of Suspension.

(1) *Petition and Response.* A respondent may at any time petition the Board to recommend termination of an interim suspension. Disciplinary counsel may file a response to the petition. The Chair may direct disciplinary counsel to investigate as appears appropriate. If disciplinary counsel recommends that the suspension should be terminated, the Clerk will transfer the petition and response to the Court for its consideration.

(2) *Board Recommendation.* If either party requests, the Board must hear oral argument on the petition at a time and place and under terms as the Chair directs. The Board may recommend termination of a suspension only if the Board makes an affirmative finding of good cause to do so. There is no right of appeal from a Board decision declining to recommend termination of a suspension.

(3) *Court Action.* The Court determines the procedure for its consideration of a recommendation to terminate a suspension.

~~**(h) Notice of Dismissal to Supreme Court.** If disciplinary counsel has filed a petition for suspension under this rule, and the disciplinary proceedings based on the criminal conviction are dismissed, the Supreme Court must be provided a copy of the decision granting dismissal whether or not the respondent is suspended at the time of dismissal.~~

ELC 1.5 VIOLATION OF DUTIES IMPOSED BY THESE RULES

A lawyer violates RPC 8.4(l) and may be disciplined under these rules for violating duties imposed by these rules, including but not limited to the following duties:

.....

- report the lawyer's felony conviction, rule 7.1(b).

RPC 8.4 MISCONDUCT.

It is professional misconduct for a lawyer to:

...

(o) Fail to report the lawyer's felony conviction to disciplinary counsel as required by ELC

7.1.

ELC 2.7 CONFLICTS REVIEW OFFICER

(a) Function. Conflicts Review Officers reviews grievances filed against disciplinary counsel and other lawyers employed by the Association, hearing officers, conflicts review officers and conflicts review officers pro tempore, and members of the Disciplinary Board, the Board of Governors, and the Supreme Court. Conflicts Review Officers also review grievances filed against persons who have been assigned cases as adjunct investigative counsel or special disciplinary counsel, or appointed in disability matters pursuant to ELC 8.2(c)(2), at the time the grievance is filed.

(1) *Limitation of Authority.* A Conflicts Review Officer’s duties are limited to performing the initial review of grievances covered by this Rule. A Conflicts Review Officer may obtain the respondent lawyer’s response to the grievance, if he/she feels it necessary to do so, in his/her sole discretion. A Conflicts Review Officer may dismiss the grievance, defer the investigation, or assign the grievance to special disciplinary counsel for investigation.

(2) *Independence.* Conflicts Review Officers act independently of disciplinary counsel and the Association.

(b) Appointment and Qualifications.

(1) The Supreme Court, on the recommendation of the Board of Governors, shall appoint three active members of the Association as Conflicts Review Officers. Each Conflicts Review Officer is appointed for a three-year term on a staggered basis, and may be recommended for reappointment at the discretion of the Board of Governors. Applications shall be solicited from those eligible to serve, and submitted to the Board of Governors, in such manner as the Association deems most appropriate under the policies and procedures then in effect for recruitment and appointment of volunteers in the discipline system.

(2) When no Conflicts Review Officer is available to handle a matter due to conflict of interest or other good cause, the Supreme Court, on the recommendation of the Board of Governors, shall appoint a Conflicts Review Officer pro tempore for the matter.

(3) To be eligible for appointment as Conflicts Review Officer or Conflicts Review Officer pro tempore, a lawyer must have prior experience as a Disciplinary Board member, disciplinary counsel, or special disciplinary counsel. Conflicts Review Officers and Conflicts Review Officers pro tempore may have no other active role in the discipline system during the term of appointment.

(4) The Association shall assign matters to the Conflicts Review Officers in such a manner as to balance their caseloads insofar as it is practicable to do so.

(c) Access to Disciplinary Information. Conflicts Review Officers and Conflicts Review Officers pro tempore have access to any otherwise confidential disciplinary information necessary to perform the duties required by these rules. Conflicts Review Officers and Conflicts Review Officers pro tempore shall return original files to the Association promptly upon completion of the duties required by these rules and shall not retain copies.

(d) Compensation and Expenses. The Association reimburses a Conflicts Review Officers and Conflicts Review Officers pro tempore for all necessary and reasonable expenses, and may provide compensation at a level established by the Board of Governors.

Purpose

This is a new rule establishing a Conflicts Review Officer to provide the initial review of grievances filed against lawyers holding positions in the discipline system. This includes bar grievances against members of the Supreme Court, but does not include any matter over which the Commission on Judicial Conduct has sole jurisdiction. Following review by the Conflicts Review Officer, any matter needing further investigation is to be assigned to Special Disciplinary Counsel. These procedures are intended to further public confidence in the self-regulation system of the profession.

Amended eff. 01/12/10.