



# WSBA

## Board of Governors DISCIPLINE COMMITTEE

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### REPORT OF THE WASHINGTON STATE BAR ASSOCIATION BOARD OF GOVERNORS DISCIPLINE COMMITTEE

**Douglas C. Lawrence, Chair**

**September 19, 2008**

The following report contains the recommendations of the Board of Governors Discipline Committee (“BOG DC”) in response to the recommendations of the 2006 Report on the Lawyer Regulation System of the State of Washington prepared by the American Bar Association (“ABA Report”).

#### **HISTORY**

In 1980, the ABA Standing Committee on Professional Discipline (“ABA Committee”) initiated a national program to confer with state lawyer disciplinary agencies upon invitation by the jurisdiction’s highest court. In the early 1990s the Washington State Supreme Court invited the ABA Committee to review Washington’s discipline system and provide its recommendations to the Court. In 1993 the Committee submitted a consultation Report to the Washington Supreme Court. That report contained many recommendations for the Court’s consideration. Subsequent to the issuance of the 1993 report the Court and the WSBA made significant changes to Washington’s discipline system, with several of those changes being made to address recommendations contained in the 1993 report.

At the invitation of the Washington Supreme Court, the ABA Standing Committee on Professional Discipline sent a team to conduct a review of the attorney discipline system in the State of Washington again in March of 2006. After completing its review the ABA Standing Committee on Professional Discipline issued a report containing 27 recommended changes to Washington’s discipline system. The report was issued in August of 2006.

In the fall of 2006 the Washington State Bar Association Board of Governors directed that the BOG DC review the recommendations contained in the report. The purpose of the review is to

provide the Board of Governors with the BOG DC's own assessment of the ABA's recommendations. The purpose is also to determine if there are other aspects of the discipline system that the BOG DC believes should be modified.

The first meeting of the BOG DC to discuss these issues was held on October 5, 2006. At that meeting core constituencies were identified which the BOG DC believed should be involved in the initial review of the ABA recommendations. This included representatives of the discipline system, the Board of Governors, and the WSBA. A second meeting was held on November 15, 2006 at which representatives from the core constituencies were present. At that meeting each of the ABA recommendations was reviewed and discussed. A preliminary determination was made concerning those ABA recommendations that the BOG DC believed warranted further study, and those that the BOG DC believed need not be pursued.

A summary of the BOG DC's recommendations was provided to the Board of Governors on November 24, 2006. The BOG DC then formed five task forces to evaluate the BOG DC's recommendations in detail. These task forces consist of members of the BOG DC and other individuals having an interest or expertise relevant to the recommendations being considered. The ABA Recommendations that were considered by each task force are noted in the materials below, as is each task force's membership.

A preliminary meeting of all task force members was held in March of 2007. The task forces met periodically to conduct and complete the review of their assigned ABA recommendations. The BOG DC also held periodic meetings to receive and consider the reports of the five task forces. Each task force prepared a report of its findings and recommendations.

The BOG DC meet on January 25, 2007 and February 27, 2008 to review the recommendations of the task forces and developed its preliminary recommendations to the BOG. A meeting of all task force members and of all members of the BOG DC was held on April 28, 2008 to review the BOG DC's preliminary recommendations. This is referred to as the April Meeting of the Whole in this report.

## **REPORT**

This report contains the recommendations of the BOG DC. The narratives relating to the recommendations of the task forces are drawn principally from the various task force reports. Those reports provide each task force's response to the ABA Recommendations the task force was assigned to review, as well as the task force's suggestions about other issues that the task force believed warranted discussion. In order to obtain a full understanding of the ABA's recommendations this report should be read in conjunction with the ABA Report.

## **TASK FORCE 1**

### **Assignment and Membership**

Task Force 1's assignment was to review ABA Recommendations 1, 10 and 22.

ABA Recommendation 1: The Supreme Court's Oversight Of The Washington Discipline System Should Be Emphasized.

ABA Recommendation 10: The Court Should Amend Rule 5.3(a) Of The Rules For Enforcement Of Lawyer Conduct To Eliminate The Washington State Bar Association's Role in Opening Grievances.

ABA Recommendation 22: The Disciplinary Board and the Court Should Administer Reprimands.

The members of Task Force 1 are:

Justice Susan Owens of the Washington State Supreme Court  
Stan Bastian, President of the Washington State Bar Association  
Ellen Dial, Immediate Past President of the Washington State Bar Association  
Mark Johnson, President Elect (2008 – 2009) of the Washington State Bar Association  
Doug Lawrence, 8<sup>th</sup> District Governor of the Washington State Bar Association (Chair)  
Paula Littlewood, Executive Director of the Washington State Bar Association  
Doug Ende, Chief Disciplinary Counsel  
Tom Andrews, the University of Washington School of Law

## REPORT

**ABA Recommendation 1: The Supreme Court's Oversight of the Washington Discipline System Should Be Emphasized.**

### **ABA Recommendation Issues:**

An initial recommendation of the ABA Committee in its 1993 report was that the discipline system should be separated both administratively and physically from the Washington State Bar Association. This is based on the ABA's strong belief as embodied in the *ABA Model Rules for Lawyer Disciplinary Enforcement* that the Supreme Court of the state should exercise direct control over the discipline system. Although many changes to Washington's disciplinary system were made in response to the 1993 recommendations, the system remains under the administration of, and is physically co-located with, the Washington State Bar Association, but remains ultimately under the control of the Supreme Court.

A principal recommendation of the ABA Committee in the present report is that the discipline system should be administratively separated from the WSBA. Primary areas of concern are the image of independence in the discipline system and the WSBA's control of the disciplinary budget.

The report suggests that the Office of Disciplinary Counsel should be renamed the Office of Disciplinary Counsel of the Supreme Court of Washington. The report further suggests that the ELCs should be amended to repeal any provisions providing specifically or implicitly that the Chief Disciplinary Counsel acts on behalf of the Washington State Bar Association, that matters

may be opened and pursued in the name of the Association, and that the captions of pleadings in disciplinary matters include the name of the Bar Association.

To accomplish these goals the ABA Committee recommends that the Supreme Court appoint an Independent Administrative Oversight Committee for the discipline system. The Oversight Committee would interact directly with the Supreme Court. It would be responsible for general administrative oversight of the entire disciplinary system, focusing on the efficiency of processing cases at the investigative, hearing and appeal levels, resource planning for the agency, public education and outreach, training of system volunteers, and, in addition to the Chief Disciplinary Counsel, proposing new disciplinary rules to the Court. The members of the Committee would be appointed by the Supreme Court.

The Oversight Committee would be responsible for the appointment of Hearing Officers and Disciplinary Board members, and would oversee their activities. The Oversight Committee would also perform public outreach to the profession and the public about the discipline system.

The ABA Committee also recommends that the Supreme Court be responsible for the screening and appointing of Chief Disciplinary Counsel. The Chief Disciplinary Counsel should prepare and submit a budget for the disciplinary system to the Oversight Committee, with final approval being made by the Supreme Court. The Chief Disciplinary Counsel should report to the Oversight Committee monthly.

#### Issues Needing to Be Addressed As Determined By Task Force 1

Task Force 1 identified several specific issues that it believed needed to be addressed:

- Whether there is a need under certain circumstances for the Office of Disciplinary Counsel to be able to voice dissenting opinions or minority views on positions taken by the WSBA
- Whether there is a need for additional protections against the possible exertion of influence by the WSBA in individual discipline cases
- Whether there is a need for more public involvement
- Whether there is a need to enhance the public perception of the independence of the discipline system
- Whether there is a need for some more clearly defined process for oversight of the discipline system
- Issues associated with the WSBA's ability to hire and fire the Chief Disciplinary Counsel and others who may affect or set disciplinary policy and practice, set the budget, and appoint Hearing Officers and members of the Disciplinary Board.

Task Force 1 evaluated several options, including the recommendation of the ABA Committee. Task Force 1 came to a general conclusion that the discipline system presently operates well, and that the benefits derived from retaining the present system outweighed the risks inherent in making wholesale changes to the system. It discussed the recommendation of the ABA Committee, but rejected it as creating an additional and costly layer of bureaucracy which would likely do little to improve the disciplinary system.

A first alternative that was discussed was the establishment of an oversight committee that would have fewer specific duties than those contemplated by the ABA's Oversight Committee. Rather than being charged with all aspects of administration of the discipline system, the committee would focus on general oversight of the operation of the discipline system. Among other things, the Office of Disciplinary Counsel would report to the oversight committee; the committee's concurrence would be required for the issuance of Formal Opinions; it would provide recommendations to the Supreme Court for Hearing Officers and members of the Disciplinary Board and it would provide specific oversight over and input into the budgetary process.

It was contemplated that this oversight committee would have ten members. The Supreme Court would appoint three judges and one nonlawyer. The WSBA would appoint two lawyers and one nonlawyer. The Attorney General would appoint three members, at least one of whom would be a nonlawyer.

After discussing this revised oversight committee at length Task Force 1 concluded that this option would also increase the administrative burden on the discipline system without creating a sufficient offsetting benefit. It was from these discussions that the concept of the Disciplinary Advisory Roundtable was born.

Task Force 1 believes that the Roundtable proposal is an efficient and effective means to address several of the key issues. The Roundtable will provide a forum for the discussion of significant issues affecting the discipline system among the key parties. Task Force 1 believes that integrating this process into the existing framework will ensure that significant issues will be thoroughly examined. The fruits of these examinations can then be used by the decision makers, including the Board of Governors and the Supreme Court, as part of their process. Equally as important there will be a formal report prepared on the state of the disciplinary system each year, which will help to inform the decision makers about existing strengths, weaknesses and possible problems. This may include deficiencies in the operation of the system, deficiencies in funding, or problems with the relationship between the WSBA and the discipline system.

### Dissenting View

Professor Thomas Andrews believes that it would be better to completely separate the discipline system administratively and physically from the WSBA at this time. If the process were being designed "from scratch," this view would also be held by former Acting Chief Disciplinary Counsel Randy Beitel and Chief Disciplinary Counsel Douglas Ende. However, Mr. Ende ultimately supported the recommendation of Task Force 1 in light of the quality and efficacy of Washington's current discipline system, which is for the most part working well, and in light of the apparent lack of system-wide support for implementation of a wholesale change. Mr. Beitel left Task Force 1 before it formulated its recommendation.

Professor Andrews believes that it would be better to completely separate the disciplinary system from the WSBA now for several reasons. Having a fully independent disciplinary system would address the major issues that are presented: the public perception and the appearance of independence; possible interference with prosecutorial independence by the WSBA through its

officers or Board of Governors; actual independence on policy issues – both in the formulation of those policies and in the execution of the policies through the exercise of its prosecutorial discretion. Until the discipline system is completely separated from the WSBA there will always be a risk that the independence of the discipline system will be compromised. This could be through the hiring or firing of personnel; manipulation of the budget; appointment of persons involved with the discipline system (i.e. Hearing Officers or Disciplinary Board members); and/or issuance of Formal Opinions. Furthermore, and at least equally as important, there will continue to be a public perception of the “fox guarding the henhouse.” For a disciplinary system to be effective, it has to have the respect and support of the people it is designed to protect – the population at large. Until there is a true separation of the discipline system from the WSBA – the lawyers’ own trade association – that respect and support may never be achieved. Significantly for Professor Andrews, separation of the disciplinary system from the WSBA was also advocated by former Chief Disciplinary Counsels Barrie Althoff and Anne Seidel in their presentations to the Task Force.

**Recommendation of the BOG Discipline Committee:**

1. The BOG DC does not recommend that ABA Recommendation 1 be adopted. The BOG DC does recommend that a Disciplinary Advisory Roundtable (“DAR”) be established on a trial basis for a period of two years. The DAR’s duties and responsibilities would be to:
  - Act as a forum for the discussion of disciplinary issues and act as an ombudsman for complaints relating to the disciplinary system.
  - Provide recommendations and input on disciplinary issues to decision makers, such as the Board of Governors and the Supreme Court, including input on potential key hires in the disciplinary system.
  - Provide an annual report to the Supreme Court and the Board of Governors regarding the state of the discipline system in Washington, including any recommendations for change and the identification of concerns or issues.
  - The Disciplinary Advisory Roundtable would not have independent decision-making authority.

The DAR would be composed of the following members:

- A member of the Supreme Court, who will serve as Chair of the Roundtable
- The Chief Disciplinary Counsel
- A member of the WSBA Board of Governors
- The Executive Director of the WSBA
- The Chief Hearing Officer
- The Chair of the Disciplinary Board
- A Respondent’s Counsel representative
- Two Nonlawyers
- An active member of the Bar who is not otherwise involved in the disciplinary process
- A lawyer from the Office of General Counsel with responsibility for staffing the Disciplinary Board and/or Hearing Officers

The Roundtable would initially be established by the Board of Governors. If after the two year trial period it was determined that the DAR was providing value to the disciplinary system, the DAR could be formalized by Court Rule.

The vote to recommend implementation of the DAR was not unanimous. At a meeting of the BOG DC in January of 2008 there was one dissenting vote, and at the April Meeting of the Whole two participants expressed support for the dissenting view. The dissenting view is that the disciplinary system presently works well and as a result there is no perceived need for a DAR.

2. There are certain circumstances under which WSBA staff who are representatives of the disciplinary system and who are involved in the disciplinary system need to be able to have their views heard independent of the WSBA. When rules and rule changes affecting the disciplinary system are proposed to the Supreme Court, dissenting views should be presented to the Court. The BOG Discipline Committee recommends that GR 9(e) be amended to specifically provide for the inclusion of dissenting views in the submission to the Court.
3. Rule 2.2(b) of the Rules for Enforcement of Lawyer Conduct should be broadened to make it clear that the Board of Governors has no authority to intervene at any stage of the disciplinary process, i.e., not only in “decisions or recommendations” of hearing officers or the Disciplinary Board but also in the Office of Disciplinary Counsel’s investigations, file openings, and the like. The Rules of Enforcement of Lawyer Conduct should also be amended to clarify that in addition to Governors, the Executive Director, Deputy Directors and all WSBA officers are subject to the same limitations and restrictions.
4. The Board of Governors should no longer appoint members of the Disciplinary Board. They should instead be appointed by the Supreme Court. The Board of Governors should recommend Disciplinary Board member candidates to the Supreme Court.
5. The Board of Governors should no longer appoint Hearing Officers. They should instead be appointed by the Supreme Court. The Board of Governors should recommend Hearing Officer candidates to the Supreme Court.

**ABA Recommendation 10: The Court Should Amend Rule 5.3(a) Of The Rules For Enforcement Of Lawyer Conduct To Eliminate The Washington State Bar Association’s Role in Opening Grievances.**

Under ELC 5.3(a), if there is no grievant the Washington State Bar Association may open a grievance in the Association’s name. The ABA recommends that this rule be amended to provide that in such cases the investigation be opened by Disciplinary Counsel.

**Recommendation of the BOG Discipline Committee:**

The BOG DC concluded that there would be a benefit in making this change. By having grievances opened by and in the name of the Office of Disciplinary Counsel it will help to confirm that specific grievances are to be handled within the disciplinary system and are not to be interfered with by others in the WSBA.

**ABA Recommendation 22: The Disciplinary Board and the Court Should Administer Reprimands.**

Rule 13.4 (a) of the Rules for Enforcement of Lawyer Conduct provides that reprimands are administered by the Washington State Bar Association via a written statement signed by the President of the Association. The ABA Committee recommends that the Court amend Rule 13.4 to eliminate the role of the Washington State Bar Association in the imposition of reprimands, and that the Disciplinary Board be given the authority to administer reprimands.

**Recommendation of the BOG Discipline Committee:**

Initially the BOG DC felt that there was merit to the ABA's Recommendation. The BOG DC also considered the possibility of having reprimands issued by the Chief Justice or the Clerk of the Supreme Court as alternatives. However, after significant discussion the BOG DC concluded that this Recommendation should not be adopted and that the current process should be retained. The BOG DC believes there is value in having reprimands issued by the senior officer of the WSBA. By having the President sign the reprimand it emphasizes its serious nature. It also ensures that the President, and through the President the WSBA BOG, will remain informed of matters giving rise to the issuance of reprimands.

## **TASK FORCE 2**

### **Assignment and Membership**

Task Force 2's assignment was to review ABA Recommendations 2, 3, 5, 6, 7 and 15.

ABA Recommendation 2: The Number Of Review Committee Members Should Be Increased.

ABA Recommendation 3: Quality Issues At The Hearing Officer Level Of The System Should Be Addressed.

ABA Recommendation 5: Volunteers In The Disciplinary System Should Receive More Intensive And Mandatory Formal Training.

ABA Recommendation 6: The Discipline System Should Have Adequate Technology Resources.

ABA Recommendation 7: Improved Scheduling Practices Will Lessen Delay At The Hearing Level.

ABA Recommendation 15: The Administrative Oversight Committee And Disciplinary Counsel's Office Should Develop For Court Approval, Standards For The Appointment Of Counsel For Respondents In Disability Proceedings And A Roster Of Volunteer Counsel To Serve In That Capacity.

The members of Task Force 2 are:

Kristal Wiitala, 3rd District Governor of the Washington State Bar Association (Chair)  
Lonnie Davis, Former Governor of the Washington State Bar Association  
Jim Danielson, Chief Hearing Officer  
Marsha Matsumoto, Office of Disciplinary Counsel  
Elizabeth Turner, Office of General Counsel (WSBA)  
Kurt Bulmer, Respondent's Counsel

## **REPORT**

**ABA Recommendation 2: The Number of Review Committee Members Should be Increased.**

### **ABA Recommendation Issues:**

1. *Number Of Review Committee Members.* The ABA Report recommends that the number of Review Committee members be increased. The Disciplinary Board (DB) and members of the Review Committee (RC) do not see a great need for additional members at this time. One proposal by Task Force 2 is for persons to serve for a year or two as RC members before serving on the Disciplinary Board. This would provide better training, but it may be difficult to obtain

that long of a volunteer commitment. If non-DB members are added, they should only be one of the three members of a RC. If the DB is given greater decision-making authority under other proposals, it may be necessary to revisit this issue as the workload of the DB may increase. Task Force 2 suggests that a review and comparison of volunteer hours may help address this issue.

Although it has always been the position of the DB that two members of an RC constitutes a quorum, Task Force 2 recommends clarifying in the Rules for Enforcement of Lawyer Conduct (ELC) to make this clear. This will avoid needing to reschedule in emergency situations or adding a temporary member if one person is not available to attend or is recused.

The ABA Report also recommends increasing the number of RC members by redeploying those Hearing Officers who may be removed if the pool of Hearing Officers is downsized. (See below for discussion on the size of the Hearing Officer panel.) Task Force 2 does not recommend that former Hearing Officers automatically be added to RCs. Former Hearing Officers may not have developed sufficient expertise if they have not conducted hearings. There may also be quality issues associated with Hearing Officers that are removed for performance issues.

Task Force 2 believes that the BOG and WSBA should look at how they recruit nonlawyer RC members and work on measures to market and increase involvement from persons already involved with law firms. The DB has had to use prior members when there are nonlawyer vacancies which has generally been successful.

2. *Recusal Of RC Members On Disciplinary Board.* The ABA Report suggests that the ELCs should be amended to require RC members who are also members of the DB to recuse themselves from consideration of matters that go before the DB. Task Force 2 does not believe this is a valid issue since RCs do not make decision on the merits. Appearance of fairness issues do not apply and this is not an ex parte contact. In fact, increased familiarity with the facts may be of assistance with DB deliberations. RC members may choose to recuse themselves in a particular case, but mandatory recusal should not be a general rule.

3. *Volume Of Materials.* The ABA Report recommends that the volume of materials sent to RC members be minimized. There was discussion about only sending draft charges, supporting exhibits, respondent's response, and exculpatory evidence, with the RC having the right to ask for additional evidence if needed. Task Force 2 does not agree with this recommendation. They believe it is better to have the full record, giving them "another look" at grievance dismissals. ODC should not edit or screen materials that are to be sent to a RC to avoid allegations of slanting or stacking the record. Task Force 2 does believe that draft charges should not be sent.

To help with the physical volume of materials Task Force 2 recommends that the method for transmitting the record to the RC be changed. By using searchable scanning technology materials can be sent in electronic format which will improve the current heavy load of paper and make the process more efficient. (See Recommendation 6 below.) RC members should be sent materials in electronic format on a CD, but they should also be allowed to opt for paper if deemed necessary. This process is already being implemented.

### **Recommendation of the BOG Discipline Committee:**

1. No change in the number of Review Committee members is needed.
2. Recruitment of nonlawyer Disciplinary Board members should be reviewed and improved.
3. Review Committee members need not recuse themselves in every matter that they addressed in committee.
4. Materials should be provided in electronic searchable format but the nature of materials provided should not be changed.
5. Add language to the ELCs to confirm that two members of a Review Committee may act as a quorum, and that the language is added for purposes of clarification only and does not constitute a change in the rule.

### **ABA Recommendation 3: Quality Issues at the Hearing Officer Level of the System Should be Addressed.**

#### **ABA Recommendation Issues:**

1. *Training.* Training should be provided by the WSBA to Hearing Officers to improve targeted areas, including (a) judicial demeanor, (b) reducing an advocacy role in proceedings, (c) enhancing control over proceedings, (d) providing opportunity to observe hearings or mock hearings, (e) promoting consistency in sanction recommendations. To accomplish these goals Task Force 2 recommends the following:

- HOs should attend the Discipline Academy on substantive legal issues. (See Recommendation 5, #1.)
- HOs should have mandatory training on procedural issues and on judicial demeanor and conduct. (see Recommendation 5, #2.)
- The ELC Rule on training does not need to be changed but the system should be better funded with additional training provided.
- CLE credits should be given for the training sessions.

2. *Number of Hearing Officers and Compensation.* The ABA Report recommends that the pool of HOs be decreased from the current authorized level of 66 to allow the HOs to gain more experience. As of October 1, 2008, there will be 56 HOs in the pool, with nine having terms expiring in 2009.

In 2006, there were approximately 28 hearings, with 12 defaults and 16 contested hearings so assignments to each HO were not made. ODC is concerned with the limited number of assignments per HO with the current size of the pool because the officers do not gain sufficient experience, and the public and profession are not served by untrained or inexperienced HOs who do not demonstrate appropriate judicial demeanor or write sound decisions. ODC supports the recommendations of Discipline 2000 to reduce the total number of HOs to approximately ten,

with increased professional qualifications and compensation as recommended in that report, or reserving the issue of compensation pending the outcome of the WSBA study on compensation of volunteers.

Chief Hearing Officer Danielson asked current hearing officers if they would be willing to serve if their workload was doubled. About 20 stated they could not continue to volunteer under those circumstances. If the pool of HOs decreased to 50 through attrition, each HO would have approximately 1 ½ hearings per year. Only 4 or 5 of the HOs in the current pool would not be able to handle this workload. Chief Hearing Officer Danielson believes that if assignments exceeded 1-2 cases per year he would lose his best HOs and he would not be able to retain active litigators. He also believes the best HOs are persons who are actively practicing law and that they should not be compensated.

The WSBA Office of General Counsel observes that compensating Hearing Officers may give rise to a perception that they are “in the pocket” of the WSBA and may raise appearance of fairness issues. While some HOs may decline to serve if an increased workload is required, others may appreciate the experience as an adjudicator.

The following three alternatives each had support from different members Task Force 2 and were presented for consideration by the full BOG DC:

- Alternative A: Reduce to a pool of 50 HOs and retain the policy of no compensation.
- Alternative B: Reduce to a pool of 30 HOs with no compensation.
- Alternative C: Adopt the Discipline 2000 recommendation to reduce the pool of HOs to ten and reserve the issue of compensation pending the outcome of a WSBA study on the compensation of volunteers.

This issue was the subject of significant debate. Some participants believe strongly that the system should not change from one that uses volunteer hearing officers, and that the number of hearing officers should be no fewer than 50. Others believe strongly that the only way for HOs to gain appropriate skill and knowledge is to have them handle more cases. Because of the significant time commitment that would involve, they also believe it would be appropriate to compensate HOs.

Task Force 2 also recommends that the ELC Rules be amended to allow the CHO to remove a hearing officer at any time from the list of HOs without cause, and to provide for an initial two-year appointment for a HO, with reappointments to be for periods of four years. The initial two-year term will give the new HO a better opportunity to gain experience, and will also provide a better opportunity for the CHO to evaluate the new HO’s performance.

3. *Staff Counsel and Technological Resources for Hearing Officers.* The ABA Report recommends that HOs be provided with staff counsel to assist them. The ABA Report also recommends that “appropriate technological resources” be provided to allow HOs to conduct their business effectively and efficiently. Task Force 2 notes that HOs may currently consult with one of the lawyers in the WSBA’s Office of General Counsel who is not part of ODC (presently Elizabeth Turner). Task Force 2 believes that enhanced training (Recommendation 5)

and availability of resources and disciplinary decisions on a website (Recommendation 6) will reduce the need for any additional assistance in this area.

4. *Need for Consistency in Sanction Recommendations and a Proportionality Analysis.* The ABA Report suggests that written guidelines should be formulated for developing sanction recommendations, and that counsel to the HOs and the DB should prepare a proportionality analysis after each trial for use by the adjudicators. Task Force 2 does not support these recommendations. The consensus in Task Force 2 is that the burden is on Respondent's counsel to raise the issue of a disproportionate sanction, and that having a HO review the proposed sanction would require a bifurcated hearing in these matters. Task Force 2 also believes that increased access to other decisions (Recommendation 6) will improve consistency in this area.

#### **Recommendation of the BOG Discipline Committee:**

1. The BOG DC recommends the institution of a smaller pool of compensated, well-trained hearing officers who are in, or connected to, the active practice of law. It is further recommended that a subcommittee be appointed to look specifically at this issue and come back with a recommendation. This position was approved at the April Meeting of the Whole, with two Committee members opposed. It was also agreed that the three alternatives set out above (Alternatives A – C) should be presented to the BOG for their consideration.
2. The BOG DC also recommends that the ELC Rules be amended to allow the CHO to remove a hearing officer at any time from the list of HOs without cause, and to provide for an initial two-year appointment for a HO with reappointments to be for periods of four years.

NOTE: The issue of the CHO's ability to unilaterally remove a hearing officer from the list of HOs at any time without cause should be reconsidered to determine if it is inconsistent with the BOG DC's recommendation that HOs should be appointed by the Supreme Court (see the BOG DC's recommendation number 5 with respect to ABA Recommendation 1, *supra*).

#### **ABA Recommendation 5: Volunteers in the Disciplinary System Should Receive More Intensive and Mandatory Formal Training.**

##### **ABA Recommendation Issues:**

The ABA Report states that the current amount of training provided to volunteers in the disciplinary system is insufficient.

1. *General CLE.* Task Force 2 recommends that the WSBA offer a Discipline Academy CLE program that is open to all and that could be attended by all involved in the discipline system.
  - The Discipline Academy CLE should be a two-day seminar produced by the WSBA CLE Department. The first day would be open to general attendance and would focus on substantive and procedural law in the area. The second day would be devoted to

breakouts with specialized training relevant to the disciplinary system. This would include specific skill training for Hearing Officers and Disciplinary Board members.

- Topics would include substantive law in the area, changes in RPCs, recent cases, and discipline system general procedures.
- Attendance for volunteers (Hearing Officers, Disciplinary Board members) should be funded through the WSBA. Others would be charged standard CLE registration fees. The WSBA should budget at least \$5,000 to \$10,000 to fund this training.
- CLE credits should be provided for attending the Discipline Academy.
- The Discipline Academy should be videotaped or recorded so that it can be offered to new volunteers or to persons who cannot otherwise attend.

2. *Hearing Officers.* Task Force 2 also recommends that Hearing Officer Training be enhanced with additional funding provided by the WSBA.

- The Budget should be increased to provide training identified in the ABA Recommendations on judicial demeanor, reducing advocacy and bias, case management, and consistency in sanction recommendations. Options for training after or in addition to the Discipline Academy include:
  - Allowing HOs to attend in-state training modules that are now offered to court judges or ALJs
  - Sending HOs to the National Judicial College
  - Developing a training curriculum with the WSBA CLE Department
  - Contracting with the National Judicial College to provide training
  - Allowing Disciplinary Board members to attend sessions on adjudication, including break-out session on appellate review
- Registration fees for HOs to attend the Discipline Academy should be waived.
- Develop a mock hearing DVD for use by incoming HOs.
- Offerings should be designed to ensure that CLE credit is given.
- The WSBA should investigate whether a license can be obtained to post the ABA Annotated Standards for Imposing Lawyer Disciplinary Sanctions online for HOs if purchasing books not considered fiscally feasible. Copies of the ABA Annotated Standards for Imposing Lawyer Disciplinary Sanctions should also be kept in the WSBA hearing room.

3. *Disciplinary Board.* Task Force 2 recommends that Disciplinary Board Training also be increased.

- Currently only four hours of training is provided to new members. Task Force 2 concurs that more training is needed.
- Registration fees for DB members to attend the Discipline Academy should be waived.
- DB members should be included in the general training sessions on adjudication that Task Force 2 recommends be provided to HOs.
- The Chair or Vice Chair of the Disciplinary Board should attend the National Counsel of Lawyer Disciplinary Boards Conference.

4. *Adjunct Investigative Counsel.* Task Force 2 was not certain what the training needs of adjunct investigative counsel might be.

- There are currently 96 adjunct investigative counsel on the panel, but only two or three are used each year.
- Adjunct Investigative Counsel should be informed of the Discipline Academy and encouraged to attend but it may be too costly to waive the registration fee for them.
- Although this was outside the scope of its assignment, Task Force 2 recommends that the number of Adjunct Investigative Counsel be reviewed and probably decreased.

5. *Technology.* Task Force 2's recommendations on technology under Recommendation 6 will improve available resources to answer questions as they arise and improve the general knowledge of those involved in the discipline system.

#### **Recommendations of the BOG Discipline Committee:**

1. Offer increased specialized adjudicative training for Hearing Officers.
2. Increase access by Hearing Officers to the ABA Annotated Standards for Imposing Lawyer Disciplinary Sanctions.
3. Provide enhanced training, including training on the appellate role, for Disciplinary Board members.
4. Before these recommendations are formally adopted there must be a fiscal analysis of their impact. The BOG DC recommendations are conditioned on the Board of Governors' determination that the fiscal impact is reasonable and acceptable.

#### **ABA Recommendation 6: The Discipline System Should Have Adequate Technology Resources.**

##### **ABA Recommendation Issues:**

The ABA Report states that the disciplinary system must have adequate technology resources to operate as effectively and efficiently as possible. It notes that an important tool is the development of an electronic compendium of previously filed hearing officer decisions and Disciplinary Board orders and opinions (referred to in the ABA Report as "Hearing Officer/Panel, Disciplinary Board and Court reports, recommendations and opinions"). The ABA Report recommends that Disciplinary Counsel have access to that information, but in a separate data base from that used by the system's adjudicators.

1. *Increase Access To GILDA For HOs And The DB.* The CHO has customized remote access to the GILDA case management system through a hard-wired connection. Extending access to others would be beneficial but would be easier to accomplish through the internet. The WSBA IT Department has plans to create secure web-based access to this system. It is anticipated that when this is in place, WSBA IT can build in customized access to outside users based on permissions such as only giving an HO access to cases the HO is assigned to.

- Task Force 2 recommends that the WSBA support the current planned upgrades to GILDA to move to a web-based system, including customized access, more report options, case management tools and other system improvements.
- Task Force 2 also recommends setting a priority for staff time and resources to create levels of access to HOs and DB members (or at least the Chair and Vice Chair) as needed to provide needed information on cases to which they are assigned.

2. *Searchable Database Of All Public Opinions And Decisions For HOs And The DB.* These decisions are public yet difficult to locate for those involved in the disciplinary system, including respondents' counsel. A hard copy of the full decision can be mailed out by the WSBA upon request, but this is a cumbersome process. Currently only Bar News summaries are available on the Lawyer Directory but more complete access to cases will increase available information about proportionality and give a complete statement of facts to increase consistency in the process. Because these decisions are public, there is no reason not to make them available to the public on the internet. The WSBA IT Department is investigating searchable scanning systems. Getting decisions online and building search functions will take programming time. Having decisions online and in a specific format will likely lead to more uniformity in sanctions.

Task Force 2 makes the following recommendations:

- The WSBA continue to pursue and support the purchase of system and staff time to scan decisions into a searchable format to post online and make available through the WSBA web site.
- Access to full decisions be made available to anyone who wishes to see them. Access should not be limited to those involved in disciplinary system. Decisions should be posted when final. Final stipulations should also be posted as they are also a matter of public record, but with a clear notation that they are not precedential.
- The WSBA should check with Casemaker to see if they would be willing to receive and maintain these decisions. However, WSBA will still need to prepare and provide these decisions to Casemaker in a standard searchable electronic format which is not currently available for older cases.
- Decisions should also be linked to the Lawyer Directory in lieu of the summaries currently posted. Notices in the Bar News could be summarized more succinctly with an online link to the full decision. This should save staff time in developing more detailed summaries.

3. *Separate Database For ODC For Access To Decisions.* Task Force 2 does not agree that a separate database should be created for use only by ODC. Task Force 2 believes that decisions should be made available to all and does not recommend adoption of this recommendation. See item 2 above.

4. *Purchase Of High-Quality Scanner For Past Decisions.* The ABA Report recommends acquiring a high quality scanner to build the database for the online system. WSBA IT staff is currently investigating this option for possible inclusion in the next budget cycle. Task Force 2 recommends support for such a purchase.

5. *Protected Area On The Website For The DB And HOs To Circulate And Discuss Draft Opinions.* The ABA Report suggests that a password protected area on a web-accessible site be created for use by counsel hired by the DB and HOs. HOs do not see a need for this. E-mail can be used to discuss issues with the CHO or with other HOs without being case specific. The HO who hears the case should make the decision without significant involvement of others or oversight. However, procedural or scheduling issues may possibly be addressed by HOs or the DB through a secure discussion portal as funds and technology permit.

Task Force 2 recommends:

- While not an immediate priority, as technology and software develops consider use of a SharePoint type website to share pertinent information, resources and updates.
- As stated in Recommendation 3, the WSBA should also look into providing online access to HOs of the ABA Annotated Standards for Imposing Lawyer Disciplinary Sanctions. This could be included on a secure Web system.

6. *ODC Should Obtain Software For Statistical Reports And To Assist With Forensic Investigations.* The ABA Report recommends providing the Disciplinary Counsel's office with software that will allow it to derive a greater variety of reports and that could be used to assist with complex forensic investigations. GILDA currently performs the reporting function and new reports can be created by IT staff, time permitting. GILDA is being upgraded and improved currently. The WSBA IT Department has also sent a staff person to special training and that person is seeking certification as a forensic computer investigator. ODC may still need to contract with outside experts for testimony in difficult cases, but developing expertise in-house saves on consultant fees.

Although Task Force 2 believes the current system is adequate to meet the needs of various users and interest groups, the WSBA should support funding an upgrade of the system. Task Force 2 also recommends that the WSBA provide the training and equipment or software needed to certify a WSBA staff person as a forensic computer investigator.

7. *ODC Should Be Provided Resources To Retain Qualified IT Experts.* The ABA Report also recommends providing ODC with resources to retain the services of qualified outside IT and software experts. WSBA's IT staff have been able to meet consultation needs and outside experts have been contracted as necessary. An in-house person may be seen as less credible at hearings. Task Force 2 does not see the need for a full-time in-house WSBA expert on IT issues.

8. *ODC Should Obtain A Modern Caseload Management System.* The ABA Report suggests that ODC may want to consider evaluating and purchasing another software program that is suited to the functions of a disciplinary agency. Task Force 2 believes that GILDA meets the needs of ODC and is being upgraded and improved. Its basic functionality is not being changed but it is being transferred to a web-based system which allows more features, faster updates, and the quicker generation of reports than the current system. Conversion to a web based system will improve functionality and facilitate increased access to fire-walled data.

Task Force 2 recommends that the WSBA support the continued enhancement and improvement of GILDA, including its conversion to a web based system.

**Recommendation of the BOG Discipline Committee:**

1. Support and fund current WSBA efforts to upgrade the GILDA system, converting it to a web based format that allows secure customized access.
2. Give high priority, and fund system and staff time, to scan past disciplinary decisions in searchable format to post online; continue to post final decisions as entered; and include stipulations with a notice that they are not precedential.

**ABA Recommendation 7 – Improved Scheduling Practices Will Lessen Delay at the Hearing Level.**

**ABA Recommendation Issues:**

A typical contested hearing lasts 2 to 2-1/2 days. However, in recent years, more hearings are taking 3 to 5 days. There is a distinction between a continued hearing (hearing commences, but is not completed and has to be rescheduled) and a continuance (entire hearing is continued to a later date).

1. *Continued Hearings.* Continued hearings adversely impact the discipline system because 1) the conclusion of the hearing may be delayed for several months due to the difficulty of finding another hearing date when everyone is available, and 2) a continued hearing forces the parties and hearing officer to spend time and resources gearing up a second (or third time) for the hearing. Momentum is lost and repetition may be needed to bring people back up to speed.

Factors that may lead to a continued hearing are:

- Parties underestimate the length of time that a hearing will take and/or do not have sufficient information at the scheduling conference to accurately predict the length of hearing.
- Pro se respondents or inexperienced respondent's counsel are not prepared (e.g. they appear at the hearing with undisclosed witnesses and exhibits, spend too much time on irrelevant issues or evidence, or fail to make sufficient copies of exhibits).
- The hearing officer fails to control the proceedings.

Task Force 2 makes the following recommendations:

- Set the hearing date promptly after the hearing officer's appointment to establish a hearing and prehearing schedule.
- Set aside an additional 1-2 days beyond the estimated length of the hearing in case the hearing runs long (e.g. set aside an entire week for a hearing expected to last 3 days)
- Hold a prehearing conference a few weeks before the hearing to address logistical questions, narrow the issues, review scheduling, etc.

- Establish a best practice for the hearing officer to issue an order similar to a CR 16 Pretrial Order, and hold the parties to the terms of the order. Include a model order in the training materials and HO handbook.
- Train HOs and promote the use of this Pretrial Order procedure on a trial basis. Assess implementation at a later date to determine whether a rule change is needed to fully adopt this recommendation rather than relying on hearing officer training alone.
- Provide added training for hearing officers in conducting and controlling hearings. (See Recommendation 5.)
- Develop checklists for all players, but particularly for respondents and respondents' counsel or pro se respondents who are unfamiliar with the discipline system.
- Consider having a paid ombudsman for respondents to answer questions and provide assistance, similar to courthouse facilitator (see Recommendation 15). (The BOG DC did not agree with this recommendation.)
- Develop a more robust and automated system that more persons involved in the process can use to help with tracking continued hearings, continuances, and hearing officer hours. (See Recommendation 6.)

2. *Continuance Of Hearings.* ELC 10.12(f) provides: “Either party may move for a continuance of the hearing date. The hearing officer has discretion to grant the motion for good cause shown.” Task Force 2 recommends:

- HO Training to address this issue specifically and provide specific training in how to control the hearing process to minimize delays.
- Use of the GILDA system by HOs to help facilitate the scheduling process.

Scheduling issues also may be impacted by the ultimate decision on the size of the HO pool under Recommendation 3 and whether compensation is paid to HOs.

3. *Appeals And Delays In Proceedings At The Disciplinary Board.* Task Force 2 met with Julie Shankland and Professor Tom Andrews of the Disciplinary Board. They indicated that there were no problems with scheduling proceedings before this body and matters are infrequently delayed by a full hearing docket before the Board. Task Force 2 makes no recommendations in this area.

**Recommendation of the BOG Discipline Committee:**

1. Enhance Hearing Officer training on control of the hearing process to minimize and avoid undue delays.
2. The Chief Hearing Officer should develop materials and a model Pretrial Order analogous to CR 16 to include in HO handbook and as a part of an online system.
3. Develop and implement HO training on the use of pretrial orders to streamline and control the hearing process.

## **ABA Recommendation 15 – Standards for Appointment of Counsel in Disability Proceedings and Development of Roster of Attorneys to Serve.**

### **ABA Recommendation Issues:**

The ABA Report notes that the lack of a sufficient pool of qualified candidates to serve as counsel for respondents in disability inactive status proceedings results in delays that pose risks of harm to the public as well as to lawyers subject to the proceedings. The ABA Report recommends developing a roster of lawyers who are qualified to serve as counsel to respondents in disability proceedings.

Disability proceedings are usually more complex and time-consuming than other disciplinary hearings. There are normally 3 or 4 cases each year in which an attorney contests a disciplinary issue based on disability and counsel is appointed by the WSBA. In the very recent past there were only two attorneys who regularly represented lawyers in disability proceedings. Through the efforts of Elizabeth Turner of the Office of General Counsel that number has now grown, but with the aging of the lawyer population, disability proceedings are likely to increase. The WSBA has an important responsibility to serve the needs of these lawyers.

Currently to obtain counsel for appointment, Disciplinary Board Counsel makes ad hoc calls to a few attorneys who repeatedly serve as appointed counsel but they cannot handle all of the cases. Finding available counsel can take considerable time. Consequently, repeated delays in the proceeding may occur because the proceeding cannot go forward with an unrepresented respondent when an appointment is required.

Specialized expertise is important in this sensitive area. To be eligible for appointment in a disability proceeding, an attorney should be an experienced litigator, preferably in criminal defense, and be familiar with the disciplinary system. For attorneys who have not already handled a disability proceeding, consultation with an experienced attorney will make for more effective representation and will expand the number of attorneys able to take these cases.

Task Force 2 believes that the low level of compensation for appointed counsel (\$100/hour) is a deterrent to finding attorneys willing to serve in this capacity. While some attorneys do volunteer to serve in this capacity, they usually volunteer only once due to the difficulties in representing these individuals. Experienced attorneys can serve as mentors but expecting this service as a volunteer unduly burdens these few persons. Encouraging consultation with experts would encourage lawyers and would improve their abilities to serve as appointed disability capacity. Task Force 2 believes that efforts should be made to increase the pool of available counsel for appointment.

Task Force 2 first recommended to the Discipline Committee that compensation of appointed attorneys be increased to \$200 per hour. The Committee asked that the fiscal impact of the recommendation be considered. Julie Mass, the Director of Finance and Administration, prepared the following information:

<b>Fiscal Year</b>	<b>Amount Incurred</b>	<b>Total Expenditure at \$200/hour</b>
2005	\$5,806	\$11,602
2006	\$2,835	\$5,670
2007	\$4,070	\$8,140

The total additional cost over a three year period would have been \$12,711, an average of \$4,237 per year. Task Force 2 believes this additional cost should be funded to increase the quality and number of available counsel.

Task Force 2 also believes that it would be desirable for less experienced counsel to serve with appointed experienced co-counsel. However, due to the fiscal impact and availability of mentors, Task Force 2 decided not to proceed with this recommendation.

Making mentor consultation available for an experience practitioner would increase the quality of representation by appointed counsel and increase counsel's willingness to serve. Task Force 2 recommends that mentors be compensated at the rate of \$200. However, compensated time should be limited to two hours per case.

Task Force 2 sees a need for increased efforts at recruitment of attorneys to serve so that a larger list of available and competent counsel can be developed. Training can also be made available through a session on this area at the Discipline Academy addressed in Recommendation 5.

**Recommendation of the BOG Discipline Committee:**

1. Compensation of appointed counsel in disability disciplinary proceedings should be increased to \$150 per hour.
2. Appointed counsel not experienced in this area should be encouraged to consult with mentor attorneys. The WSBA should fund up to two hours of consultation per case, with both the mentor and the attorney to be paid at the rate of \$150 per hour for this time.
3. Increased efforts to recruit counsel to serve in this capacity should be made by contacting the Elder Law Section, Washington Attorneys with Disabilities and other interested groups.

## **TASK FORCE 3**

### **Assignment and Membership**

Task Force 3's assignment was to review ABA Recommendations 4, 9, 12, 16, 18, 20, and General Rule Changes.

ABA Recommendation 4: The Appellate Process Before The Disciplinary Board Should Be Streamlined.

ABA Recommendation 9: The Court Should Repeal Rule 5.1(d) Of The Rules For Enforcement Of Lawyer Conduct, Entitled "Grievant Duties."

ABA Recommendation 12: The Court Should Amend Rule 7.1 Of The Rules For Enforcement Of Lawyer Conduct To Eliminate Disciplinary Board Involvement In Terminations Of Interim Suspensions Based On Criminal Convictions.

ABA Recommendation 16: Discipline On Consent Should Be Encouraged At All Stages Of Proceedings.

ABA Recommendation 18: Prior Discipline Should Be Considered Only After A Finding Of Misconduct.

ABA Recommendation 20: Review of Disciplinary Board Reports And Recommendations By The Court Should Be Discretionary In All Disciplinary Cases.

Task Force 3 was also charged with looking at possible rule changes. The ELC Drafting Task Force has been established by the BOG to evaluate and promulgate proposed rule changes to implement recommendations of the Discipline Committee that are adopted by the Board of Governors. The ELC Drafting Task Force will also consider and promulgate other rule changes as may be deemed necessary or appropriate.

The members of Task Force 3 are:

Justice Barbara Madsen of the Washington State Supreme Court  
Ed Shea, 4th District Governor of the Washington State Bar Association  
Randy Beitel, Office of Disciplinary Counsel  
Scott Busby, Office of Disciplinary Counsel  
Lee Ripley, Respondents' Counsel  
Charlie Wiggins, Appellate Lawyer (Chair)

## REPORT

### **ABA Recommendation 4: The Appellate Process Before The Disciplinary Board Should Be Streamlined.**

#### **ABA Recommendation Issues:**

The ABA made two recommendations for streamlining: first, eliminate mandatory review by the Disciplinary Board of all suspension or disbarment recommendations, even when neither party appeals; second, the Board should sit in panels consisting of three members, rather than hearing and deciding each matter *en banc*.

The Task Force unanimously agreed that sitting in panels instead of *en banc* would be a poor use of the Disciplinary Board. The Task Force also agreed that if neither the respondent lawyer nor the disciplinary counsel appeals, there is no need for automatic review by the Board. However, the Task Force felt it was important for the Board to at least review and be aware of any recommendation of suspension or disbarment from a hearing officer. The Task Force felt that at least one entity in the system should review all suspension and disbarment recommendations, and the Board is the most logical entity to do that.

However, the Task Force members felt that full mandatory review by the Board was unnecessary in cases where neither party appeals. Accordingly, the Task Force recommends the following procedure where a hearing officer has recommended disbarment or suspension and neither party appeals. The hearing officer's findings and conclusions and recommended sanctions should be distributed to the Board at the next available Board meeting. The Board would then have the option of accepting *sua sponte* review or declining any further review.

The effect of this change will be to expedite review of suspension/disbarment recommendations where neither side appeals. Currently, the Association incurs the cost of preparing a full transcript of the hearing, and those materials, along with other pleadings and exhibits, are submitted to the Board as a part of the Board's mandatory review. Under the Task Force recommendation, the only materials submitted initially to the Board will be the findings, conclusions and recommendation. If the Board decides to grant *sua sponte* review, then the parties will have an opportunity to file briefs and the full record will be provided to the Board for its complete review at a later date.

The Task Force anticipates that in most cases, the Board will decline *sua sponte* review. The effect of the change will be to expedite the proceeding and save considerable funds in obtaining the transcript and providing copies of all relevant materials to the full Board.

#### **Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 3's recommendations, with Task Force 3's draft amendments to be forwarded to the ELC Drafting Task Force for consideration and further refinement.

**ABA Recommendation 9: The Court Should Repeal Rule 5.1(d) Of The Rules For Enforcement Of Lawyer Conduct, Entitled “Grievant Duties.”**

**ABA Recommendation Issues:**

ELC 5.1(d) provides:

- (d) **Grievant Duties.** A grievant must do the following, or the grievance may be dismissed:
- (1) give the person assigned to the grievance documents or other evidence in his or her possession, and witnesses’ names and addresses;
  - (2) assist in securing relevant evidence; and
  - (3) appear and testify at any hearing resulting from the grievance.

The ABA recommended that this rule should be repealed because a grievance should not be dismissed based on the grievant’s cooperation or lack of cooperation.

The members of the Task Force felt that this was a non-problem. No one could think of a matter that had been dismissed for failure of the grievant to cooperate. At the same time, to the extent that the somewhat threatening language of the rule might have some deterrent effect on grievants, the task force felt that it would be helpful to modify the rule.

After discussion, the Task Force agreed to propose that the introductory clause of the rule be modified to read as follows: “A grievant ~~must~~ should do the following, ~~or the grievance may be dismissed.~~”

**Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 3’s recommendation, with Task Force 3’s draft amendments to be forwarded to the ELC Drafting Task Force for consideration and further refinement.

**ABA Recommendation 12: The Court Should Amend Rule 7.1 Of The Rules For Enforcement Of Lawyer Conduct To Eliminate Disciplinary Board Involvement In Terminations Of Interim Suspensions Based On Criminal Convictions.**

**ABA Recommendation Issues:**

The ABA Standing Committee made several recommendations with respect to ELC 7.1, which provides for interim suspension for lawyers convicted of a crime. Task Force 3’s evaluation and recommendations follow. A copy of ELC 7.1 with Task Force 3’s proposed amendments is attached as Appendix A on pages 40 ff.

The ABA Report discusses the following recommended changes to ELC 7.1:

1. Amend ELC 7.1(b) to require the Clerk of the Court to notify and provide Disciplinary Counsel’s Office, not the Washington State Bar Association, with the information showing that a

lawyer has been convicted of a crime as defined in Rule 7.1(a). Task Force 3 recommends adoption of this recommendation.

2. Disciplinary Counsel should not have to refer a matter not involving a felony conviction to a Review Committee to determine whether the crime at issue is a serious crime. Task Force 3 agrees that the ABA recommendation should be accepted. Evaluating whether a non felony crime involves one of the listed elements is a legal analysis and there does not appear to be any advantage to having a review committee engage in the same inquiry the Supreme Court will have to perform anyway. In any event, it would be a rare case in which the Association would seek interim suspension for a non felony conviction. Adopting this change, however, makes it all the more necessary to adopt the next change suggested by the ABA.

3. Allow a respondent the opportunity to assert any jurisdictional deficiencies showing that interim suspension is not appropriate. Under ELC 7.1 as presently existing, the respondent has no clear opportunity to protest immediate suspension. The ABA Committee suggested that the Court may wish to allow the respondent the opportunity to assert jurisdictional deficiencies. Task Force 3 agrees that it is appropriate to allow a lawyer the opportunity to respond that the lawyer has not been convicted of a serious crime. This may be because the lawyer is not the person who was convicted, or because it is a non felony crime and the lawyer disputes whether it fits within the definition of a serious crime in ELC 7.1(a)(2)(B). The Committee recommends that respondent lawyer be given seven days to answer the petition for immediate suspension, limited to the issue whether the conviction was for a serious crime.

4. Expedite the procedure for termination of interim suspensions. The ABA suggested that the Court consider amending ELC 7.1(g) to eliminate the necessity for proceedings before the Disciplinary Board when a respondent seeks termination of an interim suspension. Task Force 3 agrees to the extent that the Association and the respondent agree on termination of an interim suspension, the Disciplinary Board need not be involved. Otherwise, the Committee recommends retaining the role of the Disciplinary Board in termination of interim suspension.

#### **Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 3's recommendations, with Task Force 3's draft amendments to be forwarded to the ELC Drafting Task Force for consideration and further refinement.

#### **ABA Recommendation 16: Discipline On Consent Should Be Encouraged At All Stages Of Proceedings.**

#### **ABA Recommendation Issues:**

The ABA recommended that resolution of a disciplinary proceeding by stipulation "should be available throughout the proceedings." That is what ELC 9.1(a) says: "Any disciplinary matter or proceeding may be resolved by a stipulation at any time."

Task Force 3 suggested that although the ABA had not recommended any rule change, the Committee might wish to develop a settlement conference procedure. The Committee asked Task Force 3 to develop such a recommendation.

Task Force 3 has drafted a proposed amendment to ELC 10.12(c) requiring the hearing officer assigned to a case to determine whether a settlement conference should be held. If so, the hearing officer asks the Chief Hearing Officer to assign another hearing officer to serve as a settlement officer. The Chief Hearing Officer has discretion to appoint a settlement officer or not. If a settlement officer is appointed, the settlement conference shall be held no later than 60 days after the order of appointment.

Whether or not the hearing officer recommends a settlement conference, the hearing officer must schedule prehearing matters and a hearing date, allowing sufficient time for the settlement conference before any other dates to perfect the case.

A hearing officer or panel may approve a stipulated settlement between ODC and the respondent lawyer that does not involve suspension or disbarment. Any settlement must be approved by the Disciplinary Board if it requires suspension or disbarment. Currently, the hearing officer/panel and the DB have full discretion whether to approve a stipulation to discipline, disapprove, or conditionally approve. If the DB conditionally approves a settlement, the parties can consent to the terms, and if they do not consent, there is no settlement.

The Task Force discussed whether to restrict the circumstances under which the DB can disapprove of or impose conditions on a settlement. Disciplinary Counsel Randy Beitel checked with other states to determine if any other state had such restrictions, but was unable to find any. The Task Force recommends that the DB must approve a settlement unless the stipulation results in a manifest injustice after consideration of the purposes of lawyer discipline, the ABA Standards, and Washington authority. This is a somewhat vague standard, but it does encourage settlement by discouraging the DB from tinkering with the settlement.

Significantly, even if the DB approves of a settlement, the decision must be sent to the Supreme Court under ELC 3.5(a) and the Supreme Court retains inherent jurisdiction to exercise sua sponte review under ELC 12.2(b). It seems unwise to suggest that the Supreme Court restrict its own power to exercise this sua sponte review.

The question arose whether to impose this restriction on the DB only in cases referred to a settlement officer, or to impose the restriction on the DB for any settlement. For example, cases can be settled during the investigation phase, or even during the trial preparation phase, with or without the participation of a hearing officer. After some discussion, the Task Force concluded, with one member dissenting, that the same standard should govern DB approval of all settlements, whether conducted with the help of a settlement officer or otherwise. After all, ABA Recommendation 16 provided in part, “The option of discipline on consent via stipulations should available throughout the proceedings.”

Task Force 3 recommends that the standard for DB approval of settlements should be inserted into ELC 9.1, which deals with stipulations generally. Revised versions of both this rule and ELC 10.12 are attached to this Report at Appendix B (page 44) and Appendix C (pages 45 ff.),

respectively. The proposed language makes clear that the manifest injustice standard applies to hearing officers, panels, and the DB.

**Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 3's recommendations, with the proviso that the language following "manifest injustice" in proposed ELC 9.1(c)(3) be stricken. The BOG DC also recommends that Task Force 3's draft amendments be forwarded to the ELC Drafting Task Force for consideration and further refinement.

**ABA Recommendation 18: Prior Discipline Should Be Considered Only After A Finding Of Misconduct.**

**ABA Recommendation Issues:**

The ABA recommended that "Hearing Officers should not be advised of a lawyer's disciplinary history prior to making a finding of misconduct, because the introduction of evidence of prior discipline before there is a finding that present charges have been proven can be prejudicial." The ABA recommended that the Hearing Officer should advise counsel upon reaching a finding of misconduct and that disciplinary counsel can then provide the Officer with information about prior misconduct.

The Task Force disagrees with the ABA Recommendation and proposes that it be rejected as impractical. Adopting the recommendation would almost always require a second hearing at considerable expense. The ABA suggested that information about prior discipline could be provided the Hearing Officer, who would then make a decision without any further hearing. It is unlikely that this would be workable because both counsel would generally want an opportunity to argue the weight to be given to prior discipline. In many cases, although the misconduct is contested, the sanction is the primary issue, and it must be considered in light of all other relevant factors. In other words, the prior misconduct cannot be weighed in the abstract. A further problem is that other evidence of aggravation and mitigation is also relevant to the sanction; to be consistent with the ABA recommendation, this evidence would also have to be delayed until a sanctions hearing.

The ABA also noted that evidence of prior misconduct would sometimes be relevant during the misconduct phase of the hearing. This opens the door to argument about whether prior misconduct should be admitted during the misconduct phase, which would defeat the purpose of excluding the evidence in the first place

The question arose whether admitting this evidence of prior discipline during the misconduct phase is inconsistent with the practice in criminal cases of excluding evidence of prior misconduct. The Task Force believes that the disciplinary system is not comparable to criminal trials. Hearing Officers should be able to treat the evidence appropriately and not find present misconduct simply because a lawyer has been disciplined in the past.

### **Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 3's recommendations.

### **ABA Recommendation 20: Review of Disciplinary Board Reports And Recommendations By The Court Should Be Discretionary In All Disciplinary Cases.**

#### **ABA Recommendation Issues:**

Under the current ELC 12.3, only the respondent lawyer has a right of appeal to the Supreme Court from a disciplinary decision, and then only from a Board decision recommending suspension or disbarment. There is no other right of appeal. This is slightly strange in that only the respondent, not disciplinary counsel, has the right to appeal.

Either party may seek discretionary review of any other Board decision. Although ELC 12.4 is unclear on the point, the ABA reported that it was advised that in practice, ELC 12.4 is interpreted to allow disciplinary counsel to seek discretionary review of recommendations of suspension or disbarment. Discretionary review is limited to cases in which the Board's decision conflicts with Supreme Court law, a significant question of law is involved, there is no substantial evidence to support a material finding of fact, or the petition involves an issue of substantial public interest that the court should determine. ELC 12.4(a).

ABA recommendation 20 was that all Supreme Court review of disciplinary Board decisions should be discretionary. In support of its recommendation the ABA gave the following reason for its recommendation:

The Court should be able to rely on the adjudicators below to dispose of matters in accordance with established disciplinary law. Deference should be given by the Court to the findings of fact made by the Hearing Officers and the conclusions of law and sanction recommendations of the Disciplinary Board. The team was advised that such is the Court's current practice. Review by the Court should occur only in cases where circumstances like those set forth in the current version of Rule 12.4 exist. Adoption of this recommendation should expedite the appeals process and reduce the burden on the Court by eliminating the cases that it must hear when respondents exercise their current right of appeal.

Task Force 3 wrestled at some length with the issue and with the competing policies, and vacillated back and forth. The Task Force was always split 3-2 either for or against the ABA proposal. The primary argument for retaining the right of appeal for respondent lawyers is the perception among some respondent lawyers that the Supreme Court is the only forum in which the lawyer can obtain a completely neutral hearing. While most of the members of the Task Force disagree with this sentiment, it is an important factor to consider. Traditionally, it seems unfair to make a decision of this magnitude and importance without any right of review by a judge or panel of judges. The hearing officers are volunteers, sometimes with limited adjudicatory experience, as is the Disciplinary Board. On the other hand, it seems unfair to permit appeal by the respondent lawyer but not by disciplinary counsel. The primary argument

for eliminating the right of appeal is that some appeals have no merit, create no precedent, and are a drain on the Court's time and resources.

Not only was the Task Force closely divided on this question, Justice Madsen advised that the Court itself is divided on this proposal with some justices strongly favoring the continued right of appeal, and others favoring an amendment to eliminate appeals.

Task Force 3 considered a few compromise solutions, such as further limiting the right appeal to situations in which the Disciplinary Board disagreed with the hearing officer, or cases in which there was a significant split on the Disciplinary Board. The Task Force also considered the possibility of establishing a procedure by which some appeals could be heard without oral argument. None of these compromise measures seemed to respond to the concerns driving the ABA recommendation or the opposition to the recommendation.

The Task Force finally resolved by a vote of 3 to 2 that the right of appeal should remain as to recommendations of suspension or disbarment, but that the same right of appeal should be extended to disciplinary counsel. Task Force 3 also recommends that a right of cross-appeal be expressly created.

**Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 3's recommendations, with Task Force 3's draft amendments to be forwarded to the ELC Drafting Task Force for consideration and further refinement.

## **TASK FORCE 4**

### **Assignment and Membership**

Task Force 4's assignment was to review ABA Recommendations 13, 14, 21, 23, 24 and 25.

ABA Recommendation 13: The Court Should Amend Rule 7.2 Of The Rules For Enforcement Of Lawyer Conduct To Streamline Other Interim Suspension Procedures.

ABA Recommendation 14: The Court Should Amend The Rules For Enforcement Of Lawyer Conduct Relating To Disability Inactive Status.

ABA Recommendation 21: The Court's Role In Enhancing Consistency in Sanction Recommendations.

ABA Recommendation 23: The Court Should Eliminate The Imposition of Admonition After Hearings on Formal Charges.

ABA Recommendation 24: The Court Should Consider Amending Rule 14.2 Of The Rules For Enforcement Of Lawyer Conduct To Clarify That A Lawyer Disbarred, Suspended Or On Disability Inactive Status Cannot Work In A Law Office Or As A Paralegal.

ABA Recommendation 25: The Court Should Amend 13.8 To Provide Greater Detail Regarding the Imposition Of Probation And To Set Forth Specific Requirements For The Monitoring and Revocation of Probation.

The members of Task Force 4 are:

Stan Bastian, President of the Washington State Bar Association

Amanda Lee, Disciplinary Board

Julie Shankland, Office of General Counsel, Washington State Bar Association

Kathleen Dassel, Office of Disciplinary Counsel

Erika Balazs, Special Disciplinary Counsel (Spokane)

Brett Purtzer, Respondents Counsel

## **REPORT**

### **ABA Recommendation 13: The Court Should Amend Rule 7.2 Of The Rules For Enforcement Of Lawyer Conduct To Streamline Other Interim Suspension Procedures.**

#### **ABA Recommendation Issues:**

1. *Eliminate Review Committee Review.* The ABA Report recommends elimination of the Review Committee's review of ODC petitions for interim suspension for threat of harm to the public. Task Force 4 discussed whether this is an unnecessary review that causes delay and puts the public at risk, or a necessary and important structural checkpoint. The Task Force

determined that allowing this review protects the Office of Disciplinary Counsel from claims of overzealousness and unfair prosecution. The review also allows input from a nonlawyer and from active practitioners. Task Force 4 is not aware that this process causes significant delays. The longest delay would be from the date Disciplinary Counsel completed work on the matter until the date of the next review committee meeting. This could be as long as a month. Task Force 4 suggests that review committees could consider interim suspension requests in telephone or electronic meetings instead of waiting for the scheduled monthly meeting date. This would preserve in system integrity and more quickly protect the public. The Review Committee members expressed a willingness to hear these interim suspension matters on an expedited basis. Task Force 4 does not believe a rule change is necessary to allow this change in procedure.

2. *Eliminate The Requirement For Personal Service On Respondents.* The ABA Report also suggests eliminating the requirement that Respondents be served personally with petitions for interim suspension. Task Force 4 unanimously believes that this is a bad idea. The Committee believes personal service is a reasonable requirement, so long as the rules also allow Disciplinary Counsel ways to deal with respondents who evade service or who are not mentally capable of accepting service. Title 7 does appear to provide solutions for these situations. Although in some situations the necessity of obtaining personal service can result in delay, Disciplinary Counsel did not believe that the personal service requirement was a substantial obstacle to prompt protection of the public; however, it was suggested in discussions of the Committee of the Whole that consideration be given to clarifying the ELC provisions relating to substituted service on respondent lawyers who evade service or who cannot be found.

3. *Eliminate Show Cause Proceedings.* The ABA Report recommends eliminating show cause proceedings in petitions for interim suspension. Task Force 4 unanimously believes the show cause hearing procedure should remain in the rules. Again, the show cause hearing procedure provides an important structural checkpoint in our rules. Disciplinary Counsel indicated that the show cause process does not create dangerous delays in the ability to protect the public. The ABA Report suggested that the Court hear these matters on an expedited basis. ELC 7.5 already requires that the court expedite interim suspension petitions. This rule states that the court should set the show cause hearing within 14 days of issuing the order to show cause. The ABA Report recommends issuing the suspension order immediately in an ex parte proceeding and then allowing the respondent 2 days to appear and contest the order. Task Force 4 did not find any compelling reason to change the current rule.

Task Force 4 recommends retaining the current rule. Task Force 4 also believes that these recommendations are part of the ABA's push to make Disciplinary Counsel more independent of the Bar Association. If the Board of Governors recommends that the Court directly supervise The Office of Disciplinary Counsel, the full Discipline Committee may want to reconsider this recommendation.

### **Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 4's recommendations.

## **ABA Recommendation 14: The Court Should Amend The Rules For Enforcement Of Lawyer Conduct Relating To Disability Inactive Status.**

### **ABA Recommendation Issues:**

The ABA Report suggests that the Supreme Court, not the Disciplinary Board, transfer lawyers to and from disability inactive status. The report points out that although disability inactive transfers are not discipline, they do affect the lawyer's ability to practice law. The Court is required to act in all other cases of actions affecting the lawyer's ability to practice law.

The Task Force has not found that there are any concerns with the current system. This recommendation also appears to be part of the ABA's overall goal of moving discipline and disability proceedings to Court supervision. Task Force 4 is not opposed to the ABA recommendation, but does not recommend any change.

### **Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 4's recommendations.

## **ABA Recommendation 21: The Court's Role In Enhancing Consistency in Sanction Recommendations.**

### **ABA Recommendation Issues:**

1. *The Supreme Court Should Issue More Written Discipline Decisions.* Task Force 4 agrees that more written discipline opinions from the Court would assist all involved in the discipline system. However, Task Force 4 does not believe it is in a position to make recommendations to the Court about its procedures.

2. *Admonitions And Probation Should Be Considered Sanctions.* Task Force 4 believes that the current distinction in the ELCs between sanctions and admonitions is important and should be retained. Under our rules, sanctions remain permanently on a lawyer's record. Admonitions remain on a lawyer's record for five years. This distinction between permanent and not permanent is reflected in the words sanction and disciplinary action. Although different words could be chosen, the distinction is important and should be retained.

3. *ELC 13.1 Should Be Amended To Prevent Lawyers Who Have Received An Admonition From Claiming They Have Not Been Sanctioned.* Task Force 4 did agree that lawyers may try to answer questions about sanctions in a way that hides the admonition. Task Force 4 suggests that the solution to this problem is for the questions to be more specific. For example, the question could ask if a lawyer has ever been disciplined or admonished.

4. *Probations Should Be A Sanction That Can Be Imposed Without Discipline.* Task Force 4 is not in favor of imposing probation when the lawyer has not been sanctioned or admonished. ELC 13.8 is clear that probation may only be imposed when a lawyer is sanctioned or admonished. The committee was not able to articulate why it would be appropriate to impose

probation without a finding of an RPC violation. Our rules already allow diversion. Diversion is used in cases of less serious misconduct. Task Force 4 believes that diversion is a more efficient way to handle cases than probation without sanction or admonition.

For the foregoing reasons, Task Force 4 recommends leaving the current rules unchanged.

**Recommendation of the BOG Discipline Committee:**

The BOG DC recommends adoption of Task Force 4's recommendations.

**ABA Recommendation 23: The Court Should Eliminate The Imposition of Admonition After Hearings on Formal Charges.**

**ABA Recommendation Issues:**

The ABA suggests that admonitions should not be imposed following a hearing. The ABA suggests that the hearing officer's choices should be limited to dismissal, reprimand, suspension or disbarment. The ABA report indicates that admonitions should only be used in cases that do not merit filing of formal charges.

Task Force 4 opposes this change. Currently, a review committee can impose an admonition prior to any hearing or formal charges. If a review committee imposes an admonition, the respondent lawyer may choose to accept the admonition or protest the admonition and have a formal hearing. Task Force 4 believes the right to protest the admonition is an important procedural due process right for respondent lawyers. If a hearing officer were not allowed to impose an admonition after hearing, the respondent would, in effect, be punished for protesting the admonition. Additionally, the ABA Standards allow mitigating factors to reduce sanctions. Task Force 4 does not believe it would be appropriate for a hearing officer to be prevented from imposing the correct result in a particular case. Task Force 4 is not aware of any problems caused by the current rules. Task Force 4 suggests that the rules remain unchanged.

Task Force 4 recommends leaving the rules unchanged.

**Recommendation of the BOG Discipline Committee:**

The BOG DC recommends that Task Force 4's recommendations be adopted.

**ABA Recommendation 24: The Court Should Consider Amending Rule 14.2 Of The Rules For Enforcement Of Lawyer Conduct To Clarify That A Lawyer Disbarred, Suspended Or On Disability Inactive Status Cannot Work In A Law Office Or As A Paralegal.**

**ABA Recommendation Issues:**

The ABA suggests that ELC 14.2 should be amended to clarify that a lawyer disbarred, suspended or transferred to disability inactive status cannot work in a law office or as a paralegal.

Task Force 4 agrees with this suggestion. ELC 14.2 already states that disbarred, suspended or inactive lawyers cannot practice law. RPC 5.8 states that active lawyers cannot allow these individuals to practice law in their offices. The rules do not specifically state that a disbarred, suspended or disability inactive lawyer cannot act as a legal assistant. The committee believes that the recommendation reflects the current status of the law and should be as clear as possible.

Task Force 4 recommends that the Rule be clarified.

### **Recommendation of the BOG Discipline Committee:**

The BOG DC recommends that Task Force 4's recommendations be adopted. This matter would be directed to the ELC Drafting Task Force.

### **ABA Recommendation 25: The Court Should Amend Rule 13.8 To Provide Greater Detail Regarding the Imposition Of Probation And To Set Forth Specific Requirements For The Monitoring and Revocation of Probation.**

### **ABA Recommendation Issues:**

The ABA Report recommends that the following changes be made to Rule 13.8:

- Add a summary procedure to the rules allowing a lawyer to be prosecuted for violations of probation violations.
- Add specific factors to the rule for guidance in imposing probation.
- Add a requirement that the respondent lawyer file an affidavit of compliance prior to the end of probation.
- Disciplinary Counsel, not the Disciplinary Board Chair, should select the probation monitor. Additional resources and staff should be added to ODC if necessary to accomplish this task.
- ODC should work with the proposed oversight committee to develop a list of trained and screened probation monitors. Monitors should be required to attend annual training.
- Probation should be an alternative disciplinary sanction.

At this time, Task Force 4 does not have evidence that the Office of Disciplinary Counsel uses practice monitors to an extent that would justify the expense of the ABA's recommendation. Also, Task Force 4 does not believe that probation should be used as an alternative sanction. Task Force 4 also finds that it is not appropriate for ODC to choose the probation monitor. The Disciplinary Board is not a party to the case and is, therefore, viewed as more neutral than ODC. Usually, the orders require the parties to agree on the probation monitor. This process appears fairer and has a higher likelihood of success than a monitor appointed by the "prosecutor." Task Force 4 is not aware of any problems that this recommendation would solve. Task Force 4 does not support making this change.

Task Force 4 recommends leaving the Rules unchanged.

**Recommendation of the BOG Discipline Committee:**

The BOG DC recommends that Task Force 4's recommendations be adopted.

## TASK FORCE 5

### Assignment and Membership

Task Force 5's assignment was to review ABA Recommendations 26 and 27.

ABA Recommendation 26: The Court Should Institute Mandatory Arbitration of Lawyer/Client Fee Disputes.

ABA Recommendation 27: The Court Should Adopt a Rule Providing for Written Notice to Claimants of Payment in Third Party Settlements.

The members of Task Force 5 are:

Robert D. Welden, WSBA General Counsel (Chair)  
Salvador A. Mungia, President Elect (2009 – 2010) and 6th District Governor of the Washington State Bar Association  
Judy Massong, Former Chair, Lawyers' Fund for Client Protection Committee  
Susan Madden, Disciplinary Board Non-Lawyer Member  
Christopher Sutton, WSBA Professional Responsibility Counsel

### REPORT

#### **ABA Recommendation 26: The Court Should Institute Mandatory Arbitration of Lawyer/Client Fee Disputes.**

#### **ABA Recommendation Issues:**

The ABA Report recommends that Washington establish a mandatory fee arbitration program.

**Task Force 5 Recommendation:** The Task Force recommends (1) adoption of a specific rule regarding fee arbitration, (2) adoption of a related amendment to ELC 8.4, and (3) adoption of Fee Dispute Resolution Program Regulations.

GR 12 authorizes the WSBA to maintain a program, pursuant to court rule, requiring members to submit fee disputes to arbitration. Currently, APR 19(c) reads "Fee Arbitration Program. [Reserved]." The Task Force recommends that this rule not be included in APR 19, but rather be adopted as a separate Admission to Practice Rule (APR). It also recommends adoption of program regulations, and an amendment to RPC 8.4 that would make failure to comply with this new APR professional misconduct.

*Why adopt a rule requiring lawyers to submit to fee arbitration?* In most instances when a lawyer and a client have a fee dispute that they are unable or unwilling to resolve, the client is left without any meaningful remedy. The majority of legal fees, while significant to the client, do not constitute a sufficient amount that a lawyer would be willing to bring a lawsuit. The client may file a Small Claims Court action, but then is faced with the problem of collecting on

any judgment that is awarded. As discussed below, although the WSBA maintains a voluntary fee arbitration program, because it is voluntary it is seldom used.

The extent of the problem is demonstrated by the experience of the Lawyers' Fund for Client Protection Committee. Between Oct. 1, 2005 and Sept. 30, 2007, the Fund Committee considered 232 Fund applications. Of those, 98 were approved for payment and 55 were denied as fee disputes. In almost all instances, the amount of money in dispute was at most a few thousand dollars, and often only a few hundred.

*Why not just continue the WSBA voluntary fee arbitration program?* The short answer is that it doesn't work. As the ABA report points out, the voluntary program allows the lawyer to dictate whether or not arbitration occurs by refusing to participate. They noted that the current system gives the advantage to the lawyer over the majority of clients who are of modest means and have only the most rudimentary knowledge of the law. In FY 2006, 63 petitions were filed (17 initiated by lawyers) and 24, or fewer than half, were agreed to. In FY 2007, 59 petitions were filed (18 by lawyers) and 26, or again fewer than half, were agreed to. A program that requires lawyers to participate places the lawyer and client on an equal footing, and provides both parties with due process in consideration of the matter.

*What will this program cost?* In FY 2007, the WSBA spent approximately \$57,000 to administer the voluntary fee arbitration and mediation programs (there were 14 agreed mediations). Although the arbitration procedures provide for filing fees (paid by each party) of \$75 for claims less than \$10,000, and \$125 for claims of \$10,000 or more, the actual income from fee arbitration and mediation in FY 2007 totaled \$4,355 because the programs are so little used. If the program required lawyers to participate, it would be more widely used and could offset more of the expenses or even become self-supporting.

*Has this been tried elsewhere?* Yes. Several jurisdictions require lawyers to participate in fee arbitration. Those include Alaska, California (for more than 25 years), District of Columbia, Georgia, Maine, Montana, Nevada, New Jersey (also for more than 25 years), New York, North Carolina, Ohio, South Carolina and Wyoming.

*What has been the experience elsewhere?* In most jurisdictions, it is widely seen as a program that provides clients and attorneys with a quicker and cheaper alternative to litigation when a dispute arises over an attorney's fees. Through the confidential process, parties can avoid the expense of hiring counsel, reduce the possibility of malpractice counter-claims and have an opportunity to resolve disputes before trained fee arbitrators. One member of a state arbitration program commented, "Our statewide experience demonstrates that the outcome of fee arbitrations is fairly evenly split, with roughly half favoring attorneys and half favoring clients. It's a neutral program that gives everyone a fair shake."

*Hasn't this been proposed before in Washington?* Yes, in 1997 following a previous ABA review of the Washington disciplinary system, a fee arbitration rule was proposed for adoption. The Board of Governors reviewed several drafts of the rule and finally voted against submitting it to the Supreme Court. Task Force 5 believes that the time is right to reconsider that decision and to propose a program that will benefit both the Bar and the public. The Task Force

recommends that, in conjunction with proposing this rule, an educational program be initiated with articles in the *Bar News* and through other means to be determined, emphasizing the important client protection principle embodied in such rules, and relating the experience of the other jurisdictions that require lawyers to submit to fee arbitration.

**Discussion at April Meeting of the Whole.** There was significant discussion about the perceived benefits and detriments of a mandatory fee arbitration program. The positions articulated included the following:

- The idea is worth pursuing. Other states have successfully implemented such programs, some for more than 20 years.
- The proposal is overbroad. Implementing such a program would make every single fee for every single lawyer subject to being reviewed and reset.
- The Committee should recommend against implementation of a client-based mandatory fee arbitration program.
- The program is more accurately directed at smaller fee disputes.
- There is currently no effective forum for a person with a small, legitimate fee dispute decided.
- The lack of such a process now puts a greater burden on the discipline system.
- The proposal is premature and should be studied further prior to presentation to the BOG.
- The proposal should be debated and receive a fair hearing before the BOG.
- The Committee should present the recommendation to the BOG with no specific Committee recommendation except to consider it.

After further discussion, a motion was made to place the matter before the BOG for its consideration without making a specific recommendation in support of, or in opposition to, the proposal. The motion passed on a vote of 13 to 4.

#### **Recommendation of the BOG Discipline Committee:**

The BOG DC neither endorses nor rejects the recommendation of the ABA Report and Task Force 5. The BOG DC recommends that the BOG as a whole consider whether or not the WSBA should adopt a client-option Fee Arbitration Program and if so, how that program would operate.

#### **ABA Recommendation 27: The Court Should Adopt a Rule Providing for Written Notice to Claimants of Payment in Third Party Settlements.**

#### **ABA Recommendation Issues:**

The *ABA Model Rule for Payee Notification* requires that when an insurer issues a check or draft to the lawyer of a claimant, it will also notify the claimant that the check has been issued. Such a rule was first promulgated in New York, and a few other states have adopted similar rules.

The WSBA considered such a rule in the mid-90s. Originally, the BOG Discipline Committee recommended adoption of a WAC regulation to do this. However, after receiving negative

responses from the insurance industry, they withdrew that recommendation in July, 1995. Two issues were raised. First was cost; second was whether there is a need for such a rule.

It was reported to the Task Force that neither the Office of Disciplinary Counsel nor the Lawyers' Fund for Client Protection Committee was of the opinion that this is an issue of such significance that it would warrant adoption of such a rule in Washington. Therefore, the Task Force recommends against doing so.

**Recommendation of the BOG Discipline Committee:**

The BOG DC recommends accepting Task Force 5's recommendation.

APPENDIX A  
PROPOSED CHANGES TO ELC 7.1

**ELC 7.1 INTERIM SUSPENSION FOR CONVICTION OF A CRIME**

**(a) Definitions.**

(1) "Conviction" for the purposes of this rule occurs upon entry of a plea of guilty, [including a plea of guilty pursuant to \*North Carolina v. Alford\*](#), unless the defendant affirmatively shows that the plea was not accepted or was withdrawn, or upon entry of a finding or verdict of guilty, unless the defendant affirmatively shows that judgment was arrested or a new trial granted.

(2) "Serious crime" includes any:

(A) felony;

(B) crime a necessary element of which, as determined by its statutory or common law definition, includes any of the following:

- interference with the administration of justice;
- false swearing;
- misrepresentation;
- fraud;
- deceit;
- bribery;
- extortion;
- misappropriation; or
- theft; or

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

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

**(c) Procedure upon Conviction.**

(1) If a lawyer is convicted of a felony, disciplinary counsel must file a formal complaint regarding the conviction. Disciplinary counsel must also petition the Supreme Court for

an order suspending the respondent lawyer during the pendency of disciplinary proceedings. The petition for suspension may be filed before the formal complaint.

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

**(d) Petition and Answer.**

- (1) Petition. A petition to the Supreme Court for suspension under this rule must include a copy of any available document establishing the fact of conviction. ~~If the crime is not a felony, the petition must also include a copy of the review committee order finding that the crime is a serious crime.~~ Disciplinary counsel may also include additional facts, statements, arguments, affidavits, and documents in the petition. A copy of the petition must be personally served on the respondent, and proof of service filed with the Court.
- (2) Answer. The lawyer may answer the petition. An answer may be supported by documents or affidavits, but must address only whether the lawyer has been convicted of a serious crime as defined in section (a). Any answer must be filed with the Court and served on disciplinary counsel within seven days of service of the petition for suspension.

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

- (1) ~~If the crime is a felony, the Court must enter an order immediately suspending the respondent from the practice of law.~~
- (2) ~~If the crime is not a felony, the Court conducts a show cause proceeding under rule 7.2(b) to determine if the crime is a serious crime.~~ If the Court determines that the crime is a serious crime, the Court must enter an order immediately suspending the respondent from

the practice of law. If the Court determines that the crime is not a serious crime, upon being so advised, the Association processes the matter as it would any other grievance.

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

(43) Suspension under this rule occurs:

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

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

(C) regardless of the pendency of an appeal.

**(f) Duration of Suspension.** A suspension under this rule must terminate when the disciplinary proceeding is fully completed, after appeal or otherwise.

**(g) Termination of Suspension.**

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

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

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

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

## Purpose

The proposed amendment to section (c) would eliminate the review committee's role in determining whether a crime is a "serious crime" as defined in section (a). This amendment would necessitate a minor amendment to section (d), as well.

The proposed amendment to section (e) would eliminate the show cause proceeding currently required to determine whether a crime is a "serious crime." The Court would make its determination based on the petition and on the answer provided for in the proposed amendment to section (d).

The proposed amendment to section (g) would eliminate the necessity for Board review of a petition for termination of interim suspension where the parties agree that the suspension should be terminated. In such a case, the petition and response would be transferred to the Court.

APPENDIX B  
PROPOSED CHANGES TO ELC 9.1

**ELC 9.1 STIPULATIONS**

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

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

**(c) Approval.**

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

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

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

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

**(e) Reconsideration.** [no change]

**(f) Stipulation Rejected.** [no change].

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

APPENDIX C  
PROPOSED CHANGES TO ELC 10.12

**ELC 10.12 SCHEDULING HEARING**

(a) **Where Held.** [no change]

(b) **Scheduling of Hearing.** [no change]

(c) **Scheduling Order.**

(1) The Scheduling Order must include a determination whether a settlement conference would be helpful. The hearing officer should consider the following factors in making this determination: 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.

(2) If the hearing officer determines that a settlement conference would be helpful, the Chief Hearing Officer must either appoint a settlement officer or else overrule the determination of the hearing officer and order the case to proceed without a settlement conference.

(3) If a settlement officer is appointed, the settlement conference should be held no later than 60 days after the order appointing the settlement officer.

(4) Whether or not the hearing officer recommends a settlement conference, the hearing officer must enter an order setting the date and place of the hearing. This order may include any prehearing deadlines the hearing officer deems required by the complexity of the case, and the deadlines should be set with consideration of the timing of a settlement conference, if one is ordered. The order may be in the following form with the following timelines:

**SETTLEMENT CONFERENCE:**

This case will not benefit from a settlement conference and none is scheduled.

This case will benefit from a settlement conference and the Chief Hearing Officer should appoint a settlement hearing officer.

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

1. **Witnesses.** A list of intended witnesses, including addresses and phone numbers, must be filed and served by [Hearing Date (H)-8 weeks].
2. **Discovery.** Discovery cut-off is [H-6 weeks].

3. **Motions.** Prehearing motions, other than motions to bifurcate, must be served by [H-4 weeks]. An exhibit not ordered or stipulated admitted may not be attached to a motion or otherwise transmitted to the hearing officer unless the motion concerns the exhibit's admissibility. The hearing officer will advise counsel whether oral argument is necessary, and, if so, the date and time, and whether it will be heard by telephone. (Rule 10.15 provides the deadline for a motion to bifurcate.)
  4. **Exhibits.** A list of proposed exhibits must be filed and served by [H-3 weeks].
  5. **Service of Exhibits/Summary.** Copies of proposed exhibits and a summary of the expected testimony of each witness must be served on the opposing counsel by [H-2 weeks].
  6. **Objections.** Objections to proposed exhibits, including grounds, must be exchanged by [H-1 week].
  7. **Briefs.** Any hearing brief must be served and filed by [H-1 week]. Exhibits not ordered or stipulated admitted may not be attached to a hearing brief or otherwise transmitted to the hearing officer before the hearing.
  8. **Hearing.** The hearing is set for [H] and each day thereafter until recessed by the hearing officer, at [location].
- (d) – (f)** [no change].