



WSBA

WASHINGTON STATE BAR ASSOCIATION

ELC DRAFTING TASK FORCE

Meeting Agenda - DRAFT

August 12, 2010

9:00 a.m. to noon

Washington State Bar Association

1325 Fourth Avenue – Suite 600

Seattle, Washington 98101

1. **Call to Order/Preliminary Matters** (9:00 a.m.)
 - Approval of June 10, 2010 meeting minutes [pp. 762-768]
2. **Discussion**
 - Subcommittee A [pp. 769-845]
 - Subcommittee B: Items held over from June 10, 2010 meeting [pp. 846-848]
 - Subcommittee C: Items held over from June 10, 2010 meeting [pp. 849-857]
 - Discussion of ELC 13.9 deferred to October meeting
3. **New Business/Good of the Order**
 - Reports from Subcommittee C: Informational only, for later discussion
 - Consent items [pp. 858-862]
 - Future Discussion items [pp. 863-870]
4. **Future meeting schedule**
 - October 14, 2010, 9:00 a.m. to 12:00 noon
 - Materials Deadline: Tuesday, October 5, 2010
 - December 16, 2010, 9:00 a.m. to 12:00 noon
 - Materials Deadline: Tuesday, December 7, 2010
5. **Adjourn** (noon)

DRAFT Minutes – June 10, 2010
ELC Drafting Task Force

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

Call to Order

The Chair called the meeting to order at 10:00 a.m.

Approval of Minutes

The Chair called for corrections to the April 8, 2010 minutes. As none were advanced, the minutes were deemed approved.

Consent Calendar

Mr. Wiggins introduced the consent calendar items from Subcommittee C. Mr. Beitel noted, and Mr. Wiggins agreed, that the proposed language for ELC 12.4(d) on p. 719 should be replaced with the proposed language for ELC 12.4(d) on pp. 733-34. Mr. Wiggins informed the group that the changes to the rules for the appeals process were on the consent calendar because the subcommittee had approved the language, even though some members disagreed that the changes should be made. The Chair reminded the group that although the BOG had already approved the changes in principle, the minority opinion would be presented along with the Task Force's final report.

The members went on to discuss several technical details including where a Respondent should send payment for the appellate filing fee, in what form, and whether the fee would be returned if the appeal were withdrawn. The Chair, noting that members should submit purely technical revisions and/or suggestions to the subcommittee, asked if any of the members wanted to remove any of the items from the consent calendar. Mr. Bulmer raised objections to item #10. The Chair called for a vote on the consent calendar, minus item # 10 and with subparagraph (d) on p. 719 replaced by the corresponding subparagraph (d) on pp. 733-34. With 3 opposed and the rest in favor, the consent calendar items were adopted with the changes articulated by the Chair.

Subcommittee A – Request for Guidance

Mr. Johnson requested the task force's guidance on the issue of whether disability hearings should be public. Mr. Fine shared the Disciplinary Board's

opinion that no change should be made because the core issues often involve medical evidence that must be kept private anyway. Mr. Beitel noted that there are many variations in how other states deal with disability proceedings. Washington would not be unusual if it made the change. Mr. Beitel expressed the policy behind making disability proceedings public: A lawyer who is not capable of practicing law due to disability leaves behind a string of injured clients. The clients seek some redress and answers. This policy mirrors the reason that disciplinary proceedings were made public—to encourage public confidence in the system. Mr. Beitel also noted that the Supreme Court arguments in the appeal of a disability finding are public, as are guardianship proceedings. The intent of the proposal is that the proceedings would be public, but the records would be sealed. Mr. Ende informed the group that the concept of transitioning from private to public disability proceedings arose, not from ODC, but from the subcommittee discussions, although Mr. Beitel took on the task of drafting the proposed amendments. Mr. Ende also expressed the inherent public interest in public access to court records. He suggested that it makes more sense to work from a default of an open proceeding and work out protection of individual documents or entire proceedings on a case by case basis.

Mr. Sheldon said that in the health care arena disability proceedings are private. This allows doctors to bring disability proceedings themselves in order to get help before any harm occurs to the public. He also noted that public disability proceedings may run contrary to HIPAA. Mr. Summers suggested that mental health proceedings under RCW 71.05 were a better analogy than guardianship proceedings. He suggested that it would not be out of step to maintain confidentiality of disability proceedings and urged the group to keep in mind the humiliation and embarrassment of having one's mental health discussed in public proceedings. The Chair reminded the group that a Respondent is entitled to the presumption that he or she is not mentally ill, that such allegations must still be proven. Mr. Danielson expressed his opposition to making disability proceedings public before the procedural problems with the current system have been addressed. Mr. Beitel raised the distinction between (1) proceedings under ELC 8.2 that arise before any disciplinary proceeding has been initiated and (2) proceedings under ELC 8.3 that arise during the course disciplinary proceedings, and he suggested that the first remain private while the second become public. Ms. Shankland supported the idea of keeping disability proceedings that arise before any disciplinary proceeding private to encourage lawyers to raise this flag on their own to protect the public from further harm. Mr. Carpenter shared his view that all disability proceedings should remain private. Mr. Johnson thanked the group for its input, which he will take back to Subcommittee A.

Subcommittee C: Recommendation Held Over From April 8th

Mr. Wiggins, noting that the first held over item had been part of the consent calendar, introduced the subcommittee's recommendation for a change to ELC 11.12(g), a technical change to clarify the procedure when neither party appeals

a Disciplinary Board decision. Mr. Beitel shared that the reason for the proposal was to clarify the current practice. Mr. Bulmer moved that the subcommittee's recommended change to ELC 11.12(g) on p. 735 be adopted. The Chair deemed the motion seconded and called for a vote. With no one opposed, the motion passed and the subcommittee's recommendation was adopted.

Subcommittee B: Report

ELC 5.6 – (procedure after disciplinary counsel dismissal of grievance) (p. 736-737)

Mr. Fine noted that the only new provision in this recommendation addressed the procedure when disciplinary counsel recommends dismissal of a grievance but a review committee orders the matter to hearing or issues an admonition. The proposed changes provide for an automatic reconsideration procedure by a different review committee, allowing for a second look at a matter ordered to hearing over disciplinary counsel's recommendation for dismissal. Ms. Shankland expressed concern that the rule should make clear that matters are not public until the order to hearing is final. She also expressed concern that a second review committee might be forced to be recused by issuing notice of the reasons for its decision. Mr. Bulmer suggested redrafting the changes to avoid unintentional consequences. Mr. Fine pointed out that the review committee's finding in this setting is akin to a determination of probable cause, which is not a finding on the merits and thus should not trigger recusal. Mr. Sheldon moved that the changes be adopted as drafted. The Chair deemed the motion seconded and called for a vote. With none opposed and no abstentions, the motion passed, and Subcommittee B's suggested change to ELC 5.6 were adopted as drafted.

ELC 5.3, 5.4, 5.5, and new ELC 5.6 – (protecting confidential information, objections to investigative demands) (p. 737-714)

Mr. Fine explained that the changes in this proposal allow disciplinary counsel's demand for confidential information to be made, allow the respondent to object, and allow for review of the request. Proposed ELC 5.3(b) on p. 737 is new and is intended to prevent delay of the proceedings on initial review of a grievance. A respondent may not delay by raising the objection where a preliminary request for response to a grievance does not request confidential material. This addition was designed to meet the need of ODC to move forward without impinging on the respondent's right to raise confidentiality concerns. Mr. Bulmer admitted that he is not "wild" about the proposal, but acknowledged that it represents a fair compromise between ODC's and the respondents' needs. The proposal takes discipline for non-cooperation off of the table where a respondent raises confidentiality/privilege concerns. Mr. Bulmer also acknowledged that ODC and respondents' counsel have reached an agreement not to derail the proposal. Mr. Beitel acknowledged the compromise. He proposed two amendments to the

proposed language on p. 741. The first was a friendly amendment, noted on p. 741. The Chair called for a vote on the friendly amendment. With none opposed and none abstaining, the friendly amendment passed.

The second amendment proposed by Mr. Beitel addressed the proposed new section allowing for award of expenses and costs to the opposing party when a request for information or an objection thereto has been raised in bad faith. Mr. Beitel expressed ODC's position that it is a bad idea to introduce financial concerns when dealing with client confidences. Mr. Ende acknowledged Mr. Bulmer's remarks; ODC has been opposed to this change of procedure. Mr. Ende characterized the proposal as an attempt to fix something that is not broken, but expressed respect for Mr. Bulmer's position. While perceiving that the task force has moved too far in the direction of giving unscrupulous lawyers the power to delay the disciplinary process in order to fix a very narrow, potential problem, Mr. Ende acknowledged that Subcommittee B's proposal is the best compromise. However, ODC reserved agreement on the issue of costs, believing that it is a mistake to allow for costs due to the actions of unscrupulous lawyers. Mr. Fine noted that the award of costs/expenses is tied to bad faith, rather than merely an unfounded motion, and opined that bad faith should be sanctionable. Mr. Sheldon noted that an award of costs under the proposed rule would occur only in very narrow circumstances, but opined that if a respondent has fought to preserve client confidences against a bad faith request from ODC, ODC should pay. Mr. Carpenter opined that the award of costs/expenses provision is a bad idea. Mr. Wiggins observed that the issue of awarding costs, fees, and/or expenses has come up in other circumstances throughout the ELC revision process. He suggested that since the issues are interrelated, they should be addressed at the same time as part of a broader policy discussion. Mr. Fine moved to accept the proposal without new 5.6(d) and to defer discussion of new 5.6(d) to be addressed with other similar issues. The Chair deemed the motion seconded and called for a vote. None were opposed, Mr. Sheldon abstained, and the motion passed. Subcommittee B's proposal relating to protecting confidential information and objections to investigatory demands was adopted with Mr. Beitel's friendly amendment and without new ELC 5.6(d).

ELC 9.2 – (Reciprocal Discipline) (p. 741-743)

Mr. Fine explained that the subcommittee's proposal regarding ELC 9.2 addressed the issues raised by Justice Chambers (see letter from Justice Chambers p. 556-591). Mr. Ende, noting that reciprocal discipline is a complicated area and commended the subcommittee for creating a proposal that addresses the difficulties. He raised a procedural issue with proposed ELC 9.2(c). While Mr. Ende supports the idea of providing public notice without imposing discipline in Washington where the original discipline was less than suspension or disbarment, the provision in proposed ELC 9.2(c) is too vague. Ms. Turner also applauded the subcommittee's work on the reciprocal discipline rule and supported the concept. But she expressed concern about including

reciprocal transfer to disability status with reciprocal discipline. Because we do not know enough about disability proceedings in other jurisdictions, there may be due process issues in imposing an identical finding of disability as well as in allowing a lawyer adjudged incompetent to waive the right to contest a similar finding in Washington. The Chair called for a vote on Subcommittee B's proposal for amending ELC 9.2. With 6 in favor and 7 opposed, the proposal failed. Mr. Fine asked that task force members submit comments on these issues to him in order to assist the subcommittee in reworking the proposal.

ELC 9.3, 3.1, 3.5, 3.6, and RPC 5.8 – (resignation in lieu of discipline)
(p. 743-747)

Mr. Fine explained that this proposal is a substantive change to allow a lawyer to resign permanently in lieu of any type of discipline. Mr. Fine shared the objection raised in the subcommittee that the measure is too draconian, and the response that no lawyer is forced to use the process because there are other methods to resolve disciplinary proceedings voluntarily. Mr. Sheldon opined that the proposal is too draconian. Mr. Ende countered that no lawyer has to resign in lieu of discipline, and he described the other options, like stipulation to discipline. The rule would benefit those lawyers who prefer to stop the process entirely and resign, but for whose conduct disbarment is not warranted. Mr. Bulmer opined that proposed rule forces a respondent to agree to disciplinary counsel's vocabulary describing the underlying conduct. He also opined that the proposal would force a respondent to give up the constitutional right to choose not to associate, characterizing the procedure as forbidding a respondent to quit rather than being fired. Mr. Beitel pointed out that the proposal removes the requirement that a respondent admit to misconduct, but only requires that the respondent acknowledge the allegations and choose to resign rather than defend against them. The Chair called for a vote on Subcommittee B's proposal for resignation in lieu of discipline. With 2 opposed, the proposal carried and was adopted.

ELC 7.1, 1.5, and RPC 8.4 – (procedure on conviction of a crime) (p. 747-749)

Mr. Fine reported that the proposed amendments to the procedure on conviction of a crime contain three major changes: (1) interim suspension for a serious crime not a felony has been removed; (2) the duty to report a conviction is imposed on the lawyer, and the court clerks' duty to report is eliminated; and (3) Respondent is allowed to show that interim suspension is not required to protect the public before suspension takes place. The Chair asked whether the subcommittee took into consideration the concerns of the citizens group that addressed the task force earlier. Mr. Fine replied that it had. Mr. Beitel expressed his support for the changes, except the change to ELC 7.1(e), removing automatic suspension on conviction of a felony. He reminded the task force that ELC 7.1(g) allows for a petition for termination of suspension, thus not

depriving respondents of an avenue for. Mr. Beitel suggested replacing the proposed language for ELC 7.1(e) on p. 748-749 with the originally proposed language on p. 379. Mr. Beitel shared ODC's perspective that allowing a lawyer who is convicted of a felony to continue to practice brings too much disrespect onto the profession. Mr. Bulmer voiced his opposition to Mr. Beitel's suggested change. He noted that the proposed process mirrors the process on a recommendation of suspension/disbarment from the Disciplinary Board. Mr. Bulmer said that automatic suspension on conviction of a felony makes the presumption that commission of any felony renders a lawyer unfit to practice. The proposed rule 7.1(e) on p. 748-749 gives the lawyer a chance to resist. Mr. Beitel observed that Mr. Bulmer's argument would eliminate rule 7.1 entirely. Ms. Turner expressed concern that the proposed changes do not address the concern of the victims' rights advocates who have already approached the WSBA and the task force. She observed that the task force must balance the need to protect the public against the need to protect the rights of lawyers. Mr. Sheldon asked about the presumption of innocence. Ms. Ureña asked how often the crimes with which the citizens groups are concerned actually affect a lawyer's ability to practice law. Mr. Carpenter opined that conviction of a felony should raise the presumption that the public needs protection. He also expressed concern that requiring a show cause hearing on every conviction of a felony would cause more work for the Court. Mr. Ende reminded the group that this is a policy decision and that Washington's rule is based on the ABA Model Rules for Lawyer Disciplinary Enforcement. The policy behind the Model Rules is the presumption that continued practice by a lawyer convicted of a felony undermines public confidence in the profession. Automatic suspension on conviction of a felony is essential to preserve public confidence. At the Chair's request, Mr. Beitel moved to replace the language of rule 7.1(e) on pages 748-749 with the language on p. 379. After some further discussion of the merits of automatic suspension on conviction of a felony, the Chair informed the group that the time allotted for the meeting had expired and set forth two options: (1) defer discussion of the proposal to the next meeting or (2) take up the amendment proposed by Mr. Beitel. Mr. Bulmer moved to defer the discussion, and Mr. Sheldon seconded. With 9 in favor and 4 opposed, the motion carried and the discussion was deferred to the August meeting.

Next Meetings

Thursday, August 12, 2010, 9:00 a.m. to 12:00 noon
Materials deadline: Tuesday, August 3, 2010

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

Announcements & Adjournment

The Chair shared his plan for the next two meetings. The August meeting will be dedicated first to Subcommittee A's report, then to items deferred from this meeting. The Chair intends to devote the October meeting to discussion of major policy issues, including (1) prevailing party costs/fees/sanction and (2) the right of appeal. The Chair invited the members to bring any other major policy issues to him for inclusion in the discussion. Should the August meeting prove insufficient to complete the task force's discussion and evaluation of Subcommittee A's report, October's meeting will be devoted to completing that task and addressing the items deferred from today's meeting and the discussion of major policy issues will be deferred to December. Once the reporter has compiled and integrated all of the draft language approved by the task force, the task force will review and approve the body of work as a whole. Then the Chair will present the result to the BOG.

The Chair adjourned the meeting at 10:10 a.m.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter

REPORT AND RECOMMENDATION OF SUBCOMMITTEE A

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Subcommittee A Final Report

Subcommittee A was charged with reviewing Titles 1-4, 8, and 10 of the ELCs. Our “consent calendar” items were approved by the task force on November 5, 2009; the text of those amendments is shown in our proposed amendments, for ease of reference, in single underline/strikeout.

Amendments now proposed by Subcommittee A, which are before the task force for the first time, are set forth in **bold/double underline**. Each proposed amendment is preceded by an explanatory paragraph. Rules that have no further proposed amendments other than those already approved by the task force are not included in this report unless it was felt necessary for ease of reference.

The members of Subcommittee A are: Bruce Johnson, Chairperson; Elizabeth Turner, OGC, Reporter; Randy Beitel, ODC; Kim Boyce; Kurt Bulmer; James Danielson; David Summers; Norma Ureña.

SUBCOMMITTEE DECISIONS WITH NO PROPOSED RULE CHANGE

1. Federal Rule of Civil Procedure 6 was amended during the subcommittee’s work, with substantial changes to the manner in which time is calculated. There currently is no proposal for any similar amendments to Washington’s Civil Rules, and the Subcommittee therefore decided it would not be appropriate to make any changes to the ELCs due to the changes in the FRCP.

2. David Hevel had proposed that the ELCs include a “statute of limitations” (page 280). The Subcommittee discussed this and decided that ELC 1.4’s provision that “the passage of time since an act of misconduct occurred may be considered in determining what if any action or sanction is warranted” provided enough protection to respondent lawyers. Subcommittee A recommends against the adoption of a “statute of limitations.”

TITLE 1 – SCOPE, JURISDICTION, AND DEFINITIONS

Subcommittee A proposes no new amendments to the following ELCs:

- 1.1 Scope of Rules
- 1.2 Jurisdiction

RULE 1.3: Definitions

Subcommittee A recommends the addition of a definition of “Association counsel,” a term used in current ELC 7.7(a) and proposed ELC 3.5(c).

ELC 1.3 DEFINITIONS

Unless the context clearly indicates otherwise, terms used in these rules have the following meanings:

(a) “Association” means the Washington State Bar Association.

(b) **“Association counsel” means counsel for the Association other than disciplinary counsel.**

(bc) “Bar file” means the pleadings, motions, rulings, decisions, and other formal papers filed in a proceeding.

(ed) “Board” when used alone means the Disciplinary Board.

(de) “Chair” when used alone means the Chair of the Disciplinary Board.

(ef) “Clerk” when used alone means the Clerk to the Disciplinary Board.

(fg) “Disciplinary action” means sanctions under rule 13.1 and admonitions under rule 13.5.

(gh) “Final” means no review has been sought in a timely fashion or all appeals have been concluded.

(hi) “Grievant” means the person or entity who files a grievance, except for a confidential source under rule 5.2.

(ij) “Hearing officer” means the person assigned under rule 10.2(a)(1) ~~or, when a hearing panel has been assigned, the hearing panel chair.~~

(jk) “Mental or physical incapacity” includes, but is not limited to, insanity, mental illness, senility, or debilitating use of alcohol or drugs.

~~(kl) “Panel” means a hearing panel under rule 10.2(a)(2).~~

(l) “Party” means disciplinary counsel or respondent, except in rules 2.3(h) and 2.6(e) “party” also includes a grievant.

(m) “Respondent” means a lawyer against whom a grievance is filed or a lawyer investigated by disciplinary counsel.

(n) “APR” means the Admission to Practice Rules.

(o) “CR” means the Superior Court Civil Rules.

(p) “RAP” means the Rules of Appellate Procedure.

(q) “RPC” means the Rules of Professional Conduct adopted by the Washington Supreme Court.

(r) **Words of authority.**

(1) “May” means “has discretion to,” “has a right to,” or “is permitted to”.

Subcommittee A Final Report

- (2) “Must” means “is required to”.
- (3) “Should” means recommended but not required, except:
 - (A) in rules 2.3(h) and 2.6, “should” has the meaning ascribed to it in the Code of Judicial Conduct; and
 - (B) in title 12, “should” has the meaning ascribed to it in the Rules of Appellate Procedure.

Subcommittee A proposes no amendments to the following ELCs:

- 1.4 No Statute of Limitation
- 1.5 Violation of Duties Imposed by These Rules

TITLE 2 – ORGANIZATION AND STRUCTURE

Subcommittee A recommends no changes to ELC 2.1, Supreme Court

RULE 2.2: Board of Governors

As we know, the ABA recommends that we separate the discipline function from the WSBA; however, the WSBA Board of Governors has, to date, declined to take that radical step. Subcommittee A therefore proposes amendments to clarify that the WSBA Board of Governors, officers, and Executive Director have no authority over, and cannot direct, the discipline system and/or process. The rule is also amended to incorporate the new Disciplinary Selection Panel approved by the BOG in the Discipline Committee report, and includes a cross-reference to new rule 2.14.

2.2 is the first rule to mention proposed new 2.14. Although not in numerical order, we have attached proposed new rule 2.14 for consideration at this time, because other rules also include cross-references to new 2.14 and we thought it made the most sense for the task force to address 2.14 in conjunction with the proposed amendments to 2.2. (Other rules also referencing 2.14: 2.3, 2.6, 2.7, 2.9, 2.13)

ELC 2.2 BOARD OF GOVERNORS; DISCIPLINARY SELECTION PANEL

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

(1) ~~supervises the general functioning of~~ through the Executive Director, provides administrative and managerial support to enable the Office of Disciplinary Counsel, the Disciplinary Board, review committees, disciplinary counsel, and other Association staff and appointees to perform the functions specified by these rules, and adjunct investigative counsel;

(2) makes appointments, removes those appointed, and fills vacancies as provided in these rules; and

(3) performs other functions and takes other actions provided in these rules, delegated by the Supreme Court, or necessary and proper to carry out its duties.

(b) **Limitation of Authority.** The Board of Governors, officers of the Association, and the Executive Director of the Association have ~~has~~ no right or responsibility to direct the investigations, prosecutions, appeals or discretionary decisions of the Office of Disciplinary Counsel under these rules, or to review hearing officer, hearing panel, review committee, or Disciplinary Board decisions or recommendations in specific cases.

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

~~the Association are subject to the restrictions on representing respondents in rule 2.13(b).~~ Current and former members of the Board of Governors, Executive Directors, and officers of the Association are subject to the restrictions set forth in rule 2.14

(d) Disciplinary Selection Panel. The Disciplinary Selection Panel makes recommendations to the Board of Governors for appointment, reappointment, and removal of Disciplinary Board members, hearing officers, Chief Hearing Officer, and Conflicts Review Officers. The Panel is appointed by the Supreme Court, upon the recommendation of the Board of Governors, ~~and includes, but is not limited to,~~ shall include a Board of Governors member who serves as its chair, and should include, without limitation, one or more former Chairs of the Disciplinary Board, one or more current or former hearing officers, and one or more former nonlawyer members of the Disciplinary Board.

Proposed new Rule 2.14:

Currently, the ELCs only specifically address conflicts in representation of respondents. The current restrictions are too narrow (for example, the rules currently refer to current bar Presidents, but not other officers). In addition, there is no restriction on representing or advising grievants. Subcommittee A believes representing or advising grievants while serving in another capacity with the WSBA creates at least the appearance of impropriety, if not an actual conflict. Subcommittee A recommends that the prohibitions on representing respondent attorneys should be extended to restrict representing or advising respondents or grievants, and that the restriction apply for 3 years after the term of office.

**ELC 2.14 RESTRICTIONS ON REPRESENTING OR ADVISING
RESPONDENTS OR GRIEVANTS**

Association officers and Executive Director, Board of Governors members, Disciplinary Board members, hearing officers, and Conflicts Review Officers cannot knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings, other than advising a person of the availability of grievance procedures, until three years after leaving office. Members serving as Conflicts Review Officer pro tempore are subject to the same restriction while serving in that capacity. Service as an Adjunct Review Committee Member, counsel appointed under rule 8.3(d)(3), or as a Member Pro Tempore of the Board does not invoke this rule.

Rule 2.3: Disciplinary Board

Subcommittee A proposes amendments to require lawyer members of the Disciplinary Board to meet the same basic eligibility criteria as hearing officers (active or judicial member for at least 7 years, on active status, and no record of public discipline [ELC 2.5(b)]). The proposed amendments would also clarify that DBoard members who recuse themselves from a particular case shall not be present during deliberations. Finally, a cross-reference to new 2.14 is added.

ELC 2.3 DISCIPLINARY BOARD

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

(b) **Membership.**

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

(2) *Qualifications.* ~~Lawyer members must have been active members of the Association for at least seven years.~~ Lawyer Board members must be an Active member of the Association, have been an Active or Judicial member of the Association for at least seven years, and have no record of public discipline.

(3) *Voting.* Each member, including the Chair and the Vice Chair, whether nonlawyer or lawyer, has one vote. Recused members may not attend or participate in the Board's deliberations on a matter. Board staff may attend Board deliberations, to serve as a resource.

(4) *Quorum.* A majority of the Board members constitutes a quorum. If there is a quorum, the concurrence of a majority of those present and voting constitutes action of the Board, so long as at least seven members vote.

(5) *Leave of Absence While Grievance Is Pending.* If a grievance is filed against a lawyer member of the Board, the following procedures apply:

(A) ~~the~~ The member initially decides whether to remain on the Board or take a leave of absence until the matter is resolved.

(B) ~~if~~ If the member chooses to remain on the Board, the Conflicts Review Officer who is conducting the review of the grievance under rule 2.7 must promptly provide a confidential summary of the grievance to ~~the Board of Governors~~ a different Conflicts Review Officer who is not conducting the review. ~~with a~~ A copy of the summary is provided to the member at the same time.

(C) ~~the~~ The Board of Governors Conflicts Review Officer who is not conducting the review of the grievance should then, or at any time thereafter ~~it~~ deems as deemed appropriate, determine if the member is so impaired from serving on the Disciplinary Board that the member should take, or continue to take, a leave of absence to protect the integrity of the discipline system. In making this determination, the ~~Board of Governors~~ Conflicts Review Officer should consider, among other things, the facts, circumstances, and nature of the misconduct alleged, the possible outcome, and the extent of public concern regarding the matter;

(D) ~~the~~ The Board of Governors's deliberations are Conflict Review Officer's determination is confidential. All materials ~~of the Board of Governors~~ used in connection with such a matter determination are confidential unless released under rule 3.4(d) or (e).

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

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

(e) **Unexpired Terms.** The Supreme Court, upon the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, fills unexpired terms in ~~lawyer~~ membership on the Board. ~~The Supreme Court fills unexpired terms in nonlawyer membership.~~ A member appointed to fill an unexpired term will complete the unexpired term of the member replaced, and may be reappointed to a consecutive term if the unexpired term is less than 18 months.

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

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

(h) Disqualification.

(1) A Board member should disqualify him or herself from a particular matter in which the member's impartiality might reasonably be questioned, including, but not limited to, instances in which:

(A) the member has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the matter;

(B) the member previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the member practices law serves or has previously served as a lawyer concerning the matter, or such lawyer is or has been a material witness concerning the matter;

(C) the member knows that, individually or as a fiduciary, the member or the member's spouse or relative residing in the member's household, has an economic interest in the subject matter in controversy or in a party to the matter, or is an officer, director, or trustee of a party or has any other interest that could be substantially affected by the outcome of the matter, unless there is a remittal of disqualification under section (i);

(D) the member or the member's spouse or relative residing in the member's household, or the spouse of such a person:

(i) is a party to the matter, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the matter;

(iii) is to the member's knowledge likely to be a material witness in the matter;

(E) the member served as a hearing officer ~~or hearing panel member~~¹ for a hearing on the matter, or served on a review committee that issued an admonition to the lawyer regarding the matter.

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

(j) **Counsel and Clerk.** The Executive Director of the Association, ~~under the direction of the Board of Governors,~~ may appoint a suitable person or persons to act as counsel and clerk to the Board, to assist the Board and the review committees in carrying out their functions under these rules.

(k) **Restriction on Representing or Advising Respondents or Grievants.** ~~While serving on the Disciplinary Board in any capacity, Board members may not knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings, other than advising a person of the availability of grievance procedures.~~ ~~Current and former members of the Disciplinary Board are subject to the restrictions set forth in rule 2.14.~~

¹ Subcommittee A proposes to eliminate hearing panels in its proposed amendments to ELC 2.5.

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Rule 2.4: Review Committees

Subcommittee A proposes amending rule 2.4(f) to clarify that a majority of a review committee (2 out of 3 members) constitutes a quorum and that a 2-person review committee can only act on a unanimous vote.

ELC 2.4 REVIEW COMMITTEES

(a) – (e) [unchanged]

(f) Meetings. A review committee meets at times and places determined by the review committee chair, under the general direction of the Chair of the Disciplinary Board. In the review committee chair's discretion, the committee may meet and act through electronic, telephonic, written, or other means of communication. A majority of a review committee constitutes a quorum. A two-person review committee can only act upon unanimous vote.

(g) [unchanged]

Rule 2.5: Hearing Officer or Panel

Subcommittee A proposes amendments to revise the appointment process for hearing officers to conform to the recommendations of the Discipline Committee adopted by the Board of Governors. Terms of hearing officers are also changed to comply with the Discipline Committee Report approved by the BOG. In addition, language patterned upon ELC 2.3 (Disciplinary Board) regarding WSBA staffing is added. Finally, because one hearing officer is assigned to each case, Subcommittee A proposes eliminating the superfluous references to “hearing panels” from the rules. We also propose changing the title of the rule slightly.

Importantly, Subcommittee A proposes that the rule include, for the first time, specific qualifications for the chief hearing officer, but was unable to reach consensus on whether the chief hearing officer should be required to have experience as a hearing officer. The subcommittee therefore respectfully requests that the task force choose from two options for what will be paragraph (e)(1) of the amended rule.

Option A: The vote on this language was 3-4 in subcommittee:

(f) Chief Hearing Officer.

(1) Appointment. ~~The Board of Governors Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints a chief hearing officer for a renewable term of two years, who, in addition to hearing matters, assigns cases, monitors and evaluates the performance of hearing officers and panel members, establishes requirements for and supervises hearing officer and hearing panel member training, administers hearing officer compensation, hears prehearing motions when no hearing officer has been assigned, and performs other administrative duties necessary for an efficient and effective hearing system. The person appointed as chief hearing officer must meet the qualifications for hearing officers set forth in paragraph (b) above, have served as a hearing officer for at least four years, and presided over at least one contested disciplinary hearing.~~ If the chief hearing officer position is vacant or the chief hearing officer has recused or been disqualified from a particular matter, the Chair may, as necessary, perform the administrative duties of chief hearing officer.

Option B: The vote on this language was 4-3 in subcommittee:

(f) Chief Hearing Officer.

(1) Appointment. . . . The person appointed as chief hearing officer must meet the qualifications for hearing officers set forth in paragraph (b) above, have significant experience in the adjudication of contested matters, and have substantial administrative and managerial skills. If the chief hearing officer position is vacant or the chief hearing

officer has recused or been disqualified from a particular matter, the Chair may, as necessary, perform the administrative duties of chief hearing officer.

COMPLETE PROPOSED RULE:

ELC 2.5 HEARING OFFICERS OR PANEL

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

(b) Qualifications. A hearing officer must be an active member of the Association, have been an active or judicial member of the Association for at least seven years, have no record of public discipline, and have experience as an adjudicator or as an advocate in contested adjudicative hearings.

~~**(c) Hearing Officer Selection Panel.** The hearing officer selection panel makes recommendations to the Board of Governors for appointment, reappointment, and removal of hearing officers. The panel is appointed by the Board of Governors and includes, but is not limited to, a Board of Governors member who serves as its chair, one or more former Chairs of the Disciplinary Board, and one or more former nonlawyer members of the Disciplinary Board.²~~

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

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

(fe) Chief Hearing Officer.

(1) Appointment. [either Option A or Option B, set forth above]

² The Task Force approved moving this paragraph to new 2.2(d) on 11/05/2009.

(2) Duties and Authority. who, in addition to hearing matters, The chief hearing officer:

(A) hears matters,

(B) assigns cases,

(C) monitors and evaluates the hearing officer performance of hearing officers and panel members,

(D) hears motions for hearing officer disqualification, establishes requirements for and supervises hearing officer and hearing panel member training, administers hearing officer compensation,

(E) hears prehearing motions when no hearing officer has been assigned,

(F) hears motions for protective orders under rule 3.2(e),

(G) hears motions prior to a matter being ordered to hearing, including while a grievance is being investigated,

(H) approves stipulations to discipline not involving suspension or disbarment when no hearing officer has been assigned,

(I) responds to hearing officer requests for information or advice related to their duties,

(J) implements and oversees hearing officer training in accordance with policy established by the Board of Governors, and

(K) performs other administrative duties as the chief hearing officer deems necessary for an efficient and effective hearing system.

(gf) Case Assignment. The chief hearing officer assigns hearing officers to cases from the list of hearing officers appointed by the ~~Board of Governors~~ Supreme Court. The chief hearing officer shall be given confidential notice of any grievances filed against any hearing officers, and the ultimate disposition of those grievances, and shall consider this information when making assignments.

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

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

(h) Staff. The Executive Director of the Association may appoint a suitable person or persons to assist the hearing officers and the chief hearing officer in carrying out their functions under these rules.

Rule 2.6: Hearing Officer Conduct

Subcommittee A recommends amendments to reflect the elimination of panels and a conforming amendment, cross-referencing rule 2.14.

ELC 2.6 HEARING OFFICER CONDUCT

~~(a) “Hearing Officer” Includes Panel Members. In this rule, the term “hearing officer” includes hearing panel members.~~

~~(b)~~**(a) Integrity of Hearing Officer System.** [unchanged]

~~(c)~~**(b) Hearing Officer’s Duty to Avoid Impropriety and the Appearance of Impropriety.** [unchanged]

~~(d)~~**(c) Conduct of Those on Hearing Officer List.** [unchanged]

~~(e)~~**(d) Performing Duties Impartially and Diligently.** [unchanged]

(e) Restriction on Advising or Representing Respondents or Grievants.
Appointees to the hearing officer list are subject to the restrictions set forth in **rule 2.14.**

Rule 2.7: Conflicts Review Officer

The Conflicts Review Officer performs the intake function on grievances where ODC would have a conflict of interest. Subcommittee A recommends amending this rule to clearly state that the rule applies to grievances against officers and members of the BOG, and clarifying that the term “the Supreme Court” includes staff, attorneys, and judicial officers other than court justices (such as, for example, commissioners). Finally, language regarding WSBA staffing and a cross-reference to rule 2.14 is added.

ELC 2.7 CONFLICTS REVIEW OFFICER

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

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

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

(b) Appointment and Qualifications.

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

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

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

~~(4)~~

(c) Counsel and Clerk; Assignment of Cases. The Association shall assign matters to the Conflicts Review Officers in such a manner as to balance their caseloads insofar as it is practicable to do so. The Executive Director of the Association may appoint a suitable person or persons to act as counsel and clerk to the Conflicts Review Officers, to assist them in carrying out their functions under these rules.

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

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

(f) Restriction on Representing or Advising Respondents or Grievants. Current and former Conflicts Review Officers are subject to the restrictions set forth in rule 2.14. Members serving as Conflicts Review Officer pro tempore are subject to the same restriction while serving in that capacity.

Subcommittee A recommends no further changes to ELC 2.8, Disciplinary Counsel; Special Disciplinary Counsel (amended by consent 11/05/2009 [Materials, page 541]).

Rule 2.9: Adjunct Investigative Counsel

In addition to the amendments previously approved by the task force [Materials, page 301], Subcommittee A recommends two minor amendments and a conforming amendment to 2.9(c), cross-referencing rule 2.14.

ELC 2.9 ~~INVESTIGATIVE~~ DISCIPLINARY COUNSEL

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

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

(c) **Restriction on Representation.** ~~An a~~ Adjunct disciplinary counsel assigned to a case are subject to the restrictions of rule 2.14. ~~may not knowingly advise or represent individuals regarding pending or likely disciplinary grievances or proceedings other than advising a person of the availability of grievance procedures.~~

Subcommittee A recommends no amendments to ELC 2.10, Removal of Appointees

Rule 2.11: Compensation and Expenses:

Special disciplinary counsel are appointed to prosecute cases where ODC has a conflict, where a case requires some specialized knowledge or skill, and to utilize the services of volunteer trial counsel as a resource. Serving as special discipline counsel is extremely time-intensive, since the SDC often must work the case through presentation to the Disciplinary Board and, on occasion, to the Supreme Court. Subcommittee A recommends that 2.11 be amended to provide for special disciplinary counsel to be compensated to the extent authorized by the Board of Governors. Please note that the proposed amendment does not mandate compensation, it simply makes it possible.

ELC 2.11 COMPENSATION AND EXPENSES

(a) **Compensation.** The Association compensates the chief hearing officer to the extent authorized by the Board of Governors. The Association may compensate hearing officers and ~~hearing panel members~~ special disciplinary counsel to the extent authorized by the Board of Governors. Board members and adjunct ~~investigative disciplinary~~ counsel receive no compensation for their services.

(b) **Expenses.** The Association pays expenses incurred by hearing officers, ~~hearing panel members~~ special disciplinary counsel, the chief hearing officer, Board members, and adjunct ~~investigative disciplinary~~ counsel in connection with their duties, subject to any limitation established by resolution of the Board of Governors.

(c) **Special Appointments.** The Association pays the fees for counsel appointed under rules 7.7, 8.2(c)(2), or 8.3(d)(3) and costs or expenses reasonably incurred by these counsel.

Rule 2.13: Respondent Lawyer:

Subcommittee A recommends deleting paragraph (b), and replacing it with new 2.14.

ELC 2.13 RESPONDENT LAWYER

(a) Right to Representation. A lawyer may be represented by counsel during any stage of an investigation or proceeding under these rules.

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

(e)(b) Restriction on Charging Fee To Respond to Grievance. A respondent lawyer may not seek to charge a grievant a fee or recover costs from a grievant for responding to a grievance unless otherwise permitted by these rules.

(d)(c) Medical and Psychological Records. A respondent must furnish written releases or authorizations to permit disciplinary counsel access to medical, psychiatric, or psychological records as may be relevant to the investigation or proceeding, subject to a motion to the chief hearing officer, or the hearing officer if one has been appointed, to limit the scope of the requested releases or authorizations for good cause shown.

Proposed new rule 2.14 is at page 7 of this report.

TITLE 3 – ACCESS AND NOTICE

Rule 3.1: Open Meetings and Public Disciplinary Information

Subcommittee A recommends conforming amendments related to admonitions being made permanent and to changing resignations in lieu of disbarment to resignations in lieu of discipline.

ELC 3.1 OPEN MEETINGS AND PUBLIC DISCIPLINARY INFORMATION

(a) Open Meetings. Disciplinary hearings and meetings of the Board are public. Except as otherwise provided in these rules, Supreme Court proceedings are public to the same extent as other Supreme Court proceedings. Deliberations of a hearing officer ~~or panel~~, board, review committee, or court, and matters made confidential by a protective order, or by other provisions of these rules, are not public.

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

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

(c) Regulations. Public access to file materials and proceedings permitted by this rule may be subject to reasonable regulation as to time, place, and manner of access. Certified copies of public bar file documents will be made available at the same rate as certified copies of superior court records. Uncertified copies of public

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bar file documents will be made available at a rate to be set by the Executive Director of the Association.

Rule 3.2: Confidential Disciplinary Information

Subcommittee A engaged in spirited discussions regarding protective orders and, after many meetings, proposes the changes set forth below. The proposed amendments clarify who may issue protective orders at various stages of the proceedings, and include language intended to prevent inadvertent violation of the rule by persons directed by court order to disclose information.

Of significance, the proposed amendment to 3.2(e)(1) introduces the possibility of use of the protective order as a “gag” order by allowing use of a protective order to prohibit “any participant in the disciplinary process from disclosing or releasing specific information, documents, or pleadings obtained in the course of any matter under these rules.” The Subcommittee discussed this change at length, with disciplinary counsel noting that this runs contrary to the spirit of 3.4(a) and 3.2(f) that provides the grievants and respondents are not restrained from disclosing any information in their possession. Disciplinary counsel raised the First Amendment issues discussed in Doe v. Florida Bar, 734 F.Supp. 981 (D.C. S.D. Fla., 1990), which was the case that caused us to abandon our previous gag rule. The Subcommittee believes that allowing restriction via the mechanism of a protective order is a sufficiently limited intrusion on the First Amendment rights of grievants, respondents, and witnesses to survive constitutional challenge. Disciplinary counsel remains concerned on this point.

ELC 3.2 CONFIDENTIAL DISCIPLINARY INFORMATION

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

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

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

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

(e) Protective Orders.

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

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

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

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

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

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

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

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

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

(6) Required Disclosure. Nothing in this rule prohibits disclosure of information pursuant to court order.

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

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

Rule 3.3: Application to Stipulations, Disability Proceedings, & Diversion

Subcommittee A does not believe it appropriate that a grievant be treated differently from the general public, by being able to be told if a respondent lawyer is subject to a pending disability proceeding, and therefore recommends that provision be eliminated.

Note: At the 06/10/2010 task force meeting, Subcommittee A requested a policy discussion and guidance as to whether disability proceedings should be public. As a result of the discussion at that meeting, ODC revised its original proposal and submitted a proposal that disability proceedings be public only when the respondent asserts disability in an already public discipline proceeding. At page 73 of this report, Subcommittee A recommends that ODC's new proposal *not* be approved.

The changes to ELC 3.3(c) and ELC 3.3(d) were previously approved on the 11/05/2009 consent calendar [Materials, pages 308, 311 & 374].

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

(a) Application to Stipulations. A stipulation under rule 9.1 providing for imposition of a disciplinary sanction or admonition is confidential until approved, except that a grievant may be advised concerning a stipulation and its proposed or actual content at any time. An approved stipulation is public, unless:

- (1) it is approved before the filing of a formal complaint;
- (2) it provides for dismissal of a grievance without a disciplinary sanction or admonition; and
- (3) proceedings have not been instituted for failure to comply with the terms of the stipulation.

(b) Application to Disability Proceedings. Disability proceedings under title 8 or rule 9.2 are confidential. However, the following are public information: the fact that a lawyer has been transferred to disability inactive status, the fact that a lawyer has been reinstated to active status from disability inactive status, and the fact that a disciplinary proceeding is deferred pending supplemental proceedings under title 8. ~~However, a grievant may be advised that a lawyer against whom the grievant has complained is subject to disability proceedings. The following information is public:~~

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

(c) Custodianships. The fact that a custodian has been appointed under rule 7.7, together with the custodian's name and contact information and orders appointing and discharging such custodians, are public information and the notices

required by rule 3.5(d) will be given. Client files and records under the control of such custodians will be held confidential absent authorization to release from the client.

~~(e)~~ **(d) Diversion Contracts.** Diversion contracts and supporting affidavits and declarations under rules 6.5 and 6.6 are confidential, ~~despite rule 3.1(b)(1), unless admitted into evidence in a disciplinary proceeding,~~ however, a diversion affidavit made under rule 6.6 is public following a final termination of the diversion contract for material breach. When a matter that has previously become public under rule 3.1(b) is diverted by a diversion contract, that contract and the supporting documents are confidential but the fact that the matter was diverted from discipline is public information and a notice of diversion will be placed in the public file. Upon the conclusion of the diversion, whether by successful completion of diversion and dismissal of the grievance, or by breach of the diversion contract, a notice of that result will be placed in the public file.

Rule 3.4: Release or Disclosure of Otherwise Confidential Information

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

ELC 3.4 RELEASE OR DISCLOSURE OF OTHERWISE CONFIDENTIAL INFORMATION

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

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

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

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

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

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

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

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

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

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

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

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

(f) Statement of Concern.

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

(2) *Procedure.*

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

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

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

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

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

(g) Release to Judicial Officers. Any state or federal judicial officer may be advised of the status of a confidential disciplinary grievance about a lawyer appearing before the judicial officer in a representational capacity and, except as prohibited by rule 3.2(e), may be provided with requested confidential information

if the grievance is relevant to the lawyer's conduct in a matter before that judicial officer. The judicial officer must maintain the confidentiality of the matter.

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

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

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

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

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

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

Rule 3.5: Notice of Discipline

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

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

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

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

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

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

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

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

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

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

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

(4) — the Washington State Bar News.

(c) **Preparation of Bar News and Website Notice. Notice of the imposition of any disciplinary sanction, admonition, resignation in lieu of disbarment, interim suspension, or transfer to disability inactive status, or the filing of a statement of concern under rule 3.4(f) must be published in the Washington State Bar News and on any electronic or other index or site maintained by the Association for public information. The counsel to the Board Association counsel** has discretion in drafting notices for publication in the Washington State Bar News **and on the Website**, and should include sufficient information to adequately inform the public and the members of the Association about the misconduct found, the rules violated

and the disciplinary action imposed. For a transfer to disability inactive status, reference will be made to the disability inactive status, but no reference will be made to the specific disability. For an interim suspension, the basis of the interim suspension will be stated. All notices under this subsection should include the respondent lawyer's name, bar number, date of admission, the time frame of the misconduct, the rules violated, and the disciplinary action. ~~The counsel to the Board Association counsel~~ must serve a copy of the draft notice under this subsection on respondent and disciplinary counsel under rule 4.1 and review any comments filed with ~~the Association~~ counsel ~~to the Board~~ within five days of service, but Association counsel's ~~to the Board's~~ decision about the content of the notice is not subject to further review.

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

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

Rule 3.6: Maintenance of Records

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

ELC 3.6 MAINTENANCE OF RECORDS

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

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

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

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

* * *

ELC 13.5 ADMONITION

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

TITLE 4 – GENERAL PROCEDURAL RULES

Rule 4.1: Service of Papers

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

ELC 4.1 SERVICE OF PAPERS

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

(b) Methods of Service.

(1) *Service by Mail.*

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

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

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

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

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

~~or~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 4.2: Filing; Orders

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

ELC 4.2 FILING; ORDERS

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

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

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

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

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

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

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

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

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

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

TITLE 8 – DISABILITY PROCEEDINGS

Rule 8.1: Action on Adjudication of Incompetency

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

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

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

- (1) was found to be incapable of assisting in his or her own defense in a criminal action;
- (2) was acquitted of a crime based on insanity;
- (3) had a guardian (but not a limited guardian) appointed for his or her person or estate on a judicial finding of incompetency/incapacity;
- (4) was involuntarily committed to a mental health facility for more than 14 days under Ch. 71.05 RCW; or
- ~~(4)(5)~~ was found to be mentally incapable of conducting the practice of law in any other jurisdiction.

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

Rule 8.2: Determination of Incapacity to Practice Law

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

ELC 8.2 DETERMINATION OF INCAPACITY TO PRACTICE LAW

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

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

(c) Procedure.

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

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

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

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

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

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

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

(d) Interim Suspension.

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

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

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

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

Rule 8.3: Disability Proceedings During Course of Disciplinary Proceedings

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

ELC 8.3 DISABILITY PROCEEDINGS DURING COURSE OF DISCIPLINARY PROCEEDINGS

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

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

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

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

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

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

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

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

(4) *Health Records.* Disciplinary counsel may require the respondent to furnish written releases and authorizations for medical, psychological, or psychiatric records as may be relevant to the determination under section (b), subject to a motion to the hearing officer to limit the scope of the requested

releases or authorizations for good cause. If the respondent asserted incapacity, there is a rebuttable presumption that good cause does not exist.

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

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

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

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

(7) *Hearing Officer Decision.*

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

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

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

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

proceeding. The procedures for appeal and review of suspension recommendations shall apply ~~to recommendations for transfer to disability inactive status~~ **such appeals.**

(8) *Transfer Following Board Review.*

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

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

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

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

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

Rule 8.5: Stipulated Transfer to Disability Inactive Status

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

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

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

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

(b) Form. The stipulation must:

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

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

~~(e)~~ (d) **Approval.** The stipulation must be presented to the Board. The Board reviews the stipulation based solely on the record agreed to by the respondent, respondent's counsel, and disciplinary counsel. The Board may either approve the stipulation or reject it. Upon approval, the transfer to disability inactive status is not subject to further review.

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

Rule 8.6: Costs in Disability Proceedings

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

ELC 8.6 COSTS IN DISABILITY PROCEEDINGS

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

Rule 8.7: Burden and Standard of Proof

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

ELC 8.7 BURDEN AND STANDARD OF PROOF

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

Rule 8.8: Reinstatement to Active Status

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

ELC 8.8 REINSTATEMENT TO ACTIVE STATUS

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

(b) Petition. The petition for reinstatement must:

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

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

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

(e) Board Review.

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

(C) orders that a hearing be held before a hearing officer ~~or panel~~ under the procedural rules for disciplinary proceedings;

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

(E) denies the petition;

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

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

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

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

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

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

(g) Review by Supreme Court. ~~If the petition for reinstatement is not granted,~~ Either the respondent or disciplinary counsel may appeal the Board's decision to the Supreme Court, by filing a notice of appeal with the Clerk within ~~45~~ 30 days of service of the Board's decision on the respondent. Title 12 applies to review under this section.

Rule 8.9: Petition for Limited Guardianship

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

ELC 8.9 PETITION FOR LIMITED GUARDIANSHIP

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

(a) Request for Authorization to Initiate Guardianship Proceedings.

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

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

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

(d) Action for Limited Guardianship.

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

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

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

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

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

Rule 8.10: Appointment of Counsel for Respondent [NEW]

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

ELC 8.10 APPOINTMENT OF COUNSEL FOR RESPONDENT

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

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

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

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

TITLE 10 – HEARING PROCEDURES

Subcommittee A proposes no amendments to ELC 10.1

Rule 10.2: Hearing Officer ~~or Panel~~

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

ELC 10.2 HEARING OFFICER ~~OR PANEL~~ ASSIGNMENT

(a) Assignment.

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

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

(b) Disqualification and Removal.

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

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

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

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

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

Rule 10.3: Commencement of Proceedings

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

ELC 10.3 COMMENCEMENT OF PROCEEDINGS

(a) Assignment. Formal Complaint.

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

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

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

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

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

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

Rule 10.4: Notice to Answer

Subcommittee A recommends housekeeping and stylistic changes to ELC 10.4. As discussed herein at page 74, Subcommittee A rejected ODC’s proposals to amend ELC 10.4 to make disbarment the presumed sanction for default.

ELC 10.4 NOTICE TO ANSWER

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

**BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION**

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

To: The above named lawyer:

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

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

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

Dated this _____ day of _____, 20__.

WASHINGTON STATE BAR ASSOCIATION

By _____

Disciplinary Counsel, Bar No.

Address: _____

Telephone: _____

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

Rule 10.5: Answer

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

ELC 10.5 ANSWER

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

(b) Content. The answer must contain:

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

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

Rule 10.6: Default Proceedings

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

ELC 10.6 DEFAULT PROCEEDINGS

(a) Entry of Default.

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

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

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

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

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

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

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

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

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

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

(3) *Disciplinary Proceeding.* Within 60 days of the filing of the order of default, the hearing officer must conduct a disciplinary proceeding to recommend

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

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

Rule 10.7: Amendment of Formal Complaint

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

ELC 10.7 AMENDMENT OF FORMAL COMPLAINT

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

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

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

Rule 10.8: Motions

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

ELC 10.8 MOTIONS

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

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

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

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

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

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

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

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

Rule 10.10: Prehearing Dispositive Motions

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

ELC 10.10 PREHEARING DISPOSITIVE MOTIONS

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

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

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

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

Rule 10.11: Discovery and Prehearing Procedures

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

ELC 10.11 DISCOVERY AND PREHEARING PROCEDURES

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

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

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

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

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

~~(g)~~

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

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

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

Rule 10.12: Scheduling Hearing

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

ELC 10.12 SCHEDULING OF HEARING

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

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

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

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

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

(c) Scheduling Order.

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

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

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

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

SCHEDULING CONFERENCE DETERMINATION:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 10.13: Disciplinary Hearing

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

ELC 10.13 DISCIPLINARY HEARING

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

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

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

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

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

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

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

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

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

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

Subcommittee A Final Report

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

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

10.14 Evidence and Burden of Proof

10.15 Bifurcated Hearings

Rule 10.16: Decision of Hearing Officer or Panel

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

ELC 10.16 DECISION OF HEARING OFFICER OR PANEL

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

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

(c) Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Disability proceedings public

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

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

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

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

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

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

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

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

Dated this _____ day of _____, 20__.

WASHINGTON STATE BAR ASSOCIATION

By _____

Disciplinary Counsel, Bar No.

Address: _____

Telephone: _____

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

ELC 10.6 DEFAULT PROCEEDINGS

(a) Entry of Default.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ELC 10.13 DISCIPLINARY HEARING

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

(d) Witnesses. Except as provided in subsection (b)(2) ~~and rule 10.6~~, witnesses must testify under oath. Testimony may also be submitted by deposition as permitted by CR 32. Testimony must be recorded by a court reporter or, if allowed by the hearing officer, by tape recording. The parties have the right to cross-examine witnesses who testify and to submit rebuttal evidence.³

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

³ Edits submitted by Subcommittee A for approval at page 65 are not reflected here.

ELC 7.1 and 1.5 and RPC 8.4:

[Note: This draft was reported, without a recommendation, in the Subcommittee B report of January 5, 2010 (p. 627-29). It does not appear that the Task Force acted on the draft, so it is repeated here.]

ELC 7.1 ~~INTERIM SUSPENSION FOR~~ PROCEDURE ON CONVICTION OF A CRIME **(a) Definitions.**

(1) "Conviction" for the purposes of this rule occurs upon entry of a plea of guilty, unless the defendant affirmatively shows that the plea was not accepted or was withdrawn, or upon entry of a finding or verdict of guilty, unless the defendant affirmatively shows that judgment was arrested or a new trial granted.

(2) "~~Serious crime~~" includes any:

(A) ~~felony;~~

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

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

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

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

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

(c) Disciplinary Procedure upon Conviction.

(1) If a lawyer is convicted of a felony, disciplinary counsel must file a formal complaint regarding the conviction. Disciplinary counsel must also petition the Supreme Court for an order suspending the respondent lawyer during the pendency of disciplinary proceedings. The petition for suspension may be filed before the formal complaint.

~~(2) If a lawyer is convicted of a crime that is not a felony, disciplinary counsel may refer the matter to a review committee to determine whether the crime is a serious crime. If so, disciplinary counsel proceeds in the same manner as for a felony.~~

~~—(3) If a lawyer is convicted of a crime that is neither not a felony nor a serious crime, the review committee may considers a report of the conviction in the same manner as any other report of possible misconduct by a lawyer.~~

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

(e) Immediate Interim Suspension.

~~(1) Upon the filing of a petition for suspension under this rule, the Court determines whether the crime constitutes a serious crime felony as defined in section (a).~~

~~(1) If the crime is a felony, the Court must enter an order immediately suspending the respondent from the practice of law.~~

~~(2) If the crime is not a felony, the Court conducts a show cause proceeding under rule 7.2(b) to determine if the crime is a serious crime. If the Court determines the crime is a serious crime, the Court must enter an order immediately suspending the respondent from the practice of law. The respondent must be suspended absent an affirmative showing that the respondent's continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, or be contrary to the public interest.~~

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

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

~~(45) Suspension under this rule occurs:~~

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

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

~~(C) regardless of the pendency of an appeal.~~

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

(g) Termination of Suspension.

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

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

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

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

ELC 1.5 VIOLATION OF DUTIES IMPOSED BY THESE RULES

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

.....

- pay costs, rule 5.3(f) or 13.9; or
- report the lawyer's felony conviction, rule 7.1(b).

RPC 8.4 MISCONDUCT.

It is professional misconduct for a lawyer to:

....

(o) Fail to report the lawyer's felony conviction to disciplinary counsel as required by ELC 7.1.

Memo

To: ELC Drafting Task Force

From: Subcommittee C

Date: June 2, 2010

RE: Items Recommended For Discussion [Held Over from June 10, 2010 Meeting]

We recommend the following proposals be considered for discussion by the full Task Force:

1. Mr. Sheldon has asked that the full Task Force have a discussion regarding the issue of granting ODC the same right of appeal to the Supreme Court as respondents. This issue was previously discussed by the Task Force in September 2009, at which time the Task Force noted the Board of Governors decision to add a right of appeal for ODC, and following discussion, voted 6 to 4 to provide a right of appeal for ODC. See minutes at pp. 549-50. Based on that direction, the Subcommittee has prepared the appropriate amendments to ELC 12.3 and ELC 12.4. Mr. Sheldon does not contest any provision of the drafting of the proposed amendments to ELC 12.3 or ELC 12.4, instead, he asks that the Task Force reconsider the decision to allow ODC a right of appeal. The Subcommittee recommends that the Task Force have the discussion requested by Mr. Sheldon. Because there is no objection to the particular wording of the proposed amendments to ELC 12.3 and ELC 12.4, we have included the proposed amendments on the consent calendar, subject, of course, to any decision by the Task Force to reconsider the decision to allow ODC a right of appeal.
2. By a vote of 4 to 1, the Subcommittee recommends the Task Force approve the following proposed amendment to ELC 13.9. This is a modification of the original ODC proposal (Materials p. 512-13) to provide for costs and expenses when reciprocal discipline is imposed. The Subcommittee modified that proposal to provide for such costs and expenses only after a contested reciprocal proceeding that has required briefing.

ELC 13.9 COSTS AND EXPENSES [Redline]

(a) Assessment. The Association's costs and expenses may be assessed as provided in this rule against any respondent lawyer who is ordered sanctioned or admonished, or against whom reciprocal discipline is imposed after a contested reciprocal discipline proceeding.

....

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

- (1) for an admonition that is accepted under rule 13.5(a), \$750;

(2) for a matter that becomes final without review by the Board, \$1,500;
(3) for a matter that becomes final upon a reciprocal discipline order under rule 9.2 or rule 9.3, in a matter requiring briefing at the Supreme Court, \$1,500;

(~~3~~ 4) for a matter that becomes final following Board review, without appeal to the Supreme Court, a total of \$2,000;

(4 ~~5~~) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review but not requiring briefing, a total of \$2,500; and

(~~5~~ 6) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review in which briefing is required, a total of \$3,000.

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

(1) *Timing.* Disciplinary counsel must file a statement of costs and expenses with the Clerk within 20 days from any of the following events:

(A) an admonition is accepted;

(B) the decision of a hearing officer or panel or the Board imposing an admonition or a sanction becomes final;

(C) a notice of appeal from a Board decision is filed and served; ~~or~~

(D) the Supreme Court accepts or denies discretionary review of a Board decision; or

(E) entry of a final decision imposing reciprocal discipline under rule 9.2 or rule 9.X in a matter requiring briefing at the Supreme Court.

(2) *Content.* A statement of costs and expenses must state with particularity the nature and amount of the costs claimed and also state the expenses requested. Disciplinary counsel must sign the statement, and this signature constitutes a certification that all reasonable attempts have been made to insure the statement's accuracy.

(3) *Service.* The Clerk serves a copy of the statement on the respondent.

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

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

....

ELC 13.9 COSTS AND EXPENSES [Clean Copy]

(a) Assessment. The Association's costs and expenses may be assessed as provided in this rule against any respondent lawyer who is ordered sanctioned or admonished, or against whom reciprocal discipline is imposed after a contested reciprocal discipline proceeding.

....

(c) Expenses Defined. "Expenses" for the purposes of this rule means a reasonable charge for attorney fees and administrative costs. Ex-

penses assessed under this rule may equal the actual expenses incurred by the Association, but in any case cannot be less than the following amounts:

- (1) for an admonition that is accepted under rule 13.5(a), \$750;
- (2) for a matter that becomes final without review by the Board, \$1,500;
- (3) for a matter that becomes final upon a reciprocal discipline order under rule 9.2 or rule 9.3, in a matter requiring briefing at the Supreme Court, \$1,500;
- (4) for a matter that becomes final following Board review, without appeal to the Supreme Court, a total of \$2,000;
- (5) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review but not requiring briefing, a total of \$2,500; and
- (6) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review in which briefing is required, a total of \$3,000.

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

(1) *Timing.* Disciplinary counsel must file a statement of costs and expenses with the Clerk within 20 days from any of the following events:

- (A) an admonition is accepted;
- (B) the decision of a hearing officer or panel or the Board imposing an admonition or a sanction becomes final;
- (C) a notice of appeal from a Board decision is filed and served; or
- (D) the Supreme Court accepts or denies discretionary review of a Board decision; or
- (E) entry of a final decision imposing reciprocal discipline under rule 9.2 or rule 9.X in a matter requiring briefing at the Supreme Court.

(2) *Content.* A statement of costs and expenses must state with particularity the nature and amount of the costs claimed and also state the expenses requested. Disciplinary counsel must sign the statement, and this signature constitutes a certification that all reasonable attempts have been made to insure the statement's accuracy.

(3) *Service.* The Clerk serves a copy of the statement on the respondent.

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

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

.....

3. By a vote of 3 to 1, with 1 abstention, the Subcommittee recommends that the Task Force reject the ODC proposal set forth at p. 429 – 31 of the Materials to eliminate the distinction between sanctions and admonitions, which would make an admonition a type of sanction. The change proposed by ODC would make the following change to ELC 13.1, along with a number of other conforming changes to other rules:

ELC 13.1 SANCTIONS AND REMEDIES [Redline]

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

(a) Sanctions.

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

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

(c) Remedies.

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

ELC 13.1 SANCTIONS AND REMEDIES [Clean Copy]

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- (1) Disbarment;
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(b) Remedies.

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

4. The Subcommittee recommends the Task Force discuss ABA Recommendation No. 22, to have the Disciplinary Board and the Supreme Court administer reprimands, as opposed to the current provision in ELC 13.4(a) which provides that “The Association administers a reprimand to a respondent lawyer by written statement signed by it’s President.” The Subcommittee notes the action by the Board of Governor’s reflected in their January 22, 2009 Minutes (Materials at p. 474). By a vote of 10-1-1, the Board of Governors adopted the ABA recommendation that the Disciplinary Board and the Court administer reprimands. The Subcommittee notes, however, that this recommendation was part of a series of recommendations to remove the administration of lawyer discipline from the WSBA. That specific recom-

mendation was rejected, which removes much of the reason behind the proposal to change the current system of the President of the WSBA signing reprimands. The Subcommittee discussed that the Chief Justice could sign the reprimands, but it was pointed out that the Chief's administrative duties are quite extensive and that this addition could be problematic. Given that, the Subcommittee considers the President of the WSBA to be the next most impressive person to sign a reprimand and therefore the best choice. By a vote of 4-0-1 the Subcommittee voted to recommend that despite the Board of Governors' January 22, 2009 action, that the Task Force recommend rejection of ABA Recommendation 22 and that we retain the current provisions in ELC 13.4(a) providing for reprimands to be issued by the Association and signed by the WSBA President.

5. The Subcommittee recommends the Task Force discuss the recommendation of a hearing officer (Materials at p. 241) that a respondent lawyer who is found to not have violated the RPC be allowed to recover costs from the WSBA. The Subcommittee vote on the proposal was three members voting to leave the cost provisions the way they are, and two members voting to allow recovery of costs by a respondent when all charges are dismissed.

The Subcommittee has had lively discussions on this topic. Ron Carpenter opposed the proposal, noting that the WSBA was doing the task that had been delegated by the Court, and that such a cost provision would potentially chill ODC from pursuing that task as appropriate. Julie Shankland noted that unlike civil litigation, where the parties decide how they will pursue the litigation, ODC is not in charge of what cases it brings. She noted that Review Committees order matters to hearing, including matters that have not been recommended by ODC for hearing. Randy Beitel noted that because this is not civil litigation, using economic factors is inappropriate, because to the extent that economic issues control, the goal of delivering justice to the public will likely suffer. Mr. Beitel noted while he prefers retaining the current cost provisions, that rather than introduce an economic based system with endless prevailing party analysis for costs, he would consider the complete elimination of costs from the system, as that would assure that only justice issues would be influencing prosecutorial decisions. Patrick Sheldon supported the proposal, indicating that the costs to a respondent to defend an action can be very significant and that these costs are rarely covered by insurance. He indicated that this is an issue of fairness.

Charlie Wiggins indicated that he was torn by the issue, and was interested in knowing how often this happens. Mr. Beitel reported back to the Subcommittee with the following information:

I checked the records from the Board of Governors reports for the three-year time period January 1, 2007 – December 31, 2009:
2007 - No matters dismissed by hearing officer after hearing.
2008 - Two matters dismissed by hearing officer after hearing:
Matter One: Dismissed 10/7/08

Matter Two: Dismissed (no date available – because the original dismissal by disciplinary counsel was more than three years ago, file and computer entry destructed per ELC 3.6 based on respondent request.)

2009 - One matter dismissed 1/12/09 by hearing officer after hearing.

Summary: In the last three years, there have been a total of three cases dismissed by hearing officers following a hearing. Essentially, one a year. This should be compared to the disciplinary actions imposed in these years: 73 disciplinary actions in 2007, 81 disciplinary actions in 2008 and 62 disciplinary actions in 2009. While a not insubstantial of the disciplinary actions were the result of stipulations rather than hearing officer decisions, it is still apparent that dismissals by hearing officers following hearings is a distinct rarity.

Mr. Beitel indicated that one of the three matters involved a grievance that was originally dismissed by disciplinary counsel. The grievant protested, and the Review Committee ordered an admonition. The Respondent then protested the admonition and by operation of the rule, the matter was deemed ordered to hearing. It is little wonder that the matter was dismissed by the hearing officer, but reflects that unlike civil litigation where costs are sometimes used to reign in overzealous litigants, the Office of Disciplinary Counsel is not always in control of what cases are ordered to hearing. Mr. Beitel argued that without bringing some cases that are close calls, we are not doing the job necessary to protect the public.

Ron Carpenter submitted additional written comments for the Subcommittee on May 14, 2010:

Comments submitted by Ron Carpenter- 5/14/10:

ELC 13.9(a) generally provides for an assessment of allowable costs and expenses in favor of the Bar Association (Association) against an attorney “who is ordered sanctioned or admonished.” ELC 13.9(g) additionally provides for an assessment for costs and expenses “in favor of the Association” upon the filing of an opinion by this Court imposing a sanction or an admonition. It is significant to note that ELC 13.9(g) makes reference to following the *procedures* set forth in RAP Title 14, but it does not define or establish a substantive right to seek costs and expenses other than as to the Association (contrary to the less specific language of RAP 14.2, which specifies that any party that “substantially prevails on review” will be awarded costs). The purpose statements^[1] that accompanied ELC 13.9(a)&(g) respectively when

^[1] These purpose statements were adopted directly from the “COMMENTS TO Proposed RULES FOR ENFORCEMENT OF LAWYER CONDUCT (ELC) and Related Amendments to the RULES OF PROFESSIONAL CONDUCT (RPC) ADMISSION TO PRACTICE RULES (APR) and GENERAL RULES (GR) Prepared by Randy Beitel Reporter, Discipline 2000 Task Force”

they were published in the advance sheets for comments on April 16, 2002 (145 Wn.2d Proposed –at 181 and 182) stated in pertinent portions:

Section (a) is derived from RLD 5.7(a) with no substantive change. Under this rule costs and expenses may be assessed only against a respondent lawyer. The Discipline 2000 Task Force considered and rejected the concept to allow costs and expenses to be assessed against the Association. (emphasis mine)

and

Section (g) is derived from RLD 5.7(f), modified to allow assessment when an opinion of the Supreme Court imposes an admonition.^[2]

There are sound reasons for a distinction as to who is entitled to an award of costs in attorney discipline matters, as opposed to general litigants involved in appellate review of trial courts matters. In the administrative process of attorney discipline, unlike general litigation in the lower courts, there is no prevailing party below in the classic sense. The Association is charged with the responsibility of determining if professional misconduct has occurred, and then with making a nonbinding recommendation as to the appropriate nature of any discipline to be imposed by the Supreme Court if the Court upholds any of the Board's findings as to professional misconduct. Pursuant to the Court rules, the Association's duty is to ensure the appropriate regulation of attorney conduct; it has no specific client, nor does it ever prevail during that process in the same manner as a party in normal civil litigation. Its duty under the applicable court rules is to simply conduct the initial hearings on complaints and report its findings and recommendation to the Supreme Court; see ELC 12.2(b).

Although ELC 12.1 states that the Rules of Appellate Procedure serve as a guideline for review by this Court, it does provide: "except as to matters specifically dealt with in these rules." Therefore, one seems forced to conclude that the more specific language of ELC 13.9(a) and (g) is controlling over the general language of RAP 14.2 (that is broader in its designation of who is entitled to be awarded costs in that it allows the award to any party that "substantially prevails on review" in general appellate review matters). Clearly, applying these standards, counsel subject to disciplinary proceedings would not be entitled to an award of costs pursuant to any reasonable interpretation and application of the language of ELC 13.9(a) and (g).

^[2] This statement is somewhat incomplete in that the rule (both as proposed and adopted) makes reference to the imposition of either a sanction or an admonition, not merely an admonition.

One only needs to refer to page 41 of the May 2010 edition of the Washington State Bar News, the 11th line “Discipline”, to determine that the revenue collected for conducting disciplinary proceedings is far outdistanced by the almost oppressive costs incurred by the Association to conduct disciplinary proceedings (recovery being only about 2% of what is expended yearly by the Association) - the operating net loss is in part paid by every attorney in this state who pays bar dues. Given that there is always presumably at least a probable cause to believe that misconduct has occurred, and that disciplinary proceedings need to be implemented to protect the public, to ever allow costs to be recouped by responding counsel, would most likely have a “chilling effect” on disciplinary counsel’s determination to proceed with disciplinary proceedings. The Association’s disciplinary counsel are the designated enforcement arm of the system - tantamount to a prosecuting attorney in the criminal arena - and as such should not be dissuaded in doing what they feel is appropriate or vigorously pursuing discipline by the looming threat that, if unsuccessful, costs could be imposed against the Association.

6. The Subcommittee recommends that the Task Force discuss the proposal of a rule amendment to ELC 11.13 that would provide for the availability of sanctions at the Disciplinary Board. By a consensus, the Subcommittee recommends that the Task Force reject the proposal.

ELC 11.13 CHAIR OR BOARD MAY MODIFY REQUIREMENTS AND IMPOSE SANCTIONS [Redline]

(a) Upon written motion filed with the Clerk by either party, ~~for good cause shown or on its own motion~~, the Chair or Board may modify the time periods in title 11, and make other orders as appear appropriate to assure fair and orderly Board review.

(b) ~~However, the~~ The time period for filing a notice of appeal in rule 11.2(b)(3)(A) may not, however, be extended or altered.

(c) The procedures and sanctions in RAP 18.9(a) and (d) apply to matters before the Disciplinary Board. The Chair is considered to be the commissioner or clerk for the purposes of this rule.

ELC 11.13 CHAIR OR BOARD MAY MODIFY REQUIREMENTS AND IMPOSE SANCTIONS [Clean Copy]

(a) Upon written motion filed with the Clerk by either party, or on its own motion, the Chair or Board may modify the time periods in title 11, and make other orders as appear appropriate to assure fair and orderly Board review.

(b) The time period for filing a notice of appeal in rule 11.2(b)(3)(A) may not, however, be extended or altered.

(c) The procedures and sanctions in RAP 18.9(a) and (d) apply to matters before the Disciplinary Board. The Chair is considered to be the commissioner or clerk for the purposes of this rule.

Memo

To: ELC Drafting Task Force

From: Subcommittee C
Charlie Wiggins, Chair

Date: July 23, 2010

RE: Additional Items for Consideration on the Consent Calendar

Subcommittee C has concluded our review of all the items referred to us. By a separate memo we submit additional items which we recommend be discussed by the Task Force. Following are three issues we recommend for consideration on the **Consent Calendar**:

1. The Subcommittee recommends adoption of the following changes to ELC 12.3(d) and ELC 12.4(e) clarify how and where a party appealing to the Supreme Court must pay the filing fee:

ELC 12.3 APPEAL [redline]

(d) Filing Fee. The first party to file a notice of appeal must, at the time the notice is filed, either pay the statutory filing fee to the Clerk of the Disciplinary Board by cash or by check made payable to the Clerk of the Supreme Court, or by appropriate motion apply to the Clerk of the Supreme Court for a waiver of the filing fee ~~and other costs imposed by the Supreme Court~~ based upon a showing of indigency.

ELC 12.3 APPEAL [clean copy]

(d) Filing Fee. The first party to file a notice of appeal must, at the time the notice is filed, either pay the statutory filing fee to the Clerk of the Disciplinary Board by cash or by check made payable to the Clerk of the Supreme Court, or by appropriate motion apply to the Clerk of the Supreme Court for a waiver of the filing fee based upon a showing of indigency.

ELC 12.4 DISCRETIONARY REVIEW [redline]

(e) Filing Fee. The first party to file a petition for discretionary review, must, at the time the petition is filed, either pay the statutory filing fee to the Clerk of the Disciplinary Board by cash or by check made payable to the Clerk of the Supreme Court, or by appropriate motion apply to the Clerk of the Supreme Court for a waiver of the filing fee ~~and other costs imposed by the Supreme Court~~ based upon a showing of indigency.

ELC 12.4 DISCRETIONARY REVIEW [clean copy]

(e) Filing Fee. The first party to file a petition for discretionary review, must, at the time the petition is filed, either pay the statutory filing fee to

Consent Items From Subcommittee C

the Clerk of the Disciplinary Board by cash or by check made payable to the Clerk of the Supreme Court, or by appropriate motion apply to the Clerk of the Supreme Court for a waiver of the filing fee based upon a showing of indigency.

2. The recommends adoption of the following change to ELC 13.4 clarifying the scope the review by the Disciplinary Board of the language of a proposed reprimand:

ELC 13.4 REPRIMAND [redline]

. . . .

(b) Notice and Review of Contents. The Association must serve the respondent with a copy of the proposed reprimand. Within five days of service of the proposed reprimand, the respondent may file a request for review of the content of the proposed reprimand. This request stays the administration of the reprimand. When timely requested, the Disciplinary Board reviews the proposed reprimand content in light of the decision or stipulation imposing the reprimand and may ~~take any appropriate action~~ amend the content. The Board's action is final and not subject to further review. If no request is received, the content of the reprimand is final, and the reprimand is administered.

ELC 13.4 REPRIMAND [clean copy]

. . . .

(b) Notice and Review of Contents. The Association must serve the respondent with a copy of the proposed reprimand. Within five days of service of the proposed reprimand, the respondent may file a request for review of the content of the proposed reprimand. This request stays the administration of the reprimand. When timely requested, the Disciplinary Board reviews the proposed reprimand content in light of the decision or stipulation imposing the reprimand and may amend the content. The Board's action is final and not subject to further review. If no request is received, the content of the reprimand is final, and the reprimand is administered.

3. The Subcommittee reconsidered the language of ELC 14.1 at the request of Kurt Bulmer who sought clarification as to the level of detail that a respondent lawyer must put in a notice to explain a suspension, disbarment or resignation in lieu of discipline. Mr. Bulmer indicated his approval of the following changes to ELC 14.1(b) and ELC 14.1(c) to deal with his concerns. The Subcommittee also updated the rule to provide for resignations in lieu of discipline and to clarify the language in ELC 14.1(d) regarding what language must be used when notice is given that a lawyer has transferred to disability inactive status. The subcommittee recommends adoption of the following changes:

TITLE 14 – DUTIES ON SUSPENSION, OR DISBARMENT, OR RESIGNATION IN LIEU OF DISCIPLINE [redline]

ELC 14.1 NOTICE TO CLIENTS AND OTHERS; PROVIDING CLIENT PROPERTY

(a) Providing Client Property. A lawyer who has been suspended from the practice of law, disbarred, has resigned in lieu of discipline, or has been transferred to disability inactive status must provide each client or the client's substituted counsel upon request with the client's assets, files, and other documents in the lawyer's possession, regardless of any possible claim of lien under RCW 60.40.

(b) Notice if Suspended for 60 Days or Less. A lawyer who has been suspended for 60 days or less under rule 13.3 must within ten days of the effective date of the suspension:

(1) notify every client involved in litigation or administrative proceedings, and counsel for each adverse party (or the adverse party directly if not represented by counsel), of the suspension, ~~the reason therefor~~ that the suspension is a disciplinary suspension, and of the lawyer's consequent inability to act as a lawyer after the effective date of the suspension, and advise each of these clients to seek prompt substitution of another lawyer. If the client does not substitute counsel within ten days of this notice, the lawyer must advise the court or agency of the lawyer's inability to act; and

(2) notify all other clients of the suspension, the reason therefor, and consequent inability to act during the suspension. The notice must advise the client to seek legal advice elsewhere if needed during the suspension.

(c) Notice if Otherwise Suspended, or Disbarred, or Resigned in Lieu of Discipline. A lawyer who has been disbarred, has resigned in lieu of discipline, or has been suspended for more than 60 days, for nonpayment of dues, or under title 7 or APR 11, APR 17, or APR 26, must within ten days of the effective date of the disbarment, ~~or suspension, or resignation:~~

(1) notify every client of the lawyer's suspension, disbarment or resignation in lieu of discipline, ~~the reason therefor~~ whether a suspension is a disciplinary suspension, an interim suspension, or an administrative suspension, and of the lawyer's consequent inability to act as the client's lawyer and the reason therefor, and advise the client to seek legal advice elsewhere;

(2) advise every client involved in litigation or administrative proceedings to seek the prompt substitution of another lawyer. If the client does not substitute counsel within ten days of being notified of the lawyer's inability to act, the lawyer must advise the court or agency of the lawyer's inability to act; and

(3) notify counsel for each adverse party in pending litigation or administrative proceedings, or the adverse party directly if not represented by counsel, of the lawyer's suspension, disbarment, or resignation in lieu of discipline, the reason therefor, and the inability to act further on the client's

behalf.

(d) Notice if Transferred to Disability Inactive Status. A lawyer transferred to disability inactive status, or his or her guardian if one has been appointed, must give all notices required by section (c), except that while the notices need not refer to the specifics of the disability, the notice must advise that the lawyer has been transferred to disability inactive status.

(e) Address of Client. All notices to lawyers, adverse parties, courts, or agencies as required by sections (b), (c), or (d) must contain the client's name and last known address, unless doing so would disclose a confidence or secret of the client. If the name and address are omitted, the client must be advised that so long as his or her address remains undisclosed and no new lawyer is substituted, the client may be served by leaving papers with the clerk of the court under CR 5(b)(1) in pending superior court actions, and that comparable provisions may allow similar service in other court proceedings or administrative actions.

TITLE 14 – DUTIES ON SUSPENSION, OR DISBARMENT, OR RESIGNATION IN LIEU OF DISCIPLINE [clean copy]

ELC 14.1 NOTICE TO CLIENTS AND OTHERS; PROVIDING CLIENT PROPERTY

(a) Providing Client Property. A lawyer who has been suspended from the practice of law, disbarred, has resigned in lieu of discipline, or has been transferred to disability inactive status must provide each client or the client's substituted counsel upon request with the client's assets, files, and other documents in the lawyer's possession, regardless of any possible claim of lien under RCW 60.40.

(b) Notice if Suspended for 60 Days or Less. A lawyer who has been suspended for 60 days or less under rule 13.3 must within ten days of the effective date of the suspension:

(1) notify every client involved in litigation or administrative proceedings, and counsel for each adverse party (or the adverse party directly if not represented by counsel), of the suspension, that the suspension is a disciplinary suspension, and of the lawyer's consequent inability to act as a lawyer after the effective date of the suspension, and advise each of these clients to seek prompt substitution of another lawyer. If the client does not substitute counsel within ten days of this notice, the lawyer must advise the court or agency of the lawyer's inability to act; and

(2) notify all other clients of the suspension, the reason therefor, and consequent inability to act during the suspension. The notice must advise the client to seek legal advice elsewhere if needed during the suspension.

(c) Notice if Otherwise Suspended, Disbarred, or Resigned in Lieu of Discipline. A lawyer who has been disbarred, has resigned in lieu of discipline, or has been suspended for more than 60 days, for nonpayment of dues, or under title 7 or APR 11, APR 17, or APR 26, must within ten days

Consent Items From Subcommittee C

of the effective date of the disbarment, suspension, or resignation:

(1) notify every client of the lawyer's suspension, disbarment or resignation in lieu of discipline, whether a suspension is a disciplinary suspension, an interim suspension, or an administrative suspension, and of the lawyer's consequent inability to act as the client's lawyer and advise the client to seek legal advice elsewhere;

(2) advise every client involved in litigation or administrative proceedings to seek the prompt substitution of another lawyer. If the client does not substitute counsel within ten days of being notified of the lawyer's inability to act, the lawyer must advise the court or agency of the lawyer's inability to act; and

(3) notify counsel for each adverse party in pending litigation or administrative proceedings, or the adverse party directly if not represented by counsel, of the lawyer's suspension, disbarment, or resignation in lieu of discipline, the reason therefor, and the inability to act further on the client's behalf.

(d) Notice if Transferred to Disability Inactive Status. A lawyer transferred to disability inactive status, or his or her guardian if one has been appointed, must give all notices required by section (c), except that while the notices need not refer to the specifics of the disability, the notice must advise that the lawyer has been transferred to disability inactive status.

(e) Address of Client. All notices to lawyers, adverse parties, courts, or agencies as required by sections (b), (c), or (d) must contain the client's name and last known address, unless doing so would disclose a confidence or secret of the client. If the name and address are omitted, the client must be advised that so long as his or her address remains undisclosed and no new lawyer is substituted, the client may be served by leaving papers with the clerk of the court under CR 5(b)(1) in pending superior court actions, and that comparable provisions may allow similar service in other court proceedings or administrative actions.

Memo

To: ELC Drafting Task Force

From: Subcommittee C
Charlie Wiggins, Chair

Date: July 23, 2010

RE: Additional Items for Consideration as Discussion Items

Subcommittee C has concluded our review of all the items referred to us. By a separate memo we submit additional items which we recommend be consider by the Task Force on the consent calendar.

In this memo we forward the following items **to be discussed** by the Task Force:

1. ABA Recommendation No. 24 recommended amending ECL 14.2 to clarify that a lawyer disbarred, suspended or on disability inactive status cannot work in a law office or as a paralegal. See Materials at 131- 32. At their April 2009 meeting, the Board of Governors, by a vote of 10-1-2, approved the recommendation that the rules be so clarified. The Board's minutes noted that a member of the Family Law Section Executive Committee suggested "clarification of all aspects of what a disbarred or suspended lawyer can and cannot do." See Materials at 487- 88.

Although RPC 5.8(b) prohibits a practicing lawyer from maintaining an office for the practice of law in a room or office occupied or used in whole or in part by a disbarred or suspended lawyer or a lawyer who has resigned in lieu of disbarment, ELC 14.2, which prohibits disbarred, suspended and disability inactive lawyers from practicing, does not address a prohibition on such an individual working in a law office in a capacity such as a paralegal, although this would reasonably be deduced from RPC 5.8(b). Several changes are needed to provide better coordination between RPC 5.8(b) and ELC 14.2. We recommend two sets of changes to accomplish this.

First, the two rules need to apply to the same groups. Currently, ELC 14.2 applies to disbarred lawyers, suspended lawyers and lawyers transferred to disability inactive. Not included are lawyers who have resigned in lieu. RPC 5.8(b) currently does apply to lawyers who have resigned in lieu, as well as to disbarred or suspended lawyers, but appears not to apply to lawyers on disability inactive. We propose changes to both ELC 14.2 and RPC 5.8(b) so that both rules apply to the same four groups:

- Disbarred lawyers
- Suspended lawyers
- Lawyers who have resigned in lieu of discipline (previously in lieu of disbarment)
- Lawyers transferred to disability inactive.

Second, we believe that the operative language as to what is permitted and what is prohibited in terms of employment of these individuals in a law office needs to be located in only one of the rules. Having operative language in both sets of rules invites differing interpretations over the years. We believe that the best place for the operative language is in RPC 5.8(b) because that is where the operative language has historically been, and because there is a well developed system for interpretation of the language, see Formal Opinion 184 and Informal Opinion 2142. In addition, a lawyer who is approached by a suspended/disbarred, etc., lawyer and who has a question about whether a particular employment arrangement is permissible under the rule can make an inquiry to the Rule of Professional Conduct Committee and obtain guidance. There is no similar mechanism for getting an opinion as to the interpretation to be given an ELC provision. We have proposed a new ELC 14.2(c) which references to RPC 5.8 for the operative language.

In light of the comments in the minutes of the Board of Governors encouraging greater clarification as to just what disbarred/suspended/resigned in lieu/disability inactive lawyers can and cannot do, we also propose adding two additional comments to RPC 5.8. These are adapted from the two substantive paragraphs of Opinion 184 (as amended 2009, copy attached) which give specific guidance as to the specific types of work that are permitted and the specific types of work that are prohibited.

The Subcommittee unanimously recommended the following proposed changes be considered by the Task Force as a discussion item, with the Subcommittee unanimously recommending approval of the proposed changes.

Draft Rule Changes to ELC 14.2:

ELC 14.2 LAWYER TO DISCONTINUE PRACTICE [redline]

(a) Discontinue Practice. A disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment or discipline, or a lawyer transferred to disability inactive status, must not practice law after the effective date of the disbarment, resignation in lieu of disbarment or discipline, suspension, or transfer to disability inactive status, and also must take whatever steps necessary to avoid any reasonable likelihood that anyone will rely on him or her as a lawyer authorized to practice law.

(b) Continuing Duties to Former Clients. This rule does not preclude a disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment or discipline, or a lawyer transferred to disability inactive status, from disbursing assets held by the lawyer to clients or other persons or from providing information on the facts and the lawyer's theory of a case and its status to a succeeding lawyer, provided that the ~~suspended or disbarred~~ lawyer not be involved in any discussion regarding matters occurring after the date of the suspension, resignation in lieu of disbarment or discipline, transfer to disability inactive, or disbarment. The lawyer must provide this information on request and without charge.

(c) Working In Law Office Prohibited. A disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment, or a lawyer who

has resigned in lieu of discipline, or a lawyer transferred to disability inactive status is prohibited from employment by a lawyer or law firm as provided in Rule of Professional Conduct 5.8.

ELC 14.2 LAWYER TO DISCONTINUE PRACTICE [clean copy]

(a) Discontinue Practice. A disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment or discipline, or a lawyer transferred to disability inactive status, must not practice law after the effective date of the disbarment, resignation in lieu of disbarment or discipline, suspension, or transfer to disability inactive status, and also must take whatever steps necessary to avoid any reasonable likelihood that anyone will rely on him or her as a lawyer authorized to practice law.

(b) Continuing Duties to Former Clients. This rule does not preclude a disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment or discipline, or a lawyer transferred to disability inactive status, from disbursing assets held by the lawyer to clients or other persons or from providing information on the facts and the lawyer's theory of a case and its status to a succeeding lawyer, provided that the lawyer not be involved in any discussion regarding matters occurring after the date of the suspension, resignation in lieu of disbarment or discipline, transfer to disability inactive, or disbarment. The lawyer must provide this information on request and without charge.

(c) Working In Law Office Prohibited. A disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment, or a lawyer who has resigned in lieu of discipline, or a lawyer transferred to disability inactive status is prohibited from employment by a lawyer or law firm as provided in Rule of Professional Conduct 5.8.

Draft Rule Changes to RPC 5.8(b):

**RPC 5.8
MISCONDUCT INVOLVING DISBARRED, SUSPENDED, RESIGNED,
AND INACTIVE LAWYERS [redline]**

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

(b) A lawyer shall not engage in any of the following with an individual who is a disbarred or suspended lawyer, or who has resigned in lieu of disbarment or discipline, or who has been transferred to disability inactive status:

- (1) practice law with or in cooperation with such an individual;
- (2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;

- (3) permit such an individual to use the lawyer's name for the practice of law;
- (4) practice law for or on behalf of such an individual; or
- (5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual.

Washington Comments

[1] The provisions of this Rule were taken from former Washington RPC 5.5(d) and (e) (as amended in 2002).

[2] This rule prohibits a lawyer from hiring or employing a lawyer in connection with or related to the practice of law who is disbarred, suspended, or a lawyer who is on disability inactive status or who has resigned in lieu of disbarment or discipline. It does not prohibit a lawyer from hiring such an individual in capacities not involving the practice of law. Thus, a lawyer may employ such an individual in other, nonlaw-related capacities from such mundane tasks as mowing lawns or washing windows, to more sophisticated employment such as managing a business or property not related to the lawyer's practice of law.

[3] This rule clearly prohibits a lawyer from sharing offices with a disbarred or suspended lawyer, or a lawyer who is on disability inactive status or a lawyer who has resigned in lieu of disbarment or discipline, or from having any arrangement with such an individual which relates to the practice of law. A disbarred or suspended lawyer, or a lawyer who is on disability inactive status, or a lawyer who has resigned in lieu of disbarment or discipline, may not be employed as a paralegal or law clerk, may not be employed to do legal research or writing, or work as a law office secretary or other office employee. Neither may such an individual be employed as an investigator, messenger, or accountant in connection with a lawyer's law practice, because that would constitute a violation of the prohibition against "practic[ing] law under any arrangement or understanding for division of fees or compensation of any kind with such an individual."

RPC 5.8 MISCONDUCT INVOLVING DISBARRED, SUSPENDED, RESIGNED, AND INACTIVE LAWYERS [clean copy]

- (a)** A lawyer shall not engage in the practice of law while on inactive status, or while suspended from the practice of law for any cause.
- (b)** A lawyer shall not engage in any of the following with an individual who is a disbarred or suspended lawyer, or who has resigned in lieu of disbarment or discipline, or who has been transferred to disability inactive status:
 - (1) practice law with or in cooperation with such an individual;
 - (2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;

- (3) permit such an individual to use the lawyer's name for the practice of law;
- (4) practice law for or on behalf of such an individual; or
- (5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual.

Washington Comments

[1] The provisions of this Rule were taken from former Washington RPC 5.5(d) and (e) (as amended in 2002).

[2] This rule prohibits a lawyer from hiring or employing a lawyer in connection with or related to the practice of law who is disbarred, suspended, or a lawyer who is on disability inactive status or who has resigned in lieu of disbarment or discipline. It does not prohibit a lawyer from hiring such an individual in capacities not involving the practice of law. Thus, a lawyer may employ such an individual in other, nonlaw-related capacities from such mundane tasks as mowing lawns or washing windows, to more sophisticated employment such as managing a business or property not related to the lawyer's practice of law.

[3] This rule clearly prohibits a lawyer from sharing offices with a disbarred or suspended lawyer, or a lawyer who is on disability inactive status or a lawyer who has resigned in lieu of disbarment or discipline, or from having any arrangement with such an individual which relates to the practice of law. A disbarred or suspended lawyer, or a lawyer who is on disability inactive status, or a lawyer who has resigned in lieu of disbarment or discipline, may not be employed as a paralegal or law clerk, may not be employed to do legal research or writing, or work as a law office secretary or other office employee. Neither may such an individual be employed as an investigator, messenger, or accountant in connection with a lawyer's law practice, because that would constitute a violation of the prohibition against "practic[ing] law under any arrangement or understanding for division of fees or compensation of any kind with such an individual."

Attachment: Formal Opinion 184

Formal Opinion: 184

Year Issued: 1990

RPC(s): RPC 5.8(b), Oregon Formal Opinion 2005-24

Subject: Lawyer in Good Standing May Not Employ a Disbarred Lawyer in Connection with the Practice of Law

In 1978, Formal Opinion #171 was adopted which stated that "an attorney in good standing who hires a disbarred lawyer in any capacity could be subject to discipline for a violation of the [former] Discipline Rules for Attorneys."

The Board of Governors is of the opinion that the Rules for Lawyer Discipline do not require an absolute prohibition against employing disbarred lawyers "in any capacity" and therefore believes that Formal Opinion #171 should be withdrawn. This opinion does not address the employment of suspended lawyers.

The Rules of Professional Conduct address the issue at RPC 5.8(b):

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

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

This rule prohibits a lawyer from hiring or employing a disbarred lawyer in connection with or related to the practice of law. It does not prohibit a lawyer from hiring a disbarred lawyer in capacities not involving the practice of law. Thus, a lawyer may employ a disbarred lawyer in other, nonlaw-related capacities from such mundane tasks as mowing lawns or washing windows, to more sophisticated employment such as managing a business or property not related to the lawyer's practice of law.

Discussion Items From Subcommittee C

This rule clearly prohibits a lawyer from sharing offices with a disbarred lawyer or having any arrangement with a disbarred lawyer which relates to the practice of law. A disbarred lawyer may not be employed as a paralegal or law clerk, may not be employed to do legal research or writing, or work as a law office secretary or other office employee. Neither may a disbarred lawyer be employed as an investigator, messenger or accountant in connection with a lawyer's law practice, because that would constitute a violation of the prohibition against "practic[ing] law under any arrangement or understanding for division of fees or compensation of any kind" with a disbarred lawyer.

We recognize that other jurisdictions may have different rules regarding the employment of disbarred lawyers, (see, e.g., Oregon Formal Opinion 2005-24). We are of the opinion that the restrictions imposed by RPC 5.8(b) do not prohibit a Washington lawyer from associating with a lawyer or law firm which employs a disbarred lawyer or lawyers in a jurisdiction which permits it, nor does the rule prohibit a lawyer practicing law in Washington from being a member of a law firm with offices in such a jurisdiction.

Formal Opinion #171 is withdrawn.

[amended 2009]

2. During the July 14, 2010 meeting of Subcommittee C Kurt Bulmer submitted by attachment to an e-mail a memo related to costs and expenses under ELC 13.9 for consideration by the Subcommittee. The Subcommittee noted that it had reported this issue for consideration by the full Task Force on the agenda for the June 10, 2010 meeting [see Materials pp. 754-57], but that the Task Force did not get to that item and set it over for consideration at a subsequent Task Force meeting. The Subcommittee did not substantively discuss Mr. Bulmer's proposal, but voted to attach his memo to this report to the Task Force with a recommendation that Mr. Bulmer's memo be part of the discussion by the Task Force of ELC 13.9 at pp. 754-57.

Mr. Bulmer's Memo Attached

MEMORANDUM

TO: Subcommittee C

FROM: Kurt M. Bulmer

DATE: July 14, 2010

Re: COSTS/EXPENSES – CURRENT ELC 13.9

I propose deletion of ELC 13.9 in its entirety. That section provides for costs and expenses to be assessed against a respondent who has been sanctioned or admonished. There is no provision for costs and expenses to be awarded in favor of a respondent who prevails in a bar proceeding.

According to the Bar's audits the 2009 budget for funding the disciplinary system was \$4,433,320. The amount recovered in costs collected was \$62,303. That is .014%. In 2008 it was \$4,157,006 and \$124,513 for .03% and in 2007 it was \$3,952,171 and \$76,375 for .019%. The process of gathering the costs, preparing various declarations, motions and orders by ODC and accounting staff, review of these by the Chair of the Board and the Clerk to the Court followed by collection efforts also undertaken by ODC personnel is a great deal of work which results in an even small actual return. It appears that the "net" amount collected by the WSBA is a very small percentage of the total and is also very small in real dollar amounts.

Offset this with the extreme chilling effect the costs have on the respondent's right to defend. While the amounts collected are small in comparison to \$4.4 million spent by the Association, these amounts can nonetheless loom very large for individual respondents. While I do not have a complete picture of the costs and expenses assessed, I have to advise my clients that if we go forward to a hearing to contest and get an admonition which is then not appealed they need to be thinking in at least the \$3,000 range as the floor and take it from there with \$6,000 to \$14,000 being not unusual. If there are significant factual issues the hearing will last several days if not two weeks. Transcript costs run at roughly \$1,000 per day. Witness costs and expert costs, something we are seeing more and more of, are, of course, additional. The assessment of costs has become a significant factor in determining whether to accept a stipulation offer or to contest the proceeding.

The result is that lawyers are accepting sanctions for purely economic reasons which gives the WSBA a significant advantage in prosecuting cases. This advantage is not based on the merits. There is a very low social utility gained by the small cost recoveries and a very high social cost because obtaining the opportunity to be heard, plead your case and seek justice is being driven by the size of the lawyer's bank account.