



WSBA

WASHINGTON STATE BAR ASSOCIATION

ELC DRAFTING TASK FORCE

Meeting Agenda

July 22, 2009

8:00 a.m. to 10:00 a.m.

Washington State Bar Association

1325 Fourth Avenue – Suite 600

Seattle, Washington 98101

1. **Call to Order/Preliminary Matters** (8:00 a.m.)
 - Approval of March 12, 2009 meeting minutes [pp. 282-84]
2. **Discussion**
 - Sub Committee A [pp. 285-348]
 - Sub Committee B [pp. 349-413]
 - Sub Committee C [pp. 414-445]
3. **New Business/Good of the Order**
 - Proposed Amendments to ELC 2.7 published for comments [pp. 446-449]
4. **Future meeting schedule**
 - September 10, 2009, 10:00 a.m. to 12:00 noon
 - November 5, 2009, 10:00 a.m. to 12:00 noon
5. **Adjourn** (noon)

Minutes – March 12, 2009 - DRAFT
ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Randy Beitel, Kim Boyce, Kurt Bulmer, Ron Carpenter (phone), James Danielson (phone), Seth Fine, Bruce Johnson, Julie Shankland, Patrick Sheldon, Elizabeth Turner, Norma Linda Ureña, Charlie Wiggins (phone), Matt Williams (phone), Scott Busby, Reporter, and Nan Sullins, AOC/Supreme Court Liaison

Excused: Erika Balasz

Call to Order/Approval of Minutes

After calling the meeting to order at 10:00 a.m., the Chair acknowledged that Nan Sullins had identified typographic errors in the minutes of the November 20, 2008 meeting. The Chair called for further corrections. No further corrections being proposed, the minutes were approved.

Preliminary Matters

The Chair reminded the group that materials will be disseminated via the WSBA website (<http://www.wsba.org/lawyers/groups/elctaskforce.htm>) and asked that the Task Force members contact Natalie Cain if they experience problems accessing the materials. Ms. Cain may be contacted at 206-733-5939 or nataliec@wsba.org.

Topics

Meeting Schedule – the Chair noted that the meeting schedule as proposed was designed to allow for subcommittee meetings in between meetings of the whole. No objections were raised to the proposed schedule.

Subcommittee structure – the Chair introduced the proposed subcommittee organization chart, then posed the question of whether the group preferred to work in subcommittees or as a committee of the whole. Seth Fine felt that breaking into subcommittees was the right approach. Jim Danielson suggested that subcommittees are efficient for drafting purposes, but the group should resolve the question of how the issues should be addressed as a committee of the whole. Ron Carpenter agreed, but suggested that the group break into subcommittees to do an initial review of the suggestions in order to vet and winnow them. Each subcommittee would then present the results of its initial review to the committee of the whole for discussion before returning to the drafting process. Randy Beitel suggested that the subcommittee chairs should focus on identifying the most controversial issues requiring policy determinations for the group as a whole.

After some discussion, the Chair identified the emerging consensus: the group should follow a two step process, breaking into three subcommittees to classify issues, report to the committee of the whole for policy determinations, and reconvene to begin the task of drafting. The Chair asked for dissenting views and hearing none adopted the consensus as the Task Force's procedural framework.

The Chair then asked to group review the six major areas identified in the Possible Subcommittee Organization chart: (1) Organization & General Procedures (Titles 1–4), (2) Investigations & Interim Procedures (Titles 5, 7, 15), (3) Resolutions without Hearing (Titles 6, 9), (4) Hearing & Disability Proceedings (Titles 8, 10), (5) Review by Board & Supreme Court (Titles 11–12), and (6) Sanctions & Remedies (Titles 13–14). The group quickly identified areas 2, 4, & 5 as the areas most likely to generate both most controversy and the heaviest work load. After some discussion, the group agreed that each of these areas should be paired with one of the lighter areas in order to balance the subcommittees' workload. The Chair identified the consensus as to appropriate pairings as areas 1 & 4, 2 & 3, and 5 & 6. Hearing no dissenting views, the Chair adopted the following subcommittee structure:

Subcommittee A

- (1) Organization & General Procedures (Titles 1–4) &
- (4) Hearing & Disability Procedures (Titles 8, 10)

Subcommittee B

- (2) Investigations & Interim Procedures (Titles 5, 7, 15) &
- (3) Resolutions without Hearings (Titles 6, 9)

Subcommittee C

- (5) Review by Board & Supreme Court (Titles 11–12) &
- (6) Sanctions & Remedies (Titles 13–14)

The Chair next asked the group to consider the areas with which they would be most inclined to work. After taking input from the members, the Chair announced that he would make subcommittee assignments, accommodating as far as possible the preferences expressed by the members, and appoint subcommittee chairs by email in the next two weeks. The subcommittees' first task will be to classify issues and suggestions in their respective areas into three categories:

- (1) issues/suggestions expected to generate little or no controversy,
- (2) issues/suggestions expected to generate some controversy, and
- (3) issues/suggestions expected to generate serious controversy and for which clear policy direction from the committee of the whole will be required.

Subcommittees should generate a report for the next meeting of the whole. To aid in this endeavor, staff is preparing a matrix of the suggestions submitted to date, including the specific ELC affected and the source of the suggestion. The matrix will be circulated by the end of next week via email and posted on the

website. The matrix format will mirror the format of the BOG Discipline Task Force Recommendations chart from this meeting's materials.

The Chair identified two major policy issues that must be addressed: vexatious litigants and non-felony sanctions. After some discussion, the group agreed that both of these issues would be properly addressed by Subcommittee B, in the area of Investigations & Interim Procedures as the issue of vexatious litigants arises under Title 5 (Grievance Investigations and Disposition) and the issue of non-felony sanctions arises under Title 7 (Interim procedures).

The Chair also clarified that the subcommittees are free to begin work as soon as they wish, without waiting for the matrix. Mr. Beitel, as spokesman for ODC, informed the group that ODC will prepare memos for each of the 108 suggestions it proposed. The purpose of the memos is to identify the problems perceived by ODC and suggest drafting solutions. Kurt Bulmer, speaking on behalf of respondents' counsel, noted that respondents' counsel will review the matrix and respond to the suggestions therein rather than submit suggestions separately.

Next Meeting

The next meeting of the Task Force will be Thursday, May 14, 2009 from 10:00 a.m. to 12:00 noon in the conference center at the WSBA offices. The deadline for submitting materials to Ms. Cain for posting will be 12:00 noon on Tuesday, May 5, 2009.

Adjournment

The Chair asked for further business and, hearing none, adjourned the meeting at 10:40 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: June 26, 2009
RE: Conform ELC Jurisdictional Statements to RPC Jurisdictional Statement
ELC 1.2, ELC 5.1(a)

Proposal:

RPC 8.5(a) provides a broad statement of disciplinary authority:

Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

This statement is somewhat different, and may be somewhat more broad than the two ELC provisions that state our jurisdiction, ELC 1.2 and ELC 5.1(a). We propose conforming the scope of disciplinary authority in the ELC to that set forth in RPC 8.5(a). We also propose using the same terminology as the RPC, which references this as “disciplinary authority” rather than “jurisdiction.” We believe this will provide greater uniformity with the scope of the disciplinary authority of other jurisdictions, most of which have adopted the RPC.

Note: The reference at the beginning of ELC 1.2 to RPC 8.5(c) is to a rule that has been proposed by the Board of Governors to the Supreme Court for consideration. That provision relates to the disciplinary authority of the Office of Disciplinary Counsel over lawyers who are judicial officers.

Draft Rule Change:

ELC 1.2 JURISDICTION DISCIPLINARY AUTHORITY

Except as provided in RPC 8.5(c), Any lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction and these Rules for Enforcement of Lawyer Conduct, regardless of where the lawyer's conduct occurs. , or permitted by rule, to practice law in this state, and any lawyer specially admitted by a court of this state for a particular case, is subject to these Rules for Enforcement of Lawyer Conduct. A lawyer not admitted to practice in this jurisdiction is also subject to the disciplinary au-

thority of this jurisdiction and these rules if the lawyer provides or offers to provide any legal services in this jurisdiction. Jurisdiction Disciplinary authority exists regardless of the lawyer's residency or authority to practice law in this state. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Board of Governors Provisions
ELC 2.2

Proposal:

ELC 2.2(a) does not accurately reflect the current supervisory relationship of the Board of Governors to lawyer discipline. We propose amendments that more accurately reflect the current relationship whereby the administrative and managerial function is provided through the Executive Director. We believe this language is more consistent with the ABA's recommendation of separation between the elected Board of Governors and the actual administration of the disciplinary functions.

We also propose amendments to ELC 2.2(b) to clarify that neither the Board of Governors, the officers of the WSBA or the Executive Director is to be directly involved in the investigations, prosecutions, appeals or discretionary decisions of the Office of Disciplinary Counsel.

Included in the draft rule change are the changes to ELC 2.2(c) that are discussed in a separate memo regarding the Board of Governors members and officers not representing or advising respondents or grievants.

Draft Rule Change:

ELC 2.2 BOARD OF GOVERNORS

(a) Function. The Board of Governors of the Association:

- (1) supervises the general functioning of through the Executive Director, provides administrative and managerial support to enable the Office of Disciplinary Counsel, the Disciplinary Board, review committees, disciplinary counsel, and other Association staff and appointees to perform the functions specified by these rules, and adjunct investigative counsel;
- (2) makes appointments, removes those appointed, and fills vacancies as provided in these rules; and
- (3) performs other functions and takes other actions provided in these rules, delegated by the Supreme Court, or necessary and proper to carry out its duties.

(b) Limitation of Authority. The Board of Governors or officers of the Association, or the Executive Director of the Association have has no right or responsibility to direct the investigations, prosecutions, appeals or discretionary decisions of the Office of Disciplinary

nary Counsel under these rules, or to review hearing officer, hearing panel, review committee, or Disciplinary Board decisions or recommendations in specific cases.

(c) Restriction on Advising or Representing Respondents or Grievants. A member of the Board of Governors or officer of the Association, or the Executive Director of the Association may not knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings other than advising a person of the availability of grievance procedures. Former members of the Board of Governors and former ~~officers~~ Presidents of the Association are subject to the restrictions on representing respondents in rule 2.13(b).

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: BOG/ Officers Not Represent or Advise Respondents or Grievants
ELC 2.2(c)

Proposal:

Amend ELC 2.2(c) to prohibit sitting Board of Governor members, and officers of the Association from direct involvement in individual grievances by representing or advising respondents or grievants in disciplinary grievances or proceedings, apart from advising persons of the availability of the grievance procedures.

ABA Recommendation No. 1 recommended that the Office of Disciplinary Counsel be completely removed from the WSBA, in part to assure that the elected Bar leaders not be in a position to influence the investigatory and prosecutorial decisions of the Office of Disciplinary Counsel. While that recommendation was not adopted, the discussion of the recommendation focused attention on the need to consider structural safeguards against any inappropriate influence, regardless of how well intended.

Currently, ELC 2.2(b) precludes the Board of Governors from reviewing hearing officer or Disciplinary Board decisions. ELC 2.2(c) and ELC 2.13(b) preclude former members of the Board of Governors or Association presidents from representing respondents in any proceedings under the ELC for three years after leaving office. There is, however, no rule per se that prohibits a current member of the Board of Governors or officer of the Association from representing a grievant or a respondent in a disciplinary investigation or proceeding. We believe the rule should be specific on this point, and should apply to grievants as well as to respondents, and should restrict not only representing a grievant or respondent, but also providing advice, apart from advising a person of the availability of the grievance procedures. Note that the proposed rule does not apply to other lawyers in a law firm with a member of the Board of Governors or an officer of the Association.

Draft Rule Change:

ELC 2.2(c) Restriction on Advising or Representing Respondents or Grievants. A member of the Board of Governors or officer of the Association, may not knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings other than advising a person of the availability of grievance procedures. Former members of the Board of Governors and former officers Presidents of the Association are subject to the restrictions on representing respondents in rule 2.13(b).

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Disciplinary Selection Panel
New Section ELC 2.2(d), ELC 2.5(c), ELC 2.7(b)

Proposal:

The Hearing Officer Selection Panel under ELC 2.5(c) has proven useful in improving the quality of the hearing officers. We recommend that the selection panel also provide recommendations to the Board of Governors regarding appointments to the Disciplinary Board and appointment of the Conflicts Review Officers. In addition to broadening the scope of the selection panel, we propose moving the rule from ELC 2.5, which relates solely to hearing officers, to ELC 2.2 which relates to the Board of Governors. In conjunction with other recommended changes in the appointment process (see separate memo re Disciplinary Board Provisions), we recommend that the Disciplinary Selection Panel be appointed by the Supreme Court, upon the recommendation of the Board of Governors. We also propose conforming language to ELC 2.7(b) regarding the Conflicts Review Officers.

Draft Rule Change:

~~ELC 2.5 (c)~~ 2.2(d)

~~**Hearing Officer Disciplinary Selection Panel.**~~ The ~~hearing officer~~ disciplinary selection panel makes recommendations to the Board of Governors for appointment, reappointment, and removal of disciplinary board members, hearing officers, and Conflicts Review Officers. The panel is appointed by the Supreme Court, upon the recommendation of the Board of Governors, and includes, but is not limited to, a Board of Governors member who serves as its chair, one or more former Chairs of the Disciplinary Board, and one or more former nonlawyer members of the Disciplinary Board.

ELC 2.7 CONFLICTS REVIEW OFFICER

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(b) Appointment and Qualifications. The Supreme Court, on the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints an active member of the Association to a three year renewable term as Conflicts Review Officer. To be eligible for appointment as Conflicts Review Officer, a lawyer must have prior experience either as a Disciplinary Board member or as disciplinary counsel

or special disciplinary counsel. The Conflicts Review Officer may have no other active role in the discipline system during the term of appointment. When the Conflicts Review Officer is not available to handle a matter due to conflict of interest or other good cause, on the recommendation of the Board of Governors, the Supreme Court will appoint a Conflicts Review Officer pro tempore for the matter.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Board Members Not to Represent or Advise Respondents or Grievants
ELC 2.3(k)

Proposal:

Although ELC 2.3(k) restricts former Disciplinary Board members from representing respondents for three years, there is no rule that precludes a current Disciplinary Board member from representing a respondent. We believe that current members of the Disciplinary Board should neither represent nor advise anyone regarding a pending or likely grievance, and propose language to ELC 2.3(k) to accomplish this. Essentially, while serving on the Disciplinary Board, a member should take great care not to be involved in any matter that could come before the Board.

Draft Rule Change:

ELC 2.3(k) Restriction on Representing or Advising Respondents or Grievants.
While serving on the Disciplinary Board in any capacity, Board members may not knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings, other than advising a person of the availability of grievance procedures.
Former members of the Disciplinary Board are subject to the restrictions on representing respondents in rule 2.13(b).

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Only Voting Members to Attend Disciplinary Board Deliberations
ELC 2.3(b)(3)

Proposal:

Although ELC 2.3(h) provides that a Disciplinary Board member should disqualify himself or herself under various circumstances such as personal bias or prejudice, there is no requirement that the disqualified member absent himself or herself from Board deliberations on the matter. We propose language be added to ELC 2.3(b)(3) to allow only voting members to be present at Board deliberations.

Draft Rule Change:

ELC 2.3 DISCIPLINARY BOARD

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(b) Membership.

- (1) *Composition.* The Board consists of not fewer than three nonlawyer members, appointed by the Court, and not fewer than one lawyer member from each congressional district, appointed by the Board of Governors.
- (2) *Qualifications.* Lawyer members must have been active members of the Association for at least seven years.
- (3) *Voting.* Each member, including the Chair and the Vice Chair, whether nonlawyer or lawyer, has one vote. Only voting members and the Board's staff may attend or participate in Board deliberations.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Disciplinary Board Provisions
ELC 2.3, ELC 2.7(a)

Proposal:

The ABA recommended that all disciplinary functions be removed from the control of the WSBA and the Board of Governors. While the Board of Governors rejected the ABA recommendation, the Board did recommend a greater separation of the disciplinary functions, particularly in the appointment process and specifically directed that the Supreme Court appoint the Disciplinary Board based on Board of Governors recommendation. This is a proposal to accomplish that recommendation. We also provide that a Conflicts Review Officer, rather than the Board of Governors determines when it may be necessary for a Disciplinary Board member to take a leave of absence due to a pending disciplinary grievance against the Board member. We believe this will allow for quicker, more efficient decisions and is consistent with the goal of further insulating the Board of Governors from direct involvement in disciplinary decisions. We provide language to ensure that the Conflicts Review Officer making this determination is not the same Conflicts Review Officer reviewing the grievance against the Disciplinary Board member. We also propose language to ELC 2.7(a) to expand the scope of the Conflicts Review Officer's function to encompass these duties.

We also propose removing from ELC 2.3(f) language authorizing persons who have previously served as "alternate Board members," since there is no provision for alternate Board members under the ELC or the predecessor RLD. The language appears to be obsolete and confusing.

Draft Rule Change:

ELC 2.3 DISCIPLINARY BOARD

(a) Function. The Board performs the functions provided under these rules, delegated by the ~~Board of Governors or~~ Supreme Court, or necessary and proper to carry out its duties.

(b) Membership.

- (1) *Composition.* The Board consists of not fewer than three nonlawyer members, appointed by the Court, and not fewer than one lawyer member from each congressional district, appointed by the Court, upon the recommendation of appointed by the Board of Governors in consultation with the disciplinary selection panel.

- (2) *Qualifications.* Lawyer members must have been active members of the Association for at least seven years.
- (3) *Voting.* Each member, including the Chair and the Vice Chair, whether nonlawyer or lawyer, has one vote.
- (4) *Quorum.* A majority of the Board members constitutes a quorum. If there is a quorum, the concurrence of a majority of those present and voting constitutes action of the Board, so long as at least seven members vote.
- (5) *Leave of Absence While Grievance Is Pending.* If a grievance is filed against a lawyer member of the Board, the following procedures apply:
 - (A) ~~the~~ The member initially decides whether to remain on the Board or take a leave of absence until the matter is resolved;
 - (B) if the member chooses to remain on the Board, the Conflicts Review Officer who is conducting the review of the grievance under rule 2.7 must promptly provide a confidential summary of the grievance to ~~the Board of Governors~~ a different Conflicts Review Officer who is not conducting the review. ~~with a~~ A copy of the summary is provided to the member at the same time;
 - (C) ~~the~~ The ~~Board of Governors~~ Conflicts Review Officer who is not conducting the review of the grievance should then, or at any time thereafter ~~it deems~~ as deemed appropriate, determine if the member is so impaired from serving on the Disciplinary Board that the member should take, or continue to take, a leave of absence to protect the integrity of the discipline system. In making this determination, the ~~Board of Governors~~ Conflicts Review Officer should consider, among other things, the facts, circumstances, and nature of the misconduct alleged, the possible outcome, and the extent of public concern regarding the matter;
 - (D) ~~the~~ The ~~Board of Governors's deliberations are~~ Conflict Review Officer's determination is confidential. All materials ~~of the Board of Governors~~ used in connection with such a ~~matter~~ determination are confidential unless released under rule 3.4(d) or (e).

(c) Terms of Office. The term of office for a Board member is three years. Newly created Board positions may be filled by appointments of less than three years, as designated by the Court ~~or the Board of Governors~~, to permit as equal a number of positions as possible to be filled each year. Terms of office begin October 1 and end September 30 or when a successor has been appointed, whichever occurs later. Members may not serve more than one term except as otherwise provided in these rules. Members continue to serve until replaced, except a member's term of office ends immediately if a disciplinary sanction is imposed.

(d) Chair. The Supreme Court, upon the recommendation of the Board of Governors in consultation with the disciplinary selection panel, annually designates one lawyer member of the Board to act as Chair and another as Vice Chair. The Vice Chair serves in the absence of or at the request of the Chair.

(e) Unexpired Terms. The Supreme Court, upon the recommendation of the Board of Governors in consultation with the disciplinary selection panel, fills unexpired terms in ~~lawyer~~ membership on the Board. ~~The Supreme Court fills unexpired terms in non-lawyer membership.~~ A member appointed to fill an unexpired term will complete the

unexpired term of the member replaced, and may be reappointed to a consecutive term if the unexpired term is less than 18 months.

(f) Pro Tempore Members. If a Board member is disqualified or unable to function, the Chair may, by written order, designate a member pro tempore. A member pro tempore must have either previously served on the Board or ~~be appointed as an alternate Board member by the Board of Governors if a lawyer or by the Supreme Court if a nonlawyer.~~ Only a lawyer may be appointed to substitute for a lawyer member, and only a non-lawyer to substitute for a nonlawyer member.

(g) Meetings. The Board meets regularly at times and places it determines. The Chair may convene special Board meetings. In the Chair's discretion, the Board may meet and act through electronic, telephonic, written, or other means of communication.

(h) Disqualification.

- (1) A Board member should disqualify him or herself from a particular matter in which the member's impartiality might reasonably be questioned, including, but not limited to, instances in which:
 - (A) the member has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the matter;
 - (B) the member previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the member practices law serves or has previously served as a lawyer concerning the matter, or such lawyer is or has been a material witness concerning the matter;
 - (C) the member knows that, individually or as a fiduciary, the member or the member's spouse or relative residing in the member's household, has an economic interest in the subject matter in controversy or in a party to the matter, or is an officer, director, or trustee of a party or has any other interest that could be substantially affected by the outcome of the matter, unless there is a remittal of disqualification under section (i);
 - (D) the member or the member's spouse or relative residing in the member's household, or the spouse of such a person:
 - (i) is a party to the matter, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer in the matter;
 - (iii) is to the member's knowledge likely to be a material witness in the matter;
 - (E) the member served as a hearing officer or hearing panel member for a hearing on the matter, or served on a review committee that issued an admonition to the lawyer regarding the matter.

(i) Remittal of Disqualification. A member disqualified under subsection (h)(1)(C) or (h)(1)(D) may, instead of withdrawing from consideration of the matter, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the member's participation, all agree in writing or on the record that the member's relationship is immaterial or that the member's economic interest is de minimis, the member is no longer disqualified, and may participate in the matter. If a party is not immediately available, the member may proceed on the assurance of the party's counsel that the party's consent will be subsequently given.

(j) Counsel and Clerk. The Executive Director of the Association, ~~under the direction of the Board of Governors,~~ may appoint a suitable person or persons to act as counsel

and clerk to the Board, to assist the Board and the review committees in carrying out their functions under these rules.

(k) Restriction on Representing Respondents. Former members of the Disciplinary Board are subject to the restrictions on representing respondents in rule 2.13(b).

ELC 2.7 CONFLICTS REVIEW OFFICER

(a) Function. The Conflicts Review Officer reviews grievances filed against disciplinary counsel, hearing officers, other lawyers employed by the Association, and members of the Disciplinary Board, the Board of Governors, and the Supreme Court. After obtaining the respondent lawyer's response to the grievance, the Conflicts Review Officer may dismiss the grievance, defer the investigation, or assign the grievance to special disciplinary counsel for further investigation. The Conflicts Review Officer acts independently of disciplinary counsel and the Association. A Conflicts Review Officer performs other functions as set forth in these rules.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Hearing Officer Provisions
ELC 2.5

Proposal:

We propose to delete the provisions allowing a three-person hearing panel in lieu of a single hearing officer (ELC 2.5(h)). There has not been a single instance of the use of such a panel in over 20 years. With the focus on improving the training and quality of hearing officers, the need for a three-person panel rather than a single hearing officer has been greatly reduced. In addition to the deletion of ELC 2.5(h), there will need to be numerous conforming amendments throughout the ELC.

We have also proposed changing the appointment process to be consistent with other appointments, whereby appointment of hearing officers to the hearing officer list, as well as the appointment of the Chief Hearing Officer is done by the Supreme Court upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel. See the separate memo regarding Disciplinary Board Provisions for background on this general proposal.

The Board of Governors has approved changing the terms for hearing officers from an initial one-year term followed by five-year terms to an initial two-year term followed by four year terms. We propose an amendment to what is currently ELC 2.5(c) to accomplish this.

We also propose a three-year renewable term for the Chief Hearing Officer, similar to the term provisions for a Conflicts Review Officer in what is currently ELC 2.5(f).

For illustrative purposes, we include the deletion of ELC 2.5(c). Please see the separate memo regarding the Disciplinary Selection Panel for an explanation as to why this provision is being removed from ELC 2.5(c) and placed elsewhere in the ELC.

Draft Rule Changes:

ELC 2.5 HEARING OFFICER OR PANEL

(a) Function. A hearing officer ~~or panel~~ to whom a case has been assigned for hearing conducts the hearing and performs other functions as provided under these rules.

(b) Qualifications. A hearing officer must be an active member of the Association, have been an active or judicial member of the Association for at least seven years, have

no record of public discipline, and have experience as an adjudicator or as an advocate in contested adjudicative hearings.

(c) Hearing Officer Selection Panel. ~~The hearing officer selection panel makes recommendations to the Board of Governors for appointment, reappointment, and removal of hearing officers. The panel is appointed by the Board of Governors and includes, but is not limited to, a Board of Governors member who serves as its chair, one or more former Chairs of the Disciplinary Board, and one or more former nonlawyer members of the Disciplinary Board.~~

(dc) Appointment. ~~The Supreme Court, upon recommendation of the Board of Governors in consultation with the disciplinary selection panel, appoints hearing officers to the hearing officer list giving consideration to recommendations of the hearing officer selection panel. The list should include as many lawyers as the Board of Governors considers necessary to carry out the provisions of these rules effectively and efficiently. In making appointments, the Board of Governors Executive Director should consider diversity Diversity in gender, ethnicity, geography, and practice experience should be considered in making appointments. The Board of Governors also maintains a list of nonlawyers willing to serve on hearing panels under section (h).~~

(ed) Terms of Appointment. ~~Appointment to the hearing officer list, or the list of nonlawyers, is for an initial period of one two years, followed by periods of five four years. Reappointment is in the Board of Governors' discretion of the Supreme Court upon recommendation of the Board of Governors in consultation with the disciplinary selection panel. A hearing officer ~~or panel member~~ may continue to act in any matter assigned before his or her term expires. On the recommendation of the hearing officer Board of Governors in consultation with the disciplinary selection panel, the ~~Board of Governors~~ Supreme Court may remove a person from the list of hearing officers ~~or from the list of nonlawyer panel members.~~~~

(fe) Chief Hearing Officer. ~~The Supreme Court, upon recommendation of the Board of Governors in consultation with the disciplinary selection panel, appoints an active member of the Association to a three year renewable term as chief hearing officer who, in addition to hearing matters, assigns cases, monitors and evaluates the performance of hearing officers and panel members, establishes requirements for and supervises hearing officer and hearing panel member training, administers hearing officer compensation, hears prehearing motions when no hearing officer has been assigned, and performs other administrative duties necessary for an efficient and effective hearing system. If the chief hearing officer position is vacant or the chief hearing officer has recused or been disqualified from a particular matter, the Chair may, as necessary, perform the administrative duties of chief hearing officer.~~

(gf) Case Assignment. ~~The chief hearing officer assigns hearing officers to cases from the list of hearing officers appointed by the ~~Board of Governors~~ Supreme Court.~~

(h) Hearing Panel. ~~If a hearing panel is assigned to hear a matter, the chief hearing officer appoints the panel. A panel consists of three persons, with at least one from the hearing officer list and at least one nonlawyer from the list maintained by the Board of Governors.~~

(ig) Training. ~~Hearing officers and hearing panel members must comply with training requirements established by the chief hearing officer.~~

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Hearing Officers Not to Advise or Represent Respondents or Grievants
ELC 2.6(b)

Proposal:

Lawyers on the Hearing Officer List should not be advising or representing either respondents or grievants, or persons they know to likely become such. It is important that members of the hearing officer list conduct themselves so as to avoid any likely conflicts regarding cases to which they may be assigned.

Draft Rule Change:

[NEW SUBSECTION]

ELC 2.6 HEARING OFFICER CONDUCT

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(b) Restriction on Advising or Representing Respondents or Grievants. An appointee to the hearing officer list may not knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings other than advising a person of the availability of grievance procedures.

(b) (c) Integrity of Hearing Officer System.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Disciplinary Counsel Provisions
ELC 2.8

Proposal:

We propose changes to conform to the Board of Governors direction on consideration of the ABA Recommendations that reference be made to disciplinary counsel representing the Office of Disciplinary Counsel rather than the Association. Various other conforming amendments will be necessary to effectuate this change. We also propose other changes to conform the rule to the actual managerial and personnel practices related to disciplinary counsel and special disciplinary counsel.

Draft Rule Change:

ELC 2.8 DISCIPLINARY COUNSEL; SPECIAL DISCIPLINARY COUNSEL

(a) Function. Disciplinary counsel acts as counsel on ~~the Association's~~ behalf of the Office of Disciplinary Counsel on all matters under these rules, and performs other duties as required by these rules or the Chief Disciplinary Counsel, ~~the Executive Director, or the Board of Governors.~~

(b) Appointment. The Executive Director of the Association, under the direction of the Board of Governors, employs a suitable member ~~or members~~ of the Association as ~~disciplinary counsel~~ Chief Disciplinary Counsel. The Chief Disciplinary Counsel selects suitable members of the Association as disciplinary counsel, in a number to be determined by the Executive Director. Special disciplinary counsel may be appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Adjunct Disciplinary Counsel
ELC 2.9

Proposal:

ELC 2.9 provides for Adjunct Investigative Counsel who assist in the investigation of cases. We propose expanding their duties to include serving as probation monitors under ELC 13.8(a)(2) and custodians to protect client interests under ELC 7.7. Given the expanded duties, we also propose changing the name from Adjunct Investigative Counsel to Adjunct Disciplinary Counsel. We also propose some housekeeping amendments. We propose deleting the language about being in good standing because none of our rules use that term and no one knows what it means. We also propose changing the term “disciplinary misconduct,” which is not defined in the ELC, to “disciplinary action,” which is defined in ELC 1.3(f). We also change the training provision from “should” to “may” to allow greater flexibility and clarify that a particular AIC does not have to be trained on all the possible functions of an AIC.

Draft Rule Change:

ELC 2.9 ~~ADJUNCT INVESTIGATIVE~~ DISCIPLINARY COUNSEL

(a) Function. Adjunct ~~investigative~~disciplinary counsel performs the functions set forth in these rules as directed by disciplinary counsel.

(b) Appointment and Term of Office. The Board of Governors, ~~in consultation with~~ upon the recommendation of the Chief Disciplinary Counsel, appoints adjunct ~~investigative~~disciplinary counsel from among the active members of the Association, who have been active or judicial Association members for at least seven years, and have no record of disciplinary misconduct, ~~and are in good standing~~ action. In appointing adjunct ~~investigative~~disciplinary counsel, ~~the Board of Governors should consider~~ diversity in gender, ethnicity, geography, and practice experience should be considered. Each adjunct ~~investigative~~disciplinary counsel is appointed for a five year term on a staggered basis and may be reappointed. Adjunct ~~investigative~~disciplinary counsel ~~should~~ may be trained in the investigation of discipline cases, monitoring respondent lawyers in probation, or serving as custodians to protect clients' interests.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: AIC Not to Advise or Represent Respondents or Grievants
ELC 2.9(c)

Proposal:

Lawyers serving as Adjunct Investigatory Counsel (AIC) are essentially serving as disciplinary counsel in the investigation of disciplinary grievances and should not be advising or representing either respondents or grievants, or persons they know to likely become such. We propose a new subsection (c) to ECL 2.9.

We also include the proposed changes to ELC 2.9 changing the name to Adjunct Disciplinary Counsel and expanding the duties. See, Memo on Adjunct Disciplinary Counsel.

Draft Rule Change:

ELC 2.9 ADJUNCT INVESTIGATIVE DISCIPLINARY COUNSEL

(a) Function. Adjunct ~~investigative~~disciplinary counsel performs the functions set forth in these rules as directed by disciplinary counsel.

(b) Appointment and Term of Office. The Board of Governors, in consultation with the Chief Disciplinary Counsel, appoints adjunct ~~investigative~~disciplinary counsel from among the active members of the Association, who have been active or judicial Association members for at least seven years, have no record of disciplinary misconduct, and are in good standing. In appointing adjunct ~~investigative~~disciplinary counsel, the Board of Governors should consider diversity in gender, ethnicity, geography, and practice experience. Each adjunct ~~investigative~~disciplinary counsel is appointed for a five year term on a staggered basis and may be reappointed. Adjunct ~~investigative~~disciplinary counsel should be trained in the investigation of discipline cases, monitoring respondent lawyers in probation, and serving as custodians to protect clients' interests.

(c) Restriction on Representation. An adjunct disciplinary counsel may not knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings other than advising a person of the availability of grievance procedures.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Do Not Restrict Counsel for Appointment in Supplemental Proceedings
ELC 2.13(b)

Proposal:

ELC 8.3(d)(3) requires counsel to be appointed for a respondent in supplemental proceedings to determine whether the respondent lawyer has the capacity to defend the disciplinary proceeding. These are difficult cases, and it is often difficult to recruit knowledgeable lawyers to do this work, for which they are compensated at a modest pro bono rate. We should not be excluding lawyers who are still within the three-year restriction on representing respondents following service on the Disciplinary Board, the Board of Governors or as President.

Draft Rule Change:

ELC 2.13 RESPONDENT LAWYER

.....
(b) Restrictions on Representation of Respondent. A former Association president, a former Board of Governors member, or a former Disciplinary Board member cannot represent a respondent lawyer in any proceeding under these rules until three years after leaving office. Service as an Adjunct Review Committee Member, counsel appointed under rule 8.3(d)(3), or as a Member Pro Tempore of the Board does not invoke this rule.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Obsolete Language About the Disciplinary Board Ordering a Matter to Hearing
ELC 3.1(b)(8)

Proposal:

Reference is currently made in ELC 3.1(b)(8) to matters being ordered to hearing by the Disciplinary Board. However, the Disciplinary Board is not authorized to order a matter to hearing. We propose deleting the obsolete language, as well as simplifying the rule, since it is not necessary to identify who has ordered the matter to hearing.

Draft Rule Change:

ELC 3.1 OPEN MEETINGS AND PUBLIC DISCIPLINARY INFORMATION

.....

(b) Public Disciplinary Information. The public has access to the following information subject to these rules:

.....

- (8) the bar file and any exhibits and any Board or review committee order in any matter ~~that the Board or a review committee has~~ ordered to public hearing, or any matter in which disciplinary action has been taken, or any proceeding under rules 7.1-7.6;

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Right of Grievant/Respondent/Witness to Release Information
ELC 3.2(f), ELC 3.4(a)

Proposal:

Some have expressed concern as to what a grievant, respondent or witness is permitted to release under ELC 3.4(a), in light of the ELC 3.2(f) contempt provisions for wrongful disclosure or release. We propose broadening the ELC 3.4(a) authorization to any information in the possession of a grievant, respondent or witness not specifically restricted by a protective order, with a specific exclusion stated in ELC 3.2(f). We also recommend a simplification of ELC 3.2(f) as it is not necessary to list all of the individuals to which the prohibition against unauthorized release of confidential information applies, since it applies to everyone except those specifically authorized by ELC 3.4(a) (the grievant, respondent lawyer, or any witness) and the specific releases authorized by other provisions in the rules.

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

(a) Disclosure of Information. Except as provided in rule 3.2(e), the grievant, respondent lawyer, or any witness may disclose ~~the existence of proceedings under these rules or any documents or correspondence the person received~~ any information in their possession regarding a disciplinary matter.

....

ELC 3.2 CONFIDENTIAL DISCIPLINARY INFORMATION

....

(f) Wrongful Disclosure or Release. Disclosure or release of information made confidential by these rules, except as permitted by rule 3.4(a) or otherwise by these rules, ~~by any person involved with an investigation or proceeding, either as the Association's officer or agent (including, but not limited to, its staff, members of the Board of Governors, the Disciplinary Board, a review committee, hearing panels, hearing officers, disciplinary counsel, adjunct investigative counsel, a lawyer appointed under rule 7.7, or any other individual acting under authority of these rules) of any information about a pending or completed investigation or proceeding, except as permitted by these rules,~~ may subject ~~that~~ a person to an action for contempt of the Supreme Court. If the person is a lawyer, wrongful disclosure or release may also be grounds for discipline.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Confidentiality Provisions Apply to All Confidential Information
ELC 3.2(a), ELC 3.4 (a)(b)(c)(e)(i)(h) & (l)

Proposal:

We consider that the confidentiality provisions, both those making information confidential, and those allowing release of confidential information in certain circumstances, apply to all confidential information, regardless of whether it was obtained as part of a pre-filing inquiry, an investigation, or a formal proceeding, and regardless of the format, be it information received by phone call, interview, written materials, etc. The rules need a few tweaks to clarify this. We propose amending ELC 3.2(a) to clarify that the scope of confidentiality applies to the broader term of “all disciplinary information” rather than the current “all disciplinary materials,” which could have a more restrictive meaning. As to release of confidential information, most of the provisions in ELC 3.4 regarding release or disclosure of confidential information already apply to the broader term of “disciplinary information.” There are six subsections that can be read more restrictively, and we propose amending them (ELC 3.4(a),(c), (e), (i), (h), and (l)) so that all of the subsections are consistent. We also recommend clarifying ELC 3.4(b) to state, what is implicitly obvious, that the investigative disclosure rule applies to otherwise confidential information, and to put the restrictive clause at the beginning rather than the end of that subsection.

Draft Rule Change:

ELC 3.2 CONFIDENTIAL DISCIPLINARY INFORMATION

(a) Scope of Confidentiality. All disciplinary ~~materials~~ information that ~~are~~ is not public information as defined in rule 3.1(b) ~~are~~ is confidential, and ~~are~~ is held by the Association under the authority of the Supreme Court, including but not limited to materials submitted to a review committee under rule 8.9 or information protected by rule 3.3(b), rule 5.4(b), rule 5.1(c)(3), a protective order under rule 3.2(e), rule 3.2(b), court order, or other applicable law (e.g., medical records, police reports, etc.).

.....

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

(a) Disclosure of Information. Except as provided in rule 3.2(e) , court order, or other law, the grievant, respondent lawyer, or any witness may disclose ~~the existence of pro-~~

~~ceedings under these rules or any documents or correspondence the person received any information in his or her possession regarding a disciplinary matter.~~

(b) Investigative Disclosure. Except as prohibited by rule 3.3(b), 5.4(b), or 5.1(c)(3), a protective order under rule 3.2(e), court order, or other law, ~~the Association may disclose otherwise confidential information as necessary to conduct the investigation or to keep a grievant advised of the status of a matter except as prohibited by rule 3.3(b), 5.4(b), or 5.1(c)(3), a protective order under rule 3.2(e), other court order, or other applicable law.~~

(c) Release Based upon Lawyer's Waiver. Upon a written waiver by a lawyer, the Association may release the status of otherwise confidential disciplinary proceedings and provide copies of otherwise nonpublic confidential information to:

- (1) the Washington State Bar Association Committee of Law Examiners, the Washington State Bar Association Character and Fitness Committee, the National Conference of Bar Examiners, or the comparable body in other jurisdictions to evaluate the character and fitness of an applicant for admission to the practice of law in that jurisdiction;
- (2) the Washington State Bar Association Judicial Recommendation Committee, or the comparable body in other jurisdictions, to evaluate the character and fitness of a candidate for judicial office;
- (3) the Governor of the State of Washington, or of any other state, or his or her delegate, to evaluate the character and fitness of a potential nominee to judicial office; and
- (4) any other agency that a lawyer authorizes to investigate the lawyer's disciplinary record.

(d) Response to Inquiry or False or Misleading Statement.

- (1) Subject to rule 3.2(e), the President, the Board of Governors, the Executive Director, or Chief Disciplinary Counsel, or a designee of any of them, may release otherwise confidential information:
 - (A) to respond to specific inquiries about matters that are in the public domain; or
 - (B) if necessary to correct a false or misleading public statement.
- (2) A respondent must be given notice of a decision to release information under this section unless the President, the Board of Governors, the Executive Director, or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public or compromise an ongoing investigation.

(e) Discretionary Release. The Executive Director or the Chief Disciplinary Counsel may authorize the general or limited release of any confidential information ~~obtained during an investigation~~ when it appears necessary to protect the interests of clients or other persons, the public, or the integrity of the disciplinary process. A respondent must be given notice of a decision to release information under this section before its release unless the Executive Director or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public, or that the delay caused by giving the respondent notice would be detrimental to the integrity of the disciplinary process.

(f) Statement of Concern.

- (1) *Authority.* The Chief Disciplinary Counsel has discretion to file a statement of concern with the Clerk when deemed necessary to protect members of the public

from a substantial threat, based on information from a pending investigation into a lawyer's apparent ongoing serious misconduct not otherwise made public by these rules.

(2) *Procedure.*

- (A) On or before the date it is filed, a copy of the statement of concern must be served under rule 4.1 on the lawyer about whom the statement of concern has been made. The statement of concern is not public information until 14 days after service.
- (B) The lawyer may at any time appeal to the Chair to have the statement of concern withdrawn.
- (C) If an appeal to the Chair is filed with the Clerk under rule 4.2(a) within 14 days of service of the statement of concern, the statement of concern is not public information unless the Chair so orders and becomes public information upon issuance of the Chair's order.
- (D) The Chair's decision is not subject to further review.
- (E) The Chief Disciplinary Counsel may withdraw a statement of concern at any time.

(g) Release to Judicial Officers. Any state or federal judicial officer may be advised of the status of a confidential disciplinary grievance about a lawyer appearing before the judicial officer in a representational capacity and may be provided with requested confidential information if the grievance is relevant to the lawyer's conduct in a matter before that judicial officer. The judicial officer must maintain the confidentiality of the matter.

(h) Cooperation with Criminal and Disciplinary Authorities. Except as provided in rule 3.2(e), information ~~or testimony~~ may be released to authorities in any jurisdiction authorized to investigate alleged criminal activity or judicial or lawyer misconduct.

(i) Release to Lawyers' Fund for Client Protection. Information ~~obtained in an investigation and about~~ relating to applications pending before the Lawyers' Fund for Client Protection may be released to the Fund. The Fund must treat such information as confidential unless this title or the Executive Director authorizes release.

(j) Conflicts Review Officer. Conflicts review officers have access to any otherwise confidential disciplinary information necessary to perform their duties.

(k) Board of Governors Access. In furtherance of its supervisory function, and not in derogation of the foregoing, the Board of Governors has access to all confidential disciplinary information, but must maintain its confidentiality.

(l) Release to Practice of Law Board. Information ~~obtained in an investigation~~ relating to possible unauthorized practice of law may be released to the Practice of Law Board. Such information shall remain under the control of the Office of Disciplinary Counsel and the Practice of Law Board must treat it as confidential unless this title or the Executive Director authorizes release.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarifying Procedure for Diversions Otherwise Public
ELC 3.3(c)

Proposal:

ELC 3.2(c) provides that diversions are confidential, but that when a matter that has previously become public is diverted, the fact that the matter has been diverted from discipline is public information. Hence a notice that the matter has been diverted is placed in the public file. Concern has been raised as to what happens when the diversion is successfully completed and the matter is dismissed. We propose language providing that upon dismissal, a notice of dismissal is placed in the public file and the file is retained under the provisions of ELC 3.6(b).

Draft Rule Change:

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

....
(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 into evidence in a disciplinary proceeding following 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 and a notice of diversion will be placed in the public file. Upon the conclusion of the diversion, whether by successful completion of diversion and dismissal of the grievance, or by breach of the diversion contract, a notice of that result will be placed in the public file.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Disability Reciprocal Proceedings Should Be Non-Public
ELC 3.3(b)

Proposal:

The rule should be clarified to provide that reciprocal disability proceedings are confidential the same as other disability proceedings.

Draft Rule Change:

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

. . . .

(b) Application to Disability Proceedings. Disability proceedings under title 8 or rule 9.2 are confidential. However, a grievant may be advised that a lawyer against whom the grievant has complained is subject to disability proceedings. The following information is public:

- (1) that a lawyer has been transferred to disability inactive status, or has been reinstated to active status; and
- (2) that a disciplinary proceeding is deferred pending supplemental proceedings under title 8.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Fact of Custodianship Public Information
ELC 3.3 New Subsection (c)

Proposal:

The rules are currently unclear whether and to what extent information is public when a custodian is appointed to protect client interests under ELC 7.7. Under this rule, a custodian is authorized to take possession of the files, records and trust account of a lawyer when necessary to protect the public due to a lawyer's disappearance, death or incapacity. To protect the public, it is essential that the public be informed of the appointment of the custodian and the means by which the custodian may be contacted. Notice of such an appointment should be published in the Bar News, as well as available on the lawyer directory at the WSBA website.

Draft Rule Change:

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

. . . .

[NEW SUBSECTION]

(c) Custodianships. The fact that a custodian has been appointed under rule 7.7, together with the custodian's name and contact information and orders appointing and discharging such custodians, are public information and the notices required by rule 3.5(d) will be given. Client files and records under the control of such custodians will be held confidential absent authorization to release from the client.

(c) (d) Diversion Contracts.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: What Can Be Released Regarding a Disability Proceeding
ELC 3.3(b)

Proposal:

The rule on what can be released and to whom regarding disability proceedings needs clarification. We propose clarifying both what can be told to the public about a public matter that is deferred pending a supplemental proceeding, as well as what further information may be told to grievants regarding such matters. Currently ELC 3.3(b) says a grievant may be advised that the respondent is subject to disability proceedings. We think this should be clarified and made consistent with the ELC 3.4(b) provision that allows confidential information to be disclosed to grievants as necessary to keep them advised of the status of their matters.

Draft Rule Change:

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

....

(b) Application to Disability Proceedings. Disability proceedings under title 8 are confidential. However, the following are public information: the fact that a lawyer has been transferred to disability inactive status, the fact that a lawyer has been reinstated to active status from disability inactive status, and the fact that a disciplinary proceeding is deferred pending supplemental proceedings under title 8. In addition, otherwise confidential information may be disclosed to grievants as necessary to keep them advised of the status of their matters. ~~However, a grievant may be advised that a lawyer against whom the grievant has complained is subject to disability proceedings. The following information is public:~~

- ~~(1) that a lawyer has been transferred to disability inactive status, or has been reinstated to active status; and~~
- ~~(2) that a disciplinary proceeding is deferred pending supplemental proceedings under title 8.~~

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Board of Governors Access to Confidential Disciplinary Information
ELC 3.4(k)

Proposal:

We propose updating the language about Board of Governors access to confidential information under ELC 3.4(k). The Board does not have actual access to all confidential information, but does from time to time receive confidential information from the Chief Disciplinary Counsel when discussing a relevant issue. We have updated the language to reflect that these are discretionary releases, similar to those under ELC 3.4(e), but not requiring notice to the respondent. We also expand the provision to authorize release to the officers of the Association.

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

....

(k) Release to Board of Governors Access or Officers. The Chief Disciplinary Counsel may authorize the release of otherwise confidential information to ~~In furtherance of its supervisory function, and not in derogation of the foregoing,~~ the Board of Governors or officers of the Association as necessary to carry out their duties under these rules, ~~has access to all confidential disciplinary information but~~ the Board of Governors or officers of the Association must maintain its confidentiality.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarifying Respondent-Authorized Release of Confidential Information
ELC 3.4(c)

Proposal:

The provisions of ELC 3.4(c) are needlessly detailed as to the agencies who may receive confidential information based on a lawyer's release. The names and structures of the various agencies change from time to time. We propose deleting the list of agencies in favor of a more simple provision that authorizes release based on a written waiver to any agency authorized to investigate the lawyer's record, or any person as specifically authorized by the lawyer. We also recommend clarifying that the provision applies to the record of a disability proceeding as well as the record of a disability proceeding.

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

....

(c) Release Based upon Lawyer's Waiver. Upon a written waiver by a lawyer, the Association may release the status of otherwise confidential disciplinary or disability proceedings and provide copies of nonpublic information to:

- ~~(1) the Washington State Bar Association Committee of Law Examiners, the Washington State Bar Association Character and Fitness Committee, the National Conference of Bar Examiners, or the comparable body in other jurisdictions to evaluate the character and fitness of an applicant for admission to the practice of law in that jurisdiction;~~
- ~~(2) the Washington State Bar Association Judicial Recommendation Committee, or the comparable body in other jurisdictions, to evaluate the character and fitness of a candidate for judicial office;~~
- ~~(3) the Governor of the State of Washington, or of any other state, or his or her delegate, to evaluate the character and fitness of a potential nominee to judicial office; and~~
- ~~(4) any other agency that a lawyer authorizes to investigate the lawyer's disciplinary record.~~

any person or entity authorized by the lawyer to receive the information.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Discretionary Release Decisions Final
ELC 3.4(d) & (e)

Proposal:

Two of the discretionary release provisions call for notice of the release, ELC 3.4(d) & (e). When the notice is given in advance, the respondent lawyer may comment. No provision is made for a respondent lawyer contesting the ultimate decision regarding what is released. We propose that the rule be clarified with a statement that these decisions are final and not subject to review.

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

....

(d) Response to Inquiry or False or Misleading Statement.

- (1) Subject to rule 3.2(e), the President, the Board of Governors, the Executive Director, or Chief Disciplinary Counsel, or a designee of any of them, may release otherwise confidential information:
 - (A) to respond to specific inquiries about matters that are in the public domain; or
 - (B) if necessary to correct a false or misleading public statement.
- (2) A respondent must be given notice of a decision to release information under this section unless the President, the Board of Governors, the Executive Director, or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public or compromise an ongoing investigation.
- (3) A decision regarding release of information is final and not subject to further review.

(e) Discretionary Release. The Executive Director or the Chief Disciplinary Counsel may authorize the general or limited release of any confidential information obtained during an investigation when it appears necessary to protect the interests of clients or other persons, the public, or the integrity of the disciplinary process. A respondent must be given notice of a decision to release information under this section before its release unless the Executive Director or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public, or that the delay caused by giving the respondent notice would be detrimental to the integrity of the disciplinary process. A decision regarding release of information is final and not subject to further review.

....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Release Information to Agencies Investigating Judicial/Lawyer Disability
ELC 3.4(h)

Proposal:

It is not clear whether ELC 3.4(h), which authorizes release of information to agencies authorized to investigate judicial or lawyer misconduct includes agencies investigating instances of lawyer or judicial disability. We propose language to clarify that it does.

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

.....

(h) Cooperation with Criminal and Disciplinary Authorities. Except as provided in rule 3.2(e), information or testimony may be released to authorities in any jurisdiction authorized to investigate alleged criminal activity, or judicial or lawyer misconduct, or disability.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Release Information to Law Enforcement
ELC 3.4(h)

Proposal:

It is not clear whether ELC 3.4(h), which authorizes release of information to agencies authorized to investigate alleged criminal activity necessarily includes Attorney General offices, and regulatory enforcement agencies such as the SEC. We propose adding agencies authorized to investigate “unlawful activity,” and revising the title to the all-inclusive “Law Enforcement.”

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

.....

(h) Cooperation with Criminal Law Enforcement and Disciplinary Authorities. Except as provided in rule 3.2(e), information or testimony may be released to authorities in any jurisdiction authorized to investigate alleged criminal or unlawful activity or judicial or lawyer misconduct.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Release or Disclosure of Confidential Information Always Subject to Protective Order
ELC 3.4

Proposal:

Various subsections of ELC 3.4 on Release or Disclosure of Otherwise Confidential Information provide that the particular provision is subject to a protective order under ELC 3.2(e). These are ELC 3.4 subsections (a), (b), (d), (e), and (h). It is not clear why similar provisions have not been included in ELC 3.4 subsections (c), (f), (g), (i), (j), (k) and (l), but we believe that a discretionary release or disclosure should not be made when it is contrary to a protective order without the party who obtained the protective order having the opportunity to defend the protective order on a motion to vacate, stay or modify the protective order. The exception to this is when the release is made to a Conflicts Review Officer under ELC 3.4(j) who acts as disciplinary counsel on matters that are referred. We propose to add language referencing ELC 3.2(e) to all of the subsections of ELC 3.4 with the exception of ELC 3.4(j).

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

(a) Disclosure of Information. Except as ~~provided in~~ prohibited by rule 3.2(e), the grievant, respondent lawyer, or any witness may disclose the existence of proceedings under these rules or any documents or correspondence the person received.

(b) Investigative Disclosure. The Association may disclose information as necessary to conduct the investigation or to keep a grievant advised of the status of a matter except as prohibited by rule 3.3(b), 5.4(b), or 5.1(c)(3), a protective order under rule 3.2(e), other court order, or other applicable law.

(c) Release Based upon Lawyer's Waiver. Upon a written waiver by a lawyer, except as prohibited by rule 3.2(e), the Association may release the status of otherwise confidential disciplinary proceedings and provide copies of nonpublic information to:

- (1) the Washington State Bar Association Committee of Law Examiners, the Washington State Bar Association Character and Fitness Committee, the National Conference of Bar Examiners, or the comparable body in other jurisdictions to evaluate the character and fitness of an applicant for admission to the practice of law in that jurisdiction;

- (2) the Washington State Bar Association Judicial Recommendation Committee, or the comparable body in other jurisdictions, to evaluate the character and fitness of a candidate for judicial office;
- (3) the Governor of the State of Washington, or of any other state, or his or her delegate, to evaluate the character and fitness of a potential nominee to judicial office; and
- (4) any other agency that a lawyer authorizes to investigate the lawyer's disciplinary record.

(d) Response to Inquiry or False or Misleading Statement.

- (1) ~~Subject to~~ Except as prohibited by rule 3.2(e), the President, the Board of Governors, the Executive Director, or Chief Disciplinary Counsel, or a designee of any of them, may release otherwise confidential information:
 - (A) to respond to specific inquiries about matters that are in the public domain; or
 - (B) if necessary to correct a false or misleading public statement.
- (2) A respondent must be given notice of a decision to release information under this section unless the President, the Board of Governors, the Executive Director, or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public or compromise an ongoing investigation.

(e) Discretionary Release. The Executive Director or the Chief Disciplinary Counsel may authorize the general or limited release of any confidential information obtained during an investigation when it appears necessary to protect the interests of clients or other persons, the public, or the integrity of the disciplinary process, except as prohibited by rule 3.2(e). A respondent must be given notice of a decision to release information under this section before its release unless the Executive Director or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public, or that the delay caused by giving the respondent notice would be detrimental to the integrity of the disciplinary process.

(f) Statement of Concern.

- (1) *Authority.* The Chief Disciplinary Counsel has discretion to file a statement of concern with the Clerk when deemed necessary to protect members of the public from a substantial threat, based on information from a pending investigation into a lawyer's apparent ongoing serious misconduct not otherwise made public by these rules. The statement may not disclose information protected by rule 3.2(e).
- (2) *Procedure.*
 - (A) On or before the date it is filed, a copy of the statement of concern must be served under rule 4.1 on the lawyer about whom the statement of concern has been made. The statement of concern is not public information until 14 days after service.
 - (B) The lawyer may at any time appeal to the Chair to have the statement of concern withdrawn.
 - (C) If an appeal to the Chair is filed with the Clerk under rule 4.2(a) within 14 days of service of the statement of concern, the statement of concern is not public information unless the Chair so orders and becomes public information upon issuance of the Chair's order.
 - (D) The Chair's decision is not subject to further review.

(E) The Chief Disciplinary Counsel may withdraw a statement of concern at any time.

(g) Release to Judicial Officers. Any state or federal judicial officer may be advised of the status of a confidential disciplinary grievance about a lawyer appearing before the judicial officer in a representational capacity and except as prohibited by rule 3.2(e), may be provided with requested confidential information if the grievance is relevant to the lawyer's conduct in a matter before that judicial officer. The judicial officer must maintain the confidentiality of the matter.

(h) Cooperation with Criminal and Disciplinary Authorities. Except as ~~provided in~~ prohibited by rule 3.2(e), information or testimony may be released to authorities in any jurisdiction authorized to investigate alleged criminal activity or judicial or lawyer misconduct.

(i) Release to Lawyers' Fund for Client Protection. Information obtained in an investigation and about applications pending before the Lawyers' Fund for Client Protection may, except as prohibited by rule 3.2(e), be released to the Fund. The Fund must treat such information as confidential unless this title or the Executive Director authorizes release.

(j) Conflicts Review Officer. Conflicts review officers have access to any otherwise confidential disciplinary information necessary to perform their duties.

(k) Board of Governors Access. In furtherance of its supervisory function, and not in derogation of the foregoing, the Board of Governors has access to all confidential disciplinary information, except as prohibited by rule 3.2(e), but must maintain its confidentiality.

(l) Release to Practice of Law Board. Information obtained in an investigation relating to possible unauthorized practice of law may, except as prohibited by rule 3.2(e), be released to the Practice of Law Board. Such information shall remain under the control of the Office of Disciplinary Counsel and the Practice of Law Board must treat it as confidential unless this title or the Executive Director authorizes release.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Release of Information Shared with Practice of Law Board
ELC 3.4(l)

Proposal:

ELC 3.4(l), authorizes sharing of information obtained in an investigation relating to possible unauthorized practice of law to be shared with the Practice of Law Board, but requires that the information remain under the control of the Office of Disciplinary Counsel. It is not clear what “remain under the control of the Office of Disciplinary Counsel” means, and whether a copy of materials may be provided. We clarify that the information may be provided but must be maintained as confidential unless the Executive Director or Chief Disciplinary Counsel authorizes release.

Draft Rule Change:

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

.....

(l) Release to Practice of Law Board. Information obtained in an investigation relating to possible unauthorized practice of law may be released to the Practice of Law Board. ~~Such information shall remain under the control of the Office of Disciplinary Counsel and~~ ~~the Practice of Law Board must treat it as~~ maintain the confidentiality of the information unless ~~this title~~ or the Executive Director or the Chief Disciplinary Counsel authorizes release.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Publication and Notices to Judges of Interim Suspensions
ELC 3.5(d) & (e)

Proposal:

Prior to the adoption of the ELC, the RLD provided for publication of interim suspensions. A question has been raised whether the ELC intended any change in this regard. We believe no change was intended and propose clarifications that notices of interim suspensions are to be published, and notices given to the presiding judges.

Draft Rule Change:

ELC 3.5 NOTICE OF DISCIPLINE

.....

(d) Notices of Suspension, Disbarment, Resignation in Lieu of Disbarment, Interim Suspension or Disability Inactive Status. The Association must publish a notice of the disbarment, suspension, resignation in lieu of disbarment, interim suspension or transfer to disability inactive status of a lawyer in the Washington State Bar News and electronic or other index or site maintained by the Association for public information. The Association must provide copies of these notices to the news media in a manner designed to notify the public in the county or region where the lawyer has maintained a practice. For a transfer to disability inactive status, reference will be made to the disability inactive status, but no reference may be made to the specific disability. For an interim suspension, the basis of the interim suspension will be stated.

(e) Notice to Judges. The Association must promptly notify the presiding judge of the superior court of the county in which the lawyer maintained a practice of the lawyer's disbarment, suspension, resignation in lieu of disbarment, interim suspension, or transfer to disability inactive status, and may similarly notify the presiding judge of any district court located in the county where the lawyer practiced, or the judge of any other court in which the lawyer may have practiced or is known to have practiced.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Update Reference to National Lawyer Regulatory Data Bank
ELC 3.5(b)(3)

Proposal:

Currently ELC 3.5(b)(3) references the National Discipline Data Bank, which has changed its name to the National Lawyer Regulatory Data Bank. We propose updating the rule with the new name.

Draft Rule Change:

ELC 3.5 NOTICE OF DISCIPLINE

.....

(b) Other Notices. The counsel to the Board must also notify the following entities of the imposition of a disciplinary sanction or admonition, a resignation in lieu of disbarment, or the filing of a statement of concern under rule 3.4(f) as follows, in such form as may appear appropriate:

- (1) the lawyer discipline authority or highest court in any jurisdiction where the lawyer is believed to be admitted to practice;
- (2) the chief judge of each federal district court in Washington State and the chief judge of the United States Court of Appeals for the Ninth Circuit;
- (3) the ~~National Discipline Data Bank~~ National Lawyer Regulatory Data Bank; and
- (4) the Washington State Bar News.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Retention of Files Dismissed Following Diversion
ELC 3.6(b)

Proposal:

ELC 3.6(b) provides that the file on a matter that has been dismissed may be destroyed three years after the dismissal first occurred. ELC 6.9 provides that following a successful diversion, the grievance files are dismissed. One of the factors to be considered under ELC 6.3 when deciding whether to offer diversion is whether diversion has already been tried. Unless we retain files dismissed by diversion for substantially longer than the standard 3-year retention period, we do not have a sufficient data base to know whether diversion was tried before. We propose a 10-year retention period for such files.

Draft Rule Change:

ELC 3.6 MAINTENANCE OF RECORDS

.....

(b) Destruction of Files. In any matter in which a grievance or investigation has been dismissed without the imposition of a disciplinary sanction, whether following a hearing or otherwise, file materials relating to the matter may be destroyed three years after the dismissal first occurred, and must be destroyed at that time on the respondent lawyer's request unless the files are being used in an ongoing investigation or unless other good cause exists for retention. However, file materials on a matter concluded with an admonition must be retained at least five years after the admonition was issued and file materials on a matter dismissed after a diversion must be retained at least ten years after the dismissal. If disciplinary counsel opposes a request by a respondent for destruction of files under this rule, the Board rules on that request.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Admonitions To Be Permanent
ELC 3.6 and ELC 13.5

Proposal:

Prior to 1997, admonitions were non-public. In 1997 a series of changes were adopted to the RLD to implement changes that had been recommended by the Joint Task Force on Lawyer Discipline. The issue of whether admonitions should become public was debated at length. A compromise was reached to make admonitions public, but to make them non-permanent. Originally, admonition files were subject to destruction after 3 years. With the adoption of the ELC in 2002 we extended that to 5 years. Over time, it has become apparent that the 'public but not permanent' compromise has not worked well. Because admonitions are public, and published in the *Bar News*, the bell cannot be truly un-rung when we destroy the file some years later. While we can, and have removed references to admonitions on our website, the hard copies of the *Bar News* exist forever.

We think it is time to recognize that the 'public but not permanent' compromise was a mistake. We think we should either make admonitions non-public and non-permanent, or public and permanent. We propose making admonitions permanent and public. We think to take admonitions non-public, after 12 years of them being public, would be a giant step backwards in our commitment to protect the public by providing information needed by consumers of legal services. We also note that we now have diversion as a non-public option for many of the cases that formerly were dealt with as admonitions.

Draft Rule Change:

ELC 3.6 MAINTENANCE OF RECORDS

(a) Permanent Records. In any matter in which a disciplinary sanction or admonition has been imposed, the bar file and transcripts of the proceeding are permanent records. Related file materials, including investigative files, may be maintained in disciplinary counsel's discretion. Exhibits may be returned to the party supplying them, but copies should be retained where possible.

(b) Destruction of Files. In any matter in which a grievance or investigation has been dismissed without the imposition of a disciplinary sanction or admonition, whether following a hearing or otherwise, file materials relating to the matter may be destroyed three years after the dismissal first occurred, and must be destroyed at that time on the

respondent lawyer's request unless the files are being used in an ongoing investigation or unless other good cause exists for retention. ~~However, file materials on a matter concluded with an admonition must be retained at least five years after the admonition was issued.~~ If disciplinary counsel opposes a request by a respondent for destruction of files under this rule, the Board rules on that request.

.....

ELC 13.5 ADMONITION

.....

(d) Effect. An admonition is a permanent discipline record and is admissible in subsequent disciplinary or disability proceedings involving the respondent. ~~Rule 3.6(b) governs destruction of file materials relating to an investigation or hearing concluded with an admonition, including the admonition.~~

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Allow All Mailing to Be By First Class
ELC 4.1(b)(1)(B)

Proposal:

ELC 4.1(b)(1)(B) provides that service by mail must be by certified or registered mail, but then exempts certain items that may be by regular mail. We find that most respondents prefer regular first class mail and almost always waive the certified or registered mail in formal proceedings. We propose that regular first class mail be the standard, but that certified or registered, return receipt requested, would remain as an option.

Draft Rule Change:

ELC 4.1 SERVICE OF PAPERS

.....

(b) Methods of Service.

(1) *Service by Mail.*

- (A) Unless personal service is required or these rules specifically provide otherwise, service may be accomplished by postage prepaid mail. If properly made, service by mail is deemed accomplished on the date of mailing and is effective regardless of whether the person to whom it is addressed actually receives it.
- (B) ~~Except as provided below, s~~ Service by mail must may be by first class mail or by certified or registered mail, return receipt requested. ~~Service may be by first class mail if:~~
- ~~(i) the parties so agree;~~
 - ~~(ii) the document is a notice of dismissal by disciplinary counsel or by a review committee under rule 5.6, a notice regarding deferral under rule 5.3(c), or a request for review of any of these notices;~~
 - ~~(iii) one or more properly made certified mailings is returned as unclaimed; or~~
 - ~~(iv) service is on a hearing officer or panel.~~

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Provide For Certified Mail Service on Respondent's Registered Agent
ELC 4.1(b)(3)(B)(ii)

Proposal:

APR 5(f) requires any non-resident lawyer to file with the WSBA the name and address of a resident agent for the purpose of receiving service of process, and provides that service or delivery to such agent is deemed service upon or delivery to the lawyer. ELC 4.1(b)(3)(B) provides for service on a respondent who cannot be found in Washington, and should include the option of serving the registered agent. We so propose.

Draft Rule Change:

Rule 4.1 SERVICE OF PAPERS

....

(b) Methods of Service.

(1) *Service by Mail.*

- (A) Unless personal service is required or these rules specifically provide otherwise, service may be accomplished by postage prepaid mail. If properly made, service by mail is deemed accomplished on the date of mailing and is effective regardless of whether the person to whom it is addressed actually receives it.
- (B) Except as provided below, service by mail must be by certified or registered mail, return receipt requested. Service may be by first class mail if:
 - (i) the parties so agree;
 - (ii) the document is a notice of dismissal by disciplinary counsel or by a review committee under rule 5.6, a notice regarding deferral under rule 5.3(c), or a request for review of any of these notices;
 - (iii) one or more properly made certified mailings is returned as unclaimed; or
 - (iv) service is on a hearing officer or panel.
- (C) The address for service by mail is as follows:
 - (i) for the respondent, or his or her attorney of record, the address in the answer, a notice of appearance, or any subsequent document filed by the respondent or his or her attorney; or, in the absence of an answer, the respondent's address on file with the Association;
 - (ii) for disciplinary counsel, at the address of the Association or other address that disciplinary counsel requests.

- (2) *Service by Delivery.* If service by mail is permitted, service may instead be accomplished by leaving the document at the address for service by mail.
- (3) *Personal Service.* Personal service on a respondent is accomplished as follows:
 - (A) if the respondent is found in Washington State, by personal service in the manner required for personal service of a summons in a civil action in the superior court;
 - (B) if the respondent cannot be found in Washington State, service may be made either by:
 - (i) leaving a copy at the respondent's place of usual abode in Washington State with a person of suitable age and discretion then resident therein; or
 - (ii) mailing by registered or certified mail, postage prepaid, a copy addressed to the respondent at his or her last known place of abode, office address maintained for the practice of law, post office address, ~~or~~ address on file with the Association, or to the respondent's registered agent whose name and address are on file with the Association under APR 5(f).
 - (C) if the respondent is found outside of Washington State, then by the methods of service described in (A) or (B) above.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Declarations in Lieu of Affidavits
ELC 4.8

Proposal:

GR 13 allows use of declarations under penalty of perjury, with certain exceptions. This rule applies to matters governed by the ELC, but it would be useful to have a rule setting that out.

Draft Rule Change:

[NEW SECTION]

ELC 4.8 DECLARATIONS IN LIEU OF AFFIDAVITS

Whenever an affidavit is required by these rules, a declaration in the form authorized by GR 13 may be used.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Effect Of GR 3.1 On Service and Filing
New ELC 4.9

Proposal:

We propose a new rule in ELC Title 4 to acknowledge the effect of GR 3.1 on service and filing by an inmate confined in an institution.

GR 3.1 provides:

RULE GR 3.1 Service and Filing by an Inmate Confined in an Institution

- (a) If an inmate confined in an institution files a document in any proceeding, the document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.
- (b) Whenever service of a document on a party is permitted to be made by mail, the document is deemed "mailed" at the time of deposit in the institution's internal mail system addressed to the parties on whom the document is being served.
- (c) If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing or mailing may be shown by a declaration or notarized affidavit in form substantially as follows:

DECLARATION

I, [name of inmate], declare that, on [date], I deposited the foregoing [name of document], or a copy thereof, in the internal mail system of [name of institution] and made arrangements for postage, addressed to:
[name and address of court or other place of filing];
[name and address of parties or attorneys to be served].
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at [city, state] on [date].

[signature]

(d) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after filing or service of a document, and if an inmate files or serves the document under this rule, that period shall begin to run on the date the document is received by the party.

[Adopted effective September 1, 2006.]

Draft Rule Change:

[NEW RULE]

ELC 4.9 Service and Filing by an Inmate Confined in an Institution

Service and filing of papers under these rules by an inmate confined in an institution will conform to the requirements of GR 3.1.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Modify Procedures for Requesting Removal of Assigned Hearing Officer
ELC 10.2

Proposal:

ELC 10.2 provides for requesting removal of an assigned hearing officer or hearing panel member. We propose two changes to clarify this procedure. Currently, such a request must be made within 10 days of service on the moving party. This often means the parties have a different deadline for filing such a request. We believe the filing deadline should be the same for both parties and propose a change to ELC 10.2(b)(1) so that the deadline runs from the date of service of the hearing officer assignment on the respondent. ELC 4.1(a) requires that all motions or similar papers be served on the assigned hearing officer. When that is a motion that the assigned hearing officer be removed for cause, this is awkward, particularly because the motion is acted on by the chief hearing officer rather than the assigned hearing officer. We propose language in ELC 10.2(b)(2) providing that motions to disqualify a hearing officer be served on the chief hearing officer.

Draft Rule Change:

ELC 10.2 HEARING OFFICER OR PANEL

....

(b) Disqualification and Removal.

- (1) *Removal Without Cause.* Either party may have an assigned hearing officer or hearing panel member removed, without establishing cause for the removal, by filing a written request with the chief hearing officer within ten days of after service on ~~the moving~~ the respondent party of that officer or panel member's assignment. A party may only once request removal without cause in any proceeding.
- (2) *Disqualification for Cause.* Either party may seek to disqualify any assigned hearing officer or hearing panel member for good cause. A motion under this subsection must be filed and served on the chief hearing officer promptly after the party knows, or in the exercise of due diligence should have known, of the basis for the disqualification.
- (3) *Removal.* The chief hearing officer decides all requests for removal and disqualification motions, except the Chair decides a request to remove or disqualify the chief hearing officer. The decision of the chief hearing officer or Chair on a request for removal or a motion to disqualify is not subject to interim review. Upon removal or disqualification of an assigned hearing officer or hearing panel member, the chief hearing officer assigns a replacement.

To: The above named lawyer:

A formal complaint has been filed against you, a copy of which is served on you with this notice. You are notified that you *must* file your answer to the complaint *within 20 days of the date of service on you*, by filing the original of your answer with the Clerk to the Disciplinary Board of the Washington State Bar Association, [insert address] and by serving one copy [on the hearing officer] [on each member of the hearing panel] if one has been assigned and one copy on disciplinary counsel at the address[es] given below. ~~Failure to file an answer may result in the imposition of a disciplinary sanction against you and the entry of an order of default under rule 10.6 of the Rules for Enforcement of Lawyer Conduct.~~

Notice of default procedure: Your default may be entered for failure to file a written answer to this formal complaint within 20 days of service as required by rule 10.6 of the Rules for Enforcement of Lawyer Conduct. The entry of an order of default may will result in the allegations and violations charges of misconduct in the formal complaint being admitted and established discipline being imposed or recommended based on the admitted charges of misconduct and your disbarment recommended to the Supreme Court together with such restitution as may be established by disciplinary counsel. If an order of default is entered, you will lose the opportunity to participate further in these proceedings unless and until the order of default is vacated on motion timely made under rule 10.6(c) of the Rules for Enforcement of Lawyer Conduct. The entry of an order of default means that you will receive no further notices regarding these proceedings except those required by rule 10.6(b)(2).

The [hearing officer] [hearing panel] assigned to this proceeding is: [insert name, address, and telephone number of hearing officer, or name, address, and telephone number of each hearing panel member with an indication of the chair of the panel].

Dated this _____ day of _____, 20__.

WASHINGTON STATE BAR ASSOCIATION

By _____

Disciplinary Counsel, Bar No.

Address: _____

Telephone: _____

.....

ELC 10.6 DEFAULT PROCEEDINGS

(a) Entry of Default.

- (1) *Timing.* If a respondent lawyer, after being served with a notice to answer as provided in rule 10.4, fails to file an answer to a formal complaint or to an amendment to a formal complaint within the time provided by these rules, discip-

linary counsel may serve the respondent with a written motion for an order of default.

- (2) *Motion.* Disciplinary counsel must serve the respondent with a written motion for an order of default and a copy of this rule at least five days before entry of the order of default. The motion for an order of default must include the following:
 - (A) the dates of filing and service of the notice to answer, formal complaint, and any amendments to the complaint; ~~and~~
 - (B) disciplinary counsel's statement that the respondent has not timely filed an answer as required by rule 10.5 and that disciplinary counsel seeks an order of default under this rule; and
 - (C) notice that a default will result in the allegations and violations in the formal complaint being admitted and established, and a recommendation to the Court for the respondent lawyer's disbarment and such restitution as may be established by disciplinary counsel.
- (3) *Entry of Order of Default.* If the respondent fails to file a written answer with the Clerk within five days of service of the motion for entry of an order of default, the hearing officer, or if no hearing officer or panel has been assigned, the chief hearing officer, on proof of proper service of the motion, enters an order finding the respondent in default.
- (4) *Effect of Order of Default.* Upon entry of an order of default, the allegations and violations in the formal complaint and any amendments to the complaint are deemed admitted and established ~~for the purpose of imposing discipline~~ and the respondent may not participate further in the proceedings unless the order of default is vacated under this rule.

(b) Proceedings After Entry of an Order of Default.

- (1) *Service.* The Clerk serves the order of default and a copy of this rule under rule 4.2(b).
- (2) *No Further Notices.* After entry of an order of default, no further notices must be served on the respondent except for copies of the decisions of the hearing officer or hearing panel and the Board.
- (3) *Disciplinary Proceeding.* ~~Within 60~~ 20 days of the filing of the order of default, ~~the hearing officer must conduct a disciplinary proceeding to recommend disciplinary action based on the allegations and violations established under section (a). At the discretion of the hearing officer or panel, these proceedings may be conducted by formal hearing, written submissions, telephone hearing, or other electronic means. Disciplinary counsel may present additional evidence including, but not limited to, requests for admission under rule 10.11(b), and depositions, affidavits, and declarations regardless of the witness's availability.~~ disciplinary counsel must file a statement of any requested restitution sought under rule 13.7, together with any supporting documentation. Within 60 days of the filing of the order of default the hearing officer must enter an order finding the allegations and violations of the formal complaint, and any amendments to the complaint, as established and recommending the respondent lawyer's disbarment and such restitution as may be established by disciplinary counsel's statement.

(4) Supreme Court Action. Upon filing of the hearing officer's order, the matter is not subject to review under Title 11, and the Clerk will forward the order to the Supreme Court for review and entry of an appropriate order.

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ELC 10.13 DISCIPLINARY HEARING

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(d) Witnesses. Except as provided in subsection (b)(2) and ~~rule 10.6~~, witnesses must testify under oath. Testimony may also be submitted by deposition as permitted by CR 32. Testimony must be recorded by a court reporter or, if allowed by the hearing officer, by tape recording. The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.

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ELC 13.9 COSTS AND EXPENSES

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(c) Expenses Defined. "Expenses" for the purposes of this rule means a reasonable charge for attorney fees and administrative costs. Expenses assessed under this rule may equal the actual expenses incurred by the Association, but in any case cannot be less than the following amounts:

- (1) for an admonition that is accepted under rule 13.5(a), \$750;
- (2) for a matter that becomes final without review by the Board, including those matters resolved by a final order under rule 10.6(b)(4), \$1,500;
- (3) for a matter that becomes final following Board review, without appeal to the Supreme Court, a total of \$2,000;
- (4) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review but not requiring briefing, a total of \$2,500; and
- (5) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review in which briefing is required, a total of \$3,000.

(d) Statement of Costs and Expenses, Exceptions, and Reply.

- (1) *Timing.* Disciplinary counsel must file a statement of costs and expenses with the Clerk within 20 days from any of the following events:
 - (A) an admonition is accepted;
 - (B) the decision of a hearing officer or panel or the Board imposing an admonition or a sanction becomes final;
 - (C) a notice of appeal from a Board decision is filed and served; ~~or~~
 - (D) the Supreme Court accepts or denies discretionary review of a Board decision; or
 - (E) the Supreme Court enters a final order on a default disbarment under rule 10.6(b)(4).
- (2) *Content.* A statement of costs and expenses must state with particularity the nature and amount of the costs claimed and also state the expenses requested. Disciplinary counsel must sign the statement, and this signature constitutes a certification that all reasonable attempts have been made to insure the statement's accuracy.
- (3) *Service.* The Clerk serves a copy of the statement on the respondent.

(4) *Exceptions*. The respondent may file exceptions no later than 20 days from service of the statement of costs and expenses.

(5) *Reply*. Disciplinary counsel may file a reply no later than ten days from service of any exceptions.

(e) Assessment. The Chair enters an order assessing costs and expenses after the expiration of the time for filing exceptions or replies.

(f) Review of Chair's Decision.

(1) *Matters Reviewed by Court*. In matters reviewed by the Supreme Court under title 12, the Chair's decision is subject to review only by the Court.

(2) *All Other Matters*. In all other matters, including those resolved under rule 10.6(b)(4), the following procedures apply:

(A) Request for Review by Board. Within 20 days of service on the respondent of the order assessing costs and expenses, either party may file a request for Board review of the order.

(B) Board Action. Upon the timely filing of a request, the Board reviews the order assessing costs and expenses, based on the Association's statement of costs and expenses and any exceptions or reply, the decision of the hearing officer or panel or of the Board, and any written statement submitted by either party within the time directed by the Chair. The Board may approve or modify the order assessing costs and expenses. The Board's decision is final when filed and not subject to further review.

(g) Assessment in Matters Reviewed by the Court. When a matter is reviewed by the Court as provided in title 12, any order assessing costs and expenses entered by the Chair under section (e) and the statement of costs and expenses and any exceptions or reply filed in the proceeding are included in the record transmitted to the Court. Upon filing of an opinion by the Court imposing a sanction or admonition, costs and expenses may be assessed in favor of the Association under the procedures of RAP Title 14, except that "costs" as used in that title means any costs and expenses allowable under this rule.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2006
RE: Clarify No Further Notices or Transcripts After Default
ELC 10.6(b)(2)

Proposal:

The provision in the default rule, ELC 10.6(b)(2), that provides that after entry of an order of default no further notices must be served on the respondent, is at times confused by the operation of other service rules, such as ELC 4.1(a) calling for service on the respondent of every pleading, motion, etc., and ELC 11.4(b) requiring service on the respondent of any transcript prepared in a case. Under these rules, questions are sometimes raised whether a lawyer who has been ordered in default must nonetheless be served with all the subsequent papers in the matter, or whether the defaulted lawyer must be provided with a transcript of the default hearing when that is filed. We propose language to make it clear that notwithstanding these other provisions, once a lawyer has been ordered to be in default, nothing further must be served on the lawyer with the exception of the orders entered by the hearing officer, the Disciplinary Board, and the Supreme Court imposing discipline based on the lawyer's default.

Draft Rule Change:

ELC 10.6 DEFAULT PROCEEDINGS

....

(b) Proceedings After Entry of an Order of Default.

- (1) *Service.* The Clerk serves the order of default and a copy of this rule under rule 4.2(b).
- (2) *No Further Notices.* Notwithstanding any other provision of these rules, after entry of an order of default, no further notices, motions, documents, papers or transcripts must be served on the respondent except for copies of the decisions of the hearing officer or hearing panel and, the Board, and the Court.

....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Extend Time for Response and Reply to Motions
ELC 10.8

Proposal:

We believe the ELC 10.8(b) five-day time frame for responding to a motion is too short and propose extending that to ten days. The rule currently has no provision for the moving party to file a reply to a response. Given the traditional opportunity in most forums to reply to a response, there is often confusion in disciplinary proceedings as to whether the moving party can file a response. We believe the rule should provide a reply opportunity and propose a seven-day time limit.

ELC 10.8(b) allows a hearing officer to shorten the 5-day response time for a motion. We believe that a hearing officer should be able to lengthen as well as shorten the time for response and propose changing the operative language to “alter” rather than “shorten.” We also believe such motions should not be made ex parte and propose striking the language allowing that.

Draft Rule Change:

ELC 10.8 MOTIONS

(a) Filing and Service. Motions to the hearing officer, except motions which may be made ex parte or motions at hearing, must be in writing and filed and served as required by rules 4.1 and 4.2.

(b) Response. The opposing party has ~~five~~ ten days from service of a motion to respond, unless the time is ~~shortened~~ altered by the hearing officer for good cause. ~~A request to shorten time for response to a motion may be made ex parte.~~

(c) Reply. The moving party has seven days from service of the response to reply unless the time for reply is altered by the hearing officer for good cause.

(ed) Consideration of Motion. Upon expiration of the time for ~~response~~ reply, the hearing officer should promptly rule on the motion, with or without argument as may appear appropriate. Argument on a motion may be heard by conference telephone call.

(de) Ruling. A ruling on a written motion must be in writing and filed with the Clerk.

(ef) Minor Matters. Alternatively, motions on minor matters may be made by letter to the hearing officer, with a copy to the opposing party and to the Clerk. The provisions of sections (b) and (c) apply to these motions. A ruling on such motion may also be by letter to each party with a copy to the Clerk.

(fg) Chief Hearing Officer Authority. Before the assignment of a hearing officer or panel, the chief hearing officer may rule on any prehearing motion.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Conform Timing of Failure to State a Claim Motion to CR 12(b)
ELC 10.10

Proposal:

ELC 10.10(d) provides that the procedure of CR 12 applies to dispositive motions under this rule. CR 12(b)(6) on motions for failure to state a claim requires the motion to be filed no later than the time for an answer. ELC 10.10(c) is inconsistent with CR 12(b) and currently allows a motion for failure to state a claim to be filed within 30 days after the filing of the respondent's answer. We propose correcting this conflict by conforming the timing of a motion for failure to state a claim with CR 12(b), allowing such motions only within the time for filing of the respondent's answer to the complaint or amended complaint.

The motion allowed of disciplinary counsel, for judgment on the pleadings, is subject to a different procedure under CR 12(c), which allows such motions "after the pleadings are closed but within such time as not to delay the trial." We believe the current provision for disciplinary counsel's motion for judgment on the pleadings to be brought within 30 days after the filing of respondent's answer is consistent with CR 12(c) and recommend retaining this provision.

Draft Rule Change:

ELC 10.10 PREHEARING DISPOSITIVE MOTIONS

(a) Respondent Motion. A respondent lawyer may move for dismissal of all or any portion of one or more counts of a formal complaint for failure to state a claim upon which relief can be granted.

(b) Disciplinary Counsel Motion. Disciplinary counsel may move for an order finding misconduct based on the pleadings. In ruling on this motion, the hearing officer or panel may find that all or some of the misconduct as alleged in the formal complaint is established, but will determine the sanction after a hearing.

(c) Time for Motion. A motion under section (a) of this rule must be filed within ~~30 days of the time for~~ filing of the answer to a formal complaint or amended formal complaint, and may be filed in lieu of filing an answer. ~~A respondent may, within the time provided for filing an answer, instead file a motion under this rule.~~ If the motion does not result in the dismissal of the entire formal complaint or amended formal complaint,

the respondent must file and serve an answer to the remaining allegations within ten days of service of the ruling on the motion. A motion under section (b) of this rule must be filed within 30 days of the filing of the answer to a formal complaint or amended formal complaint.

(d) Procedure. Rule 10.8 and CR 12 apply to motions under this rule. No factual materials outside the answer and complaint may be presented. If the motion results in dismissal of part but not all of a formal complaint, the Board must hear an interlocutory appeal of the order by either party. The appeal must be filed within 15 days of service of the order.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Conform Discovery Rule to CR 45 Changes
ELC 10.11

Proposal:

We need to coordinate ELC 10.11 regarding discovery in formal proceedings with the 2007 amendments to CR 45, which allow a subpoena for obtaining documents without scheduling a deposition. See CR 45(b)(2). Because a CR 45 subpoena may be issued for more than a deposition, we propose changing the title of subsection (e) from “deposition procedure” to “subpoenas,” and moving the language about commissions to a separate subsection to improve clarity.

Draft Rule Change:

ELC 10.11 DISCOVERY AND PREHEARING PROCEDURES

(a) General. The parties should cooperate in mutual informal exchange of relevant non-privileged information to facilitate expeditious, economical, and fair resolution of the case.

(b) Requests for Admission. After a formal complaint is filed, the parties may request admissions under CR 36. Under appropriate circumstances, the hearing officer may apply the sanctions in CR 37(c) for improper denial of requests for admission.

(c) Other Discovery. After a formal complaint is filed, the parties have the right to other discovery under the Superior Court Civil Rules, including under CR 27–31 and 33–35, only on motion and under terms and limitations the hearing officer deems just or on the parties’ stipulation.

(d) Limitations on Discovery. The hearing officer may exercise discretion in imposing terms or limitations on the exercise of discovery to assure an expeditious, economical, and fair proceeding, considering all relevant factors including necessity and unavailability by other means, the nature and complexity of the case, seriousness of charges, the formal and informal discovery that has already occurred, the burdens on the party from whom discovery is sought, and the possibility of unfair surprise.

(e) ~~Deposition Procedure~~ Subpoenas. (1) Subpoenas for depositions may be issued under CR 45. Subpoenas may be enforced under rule 4.7.

(2)

(f) Commissions. For a deposition outside Washington State, a commission need not issue, but a copy of the order of the chief hearing officer or hearing officer, certified by the officer, is sufficient to authorize the deposition.

(fg) CR 16 Orders. The hearing officer may enter orders under CR 16.

(gh) Duty to Cooperate. A respondent lawyer who has been served with a formal complaint must respond to discovery requests and comply with all lawful orders made by the hearing officer. The hearing officer or panel may draw adverse inferences as appear warranted by the failure of either the Association or the respondent to respond to discovery.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Procedure for Scheduling Conferences
ELC 10.12(b)

Proposal:

ELC 10.12(b) suggests that the parties and the hearing officer agree among themselves to a hearing date, or in the alternative, after an answer is filed either party may make a motion to have a hearing date set. In practice, neither of these alternatives is utilized. What actually happens is that the hearing officer holds a scheduling conference to establish a hearing date and the terms of a scheduling order. We propose changes to ELC 10.12(b) to conform it to the current practice. We also retain the current provision of ELC 10.12(b) that the scheduling conference not occur until after the respondent has filed an answer, since otherwise the matter is likely to proceed by default, under a different schedule.

Draft Rule Change:

ELC 10.12 SCHEDULING HEARING

.....

(b) Scheduling of Hearing Conference. ~~If possible, the parties should arrange a date, time, and place for the hearing by agreement among themselves and the hearing officer or panel members. Alternatively, at any time after the respondent has filed an answer to the formal complaint, or after the time to file the answer has expired, either party may move for an order setting a date, time, and place for the hearing. Rule 10.8 applies to this motion. The motion must state:~~

- ~~(1) the requested date or dates for the hearing;~~
- ~~(2) other dates that are available to the requesting party;~~
- ~~(3) the expected duration of the hearing;~~
- ~~(4) discovery and anything else that must be completed before the hearing; and~~
- ~~(5) the requested time and place for the hearing.~~

~~A response to the motion must contain the same information.~~

Following the filing of respondent's answer, the hearing officer must convene a scheduling conference of the parties, by conference call or in person, to discuss with the parties their available hearing dates, the location and likely length of the hearing, discovery, and anything else that must be completed before the hearing.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Scheduling Orders
ELC 10.12(c) & (d)

Proposal:

The rules are unclear as to what happens when a party fails to comply with the ELC 10.12 scheduling order. The ELC do not have a general contempt provision, and simply dismissing the matter does not make sense in an administrative enforcement action. We propose a new subsection (d) on noncompliance, noting that the hearing officer may exclude witnesses, testimony, exhibits or other evidence, or take such other action as may be appropriate. It has also been our experience that two weeks is not enough time between the identification of witnesses and the discovery cutoff. We propose moving the preliminary identification of witnesses back four weeks from eight weeks prior to the hearing to 12 weeks prior to the hearing in order to allow more time for discovery. We also propose that the parties designate whether the witnesses are fact witnesses, character witnesses or expert witnesses.

Draft Rule Change:

ELC 10.12 SCHEDULING HEARING

....

(c) Scheduling Order. The hearing officer must enter an order setting the date and place of the hearing. This order may include any prehearing deadlines the hearing officer deems required by the complexity of the case, and may be in the following form with the following timelines:

IT IS ORDERED that the hearing is set and the parties must comply with prehearing deadlines as follows:

1. **Witnesses.** A preliminary list of intended witnesses, including addresses and phone numbers, and a designation of whether the witness is a fact witness, character witness, or expert witness, must be filed and served by [Hearing Date (H)-8~~12~~weeks].
2. **Discovery.** Discovery cut-off is [H-6 weeks].
3. **Motions.** Prehearing motions, other than motions to bifurcate, must be served by [H-4 weeks]. An exhibit not ordered or stipulated admitted may not be attached to a motion or otherwise transmitted to the hearing officer unless the motion concerns the exhibit's admissibility. The hearing officer will advise counsel

whether oral argument is necessary, and, if so, the date and time, and whether it will be heard by telephone. (Rule 10.15 provides the deadline for a motion to bifurcate.)

4. **Exhibits.** A list of proposed exhibits must be filed and served by [H-3 weeks].
5. **Service of Exhibits/SummaryFinal Witness List.** Copies of proposed exhibits and a final witness list, including a summary of the expected testimony of each witness must be served on the opposing counsel by [H-2 weeks].
6. **Objections.** Objections to proposed exhibits, including grounds, must be exchanged by [H-1 week].
7. **Briefs.** Any hearing brief must be served and filed by [H-1 week]. Exhibits not ordered or stipulated admitted may not be attached to a hearing brief or otherwise transmitted to the hearing officer before the hearing.
8. **Hearing.** The hearing is set for [H] and each day thereafter until recessed by the hearing officer, at [location].

(d) Failure to Comply With Scheduling Order. Upon a party failing to comply with a provision of the scheduling order, the hearing officer may exclude witnesses, testimony, exhibits or other evidence, and take such other action as may be appropriate.

(de) Motion for Hearing Within 120 Days. A respondent's motion under section (b) for a hearing within 120 days must be granted, unless disciplinary counsel shows good cause for setting the hearing at a later date.

(ef) Notice. Service of a copy of an order or ruling of the hearing officer setting a date, time, and place for the hearing constitutes notice of the hearing. The respondent must be given at least ten days notice of the hearing absent consent.

(fg) Continuance. Either party may move for a continuance of the hearing date. The hearing officer has discretion to grant the motion for good cause shown.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Testimony By Telephone/Video/Other Electronic Means
ELC 10.13(d)

Proposal:

For some time, hearing officers have routinely allowed distant witnesses to testify by telephone or live video connection. We propose an amendment to ELC 10.13 to specifically authorize this when allowed by the hearing officer. This provision is based on a similar provision in the Washington Administrative Procedures Act, RCW 34.05.449(3). We also propose an amendment to allow recording of hearings by electronic recording as well as tape recording, as tape technology appears to be approaching obsolescence.

Draft Rule Change:

ELC 10.13 DISCIPLINARY HEARING

....

(d) Witnesses. Except as provided in subsection (b)(2) and rule 10.6, witnesses must testify under oath. Testimony may also be submitted by deposition as permitted by CR 32. If ordered by the hearing officer, testimony may be taken by telephone, television, video connection or other electronic means. Testimony must be recorded by a court reporter or, if allowed by the hearing officer, by tape or electronic recording. The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.

....

Proposed Draft From BOG Discipline Committee Task Force 3

ELC 10.16 DECISION OF HEARING OFFICER OR PANEL

(a)-(e) [Unchanged.]

(f) When Final.

(1) Decisions Recommending Suspension or Disbarment. If a hearing officer or panel recommends suspension or disbarment and either party files an appeal or if the Board issues an order for sua sponte review, the decision becomes final as described in rule 11.12(g). If neither party files an appeal from a hearing officer or panel recommendation of suspension or disbarment, and the Board issues an order declining sua sponte review under rule 11.3(a), the recommendation becomes the final decision and the Clerk sends it to the Court for an appropriate order.

(2) Other Decisions. If a hearing officer or panel recommends reprimand or an admonition, or recommends dismissal of the charges, the recommendation becomes the final decision if neither party files an appeal and if the Chair does not refer the matter to the Board for consideration within the time permitted by rule 11.23(b)(3). If the Chair refers the matter to the Board for consideration of a sua sponte review, the decision is final upon entry of an order ~~dismissing~~ declining sua sponte review under rule 11.3(b). If the Chair refers the matter to the Board for consideration of sua sponte review and the Board issues an order for sua sponte review, or if either party files an appeal, the decision becomes final as described in or upon other Board decision under rule 11.12(g).

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Grievant Consent To Disclosure
ELC 5.1(b)

Proposal:

Under ELC 5.1(b), by filing a grievance, a grievant consents to disclosure of the contents of the grievance to the respondent lawyer and others. Clarification is needed that this release also includes information subsequently submitted. Clarification is also needed that while the grievant has consented to release, absent a protective order under ELC 3.2(e) or the grievance having been filed under the confidential source provisions of ELC 5.2, disciplinary counsel has discretion in the interests of justice to restrict disclosure. We also propose a clarification that the consent entailed in submitting information to disciplinary counsel does not constitute a waiver of any privilege or restriction against disclosure of the information in another forum.

Draft Rule Change:

ELC 5.1 GRIEVANTS

....

(b) Consent to Disclosure.

(1) Subject to paragraph (2), by 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 restricted when:

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

(B) the grievance was filed under rule 5.2, or

(C) disciplinary counsel determines that the interests of justice would be better served by not releasing the information.

(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.

....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Grievant Right to Speak With Investigator
ELC 5.1(c)(2)

Proposal:

From time to time we get collect calls from inmates in institutions. Our phone system automatically rejects collect calls, which has resulted in some incarcerated grievants objecting to this based on the current ELC 5.1(c)(2) provision of a right to “speak” to the person assigned to the investigation. We believe this language should be modified to indicate that speaking by telephone is just one of several methods of communications which are acceptable. We believe a grievant should be assured of a right to communicate, but that circumstances do not always permit a particular means of communication and that the rule should leave the particular means of communication to the person responsible for the investigation.

Draft Rule Change:

ELC 5.1 GRIEVANTS

....

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

- (1) to be advised promptly of the receipt of the grievance, and of the name, address, and office phone number of the person assigned to its investigation if such an assignment is made;
- (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;

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Withholding Response From Grievants
ELC 5.1(c)(3)

Proposal:

ELC 5.1(c)(e) provides that a grievant is entitled to receive a copy of any response submitted by a respondent except in certain circumstances. One of those circumstances is when the response contains information of a personal or private nature about the respondent. We propose clarifying the rule that a response may also be withheld when it contains information of a personal or private nature about other parties. Also, the rule does not provide for any mechanism for resolving disputes with either grievants or respondents as to what should be withheld. We propose that such disputes be resolved by referral to Review Committees.

Draft Rule Change:

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 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.

....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Vexatious Grievants
ELC 5.1(new subsection)

Proposal:

On very rare, but significant occasions, grievants who are either totally out of control, or have a malicious intent to harass, file series of grievances, not only against respondents, but against any disciplinary counsel, review committee member, or conflicts review officer who has any association with the grievances whatsoever. The grievances tend to have a common trait of being completely unfounded. While the grievances can be ultimately dismissed, the effect of dozens upon dozens of grievances from such a grievant are truly vexatious and require an undue amount of resources to deal with.

The courts have for some time had standards by which such vexatious litigants can be enjoined from initiating new matters and further clogging the system. In DeLong v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir. 1990) the Ninth Circuit held that injunctions against vexatious litigants to restrict future filings are permissible, but laid down certain requirements that must be met:

- The litigant must be given notice and a chance to be heard before the order is entered;
- The District Court must compile an adequate record for review;
- The District Court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation; and
- The vexatious litigant order must be narrowly tailored to closely fit the specific vice encountered.

See also, Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007). Similar injunctions against vexatious litigants have been approved by our Court of Appeals. Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008); Whatcom County v. Kane, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981). A recent article has suggested reinvigorating Washington's vexatious litigant doctrine. David Goodnight, Greg Tolbert and Jason Morgan, "The Pro Se Dilemma: Washington Courts and Vexatious Pro Se Litigation," January 2009, *Washington State Bar News* 25.

In 2008 we were faced with the situation of a grievant who filed numerous grievances against any lawyer he came in contact with. When the baseless grievances were dismissed, he appealed to the review committees. When the review committees dismissed

the grievances, he filed grievances against the review committee members as well as against the disciplinary counsel. When all of this was sent to a conflicts review officer, he filed grievances against the conflicts review officers until he had filed grievances against all of the conflicts review officers. The Association petitioned the Supreme Court for relief which was granted in the form of an order precluding the grievant from filing grievances against any of the disciplinary personnel or volunteers without prior approval of a deputy clerk of the Supreme Court. While these instances are rare, we believe we should have a procedure in place for dealing with them rather than relying upon the use of extraordinary writs for relief.

We have proposed an amendment to ELC 5.1 providing for a vexatious grievant rule which we believe fully meets the generally accepted requirements for restricting vexatious litigants.

Draft Rule Change:

ELC 5.1 GRIEVANTS

(a) Filing of Grievance. Except as provided in rule 5.1(e), 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.

....

(e) Vexatious Grievant. Disciplinary counsel may, in his or her discretion, seek to have a person or entity found to be a vexatious grievant and restrict the person or entity in the filing of grievances or pursuing other rights ordinarily afforded grievants under these rules, as deemed necessary to protect the disciplinary system and other parties in the disciplinary system from abuse by frivolous grievances brought for the purpose of harassment, as follows:

(1) Disciplinary counsel may file a petition with the chief hearing officer setting forth with particularity the factual basis and grounds for finding that the person or entity has engaged in a frivolous and harassing course of conduct that so departs from any reasonable standard as to render the grievant's conduct vexatious and harmful and abusive to the disciplinary system and participants in the disciplinary system, together with a statement as to the scope of the requested relief.

(2) Disciplinary counsel must serve a copy of the petition on the grievant by first class mail, and provide 20 days for a written response before forwarding all materials in the matter to the chief hearing officer.

(3) The chief hearing officer must determine whether, and to what extent, to grant the petition for finding the person or entity a vexatious grievant, and must support any such finding with a thorough recitation of the factual basis for the finding. An order of the chief hearing officer restricting a person or entity from filing grievances or pursuing other rights under these rules must be no more broad than deemed necessary by the chief hearing officer to prevent the harassment and abuse found, and the basis for the scope of the order must be set forth with particularity.

(4) No appeal is allowed other than either party may seek review of the chief hearing officer's order by a petition for discretionary review under rule 12.4.

Vexatious Grievants

(5) All proceedings and documents related to a petition under this subsection are confidential including all orders of the chief hearing officer, however the fact that a person or entity has been determined to be a vexatious grievant, and the manner in which they have been restricted is public.

(6) This rule provides no right or remedy to any respondent or third party.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Update ELC for New RPC Language on Confidences and Secrets
ELC 5.1(c)(3)(A), ELC 5.4(b), ELC 8.9(d)(4)

Proposal:

Prior to the 1996 amendments to RPC 1.6 and RPC 1.9, a lawyer was required to keep confidential client “confidences and secrets.” The amendments changed that language to “information relating to the representation of a client.” The ELC references the old “confidences and secrets” in three places. We propose amendments to update the ELC with a reference to information protected by RPC 1.6 or RPC 1.9 rather than confidences and secrets.

Draft Rule Change:

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;
 - (B) if the response contains information of a personal and private nature about the respondent; or
 - (C) if a review committee determines that the interests of justice would be better served by not releasing the response;

....

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.

- (1) Upon authorization of a review committee, the Association may file a petition in any Superior Court seeking a limited guardian to act regarding the respondent's license or any disciplinary or disability investigation or proceeding.
- (2) Notwithstanding any other provisions regarding the qualifications of a guardian ad litem, any guardian ad litem appointed under this rule must be a lawyer qualified to maintain and protect the confidences and secrets of the respondent's clients.
- (3) Upon application to the Superior Court, the respondent may have the matter moved to the county where the respondent is domiciled or maintains an office or another county as authorized by law.
- (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.
- (5) The costs of any guardianship are paid out of the guardianship estate, except if the guardianship estate is indigent, the Association pays the costs.

.....

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 inquiries 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.

....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Correct Reference to Board Review of Non-Cooperation Costs
ELC 5.3(f)(2)(B)(iv)

Proposal:

ELC 5.3(f)(2)(B)(iv) states that ELC 13.9(e) governs Board review of a Review Committee Order assessing costs as the result of a non-cooperation deposition. However, it is ELC 13.9(f), not ELC 13.9(e), that provides the procedure for Board review of cost assessments. We propose correcting this error.

Draft Rule Change:

ELC 5.3 INVESTIGATION OF GRIEVANCE

.....

(f) Failure To Cooperate.

.....

- (B) The procedure for assessing costs and expenses is as follows:
- (i) Disciplinary counsel applies to a review committee by itemizing the cost and expenses and stating the reasons for the deposition.
 - (ii) The lawyer has ten days to respond to disciplinary counsel's application.
 - (iii) The review committee by order assesses appropriate costs and expenses.
 - (iv) Rule 13.9(e f) governs Board review of the review committee order.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Respondent's Duty to Identify Client Confidential Information
ELC 5.4(b)

Proposal:

Under ELC 5.4(b) a lawyer may not assert client confidentiality as a basis for refusing to provide information in a disciplinary investigation, but disciplinary counsel is required to the extent possible to maintain the confidential client information. A practical difficulty in administering this rule is it that it is not always apparent to disciplinary counsel just what is considered by a lawyer or the lawyer's client as confidential. We propose a more practical bright-line that requires disciplinary counsel to endeavor to maintain the confidentiality of that information which the lawyer identifies as protected by RPC 1.6 or RPC 1.9 or other provision of law requiring confidentiality. We propose that as to the information so identified, disciplinary counsel should make reasonable efforts to maintain the confidentiality of the information.

We also propose separating ELC 5.4(a) dealing with the lawyer's privilege against self incrimination and ELC 5.4(b) dealing with attorney client privilege. These two rules have no relationship to each other, apart from happening to both use the word "privilege." We propose moving ELC 5.4(a) to a new ELC 5.8 to avoid confusion.

Draft Rule Change:

ELC 5.4 ATTORNEY-CLIENT PRIVILEGE

~~(a) Privilege Against Self-Incrimination.~~ A lawyer's duty to cooperate is subject to the lawyer's privilege against self-incrimination, where applicable.

~~(b) 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.~~ A lawyer does not waive any attorney-client privilege or violate the RPC 1.6 or RPC 1.9 duty of confidentiality by providing information to disciplinary counsel. If a lawyer identifies information as protected by RPC 1.6 or RPC 1.9, or other provision of law providing for confidentiality, disciplinary counsel should make reasonable efforts to maintain the confidentiality of the information. Nothing in these rules waives or requires waiver of any

Clarify Respondent's Duty to Identify Client Confidential Information

lawyer's own privilege or other protection as a client against the disclosure of confidences or secrets.

[NEW SECTION]

ELC 5.8 PRIVILEGE AGAINST SELF-INCRIMINATION

(a) Privilege Against Self-Incrimination. A lawyer's duty to cooperate is subject to the lawyer's privilege against self-incrimination, where applicable.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Conform Discovery Before Formal Complaint to CR 45 Changes
ELC 5.5

Proposal:

CR 45 was amended in 2007 allowing a subpoena for obtaining documents without scheduling a deposition. See CR 45(b)(2). We propose changes to our rule on discovery before filing a formal complaint to conform to the new procedures. One provision of the 2007 amendments to CR 45 has been problematic when applied to discovery during an investigation. That is the CR 45(b)(2) requirement to serve notice on “each party” five days prior to service of the subpoena for documents on a person. While this makes sense in civil litigation where there are “parties” who may want to move to quash, it makes no sense to apply this concept to an investigatory subpoena where there are no “parties” prior to the filing of a formal complaint. The provision for subpoenas for documents during the investigation is used most often by disciplinary counsel to obtain bank records. Having to give a notice, presumably to the respondent, five days before sending the subpoena to the bank simply delays the investigation. Our proposal makes it optional to give the notice required prior to service of a CR 45(b)(2) subpoena for documents.

Draft Rule Change:

ELC 5.5 DISCOVERY BEFORE FORMAL COMPLAINT

(a) Procedure. Before filing a formal complaint, disciplinary counsel may depose either a respondent lawyer or a witness, issue a subpoena for documents to the respondent or other person, or issue requests for admission to the respondent. To the extent possible, CR 30 or 31 applies to depositions under this rule. CR 36 governs requests for admission. CR 45 governs subpoenas for documents, but the notice required by CR 45(b)(2) need not be given.

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

(c) Cooperation. Every lawyer must promptly respond to discovery requests from disciplinary counsel.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Restructure Provisions for Investigatory Subpoenas
ELC 5.5

Proposal:

Although denominated as “Discovery Before Formal Complaint,” ELC 5.5 is not so much discovery in the traditional sense as it is a provision for obtaining information via investigatory subpoenas. We propose changing the title to reflect that and clarify what parts of the discovery rules apply to investigative subpoenas.

ELC 5.5 applies the deposition provisions of CR 30 and CR 31 “[t]o the extent possible.” CR 30(b)(1) requires notice to all other parties of the deposition. This makes no sense when applied to an investigatory subpoena where there are not yet “parties” as used in CR 30 and CR 31. As such, the Office of Disciplinary Counsel does not give notice of an investigatory subpoena to the respondent unless we are seeking to take the deposition to perpetuate testimony. To avoid confusion, we propose language to ELC 5.5(a) to clarify that notice is not given of an investigatory subpoena to a witness.

We also need to coordinate the rules on investigatory subpoenas with the 2007 amendments to CR 45, by which CR 45 was amended to allow a subpoena for obtaining documents without scheduling a deposition. See CR 45(b)(2). We propose changes to our rule on discovery before filing a formal complaint to conform to the new procedures.

We add a new subsection on challenges to provide that a challenge to an investigatory subpoena may be made to the Chief Hearing Officer.

We also delete the provision for requests for admissions prior to filing of a formal complaint, as these have little, if any utility for an investigation.

Draft Rule Change:

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, however the respondent need not be given notice of a subpoena. ~~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, but the notice required by CR 45(b)(2) need not be given. ~~Subpoenas must be served as in civil cases in the superior court and may be enforced under rule 4.7.~~

(c) 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).

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

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Review Committee's Authority To Dismiss Grievances
ELC 5.6(d)

Proposal:

ELC 5.6(d) states a Review Committee's authority when reviewing grievances either upon a grievant's request for review of a dismissal, or upon a report from disciplinary counsel. Currently the only authority for the Review Committee to dismiss a grievance is language that "a review committee may: (1) affirm the dismissal." Nonetheless, review committees have always felt free to dismiss grievances that may be before them with a recommendation from disciplinary counsel for an advisory letter, an admonition, or a hearing, despite there being no previous dismissal to affirm. We propose language to conform the rule to the current practice.

Draft Rule Change:

ELC 5.6 DISPOSITION OF GRIEVANCE

(a) Dismissal by Disciplinary Counsel. Disciplinary counsel may dismiss grievances with or without investigation. On dismissal, disciplinary counsel must notify the grievant of the procedure for review in this rule.

(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.

(c) Report in Other Cases. Disciplinary counsel must report to a review committee the results of investigations except those dismissed or diverted.

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

- (1) dismiss the grievance;
- ~~(1~~ 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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify That Withdrawn Request for Review May Not Be Revived
ELC 5.6(b)

Proposal:

From time to time, a grievant will decide to withdraw a request for review of the dismissal of his or her grievance. We believe this should only be allowed upon a written withdrawal of the request for review. On rare occasions, a grievant will decide later on to ask that the withdrawn request for review be revived. In the interest of the respondent knowing when the matter is final, we believe that a grievant should not be allowed to revive a withdrawn request for review. We also believe that disputes as to the timeliness of a request for review should be resolved by a review committee.

Draft Rule Change:

ELC 5.6 DISPOSITION OF GRIEVANCE

(a) Dismissal by Disciplinary Counsel. Disciplinary counsel may dismiss grievances with or without investigation. On dismissal, disciplinary counsel must notify the grievant of the procedure for review in this rule.

(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. 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.

....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Advisory Letter Provisions
ELC 5.7, ELC 5.6(d)(1)

Proposal:

Advisory letters under ELC 5.7 appear to be underutilized, both by disciplinary counsel and by Review Committees. We believe this is due to the vagueness of whether an advisory letter is appropriate when there is an actual violation. We propose to strike the language that an advisory letter does not constitute a finding of misconduct, and provide that the grounds for an advisory letter are broad enough to include both situations where despite some misconduct the circumstances do not warrant anything more than an advisory letter, and those situations where the conduct does not constitute a violation but the lawyer should be cautioned about potential violation in the future. We also clarify that an advisory letter is not public information and may not be introduced into a subsequent disciplinary hearing. We propose more organization to help clarify the rule. We also propose a companion amendment to ELC 5.6(d)(1) to clarify that an advisory letter accompanies a dismissal.

Draft Rule Change:

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.

ELC 5.6 DISPOSITION OF GRIEVANCE

....

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

- (1) affirm the dismissal;
- (2) dismiss the grievance and issue an advisory letter under rule 5.7;
- (3) issue an admonition under rule 13.5;
- (4) order a hearing on the alleged misconduct; or
- (5) order further investigation as may appear appropriate.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Expand Diversion Availability
ELC 6.1

Proposal:

We propose to delete the language limiting diversion to the time frame prior to filing of a formal complaint. In our experience, we have encountered situations which are appropriate for diversion, but where a formal complaint has already been filed. This happens most often with pro se respondents who may not be familiar with the benefits of the diversion program and may inadvisably dismiss it out of hand in the investigation stage, only to recognize the desirability of the program when confronted with the reality of a formal complaint in hand. We propose to expand the time period for diversion, with a cutoff of 45 days following service of the formal complaint.

Draft Rule Change:

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 45 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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Diversion Rule
ELC 6.1

Proposal:

We propose adding language to ELC 6.1 to state what is implicit in Title 6, but not clearly stated, that under diversion, the respondent lawyer is diverted from discipline. Similarly, we propose making explicit what is implicit by the absence of any review provision for disciplinary counsel's decision to divert or not divert, by adding a clear statement that such decisions are final and not subject to review.

Draft Rule Change:

ELC 6.1 REFERRAL TO DIVERSION

In a matter involving less serious misconduct as defined in rule 6.2, before filing 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 diverting a respondent lawyer from discipline, 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. A decision by disciplinary counsel to divert or not divert a respondent from discipline is final and not subject to review.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Expand Diversion Availability
ELC 6.1

Proposal:

We propose to delete the language limiting diversion to the time frame prior to filing of a formal complaint. In our experience, we have encountered situations which are appropriate for diversion, but where a formal complaint has already been filed. This happens most often with pro se respondents who may not be familiar with the benefits of the diversion program and may inadvisably dismiss it out of hand in the investigation stage, only to recognize the desirability of the program when confronted with the reality of a formal complaint in hand. We propose to expand the time period for diversion, with a cutoff of 45 days following service of the formal complaint.

Draft Rule Change:

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 45 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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Limitation of Rights Under Diversion Contracts
ELC 6.5 (New Subsection c)

Proposal:

We propose language to clarify that a diversion contract does not create any enforceable rights or liabilities outside those specifically provided for under ELC Title 6. This is to guard against grievants or others pursuing claims in civil or other proceedings under third-party beneficiary arguments based on the terms of a diversion contract.

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 associated with the grievances to be deferred; and
- (5) include a specific acknowledgment that a material violation of a term of the contract renders the respondent's participation in diversion voidable by disciplinary counsel.

(c) Limitations. A diversion contract does not create any enforceable rights, duties, or liabilities in any person not a party to the diversion contract or create any such rights, duties or liabilities outside of those stated in the diversion contract or provided by Title 6 of these rules.

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

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 disputes 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 respon-

dent 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

.....

(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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Allow For Greater Flexibility In Resolving Diversions
ELC 6.9(a)

Proposal:

Currently, ELC 6.9(a) requires that upon completion of the terms of the diversion contract the respondent lawyer must provide a declaration or affidavit demonstrating fulfillment. This causes confusion, and is not needed as the Diversion Administrator keeps track of the respondent lawyer's compliance with the terms of the diversion, and already knows whether the respondent has complied with the terms of the diversion. We propose making such a declaration or affidavit optional.

In addition, we propose giving Disciplinary Counsel greater flexibility in how to deal with respondents who have not successfully met all the conditions of diversion. Not all of the diversion conditions are of equal weight. We propose authorizing disciplinary counsel to conclude a diversion without finding successful completion of all the conditions.

Draft Rule Change:

ELC 6.9 TERMINATION OF DIVERSION

(a) ~~Fulfillment of the Contract~~Termination. ~~The contract terminates when the respondent lawyer has fulfilled the terms of the contract and gives~~ Respondent may provide disciplinary counsel an affidavit or declaration demonstrating fulfillment of the terms of the contract. Upon receipt of this such an affidavit or declaration, or upon expiration of the diversion period, disciplinary counsel must acknowledge receipt and either may take any of the following actions:

(1) Upon disciplinary counsel's determination that the contract has been completed, dismiss any grievances that were deferred pending the successful completion of the diversion. contract or notifies the respondent that fulfillment of the contract is disputed. The grievant cannot appeal the dismissal. Successful completion of the contract is a bar to any further disciplinary proceedings based on the same allegations.

(2) Amend the diversion contract under rule 6.5(c).

(3) Declare a material breach of the diversion contract under the provisions of subsection (b) of this rule.

(b) Material Breach. A material breach of the contract is cause for termination of the diversion. After a material breach, disciplinary counsel must notify the respondent of termination from diversion and disciplinary proceedings may be instituted, resumed, or reinstated.

(c) Review by the Chair. The Chair may review disputes about fulfillment or material breach of the terms of the contract on the request of the respondent or disciplinary counsel. The request must be filed with the Board within 15 days of notice to the respondent of the determination for which review is sought. Determinations by the Chair under this section are not subject to further review and are not reviewable in any proceeding.

(d) Effect of Completion. The grievant cannot appeal a dismissal under this rule. Completion of the diversion is a bar to any further disciplinary proceedings based on the same allegations.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Limit Interim Suspension for Criminal Convictions to Felony Convictions
ELC 7.1(b)

Proposal:

Currently, an interim suspension may be based on conviction of a “serious crime,” which is defined as any felony and certain non-felonies such as theft, false swearing, fraud and the like. ELC 7.1(a)(2). We believe that the draconian measure of an interim suspension should only apply when the lawyer is convicted of a felony. Non-felony offenses do not necessarily reflect on the lawyer’s fitness to practice, and often the primary “discipline” is the interim suspension that is served pending the resolution of the disciplinary case. We do not believe this is appropriate. We do not believe that allowing a lawyer who has been convicted of a non-felony offense to continue practicing while the disciplinary process determines what, if any, disciplinary action should be taken will subject the Bar or the disciplinary system to embarrassment or disrespect.

We propose jettisoning the concept of a “serious crime,” in favor of limiting the interim suspension rule to felony convictions. Note that by separate memo we are proposing changes to ELC 7.1(b) to create a duty to report a criminal conviction. We are proposing that this duty apply to any conviction, even though only felony convictions would result in interim suspensions. We include in this proposed draft changes that would be consistent with that recommendation as well as a draft change to ELC 1.5. Non-felony convictions would continue to be reviewed in the investigation process to determine whether any disciplinary action should be recommended.

We also recommend changes to the procedure for a petition for terminating the interim suspension. ELC 7.1(g). We propose the changes that the Board of Governors approved at their March, 2009 meeting, allowing the matter to bypass the Disciplinary Board if both disciplinary counsel and the respondent agree on the termination of the interim suspension.

ELC 7.1(f) and ELC 7.1(h) are largely duplicative. We propose combining the two subsections into ELC 7.1(f).

Draft Rule Change:

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.
- (3) "Misdemeanor" includes any crime not 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 misdemeanor or felony crime, ~~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. Prosecuting attorneys, judicial officers or other court personnel who are aware of a lawyer being convicted of a crime as defined by this rule should report that information to disciplinary counsel.

(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 ~~considers~~ 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. Upon the filing of a petition for suspension under this rule; ~~the Court determines whether the crime constitutes a serious crime as defined in section (a).~~

- (1) ~~If the crime is a felony~~ Court determines that the lawyer has been convicted of 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. If the Court determines that the crime is not a serious crime, upon being so advised, the Association processes the matter as it would any other grievance.~~

- ~~(3)~~ If suspended, the respondent must comply with title 14.

~~(4)~~ 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:

- respond to inquiries or requests about matters under investigation, rule 5.3(f);
- file an answer to a formal complaint or to an amendment to a formal complaint, rule 10.5;
- cooperate with discovery and comply with hearing orders, rules 10.11(g) and 5.5;
- attend a hearing and bring materials requested by disciplinary counsel, rule 10.13(b) and (c);
- respond to subpoenas and comply with orders enforcing subpoenas, rule 10.13(e);
- notify clients and others of inability to act, rule 14.1;
- discontinue practice, rule 14.2;
- file an affidavit of compliance, rule 14.3;
- maintain confidentiality, rule 3.2(f);
- report being disciplined or transferred to disability inactive status in another jurisdiction, rule 9.2(a);
- cooperate with an examination of books and records, rule 15.2;
- notify the Association of a trust account overdraft, rule 15.4(d);
- file a declaration or questionnaire certifying compliance with RPC 1.15A, rule 15.5;
- comply with conditions of probation, rule 13.8;
- comply with conditions of a stipulation, rule 9.1;
- pay restitution, rule 13.7; or
- pay costs, rule 5.3(f) or 13.9; or
- report of a conviction, rule 7.1(b).

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Self-Reporting of Criminal Convictions
ELC 7.1(b)

Proposal:

The Clerks Association has indicated that the court clerks are not in a position to report criminal convictions of lawyers to disciplinary counsel as required by ELC 7.1(b). They have suggested that we require lawyers to self report criminal convictions and that we recommend, but not require, that prosecuting attorneys and judges report the convictions. We make that proposal. We do, however, temper the suggestion by having the duty apply only to serious crimes as defined by ELC 7.1(a), as only those convictions trigger the possibility of interim suspension. We also propose adding the duty to self-report conviction of a serious crime to the duties enumerated in ELC 1.5 for which a lawyer may be disciplined under RPC 8.4(l).

Draft Rule Change:

ELC 7.1 INTERIM SUSPENSION FOR CONVICTION OF A CRIME

....

(b) ~~Court Clerk To Advise Association~~ Reporting of Conviction. When a lawyer is convicted of a crime, ~~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. Prosecuting attorneys, judicial officers or other court personnel who are aware of a lawyer being convicted of a crime as defined by this rule should report that information to disciplinary counsel.

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:

- respond to inquiries or requests about matters under investigation, rule 5.3(f);
- file an answer to a formal complaint or to an amendment to a formal complaint, rule 10.5;
- cooperate with discovery and comply with hearing orders, rules 10.11(g) and 5.5;

Self-Reporting of Criminal Convictions

- attend a hearing and bring materials requested by disciplinary counsel, rule 10.13(b) and (c);
- respond to subpoenas and comply with orders enforcing subpoenas, rule 10.13(e);
- notify clients and others of inability to act, rule 14.1;
- discontinue practice, rule 14.2;
- file an affidavit of compliance, rule 14.3;
- maintain confidentiality, rule 3.2(f);
- report being disciplined or transferred to disability inactive status in another jurisdiction, rule 9.2(a);
- cooperate with an examination of books and records, rule 15.2;
- notify the Association of a trust account overdraft, rule 15.4(d);
- file a declaration or questionnaire certifying compliance with RPC 1.15A, rule 15.5;
- comply with conditions of probation, rule 13.8;
- comply with conditions of a stipulation, rule 9.1;
- pay restitution, rule 13.7; or
- pay costs, rule 5.3(f) or 13.9; or
- report conviction of a crime, rule 7.1(b).

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify When Review Committee Must Review Interim Suspensions
ELC 7.2 (a)

Proposal:

ELC 8.2(d)(1) and ELC 8.3(e) require an interim suspension petition under ELC 7.2(a) during disability proceedings and supplemental proceedings. The provisions of ELC 7.2(a) are unclear whether in such circumstances there must be a separate determination of risk to the public by a Review Committee. Such a determination is not needed, as under ELC 8.2(d)(1) a Review Committee has already ordered a hearing into the lawyer's capacity, and under ELC 8.3 a hearing officer has determined that supplemental proceedings must be instituted to determine the lawyer's capacity to defend a disciplinary proceeding or practice law. We propose a clarification that in these instances, it is not necessary to have a separate review by a Review Committee before disciplinary counsel petitions the Supreme Court for an interim suspension.

Draft Rule Change:

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.
- (2) *Board Recommendation for Disbarment.* [unchanged]
- (3) *Failure To Cooperate with Investigation.* [unchanged]

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Custodian May Be Appointed Upon Lawyer Abandoning Practice
ELC 7.7(a)

Proposal:

Currently, ELC 7.7(a) does not authorize the appointment of a custodian when a lawyer abandons practice. The rule authorizes appointment of a custodian when a lawyer dies or disappears, or when the lawyer has been disbarred, suspended or transferred to disability inactive status. But, if a lawyer is still around town (hasn't disappeared) and still on active status, but has abandoned his or her practice or is otherwise incapable of meeting their duties to their clients, the rule does not now authorize appointment of a custodian to protect the client's interest. We propose an amendment to ELC 7.7(a) to allow appointment of a custodian in such situations.

Draft Rule Change:

ELC 7.7 APPOINTMENT OF CUSTODIAN TO PROTECT CLIENTS' INTERESTS

(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 whenever a lawyer 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 disappears or, dies, abandons practice, or is otherwise incapable of meeting the lawyer's obligations to clients, 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.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Maintenance Of Custodianship Records
ELC 7.7(new subsection)

Proposal:

The rules do not currently indicate the period of retention for records of custodianships appointed to protect client interests under ELC 7.7. We propose a new subsection (e) to ELC 7.7 to provide that a record of the custodianship be maintained by the Association permanently, and that the files and papers obtained by the custodian be retained by the custodian as ordered by the Chair of the Disciplinary Board, who usually orders destruction of the files at the time the custodian is discharged. See the proposed change at ELC 3.3(c) for what portions of the records are public.

Draft Rule Change:

ELC 7.7 APPOINTMENT OF CUSTODIAN TO PROTECT CLIENTS' INTERESTS

....

(e) Records. The Bar Association maintains record of the custodianship permanently. The custodian maintains files and papers obtained as custodian until otherwise ordered by the Chair.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Assessment of Costs and Expenses for Approved Stipulation
ELC 9.1(b)(4)

Proposal:

ELC 9.1(b)(4) provides that a stipulation must fix the amount of costs and expenses to be paid by the respondent. Missing is clear language that a final order approving the stipulation also acts as a final order assessing the costs and expenses for the purposes of the ELC 13.9 assessment. We propose adding that language as a new subsection (h) to ELC 9.1.

Draft Rule Change:

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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify That Stipulations May Be Based on Alford Language
ELC 9.1(b)(1)

Proposal:

For many years stipulations have been approved using language generally referred to as Alford language, by which the respondent, while not admitting the factual assertion, nonetheless agrees that if the matter went to hearing, the Association would prove the factual assertion by a clear preponderance of the evidence. This is useful for respondents who are concerned about the effect of language in the stipulation being admissible as an admission in other proceedings. Whether such language was authorized by the rule was questioned recently. We propose making the rule explicitly authorize a stipulation based on either admitted or alleged acts or omissions.

Draft Rule Change:

ELC 9.1 STIPULATIONS

.....

(b) Form. A stipulation must:

- (1) provide sufficient detail regarding the ~~particular~~ admitted or alleged acts or omissions of the respondent to permit the Board or hearing officer to form an opinion as to the propriety of the proposed resolution, and, if approved, to make the stipulation useful in any subsequent disciplinary proceeding against the respondent;
- (2) set forth the respondent's prior disciplinary record or its absence;
- (3) state that the stipulation is not binding on the Association as a statement of facts about the respondent's conduct, and that additional facts may be proved in a subsequent disciplinary proceeding; and
- (4) fix the amount of costs and expenses to be paid by the respondent.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Conditional Approval, Reconsideration and Review of Stipulations By Hearing Officers/Chief Hearing Officer
ELC 9.1(d), (e), (f) & (g)

Proposal:

Currently, the Disciplinary Board may conditionally approve a stipulation, providing a different result, subject to acceptance of the changes by the parties. We propose giving hearing officers and the Chief Hearing Officer the same option. In addition, a Board order rejecting a stipulation must state the reason for the rejection, and the parties may jointly seek to address the Board on a motion for reconsideration. We propose extending these same provisions to stipulations rejected by the hearing officers and the Chief Hearing Officer. We also propose allowing a stipulation rejected by the hearing officer or the Chief Hearing Officer to be submitted to the Disciplinary Board for consideration.

Draft Rule Change:

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, the stipulation may be presented to the Board for consideration.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Set Forth Supreme Court's Role in Stipulations
ELC 9.1(c)

Proposal:

Currently the ELC are silent as the role of the Supreme Court regarding stipulations to discipline. The Court reviews all stipulations providing for suspension or disbarment and must approve such stipulations for them to have any effect. While we are proposing no change in the Supreme Court's practices regarding stipulations, we do propose a new ELC 9.1(c)(3)(A) making the Court's role regarding stipulations explicit in the rules.

In addition, although we have stipulated to resolve matters while an appeal or review is pending at the Supreme Court, the rules are silent on this point. We propose a new ELC 9.1(c)(3)(B) to make it explicit that this is a possibility.

Draft Rule Change:

ELC 9.1 STIPULATIONS

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(c) Approval.

- (1) *By Hearing Officer.* A hearing officer or panel may approve 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. 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) *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.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Authorize Chief Hearing Officer to Hear Motions During Investigation Stage
and to Consider Stipulations
ELC 2.5(f), ELC 9.1(c)(1), ELC 3.2(e)

Proposal:

Hearing officers are authorized to approve stipulations to discipline not involving suspension or disbarment [ELC 9.1(c)]. When no hearing officer has been appointed, the Chief Hearing Officer should be able to approve such stipulations. This would include matters not yet ordered to hearing, such as those in the investigation stage. We add authorizing language to ELC 2.5(f) and ELC 9.1(c). We also suggest a restructuring of ELC 2.5(f) to provide better readability.

The rules are currently silent as to who hears a motion that is made when a matter is in the investigation stage. We propose an amendment to ELC 2.5(f) to authorize the Chief Hearing Officer to hear motions made prior to a matter being ordered to hearing, including during an investigation. We also propose amendments to ELC 2.5(f) and ELC 3.2(e) to clarify that this includes the authority to issue protective orders regarding matters at any stage of a matter, including during an investigation, except when a matter is pending before an assigned hearing officer, a Review Committee or the Disciplinary Board, in which case a motion for a protective order may be made to the assigned hearing officer, the chair of the Review Committee or the Board Chair, respectively. Our proposed amendments provide that except when a matter is pending before the Board, a Review Committee or a hearing officer, the default authority to hear a motion for protective order is the Chief Hearing Officer rather than the Board Chair, as the current rule provides. We believe this is more appropriate since the Disciplinary Board has the authority to review all rulings on protective orders, including those made by the Chair of the Disciplinary Board.

Draft Rule Change:

ELC 2.5 HEARING OFFICER OR PANEL

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(f) Chief Hearing Officer.

(1) Appointment. ~~The Board of Governors appoints a chief hearing officer, who, in addition to hearing matters, assigns cases, monitors and evaluates the performance of hearing officers and panel members, establishes requirements for and supervises hear-~~

~~ing officer and hearing panel member training, administers hearing officer compensa-
tion, hears prehearing motions when no hearing officer has been assigned, and per-
forms other administrative duties necessary for an efficient and effective hearing sys-
tem.~~ If the chief hearing officer position is vacant or the chief hearing officer has re-
cused or been disqualified from a particular matter, the Chair may, as necessary, per-
form the administrative duties of chief hearing officer.

(2) Duties and Authority. ~~who, in~~ In addition to hearing matters, the chief hearing offic-
er:

- (A) assigns cases,
- (B) monitors and evaluates the performance of hearing officers and panel members,
- (C) establishes requirements for and supervises hearing officer and hearing panel member training,
- (D) administers hearing officer compensation,
- (E) hears motions for protective orders under rule 3.2(e),
- (F) hears motions prior to a matter being ordered to hearing, including while a grievance is being investigated,
- (G) hears prehearing motions when no hearing officer has been assigned,
- (H) approves stipulations to discipline not involving suspension or disbarment when no hearing officer has been assigned, and
- (I) performs other administrative duties necessary for an efficient and effective hearing system.

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ELC 3.2 CONFIDENTIAL DISCIPLINARY INFORMATION

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(e) Protective Orders. To protect a compelling interest of a grievant, witness, third party, respondent lawyer, or other participant in ~~an investigation~~ any matter under these rules, on motion and for good cause shown, the chief hearing officer, the Board Chair when a matter is pending before the Board, the chair of a review committee to which a matter is assigned, or a hearing officer to whom a matter is assigned, may issue a protective order prohibiting the disclosure or release of specific information, documents, or pleadings, and direct that the proceedings be conducted so as to implement the order. Filing a motion for a protective order stays the provisions of this title as to any matter sought to be kept confidential until five days after a ruling is served on the parties. The Board reviews decisions granting or denying a protective order if either the respondent lawyer or disciplinary counsel requests a review within five days of service of the decision. On review, the Board may affirm, reverse, or modify the protective order. The Board's decision is not subject to further review. A request for review by the Board stays the provisions of this title as to any matter sought to be kept confidential in that request, and the request itself is confidential until a ruling is issued.

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ELC 9.1 STIPULATIONS

.....

(c) Approval.

(1) *By Hearing Officer.* A hearing officer or panel may approve 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 Chief Hearing Officer.* At any point, during an investigation or otherwise, prior to entry of final decision under rule 10.16(f), when a matter is not then pending before an assigned hearing officer or panel, the Board or the Supreme Court, the chief hearing officer may approve a stipulation disposing of the matter, unless the stipulation requires the respondent's suspension or disbarment.

(23) *By Board.* All other stipulations must be presented to the Board. . . .

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Public Disciplinary Action in Reciprocal Discipline
ELC 9.2

Proposal:

Under reciprocal discipline, ELC 9.2 calls for the Supreme Court to impose the identical sanction that was imposed by the other jurisdiction. However, sanctions vary among the jurisdictions, and confusion can arise when the jurisdictions vary on whether the particular sanction is public. We propose amendments to provide for reciprocal discipline only when a lawyer has received public discipline in another jurisdiction.

Draft Rule Change:

ELC 9.2 RECIPROCAL DISCIPLINE AND DISABILITY INACTIVE STATUS; DUTY TO SELF-REPORT

(a) Duty To Self-Report Discipline or Transfer to Disability Inactive Status. Within 30 days of being publicly disciplined, or being transferred to disability inactive status in another jurisdiction, a lawyer admitted to practice in this state must inform disciplinary counsel of the discipline or transfer.

(b) Obtaining Order. Upon notification from any source that a lawyer admitted to practice in this state was publicly disciplined, or was transferred to disability inactive status in another jurisdiction, disciplinary counsel must obtain a certified copy of the order and file it with the Supreme Court.

(c) Supreme Court Action. Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in this state has been disciplined or transferred to disability inactive status in another jurisdiction, the Supreme Court orders the respondent lawyer to show cause within 30 days of service why it should not impose the identical discipline or disability inactive status. The Association must personally serve this order, and a copy of the order from the other jurisdiction, on the respondent under rule 4.1(b)(3).

(d) Deferral. If the other jurisdiction has stayed the discipline or transfer, any reciprocal discipline or transfer in this state is deferred until the stay expires.

(e) Discipline or Transfer To Be Imposed.

- (1) Thirty days after service of the order under section (c), the Supreme Court imposes the identical discipline or disability inactive status unless disciplinary counsel or the lawyer demonstrates, or the Court finds, that it clearly appears on the face of the record on which the discipline or disability transfer is based, that:

- (A) the procedure so lacked notice or opportunity to be heard that it denied due process;
 - (B) the proof of misconduct or disability was so infirm that the Court is clearly convinced that it cannot, consistent with its duty, accept the finding of misconduct or disability;
 - (C) the imposition of the same would result in grave injustice;
 - (D) the established misconduct warrants substantially different discipline in this state;
 - (E) the reason for the original transfer to disability inactive status no longer exists;
or
 - (F) appropriate discipline has already been imposed in this jurisdiction for the misconduct.
- (2) If the Court determines that any of the factors in subsection (1) exist, it enters an appropriate order. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that imposing the same discipline is not appropriate.
- (f) Conclusive Effect.** Except as this rule otherwise provides, a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct or should be transferred to disability inactive status conclusively establishes the misconduct or the disability for purposes of a disciplinary or disability proceeding in this state.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Reciprocal Discipline Not To Require Certified Order From Other Jurisdiction
ELC 9.2(b)

Proposal:

Currently, ELC 9.2(b) requires that disciplinary counsel obtain a certified copy of the order from another jurisdiction that imposes discipline on the lawyer or transferred the lawyer to disability inactive status. Obtaining a certified copy of such orders can be difficult, time consuming and expensive. Should any respondent lawyer question the correctness of the order, they may raise that to the Court under ELC 9.2(e)(1)(B), and a certified copy could be obtained at that time. There is no need to incur the delay and expense in every case. Indeed, most often the respondent lawyer submits a copy of the order with the self-report required by ELC 9.2(a), although usually this is simply a copy of the order that was provided to the respondent lawyer and is not itself a certified copy. We propose deleting the requirement that the order be certified. This is consistent with the change we have proposed to ELC 7.1(d) to eliminate the requirement that a copy of the order related to a criminal conviction be a certified order.

Draft Rule Change:

ELC 9.2 RECIPROCAL DISCIPLINE AND DISABILITY INACTIVE STATUS; DUTY TO SELF-REPORT

.....

(b) Obtaining Order. Upon notification from any source that a lawyer admitted to practice in this state was disciplined or transferred to disability inactive status in another jurisdiction, disciplinary counsel must obtain a ~~certified~~ copy of the order and file it with the Supreme Court.

.....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Resignation In Lieu of Disbarment At Any Time With Disciplinary Counsel
Consent
ELC 9.3(a)

Proposal:

Currently, ELC 9.3(a) allows resignation in lieu of disbarment only when requested by the respondent before the answer in any disciplinary proceeding is due. This was designed to guard against a respondent invoking resignation at a late point in the proceedings when it has become obvious that disbarment is likely, such as after oral argument at either the Disciplinary Board or the Supreme Court. In practice, the rule has proved to be too rigid. It is not uncommon for a respondent to discover the option of resignation in lieu of disbarment only after the time for answer has expired. This is particularly true for pro se respondents who are not familiar with the rules. We propose allowing a resignation in lieu of disbarment after the time for an answer, when disciplinary counsel consents.

Draft Rule Change:

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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Resignation In Lieu of Discipline
ELC 9.3, ELC 3.1, ELC 3.5, ELC 3.6, RPC 5.8

Proposal:

The current resignation option is for a resignation in lieu of disbarment which requires a lawyer to either stipulate to the pending misconduct or enter into an Alford style stipulation that the pending charges could be proven sufficient to warrant disbarment. We believe this is both too severe and too rigid. There are lawyers who are facing discipline that is not likely to result in disbarment, but who simply no longer wish to be lawyers and are willing to permanently give up their license to have it all over and done with. There are also lawyers whose misconduct warrants disbarment, but who will simply not stipulate, Alford style or otherwise, to the misconduct, but who would be willing to have the allegations stated and agree to resign rather than defend the charges. We propose modifying the rule to make resignation a possibility for both groups. We believe resignation should be encouraged in that it offers the advantage of permanently removing the respondents from practice without expending the substantial resources necessary to prosecute the cases.

Some jurisdictions do not recognize a resignation in lieu of discipline as a disciplinary action that can be reciprocated. To deal with this, we propose two amendments designed to make it easier for other jurisdictions to take reciprocal action based on a resignation in lieu of discipline. We propose adding a new subsection (b)(4)(D) whereby the resignation form will acknowledge that the resignation will be treated as a disbarment by all other jurisdictions. We also propose under ELC 9.3(c) that disciplinary counsel will endorse the resignation upon receipt of all the required documents, costs and expenses. While we cannot dictate how other jurisdictions will treat a Washington resignation in lieu of discipline, this provision will provide a basis for other jurisdictions to impose a reciprocal disbarment if they so choose.

We also modify the costs and expenses provisions in ELC 9.3(f), retaining the \$1,000 mandatory expenses, but removing the \$1,000 cap on the ELC 13.9(b) actual out of pocket costs that have been incurred by the Association.

We also propose conforming amendments to ELC 3.1 (public discipline), ELC 3.5 (notices of discipline), and ELC 3.6 (maintenance of files).

We also propose a conforming amendment to RPC 8.5.

Draft Rule Change:

ELC 9.3 RESIGNATION IN LIEU OF DISBARMENT DISCIPLINE

(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.

(b) Process. The respondent first notifies disciplinary counsel that the respondent intends to submit a resignation and asks disciplinary counsel to prepare a statement of alleged misconduct and to provide a declaration of costs and a proposed resignation form. After receiving the statement and the declaration of costs, if any, the respondent may resign by signing and submitting to disciplinary counsel a signed resignation, the resignation form prepared by disciplinary counsel, sworn to or affirmed under oath and notarized, that which must include the following:

(1) ~~includes Disciplinary counsel's statement of the misconduct alleged misconduct in the matters then pending, and either an admission of that misconduct or a statement that while not admitting the misconduct the respondent agrees that the Association could prove by a clear preponderance of the evidence that the respondent committed violations sufficient to result in respondent's disbarment;~~

(2) Respondent's statement that he or she is aware of the alleged misconduct stated in disciplinary counsel's statement and that rather than defend against the allegations, he or she wishes to permanently resign from membership in the Association.

(23) Respondent's affirmatively acknowledgement that the resignation is permanent including the statement:

"I understand that my resignation is permanent and that any future application by me for reinstatement as a member of the Washington State Bar Association is currently barred. If the Supreme Court changes this rule or an application is otherwise permitted in the future, it will be treated as an application by one who has been disbarred for ethical misconduct, and that, if I file an application, I will not be entitled to a reconsideration or reexamination of the facts, complaints, allegations, or instances of alleged misconduct on which this resignation was based.";

(34) ~~assures that the respondent will~~ Respondent's agreement:

(A) to notify all other jurisdictions in which the respondent is or has been admitted to practice law of the resignation in lieu of ~~disbarment~~ discipline;

(B) to seek to resign permanently from the practice of law in any other jurisdiction in which the respondent is admitted; ~~and~~

(C) to provide disciplinary counsel with copies of any of these notifications and any responses; and

(D) acknowledging that the resignation may be treated as a disbarment by all other jurisdictions.

(45) ~~assures that the respondent will~~ Respondent's agreement to:

(A) notify all other professional licensing agencies in any jurisdiction from which the respondent has a professional license that is predicated on the respon-

- dent's admission to practice law of the resignation in lieu of ~~disbarment~~ discipline;
- (B) seek to resign permanently from any such license; and
- (C) provide disciplinary counsel with copies of any of these notifications and any responses;
- ~~(56)~~ states Respondent's agreement that when applying for any employment or license the respondent agrees to disclose the resignation in lieu of ~~disbarment~~ discipline in response to any question regarding disciplinary action or the status of the respondent's license to practice law;
- ~~(67)~~ states that the respondent agrees Respondent's agreement to pay any restitution or additional costs and expenses ordered by ~~the~~ a review committee, and attaches payment for costs as described in section (f) below, or states that the respondents will execute a confession of judgment or deed of trust as described in section (f); ~~and~~.
- ~~(78)~~ states Respondent's agreement that when the resignation becomes effective, the respondent will be subject to all restrictions that apply to a disbarred lawyer.
- (c) Public Filing.** Upon receipt of a resignation meeting the requirements set forth above, and the costs and expenses and any executed confession of judgment or deed of trust required under section (f), disciplinary counsel will endorse the resignation and promptly causes it to be filed with the Clerk as a public and permanent record of the Association.
- (d) Effect.** A resignation under this rule is effective upon its filing with the Clerk. All disciplinary proceedings against the respondent terminate except disciplinary counsel has the discretion to continue any investigations deemed appropriate under the circumstances to create a record of the respondent's actions. The Association immediately notifies the Supreme Court of a resignation under this rule and the respondent's name is forthwith stricken from the roll of lawyers. Upon filing of the resignation, the resigned respondent must comply with the same duties as a disbarred lawyer under title 14 and comply with all restrictions that apply to a disbarred lawyer. Notice is given of the resignation in lieu of ~~disbarment~~ discipline under rule 3.5.
- (e) Resignation is Permanent.** Resignation under this rule is permanent. A respondent who has resigned under this rule will never be eligible to apply and will not be considered for admission or reinstatement to the practice of law nor will the respondent be eligible for admission for any limited practice of law.
- (f) Costs and Expenses.** ~~(A) If a respondent resigns under this rule, the expenses under rule 13.9(c) are \$1,000 for any proceedings for which an answer was not due when the respondent notified disciplinary counsel of the respondent's intent to resign under section (b). With the resignation, the respondent must pay this \$1,000 expense, plus all actual costs for which disciplinary counsel provides documentation, up to an additional \$1,000 as defined by rule 13.9(b). If the respondent demonstrates inability to pay these costs and expenses, instead of paying this amount, the respondent must execute, in disciplinary counsel's discretion, a confession of judgment or a deed of trust for that amount. Disciplinary counsel may file a claim under section (g) for costs not covered by the payment, confession of judgment, or deed of trust.~~
- ~~(B) If at the time respondent serves the notice of intent to resign, an additional proceeding is pending against the respondent for which an answer has been filed or is due,~~

~~disciplinary counsel may also file a claim under section (g) for costs and expenses for that proceeding.~~

(g) Review of Costs, Expenses, and Restitution. Any claims for restitution or for costs and expenses not resolved by agreement between disciplinary counsel and the respondent may be submitted at any time, including after the resignation, to a review committee in writing for the determination of appropriate restitution or costs and expenses. The Lawyers' Fund for Client Protection may request review including a determination by the review committee of whether any funds were obtained by the respondent by dishonesty of, or failure to account for money or property entrusted to, the respondent in connection with the respondent's practice of law or while acting as a fiduciary in a matter related to the respondent's practice of law. The review committee's order is not subject to further review and is the final assessment of restitution or costs and expenses for the purposes of rule 13.9 and may be enforced as any other order for restitution or costs and expenses. The record before the review committee and the review committee's order is public information under rule 3.1(b).

ELC 3.1 OPEN MEETINGS AND PUBLIC DISCIPLINARY INFORMATION

.....

(b) Public Disciplinary Information. The public has access to the following information subject to these rules:

.....

(10) a lawyer's resignation in lieu of ~~disbarment~~ discipline under rule 9.3; and

.....

ELC 3.5 NOTICE OF DISCIPLINE

(a) Notice to Supreme Court. The counsel to the Board must provide the Supreme Court with:

- (A) a copy of any decision imposing a disciplinary sanction when that decision becomes final;
- (B) a copy of any admonition, together with the order issuing the admonition, when the admonition is accepted or otherwise becomes final; and
- (C) a copy of any resignation in lieu of ~~disbarment~~ discipline.

(b) Other Notices. The counsel to the Board must also notify the following entities of the imposition of a disciplinary sanction or admonition, a resignation in lieu of ~~disbarment~~ discipline, or the filing of a statement of concern under rule 3.4(f) as follows, in such form as may appear appropriate:

- (1) the lawyer discipline authority or highest court in any jurisdiction where the lawyer is believed to be admitted to practice;
- (2) the chief judge of each federal district court in Washington State and the chief judge of the United States Court of Appeals for the Ninth Circuit;
- (3) the National Discipline Data Bank; and
- (4) the Washington State Bar News.

.....

(d) Notices of Suspension, Disbarment, Resignation in Lieu of ~~Disbarment~~Discipline, or Disability Inactive Status. The Association must publish a notice of the disbarment, suspension, resignation in lieu of ~~disbarment~~discipline, or transfer to disability inactive status of a lawyer in the Washington State Bar News and electronic or other index or site maintained by the Association for public information. The Association must provide copies of these notices to the news media in a manner designed to notify the public in the county or region where the lawyer has maintained a practice. For a transfer to disability inactive status, no reference may be made to the specific disability.

(e) Notice to Judges. The Association must promptly notify the presiding judge of the superior court of the county in which the lawyer maintained a practice of the lawyer's disbarment, suspension, resignation in lieu of ~~disbarment~~discipline, or transfer to disability inactive status, and may similarly notify the presiding judge of any district court located in the county where the lawyer practiced, or the judge of any other court in which the lawyer may have practiced or is known to have practiced.

ELC 3.6 MAINTENANCE OF RECORDS

(a) Permanent Records. In any matter in which a disciplinary sanction has been imposed or the lawyer has resigned in lieu of discipline under rule 9.3, the bar file and transcripts of the proceeding are permanent records. Related file materials, including investigative files, may be maintained in disciplinary counsel's discretion. Exhibits may be returned to the party supplying them, but copies should be retained where possible.

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RPC 5.8

MISCONDUCT INVOLVING DISBARRED, SUSPENDED, RESIGNED, AND INACTIVE LAWYERS

(a) A lawyer shall not engage in the practice of law while on inactive status, or while suspended from the practice of law for any cause.

(b) A lawyer shall not engage in any of the following with an individual who is a disbarred or suspended lawyer or who has resigned in lieu of ~~disbarment~~ discipline:

- (1) practice law with or in cooperation with such an individual;
- (2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;
- (3) permit such an individual to use the lawyer's name for the practice of law;
- (4) practice law for or on behalf of such an individual; or
- (5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Reciprocal Discipline for Resignation In Lieu of Discipline
ELC 9.X

Proposal:

We propose a new rule to provide for a resignation in lieu of discipline by reciprocal discipline, that will be treated as a disbarment. A number of other jurisdictions treat a resignation in lieu of discipline in another jurisdiction the same as a disbarment. See, Idaho Rules for Review of Professional Conduct, Rule 506(b). We also propose including a duty to self-report a resignation in lieu of discipline from another jurisdiction. Because the resignation in lieu of discipline provisions vary widely from state to state, these resignations are not always reported by the ABA's National Lawyer Regulatory Data Bank as discipline-related. A self-report requirement would help assure that matters that should be taken up for reciprocal discipline are not overlooked.

Draft Rule Change:

[NEW RULE]

ELC 9.X RECIPROCAL RESIGNATION IN LIEU OF DISCIPLINE

(a) Duty To Self-Report Resignation In Lieu of Discipline. Within 30 days of resigning in lieu of discipline from another jurisdiction, a lawyer admitted to practice in this state must inform disciplinary counsel of the resignation in lieu of discipline.

(b) Obtaining Order. Upon notification from any source that a lawyer admitted to practice in this state has resigned in lieu of discipline in another jurisdiction, disciplinary counsel must obtain a copy of the resignation in lieu of discipline and any order approving the resignation and file it with the Supreme Court.

(c) Supreme Court Action. Upon receipt of a copy of a resignation in lieu of discipline and any order approving the resignation, the Supreme Court orders the respondent lawyer to show cause within 30 days of service why the lawyer should not be disbarred in this jurisdiction. The Association must personally serve this order, and a copy of the resignation in lieu of discipline and any order from the other jurisdiction approving the resignation, on the respondent under rule 4.1(b)(3).

(d) Discipline To Be Imposed.

- (1) Thirty days after service of the order under section (c), the Supreme Court enters an order disbarring the respondent lawyer unless the lawyer demonstrates that disbarment would result in grave injustice.

- (2) The burden is on the respondent to establish that continuing to remain admitted to practice in this jurisdiction will not place the public at risk.
- (3) If the Supreme Court determines that disbarment would result in a grave injustice, the Court may enter an appropriate order.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarifying Audit Provisions
ELC 15.1, ELC 15.2, ELC 15.3, ELC 5.3(e)(5)

Proposal:

The current rules do not clearly set forth the relationship between for cause audits of trust accounts that are conducted as part of disciplinary investigations under ELC 5.3, and the audit provisions in ELC 15.1. Currently ELC 15.1 provides for two types of examinations and one type of audit. In practice, there is only one type of examination, that being a random examination, which is limited to an examination of the books and records of the law firm. When it is necessary to obtain verification from other sources, that is done as part of a referral to disciplinary counsel following a random examination, or as the case may be, as part of an audit being conducted as part of a disciplinary investigation. An example of when it is necessary to obtain verification from other sources would be when it is necessary to obtain microfiche records of deposit items or cancelled checks from a bank because the lawyer had not maintained adequate records. Furthermore, given the ELC 5.3 requirements of cooperation, the ELC 15.1(b) provision for an order of the Board Chair for an audit is not needed, and as a practical matter is never sought. We propose simplifying the rule as to the difference between an examination and an audit, and clarifying the duty of lawyers to cooperate with either a random examination or an audit being conducted as part of a disciplinary investigation. We also delete obsolete language in ELC 15.3 about making audit reports available to the Board of Governors.

Draft Rule Change:

ELC 5.3 INVESTIGATION OF GRIEVANCE

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(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 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 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.~~

(e 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.

Proposed Draft From BOG Discipline Committee Task Force 3

ELC 5.1(d) provides:

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

- (1) give the person assigned to the grievance documents or other evidence in his or her possession, and witnesses' names and addresses;
- (2) assist in securing relevant evidence; and
- (3) appear and testify at any hearing resulting from the grievance.

Proposed Draft From BOG Discipline Committee Task Force 3

ELC 7.1 INTERIM SUSPENSION FOR CONVICTION OF A CRIME

(a) Definitions.

- (1) "Conviction" for the purposes of this rule occurs upon entry of a plea of guilty, including a plea of guilty pursuant to *North Carolina v. Alford*, 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".

(b) Court Clerk To Advise Association of Conviction. When a lawyer is convicted of a crime, the clerk of the court must advise the ~~Association~~ Office of Disciplinary Counsel of the Association of the conviction, and on request provide the Association with certified copies of any order or other document showing the conviction.

(c) 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 serious 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~~ file a formal complaint regarding the conviction. If so, disciplinary counsel proceeds in the same manner as for a felony. Disciplinary counsel may 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.

- (3) If a lawyer is convicted of a crime that is neither a felony nor a serious crime, the review committee considers a report of the conviction in the same manner as any other report of possible misconduct by a lawyer.

(d) Petition and Answer.

(1) 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.

(2) Answer. ~~The lawyer may answer the petition. An answer may be supported by documents or affidavits, but must address only whether the lawyer has been convicted of a serious crime as defined in section (a). Any answer must be filed with the Court and served on disciplinary counsel within seven days of service of the petition for suspension.~~

(e) Immediate Interim Suspension. ~~Upon~~After the filing of a petition for suspension under this rule, and upon expiration of the time for an answer, the Court determines whether the crime constitutes a serious crime as defined in section (a).

(1) If the ~~crime is a felony~~Court determines that the crime is a serious crime, the Court must enter an order immediately suspending the respondent from the practice of law. If the Court determines that the crime is not a serious crime, upon being so advised, the Association processes the matter as it would any other grievance.

~~(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 and order immediately suspending the respondent from the practice of law. If the Court determines the crime is not a serious crime, upon being so advised, the Association processes the matter as it would any other grievance.~~

~~(3)~~(2) If suspended, the respondent must comply with title 14.

~~(4)~~(3) 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.

(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.

Proposed Draft From BOG Discipline Committee Task Force 3

ELC 9.1 STIPULATIONS

(a) **Requirements.** [no change]

(b) **Form.** [no change]

(c) **Approval.**

(1) *By Hearing Officer.* Subject to subsection (3), a hearing officer or panel may approve 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) [new subsection] *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, 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.

(e) Reconsideration. [no change]

(f) Stipulation Rejected. [no change].

(g) Failure To Comply. [no change].

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Board Authority to Review Dismissal For Failure To State A Claim
ELC 11.1, ELC 11.2

Proposal:

When the ELC were adopted in 2002, a new provision for a respondent's motion for dismissal based on failure to state a claim was added in ELC 10.10(a). While ELC 10.10(d) provided for an interlocutory appeal when some but not all of the claims of the formal complaint were dismissed, the rule is silent as to the review mechanism when all of the claims of the formal complaint are dismissed by an ELC 10.10(a) motion. There is general agreement that such a decision could be reviewed by an appeal to the Disciplinary Board. We propose amendments to ELC 11.1 and 11.2 to specifically provide for that.

Draft Rule Change:

ELC 11.1 SCOPE OF TITLE

This title provides the procedure for Board review following a hearing officer or panel's findings of fact, conclusions of law, and recommendation, or dismissal of all claims under rule 10.10(a). It does not apply to Board review of interim rulings under rule 10.9.

ELC 11.2 DECISIONS SUBJECT TO BOARD REVIEW

(a) Decision. For purposes of this title, "Decision" means:

- (1) the hearing officer or panel's findings of fact, conclusions of law, and recommendation, provided that if either party properly files a motion to amend under rule 10.16(c), the "Decision" includes the ruling on the motion, and becomes subject to Board review only upon the ruling on the motion; or
- (2) the hearing officer or panel's decision under rule 10.10(a) dismissing all claims.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Conform Time Limits for Filing Appeals to RAP
ELC 11.2, ELC 12.3, ELC 12.4

Proposal:

Currently, the time limits for filing an appeal to the Disciplinary Board and to the Supreme Court vary from the traditional appeal time limits established by the Rules of Appellate Procedure (RAP). We suggest a series of changes to conform the time limits to the 30 days traditionally required by the RAP in order to reduce confusion.

Draft Rule Change:

ELC 11.2 DECISIONS SUBJECT TO BOARD REVIEW

....

(b) Review of Decisions. The Board reviews the following Decisions:

- (1) those recommending suspension or disbarment;
- (2) those in which no two members of a hearing panel are able to agree on a Decision; and
- (3) all others if within ~~45~~ 30 days of service of the Decision on the respondent:
 - (A) either party files a notice of appeal; or
 - (B) the Chair files a notice of referral for sua sponte consideration of the Decision.

ELC 12.3 APPEAL

(a) Respondent's Right to Appeal. The respondent lawyer has the right to appeal a Board decision recommending suspension or disbarment. There is no other right of appeal.

(b) Notice of Appeal. To appeal, the respondent must file a notice of appeal with the Clerk within ~~45~~ 30 days of service of the Board's decision on the respondent.

ELC 12.4 DISCRETIONARY REVIEW

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(b) Petition for Review. Either party may seek discretionary review by filing a petition for review with the Court within ~~25~~ 30 days of service of the Board's decision.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Conform Briefing Schedule at Disciplinary Board to the RAP
ELC 11.8, ELC 11.9

Proposal:

Currently ELC 11.8 and ELC 11.9 provide a 20/15/10 briefing schedule for the opening brief, responsive brief and reply brief on a matter being reviewed by the Disciplinary Board. These periods are too short, and most often get extended. We propose the same 45/30/30 schedule set for in the Rules of Appellate Procedure (RAP), see RAP 10.2. We believe this would result in fewer requests for extensions and provide both parties more certainty in scheduling.

Note: Task Force 3 recommended that automatic reviews be eliminated and recommended repeal of ELC 11.8 and restructuring of ELC 11.9 so that it will apply to all matters being reviewed by the Disciplinary Board. The Board of Governors has approved this recommendation. We support that recommendation. We have submitted our proposal in the form of the amendments that would be necessary to the current rules, however, our proposed amendment to ELC 11.9 is entirely consistent with the Task Force 3 recommendation.

Draft Rule Change:

ELC 11.8 BRIEFS FOR REVIEWS INVOLVING SUSPENSION OR DISBARMENT RECOMMENDATION

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(c) Time for Filing Briefs. Briefs, if any, must be filed as follows:

- (1) The respondent lawyer must file a brief within ~~20~~ 45 days of service on the respondent of the later of:
 - (A) a copy of the hearing transcript; or
 - (B) the Decision.
- (2) Disciplinary counsel must file a brief within ~~45~~ 30 days of service on disciplinary counsel of the respondent's brief, or, if no brief is filed by the respondent, within ~~45~~ 30 days of the expiration of the period for the respondent to file a brief.
- (3) The respondent may file a reply to disciplinary counsel's brief within ~~ten~~ 30 days of service of that brief on the respondent.

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ELC 11.9 BRIEFS FOR REVIEWS NOT INVOLVING SUSPENSION OR DISBARMENT RECOMMENDATION

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(b) Brief in Opposition.

(1) The party seeking review must file a brief in opposition to the Decision within ~~20~~ 45 days of the later of:

(A) service on the respondent lawyer of a copy of the transcript, unless the parties have agreed that no transcript is necessary; or

(B) filing of the notice of appeal.

(2) Failure to file a brief within the required period constitutes an abandonment of the appeal.

(c) Response. The opposing party has ~~15~~ 30 days from service of the statement of the party seeking review to file a brief responding to the issues raised on appeal.

(d) Reply. The party seeking review may file a reply to the response within ~~ten~~ 30 days of service of the response.

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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Place Disciplinary Board Policies in the ELC
ELC 11.9, ELC 11.12(c), and New Section ELC 11.X

Proposal:

The Disciplinary Board has adopted policies as to the preparation and filing of briefs, oral argument, and case scheduling orders. Although the Board provides copies of the policies to pro se respondents, we believe these policies should be in the rule where they will be more readily accessible to all. We have proposed adding the Board's policy on the length of briefs as a new section (f) to ELC 11.9. We have proposed incorporating into ELC 11.12(c) the Board's policy regarding oral argument. We have proposed the Board's policy on case scheduling orders be a new stand-alone rule in Title 11, that we have denoted as ELC 11.X, to be inserted prior to ELC 11.4 on transcripts. The text of the Disciplinary Board policies had been modified somewhat to make them suitable for incorporation into the rules and to conform with the ELC 1.3(r) provisions on words of authority.

A copy of the full Disciplinary Board Policies is attached.

Draft Rule Change:

[NEW SECTION] ELC 11.X CASE SCHEDULING ORDER.

The Board may issue a case scheduling order. The parties must comply with the deadlines in the order, file a written agreement to an extended schedule, or file a motion to request an extension. The Board may not consider documents filed after the deadline on the scheduling order.

ELC 11.9 BRIEFS FOR REVIEWS NOT INVOLVING SUSPENSION OR DISBARMENT RECOMMENDATION

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(f) Preparation and Filing of Briefs by Parties. The text of all briefs must appear double spaced and in 12 point font or larger, except that footnotes may appear in 10 point font. The text must not be reduced or condensed by photographic or other means. The opening brief must not exceed 35 pages. The responsive brief must not exceed 35 pages. Any allowed reply brief must not exceed 10 pages. In calculating

the page limits, any appendices, tables of contents, title sheets or tables of authorities are not included. For compelling reasons the Chair may grant a motion to file an over-length brief. Absent a motion to the Chair to permit a non-conforming brief, the Clerk to the Disciplinary Board must return a non-conforming brief without filing the same.

ELC 11.12 DECISION OF BOARD

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(c) Oral Argument. The Board hears oral argument if requested by either party or the Chair. A party's request must be filed no later than the deadline for that party to file his or her last brief, including a response or reply, under rule 11.8 or 11.9. The Chair's notice of oral argument must be filed and served on the parties no later than 14 days before the oral argument. The Chair sets the time, place, and terms for oral argument. Each party has 15 minutes to present oral argument. The Board may ask questions during the oral argument. All oral arguments must be recorded by a court reporter. For compelling reasons, the Chair may grant a motion for additional oral argument time. This motion must be filed with the request for oral argument. If either party fails to appear for argument at the scheduled time, the Board may consider the case without oral argument.

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DISCIPLINARY BOARD POLICIES

Revised January 28, 2005

1. **Documents Supporting Stipulations.** The Board reviews stipulations based only on documentation agreed upon by the parties.

2. **Scope of Review.** ELC 11.12 (b) prescribes the standard of review by which the Disciplinary Board reviews the decisions of hearing officers:

The Board reviews findings of fact for substantial evidence. The Board reviews conclusions of law and recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board.

The intent of this Rule was clearly to impose an appellate standard of review as used by the appellate courts.

The Board will follow appellate case precedent in following this standard of review. The modern era of substantial evidence review of findings of fact begins with *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 343 P.2d 183 (1959). *Thorndike* explains that a statute in place from 1893 to 1951 required the Supreme Court to review judicial findings de novo when the entire record was brought up on appeal. But the statute was repealed in 1951, returning Washington to the prior rule that the appellate court does not review factual findings de novo. The *Thorndike* opinion explains that henceforth appeals from judicial findings are governed by RCW 4.44.60: "The findings of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons as far as applicable, and a new trial granted." The Court also quotes from early cases explaining the standard:

This is a territorial statute first appearing in the Laws of 1869, chapter 17, SS 251, p. 60. In construing this statute, the court said in *Reynolds v. Dexter Horton & Co.*, 2 Wash. 185, 26 Pac. 221:

" . . . Unless the finding was so clearly unfounded that it should have been set aside had it been made by the jury, we should not disturb it. It stands as a special verdict, and must be so treated.

In *Graves v. L.H. Griffith Realty & Banking Co.*, 3 Wash. 742, 29 Pac. 344, the court explained the effect of the section in these words:

The main contention here is that the evidence does not support the findings. An appellate court in a law case will not usurp the functions of a jury, or of a judge acting in the capacity of a jury, and reverse the judgment because the weight of testimony seems to be on the other side, or because, in the case of a conflict of testimony, the jury believed the testimony of witnesses that it does not believe. This doctrine is so elementary and so universally pronounced by the courts that it would be idle to enlarge on it or to discuss it further. It is sufficient to say that the jury is the judge of the facts. If the testimony on which the judgment is based is competent, and is legally introduced, and if conceded to be true would sustain the judgment, the appellate court will not inquire further as to its sufficiency. . . ."

54 Wn.2d at 573.

The first sentence of this quote provides a good guideline for the substantial evidence standard: "If the testimony on which the judgment is based is competent, and is legally introduced, and if conceded to be true, would sustain the judgment, the appellate court will not inquire further as to its sufficiency. . . ."

Other cases have added other formulations of the substantial evidence standard. For Example:

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If there is substantial evidence supporting the verdict of the jury, as distinguished from a mere scintilla of evidence, the verdict must stand. By “substantial evidence” is meant that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *Grange v. Finlay*, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990).

This standard of review places a high premium on drafting and entering specific and defensible findings of fact. The Supreme Court has directed that Hearing Officers, the Board and the parties must focus on specific findings of fact and conclusions of law:

We have previously approved the American bar Association’s ABA Standards for Imposing Lawyer Sanctions (Approved Draft 1986). In determining an appropriate disciplinary sanction, we apply the analytical framework provided by the Standards. Neither the Hearing Officer nor the Disciplinary Board followed the framework provided by the ABA Standards. We necessarily must extract the information from the limited record and perform the ABA analysis ourselves. To avoid this problem in the future, hearing officers and the Disciplinary Board will be required by this Court in every case to indicate clearly in their findings: (1) the formal complaint; (2) findings of fact; (3) conclusions indicating violations of specific provisions of the Rules of Professional Conduct; (4) the sanction suggested by the ABA Standards; (5) weighing of any aggravating or mitigating factors, based upon the ABA Standards, considered in determining what sanction to recommend; and (6) the sanction recommended by the Hearing Officer or Board.

In re Johnston, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990)
Adopted March 27, 1998.

3. **Presentation of cases on appeal.** The Hearing Officer is in the best position to determine credibility and make findings. A party challenging a hearing officer’s findings should identify with specificity the findings to which exception is taken and discuss the lack of evidence in support. A party defending a hearing officer’s findings should marshal the evidence supporting the finding. The parties cannot expect the Disciplinary Board to sift through the record without guidance. But, the Board has the power to sift through the record for substantial evidence whether or not the parties argue the standard of review with any specificity.
Adopted March 27, 1998.

4. **Preparation and Filing of Briefs by Parties.** The text of all briefs must appear double spaced and in 12 point font or larger, except that footnotes may appear in 10 point font. The text shall not be reduced or condensed by photographic or other means. The opening brief [ELC 11.8(c)(2) or 11.9(b) (1)] shall not exceed 35 pages. The responsive brief shall not exceed 35 pages. Any allowed reply brief shall not exceed 10 pages. In calculating the page limits appendices, tables of contents, title sheets and tables of authorities shall not be included. For compelling reasons the Board Chair may grant a motion to file an over-length brief. The Clerk to the Disciplinary Board shall return over-length briefs presented for filing without a motion to the Chair. The Clerk shall provide a copy of this policy to the party with the original un-filed brief.

5. **Oral Argument.** Each party shall have 15 minutes to present oral argument if requested as provided in ELC 11.12(c). The Board may ask questions during the oral argument. All oral arguments are recorded by a court reporter. For compelling reasons the Board Chair may grant a motion for additional

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oral argument time. This motion should be filed with the request for oral argument. If either party fails to appear for argument at the scheduled time, the Board may consider the case without oral argument.

6. **Case Scheduling Orders**. The Board may issue a case scheduling order. The parties must comply with the deadlines in the order, file a written agreement to an extended schedule, or file a motion to request an extension. The Board may not consider documents filed after the deadline on the scheduling order. All pleadings must be filed by the posted agenda date.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Require Clarity On Disciplinary Board Dissenting Votes
ELC 11.12(e)

Proposal:

At times, when a Disciplinary Board member has dissented from the majority decision, but has not written a dissenting opinion, the order or opinion just reflects the vote, without clearly indicating what result each dissenting member favors. The Supreme Court looks to degree of unanimity of the Board's decision as a factor in determining sanction. This proposed amendment ensures that each Board decision will provide such information to the Court.

Draft Rule Change:

ELC 11.12 DECISION OF BOARD

....

(e) Order or Opinion. The Board must issue a written order or opinion. If the Board amends, modifies, or reverses any finding, conclusion, or recommendation of the hearing officer or panel, the Board must state the reasons for its decision in a written order or opinion. A Board member agreeing with the majority's order or opinion may file separate concurring reasons. A Board member dissenting from the majority's order or opinion may set forth in writing the reasons for that dissent. Regardless of whether or not a dissenting member files a written dissent, the Board order or opinion must set forth the result favored by each dissenting member. The decision should be prepared as expeditiously as possible and consists of the majority's opinion or order together with any concurring or dissenting opinions. None of the opinions or orders may be filed until all opinions are filed. A copy of the complete decision is served by the Clerk on the parties.

....

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Clarify Filing of Appeals and Payment of Filing Fees
ELC 12.3, ELC 12.4

Proposal:

The rules are currently silent about the payment of the Supreme Court filing fee on filing of an appeal under ELC 12.3 or a petition for discretionary review under ELC 12.4. This catches pro se respondents unaware as to the requirement and the procedure for paying the filing fee. We propose amendments to ELC 12.3 and ELC 12.4 to remedy this. We also provide that the notice of appeal or petition for discretionary review must be filed with the Supreme Court Clerk as well as with the Disciplinary Board Clerk, and must be served on the opposing party. Consistent with the procedure of RAP 5.1(b), we provide that the first party filing an appeal or petition for discretionary review must pay the filing fee.

Draft Rule Change:

ELC 12.3 APPEAL

(a) Respondent's Right to Appeal. The respondent lawyer has the right to appeal a Board decision recommending suspension or disbarment. There is no other right of appeal.

(b) Notice of Appeal. To appeal, the respondent must file a notice of appeal with the Clerk of the Supreme Court within 15 days of service of the Board's decision on the respondent. A copy of the notice of appeal must also be filed with the Clerk of the Disciplinary Board and served on the other party.

(c) Filing Fee. The first party to file a notice of appeal must, at the time the notice is filed, pay the statutory filing fee. The filing fee should be paid to the Clerk of the Supreme Court.

ELC 12.4 DISCRETIONARY REVIEW

(a) Decisions Subject to Discretionary Review. Board decisions under rule 11.12(e) not recommending suspension or disbarment are subject to Supreme Court review only through discretionary review. The Court accepts discretionary review only if:

- (1) the Board's decision is in conflict with a Supreme Court decision;
- (2) a significant question of law is involved;

- (3) there is no substantial evidence in the record to support a material finding of fact on which the Board's decision is based; or
- (4) the petition involves an issue of substantial public interest that the Court should determine.

(b) Petition for Review. Either party may seek discretionary review by filing a petition for review with the Court within 25 days of service of the Board's decision.

(c) Filing Fee. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the Clerk of the Supreme Court.

(e d) Content of Petition; Answer; Service; Decision. A petition for review should be substantially in the form prescribed by RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in that rule to the Court of Appeals are considered references to the Board. The appendix to the petition or an appendix to an answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d) – (h) govern answers and replies to petitions for review and related matters including service and decision by the Court.

(d) Acceptance of Review. The Court accepts discretionary review of a Board decision by granting a petition for review. Upon acceptance of review, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Right of Cross Appeal
ELC 12.3, ELC 12.4

Proposal:

Task Force 3 made two recommendations regarding ELC 12.3 and ELC 12.4. First, to give disciplinary counsel and the respondent the same right to appeal or file for discretionary review of a Disciplinary Board decision, and second, to allow for a cross appeal. Although the Board of Governors approved both of these recommendations, the rule draft that was in the Board materials was an earlier version, without the language providing a cross appeal. Here is the draft including both recommendations that should have been in the Board materials. It is taken from Charlie Wiggins' December 12, 2007 Second Memo Regarding ABA Recommendation 20.

We propose two substantive changes to the December 12, 2007 Task Force 3 draft:

(1) That draft proposed changing the beginning of the time frame for filing the notice of appeal (ELC 12.3(b)) from the date of service on the respondent to the date of the service on the party. We propose leaving that language as it is, so that the time frame for both the respondent and for disciplinary counsel would start as of the date the Board's decision is served on the respondent. There are two reasons for this. First, this would be consistent with the procedure at ELC 11.2(b)(3) for filing of appeals to the Disciplinary Board. To use a different procedure for appeals to the Supreme Court is likely to lead to confusion. Second, the date of service on the respondent is easier to ascertain than the date of service on disciplinary counsel. The Clerk serves the respondent by mail, with a certificate of service by mailing. Disciplinary counsel is not served by mail, hence there can be confusion as to when the Board decision was delivered to the ODC mail room. We also propose similar language to clarify ELC 12.4(b) which is currently confusing as to this point.

(2) The Task Force 3 December 12, 2007 draft provided that :

If a timely notice of appeal is filed by a party, any other party who wants relief from the Board's decision must file a notice of appeal with the Clerk within 14 days after service of the notice filed by the other party.

There are only two parties to a disciplinary matter, the respondent lawyer and the Office of Disciplinary Counsel. From time to time, other persons, like a disappointed grievant or a party in underlying civil litigation, wants to intervene in the disciplinary proceeding. We are concerned that the “any other party” language will be cited as authorizing such, when that is not what is intended. We propose using the language “the other party” in both ELC 12.3 and ELC 12.4 rather than “any other party.”

We also question whether the proposed ELC 12.4(d) is necessary in light of the specific reference to RAP 13.4(d) in ELC 12.4(c). RAP 13.4(d) provides in part that “If any party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer.” We ask that the ELC Drafting Taskforce consider this issue further.

Draft Rule Change:

ELC 12.3 APPEAL

(a) Respondent’s Right to Appeal. The respondent lawyer or disciplinary counsel has the right to appeal a Board decision recommending suspension or disbarment. There is no other right of appeal.

(b) Notice of Appeal. ~~To appeal, the respondent~~ The appealing party must file a notice of appeal with the Clerk within 15 days of service of the Board’s decision on the respondent.

(c) Subsequent Notice By the Other Party. When a timely notice of appeal has been filed by a party, if the other party wants relief from the Board’s decision, that party must file a notice of appeal with the Clerk within 14 days after service of the notice filed by the other party.

ELC 12.4 DISCRETIONARY REVIEW

(a) Decisions Subject to Discretionary Review. Either party may seek discretionary review of Board decisions under rule 11.12(e) not recommending suspension or disbarment subject to appeal under rule 12.3. ~~are subject to Supreme Court review only through discretionary review.~~ The Court accepts discretionary review only if:

- (1) the Board’s decision is in conflict with a Supreme Court decision;
- (2) a significant question of law is involved;
- (3) there is no substantial evidence in the record to support a material finding of fact on which the Board’s decision is based; or
- (4) the petition involves an issue of substantial public interest that the Court should determine.

(b) Petition for Review. Either party may seek discretionary review by filing a petition for review with the Court within 25 days of service of the Board’s decision on respondent.

(c) Content of Petition; Answer; Service; Decision. A petition for review should be substantially in the form prescribed by RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in that rule to the Court of Appeals are considered references to the Board. The appendix to the petition or an appendix to an

answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d) – (h) govern answers and replies to petitions for review and related matters including service and decision by the Court.

(d) Subsequent Petition By the Other Party. When a timely petition for discretionary review is filed by a party, if the other party wants relief from the Board's decision, that party must file a petition for discretionary review with the Clerk within 14 days after service of the petition filed by the other party.

(d e) Acceptance of Review. The Court accepts discretionary review of a Board decision by granting a petition for review. Upon acceptance of review, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: June 26, 2009
RE: Eliminate Non-Sanction Distinction for Admonitions
ELC 13.1, ELC 13.5, ELC 13.6 ELC 13.7, ELC 13.8, ELC 13.9, ELC 3.1, ELC 3.5

Proposal:

We propose that the non-sanction distinction of admonitions be eliminated. Both the ABA Model Rules for Lawyer Disciplinary Enforcement (Rule 10) and the ABA Standards for Imposition of Lawyer Sanctions list admonitions as a sanction. No useful purpose is served by making admonitions non-sanctions, and doing so allows a respondent lawyer who has received an admonition to use the half-truth deception of "I've never been sanctioned by the Bar." We also propose eliminating ELC 13.6 that provided for imposing a sanction upon the accumulation of three or more admonitions in five years. With the elimination of the non-sanction distinction of admonitions and the proposal to make admonitions permanent, there is no purpose in a provision such as ELC 13.6. We include various conforming amendments.

Draft Rule Change:

ELC 13.1 SANCTIONS AND REMEDIES

Upon a finding that a lawyer has committed an act of misconduct, one or more of the following may be imposed:

(a) Sanctions.

- (1) Disbarment;
- (2) Suspension ~~under rule 13.3~~; or
- (3) Reprimand; or

(b) Admonition. ~~(4) An admonition under rule 13.5.~~

(c) Remedies.

- (1) Restitution;
- (2) Probation;
- (3) Limitation on practice;
- (4) Requirement that the lawyer attend continuing legal education courses;
- (5) Assessment of costs; or
- (6) Other requirements consistent with the purposes of lawyer discipline.

ELC 13.5 ADMONITION

.....

(e) Action on Board Review. Upon review under title 11, the Board may dismiss, ~~is-~~
~~sue an admonition,~~ or impose sanctions or other remedies under rule 13.1.

.....

~~ELC 13.6 DISCIPLINE FOR CUMULATIVE ADMONITIONS (Reserved)~~

~~**(a) Grounds.**~~ A lawyer may be subject to sanction or other remedy under rule 13.1 if
the lawyer receives three admonitions within a five year period.

~~**(b) Procedure.**~~ Upon being presented with evidence that a respondent lawyer has re-
ceived three admonitions within a five year period, a review committee may authorize
the filing of a formal complaint based solely on the provisions of this rule. A proceeding
under this rule is conducted in the same manner as any disciplinary proceeding. The
issues in the proceeding are whether the respondent has received three admonitions
within a five year period and, if so, what sanction or other remedy should be recom-
mended.

ELC 13.7 RESTITUTION

(a) Restitution May Be Required. A respondent lawyer who has been sanctioned un-
der rule 13.1 ~~or admonished under rule 13.5(b)~~ may be ordered to make restitution to
persons financially injured by the respondent's conduct.

.....

ELC 13.8 PROBATION

(a) Conditions of Probation. A respondent lawyer who has been sanctioned under
rule 13.1 ~~or admonished under rule 13.5(b)~~ may be placed on probation for a fixed pe-
riod of two years or less.

.....

ELC 13.9 COSTS AND EXPENSES

(a) Assessment. The Association's costs and expenses may be assessed as provided
in this rule against any respondent lawyer who is ordered sanctioned ~~or admonished~~.

.....

ELC 3.1 OPEN MEETINGS AND PUBLIC DISCIPLINARY INFORMATION

.....

(b) Public Disciplinary Information. The public has access to the following informa-
tion subject to these rules:

- (1) the record before a review committee and the order of the review committee in
any matter that a review committee has ordered to hearing or ordered an admo-
nition be issued;
- (2) the record upon distribution to a review committee or to the Supreme Court in
proceedings based on a conviction of a felony or serious crime, as defined in rule
7.1(a);

- (3) the record upon distribution to a review committee or to the Supreme Court in proceedings under rule 7.2;
- (4) a statement of concern to the extent provided under rule 3.4(f);
- (5) the record and order upon approval of a stipulation for discipline imposing a sanction ~~or admonition~~, and the order approving a stipulation to dismissal of a matter previously made public under these rules;
- (6) the record before a hearing officer or panel;
- (7) the record and order before the Board in any matter reviewed under rule 10.9 or title 11;
- (8) the bar file and any exhibits and any Board or review committee order in any matter that the Board or a review committee has ordered to public hearing, or any matter in which disciplinary action has been taken, or any proceeding under rules 7.1-7.6;
- (9) in any disciplinary matter referred to the Supreme Court, the file, record, briefs, and argument in the case;
- (10) a lawyer's resignation in lieu of disbarment under rule 9.3; and
- (11) any sanction ~~or admonition~~ imposed on a respondent.

.....

ELC 3.5 NOTICE OF DISCIPLINE

(a) Notice to Supreme Court. The counsel to the Board must provide the Supreme Court with:

- (A) a copy of any decision imposing a disciplinary sanction when that decision becomes final;
- ~~(B) a copy of any admonition, together with the order issuing the admonition, when the admonition is accepted or otherwise becomes final; and~~
- (B) a copy of any resignation in lieu of disbarment.

(b) Other Notices. The counsel to the Board must also notify the following entities of the imposition of a disciplinary sanction ~~or admonition~~, a resignation in lieu of disbarment, or the filing of a statement of concern under rule 3.4(f) as follows, in such form as may appear appropriate:

.....

Proposed Draft From BOG Discipline Committee Task Force 3

ELC 11.2
DECISIONS SUBJECT TO BOARD REVIEW

(a) Decision. For purposes of this title, "Decision" means the hearing officer or panel's findings of fact, conclusions of law, and recommendation, provided that if either party properly files a motion to amend under rule 10.16(c), the "Decision" includes the ruling on the motion, and becomes subject to Board review only upon the ruling on the motion.

(b) Review of Decisions. The Board reviews the following Decisions:

~~(1) those recommending suspension or disbarment;~~

~~(2) 1) those in which no two members of a hearing panel are able to agree on a Decision; and~~

~~(3) 2) all others if:~~

~~(A) within 15 days of service of the Decision on the respondent either party files a notice of appeal;~~
or

~~(B) the Board orders sua sponte review under rule 11.3(a) of a decision recommending suspension or disbarment; or~~

~~(B C) the Chair files a notice of referral for sua sponte Consideration under rule 11.3(b) of a decision not recommending suspension or disbarment.~~

Proposed Draft From BOG Discipline Committee Task Force 3

ELC 11.3

SUA SPONTE REVIEW

(a) Sua Sponte Review of Recommendations for Disbarment and Suspension. If neither the respondent nor Disciplinary Counsel files a timely notice of appeal from a Decision recommending suspension or disbarment, the Decision shall be distributed to the Board members for consideration of whether to order sua sponte review and the matter shall be scheduled for consideration by the Board. An order for sua sponte review shall set forth the issues to be reviewed. If the Board declines to order sua sponte review, the Board shall issue an order declining sua sponte review and adopting the Decision of the hearing officer or panel.

(ab) Procedure Sua Sponte Review of Other Recommendations. Sua sponte review commences when the Chair files a notice of referral under rule 11.2(b)(3)(B). The Chair may file a notice of referral for sua sponte consideration of a Decision other than one recommending disbarment or suspension under rule 11.2(b)(2)(C). Upon this filing, the Chair causes a copy to be served on the parties and schedules the matter for consideration by the Board. On consideration, the Board either issues an order for sua sponte review setting forth the issues to be reviewed or an order declining ~~dismisses~~ the sua sponte review. If the Board issues an order for sua sponte review, the procedures of rule 11.9(e) apply unless otherwise modified by the order, except either party may raise any issue for Board review.

(c) Procedure. If the Board issues an order for sua sponte review, unless modified by the Board's order, the respondent is considered the party seeking review under ELC 11.6 and 11.9, but either party may raise any issue for Board review. Board review is conducted as described in rule 11.12.

(bd) Standards for Ordering Sua Sponte Review. The Board ~~uses~~ should order sua sponte review only in extraordinary circumstances to prevent substantial injustice or to correct a clear error. Sua sponte review uses the same standards of review as other cases.

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ELC 11.4
TRANSCRIPT OF HEARING

(a) Ordering Transcript. A hearing transcript or partial transcript may be ordered at any time by the hearing officer or panel, respondent lawyer, disciplinary counsel, or the Board. Disciplinary counsel must order the entire transcript ~~if the hearing officer or panel recommends suspension or disbarment or~~ if no two panel members can agree on a Decision or if the Board orders sua sponte review of a recommendation of suspension or disbarment. If a notice of appeal is filed under rule 11.2(b)~~(3)~~ (2)(A), disciplinary counsel must order the entire transcript unless the parties agree that no transcript or only a partial transcript is necessary for review. For sua sponte review, the Chair determines the extent of the transcript necessary for review. ~~the procedure for ordering the transcript if not already ordered.~~

(b) Filing and Service. The original of the transcript is filed with the Clerk. Disciplinary counsel must cause a copy of the transcript to be served on the respondent except if the respondent ordered the transcript.

(c) Proposed Corrections. Within ten days of service of a copy of the transcript on the respondent, or within ten days of filing the transcript if the respondent ordered the transcript, each party may file any proposed corrections to the transcript. Each party has five days after service of the opposing party's proposed corrections to file objections to those proposed corrections.

(d) Settlement of Transcript. If either party files objections to any proposed correction under section (c), the hearing officer, upon review of the proposed corrections and objections, enters an order settling the transcript. Otherwise, the transcript is deemed settled and any proposed corrections deemed incorporated in the transcript.

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ELC 11.6 DESIGNATION OF BAR FILE DOCUMENTS AND EXHIBITS

The parties designate bar file documents and exhibits for Board consideration under the procedure of RAP 9.6 with the following adaptations and modifications:

- (a) Bar File Documents.** The bar file documents are considered the clerk's papers.
- (b) Disciplinary Board and Clerk.** The Disciplinary Board is considered the appellate court and the Clerk to the Disciplinary Board is considered the trial court clerk.
- (c) Responsibility and Time for Designation.** When a party seeks review by the Board, that party

~~(1) *Review of Suspension or Disbarment Recommendation.* When review is under rule 11.2(b)(1), the respondent lawyer must file and serve the respondent's designation of bar file documents and exhibits within 30 days of service of the Decision.~~

~~(2) *Review Not Involving Suspension or Disbarment Recommendation.* When review is under rule 11.2(b)(3)(A), the party seeking review must file and serve that party's designation of bar file documents and exhibits within 15 days of filing the notice of appeal. When review is under rule 11.2(b)(2) or 11.2(b)(3)(B), In all other reviews, the respondent is considered the party seeking review for designating bar file documents and exhibits.~~

- (d) Hearing Officer Recommendation.** The bar file documents must include the hearing officer or panel's recommendation.

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THIS RULE CAN BE DELETED. WE WILL NO LONGER HAVE AUTOMATIC REVIEW OF DECISIONS INVOLVING SUSPENSION OR DISBARMENT. THE NUMBER ELC 11.8 NEEDS TO REMAIN SHOWING AS “DELETED” SO THAT THE FOLLOWING NUMBERS REMAIN CORRECT.

~~ELC 11.8 — BRIEFS FOR REVIEWS INVOLVING SUSPENSION OR DISBARMENT RECOMMENDATION~~

~~(a) **Caption of Briefs.** Parties should caption their briefs as follows:~~

~~— [Name of Party] Brief [in Support of/in Opposition to] Hearing [Officer’s] [Panel’s] Decision~~

~~— [Name of Party] Reply Brief~~

~~(b) **Briefs in Support or Opposition.** In a matter before the Board under rule 11.2(b)(1), each party may file a brief in support of or in opposition to the Decision, or any part of it.~~

~~(c) **Time for Filing Briefs.** Briefs, if any, must be filed as follows:~~

~~(1) The respondent lawyer must file a brief within 20 days of service on the respondent of the later of:~~

~~(A) a copy of the hearing transcript; or~~

~~(B) the Decision.~~

~~(2) Disciplinary counsel must file a brief within 15 days of service on~~

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~~disciplinary counsel of the respondent's brief, or, if no brief is filed by the respondent, within 15 days of the expiration of the period for the respondent to file a brief.~~

~~(3) The respondent may file a reply to disciplinary counsel's brief within ten days of service of that brief on the respondent.~~

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**ELC 11.9 BRIEFS FOR REVIEWS NOT INVOLVING SUSPENSION OR
DISBARMENT RECOMMENDATION**

(a) Caption of Briefs. The parties should caption briefs as follows:

[Name of Party] Opening Brief

[Name of Party] Response

[Name of Party] Reply

(b) Opening Brief.

(1) The party seeking review must file an opening brief within 20 days of the later of:

(A) service on the respondent lawyer of a copy of the transcript, unless the parties have agreed that no transcript is necessary; or

(B) filing of the notice of appeal.

(2) Failure to file a brief within the required period constitutes an abandonment of the appeal.

(c) Response. The responding party has 15 days from service of the opening brief to file a brief responding to the issues raised on appeal.

(d) Reply. The party seeking review may file a reply to the response within ten days of service of the response.

(e) Procedure when Both Parties Seek Review or ~~When No Two Panel Members Can Agree.~~ Neither Party Seeks Review. When both parties file notices of appeal ~~rule 11.2(b)(3)(A) or when neither party seeks review no two panel members are able to agree on a Decision,~~ the respondent is considered the party seeking review and disciplinary

Proposed Draft From BOG Discipline Committee Task Force 3 – ELC 11.9

counsel is considered the responding party. In that case, disciplinary counsel's response may raise any issue for Board review, and the respondent has an additional five days to file the reply permitted by section (d).

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ELC 11.11 REQUEST FOR ADDITIONAL PROCEEDINGS

In any brief permitted in rule 11.9, either party may request that an additional hearing be held before the hearing officer or panel to take additional evidence based on newly discovered evidence. A request for an additional hearing must be supported by affidavit describing in detail the additional evidence sought to be admitted and any reasons why it was not presented at the previous hearing. The Board may grant or deny the request in its discretion.

Proposed Draft From BOG Discipline Committee Task Force 3

ELC 11.12
DECISION OF BOARD

(a) Basis for Review. Board review is based on the hearing officer or panel's Decision, any hearing panel member's dissent, the parties' briefs filed under rule 11.8 or 11.9, and the record on review.

(b) Standards of Review. The Board reviews findings of fact for substantial evidence. The Board reviews conclusions of law and recommendation de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board.

(c) Oral Argument. The Board hears oral argument if requested by either party or the Chair. A party's request must be filed no later than the deadline for that party to file his or her last brief, including a response or reply, under rule 11.8 or 11.9. The Chair's notice of oral argument must be filed and served on the parties no later than 14 days before the oral argument. The Chair sets the time, place, and terms for oral argument.

(d) Action by Board. On review, the Board may adopt, modify, or reverse the findings, conclusions, or recommendation of the hearing officer or panel. The Board may also direct that the hearing officer or panel hold an additional hearing on any issue, on its own motion, or on either party's request.

(e) Order or Opinion. The Board must issue a written order or opinion. If the Board amends, modifies, or reverses any finding, conclusion, or recommendation of the hearing officer or panel, the Board must state the reasons for its decision in a written order or opinion. A Board member agreeing with the majority's order or opinion may file separate concurring reasons. A Board member dissenting from the majority's order or opinion may set forth in writing the reasons for that dissent. The decision should be prepared as expeditiously as possible and consists of the majority's opinion or order together with any concurring or dissenting opinions. None of the opinions or orders may be filed until all opinions are filed. A copy of the complete decision is served by the Clerk on the parties.

(f) Procedure to Amend, Modify, or Reverse if No Appeal or sua sponte review of a recommendation for suspension or disbarment.

(1) Other than sua sponte review of a recommendation for suspension or disbarment, if ~~if~~ the Board intends to amend, modify, or reverse the hearing officer or panel's recommendation in a matter that has not been appealed to the Board by

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either party, the Board issues a notice of intended decision.

- (2) Either party may, within 15 days of service of this notice, file a request that the Board reconsider the intended decision.
- (3) If a request is filed, the Board reconsiders its intended decision and the intended decision has no force or effect. The Chair determines the procedure for the Board's reconsideration, including whether to grant requests for oral argument.
- (4) If no timely request for reconsideration is filed, the Board forthwith issues an order adopting the intended decision effective on the date of the order. If a party files a timely request for reconsideration, the Board issues an order or opinion after reconsideration under section (e).

(g) Decision Final Unless Appealed. The Board's decision is final if neither party files a notice of appeal nor a petition for review within the time permitted by title 12 or upon the Supreme Court's denial of a petition for discretionary review. A final decision of the Board recommending suspension or disbarment is sent by the Clerk to the Court for an appropriate order.

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ELC 12.3 APPEAL

- (a) **Respondent's Right to Appeal.** The respondent lawyer or Disciplinary Counsel has the right to appeal a Board decision recommending suspension or disbarment. There is no other right of appeal.
- (b) **Notice of Appeal.** ~~To appeal, the respondent~~ The appealing party must file a notice of appeal with the Clerk within 15 days of service of the Board's decision on that party. ~~the respondent.~~

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ELC 12.4 DISCRETIONARY REVIEW

(a) Decisions Subject to Discretionary Review. Either party may seek discretionary review of Board decisions under rule 11.12(e) not recommending suspension or disbarment subject to appeal under rule 12.3. are subject to Supreme Court review only through discretionary review.

The Court accepts discretionary review only if:

- (1) the Board's decision is in conflict with a Supreme Court decision;
- (2) a significant question of law is involved;
- (3) there is no substantial evidence in the record to support a material finding of fact on which the Board's decision is based; or
- (4) the petition involves an issue of substantial public interest that the Court should determine.

(b) Petition for Review. Either party may seek discretionary review by filing a petition for review with the Court within 25 days of service of the Board's decision.

(c) Content of Petition; Answer; Service; Decision. A petition for review should be substantially in the form prescribed by RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in that rule to the Court of Appeals are considered references to the Board. The appendix to the petition or an appendix to an answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d) – (h) govern answers and replies to petitions for review and related matters including service and decision by the Court.

(d) [NEW SECTION] Subsequent Petition by Other Parties. If a timely petition for discretionary review is filed by a party, any other party who wants relief from the Board's

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decision must file a petition for discretionary review with the Clerk within 14 days after service of the petition filed by the other party.

(d e) Acceptance of Review. The Court accepts discretionary review of a Board decision by granting a petition for review. Upon acceptance of review, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE ADOPTION OF THE
AMENDMENT TO ELC 2.7-CONFLICTS
REVIEW OFFICER

ORDER

NO. 25700-A- 920

The Washington State Bar Association having recommended the adoption of the proposed amendment to ELC 2.7-Conflicts Review Officer, and the Court having approved the proposed amendment for publication;

Now, therefore, it is hereby

ORDERED:

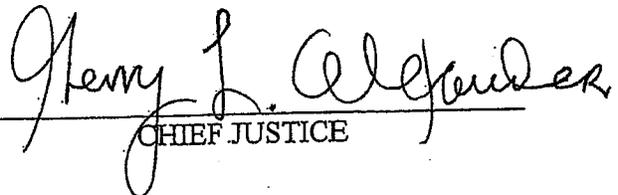
(a) That pursuant to the provisions of GR 9(g), the proposed amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites expeditiously.

(b) The purpose statement as required by GR 9(e) is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than 60 days from the published date. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or Camilla.Faulk@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 8th day of July, 2009.

For the Court


CHIEF JUSTICE

563/134

FILED
SUPREME COURT
STATE OF WASHINGTON
2009 JUL -8 P 2:46
BY RONALD R. CLEMENT
CLERK

GR 9 COVER SHEET

Suggested Amendment RULES FOR ENFORCEMENT OF LAWYER CONDUCT (ELC) ELC 2.7 – Conflicts Review Officer

(Modifying Conflicts Review Officer position to a panel of three and clarifying duties and procedures)

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: The Conflicts Review Officer position was created in October 2002 with the adoption of Rule for Enforcement of Lawyer Conduct (ELC) 2.7. Pursuant to the Rule, the Conflicts Review Officer reviews grievances filed against disciplinary counsel, hearing officers, other lawyers employed by the Association, and members of the Disciplinary Board, the Board of Governors, and the Supreme Court. The CRO is not a WSBA employee and operates at "arm's length" of the WSBA and the Office of Disciplinary Counsel. CROs are appointed by the Supreme Court on recommendation of the Board of Governors.

When reviewing a grievance, the CRO essentially performs the intake screening function that would otherwise be performed by the Office of Disciplinary Counsel. The CRO reviews the grievance and the response of the lawyer and determines whether the grievance should be dismissed, deferred, or referred to special disciplinary counsel for investigation. CROs perform intake screening only, not investigation, and are expected to comply with the 60-day aspirational timeline applicable to grievance intake. CRO files are unique. Unlike "regular" grievances, which can be dismissed at the intake level without requiring a response from the Respondent lawyer, the CRO is required, under ELC 2.7(a), to obtain a response before performing the intake review on a grievance. This includes grievances which are a direct result of a lawyer's work within the discipline system (e.g., grievances filed against a disciplinary counsel or review committee members because they dismissed a grievance).

The Rule currently provides for one Conflicts Review Officer, and allows for appointment of CROs pro tem as needed for a specific case; however, this has resulted in the appointment of an inordinate number of CROs pro tem, which in turn has interfered with the ability to process such grievances in a timely fashion. The proposed amendments to the ELC would establish a panel of three Conflicts Review Officers while preserving the ability to appoint a CRO pro tem where all three CROs were unable to serve on a particular matter. The proposed amendments set forth with greater specificity what grievances are to be assigned to CROs, and would allow a CRO to dismiss a baseless or frivolous grievance without requiring the attorney to file a response.

SUGGESTED AMENDMENT
RULE FOR ENFORCEMENT OF LAWYER CONDUCT (ELC)
Rule 2.7 – Conflicts Review Officer

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

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

13 (2) *Independence.* The Conflicts Review Officers acts independently of disciplinary counsel
14 and the Association.

15 **(b) Appointment and Qualifications.**

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

SUGGESTED AMENDMENT
RULE FOR ENFORCEMENT OF LAWYER CONDUCT (ELC)
Rule 2.7 – Conflicts Review Officer

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

4 (3) To be eligible for appointment as Conflicts Review Officer or Conflicts Review Officer pro
5 tempore, a lawyer must have prior experience either as a Disciplinary Board member, or as disciplinary
6 counsel, or special disciplinary counsel. The Conflicts Review Officers and Conflicts Review Officers
7 pro tempore may have no other active role in the discipline system during the term of appointment. When
8 the Conflicts Review Officer is not available to handle a matter due to conflict of interest or other good
9 cause, on the recommendation of the Board of Governors, the Supreme Court will appoint a Conflicts
10 Review Officer pro tempore for the matter.

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

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

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