



WSBA

WASHINGTON STATE BAR ASSOCIATION

ELC DRAFTING TASK FORCE

Meeting Agenda

March 10, 2010

10:00 a.m. to 1:00 p.m.

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

1. **Call to Order/Preliminary Matters** (10:00 a.m.)
 - Approval of January 14, 2010 meeting minutes [pp. 632-637]
2. **Consent Calendar**
 - Subcommittee C [pp. 638-652]
 - Subcommittee B – new consent item [p. 653-654]
3. **Discussion**
 - Subcommittee B – Recommendations [pp. 655-661]
 - Subcommittee B – Supplemental Recommendations [pp. 662-668]
 - Subcommittee C - Recommendations [pp. 669-674]
4. **Future meeting schedule**
 - April 8, 2010, 10:00 a.m. to 12:00 noon
 - Consent Calendar Subcommittee A
 - Materials Deadline: Tuesday, March 30, 2010
 - June 10, 2010, 10:00 a.m. to 12:00 noon
 - Consent Calendar Subcommittee B
 - Materials Deadline: Tuesday, June 1, 2010
5. **Adjourn** (noon)

DRAFT Minutes – January 14, 2010
ELC Drafting Task Force

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

Call to Order

The Chair called the meeting to order at 8:40.

Preliminary Matters

The Chair called for corrections to the draft minutes from the November 5, 2009 meeting. Hearing none, the Chair deemed the minutes approved as circulated.

Consent Calendar: Subcommittee B

Mr. Fine explained that Subcommittee B's items on the consent calendar, in the materials at pp. 614–19, represent clarifications rather than substantive changes. The Chair opened the floor for requests to withdraw any items from the subcommittee's list. No requests were made. Ms. Turner moved for approval of the items as submitted; the Chair seconded. There being no objections, the consent calendar items from Subcommittee B were approved unanimously.

Subcommittee B's Request for Guidance Regarding ELC 5.4(b)

Mr. Fine explained that the subcommittee's request for guidance arises from the issue presented in Mr. Bulmer's memo proposing that lawyers be allowed to assert their clients' attorney-client privilege in responding to grievances, materials pp. 612–13, and ODC's response memo, materials pp. 608-610. Mr. Bulmer questioned the Supreme Court's authority to contravene the attorney-client privilege granted by the legislature. He opined that the Supreme Court has no authority to waive the client's privilege, as the Court has no authority over the client. He presented the hypothetical of a criminal defense lawyer who has in his file a communication from a client that amounts to a confession to a crime responding to a grievance filed by someone other than the client. Mr. Bulmer stated that a request from ODC in this situation puts the defense lawyer in the untenable position of breaking his client's privilege to protect himself. He pointed out that WSBA is a large enterprise with many employees and observed that WSBA is not "leak-proof." Mr. Bulmer also expressed doubt that ODC or WSBA could resist disclosure of the file in the face of a federal subpoena. He opined

that the sole justification for the rule is to make investigations easier for ODC and that this justification insufficient.

At the Chair's invitation, Mr. Ende presented ODC's position. Mr. Ende reminded the Task Force that this debate was had by the Discipline 2000 Task Force and that the issues were discussed, evaluated, and resolved. Further, the Discipline 2000 Task Force's recommendation was reviewed the BOG and then by the Supreme Court, which decided to retain the rule. The rule implements the Supreme Court's authority to regulate the profession and protect the public, and is in keeping with the purposes of lawyer discipline. He explained that the Court has the authority to enact such a rule under its plenary power and its relationship to the profession, as reflected in the requirements under RPC 1.6(b) to disclose certain information covered by the attorney-client privilege. Mr. Ende expressed deep concern about any proposal that turns investigations of lawyer conduct into a process of civil discovery. He was concerned that this transformation would impair the efficiency of the discipline process. He stated that the rule is not merely a rule of convenience; investigations depend on it. He noted that the process has been working well for decades. ODC has investigated thousands of grievances, and a high proportion of its files contain privileged materials. The burden of protecting the privilege is on both the discipline system and respondent lawyers. ODC has an affirmative obligation under the rules not to disclose privileged information that it has honored for decades. Mr. Ende encouraged the Task Force to view the whole picture.

Mr. Bulmer countered that the exceptions in RPC 1.6(b)(1) merely expresses the existing crime-fraud exception. He did not remember the issues being discussed in Discipline 2000, but opined that even so the time has come to revisit them. Mr. Bulmer reiterated his contention that the rule is merely one of convenience.

The Chair opened the floor for discussion of Mr. Bulmer's suggestion.

Mr. Fine, speaking as an individual rather than subcommittee chair, noted that Mr. Bulmer was unable to identify a single case where a client has come to harm from a respondent lawyer's disclosure to disciplinary counsel. Concerned that the proposal provides a method for stonewalling a bar investigation, Mr. Fine rejected the broad brush approach of eliminating ELC 5.4(b) and suggested that the Task Force look at smaller areas where the rule could be tightened.

Ms. Balazs voiced concern for the situation in which a lawyer receives a bar complaint from a pro se opponent, allowing the opposing party to place the lawyer in conflict with her own client and perhaps to gain privileged information not otherwise available.

Mr. Johnson shared the concern about cases where the grievant is not the client, whose filing of the grievance would be a waiver of the privilege. He did not share the concern for the separation of powers.

Mr. Wiggins, sharing his concerns about eliminating ELC 5.4(b), counseled that the group should craft any exceptions very narrowly.

Mr. Carpenter recognized the Supreme Court's authority to regulate lawyers, but advocated for crafting an exception for the client to affirmatively exercise the client's own privilege. He also shared the concern for leaks in the organization.

Mr. Danielson suggested implementing a very narrowly available in camera review, but was concerned that respondent lawyers would use such review as a tactical device.

Mr. Sheldon shared his concern about grievances filed by prosecuting attorneys against defense counsel. In some cases the respondent's client may be willing to waive the privilege, but not in all cases. Mr. Sheldon opined that because there was no agreement in the subcommittee to carve out a narrow exception to the current rule, eliminating the rule would be the simplest solution. He opined that the situation would not come up frequently.

Mr. Ende countered that nearly 100% of investigations involve privileged information in the lawyer's file. In cases where the respondent is represented, the privilege issue is worked out. But many respondents are motivated to assert the privilege to delay the investigation. Mr. Ende also observed that the discussion had operated under the assumption that giving information to the bar in an investigation operates as a waiver. Mr. Ende assured the group that this is not the case. ODC is acting as an arm of the Supreme Court under an obligation of confidentiality. Disciplinary counsel's examination of material in a lawyer's file is the equivalent of in camera review and serves the same purpose. Mr. Ende also noted that the potential for information to slip through the cracks exists everywhere, not just ODC. He opined that this potential is not an argument for so radically changing the system.

Mr. Beitel provided a historical perspective, having been the reporter for the Discipline 2000 Task Force. Most of the issues discussed in this meeting had been discussed at Discipline 2000 and had been addressed by adding ELC 3.2(b), setting out the obligation of ODC to keep privileged information confidential—with the bar in full agreement.

The Chair identified three positions distilled from the discussion: (1) ELC 5.4(b) should be eliminated; (2) No change is needed; and (3) Some refinement is needed. The Chair polled the Task Force on each position separately. The results were 2 in favor of eliminating ELC 5.4(b), 5 in favor of no change, and 6 (including the 2 in favor of eliminating the rule) in favor of refining the rule. Noting the very slim majority for seeking refinement, the Chair sent the issue back to Subcommittee B for discussion. Ms. Shankland commented that one possible to refinement would be to specify that forced disclosure is not a waiver,

as had been suggested in ODC's memo in the materials at p. 608. Mr. Fine solicited specific proposals for refinement as soon as possible and requested that the language of the proposals be as detailed as possible.

The Chair introduced the next item: Proposals recommended for rejection by Subcommittee B at p. 627. The first such proposal was the addition of "accurate" to the ELC 5.3(e)(1) requirement that a lawyer make a full and complete response to a grievance. Mr. Bulmer asked whether a good faith mistake is disciplinable. He opined that to demand an accurate response adds a level of assuredness that a respondent cannot give. Mr. Danielson moved to reject the addition of accurate. Mr. Sheldon seconded. With a poll of 10 in favor, the motion passed.

Next, Subcommittee B recommended rejecting ODC's proposal, located at p. 372 of the materials, that the respondent stipulate to the sanction to be imposed in the event of breach when entering into the diversion program. Mr. Fine moved to reject the proposal; Mr. Sheldon seconded. The Chair called for discussion.

Mr. Beitel explained that the purpose of the proposal was to make diversion more attractive both to disciplinary counsel and to respondents. In the event of a breach, respondents would gain certainty, and disciplinary counsel would not have to prosecute the case. This would result in more diversions being offered.

Mr. Sheldon countered that the idea of diversion is to get the lawyer help rather than go through prosecution. This proposal would make diversion less palatable because it removes the opportunity to argue mitigation in the event of a breach.

Mr. Bulmer noted that the proposal amounts to a confession of judgment, while the stipulation to misconduct is merely a confession of wrongdoing. He noted that the subcommittee's opposition was merely to the confession of judgment and not to other proposals in the same memo from ODC.

After more some discussion, the Chair polled the group. With 8 in favor and 3 opposed, the motion to reject the proposal passed.

Next, Subcommittee B recommended that the Task Force reject ODC's proposed addition to ELC 7.3, located at p. 502 in the materials. ELC 7.3 provides for immediate interim suspension when a lawyer asserts incapacity to conduct a proper defense to a disciplinary proceeding. The proposal would extend the provision to lawyers who assert incapacity to practice law. The subcommittee had voted 5-1 to reject the proposal as overbroad. Mr. Fine moved to accept the subcommittee's recommendation to reject the proposal. The Chair seconded.

Two opposing views emerged from the discussion of the proposal: (1) the proposal is overbroad and could be unfairly applied where a lawyer asserts a temporary inability to practice, like illness or exhaustion; and (2) there is no harm

in the proposed revision because it would never be invoked where the asserted inability is temporary, and if it were, it would not be approved by the Court.

By a vote of 6 in favor and 5 opposed, the motion to reject the proposed change carried. The Chair assured the Task Force that there would be an opportunity for the minority opinion to be shared with the BOG.

The Task Force moved on to discuss Subcommittee B's recommendation for adoption of proposed ELC 5.1(e), at p. 619, regarding vexatious grievants. Mr. Sheldon moved that the Task Force adopt the recommendation; the Chair seconded.

Mr. Beitel moved to amend the proposal to provide that the decision maker should be the Chief Hearing Officer (CHO) rather than the Chair of the Disciplinary Board. He opined that motions to declare vexatious grievants would be rare, and because the Chair changes every year, the Chair would not develop sufficient familiarity with the issue. The CHO, on the other hand, serves a term of years and thus has a chance to develop more familiarity with the issue. Mr. Beitel also opined that the CHO more likely to be timely in ruling on motions than the Chair.

Mr. Danielson moved to table discussion of who should rule on vexatious grievant motions until the current CHO is present to join the discussion. The Task Force Chair tabled discussion on who should make vexatious grievant rulings, clarified that the motion before the Task Force was whether to adopt a vexatious grievant rule, and called for discussion.

Mr. Sheldon observed that both ODC and respondents' counsel agree that the problem of vexatious grievants must be dealt with and that debate in the subcommittee centered on narrowly defining "vexatious grievant." Mr. Wiggins, Mr. Johnson, and Mr. Carpenter also expressed agreement with the proposed rule.

Mr. Fine acknowledged that vexatious grievants exist and that frivolous grievances are filed. However, allowing lawyers to bring motions to identify a grievant as vexatious will result in cross harassment of grievants. The process already disposes of vexatious grievances by allowing for dismissals without requiring a response from the respondent lawyer. Mr. Fine warned that the proposed solution may create a bigger problem than the one it is meant to solve.

Ms. Turner opined that the power to file the motion should be reserved to disciplinary counsel. This opinion encountered vigorous opposition from respondents' counsel. Mr. Sheldon said that the definition provided in the rule would prevent the abusive use of vexatious grievant motions. Mr. Bulmer noted that filing the motion would not stay the disciplinary investigation. Mr. Ende observed that allowing the respondent to petition would open the door to a

petition in response to an isolated grievance against a single lawyer, which is not the situation that the rule was meant to address.

The Chair polled the members on the motion to adopt the language as proposed, reserving the issue of who the decision maker should be. With 8 in favor, 3 in opposition, and 1 abstention, the motion carried.

Further discussion of Subcommittee B's proposals for adoption was set over to the February meeting. The Chair also proposed adding a meeting in March.

Next Meetings

Thursday, February 11, 2010 10:00 a.m. to 12:00 noon
Consent Calendar: entries from Subcommittee C
Deadline for Materials: Tuesday, February 2, 2010

March: Date to be determined

Thursday, April 8, 2010 10:00 a.m. to 12:00 noon
Consent Calendar: to be determined
Deadline for Materials: Tuesday, March 30, 2010

Adjournment

The Chair adjourned the meeting at 10:40.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter

ELC 11.2 DECISIONS SUBJECT TO BOARD REVIEW [Redline]

(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 ~~45~~ 30 days of service of the Decision on the respondent:~~
 - ~~(A) 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 the a Decision not recommending suspension or disbarment.~~

(c) Cross Appeal. If a party files a timely notice of appeal under subsection (b)(2)(A) of this rule and the other party wants relief from the Decision, the other party must file a notice of appeal with the Clerk within the later of (1) 14 days after service of the notice filed by the other party, or (2) within the time set forth in subsection (a) and (b) for filing a notice of appeal.

ELC 11.2 DECISIONS SUBJECT TO BOARD REVIEW [Clean Copy]

(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 in which no two members of a hearing panel are able to agree on a Decision; and
- (2) all others if:
 - (A) within 30 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
 - (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.

(c) Cross Appeal. If a party files a timely notice of appeal under subsection (b)(2)(A) of this rule and the other party wants relief from the Decision, the other party must file a notice of appeal with the Clerk within the later of (1) 14 days after service of the notice

filed by the other party, or (2) within the time set forth in subsection (a) and (b) for filing a notice of appeal.

ELC 11.3 SUA SPONTE REVIEW [Redline]

(a) Procedure. ~~Sua sponte review commences when the Chair files a notice of referral under rule 11.2(b)(3)(B).~~ **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. The Decision shall be distributed to the Board within 30 days after the last day to file a notice of appeal. 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.

(b) Standards. ~~The Board uses 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~~ **Sua Sponte Review of Other Recommendations.** 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). The notice shall be filed within 30 days after the last day to file a notice of appeal. 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 dismisses the sua sponte review or an order declining sua sponte review.

(c) Procedure. ~~If the Board issues an order for sua sponte review, the procedures of rule 11.9(e) apply unless otherwise modified by the order, the Board's order must designate the appellant for purposes of ELC 11.6 and 11.9, except but either party may raise any issue for Board review. Board review is conducted as described in rule 11.12.~~

(d) Standards for Ordering Sua Sponte Review. The Board should order sua sponte review only in extraordinary circumstances to prevent substantial injustice or to correct a clear error.

ELC 11.3 SUA SPONTE REVIEW [Clean Copy]

(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. The Decision shall be distributed to the Board within 30 days after the last day to file a notice of appeal. 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.

(b) Sua Sponte Review of Other Recommendations. 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). The notice shall be filed within 30 days after the last day to file a notice of appeal. 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 sua sponte review.

(c) Procedure. If the Board issues an order for sua sponte review, the Board's order must designate the appellant for purposes of 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.

(d) Standards for Ordering Sua Sponte Review. The Board should order sua sponte review only in extraordinary circumstances to prevent substantial injustice or to correct a clear error.

ELC 11.4 TRANSCRIPT OF HEARING [Redline]

(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)(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 procedure for ordering the transcript if not already ordered~~ the extent of the transcript necessary for review. If the Chair orders a partial transcript, either party may request additional portions of the transcript.

(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.

ELC 11.4 TRANSCRIPT OF HEARING [Clean Copy]

(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 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)(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. If the Chair orders a partial transcript, either party may request additional portions of the transcript.

(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.

ELC 11.6 DESIGNATION OF BAR FILE DOCUMENTS AND EXHIBITS [Redline]

(a) RAP 9.6 Controls. The parties designate bar file documents and exhibits for Board consideration under the procedure of RAP 9.6 ~~with the following adaptations and modifications: , except as provided in this rule.~~

(ab) Bar File Documents. The bar file documents are considered the clerk's papers.

(bc) 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.

(cd) Responsibility and Time for Designation.

~~(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~~ When a party appeals to the Board, that party 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), the respondent is considered the party seeking review~~ In all other reviews, the party identified as appellant by the Board's order is responsible for designating bar file documents and exhibits.

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

ELC 11.6 DESIGNATION OF BAR FILE DOCUMENTS AND EXHIBITS [Clean Copy]

(a) **RAP 9.6 Controls.** The parties designate bar file documents and exhibits for Board consideration under the procedure of RAP 9.6, except as provided in this rule.

(b) **Bar File Documents:** The bar file documents are considered the clerk's papers.

(c) **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.

(d) **Responsibility and Time for Designation.** When a party appeals to the Board, that party must file and serve that party's designation of bar file documents and exhibits within 15 days of filing the notice of appeal. In all other reviews, the party identified as appellant by the Board's order is responsible for designating bar file documents and exhibits.

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

**~~ELC 11.8 BRIEFS FOR REVIEWS INVOLVING SUSPENSION OR DISBARMENT
RECOMMENDATION [Redline]~~**

~~(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 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.~~

Subcommittee C recommends deleting ELC 11.8 in its entirety, given the elimination of automatic review.

ELC 11.9 BRIEFS FOR REVIEWS NOT INVOLVING SUSPENSION OR DISBARMENT RECOMMENDATION [Redline]

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

[Name of Party] ~~Opening Brief in Opposition to Hearing~~ [Officer's] [Panel's] Decision

[Name of Party] Response

[Name of Party] Reply

(b) Opening Brief in Opposition.

(1) The party seeking review must file a an opening 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 an opening 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~~ 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~~ 30 days of service of the response.

(e) Procedure when Both Parties Seek Review or ~~When No Two Panel Members Can Agree the Board Orders Sua Sponte Review.~~ When both parties file notices of appeal under rule 11.2(b)(3)(A) or when no two panel members are able to agree on a Decision, ~~the respondent~~ the party filing first is considered the party seeking review and disciplinary counsel is considered the opposing party. When the Board initiates sua sponte review, the order must designate the party seeking review. In ~~that~~ these cases, ~~disciplinary counsel's response~~ the responding party may raise any issue for Board review, and the ~~respondent~~ designated party seeking review has an additional five days to file the reply permitted by section (d).

ELC 11.9 BRIEFS [Clean Copy]

(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 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 a notice of appeal.

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

(c) **Response.** The opposing party has 30 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 30 days of service of the response.

(e) **Procedure when Both Parties Seek Review or the Board Orders Sua Sponte Review.** When both parties file notices of appeal, the party filing first is considered the party seeking review. When the Board initiates sua sponte review, the order must designate the party seeking review. In these cases, the responding party may raise any issue for Board review, and the designated party seeking review has an additional five days to file the reply permitted by section (d).

ELC 11.11 REQUEST FOR ADDITIONAL PROCEEDINGS [Redline]

In any brief permitted in rules ~~11.8 and~~ 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.

ELC 11.11 REQUEST FOR ADDITIONAL PROCEEDINGS [Clean Copy]

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.

ELC 11.12 DECISION OF BOARD [Redline]

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(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.

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ELC 11.12 DECISION OF BOARD [Clean Copy]

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(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.

.....

ELC 12.3 APPEAL [Redline]

(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 ~~45~~ 30 days of service of the board's decision on ~~the respondent~~ that party.

(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 12.3 APPEAL [Clean Copy]

(a) 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. The appealing party must file a notice of appeal with the Clerk within 30 days of service of the board's decision on that party.

(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 [Redline]

(a) Decisions Subject to Discretionary Review. Respondent or disciplinary counsel 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~~ Respondent or disciplinary counsel may seek discretionary review by filing a petition for review with the Court within ~~25~~ 30 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) governs answers and replies to petitions for review and related matters including service and decision by the Court.

(d) Subsequent Petition By Other Parties. If a timely petition for discretionary review is filed by the Respondent of disciplinary counsel, and the other wants relief from the Board's decision, he or she 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.

ELC 12.4 DISCRETIONARY REVIEW

(a) Decisions Subject to Discretionary Review.

Respondent or disciplinary counsel may seek discretionary review of Board decisions under rule 11.12(e) not subject to appeal under rule 12.3. 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.** Respondent or Disciplinary Counsel may seek discretionary review by filing a petition for review with the Court within 30 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 the 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) governs answers and replies to petitions for review and related matters including service and decision by the Court.

(d) **Subsequent Petition by Other Parties.** If a timely petition for discretionary review is filed by a Respondent or disciplinary counsel, and the other wants relief from the board's decision, he or she must file a petition for discretionary review with the Clerk within 14 days after service of the petition filed by the other party.

(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.

February 2, 2010

To: Geoff Gibbs, Chair
ELC Drafting Task Force

From: Seth Fine, Chair
Subcommittee B

Re: Supplemental Subcommittee B Report

This supplements the Subcommittee B report dated December 29, 2009 (p. 614-29). The Subcommittee makes the following additional recommendations.

I. CONSENT CALENDAR

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

ELC 6.9, ODC proposal at p. 375:

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.

SUBCOMMITTEE B - PROPOSALS RECOMMENDED FOR ADOPTION (held over from January 14, 2010 meeting)

2. ELC 5.1(b):

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

ELC 5.1 GRIEVANTS

.....

(b) Consent to Disclosure.

(1) Subject to paragraph (2), 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 specifically restricted, such as:

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

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

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

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

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

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

ELC 5.1 GRIEVANTS

.....

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

.....

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

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

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

(B) if

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

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

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

....

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

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

ELC 5.3 INVESTIGATION OF GRIEVANCE

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

5. ELC 5.1(c)(5)

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

ELC 5.1 GRIEVANTS

....

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

....

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

....

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

ELC 5.3 INVESTIGATION OF GRIEVANCE

....

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

ELC 5.5 DISCOVERY BEFORE FORMAL COMPLAINT

....

(d) Objections.

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

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

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

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

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

ELC 7.2 INTERIM SUSPENSION IN OTHER CIRCUMSTANCES

(a) Types of Interim Suspension.

....

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

7. ELC 5.5:

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

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

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

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

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

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

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

8. ELC 5.6(b):

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

ELC 5.6 DISPOSITION OF GRIEVANCE

....

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

....

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

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

ELC 5.6 DISPOSITION OF GRIEVANCE

....

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

(1) dismiss the grievance;

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

~~(2~~ 3) issue an advisory letter under rule 5.7;

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

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

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

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

10. ELC 6.1:

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

ELC 6.1 REFERRAL TO DIVERSION

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

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

and respondent to address respondent's misconduct.

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

11. ELC 7.7(a):

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

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

12. ELC 7.7(d):

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

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

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

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

ELC 9.1 STIPULATIONS

.....

(c) Approval.

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

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

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

(d) Conditional Approval. Subject to subsection (c)(3), the Board may condition its approval of a stipulation on the agreement by the respondent and disciplinary counsel to a different disciplinary action, probation, restitution, or other terms the Board deems necessary to accomplish the purposes of lawyer discipline. If the Board conditions approval of a stipulation, the stipulation as conditioned is deemed approved if, within 14 days of service of the order, or within additional time granted by the Chair, both parties serve on the Clerk written consent to the conditional terms in the Board's order.

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

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

ELC 9.1 STIPULATIONS

.....

(d) Conditional Approval.

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

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

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

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

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

February 2, 2010

To: Geoff Gibbs, Chair
ELC Drafting Task Force

From: Seth Fine, Chair
Subcommittee B

Re: Supplemental Subcommittee B Report [Part 2]

This supplements the Subcommittee B report dated December 29, 2009 (p. 614-29). The Subcommittee makes the following additional recommendations.

II. PROPOSALS RECOMMENDED FOR ADOPTION

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

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

[Note: This supplements the subcommittee proposal at p. 619-20, which was adopted by the Task Force at the 1/14 meeting.]

ELC 5.1 GRIEVANTS

....

(f) Recovery of Attorney's fees and Costs Against a Serial Vexatious Grievant.

(1) If the Chair grants the motion and finds the person or entity to be a vexatious grievant, disciplinary counsel or the respondent lawyer may recover attorney's fees and costs against a serial vexatious grievant.

(2) Disciplinary counsel or the respondent lawyer may request fees by filing a motion within 15 days after the Chair issues its order under subpart (e)(3). The motion procedure shall conform to ELC 11.14 and shall also include an affidavit of counsel providing detailed support for the fees and costs requested. The Chair may, in the Chair's discretion, award fees and costs incurred in the preparation of the motion made pursuant to this rule, but only if the Chair further determines that the vexatious grievant is a serial vexatious grievant. A person or entity is a serial vexatious grievant if:

(a) the grievant, acting alone or in apparent concert with another, has previously filed

(i) two other grievances against the respondent lawyer or

(ii) four other grievances against members of the same "firm" as defined in

RPC 1.0(c):

(b) the principal purpose in filing the grievances was to harass or annoy the respondent lawyer; and

(c) the prior grievances were dismissed under ELC 5.6 with no more than an advisory letter. A grievance that results in (1) a sanction, admonition or remedy under ELC 13.1 or in (2) diversion under Title 6 may not be counted toward the required number of grievances under part (f)(1).

(3) Disciplinary counsel, the respondent lawyer, or the grievant may seek review of the Chair's order on fees by a petition for discretionary review under rule 12.4.

(4) After the award of costs and fees is final, upon application by the Association or the respondent lawyer, the Supreme Court commissioner or clerk may enter a money judgment on the order for costs and fees if the grievant has failed to pay the costs and fees. The Association or respondent lawyer must serve the application for a money judgment on the grievant under rule 4.1. The grievant may file an objection with the commissioner or clerk within 20 days of service of the application. The sole issue to be determined by the commissioner or clerk is whether the grievant has complied with the duty to pay costs and fees under this rule. The commissioner or clerk may enter a money judgment in compliance with RCW 4.64.030 and notify the Association or respondent lawyer and the grievant of the judgment. On application, the commissioner or clerk transmits the judgment to the clerk of the superior court in any county selected by the Association or respondent lawyer and notifies grievant of the transmittal. The clerk of the superior court files the judgment as a judgment in that court without payment of a filing fee.

2. ELC 5.1(c)(3):

[Note: This replaces the previous Subcommittee proposal at p. 620-21. It is a modified version of the ODC proposal at p. 351.]

ELC 5.1 GRIEVANTS

.....

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

.....

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

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

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

~~(B) if~~

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

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

(B) When either the grievant or respondent disputes in writing a decision by disciplinary counsel to withhold or not withhold all or a portion of a response, the matter will be forwarded to a review committee to resolve the dispute, unless the matter has previously been dismissed under rule 5.6.

3. ELC 5.6:

[Note: This is a modification of the ODC proposal at p. 364.]

ELC 5.6 DISPOSITION OF GRIEVANCE

.....

(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) dismiss the grievance and issue an advisory letter under rule 5.7;
- ~~(3~~ 4) issue an admonition under rule 13.5;
- (4 5) order a hearing on the alleged misconduct; or
- ~~(5~~ 6) order further investigation as may appear appropriate.

(e) Action Final. A review committee's action under this rule is final and not subject to further review.

4. ELC 6.5:

[Note: This is a modification of the ODC proposal at p. 371.]

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)~~ 4) include a statement in substantially the following form: "This diversion contract is a compromise and settlement of one or more disputes. Except as specifically authorized by the Rules for Enforcement of Lawyer Conduct, it is not admissible in any court, administrative, or other proceedings. It may not be used as a basis for establishing liability to any person who is not a party to this contract";
- ~~(3~~ 4) provide for oversight of fulfillment of the contract terms. Oversight includes reporting any alleged breach of the contract to disciplinary counsel;
- (4 5) 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~~ 6) 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.

5. ELC 7.4 and 8.5:

[Note: This is based on the Turner suggestion set out in the 1/4 matrix at p. 18.]

ELC 7.4 STIPULATION TO INTERIM SUSPENSION

At any time a respondent lawyer and disciplinary counsel may stipulate that the respondent be suspended during the pendency of any investigation or proceeding because of conviction of a serious crime, a substantial threat of serious harm to the public, or incapacity to practice law. A stipulation must state the factual basis for the stipulation and be submitted directly to the Supreme Court for expedited consideration. When the stipulation is based on the lawyer's incapacity to practice law, the lawyer must be represented by counsel, and if counsel does not otherwise appear, the Association will appoint counsel. Stipulations under this rule are public upon filing with the Court, but the Court may order that supporting materials are confidential. Either party may petition the Court to terminate the interim suspension, and on a showing that the cause for the interim suspension no longer exists, the Court may terminate the suspension.

ELC 8.5 STIPULATED TRANSFER TO DISABILITY INACTIVE STATUS

(a) Requirements. At any time a respondent lawyer and disciplinary counsel may stipulate to the transfer of the respondent to disability inactive status under this title. The respondent and disciplinary counsel must sign the stipulation. The respondent lawyer must be represented by counsel in entering into such a stipulation. If counsel does not otherwise appear, the Association will appoint counsel.

...

6. ELC 7.7, ODC proposal at p. 385:

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.

7. ELC 9.1:

[Note: This is a consolidation of the following:

1. ODC proposal at 386 (adopted by Task Force at 1/14 meeting, p. 617).
2. ODC proposal at p. 390-91 (adopted by Task Force at 1/14 meeting, p. 617).
3. BOG proposal at p. 124 and 412 (modified as set out in previous Subcommittee report at p. 625).
4. ODC proposal at p. 388-89 (modified as set out in previous Subcommittee report at p. 626).
5. ODC proposal at p. 387 (modified).
6. ODC proposal at p. 394.]

ELC 9.1. STIPULATIONS

...

(c) Stipulation to alleged facts. A respondent lawyer and disciplinary counsel may agree to stipulate to alleged facts in lieu of admissions to particular acts or omissions. The stipulation must also include an agreement that the facts and misconduct will be deemed proved in any subsequent disciplinary proceeding in any jurisdiction.

(e d) Approval.

(1) Standards. The chief hearing officer, a hearing officer or panel, or the Board must approve a stipulation unless the stipulation results in a manifest injustice after consideration of the purposes of lawyer discipline, the ABA Standards for Imposing Lawyer Sanctions, and Washington authority.

(2) Approval By Chief Hearing Officer. Subject to subsection (1), the chief hearing officer may approve of a stipulation disposing of any matter that is not then pending before an assigned hearing officer or panel, the Board, or the Supreme Court. Approval may be granted at any point, during an investigation or otherwise, prior to entry of final decision under rule 10.16(f). The chief hearing officer may not approve of a stipulation that requires the respondent's suspension or disbarment.

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

(2 4) Approval 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 (1), 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.

(5) Approval by 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.

(d e) Conditional Approval.

(1) By Hearing Officer. Subject to subsection (d)(1), a 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 deems necessary to accomplish the purposes of lawyer discipline, provided the terms do not involve suspension or disbarment. If the 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, both parties serve on the hearing officer written consent to the conditional terms in the order of the hearing officer or chief hearing officer. For purposes of this subsection, "hearing officer" includes hearing panel and chief hearing officer.

(2) By Board. Subjection to subsection (d)(1), 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 f) 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 panel, or chief hearing officer a joint motion for reconsideration and may ask to address the Board, hearing officer or panel, or chief hearing officer on the motion.

(f g) 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.

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

(i) 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.

8. ELC 9.X and 9.2:

[Note: This is a modification of the ODC proposal at p. 404-05.]

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, except in circumstances set forth in subsection (e).

(c) Supreme Court Action. Except in circumstances set forth in subsection (e), 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.

(e) Prior Matter In Washington. No action will be taken against a lawyer under this rule when the lawyer has already been the subject of discipline or other final disposition of a grievance or disciplinary proceeding in Washington for the same conduct that is the basis for discipline or a resignation in another jurisdiction.

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 disciplined or 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 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, except in circumstances set forth in subsection (g).

(c) Supreme Court Action. Except in circumstances set forth in subsection (g), 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).

...

(g) Prior Matter In Washington. No action will be taken against a lawyer under this rule when the lawyer has already been the subject of discipline, disability transfer, or other final disposition of a grievance, disciplinary proceeding, or disability proceeding in Washington for the same conduct that is the basis for discipline, resignation, or disability transfer in another jurisdiction.

Memo

To: Geoff Gibbs, Chair ELC Drafting Taskforce

From: Charlie Wiggins, Chair Subcommittee C

Date: February 3, 2010

Re: Subcommittee C Report

ITEMS FOR DISCUSSION BY THE TASKFORCE

1. ELIMINATE AUTOMATIC BOARD REVIEW OF HEARING OFFICER SUSPENSION AND DISBARMENT RECOMMENDATIONS, AND ADD PROCEDURE FOR SUA SPONTE REVIEW.

The BOG and Subcommittee C agree that automatic review of suspension and disbarment recommendations should be eliminated, and in its place a procedure for sua sponte review adopted. The Subcommittee's recommendation, listing the relevant material, is at page 530, and the Task Force agreed with the recommendation. Minutes of September 10, 2009 meeting. The minutes reflect that there was a consensus against automatic review, and the vote for sua sponte review was seven in favor and five opposed. The chair directed the Subcommittee to draft appropriate language to incorporate this change.

The proposed language has being submitted as a consent item with this report. Patrick Sheldon has requested that the Task Force reopen the issue of the desirability of these changes.

2. RIGHT OF APPEAL ON SUSPENSION AND DISBARMENT RECOMMENDATIONS FOR BOTH RESPONDENT AND DISCIPLINARY COUNSEL.

Currently only respondents have the right to appeal a suspension or disbarment recommendation. The proposal would extend this right to disciplinary counsel. The BOG approved this change, and Subcommittee C recommended it by a vote of 4 to 1. The Task Force considered this change in the September 10 meeting and approved it by a vote of six in favor and four opposed.

Draft language to accomplish this change is being submitted with this report. Mr. Sheldon has asked that the issue be raised for discussion in the full Task Force.

Date: February 3, 2010
Re: Subcommittee C Report

3. ODC PROPOSAL FOR A MOTION PROCEDURE.

Although there are provisions for motion practice before the hearing officer and on appeal to the Supreme Court, there is no motion procedure in ELC Title 11 for matters pending before the Disciplinary Board. ODC has proposed a new ELC 11.14 that is loosely modeled on the RAP Title 17 motions practice. The ODC proposal is also at pages 600-01.

Current Disciplinary Board Chair Seth Fine has raised two issues under the proposed rule. Subsection (f) says that the chair must “promptly rule on the motion.” ELC 1.3(r)(2) provides that “must” means “is required to.” Seth asks how this will be enforced. The Subcommittee discussed this concern and did not feel it would be a problem. We considered changing the language, but the fact is that we believe that the Chair should be required to act promptly, whether or not there is a mechanism for enforcement.

Seth also raises the concern that subsection (h), providing for “motions on minor matters”, may be confusing because it fails to define what matters are “minor.” The Subcommittee felt that lawyers have a general sense of what is “minor” and what is “non-minor” and that the chair is in a position to make such a determination and rule accordingly. The Subcommittee felt the language of the rule was appropriate.

The Subcommittee recommends adoption of the ODC proposed rule following discussion by the Task Force.

4. PROVISION FOR BOARD REVIEW OF A HEARING OFFICER’S DISMISSAL OF ALL CLAIMS UNDER ELC 10.10(A).

ODC has proposed modifying ELC 11.1 and 11.2 to provide that a hearing officer’s dismissal of all claims under ELC 10.10(a) is subject to board review. Rule 10.10(a) provides for dismissal for failure to state a claim upon which relief can be granted.

ODC’s proposed language is at page 414. The Subcommittee recommends adoption of the rule.

CONSENT CALENDAR ITEMS

Subject to Task Force approval of the discussion of the items recommended above, Subcommittee C recommends that draft language incorporating these changes be placed on the consent agenda. The following proposed rules are attached incorporating these changes: 11.2, 11.3, 11.4, 11.6, 11.9, 11.11, 12.3, 12.4.

Text of ODC Proposal for Motions Rule:

[NEW SECTION]

ELC 11.14 MOTIONS

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

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

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

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

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

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

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

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

Memo

To: ELC Drafting Task Force
From: Subcommittee C
Date: February 23, 2010
RE: Place Disciplinary Board Policies in the ELC
ELC 11.9, ELC 11.12(c), and New Section ELC 11.X

This matter is submitted for discussion at the next meeting of the Task Force. Subcommittee C (by a vote of 4 to 1) recommends that the following Disciplinary Board Policies be placed in the ELC rules. This is based on ODC's memo at pp. 418-19 of the materials, as modified by the subcommittee as to the proposed ELC 11.X, which rule the subcommittee recommends be placed after ELC 11.4, with ELC 11.5, 11.6 and 11.7 being re-numbered. Note, we are separately recommending that ELC 11.8 be deleted (see Materials at 645).

Redline Version:

[NEW SECTION]

ELC 11.X CASE SCHEDULING ORDER.

The Board should issue a case scheduling order. The parties must comply with the deadlines in the order, file a written agreement to modify the schedule, or file a motion to modify the schedule. The Board may decline to consider documents filed after the deadline on the scheduling order.

ELC 11.9 BRIEFS FOR REVIEWS NOT INVOLVING SUSPENSION OR DISBARMENT RECOMMENDATION

.....

(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

.....

(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

RE: Place Disciplinary Board Policies in the ELC
February 23, 2010

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.

.....

Clean Copy Version:

[NEW SECTION]

ELC 11.X CASE SCHEDULING ORDER.

The Board should issue a case scheduling order. The parties must comply with the deadlines in the order, file a written agreement to modify the schedule, or file a motion to modify the schedule. The Board may decline to consider documents filed after the deadline on the scheduling order.

ELC 11.9 BRIEFS FOR REVIEWS NOT INVOLVING SUSPENSION OR DISBARMENT RECOMMENDATION

.....

(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

.....

(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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Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: March 10, 2010
RE: Proposals for Today's Meeting

Today's agenda contains a number of items which ODC wishes to discuss with the full Task Force. We believe that the discussion of two of these items would benefit from some draft language, which we have attached.

1. At p. 666 of the materials, Subcommittee B has recommended deletion of the following language proposed by ODC:

ELC 9.1 STIPULATIONS

....

(c) Stipulation To Alleged Facts. A respondent lawyer and disciplinary counsel may agree to stipulate to alleged facts in lieu of admissions to particular acts or omissions. ~~A factual basis for a stipulation under this paragraph is established by respondent's acknowledgment that if the matter were to proceed to a hearing, there is a substantial likelihood that the facts and misconduct set forth in the stipulation would be proved by a clear preponderance of the evidence.~~ The stipulation must also include an agreement that the facts and misconduct will be deemed proved in any subsequent disciplinary proceeding in any jurisdiction.

If the Task Force agrees with the deletion of the above language, ODC recommends the following changes to the remaining language:

ELC 9.1 STIPULATIONS

....

(c) Stipulation To Alleged Facts. A respondent lawyer and disciplinary counsel may agree to stipulate to alleged facts in lieu of admissions to particular acts or omissions. The stipulation must ~~also~~ include an agreement that the facts and misconduct will be deemed proved in this and any subsequent disciplinary proceeding in any jurisdiction.

2. At p. 655 of the materials, Subcommittee B has proposed a modification of the ODC proposal [p. 349] regarding ELC 5.1. The Subcommittee has recommended deletion of subparagraph (b)(2)(C), shown below as shaded. We believe the (b)(2)(C) language should be retained in the proposal.

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 specifically restricted, such as:

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

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

(C) when necessary to protect a compelling privacy or safety interest of a grievant or other individual.

(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.