



**WSBA**

WASHINGTON STATE BAR ASSOCIATION

## **ELC DRAFTING TASK FORCE**

### **Meeting Agenda**

**October 28, 2010**

**9:00 a.m. to noon**

**Washington State Bar Association**

**1325 Fourth Avenue – Suite 600**

**Seattle, Washington 98101**

1. **Call to Order/Preliminary Matters (9:00 a.m.)**
  - Approval of August 12, 2010 meeting minutes [pp. 872-879]
2. **Discussion**
  - Subcommittee A Memo [pp. 880-889]
  - Remainder of Subcommittee A's Final Report - Held over from [pp. 890-938]
3. **Future meeting schedule**
  - December 16, 2010, 9:00 a.m. to 12:00 noon
    - Materials Deadline: Tuesday, December 7, 2010
  - January 20, 2011, 9:00 a.m. to 12:00 noon
    - Materials Deadline: Tuesday, January 11, 2010
4. **Adjourn (noon)**

**DRAFT Minutes – August 12, 2010**  
**ELC Drafting Task Force**

Present: Geoff Gibbs, Chair, Erika Balazs (phone), Randy Beitel, Kim Boyce (phone), Kurt Bulmer, James Danielson, Doug Ende, Seth Fine, Bruce Johnson, Julie Shankland, David Summers, Elizabeth Turner, Norma Linda Ureña, Charlie Wiggins (phone), and Nan Sullins, AOC/Supreme Court Liaison

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**Call to Order**

The Chair called the meeting to order at 9:00 a.m.

**Approval of Minutes**

The Chair called for corrections to the minutes from the June 10, 2010 meeting. Mr. Fine proposed a correction. The minutes were approved as corrected.

**Subcommittee A: Final Report**

Mr. Johnson introduced the subcommittee's final report. He thanked the subcommittee members (Ms. Turner, OGC, Reporter; Mr. Beitel, ODC; Ms. Boyce; Mr. Bulmer; Mr. Danielson; Mr. Summers; and Ms. Ureña), and commended Ms. Turner's work in drafting the report. Ms. Turner noted that the subcommittee had not been unanimous on all of the recommendations and that close votes were reflected in the report.

**ELC 1.3 – Definitions (adding definition of “Association counsel”)**  
**(pp. 772-773)**

Mr. Fine disagreed with the addition of “association counsel” to the definitions and recommended specifying that counsel could not include disciplinary counsel in those rules that require it. Ms. Turner explained that association counsel had been added as a term of art to allow for changing roles and additions to WSBA staff without changing the rules. Mr. Beitel noted that the old rules had used the general term Bar Counsel, that the term had been eliminated in the ELC, and that the need for a term of art to describe non-disciplinary association counsel has since been recognized. Mr. Fine moved to amend the proposed rule to delete the addition of association counsel. The Chair deemed the motion seconded and called for a vote. With one in favor and all others opposed, the motion failed. Ms. Turner moved that the recommendation as to ELC 1.3 be approved. The Chair deemed the motion seconded and called for a vote. With none opposed, the motion carried and the proposed changes were adopted.

**ELC 2.2 – (Disciplinary Selection Panel) & Proposed New Rule 2.14 – (Restrictions on Representing or Advising Grievants or Respondents) (pp. 774-775)**

Ms. Turner explained that proposed new rule 2.14 was introduced out of numerical order because several other rule changes proposed in Title 2 make reference to the restrictions therein. Mr. Ende suggested that the amendment to ELC 2.2(d) should use “must” rather than “shall.” Mr. Johnson accepted the Mr. Ende’s suggestion as a friendly amendment. Mr. Fine opined that the term “advising” in proposed new rule 2.14 is too broad as it would include any advice about whether to file or how to respond to a grievance. Mr. Bulmer noted that such general advice could be improperly used as an endorsement of either the grievant’s or respondent’s position. Ms. Turner explained that using the broader term maintains the bright dividing line between the discipline system and the Association’s Board of Governors (BOG) and officers. Mr. Danielson moved that the proposed changes to ELC 2.2, with the friendly amendment, and proposed new rule 2.14 be adopted. Chair deemed the motion seconded and called for a vote. With none opposed, the motion carried and the proposed changes were adopted.

**ELC 2.3 – (eligibility requirements for lawyer members of DBoard) (pp. 776-778)**

Ms. Turner explained that the proposed changes would require lawyer members of the DBoard to meet the same requirements as hearing officers. Mr. Fine wondered if it was truly necessary that any lawyer who had received discipline of any kind be permanently disqualified from service on the DBoard. Ms. Turner pointed out that hearing officers already must meet the same criteria. The Chair called for a vote on the proposed changes to ELC 2.3. With none opposed, the changes were adopted.

**ELC 2.4 – (clarifying that two members of a review committee make a quorum) (p. 779)**

Ms. Shankland objected to the use of the term “two-person review committee” because there is no such thing. Two members of the review committee may make a quorum, but the review committee always has three members and it would seem obvious that a quorum of two must be unanimous to act. Mr. Bulmer inquired whether one member of the quorum could act if the other abstained. After some discussion in which the group agreed that the rule should make it clear that one member of a review committee may not act unilaterally, Mr. Danielson moved to amend the proposed change to “A review committee can only act upon at least two affirmative votes.” The Chair deemed the motion seconded and called for a vote. The group unanimously approved Mr. Danielson’s amendment. The Chair then called for a vote. With none opposed, the motion carried and the proposed changes were adopted as amended.

### **ELC 2.5 – (Hearing Officers) (pp. 780-782)**

Ms. Turner explained that the proposed changes incorporate changes previously approved by the BOG, conform the rule to other changes already approved by the task force, and clarify the role of Chief Hearing Officer (CHO). She also explained that the subcommittee was almost evenly divided on issue of qualifications for appointment of a CHO. The subcommittee developed two options: (A) emphasizes experience in the Washington's lawyer discipline system by requiring that a CHO must have served as a hearing officer for at least four years and presided over at least one contested hearing. (B) does not require experience in the discipline system, but emphasizes experience in adjudication of contested matters and administrative/managerial skills. The group agreed that a CHO must meet the requirements for appointment as a hearing officer, especially since one of the duties of the position is to serve as a hearing officer on occasion, but debated whether requiring service as a hearing officer would unduly restrict the pool of potential CHO candidates. Mr. Fine observed that the remainder of either option was essentially advice to the BOG and objected to putting advice to the BOG into the rules. Mr. Danielson urged adoption of option B to leave the potential pool of candidates as wide as possible. Mr. Beitel suggested making the experience in the disciplinary system from option A recommended rather than required. Mr. Wiggins opined that lawyer discipline hearings are very different from other contested hearings and that a CHO needs experience in the lawyer discipline system, but worried that it might be difficult to find a candidate that both met the qualifications and was willing to serve in the role. Mr. Ende agreed with Mr. Wiggins that it would be imprudent to appoint a CHO who had not served as a hearing officer in a contested disciplinary matter. The Chair called for a vote on option B, noting that should this broader option fail, the group could move on to wordsmith the more limited option. With 6 in favor, 5 opposed, and 1 abstaining, option B was adopted.

The Chair then called for discussion of the proposed changes to ELC 2.5 including option B. Mr. Bulmer inquired about additional delays in the process occasioned by the need to have the Supreme Court appoint hearing officers. Ms. Turner and Ms. Shankland acknowledged that significant delay was possible. The Chair called for a vote on the proposed changes to ELC 2.5 as amended to include option B. With none opposed, the changes were adopted as amended.

### **ELC 2.6 – (Hearing Officer Conduct) (p. 783)**

The proposed changes to ELC 2.6 reflect the elimination of hearing panels and a conforming amendment that cross-references new rule 2.14. The Chair called for discussion and, hearing none, called for a vote on the proposed changes to ELC 2.6. With none opposed, the proposed changes were adopted.

**ELC 2.7 – (Clarifying Conflicts Review Officer provisions) (pp. 784-785)**

Ms. Turner explained that the proposed changes to ELC 2.7 make it clear that the rule applies to grievances against officers and members of the BOG; clarify that the term “Supreme Court” includes staff, attorneys, and judicial officers other than the court justices; and include a cross-reference to new rule 2.14. The Chair called for discussion and, hearing none, called for a vote on the proposed changes to ELC 2.7. With none opposed, the proposed changes were adopted.

**ELC 2.9 – (Adjunct Disciplinary Counsel) (p. 786)**

Ms. Turner explained that the proposed amendments change Adjunct Investigative Counsel (AIC) to Adjunct Disciplinary Counsel (ADC) and include a cross-reference to new rule 2.14. Mr. Ende inquired about conforming amendments to other ELC in which AIC are mentioned. The Chair confirmed that the Reporter will review and conform all of the proposed changes to the ELC adopted by the task force where necessary. The Chair then called for discussion of the proposed changes to ELC 2.9. Ms. Boyce pointed out an inconsistency between proposed ELC 2.9(c) and new ELC 2.14: Proposed ELC 2.9(c) would make new ELC 2.14’s prohibition on advising or representing grievants or respondents only applicable to an ADC while the ADC is assigned to a case, while new ELC 2.14 makes the restriction applicable until three years after the restricted person’s term of office. Mr. Ende noted that membership on the ADC panel is an appointment, similar to a hearing officer’s appointment to the hearing officer panel, and opined that new ELC 2.14’s prohibition should be applied to ADC to the same extent. Mr. Beitel moved to amend the proposed changes to ELC 2.9 by striking the phrase “assigned to a case” from proposed ELC 2.9(c). The Chair deemed the motion seconded and called for a vote. With none opposed, the amendment to proposed ELC 2.9(c) carried. Mr. Fine moved to strike the last sentence of proposed ELC 2.9(b) referring to discretionary training for ADC. The Chair deemed the motion seconded and called for a vote. With none opposed, the amendment to proposed ELC 2.9(b) carried. The Chair called for discussion of proposed ELC 2.9 as amended. Mr. Fine asked if it is truly necessary to permanently disqualify a person from service as an ADC for any disciplinary action. The consensus was yes. The Chair called for a vote on proposed ELC 2.9 as amended. With one opposed, the proposed changes to ELC 2.9 as amended were adopted.

**ELC 2.11 – (Compensation & Expenses) (p. 787)**

Ms. Turner explained that the proposed changes to ELC 2.11 would allow for (but not mandate) compensation for special disciplinary counsel, who are appointed to prosecute cases in which ODC has a conflict, to the extent authorized by the BOG. The Chair called for discussion and hearing none called for a vote. With none opposed, the proposed changes to ELC 2.11 were adopted.

### **ELC 2.13 – (Re: Respondent Lawyers) (p. 788)**

The changes to ELC 2.13 remove reference to restrictions on representing respondent lawyers, which are now contained in proposed new ELC 2.14. The Chair opened the floor for discussion. Mr. Bulmer moved to strike proposed ELC 2.13(b)<sup>1</sup> because the absolute prohibition on charging a fee to respond to a grievance does not allow for recovery of fees for responding to a frivolous grievance that is filed purely as a delaying tactic in litigation by an opposing party and/or lawyer. Mr. Beitel noted that Mr. Bulmer's amendment would chill the filing of bar grievances; part of the price that the profession pays for self-regulation is to avoid chilling the filing of grievances. After some discussion of the comparative merits of protecting the public versus protecting the membership from frivolous grievances, Mr. Wiggins moved to table the discussion and allow Mr. Bulmer to submit a proposal for the task force's consideration. The Chair called for a vote on Mr. Wiggin's motion to table; with only three in favor, the motion failed. The Chair called for a vote on Mr. Bulmer's motion to strike subsection b. With only three in favor, the motion failed.

Mr. Bulmer moved to strike proposed ELC 2.13(c) because the subsection requires that respondent lawyers waive medical record privacy even when the respondent has not put his or her medical and/or psychological condition at issue. Mr. Beitel noted that the rule as written requires that the medical and/or psychological records at issue be relevant and also allows for a hearing to limit the scope of the release. Mr. Ende made the point that the practice of law is a heavily regulated profession; regulated to protect the public. Lawyers are subject to rules that others are not. Lawyers have the power, training, and skills to damage the public; these rules allow for efficient protection of the public. Mr. Ende urged no change be made to ELC 2.13(c). Mr. Danielson agreed that being a lawyer does have an impact on privileges that are held by others; he also urged the task force members to vote against this change. The Chair called for a vote on Mr. Bulmer's motion to strike subsection c. With only one in favor, the motion failed. The Chair then called for a vote on adoption of ELC 2.13 as proposed by the subcommittee. With none opposed, the motion carried and the changes to ELC 2.13 were adopted as proposed.

After a short break the task force moved on to consider Subcommittee A's recommendations for ELC Title 3.

### **ELC 3.1 – (Public Disciplinary Information) (pp.789-90)**

Mr. Johnson explained that the proposed changes to ELC 3.1 conform the rule to amendments related to admonitions being made permanent and to changing

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<sup>1</sup> Note: Proposed ELC 2.13(b) represents a renumbering of the paragraph only; the text is the same as current ELC 2.13(c). Likewise, the text of proposed ELC 2.13(c) is the same as current ELC 2.13(d).

resignations in lieu of disbarment to resignations in lieu of discipline. Mr. Beitel noted that striking the phrase “or admonition” from proposed ELC 3.1(b)(5) is contingent on removing the distinction between admonition and sanction. Mr. Fine moved to defer consideration of proposed ELC 3.1 until the task force acts on the rule dealing with sanctions and admonitions (ELC 13.5). Ms. Shankland asked that the group consider three questions: (1) how does proposed ELC 3.1(b)(5) affect conditional stipulations; (2) will custodianships be public; and (3) does the fact that an affidavit of compliance with duties on suspension or disbarment under ELC 13.2 has been filed become public? The Chair called for a vote on the motion to defer. With none opposed, the motion passed and consideration of proposed changes to ELC 3.1 were deferred until the task force has considered ELC 13.5.

### **ELC 3.2 – (Confidential Disciplinary Information) (pp. 791-793)**

Mr. Johnson explained that the proposed amendments to ELC 3.2 clarify who may issue protective orders at various stages of the proceedings, and include language intended to prevent inadvertent violation of the rule by persons directed by court order to disclose information. Mr. Bulmer moved to strike proposed ELC 3.2(e)(6) Required Disclosure because the provision opens up the disciplinary record to compelled discovery in malpractice litigation outside the disciplinary system. Mr. Beitel noted that the ELC did not have a provision for a gag order and proposed 3.2(e)(6) shows that a protective order is not meant to trump a superior court order. Mr. Ende agreed with Mr. Bulmer that regardless of the intent, the provision as written is overbroad. The Chair called for a vote on Mr. Bulmer’s motion to strike proposed ELC 3.2(e)(6). With one opposed, the motion passed.

Mr. Fine moved to strike proposed ELC 3.2(e)(2) (parties prevented from action which would violate a requested protective order upon actual notice of a motion for the protective order) because the rule does not allow for a balancing of interests. Mr. Fine asked how to justify a lengthy restriction on freedom of speech simply on the filing of a motion. Mr. Wiggins seconded the motion, and urged restoring the original language of the rule. Mr. Beitel noted that the only effect of proposed ELC 3.2(e)(2) is to prevent WSBA from making a discretionary disclosure after a motion for protective order is filed. Mr. Danielson urged the task force members not to adopt the motion because it would encourage participants to rush to release information before a ruling on a motion for protective order is made. The Chair called for a vote on Mr. Fine’s motion. With only three in favor, the motion to strike proposed ELC 3.2(e)(2) failed.

Mr. Ende opined that the language of proposed ELC 3.2(e)(3)(D) is too broad because it seems to allow the CHO to enter an unauthorized protective order. Mr. Beitel moved to amend proposed ELC 3.2(e)(3)(D) by replacing “when not otherwise authorized above” with “in other circumstances.” Mr. Johnson, on behalf of the subcommittee, accepted Mr. Beitel’s proposal as a friendly

amendment. The Chair called for a vote on proposed ELC 3.2 as amended by Mr. Bulmer's motion and by Mr. Beitel's friendly amendment. With one opposed and one abstaining, the motion passed. Proposed ELC 3.2 was adopted as amended.

**ELC 3.3 – (Notice to grievant re: disability proceedings) (pp. 794-795)**

Mr. Johnson explained that the subcommittee recommended removing the provision allowing notice to a grievant when a lawyer against whom the grievant has complained is subject to a disability proceeding. Ms. Shankland asked if the fact that an interim suspension is due to disability proceedings is public. Mr. Danielson explained that the subcommittee did not want the fact that the Association started a disability proceeding to be public, but did want to allow the Association to inform the grievant when a formal proceeding moves to disability. Ms. Shankland noted that the current rule allows the Supreme Court to disclose things the Association may not disclose, by allowing an order for interim suspension under ELC 8.2(d) to include the fact that the interim suspension is based on a disability proceeding. The Chair called for a vote to approve the subcommittee's proposed changes to ELC 3.3. With one opposed, the motion carried and the proposed changes to ELC 3.3 were adopted.

**ELC 3.4 – (Discretionary Disclosure of Confidential Information) (pp. 796-798)**

Mr. Bulmer raised his concerns that the discretionary disclosure permitted by ELC 3.4(d)(1)(A) (disclosure allowed to respond to specific inquiries that are in the public domain) eviscerates the presumed confidentiality of disciplinary information that is not yet part of the public record by allowing for disclosure—without adequate notice to the respondent of the intent to disclose—based on political motivation. Mr. Ende acknowledged that the problem identified by Mr. Bulmer arises due to the tension between the confidential and the public nature of the discipline system. Mr. Ende suggested limiting the number of people authorized to make discretionary disclosures of confidential information. Mr. Johnson expressed the subcommittee's willingness to accept friendly amendments limiting those so authorized. The group discussed the merits of authorizing (1) only the Chief Disciplinary Counsel; (2) the Chief Disciplinary Counsel and the Executive Director; (3) the Chief Disciplinary Counsel and the President of the BOG; or (4) the Chief Disciplinary Counsel and the Chair of the DBoard. The Chair informed the group that the noon hour had passed and noted that the proposed amendments to ELC 3.4 did not appear to be ripe for immediate action since the group had not reached a consensus on anticipated friendly amendments to the subcommittee's proposal.

### **Next Meetings**

Thursday, October 14, 2010, 9:00 a.m. to 12:00 noon  
Materials deadline: Tuesday, October 5, 2010

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

### **Adjournment**

The Chair adjourned the meeting at 12:10 and directed the group to circulate friendly amendments to the subcommittee's proposed language for ELC 3.4. The task force will begin the October meeting at the same point: Subcommittee A's proposed language for ELC 3.4 with friendly amendment.

Minutes Respectfully Submitted by

Randy Beitel and Natalie Cain  
Office of Disciplinary Counsel  
Substitute Task Force Staff Reporter

## Memo

To: ELC Drafting Task

From: Subcommittee A

Date: October 13, 2010

RE: Further Proposals re Relief Pending Motions for Protective Orders

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At the August meeting of the Task Force, a discussion ensued regarding the proposed changes to the provisions for protective orders in ELC 3.2(e) as to the provision that filing of a motion for a protective order requires any participant in the disciplinary matter who has actual notice of the motion to comply with the requested protective order during the period when the motion for the protective order is pending. See Proposed ELC 3.2(e)(2) at Materials, p. 792. Mr. Fine indicated he had concerns with this given the proposed expansion of the scope of protective orders to include “gag” orders applicable not only to the parties but to any participant in the matter. Mr. Fine proposed a change to meet his concerns, and others have made alternative proposals. This memo collects the proposals and comments that have been made. Subcommittee A has not met or discussed the proposals, believing that at this stage, it is more effective to have the full Task Force level do this.

We have attached the following materials for the Task Force to consider when this matter is again taken up for discussion:

1. A copy of the Proposed changes to ELC 3.2, as proposed by Subcommittee A, See Materials pp. 791 – 93, with changes that were approved by the full Task Force at the August 12, 2010 meeting.
2. Seth Fine’s memo to the Task Force Chair, with his proposed Option A and Option B.
3. A copy of the ODC Alternative Proposal “Option C.”
4. An August 24<sup>th</sup> e-mail chain with ODC’s alternative proposal, and responses from Seth Fine and Bruce Johnson to the ODC proposal, and Seth Fine’s original August 17<sup>th</sup> e-mail.
5. Kurt Bulmer’s August 25<sup>th</sup> e-mail responding to the alternative proposals.

**Attachment 1 – Current Proposal from pp. 791-93 of Materials as amended at the August 12<sup>th</sup> meeting:**

**ELC 3.2 CONFIDENTIAL DISCIPLINARY INFORMATION**

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

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

**(c) Investigative Confidentiality.** During the course of an investigation or proceeding, the Chief Disciplinary Counsel may direct that otherwise public information be kept confidential if necessary to further the purposes of the investigation. At the conclusion of the proceeding, those materials become public information unless subject to a protective order.

**(d) Discipline Under Prior Rules.** Discipline imposed under prior rules of this state that was confidential when imposed remains confidential. A record of confidential discipline may be kept confidential during proceedings under these rules, or in connection with a stipulation under rule 9.1, through a protective order under section (e).

**(e) Protective Orders.**

**(1) Authorization.** To protect a compelling interest of a grievant, witness, third party, respondent lawyer, the Association, or other participant in ~~an investigation~~ any matter under these rules, on motion and for good cause shown, ~~the Board Chair, the chair of a review committee to which a matter is assigned, or a hearing officer to whom a matter is assigned,~~ may be entered prohibiting any participant in the disciplinary process from disclosing or releasing the disclosure or release of specific information, documents, or pleadings obtained in the course of any matter under these rules, and direct that the proceedings be conducted so as to implement the order.

**(2) Pending Relief. Upon Filing a motion for a protective order, any participant in the disciplinary matter who has actual notice of the motion is prohibited from taking any action which would violate the requested protective order if granted, pending final action on the requested protective order under this rule, including the time period for requesting review by the Board.** ~~stays the provisions of this title as to any matter sought to be kept confidential until five days after a ruling is served on the parties.~~

**(3) Entry. A protective order under this rule may be entered by the following:**

**(A) A hearing officer when a matter is pending before that hearing officer;**

**(B) The Chair when a matter is pending before the Board;**

**(C) The chair of a review committee when the matter is pending before a review committee; or**

**(D) The chief hearing officer when not otherwise authorized above.**

**(4) Service. The Clerk serves copies of decisions and protective orders entered under this rule on all affected participants in the disciplinary process.**

**(5) Review.** The Board reviews decisions granting or denying a protective order if **either the respondent lawyer or disciplinary counsel requests any party subject to the decision seeks relief from the decision by requesting** a review within five days of service of the decision. **The Clerk serves a copy of the request for review on all parties to the disciplinary matter. The Board considers the review under such procedure as it determines, but must allow comment from any person or party affected by the decision under review. Any participant in the disciplinary matter who has actual notice of the request for review is prohibited from taking any action which would violate the relief requested by the party seeking review if granted.** On review, the Board may affirm, reverse, or modify the protective order. The Board's decision is not subject to further review. A request for review by the Board stays the provisions of this title as to any matter sought to be kept confidential in that request, and the request itself is confidential until a ruling is issued.

**(6) Relief from Protective Order. Any person may apply to the authority that issued a protective order for specific relief from the order upon good cause shown, provided that notice and an opportunity to respond to the requested relief must be afforded any person affected by the order.**

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

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**Attachment 2 – Seth Fine Memo to Task Force with Option A and Option B:**

To: Geoff Gibbs  
Chair, ELC Task Force

From: Seth Fine

RE: Proposed ELC 3.2 (DRAFT)

The Task Force has adopted a provision for an “automatic gag” order on the filing of a motion for a protective order. I am requesting to reconsider this provision.

The provision at issue is part of proposed amendments to ELC 3.2. That rule is in the materials at pages 791-93. (There were some changes to this proposal, but they do not affect the provision at issue here. The relevant provision is ELC 3.2(e)(2):

(2) Pending Relief. Upon filing a motion for a protective order, any participant in the disciplinary matter who has actual notice of the motion is prohibited from taking any action which would violate the requested order if granted, pending final action on the requested protective order under this rule, including the time period for requesting review by the Board ~~stays the provision of this title as to any matter sought to be kept confidential until five days after a ruling is served on the parties.~~

This provision is unique in three respects:

(1) The filing of a motion automatically leads to the motion being temporarily granted. I am not aware of any other situation in which a party can be restrained by the mere filing of a motion, without any action by a neutral decision maker.

(2) This restraining order automatically remains in effect even after the decision maker denies relief. This is true for at least a 30-day period (the time authorized for seeking Board review). The proposed rule does not specifically address what happens if a timely request for review is made. It could be interpreted as extending the automatic stay pending Board action.

(3) There is no provision for any modification of the automatic stay.

To demonstrate how far this proposal departs from usual procedures, compare it with the procedure under CR 65 for preliminary injunctions and temporary restraining orders (attached to this memo). A preliminary injunction can only be granted by a judicial officer after notice and hearing. CR 65(a). Temporary restraining orders may be granted without notice, if the application shows that delay will result in immediate and irreparable harm. The order can remain in effect for no more than 14 days, unless the court extends that period on a showing of good cause. The order can be modified at any time. In contrast, the “restraining order” provided by ELC 3.2(e)(2): (1) does not require any action by a neutral decision maker; (2) remains in effect for a period of two months or more, and (3) cannot be modified by the decision maker.

The proposed rule provides serious opportunities for abuse. For example, motions could be brought to prevent disciplinary counsel from disclosing information to grievants, attor-

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neys, witnesses, or investigators. Even if such motions are promptly denied, the automatic restraining provisions could result in lengthy delays. Disclosures pursuant to ELC 3.4 could also be blocked for lengthy periods, simplifying by filing motions to prevent such disclosures.

The justification for the proposed rule is to prevent the protective order from becoming moot by the opposing party's release of the information. This problem can, however, be addressed by other means that have less potential for abuse. There at least TWO possible options.

### OPTION A: ALLOW EX PARTE TEMPORARY ORDERS

This option would provide procedures comparable to CR 65(b). It would ensure that any restraint be the result of action by a neutral decision maker. The following language is suggested:

Temporary Protective Orders. A temporary protective order may be considered without notice to other parties, if the applicant demonstrates that immediate and irreparable injury will result from the giving of notice or from delay in issuance of the order. The order shall specify an expiration date, which shall not exceed 30 days from the date of issuance.

### OPTION B: LIMIT THE DURATION OF THE AUTOMATIC ORDER

If an automatic "restraining order" is considered desirable, at least its duration could be limited. The following language is suggested:

(2) Pending Relief. Upon filing a motion for a protective order, any participant in the disciplinary matter who has actual notice of the motion is prohibited from taking any action which would violate the requested order if granted ~~stays the provision of this title as to any matter sought to be kept confidential until five days after a ruling is served on the parties.~~ This prohibition may be modified or terminated by the officer who rules on the motion. The prohibition shall terminate upon entry of an order granting or denying a protective order, unless otherwise provided by the officer who rules on the motion.

## BACKGROUND

### CR 65. INJUNCTIONS

#### (a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a prelimi-

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nary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. Pursuant to RCW 4.92.080 no security shall be required of the State of Washington, municipal corporations or political subdivisions of the State of Washington. The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Statutes. These rules are intended to supplement and not to modify any statute prescribing the basis for obtaining injunctive relief. These rules shall prevail over statutes if there are procedural conflicts.

**Attachment 3 – ODC Alternative Proposal – Option C:**

**OPTION C:**

(2) Pending Relief. Upon filing a motion for a protective order, any participant in the disciplinary matter may move for a temporary protective order prohibiting any participant in the disciplinary matter who has actual notice of the motion for temporary protective order from taking any action which would violate the requested protective order if granted ~~stays the provision of this title as to any matter sought to be kept confidential until five days after a ruling is served on the parties.~~ A motion for temporary protective order may only be granted upon notice and an opportunity to be heard to all affected participants in the matter unless the participant seeking the order demonstrates that immediate and irreparable harm will result to the applicant before the affected participants can be heard in opposition and the participant seeking the order certifies the efforts, if any, which have been made to give notice and the reasons supporting the claim that notice should not be required. Any temporary protective order granted without notice must set forth the irreparable harm warranting issuance of the order without notice. Any temporary protective order expires upon the filing of a decision regarding the requested protective order, or thirty days following issuance of the temporary protective order, whichever is sooner. Upon two day's notice to the party who obtained a temporary protective order, any participant in the matter may move for the dissolution or modification of a temporary protection order, which motion must be heard as expeditiously as the ends of justice require.

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**Attachment 4 - An August 24<sup>th</sup> e-mail chain with ODC's alternative proposal, and responses from Seth Fine and Bruce Johnson to the ODC proposal, and Seth Fine's original August 17<sup>th</sup> e-mail:**

**From: Johnson, Bruce [brucejohnson@dwt.com]  
Sent: Tuesday, August 24, 2010 3:56 PM  
To: Fine, Seth; Randy Beitel; Kurt Bulmer; Julie Shankland  
Cc: Doug Ende  
Subject: RE: ELC 3.2**

**And I like this much better than the draft that we were proposing.**

**Bruce E. H. Johnson | Davis Wright Tremaine LLP  
1201 Third Avenue, Suite 2200 | Seattle, WA 98101  
Tel: (206) 757-8069 | Fax: (206) 757-7069 | Mobile: (206) 465-4309  
Email: [brucejohnson@dwt.com](mailto:brucejohnson@dwt.com) | Website: [www.dwt.com](http://www.dwt.com)**

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | [Seattle](#) | Shanghai | Washington, D.C.

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**From: Fine, Seth [mailto:sfine@co.snohomish.wa.us]  
Sent: Tuesday, August 24, 2010 3:55 PM  
To: 'Randy Beitel'; Kurt Bulmer; Julie Shankland  
Cc: Doug Ende; Johnson, Bruce  
Subject: RE: ELC 3.2**

**That looks like an improvement over my language. If you want to submit this to the Task Force, feel free to borrow as much of my memo as you like.**

**Seth Fine  
Asst. Chief Criminal Deputy  
Snohomish County Prosecutor's Office  
3000 Rockefeller Ave., MS 504  
Everett, WA 98201  
(425) 388-3333**

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**From: Randy Beitel [mailto:randyb@wsba.org]  
Sent: Tuesday, August 24, 2010 3:52 PM  
To: Fine, Seth; Kurt Bulmer; Julie Shankland  
Cc: Doug Ende; Johnson, Bruce  
Subject: RE: ELC 3.2**

**Seth –**

**We have pondered over how to deal with the potential abuse of the automatic temporary protective order. We think it best not to have any automatic temporary protective order but to simply authorize a participant to seek a temporary protective order upon a showing**

## SubComA 10-14-10 Memo

of bona fide need, essentially the CR 65(b) approach. We have come up with the attached “Option C,” which is a further refinement on your Option A approach. We originally thought to just incorporate CR 65(b) by reference, but then thought better of that because CR 65(b) has lots of language about the preliminary injunction and other features that would be confusing if incorporated into our proceedings. Instead, we paraphrased the portions of CR 65(b) that we think would be needed for an effective temporary protective order system.

We will be interested to hear what people think. I have included Bruce Johnson in the loop so that Subcommittee A is kept informed and can join in the discussion.

Thanks,

Randy Beitel  
Senior Disciplinary Counsel  
Washington State Bar Association  
1325 Fourth Ave., Ste. 600  
Seattle, WA 98101-2539  
(206) 727-8257  
[randyb@wsba.org](mailto:randyb@wsba.org)

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From: **Fine, Seth** [mailto:[sfine@co.snohomish.wa.us](mailto:sfine@co.snohomish.wa.us)]  
Sent: **Tuesday, August 17, 2010 4:35 PM**  
To: **Kurt Bulmer; Randy Beitel; Julie Shankland**  
Subject: **ELC 3.2**

**I have major concerns about the “automatic restraint” provisions of this proposed rule. I’m drafting a memo setting out these concerns. I’d like to propose some alternative language. Can you suggest any improvements in the language I came up with (“Option A” and “Option B”)?**

**Please forward this to anyone that you think might be interested.**

Seth Fine  
Asst. Chief Criminal Deputy  
Snohomish County Prosecutor's Office  
3000 Rockefeller Ave., MS 504  
Everett, WA 98201  
(425) 388-3333

**SubComA 10-14-10 Memo**

**Attachment 5 - Kurt Bulmer's August 25<sup>th</sup> e-mail responding to the alternative proposals:**

From: Kurt Bulmer [kbulmer@comcast.net]  
Sent: Wednesday, August 25, 2010 11:50 AM  
To: Randy Beitel; Fine, Seth; Julie Shankland  
Cc: Doug Ende; Johnson, Bruce  
Subject: Re: ELC 3.2

I believe who gets to the courthouse first should not be how justice is determined which is all this change does. All the respondent, who is about to have his/her life ruined but which would not occur if notice was provided, can do is hope to get there before the horse is out of the barn.

I am not in favor of this and think the automatic hold should apply. When a statement is to be released which contains information which the lawyer has been told is confidential by the very system which now plans to release it she is entitled to at least notice of the intent by the those promisors to change the information's status and to have a chance to seek to protect it.

Rule 3.4: Release or Disclosure of Otherwise Confidential Information

Subcommittee A spent a great deal of time engaged in spirited discussions regarding confidential information. Subcommittee member Kurt Bulmer expressed especially strong feelings on this issue, but has not submitted any written materials. Due to time constraints, after continuing the issue for many meetings the subcommittee felt it necessary to vote on the issue at a meeting Mr. Bulmer was unable, at the last minute, to attend. Subcommittee A proposes the following amendments to Rule 3.4:

**ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION**

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

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

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

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

~~(2) the Washington State Bar Association Judicial Recommendation Committee, or the comparable body in other jurisdictions, to evaluate the character and fitness of a candidate for judicial office;~~

~~(3) the Governor of the State of Washington, or of any other state, or his or her delegate, to evaluate the character and fitness of a potential nominee to judicial office; and~~

~~(4) any other agency that a lawyer authorizes to investigate the lawyer's disciplinary record.~~

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

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

(1) ~~Subject to~~ Except as prohibited by rule 3.2(e), the President, the Board of Governors, the Executive Director, or Chief Disciplinary Counsel, or a designee of any of them, may release otherwise confidential information:

(A) to respond to specific inquiries about matters that are in the public domain; or

(B) if necessary to correct a false or misleading public statement.

(2) A respondent must be given notice of a decision to release information under this section unless the President, the Board of Governors, the Executive Director, or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public or compromise an ongoing investigation.

(3) A decision regarding release of information is final and is not subject to further review.

**(e) Discretionary Release.** The Executive Director or the Chief Disciplinary Counsel may authorize the general or limited release of any confidential information ~~obtained during an investigation~~ when it appears necessary to protect the interests of clients or other persons, the public, or the integrity of the disciplinary process, except as prohibited by rule 3.2(e). A respondent must be given notice of a decision to release information under this section before its release unless the Executive Director or the Chief Disciplinary Counsel finds that notice would jeopardize serious interests of any person or the public, or that the delay caused by giving the respondent notice would be detrimental to the integrity of the disciplinary process. A decision regarding release of information is final and is not subject to further review.

**(f) Statement of Concern.**

(1) *Authority.* The Chief Disciplinary Counsel has discretion to file a statement of concern with the Clerk when deemed necessary to protect members of the public from a substantial threat, based on information from a pending investigation into a lawyer's apparent ongoing serious misconduct not otherwise made public by these rules. The statement may not disclose information protected by rule 3.2(e).

(2) *Procedure.*

(A) On or before the date it is filed, a copy of the statement of concern must be served under rule 4.1 on the lawyer about whom the statement of concern has been made. The statement of concern is not public information until 14 days after service.

(B) The lawyer may at any time appeal to the Chair to have the statement of concern withdrawn.

(C) If an appeal to the Chair is filed with the Clerk under rule 4.2(a) within 14 days of service of the statement of concern, the statement of concern is not public information unless the Chair so orders and becomes public information upon issuance of the Chair's order.

(D) The Chair's decision is not subject to further review.

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

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

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

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

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

**(k) Chief Hearing Officer and Disciplinary Selection Panel. The Chief Hearing Officer and the Disciplinary Selection Panel shall have access to any otherwise confidential disciplinary information necessary to perform their duties. The Chief Hearing Officer shall be given notice when any grievance is filed against a hearing officer and of the disposition of that grievance. Confidential information provided under the terms of this rule shall not be further disseminated except as may be otherwise allowed under these rules.**

~~**(k)(l) Release to Board of Governors Access or Officers.**~~ The Chief Disciplinary Counsel may authorize release of otherwise confidential information to ~~**In furtherance of its supervisory function, and not in derogation of the foregoing,**~~ the Board of Governors or officers of the Association as necessary to carry out their duties under these rules, except as prohibited by rule 3.2(e), has access to all confidential disciplinary information but the Board of Governors or officers of the Association must maintain its confidentiality..

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

Rule 3.5: Notice of Discipline

Responsibility for drafting discipline/*Bar News* notices has been transferred between several different WSBA staff attorneys since the ELCs were implemented, and counsel for the Disciplinary Board has not performed that function for some time. Subcommittee A recommends amendments that retain the flexibility for the function to be reassigned internally, while clarifying how notice is to be made. These proposed rule changes do not reflect any substantive change from current practice, but merely amend the rules to reflect the current practice and to include reference to changes made over the years such as the disciplinary notices on the Website.

**ELC 3.5 NOTICE OF ~~DISCIPLINE~~ DISCIPLINARY ACTION OR  
TRANSFER TO DISABILITY INACTIVE STATUS**

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

(1) a copy of any decision imposing a disciplinary sanction when that decision becomes final;

(2) a copy of any admonition, together with the order issuing the admonition, when the admonition is accepted or otherwise becomes final;

**(3) a copy of any transfer to disability inactive status; and**

**(3 4) a copy of any resignation in lieu of disbarment.**

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

(1) the lawyer discipline authority or highest court in any jurisdiction where the lawyer is believed to be admitted to practice;

(2) the chief judge of each federal district court in Washington State and the chief judge of the United States Court of Appeals for the Ninth Circuit; **and**

(3) the National ~~Discipline Data Bank~~ Lawyer Regulatory Data Bank; **and**

**(4) — the Washington State Bar News.**

(c) **Preparation of Bar News and Website Notice. Notice of the imposition of any disciplinary sanction, admonition, resignation in lieu of disbarment, interim suspension, or transfer to disability inactive status, or the filing of a statement of concern under rule 3.4(f) must be published in the Washington State Bar News and on any electronic or other index or site maintained by the Association for public information. The counsel to the Board Association counsel** has discretion in drafting notices for publication in the Washington State Bar News **and on the Website**, and should include sufficient information to adequately inform the public and the members of the Association about the misconduct found, the rules violated and the disciplinary action imposed. **For a transfer to disability inactive status, reference will be made to the disability inactive status, but no reference will be**

made to the specific disability. For an interim suspension, the basis of the interim suspension will be stated. All notices under this subsection should include the respondent lawyer's name, bar number, date of admission, the time frame of the misconduct, the rules violated, and the disciplinary action. ~~The counsel to the Board~~ Association counsel must serve a copy of the draft notice under this subsection on respondent and disciplinary counsel under rule 4.1 and review any comments filed with ~~the Association~~ counsel to the Board within five days of service, but Association ~~counsel's~~ counsel's ~~to the Board's~~ decision about the content of the notice is not subject to further review.

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

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

Rule 3.6: Maintenance of Records

WSBA discipline options used to include censures, which were, depending on the time period, either public or non-public. Censures were eliminated in 2002, and now all discipline sanctions are both permanent and public. Under the current ELCs, admonitions are neither a discipline sanction nor permanent. Admonitions are public but are currently only of record for 5 years. The advent of the internet has caused this to be particularly problematic, since once something is out there it can always be found by someone determined enough to do so, even if removed from our website. Advisory letters are also available under the ELCs; advisory letters are not a disciplinary sanction and are non-public. Subcommittee A believes the “illusion” that admonitions disappear after 5 years is both a fallacy and directly contrary to the current trends regarding open court files and public proceedings, and that the public is better served by admonitions being permanent disciplinary sanctions. The proposed amendments eliminate the disparate treatment for admonitions, and also implement a 10-year retention period for grievances dismissed after diversion. In addition to the proposed change to ELC 3.6, we propose a conforming amendment to ELC 13.5(d) from page 325 of the Materials, even though this rule is within Subcommittee C’s jurisdiction, just to ensure it isn’t missed.

**ELC 3.6 MAINTENANCE OF RECORDS**

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

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

**(c) Retention of Docket.** If a file on a matter has been destroyed under section (b), the Association may retain a docket record of the matter for statistical purposes only. That docket record must not include the name or other identification of the respondent.

**(d) Deceased Lawyers.** Records and files relating to a deceased lawyer, including permanent records, may be destroyed at any time in disciplinary counsel’s discretion.

\* \* \*

ELC 13.5 ADMONITION

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

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## TITLE 4 – GENERAL PROCEDURAL RULES

### Rule 4.1: Service of Papers

Recently procedural questions were raised about whether filing something with the clerk constituted service on the chief hearing officer. Subcommittee A proposes amendments that provide specific direction for service on hearing officers, the chief hearing officer, the disciplinary board, etc. The proposed amendments also modify the language regarding service where there are issues of mental competence, to comply with current statutes and usage. The Task Force has previously approved on the 11/05/2009 consent calendar the proposed amendments to allow service by mail as either first class mail or certified or registered, return receipt requested at the option of the sender [Materials, page 326].

#### ELC 4.1 SERVICE OF PAPERS

**(a) Service Required.** Every pleading, every paper relating to discovery, every written request or motion other than one which may be heard ex parte, and every similar paper or document issued by disciplinary counsel or the respondent lawyer under these rules must be served on the opposing party. If a hearing is pending and a hearing officer has been assigned, except for discovery, the party also must serve a copy on the hearing officer ~~or panel chair or, if required by these rules, on each member of a hearing panel.~~

**(b) Methods of Service.**

(1) *Service by Mail.*

(A) Unless personal service is required or these rules specifically provide otherwise, service may be accomplished by postage prepaid mail. If properly made, service by mail is deemed accomplished on the date of mailing and is effective regardless of whether the person to whom it is addressed actually receives it.

(B) ~~Except as provided below, s~~ Service by mail ~~must~~ may be by first class mail or by certified or registered mail, return receipt requested. ~~Service may be by first class mail if:~~

~~(i) the parties so agree;~~

~~(ii) the document is a notice of dismissal by disciplinary counsel or by a review committee under rule 5.6, a notice regarding deferral under rule 5.3(e), or a request for review of any of these notices;~~

~~(iii) one or more properly made certified mailings is returned as unclaimed;~~

~~or~~

~~(iv) service is on a hearing officer or panel.~~

(C) The address for service by mail is as follows:

(i) for the respondent, or his or her attorney of record, the address in the answer, a notice of appearance, or any subsequent document filed by the respondent or his or her attorney; or, in the absence of an answer, the respondent's address on file with the Association;

(ii) for disciplinary counsel, at the address of the Association or other address that disciplinary counsel requests;

**(iii) for a hearing officer assigned to a matter, at the address of the hearing officer set forth on the notice of assignment of the hearing officer, or such other address as the hearing officer directs; and**

**(iv) for the chief hearing officer, the Chair, the Board, a review committee, Association counsel, or any other person or entity acting under the authority of these rules, addressed to that person or entity in care of the Clerk at the address of the Association.**

(2) *Service by Delivery.* If service by mail is permitted, service may instead be accomplished by leaving the document at the address for service by mail.

(3) *Personal Service.* Personal service on a respondent is accomplished as follows:

(A) if the respondent is found in Washington State, by personal service in the manner required for personal service of a summons in a civil action in the superior court;

(B) if the respondent cannot be found in Washington State, service may be made either by:

(i) leaving a copy at the respondent's place of usual abode in Washington State with a person of suitable age and discretion then resident therein; or

(ii) mailing by registered or certified mail, postage prepaid, a copy addressed to the respondent at his or her last known place of abode, office address maintained for the practice of law, post office address, or address on file with the Association, or to the respondent's resident agent whose name and address are on file with the Association under APR 5(f).

(C) if the respondent is found outside of Washington State, then by the methods of service described in (A) or (B) above.

**(c) Service Where Question of Mental Competence.** If **the Superior Court has appointed** a guardian or guardian ad litem ~~has been appointed~~ for a respondent ~~who has been judicially declared to be of unsound mind or incapable of conducting his or her own affairs~~, service under sections (a) and (b) above must also be made on the guardian or guardian ad litem.

**(d) Proof of Service.** If personal service is required, proof of service may be made by affidavit of service, sheriff's return of service, or a signed acknowledgment of service. In other cases, proof of service may also be made by certificate of a lawyer similar to that allowed by CR 5(b)(2)(B), which certificate must state the form of mail used. Proof of service in all cases must be filed but need not be served on the opposing party.

Rule 4.2: Filing; Orders

Recently questions have been raised about the distinction between filing with or serving the chief hearing officer, and filing with the clerk. The Disciplinary Board Clerk is responsible for maintaining the original record, and the rules should clearly state that all originals are to be filed with the clerk. Subcommittee A proposes amendments that specifically provide that all originals are to be filed with the clerk. The subcommittee also discussed electronic filing. Currently, the WSBA does not have the technology for a true electronic filing system, which would require electronic signature verification and other security measures; however, the Clerk does allow pleadings to be filed via e-mail or fax, so long as a hard copy original is also later filed. The proposed amendments memorialize that practice with one important exception proposed by the chief hearing officer: orders bearing the electronic signature of a hearing officer do not have to subsequently be followed with a hard copy original. Subcommittee A acknowledges that counsel to the Disciplinary Board is opposed to this exception and believes that originals with original signatures must be filed on all documents.

**ELC 4.2 FILING; ORDERS**

**(a) Filing Originals.** Except in matters before the Supreme Court, the original of any pleading, motion, or other paper authorized by these rules, other than discovery, must be filed with the Clerk. Filing may be made by first class mail and is deemed accomplished on the date of mailing. Filing of papers for matters before the Supreme Court is governed by the Rules of Appellate Procedure.

**(b) Filing and Service of Orders.** Any written order, decision, or ruling, except an order of the Supreme Court or an informal ruling issued under rule 10.8(e), must be filed with the Clerk, and the Clerk serves it on the respondent lawyer and disciplinary counsel.

(c) Electronic Filing. Filing of documents with the Clerk under subsections (a) and (b) of this rule may be accomplished by e-mail or by facsimile, provided that a document so filed with the Clerk after 5:00 p.m. or on weekends or legal holidays shall be deemed to have been filed on the next business day. Except for orders, decisions and rulings bearing an electronic signature, a paper original of documents filed under this subsection (c) should thereafter be filed as well.

The subcommittee is not proposing any amendments to the following ELCs:

- 4.3 Papers
- 4.4 Computation of Time
- 4.5 Stipulation to Extension or Reduction of Time
- 4.6 Subpoena Under the Law of Another Jurisdiction
- 4.7 Enforcement of Subpoenas

Remainder of Subcommittee A Final Report - held over from August 12, 2010

The task force as a whole approved new ELC 4.8 (Declarations in Lieu of Affidavits) and 4.9 (Service and Filing by an Inmate Confined in an Institution) by consent on 11/05/2009.

Rule 4.10: Redaction or Omission of Confidential Identifiers [NEW]

The Supreme Court has recently notified counsel of the need to comply with provisions of the General Rules which require redaction of personal identifiers from documents filed with the Court; this proposed new rule formally incorporates that requirement into the ELCs.

**ELC 4.10 REDACTION OR OMISSION OF  
CONFIDENTIAL IDENTIFIERS**

**In all matters filed with a review committee, a hearing officer or the chief hearing officer, the clerk, the Board, or the Supreme Court, both disciplinary counsel and respondents must redact or omit from all exhibits, documents, and pleadings all personal identifiers as are required to be redacted or omitted by the General Rules applicable to the Superior Court, including GR 15, 22, and 31. When it is not feasible to redact or omit a personal identifier, the filing party must seek a protective order under rule 3.2(e) to have the document filed under seal.**

## TITLE 8 – DISABILITY PROCEEDINGS

### Rule 8.1: Action on Adjudication of Incompetency

Subcommittee A proposes amendments which would include involuntary commitment under RCW 71.04 (mental health) for periods in excess of 14 days as a basis for automatic disability. The proposed amendments also add in the requirement that any court-appointed guardian ad litem for a respondent attorney be served.

#### **ELC 8.1 ACTION ON ADJUDICATION OF INCOMPETENCY OR INCAPACITY**

**(a) Grounds.** The Association must automatically transfer a lawyer from active to disability inactive membership status upon receipt of a certified copy of the judgment, order, or other appropriate document demonstrating that the lawyer:

(1) was found to be incapable of assisting in his or her own defense in a criminal action;

(2) was acquitted of a crime based on insanity;

(3) had a guardian (but not a limited guardian) appointed for his or her person or estate on a judicial finding of incompetency/incapacity;

(4) was involuntarily committed to a mental health facility for more than 14 days under Ch. 71.05 RCW; or

~~(4)~~(5) was found to be mentally incapable of conducting the practice of law in any other jurisdiction.

**(b) Notice to Lawyer.** The Association must forthwith notify the disabled lawyer and his or her guardian or guardian ad litem, if ~~any one has been appointed~~, of the transfer to disability inactive status. The Association must also notify the Supreme Court of the transfer and provide a copy of the judgment, order, or other appropriate document on which the transfer was based.

Rule 8.2: Determination of Incapacity to Practice Law

Currently, the ELCs contain no requirement that a respondent attorney be notified of ODC's intent to seek a review committee order directing the filing of a disability proceeding. Subcommittee A proposes amendments that require the respondent to be provided with notice and the opportunity to respond before the review committee hearing. In addition, the amendments state that either party may appeal. The subcommittee also approved ODC's proposal that the caption of disability cases only include the respondent attorney's initials.

**ELC 8.2 DETERMINATION OF INCAPACITY TO PRACTICE LAW**

**(a) Review Committee May Order Hearing.** Disciplinary counsel reports to a review committee on investigations into an active, suspended, or inactive respondent lawyer's mental or physical capacity to practice law. The respondent lawyer and his or her guardian or guardian ad litem, if any, shall be provided with a complete copy of disciplinary counsel's report and shall be afforded a reasonable opportunity to respond prior to the review committee taking action on the report. The committee orders a hearing if it appears there is reasonable cause to believe that the respondent does not have the mental or physical capacity to practice law. In other cases, the committee may direct further investigation as appears appropriate or dismiss the matter.

**(b) Not Disciplinary Proceedings.** Proceedings under this rule are not disciplinary proceedings.

**(c) Procedure.**

(1) *Applicable Rules and Case Caption.* Proceedings under this rule are conducted under the procedural rules for disciplinary proceedings except that the respondent lawyer's initials are to be used in the case caption rather than the lawyer's full name.

(2) *Appointment of Counsel.* If counsel for the respondent does not appear within the time for filing an answer, the Chair must appoint an active member of the Association as counsel for the respondent under Rule 8.10.

(3) *Health Records.* After a review committee orders a hearing under this rule, disciplinary counsel may require the respondent to furnish written releases and authorizations for medical, psychological, or psychiatric records as may be relevant to the inquiry, subject to a motion to the hearing officer, or if no hearing officer has been appointed, to the chief hearing officer, to limit the scope of the requested releases or authorizations for good cause.

(4) *Examination.* Upon motion, the hearing officer, or if no hearing officer has been appointed, the chief hearing officer, may order an examination by a physician of the respondent's physical condition or by a mental health professional (as defined by RCW 71.05.020) of the respondent's mental condition to assist in determining the respondent's capacity to practice law. Unless waived by the parties, the examiner must submit a report of the examination, including the results of any tests administered and any diagnosis, to the hearing officer, disciplinary counsel, and the respondent.

(5) *Hearing Officer Recommendation.* If the hearing officer ~~or panel~~ finds that the respondent does not have the mental or physical capacity to practice law, the hearing officer ~~or panel~~ must recommend that the respondent be transferred to disability inactive status.

(6) *Appeal Procedure.* Either respondent or disciplinary counsel may appeal from a final determination of the hearing officer as to the respondent's capacity to practice law. The procedures for appeal and review of suspension recommendations apply to ~~recommendations for transfer to disability inactive status~~ such appeals.

(7) *Transfer Following Board Review.* If, after review of the decision of the hearing officer ~~or panel~~, the Board finds that the respondent does not have the mental or physical capacity to practice law, it must enter an order immediately transferring the respondent to disability inactive status. The transfer is effective upon service of the order under rule 4.1.

**(d) Interim Suspension.**

(1) When a review committee orders a hearing on the capacity of a respondent to practice law, disciplinary counsel must petition the Supreme Court for the respondent's interim suspension under rule 7.2(a) unless the respondent is already suspended on an interim basis.

(2) Even if the Court previously denied a petition for interim suspension under subsection (d)(1), disciplinary counsel may petition the Court for the interim suspension of a respondent under rule 7.2(a)(3) if the respondent fails:

- (A) to appear for an independent examination under this rule;
- (B) to waive health care provider-patient privilege as required by this rule; or
- (C) to appear at a hearing under this rule.

**(e) Termination of Interim Suspension.** If the hearing officer ~~or panel~~ files a decision recommending that a respondent placed on interim suspension under this rule not be transferred to disability inactive status, upon either party's petition, the Court may terminate the interim suspension.

Rule 8.3: Disability Proceedings During Course of Disciplinary Proceedings

Although the ELCs do not require the appointment of a second hearing officer if a disability proceeding is commenced during a discipline proceeding, that has always been the practice and Subcommittee A believes it would be inappropriate for the discipline hearing officer to also make the disability determination. The proposed amendments specifically require the appointment of a separate hearing officer for disability proceedings.

**ELC 8.3 DISABILITY PROCEEDINGS DURING COURSE OF DISCIPLINARY PROCEEDINGS**

**(a) Supplemental Proceedings on Capacity To Defend.** A hearing officer ~~or hearing panel~~, or chief hearing officer if no hearing officer has been appointed, must order a supplemental proceeding on the respondent lawyer's capacity to defend the disciplinary proceedings if the respondent asserts, or there is reasonable cause to believe, that the respondent is incapable of properly defending the disciplinary proceeding because of mental or physical incapacity. A new hearing officer shall be appointed for the supplemental proceeding.

**(b) Purpose of Supplemental Proceedings.** In a supplemental proceeding, the hearing officer ~~or panel~~ determines if the respondent:

- (1) is incapable of defending himself or herself in the disciplinary proceedings because of mental or physical incapacity;
- (2) is incapable, because of mental or physical incapacity, of defending against the disciplinary charges without the assistance of counsel; or
- (3) is currently unable to practice law because of mental or physical incapacity.

**(c) Not Disciplinary Proceedings.** Proceedings under this rule are not disciplinary proceedings.

**(d) Procedure for Supplemental Proceedings.**

(1) *Applicable Rules and Case Caption.* Proceedings under this rule are conducted under the procedural rules for disciplinary proceedings except that the respondent lawyer's initials are to be used in the case caption rather than the lawyer's full name.

(2) *Deferral of Disciplinary Proceedings.* The disciplinary proceedings are deferred pending the outcome of the supplemental proceeding.

(3) *Appointment of Counsel.* If counsel for the respondent does not appear within 20 days of notice to the respondent of the issues to be considered in a supplemental proceeding under this rule, or within the time for filing an answer, the Chair must appoint an active member of the Association as counsel for the respondent in the supplemental proceedings under rule 8.10.

(4) *Health Records.* Disciplinary counsel may require the respondent to furnish written releases and authorizations for medical, psychological, or psychiatric records as may be relevant to the determination under section (b), subject to a motion to the hearing officer to limit the scope of the requested releases or authorizations for good cause. If the respondent asserted incapacity, there is a rebuttable presumption that good cause does not exist.

(5) *Examination.* Upon motion, the hearing officer may order an examination by a physician of the respondent's physical condition or by a mental health professional (as defined by RCW 71.05.020) of the respondent's mental condition to assist in the determinations to be made under section (b). Unless waived by the parties, the examiner must submit a report of the examination, including the results of any tests administered and any diagnosis, to the hearing officer, disciplinary counsel, and the respondent.

(6) *Failure To Appear or Cooperate.* If the respondent fails to appear for an independent examination, fails to waive health care provider-patient privilege as required in these rules, or fails to appear at the hearing, unless the procedure under rule 8.10(d) is followed the following procedures apply:

(A) If the Association has the burden of proof, the hearing officer must hold a hearing and, if presented with sufficient evidence to determine incapacity, order the respondent transferred to disability inactive status. If there is insufficient evidence to determine incapacity, the hearing officer must enter an order terminating the supplemental proceedings and reinstating the disciplinary proceedings. A respondent who does not appear at the hearing may move to vacate the order of transfer under rule 10.6(c).

(B) If the respondent has the burden of proof, the hearing officer must enter an order terminating the supplemental proceedings and resuming the disciplinary proceedings.

(7) *Hearing Officer Decision.*

(A) Capacity To Defend and Practice Law. If the hearing officer ~~or panel~~ finds that the respondent is capable of defending himself or herself and has the mental and physical capacity to practice law, the disciplinary proceedings resume.

(B) Capacity To Defend with Counsel. Regardless of the hearing officer's determination as to mental or physical capacity to practice law, if ~~if~~ the hearing officer ~~or panel~~ finds that the respondent is not capable of defending himself or herself in the disciplinary proceedings but is capable of adequately assisting counsel in the defense, the supplemental proceedings are dismissed and the disciplinary proceedings resume. If counsel does not appear on behalf of the respondent within 20 days of service of the hearing officer's decision, the Chair must appoint an active member of the Association as counsel for the respondent in the disciplinary proceeding.

(C) Finding of Incapacity. If the hearing officer ~~or panel~~ finds that the respondent either does not have the mental or physical capacity to practice law, or is incapable of assisting counsel in properly defending a disciplinary proceeding because of mental or physical incapacity, the hearing officer ~~or panel~~ must recommend that the respondent be transferred to disability inactive status.

(D) Review and Appeals. Either respondent or disciplinary counsel may appeal from a final determination of the hearing officer as to the respondent's capacity to practice law or respondent's capacity to defend a disciplinary proceeding. The procedures for appeal and review of suspension

recommendations shall apply ~~to recommendations for transfer to disability inactive status~~ **such appeals**.

(8) *Transfer Following Board Review.*

(A) The Board must enter an order immediately transferring the respondent to disability inactive status if after review of a hearing officer's ~~or panel's~~ recommendation of transfer to disability inactive status, the Board finds that the respondent:

- (i) does not have the mental or physical capacity to practice law; or
- (ii) is incapable of assisting counsel in properly defending a disciplinary proceeding because of mental or physical incapacity.

(B) The transfer is effective upon service of the order on the respondent under rule 4.1.

(e) **Interim Suspension.** When supplemental proceedings have been ordered, disciplinary counsel must petition the Supreme Court for the respondent's interim suspension under rule 7.2(a)(1) or seek automatic suspension under rule 7.3 unless the respondent is already suspended on an interim basis.

The task force approved amendments to ELC 8.4, Appeal of Transfer to Disability Inactive Status, on consent on 11/05/09, and subcommittee A is not recommending any further amendments to this rule.

#### Rule 8.5: Stipulated Transfer to Disability Inactive Status

The ELCs do not specifically require that a respondent attorney be represented by counsel when stipulating to disability. Subcommittee A believes allowing someone to stipulate that they are incapacitated, without the benefit of representation, raises serious due process concerns. Current practice is to appoint counsel even though the rules don't require it. The proposed amendments require that counsel be appointed for unrepresented respondents on stipulations to disability.

At its 04/08/2010 meeting the task force approved an amendment to ELC 8.5(a) suggested by subcommittee B (page 689). Subcommittee A respectfully believes the better approach is to highlight the requirement that the respondent be represented by counsel by adding in a new (c), and proposes to delete subcommittee B's amendment.

#### **ELC 8.5 STIPULATED TRANSFER TO DISABILITY INACTIVE STATUS**

**(a) Requirements.** At any time a respondent lawyer, respondent's counsel, and disciplinary counsel may stipulate to the transfer of the respondent to disability inactive status under this title. The respondent, respondent's counsel, and disciplinary counsel must all 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.~~

**(b) Form.** The stipulation must:

- (1) state with particularity the nature of the respondent's incapacity to practice law and the nature of any pending disciplinary proceedings that will be deferred as a result of the respondent's transfer to disability inactive status;
- (2) state that it is not binding on the Association as a statement of all existing facts relating to the professional conduct of the respondent and that any additional existing facts may be proved in a subsequent disciplinary proceeding; and
- (3) fix the amount of costs and expenses to be paid by the respondent.

**(c) Respondent Must be Represented by Counsel.** Respondent must be represented by counsel at the time of entering into the stipulation. If the respondent has not retained counsel, the Chair must appoint an active member of the Association as counsel for the respondent pursuant to rule 8.10. Any counsel appointed for purposes of entering into a stipulation shall be deemed automatically discharged when the Board approves or rejects the stipulation.

~~(e)~~ **(d) Approval.** The stipulation must be presented to the Board. The Board reviews the stipulation based solely on the record agreed to by the respondent, respondent's counsel, and disciplinary counsel. The Board may either approve the

stipulation or reject it. Upon approval, the transfer to disability inactive status is not subject to further review.

~~(d)~~ (e) **Stipulation Not Approved.** If the stipulation is rejected by the Board, the stipulation has no force or effect and neither it nor the fact of its execution is admissible in any pending or subsequent disciplinary proceeding or in any civil or criminal action.

Rule 8.6: Costs in Disability Proceedings

Subcommittee A does not propose any amendments to ELC 8.6; the text of that rule is set forth below for reference purposes only..

**ELC 8.6 COSTS IN DISABILITY PROCEEDINGS**

When reviewing a matter under this title, the Board may authorize disciplinary counsel to seek assessment of the costs and expenses against the respondent lawyer. If the Board authorizes, disciplinary counsel may file a statement of costs within 20 days of service of the Board's order. Rule 13.9 governs assessment of these costs and expenses. The respondent is not required to pay the costs and expenses until 90 days after reinstatement to active status.

Rule 8.7: Burden and Standard of Proof

ELC 8.7 was amended by consent on 11/05/2009; the language as amended is set forth here for reference purposes only.

**ELC 8.7 BURDEN AND STANDARD OF PROOF**

In proceedings under rules 8.2 or 8.3, the party asserting or alleging the incapacity has the burden of proof ~~establishing it by a preponderance of the evidence~~. If the issue of incapacity is raised by a hearing officer ~~or panel~~, the Association has the burden of proof. A respondent lawyer establishes incapacity by a preponderance of the evidence. The Association establishes incapacity by a clear preponderance of the evidence.

Rule 8.8: Reinstatement to Active Status

ELC 8.8 was amended by consent on 11/05/2009. The only additional amendment Subcommittee A is proposing is to change the time period for filing a notice of appeal in (g) from 15 days to 30. This would be consistent with other proposed rule changes. Although in other places in this report we have omitted portions of rules not being amended, we felt it necessary to include the complete rule here for context.

**ELC 8.8 REINSTATEMENT TO ACTIVE STATUS**

**(a) Right of Petition and Burden.** A respondent lawyer transferred to disability inactive status may resume active status only by Board or Supreme Court order. Any respondent transferred to disability inactive status may petition the Board for transfer to active status. The respondent has the burden of showing that the disability has been removed.

**(b) Petition.** The petition for reinstatement must:

- (1) state facts demonstrating that the disability has been removed;
- (2) include the name and address of each psychiatrist, psychologist, physician, or other person and each hospital or other institution by whom or in which the respondent has been examined or treated since the transfer to disability inactive status; and
- (3) be filed with the Clerk and served on disciplinary counsel.

**(c) Waiver of Privilege.** The filing of a petition for reinstatement to active status by a respondent transferred to disability inactive status waives any privilege as to treatment of any medical, psychological, or psychiatric condition during the period of disability. The respondent must furnish, if requested by the Board or disciplinary counsel, written consent to each treatment provider to divulge information and records relating to the disability.

**(d) Initial Review by Chair.** The Chair reviews the petition and any response by disciplinary counsel and directs appropriate action to determine whether the disability has been removed, including investigation by disciplinary counsel or any other person or an examination by a physician of the respondent's physical condition or by a mental health professional (as defined by RCW 71.05.020) of the respondent's mental condition.

**(e) Board Review.**

- (1) The respondent must have a reasonable opportunity to review any reports of investigations or examinations ordered by the Chair and submit additional materials before the matter is submitted to the Board.
- (2) On submission, the Board reviews the petition and any reports as expeditiously as possible and takes one or more of the following actions:
  - (A) grants the petition;
  - (B) directs additional action as the Board deems necessary to determine whether the disability has been removed;
  - (C) orders that a hearing be held before a hearing officer ~~or panel~~ under the procedural rules for disciplinary proceedings;

(D) directs the respondent to establish proof of competence and learning in the law, which may include certification by the bar examiners of successful completion of an examination for admission to practice;

(E) denies the petition;

(F) directs the respondent to pay the costs of the reinstatement proceedings; or

(G) approves or rejects a stipulation to reinstatement between the respondent and the Association.

(3) The petition may be denied without the respondent having an opportunity for a hearing before a hearing officer ~~or panel~~ only if the Board determines that a hearing is not necessary because:

(A) the respondent fails to state a prima facie case for reinstatement in the petition; or

(B) the petition does not indicate a material change of circumstance since a previous denial of a petition for reinstatement.

**(f) Petition Granted.** If the petition for reinstatement is granted, the Association ~~immediately~~ restores the respondent to the respondent's prior status and notifies the Supreme Court of the transfer, unless disciplinary counsel files a notice of appeal under subsection (g) of this rule, in which case respondent will not be returned to the respondent's prior status until that appeal is final. If a disciplinary ~~proceeding~~ investigation has been deferred because of the disability transfer, the ~~proceeding~~ matter is reopened and the investigation resumes upon reinstatement. If a formal proceeding has been deferred because of the disability transfer, the proceeding resumes upon reinstatement.

**(g) Review by Supreme Court.** ~~If the petition for reinstatement is not granted,~~ Either the respondent or disciplinary counsel may appeal the Board's decision to the Supreme Court, by filing a notice of appeal with the Clerk within 15 ~~15~~ 30 ~~days of service of the Board's decision on the respondent.~~ Title 12 applies to review under this section.

Rule 8.9: Petition for Limited Guardianship

The current wording of rule 8.9 almost makes it sound like our hearing officers can appoint a guardian, when all guardians must be appointed by the Superior Court. In addition, cases in which a guardianship is contemplated are often emergent—however, the respondent’s due process rights must still be protected. Subcommittee A proposes amendments that recognize the authority of the Superior Court and provide for notice and an opportunity to be heard before a guardianship petition is authorized, as circumstances allow.

**ELC 8.9 PETITION FOR LIMITED GUARDIANSHIP**

~~(a) Guardian Powers and Qualifications. A guardian may be appointed under this rule to take any action deemed advisable related to the respondent lawyer’s license to practice law and any disciplinary or disability investigation or proceeding.~~

(a) Request for Authorization to Initiate Guardianship Proceedings.

~~(b) Referral to Review Committee.~~ A hearing officer ~~or panel,~~ the Chair, the Association, the respondent, or respondent’s counsel may request that a review committee authorize the filing of a petition for a limited guardianship of a respondent ~~as described in section (a).~~

(b) Notice. The person requesting authority to file the guardianship petition must give notice to the parties at the time of the request. The party not making the request shall be given a reasonable opportunity, under the facts and circumstances of the case, to respond before the Review Committee renders its decision. The Association and the respondent may submit declarations or affidavits relevant to the Review Committee’s decision.

(c) Review Committee Determination. The review committee may authorize the ~~Association to filing of a~~ petition for the appointment of a limited guardian ~~as described in section (a)~~ when the review committee reasonably believes that grounds for such an appointment exist under RCW 11.88.010(2). The review committee may require the respondent to submit to any necessary examinations or evaluations and may retain independent counsel to assist in the investigation and the filing of any petition.

**(d) Action for Limited Guardianship.**

(1) Upon authorization of a review committee, the ~~Association petitioning party~~ may file a petition in any Superior Court seeking a limited guardian to act regarding the respondent’s license or any disciplinary or disability investigation or proceeding.

(2) Notwithstanding any other ~~statutory provisions regarding the qualifications, of a guardian ad litem,~~ any guardian or guardian ad litem appointed pursuant to a petition filed under this rule must be a lawyer qualified to maintain and protect the confidences and secrets of the respondent’s clients.

(3) Upon application to the Superior Court, the respondent may have the matter moved to the county where the respondent is domiciled or maintains an office or another county as authorized by law.

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

(5) The costs of any guardianship proceeding are paid out of the guardianship estate, except if the guardianship estate is indigent, the Association pays the costs.

Rule 8.10: Appointment of Counsel for Respondent [NEW]

Subcommittee A believes that protection of the public, without sacrificing the due process protections due respondents, is especially important in disability proceedings. The proposed new rule clearly sets forth when and how counsel is appointed for respondents in disability proceedings. Unfortunately, disability proceedings, although critical to the protection of the public, can be stalled when a respondent's mental health issues cause him/her to repeatedly dismiss his/her counsel, or to refuse to cooperate with counsel. The proposed new rule provides that if the chair determines that appointment of successor counsel would be futile, the respondent may be administratively transferred to disability status. The respondent is protected by liberal appeal opportunities.

**ELC 8.10 APPOINTMENT OF COUNSEL FOR RESPONDENT**

**(a) Appointment of Counsel for Respondent.** If counsel for the respondent does not appear within the time for filing an answer, or as may otherwise be required, under Title 8 of these rules, the Chair must appoint an active member of the Association as counsel for the respondent.

**(b) Counsel's Role.** Counsel appointed for respondent shall act as an advocate for their client and shall not substitute counsel's own judgment for that of the client.

**(c) Withdrawal of Appointed Counsel.** Counsel appointed under this rule may withdraw only upon authorization from the Chair, upon a showing of the inability of the appointed counsel to locate, communicate or work with the respondent, or other good cause.

**(d) Action Upon Withdrawal of Appointed Counsel.** Upon authorizing appointed counsel to withdraw, the Chair will determine whether to appoint other counsel to represent the respondent, or, upon a finding that there is no reasonable chance that other counsel will be able to represent the respondent and that appointment of counsel would be futile, may recommend to the Board that the respondent be transferred to disability inactive status. The Board will review any order of the Chair recommending transfer to disability inactive status because appointment of counsel would be futile and may either affirm such order or direct that substitute counsel be appointed for the respondent. An unrepresented respondent may not participate in this review by the Board unless specifically authorized by the Chair to participate. The respondent may seek review under rule 12.3 of an order of the Board recommending transfer to disability inactive status under this rule but must be represented by counsel for purposes of such motion unless specifically authorized to proceed without representation by the Chair.

## TITLE 10 – HEARING PROCEDURES

Subcommittee A proposes no amendments to ELC 10.1

### Rule 10.2: Hearing Officer ~~or Panel~~

In addition to amendments related to the elimination of hearing panels, Subcommittee A proposes amendments that clarify the procedure for motions for removal of hearing officers. The rule currently provides that removal may be “requested;” the proposed amendments specify that this must be in the form of a motion, and clarify the “without cause” procedure (similar to the affidavit of prejudice). Finally, we also propose changing the title of the rule, to avoid confusion with ELC 2.5.

### **ELC 10.2 HEARING OFFICER ~~OR PANEL~~ ASSIGNMENT**

#### **(a) Assignment.**

~~(1) *Hearing Officer.* The chief hearing officer **ordinarily** assigns a **single** hearing officer, from those eligible under rule 2.5, to hear a matter ordered to hearing.~~

~~(2) *Hearing Panel.* **On either party’s motion, or when otherwise deemed advisable, the chief hearing officer may assign a hearing panel. In determining whether to assign a hearing panel, the chief hearing officer considers whether public interest in the proceeding makes a panel advisable and whether a nonlawyer on a hearing panel could contribute to the fairness, or the perception of fairness, in the process and the outcome. When a panel is assigned, the chief hearing officer designates one lawyer member as panel chair. The chief hearing officer’s ruling on assigning a hearing panel is not subject to interim review. The chief hearing officer makes an assignment to fill any hearing officer or panel member vacancy.**~~

#### **(b) Disqualification and Removal.**

(1) *Removal Without Cause.* Either party may is entitled to have an assigned hearing officer ~~or hearing panel member~~ removed, without establishing cause for the removal, by filing a written request motion with the ~~chief hearing officer~~ Clerk within ten days ~~of after~~ service on ~~the moving party~~ the respondent of that officer’s ~~or panel member’s~~ assignment. A party may only once request removal without cause in any proceeding.

(2) *Disqualification for Cause.* Either party may seek to disqualify any assigned hearing officer ~~or hearing panel member~~ for good cause. A motion under this subsection must be filed promptly after the party knows, or in the exercise of due diligence should have known, of the basis for the disqualification.

(3) *Notice to Chief Hearing Officer.* **The Clerk must promptly provide copies of motions for removal or for disqualification to the chief hearing officer.**

~~(3)(4) *Removal Decision.* The chief hearing officer decides all **requests motions** for removal and disqualification **motions**, except the Chair decides a **request motion** to remove or disqualify the chief hearing officer. The decision of the chief hearing officer or Chair on a **request motion** for removal or **a motion** to~~

disqualify is not subject to interim review. Upon removal or disqualification of ~~an~~ the assigned hearing officer ~~or hearing panel member~~, the chief hearing officer assigns a replacement.

Rule 10.3: Commencement of Proceedings

Subcommittee A proposes amendments, suggested by the chief hearing officer, that would allow a hearing officer to sever charges and require the filing of separate complaints, either *sua sponte* or on motion of either party. The subcommittee vote on this proposal was 3-2-1.

**ELC 10.3 COMMENCEMENT OF PROCEEDINGS**

**(a) Assignment. Formal Complaint.**

~~(1)~~1. *Filing.* After a matter is ordered to hearing, disciplinary counsel files a formal complaint with the Clerk.

~~(2)~~2. *Service.* After the formal complaint is filed, it must be personally served on the respondent lawyer, with a notice to answer.

~~(3)~~3. *Content.* The formal complaint must state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the allegations of misconduct. Disciplinary counsel must sign the formal complaint, but it need not be verified.

~~(4)~~4. *Prior Discipline.* Prior disciplinary action against the respondent may be described in a separate count of the formal complaint if the respondent is charged with conduct demonstrating unfitness to practice law.

**(b) Filing Commences Proceedings.** A disciplinary proceeding commences when the formal complaint is filed.

**(c) Joinder.** The body ordering a hearing on alleged misconduct or the hearing officer ~~or panel~~ may in its discretion consolidate for hearing two or more charges against the same respondent, or may join charges against two or more respondents in one formal complaint, provided that: the hearing officer to whom the case is assigned, or the chief hearing officer, if no hearing officer has been assigned, may on his or her own motion or on the motion of either party, for good cause shown, sever any or all of the charges so consolidated or joined, and order that they be the subject of separate formal complaints.

Rule 10.4: Notice to Answer

Subcommittee A recommends housekeeping and stylistic changes to ELC 10.4. As discussed herein at page 935, Subcommittee A rejected ODC’s proposals to amend ELC 10.4 to make disbarment the presumed sanction for default.

**ELC 10.4 NOTICE TO ANSWER**

**(a) Content.** The notice to answer must be substantially in the following form:

BEFORE THE DISCIPLINARY BOARD OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re \_\_\_\_\_ ) NOTICE TO ANSWER;  
 ) NOTICE OF HEARING OFFICER ~~[OR PANEL]~~;  
 ) NOTICE OF DEFAULT PROCEDURE  
Lawyer. )

To: The above named lawyer:

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

**Notice of default procedure: Your default may be entered for failure to file a written answer to this formal complaint within 20 days of service as required by rule 10.6 of the Rules for Enforcement of Lawyer Conduct. THE ENTRY OF AN ORDER OF DEFAULT ~~may~~ WILL RESULT IN THE ALLEGATIONS AND VIOLATIONS charges of misconduct IN THE FORMAL COMPLAINT BEING ADMITTED AND ESTABLISHED AND discipline being imposed or recommended based on the admitted charges of misconduct. If an order of default is entered, you will lose the opportunity to participate further in these proceedings unless and until the order of default is vacated on motion timely made under rule 10.6(c) of the Rules for Enforcement of Lawyer Conduct. The entry of an order of default means that you will receive no further notices regarding these proceedings except those required by rule 10.6(b)(2).**

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

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

WASHINGTON STATE BAR ASSOCIATION

By \_\_\_\_\_

Disciplinary Counsel, Bar No.

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

**(b) Notice When Hearing Officer ~~or Panel~~ Not Assigned.** If no hearing officer ~~or panel~~ has been assigned when a formal complaint is served, disciplinary counsel serves the formal complaint and a notice to answer as in section (a), but without reference to the hearing officer ~~or panel~~.

Rule 10.5: Answer

Subcommittee A proposes no amendments to this rule other than a housekeeping amendment necessitated by the elimination of panels. The text of the rule is set forth here for reference purposes only.

**ELC 10.5 ANSWER**

**(a) Time to Answer.** Within 20 days of service of the formal complaint and notice to answer, the respondent lawyer must file and serve an answer. Failure to file an answer as required may be grounds for discipline and for an order of default under rule 10.6. The filing of a motion to dismiss for failure to state a claim stays the time for filing an answer during the pendency of the motion.

**(b) Content.** The answer must contain:

- (1) a specific denial or admission of each fact or claim asserted in the formal complaint in accordance with CR 8(b);
- (2) a statement of any matter or facts constituting a defense, affirmative defense, or justification, in ordinary and concise language without repetition; and
- (3) an address at which all further pleadings, notices, and other documents in the proceeding may be served on the respondent.

**(c) Filing and Service.** The answer must be filed and served under rules 4.1 and 4.2. ~~If a hearing panel has been assigned to hear a matter, the respondent must serve each member with a copy of the answer.~~

Rule 10.6: Default Proceedings

Subcommittee A proposes revisions to the default process. Please note that ODC had proposed amendments to ELC 10.6 related to its proposal to make disbarment the presumed remedy for defaults; Subcommittee A is *not* recommending those proposed amendments for approval.

**ELC 10.6 DEFAULT PROCEEDINGS**

**(a) Entry of Default.**

(1) *Timing.* If a respondent lawyer, after being served with a notice to answer as provided in rule 10.4, fails to file an answer to a formal complaint or to an amendment to a formal complaint within the time provided by these rules, disciplinary counsel may serve the respondent with a written motion for an order of default.

(2) *Motion.* Disciplinary counsel must serve the respondent with a written motion for an order of default and a copy of this rule at least five days before entry of the order of default. The motion for an order of default must include the following:

(A) the dates of filing and service of the notice to answer, formal complaint, and any amendments to the complaint; and

(B) disciplinary counsel's statement that the respondent has not timely filed an answer as required by rule 10.5 and that disciplinary counsel seeks an order of default under this rule; and

(C) notice that a default will result in the allegations and violations in the formal complaint being admitted and established.

(3) *Entry of Order of Default.* If the respondent fails to file a written answer with the Clerk within five days of service of the motion for entry of an order of default, the hearing officer, or if no hearing officer ~~or panel~~ has been assigned, the chief hearing officer, on proof of proper service of the motion, enters an order finding the respondent in default.

(4) *Effect of Order of Default.* Upon entry of an order of default, the allegations and violations in the formal complaint and any amendments to the complaint are deemed admitted and established for the purpose of imposing discipline and the respondent may not participate further in the proceedings unless the order of default is vacated under this rule.

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

(1) *Service.* The Clerk serves the order of default and a copy of this rule under rule 4.2(b).

(2) *No Further Notices.* Notwithstanding any other provision of these rules, a~~After~~ entry of an order of default, no further notices, motions, documents, papers, or transcripts need ~~must~~ be served on the respondent except for copies of the decisions of the hearing officer ~~or hearing panel and~~ the Board, and the Court.

(3) *Disciplinary Proceeding.* Within 60 days of the filing of the order of default, the hearing officer must conduct a disciplinary proceeding to recommend disciplinary action based on the allegations and violations established under section

(a). At the discretion of the hearing officer ~~or panel~~, these proceedings may be conducted by formal hearing, written submissions, telephone hearing, or other electronic means. Disciplinary counsel may present additional evidence including, but not limited to, requests for admission under rule 10.11(b), and depositions, affidavits, and declarations regardless of the witness's availability.

**[remainder of rule [(c) and (d)] unchanged]**

Rule 10.7: Amendment of Formal Complaint

Subcommittee A proposes amending (b) by deleting the ability of the Chair to consolidate matters only upon consent of the Respondent.

**ELC 10.7 AMENDMENT OF FORMAL COMPLAINT**

**(a) Right To Amend.** Disciplinary counsel may, without review committee authorization, amend a formal complaint at any time to add facts or charges that relate to matters in the formal complaint or to the respondent lawyer's conduct regarding the pending proceedings.

**(b) Amendment with Authorization.** Disciplinary counsel must seek review committee authorization for amendments other than those under section (a). The review committee may authorize the amendment or may require that the additional facts or charges be the subject of a separate formal complaint. ~~The Chair, with the consent of the respondent, and after consultation with the hearing officer on the previously filed matter, may consolidate the hearing on the separate formal complaint with the hearing on the other pending formal complaint against the respondent.~~

**(c) Service and Answer.** Disciplinary counsel serves an amendment to a formal complaint on the respondent as provided in rule 4.1 but need not serve a Notice to Answer with the amendment. Rule 10.5 governs the answer to an amendment except that any part of a previous answer may be incorporated by reference.

Rule 10.8: Motions

The task force amended ELC 10.8 by consent on 11/05/2009. So that task force members can compare timelines and ensure consistency, the text as amended is set forth here for reference purposes only.

**ELC 10.8 MOTIONS**

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

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

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

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

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

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

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

Subcommittee A does not propose any amendments to ELC 10.9, Interim Review.

Rule 10.10: Prehearing Dispositive Motions

The task force amended ELC 10.10 by consent on 11/05/2009. Because the rule includes time deadlines, to allow task force members to compare to other proposed amendments for consistency the text as amended is set forth here for reference purposes.

**ELC 10.10 PREHEARING DISPOSITIVE MOTIONS**

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

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

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

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

Rule 10.11: Discovery and Prehearing Procedures

The task force amended ELC 10.11 by consent on 11/05/2009. The text as amended is set forth here for reference purposes only.

**ELC 10.11 DISCOVERY AND PREHEARING PROCEDURES**

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

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

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

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

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

~~(2)~~

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

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

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

Rule 10.12: Scheduling Hearing

Subcommittee A proposes amendments that require the scheduling of a scheduling conference after the answer is filed or expiration of the time for filing an answer. In addition, the WSBA Discipline Committee recommended the establishment of a settlement conference procedure. The proposed amendments incorporate that recommendation, with a few minor changes. If the hearing officer assigned to a case finds that a settlement conference may be helpful, a separate hearing officer would be appointed to serve as settlement officer, and the settlement conference would be completed no later than 30 days after the discovery cutoff [the original recommendation was within 60 days of the appointment of the settlement officer, but the subcommittee felt this was not workable].

**ELC 10.12 SCHEDULING OF HEARING**

(a) **Where Held.** Absent agreement of all parties, all ~~All~~ disciplinary hearings must be held in Washington State, ~~unless the respondent lawyer is not a resident of the state, or cannot be found in the state.~~

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

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

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

~~Following the filing of respondent's answer, or upon expiration of the time to file an answer, the hearing officer must convene a scheduling conference of the parties, by conference call or in person.~~

**(c) Scheduling Order.**

(1) The hearing officer must enter an order setting the date and place of the hearing. This order may include any prehearing deadlines the hearing officer deems required by the complexity of the case.

(2) The Scheduling Order must include a determination by the hearing officer of whether a settlement conference may be helpful. In making this determination the hearing officer should consider the following factors: whether the parties believe a settlement conference would be helpful; the complexity of the issues; the extent to which the relevant facts are disputed; whether violation of the Rules of Professional Conduct is disputed; any other relevant factor.

(3) If the hearing officer determines that a settlement conference may be

**helpful, a new hearing officer shall be assigned for the limited purpose of serving as settlement officer, and the settlement conference should be held no later than 30 days after the discovery cutoff. Settlement conference proceedings are confidential and are not admissible in any discipline hearing.**

**(4) The Scheduling Order**, ~~and~~ may be in the following form with the following timelines:

**SCHEDULING CONFERENCE DETERMINATION:**

**[ ] The hearing officer finds that this case may benefit from a settlement conference, and a settlement officer should be assigned.**

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

1. **Witnesses.** A **preliminary** list of intended witnesses, including addresses and phone numbers, **and a designation of whether the witness is a fact witness, character witness, or expert witness,** must be filed and served by [Hearing Date (H)-~~8~~**12** weeks].

2. **Discovery.** Discovery cut-off is [H-6 weeks].

3. **Motions.** Prehearing motions, other than motions to bifurcate, must be served by [H-4 weeks]. An exhibit not ordered or stipulated admitted may not be attached to a motion or otherwise transmitted to the hearing officer unless the motion concerns the exhibit's admissibility. The hearing officer will advise counsel whether oral argument is necessary, and, if so, the date and time, and whether it will be heard by telephone. (Rule 10.15 provides the deadline for a motion to bifurcate.)

4. **Exhibits.** ~~A list~~ **Lists** of proposed exhibits must be ~~filed and served~~ **exchanged** by [H-3 weeks].

5. **Service of Exhibits/~~Summary~~**Final Witness List**.** Copies of proposed exhibits and a **final witness list, including** a summary of the expected testimony of each witness must be ~~served on the opposing counsel~~ **exchanged** by [H-2 weeks]. **A copy of the final witness list, excluding the summary of expected testimony, must be filed and served by [H-2 weeks].**

6. **Objections.** Objections to proposed exhibits, including grounds **other than relevancy,** must be exchanged by [H-1 week].

7. **Briefs.** Any hearing brief must be **filed and** served ~~and filed~~ by [H-1 week]. Exhibits not ordered or stipulated admitted may not be attached to a hearing brief or otherwise transmitted to the hearing officer before the hearing.

8. **Hearing.** The hearing is set for [H] and each day thereafter until recessed by the hearing officer, at [location].

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

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

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

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

Rule 10.13: Disciplinary Hearing

Currently, the rules do not specifically state that the hearing may proceed if the respondent doesn't show up—even though the rules do specifically require the respondent to attend the hearing. Subcommittee A proposes an amendment that specifically states that the hearing may go forward if the respondent fails to show up. In addition, language is proposed, consistent with pending amendments to CR 43, that would specifically allow for testimony by telephonic or other contemporaneous electronic means. Finally, (c) is amended to make it clear that a respondent cannot be asked to bring materials to the hearing that have not previously been requested.

**ELC 10.13 DISCIPLINARY HEARING**

**(a) Representation.** The Association is represented at the hearing by disciplinary counsel. The respondent lawyer may be represented by counsel.

**(b) Respondent Must Attend.** A respondent given notice of a hearing must attend the hearing. Failure to attend the hearing, without good cause, may be grounds for discipline. If, after proper notice, the respondent fails to attend the hearing, the hearing may proceed, and the hearing officer ~~or panel~~:

(1) may draw an adverse inference from the respondent's failure to attend as to any questions that might have been asked the respondent at the hearing; and

(2) must admit testimony by deposition regardless of the deponent's availability. An affidavit or declaration is also admissible, if:

(A) the facts stated are within the witness's personal knowledge;

(B) the facts are set forth with particularity; and

(C) it shows affirmatively that the witness could testify competently to the stated facts.

**(c) Respondent Must Bring Requested Materials.** Disciplinary counsel may request in writing, served on the respondent at least three days before the hearing, that the respondent bring to the hearing any documents, files, records, or other written materials or things previously requested in accordance with these rules. The respondent must comply with this request and failure to bring requested materials, without good cause, may be grounds for discipline.

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

**(e) Subpoenas.** The parties may subpoena witnesses, documents, or things under the terms of CR 45. A witness must promptly comply with all subpoenas issued under this rule and with all lawful orders made by the hearing officer under this rule. Subpoenas may be enforced under rule 4.7. The hearing officer ~~or panel~~ may additionally draw adverse inferences as appear warranted by the respondent's failure to respond.

**(f) Prior Disciplinary Record.** The respondent's record of prior disciplinary action, or the fact that the respondent has no prior disciplinary action, must be made a part of the hearing record before the hearing officer ~~or panel~~ files a **decision recommendation**.

Subcommittee A is not recommending any amendments to the following ELCs:

10.14 Evidence and Burden of Proof

10.15 Bifurcated Hearings

Rule 10.16: Decision of Hearing Officer or Panel

Subcommittee A recommends making the deadlines in the rule more realistic and internally consistent, eliminating the ability of the hearing officer to request that the parties submit proposed findings, and amending (c)(2) to refer to the timing of the reply. Finally, the Subcommittee also recommends revising the finality “definitions” in [renumbered] (d).

**ELC 10.16 DECISION OF HEARING OFFICER OR PANEL**

**(a) Decision.** Within ~~20~~ 30 days after the proceedings are concluded, unless extended by agreement, the hearing officer should file with the Clerk a decision in the form of findings of fact, conclusions of law, and recommendation.

**(b) Preparation of Findings.** The hearing officer ~~or hearing panel~~ writes their own findings of fact, conclusions of law, and recommendations. ~~At the request of the hearing officer, or without a request, e~~ Either party may submit proposed findings, conclusions, and recommendation.

**(c) Amendment.**

(1) *Timing of Motion.* Either party may move to modify, amend, or correct the decision as follows:

(A) In a proceeding not bifurcated, within ~~ten~~ 15 days of service of the decision on the respondent lawyer;

(B) In a bifurcated proceeding, within ~~five~~ 15 days of service of:

(i) the violation findings of fact and conclusions of law; or

(ii) the sanction recommendation, but this motion may not seek to modify, amend, or correct the violation findings or conclusions.

~~(C) If a hearing panel member dissents from a decision of the majority, the five or ten day period does not begin until the written dissent is filed or the time to file a dissent has expired, whichever is sooner.~~

(2) *Procedure.* Rule 10.8 governs this motion, ~~except that all members of a hearing panel must be served with the motion and any response and participate in a decision on the motion. A panel’s deliberation may be conducted through telephone conference call.~~ The hearing officer ~~or panel~~ should rule on the motion within 15 days after the filing of a timely ~~response~~ reply or after the period to file a ~~response~~ reply under rule 10.8~~(b)(c)~~ has expired. The ruling may deny the motion or may amend, modify, or correct the decision.

(3) *Effect of Failure To Move.* Failure to move for modification, correction, or amendment does not affect any appeal to the Board or review by the Supreme Court.

~~(d) Dissent of Panel Member. Any member of a hearing panel who dissents from the decision of the majority of the panel should file a dissent, which may consist of alternative findings, conclusions, or recommendation. A dissent should be filed within ten days of the filing of the majority’s decision and becomes part of the record of the proceedings.~~

~~(e) Panel Members Unable To Agree. If no two panel members are able to agree on a decision, each panel member files findings, conclusions, and a~~

**~~recommendation, and the Board reviews the matter whether or not an appeal is filed.~~**

**~~(f)-(d) When Final.~~ If a hearing officer ~~or panel~~ recommends reprimand or an admonition, or recommends dismissal of the charges, the recommendation becomes the final decision if neither party files an appeal. If a hearing officer recommends disbarment or suspension, the recommendation becomes the final decision only upon entry of an order by the Supreme Court under rule 11.12(g) or final action on an appeal or petition for discretionary review under Title 12. ~~and if the Chair does not refer the matter to the Board for consideration within the time permitted by rule 11.2(b)(3). If the Chair refers the matter to the Board for consideration of a sua sponte review, the decision is final upon entry of an order dismissing sua sponte review under rule 11.3 or upon other Board decision under rule 11.12(g).~~**

**SUBCOMMITTEE A RECOMMENDS THAT THE FOLLOWING PROPOSALS *NOT* BE APPROVED:**

**1. Disability proceedings public**

At the June 10, 2010 task force meeting, Subcommittee A asked for guidance on whether disability proceedings should be confidential/closed. As a result of the discussion at that meeting, ODC revised its original proposal and submitted the following proposal that disability proceedings be public only when the respondent asserts disability in an already public discipline proceeding:

Based on the June 10, 2010 discussion at the full Task Force, ODC has rethought the proposal to make all disability proceedings public. Instead, we believe the only disability proceedings that should be public are those proceedings which are the result of a respondent choosing in an already public disciplinary proceeding to assert incapacity to defend under ELC 8.3. In those situations, because the disciplinary proceeding is already public, and most often is the result of grievances by individuals, we are concerned that the current system gives the appearance to the grievant and the public that the proceedings have gone off into an abyss of confidentiality.

Unlike an ELC 8.2 proceeding, where the respondent lawyer has not asked for the disability inquiry to be initiated, the only proceedings under this rule proposal that would be public are those where the respondent has affirmatively asserted their incapacity and by doing so has thereby obtained deferral of the disciplinary proceeding. There are often grievants following the progress of the discipline proceedings and we believe they should be provided with the closure that only a public supplemental proceeding can provide.

To guard against undue embarrassment, ELC 3.3(c) provides that a protective order may be issued when compelling privacy or safety concerns outweigh any public interest. Some degree of embarrassment is inherent in any proceeding we do, whether disciplinary or disability. This proposal gives the hearing officer broad powers to protect the respondent from undue embarrassment. While we incorporate the procedure of protective orders under ELC 3.2(e), we use the substantive standard set forth in GR 15(c)(2), which provides for redaction or sealing when "justified by identified compelling privacy or safety concerns that outweigh the public access to the court record."

In the conforming amendments to ELC 3.1(b) and ELC 3.2(a), we propose a bit of word smithing of the list of rules at the end of ELC 3.2(a) to make it read better. We also add language to ELC 3.3(b) to clarify that the Association can release such information as necessary to conduct the investigation into a disability matter. We believe the language in ELC 3.4(b) authorizing investigative disclosures in disciplinary investigations carries over to an investigation in a disability matter, but believe, for the sake of clarification, that similar language should also be in ELC 3.3(b).



Bar Association, [insert address] and by serving one copy {on the hearing officer} ~~{on each member of the hearing panel}~~ if one has been assigned and one copy on disciplinary counsel at the address[es] given below. ~~Failure to file an answer may result in the imposition of a disciplinary sanction against you and the entry of an order of default under rule 10.6 of the Rules for Enforcement of Lawyer Conduct.~~

**Notice of default procedure: Your default may be entered for failure to file a written answer to this formal complaint within 20 days of service as required by rule 10.6 of the Rules for Enforcement of Lawyer Conduct. THE ENTRY OF AN ORDER OF DEFAULT ~~may~~ WILL RESULT IN THE ALLEGATIONS AND VIOLATIONS charges of misconduct IN THE FORMAL COMPLAINT BEING ADMITTED AND ESTABLISHED ~~discipline being imposed or recommended based on the admitted charges of misconduct~~ AND YOUR DISBARMENT MAY BE RECOMMENDED TO THE SUPREME COURT TOGETHER WITH SUCH RESTITUTION AS MAY BE ESTABLISHED BY DISCIPLINARY COUNSEL. If an order of default is entered, you will lose the opportunity to participate further in these proceedings unless and until the order of default is vacated on motion timely made under rule 10.6(c) of the Rules for Enforcement of Lawyer Conduct. The entry of an order of default means that you will receive no further notices regarding these proceedings except those required by rule 10.6(b)(2).**

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

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

WASHINGTON STATE BAR ASSOCIATION

By \_\_\_\_\_

Disciplinary Counsel, Bar No.

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

**(b) Notice When Hearing Officer ~~or Panel~~ Not Assigned.** If no hearing officer ~~or panel~~ has been assigned when a formal complaint is served, disciplinary counsel serves the formal complaint and a notice to answer as in section (a), but without reference to the hearing officer ~~or panel~~.

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## ELC 10.6 DEFAULT PROCEEDINGS

### (a) Entry of Default.

(1) *Timing.* If a respondent lawyer, after being served with a notice to answer as provided in rule 10.4, fails to file an answer to a formal complaint or to an amendment to a formal complaint within the time provided by these rules, disciplinary counsel may serve the respondent with a written motion for an order of default.

(2) *Motion.* Disciplinary counsel must serve the respondent with a written motion for an order of default and a copy of this rule at least five days before entry of the order of default. The motion for an order of default must include the following:

(A) the dates of filing and service of the notice to answer, formal complaint, and any amendments to the complaint; and

(B) disciplinary counsel's statement that the respondent has not timely filed an answer as required by rule 10.5 and that disciplinary counsel seeks an order of default under this rule; and

(C) notice that a default will result in the allegations and violations in the formal complaint being admitted and established, and a recommendation to the Court for the respondent lawyer's disbarment and such restitution as may be established by disciplinary counsel.

(3) *Entry of Order of Default.* If the respondent fails to file a written answer with the Clerk within five days of service of the motion for entry of an order of default, the hearing officer, or if no hearing officer ~~or panel~~ has been assigned, the chief hearing officer, on proof of proper service of the motion, enters an order finding the respondent in default.

(4) *Effect of Order of Default.* Upon entry of an order of default, the allegations and violations in the formal complaint and any amendments to the complaint are deemed admitted and established ~~for the purpose of imposing discipline~~ and the respondent may not participate further in the proceedings unless the order of default is vacated under this rule.

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

(1) *Service.* The Clerk serves the order of default and a copy of this rule under rule 4.2(b).

(2) *No Further Notices.* Notwithstanding any other provision of these rules, ~~a~~After entry of an order of default, no further notices, motions, documents, papers, or transcripts need ~~must~~ be served on the respondent except for copies of the decisions of the hearing officer ~~or hearing panel and~~ , the Board, and the Court.

(3) *Disciplinary Proceeding.* Within ~~60~~ 20 days of the filing of the order of default, ~~the hearing officer must conduct a disciplinary proceeding to recommend disciplinary action based on the allegations and violations established under section (a). At the discretion of the hearing officer or panel, these proceedings may be conducted by formal hearing, written submissions, telephone hearing, or other electronic means. Disciplinary counsel may present additional evidence including, but not limited to, requests for admission under rule 10.11(b), and depositions, affidavits, and declarations regardless of the witness's availability.~~

disciplinary counsel must file a statement of any requested restitution sought under rule 13.7, together with any supporting documentation. Within 60 days of the filing of the order of default the hearing officer must enter an order finding the allegations and violations of the formal complaint, and any amendments to the complaint, as established and recommending the ~~respondent lawyer's disbarment~~ appropriate sanctions and such restitution as may be established by disciplinary counsel's statement.

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

**[remainder of rule [(c) and (d)] unchanged]**

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### **ELC 10.13 DISCIPLINARY HEARING**

**[(a) – (c) not affected by this proposal]**

**(d) Witnesses.** Except as provided in subsection (b)(2) ~~and rule 10.6~~, witnesses must testify under oath. Testimony may also be submitted by deposition as permitted by CR 32. Testimony must be recorded by a court reporter or, if allowed by the hearing officer, by tape recording. The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.<sup>1</sup>

**[remainder of rule [(e) and (f)] unchanged]**

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<sup>1</sup> Edits submitted by Subcommittee A for approval at page 65 are not reflected here.