



WSBA

WASHINGTON STATE BAR ASSOCIATION

ELC DRAFTING TASK FORCE

Meeting Agenda

December 16, 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 October 28, 2010 meeting minutes [pp. 940-946]
2. **Discussion**
 - Remainder of Subcommittee A Final Report [pp. 947-970]
 - Subcommittee B - Report held over from June 10, 2010 [pp. 971-973]
 - Subcommittee C - Discussion Items held over from June 10, 2010 [pp. 974-982]
 - Subcommittee C Memo - Items for Consent, July 23, 2010 [pp. 983-987]
 - Subcommittee C Memo - Items for Discussion, July 23, 2010 [pp. 988-995]
 - ODC Memos re: ELC [pp. 996-1000]
4. **Future meeting schedule**
 - February 3, 2011, 9:00 a.m. to 12:00 noon
 - Materials Deadline: Tuesday, January 25, 2011
 - March 17, 2011, 9:00 a.m. to 12:00 noon
 - Materials Deadline: Tuesday, March 8, 2011
5. **Adjourn** (noon)

DRAFT Minutes – October 28, 2010
ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Erika Balazs (telephone), Randy Beitel, Kim Boyce, Kurt Bulmer, Ron Carpenter, Doug Ende, Seth Fine, Bruce Johnson, Joseph Nappi, Jr., Julie Shankland, Patrick Sheldon, David Summers, Elizabeth Turner, Scott Busby, Reporter, and Nan Sullins, AOC/Supreme Court Liaison

Call to Order/Preliminary Matters

The Chair called the meeting to order at 9:05 a.m. and began with introductions for the benefit of new Chief Hearing Officer Joseph Nappi, Jr. The Chair noted that Mr. Nappi's appointment as a voting member of the task force would be before the BOG at its October meeting. The Chair also informed the task force that the BOG had approved a one year extension of the task force charter. While the Chair does not intend to use the entire additional year, four more meetings will be scheduled. The Chair intends to submit the full text of the task force's recommended rule changes for a first reading at the March 2011 BOG meeting and for a second reading at the June 2011 BOG meeting.

Approval of Minutes

The Chair called for changes and/or corrections to the minutes from the August 12, 2010 meeting. Hearing none, he deemed the minutes approved as submitted.

Subcommittee A - Final Report

Mr. Johnson continued the discussion from the August 12, 2010 meeting about suggested amendments to ELC 3.4 regarding who may authorize release of confidential information. He moved that the task force accept the subcommittee's suggested change: removing both the Board of Governors and the President from the list. The Chair deemed the motion seconded. The Chair, having discussed the issue with the Executive Director and the President, expressed their view that the President should be retained, but made it clear that their view was not binding on the task force. Ms. Shankland asked if counsel appointed under ELC 8.3 should be added to the list of recipients of confidential information. The subcommittee accepted removing the specific reference to "special disciplinary counsel"—thereby allowing disclosures as necessary to "recruit counsel"—as a friendly amendment. The Chair called for a vote, and Subcommittee A's proposed changes to ELC 3.4 were approved.

ELC 3.2(e)(2) – (Confidential Disciplinary Information: Protective Orders) (pp. 880 - 886)

Mr. Johnson introduced the subcommittee's new proposals for changes to ELC 3.2(e)(2) to replace the proposal adopted at the August meeting. Mr. Fine had requested that the subcommittee revisit the provision in 3.2(e)(2) for an "automatic gag order" on filing of a motion for protective order. He submitted two suggestions for amendments (Options A & B) and ODC submitted a third (Option C). Mr. Fine told the group that on reflection he endorsed ODC's suggested language. Mr. Johnson noted that Option C puts the burden on the proponent of a protective order and is clearer than the version adopted at the August meeting. Ms. Turner moved to further amend ELC 3.2 by replacing the adopted language for ELC 3.2(e)(2) with Option C. The Chair deemed the motion seconded. Mr. Beitel, while strongly supporting Option C, directed the task force's attention to Mr. Bulmer's objections on p. 889 of the materials.¹ With one opposed, the further amendment to ELC 3.2(e)(2) was adopted.

ELC 3.4 – (Release or Disclosure of Otherwise Confidential Information) (pp. 890-892)

Mr. Johnson moved for adoption of the subcommittee's proposal to amend ELC 3.4 (as modified earlier in the meeting). The Chair deemed the motion seconded. Mr. Sheldon asked Mr. Beitel to summarize Mr. Bulmer's objections to this rule. Mr. Beitel related that Mr. Bulmer is opposed to discretionary releases generally. Ms. Shankland added that Mr. Bulmer also objected to any release of the information without notice to the respondent lawyer. The Chair called for a vote. With none opposed, the proposed changes (as modified) were adopted.

ELC 3.5 – (Notice of Disciplinary Action or Transfer to Disability Inactive Status) (pp. 893-894)

Mr. Johnson introduced the subcommittee's proposed changes to ELC 3.5. Mr. Beitel noted that the proposals conform the rule to current practice and technology. Ms. Shankland asked why not give notice of administrative suspensions and transfers to inactive status, which, like interim suspensions, are not disciplinary actions. Mr. Ende suggested that administrative suspensions and transfers to inactive status were not included because they are authorized under the APR rather than the ELC. Ms. Turner suggested changing the caption to "Notice of Action Under the ELC." Mr. Carpenter suggested adding "Interim Suspension" to the caption. Mr. Johnson moved to adopt Mr. Carpenter's suggestion. The Chair deemed the motion seconded and with none opposed, the amendment carried. Mr. Johnson moved to adopt the changes to ELC 3.5 with the amended caption. The Chair deemed the motion seconded; and with none opposed, the motion carried.

¹ Mr. Bulmer was not present during the discussion of ELC 3.2 and 3.4.

ELC 3.6 – (Maintenance of Records) (pp. 895-896)

Mr. Johnson noted that the proposed amendment making the record of admonitions permanent was a recognition that notices of admonitions printed in the *Bar News* would not physically disappear after five years. Ms. Turner added that the accompanying proposed change to ELC 13.5 would make an admonition a permanent disciplinary action. Adoption of the proposed changes was moved and deemed seconded. Ms. Shankland, noting that an admonition may be ordered by a Review Committee (RC), asked if the RC records would therefore become part of the public record. Mr. Beitel said that under the proposed changes, RC records pertaining to admonitions would be treated in the same way as RC records of reprimands. The Chair called for a vote and, with one opposed, the changes were adopted.

ELC 4.1 – (Service of Papers) (pp. 897-898)

Proposed changes to ELC 4.1 provide specific direction for service on hearing officers and modify the language regarding service where there are issues of mental competence to comply with current statutes and usage. Mr. Johnson moved that the proposed changes be adopted; the Chair deemed the motion seconded. With none opposed, the changes were adopted.

ELC 4.2 – (Electronic Filing) (p. 899)

Mr. Johnson introduced the proposed change to ELC 4.2 that would allow for electronic filing with the Clerk to the Disciplinary Board via email. Ms. Turner expressed the Disciplinary Board's view that originals with signatures should be filed. Mr. Fine shared said while he was Chair, the Board strongly favored the filing of signed originals to satisfy security and authenticity concerns. Mr. Summers said while he was Chief Hearing Officer the usual practice was for orders and decisions to be filed by email. Ms. Boyce said that as a hearing officer her practice was to file signed paper original Findings, Conclusions and Recommendations and to file other orders by email. She felt that it would burdensome to require the filing of paper originals of all orders.

Mr. Fine moved to strike the first clause of the last sentence of proposed ELC 4.2(c) (making the sentence read "A paper original of documents filed under this subsection (c) should thereafter be filed as well."). The group discussed the nature of an "original" and the relative ease with which both inked and electronic signature may be falsified. Mr. Beitel wondered why not simply adopt a rule that allows electronic filing in accordance with GR 30, noting that the discipline system is already behind technologically. Mr. Ende said that the discipline system in Washington needs to move toward an electronic filing system. While agreeing with Mr. Ende on the need for an electronic filing system, Ms. Shankland expressed her concerns about the authenticity of filed documents.

The Chair called for a vote on Mr. Fine's amendment. With six in favor and five opposed, the amendment carried. Adoption of the proposed changes, as amended, were moved and deemed seconded. With none opposed and four abstentions, the changes were adopted as amended.

ELC 4.10 – (Redaction - NEW RULE) (p. 900)

Adoption of the proposed new Rule 4.10 relating to redaction of personal identifiers, as identified in GR 15, 22, and 31, was moved and deemed seconded. With none opposed, the new rule was adopted.

ELC 8.1 – (Action on Adjudication of Incompetency or Incapacity) (p. 901)

Ms. Turner introduced the subcommittee's proposed changes to ELC 8.1 that would (1) add involuntary commitment for more than 14 days under RCW 71.05 to the events that would trigger a transfer to disability inactive status and (2) require that a lawyer's guardian ad litem, if any, be served. Ms. Turner moved that the proposed changes be adopted; the Chair deemed the motion seconded. With one opposed, the changes were adopted.

ELC 8.2 – (Determination of Incapacity to Practice Law) (pp. 902-903)

Ms. Turner introduced the proposed changes to ELC 8.2. The proposed changes would require that a lawyer be notified of ODC's intent to ask an RC for an order authorizing a disability proceeding; make the case caption comply with GR 31; require that an appointed attorney be in active status; and clarify the appeals procedure. Ms. Turner moved for adoption of the proposed changes. The Chair deemed the motion seconded.

There followed a discussion of the appointment of attorneys in emeritus status. APR 8(e) allows attorneys in emeritus status to represent clients on a pro bono basis, but only through a qualified legal services provider. Because ELC 8.2 refers only to attorneys appointed by the Association, which does not qualify as a legal services provider under APR 8(e), emeritus attorneys are not eligible for appointment under ELC Title 8.

Mr. Beitel expressed concern about providing a complete copy of disciplinary counsel's report to respondents in so far as the report relates to confidential sources. Mr. Fine suggested that disciplinary counsel could redact confidential sources from the RC report. Ms. Turner noted that the intent was to give the respondent lawyer everything that the RC has. Mr. Beitel said that disciplinary counsel inform confidential sources that confidentiality is not guaranteed because, under ELC 5.2, the RC can order that the confidential source's identity disclosed. Mr. Bulmer objected to using any information in the decision process that is not shared with the respondent.

After further discussion, Mr. Ende suggested beginning the sentence in proposed ELC 8.2(a) requiring disclosures to respondents with “Subject to Rule 5.2,” noting that ELC 5.2 allows the respondent to request disclosure. Mr. Carpenter moved to amend the subcommittee’s proposed language per Mr. Ende’s suggestion, and the Chair deemed the motion seconded. Mr. Sheldon echoed Mr. Bulmer’s concern about using information that is not shared with the respondent. Ms. Turner pointed out that the only information withheld under ELC 5.2 is the confidential source’s identity. Mr. Bulmer opined that the confidential source’s identity might be used to enhance his or her credibility. The Chair called for a vote on the amendment. With 6 in favor and 5 opposed, Mr. Ende’s amendment to Subcommittee A’s proposed changes to ELC 8.2(a) passed.

Ms. Turner moved that the task force adopt the subcommittee’s changes to ELC 8.2 as amended. Mr. Bulmer renewed his objection to ELC 8.2(c)(3) (mandatory release for health records) and ELC 8.2(d)(2)(B) (waiver of provider-patient privilege). The Chair called for a vote on adoption of the proposed language for ELC 8.2 as amended. With 2 abstentions, the motion passed and the proposed language for ELC 8.2 was adopted as amended.

ELC 8.3 – (Disability Proceedings During the Course of Disciplinary Proceedings) (pp. 904-906)

Ms. Turner introduced the subcommittee’s proposed changes to ELC 8.3. The proposal codifies the current practice of appointing a different hearing officer for a disability proceeding commenced during a disciplinary proceeding. She moved to adopt the subcommittee’s proposed changes; the Chair deemed the motion seconded. Mr. Fine moved to remove the reference in ELC 8.3(d)(6) to the procedure under rule 8.10(d) because rule 8.10(d) deals with an entirely different situation. The Chair deemed the motion seconded. With none opposed the amendment carried.

The Chair asked what triggers appointment of counsel. Ms. Shankland explained that if no counsel appears for the respondent within 20 days, counsel must be appointed and noted that under the new proposal this requirement is clearer. Mr. Bulmer renewed his previously noted objection to the mandatory release of health information. Mr. Johnson accepted on behalf of the subcommittee Mr. Beitel’s suggestion that “different hearing officer” be substituted for “new hearing officer” in proposed ELC 8.3(a). The Chair called for a vote on the proposed changes to ELC 8.3, as amended. With none opposed, the changes were adopted.

ELC 8.5 – (Stipulated Transfer to Disability Inactive Status) (pp. 907-908)

Ms. Turner introduced the proposed changes to ELC 8.5, which require that a respondent who stipulates to disability status must be represented by counsel. Ms. Turner then moved that the changes be adopted. Ms. Shankland inquired whether a rejected stipulation to disability status becomes public or is it covered by other rules making rejected stipulations non-public. The Chair noted that this question can be addressed later in relation to other rules. Mr. Ende inquired whether proposed new rule 8.10 would cover the situation in which counsel is appointed for the stipulation process but the respondent is no longer amenable to stipulation. Ms. Turner believed that it would. The Chair called for a vote on Subcommittee A's proposed changes to ELC 8.5. With none opposed, the changed were adopted.

ELC 8.6 – (Costs in Disability Proceedings) (p. 908)

Ms. Turner noted that the subcommittee presented ELC 8.6 simply for reference, with no proposed amendments. Mr. Bulmer stated that he would have input when costs are discussed later.

ELC 8.7 – (Burden and Standard of Proof) (p. 909)

Ms. Turner noted that the proposed language for ELC 8.7 sets forth amendments previously approved on consent, as well as a housekeeping change. She moved for adoption of the changes, and the Chair deemed the motion seconded. With none opposed, the changes were adopted.

ELC 8.8 – (Reinstatement to Active Status) (pp. 910-911)

Ms. Turner explained that the only proposed change to ELC 8.8 was to change the time limit to file a notice of appeal from 15 to 30 days. This change is consistent with other rule changes previously adopted. The Chair deemed adoption of the subcommittee's changes to ELC 8.8 moved and seconded. With none opposed, the changes were adopted.

ELC 8.9 – (Petition for Limited Guardianship) (pp. 912-913)

Ms. Turner presented the subcommittee's proposed changes to ELC 8.9. The proposed changes provide an opportunity for parties to respond to a request for authorization to file a guardianship petition before a review committee renders its decision. Ms. Turner moved for adoption of the subcommittee's proposed changes, and the Chair deemed the motion seconded.

Mr. Ende asked who were the "parties" who could respond under 8.9(b). Ms. Turner said that the term refers to persons listed in 8.9(a) except the hearing

officer, who is not a party. Mr. Johnson accepted, on behalf of the subcommittee, a friendly amendment that changed “any party” to “all parties” in new 8.9(b). The Chair called for a vote on the proposed changes to ELC 8.9 as amended. With none opposed, the changes as amended were adopted.

New Rule ELC 8.10 – (Appointment of Counsel for Respondent) (p. 914)

Ms. Turner introduced the proposed new ELC 8.10, which sets forth when and how counsel is appointed for respondents in disability proceedings. Ms. Turner moved for its adoption, and the Chair deemed the motion seconded. Mr. Fine raised concerns about a respondent losing the ability to practice due to failure to cooperate with his or her lawyer. He recommended that the rule track criminal procedures whereby appointed counsel may only withdraw on good cause shown. After further discussion, Mr. Fine proposed a friendly amendment to 8.10(c), removing the language between “showing of” and “good cause.” Mr. Johnson accepted the amendment on behalf of the subcommittee. Mr. Nappi expressed concern over the wording of proposed 8.10(b). Ms. Turner explained that the language is drawn from the guardianship statute. The Chair called for a vote on proposed new rule 8.10 with the friendly amendment. With none opposed, the new rule was adopted as amended.

Next Meetings

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

February 3, 2011, 9:00 a.m. to 12:00 noon
Materials Deadline: Tuesday, January 25, 2011

Adjournment

The Chair adjourned the meeting at noon, noting that the task force would take up Subcommittee A’s proposed changes to Title 10 at the next meeting, followed by the items from Subcommittees B & C that had been held over from the June 10, 2010 meeting.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter

TITLE 10 – HEARING PROCEDURES

Subcommittee A proposes no amendments to ELC 10.1

Rule 10.2: Hearing Officer ~~or Panel~~

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

ELC 10.2 HEARING OFFICER ~~OR PANEL~~ ASSIGNMENT

(a) Assignment.

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

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

(b) Disqualification and Removal.

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

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

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

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

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

Rule 10.3: Commencement of Proceedings

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

ELC 10.3 COMMENCEMENT OF PROCEEDINGS

(a) Assignment. Formal Complaint.

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

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

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

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

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

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

Rule 10.4: Notice to Answer

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

ELC 10.4 NOTICE TO ANSWER

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

BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

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

To: The above named lawyer:

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

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

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

Dated this _____ day of _____, 20__.

WASHINGTON STATE BAR ASSOCIATION

By _____

Disciplinary Counsel, Bar No.

Address: _____

Telephone: _____

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

Rule 10.5: Answer

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

ELC 10.5 ANSWER

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

(b) Content. The answer must contain:

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

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

Rule 10.6: Default Proceedings

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

ELC 10.6 DEFAULT PROCEEDINGS

(a) Entry of Default.

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 10.7: Amendment of Formal Complaint

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

ELC 10.7 AMENDMENT OF FORMAL COMPLAINT

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

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

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

Rule 10.8: Motions

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

ELC 10.8 MOTIONS

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

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

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

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

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

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

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

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

Rule 10.10: Prehearing Dispositive Motions

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

ELC 10.10 PREHEARING DISPOSITIVE MOTIONS

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

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

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

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

Rule 10.11: Discovery and Prehearing Procedures

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

ELC 10.11 DISCOVERY AND PREHEARING PROCEDURES

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

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

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

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

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

~~(2)~~

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

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

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

Rule 10.12: Scheduling Hearing

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

ELC 10.12 SCHEDULING OF HEARING

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

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

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

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

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

(c) Scheduling Order.

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

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

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

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

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

SCHEDULING CONFERENCE DETERMINATION:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 10.13: Disciplinary Hearing

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

ELC 10.13 DISCIPLINARY HEARING

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

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

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

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

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

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

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

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

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

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

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

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

10.14 Evidence and Burden of Proof

10.15 Bifurcated Hearings

Rule 10.16: Decision of Hearing Officer or Panel

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

ELC 10.16 DECISION OF HEARING OFFICER OR PANEL

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

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

(c) Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Disability proceedings public

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

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

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

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

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

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

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

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

Dated this _____ day of _____, 20__.

WASHINGTON STATE BAR ASSOCIATION
By _____
Disciplinary Counsel, Bar No. _____
Address: _____
Telephone: _____

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

ELC 10.6 DEFAULT PROCEEDINGS

(a) Entry of Default.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.¹

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

¹ 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;
- (2) Suspension;
- (3) Reprimand; or
- (4) An admonition.

(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).

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[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.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: December 3, 2010
RE: Update ELC 2.6(b) to Conform to CJC Changes

Proposal:

ELC 2.6(b) currently notes that the substantive provisions in ELC 2.6 regarding hearing officer conduct have been adapted from Canon 2 and Canon 3 of the Code of Judicial Conduct (CJC). ELC 2.6(b) does not itself set forth any substantive provisions for hearing officer conduct, it just explains where the substantive provisions came from.

A substantial revision to the CJC has been adopted and takes effect January 1, 2011. In the course of that revision, various provisions have been moved around, which makes continued citation to Canon 2 and Canon 3 problematic. For example, ELC 2.6(c) requires that hearing officers avoid the appearance of impropriety. This was originally drawn from ELC Canon 2. However, with the 2011 changes to the CJC, the provision on avoiding the appearance of impropriety is being moved to Canon 1. We propose a change that deletes reference to individual Canons.

We have also proposed deletion of the language that says “to the extent applicable,” the CJC should guide the hearing officers. This language has been problematic since it leaves open to argument that any provision in the CJC might be applicable, whereas the substantive sections of the rule, ELC 2.6(c), (d), and (e) set out the actual requirements. We propose deleting the “to the extent applicable” language because it is confusing. We propose replacing that with a simply notation that the CJC is useful guidance.

Because the Subcommittees have finished their work, we are sending this directly to the full Task Force.

Draft Rule Change:

ELC 2.6 HEARING OFFICER CONDUCT [Redline]

....

(b) Integrity of Hearing Officer System. The integrity and fairness of the disciplinary system requires that hearing officers observe high standards of conduct. ~~To the extent applicable, the~~ The Code of Judicial Conduct should guide is useful guidance for hearing officers. The following rules have been adapted from ~~Canon 2 and Canon 3~~ of the Code of Judicial Conduct ~~as particularly applicable to hearing officers~~, and the words “should” and “shall” have the meanings ascribed to them in those rules.

ELC 2.6 HEARING OFFICER CONDUCT [Clean Copy]

....

(b) Integrity of Hearing Officer System. The integrity and fairness of the disciplinary system requires that hearing officers observe high standards of conduct. The Code of Judicial Conduct is useful guidance for hearing officers. The following rules have been adapted from the Code of Judicial Conduct, and the words “should” and “shall” have the meanings ascribed to them in those rules.

Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: December 3, 2010
RE: Administrative Suspension for Failure to File Trust Account Declaration
ELC 15.5; ELC 1.5

Proposal:

ELC 15.5(b) provides for a disciplinary approach to lawyers who fail to file the annual trust account declaration. Currently, we are not opening disciplinary grievances against lawyers who do not file trust account declarations. At times in the past, ODC opened disciplinary investigations each year on the lawyers who fail to file a trust account declaration to determine the reason for the failure and then to pursue appropriate discipline based on the particular circumstances. This approach embroils lawyers in disciplinary investigations and proceedings for conduct that is more appropriately dealt with administratively. A simple, but effective, administrative suspension system, the way we do for failure to provide the annual insurance disclosures, would require no disciplinary resources and would more quickly get the lawyer's attention and secure compliance. Furthermore, the WSBA Bylaws were amended in September, 2010, to provide for administrative suspension for failure to file trust account declarations. We want to make the ELC provision consistent with the WSBA Bylaws. Our proposal replaces the current ELC 15.5(b) in its entirety with the language of APR 26(c), which was adopted in 2007 to deal with failing to file the required insurance disclosure. The Regulatory Services Department advises us that this system is working well.

Note, that although this proposal would eliminate the language now in ELC 15.5(b) about a lawyer possibly being subjected to an audit for failing to file a trust account declaration, that rarely, if ever, has happened, and the revised language of ELC 15.1(b) that the Task Force has tentatively approved (Materials at 618) makes it clear that an audit can be instituted as part of a disciplinary investigation under ELC 5.3 whenever disciplinary counsel becomes aware of potential violations.

We have also recommended deleting the word "questionnaire" from ELC 15.5(a) as the practice for some years has been to use a declaration rather than a questionnaire. We also have adjusted the language in ELC 15.5(a) to allow for changes in the technology of how the information gets reported to the Association.

All of these changes would also conform the ELC to the recent (September 24, 2010) amendment to the WSBA Bylaws, providing at Title III, Clause I, Section(3)(a)(3) that "a member may be administratively suspended for . . . (3) failure to file a trust account declaration (ELC 15.1(b))."

We also propose a conforming amendment to ELC 1.5 to delete the reference to disciplinary action for failure to file a trust account declaration or questionnaire and to limit that reference to only the disciplinary liability for filing false information.

Because the Task Force is nearing the conclusion of its work, we are submitting this directly to the full Task Force for consideration.

Draft Rule Change:

ELC 15.5 DECLARATION OR QUESTIONNAIRE [redline]

(a) Questionnaire Declaration. ~~The Association annually, sends each active lawyer must provide the Association a with such written declaration or questionnaire other information as the Association designed determines to determine whether is needed to assure that the lawyer is complying with RPC 1.15A. Each active lawyer must complete, execute, and deliver this to the Association this declaration or questionnaire by the date specified in the declaration or questionnaire by the Association.~~

(b) Noncompliance. ~~Failure to file the declaration or questionnaire by the date specified in section (a) is grounds for discipline. This failure also subjects the lawyer who has failed to comply with this rule to a full audit of his or her books and records as provided in rule 15.1(c), upon request of disciplinary counsel to a review committee. A copy of any request made under this section must be served on the lawyer. The request must be granted on a showing that the lawyer has failed to comply with section (a) of this rule. If the lawyer should later comply, disciplinary counsel has discretion to determine whether an audit should be conducted, and if so the scope of that audit. A lawyer audited under this section is liable for all actual costs of conducting such audit, and also a charge of \$100 per day spent by the auditor in conducting the audit and preparing an audit report. Costs and charges are assessed in the same manner as costs under rule 5.3(f). Any lawyer admitted to the active practice of law who fails to comply with this rule by the date specified in section (a) may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies. Supplying false information in response to this rule shall subject the lawyer to appropriate disciplinary action.~~

ELC 15.5 DECLARATION [clean copy]

(a) Declaration. Annually, each active lawyer must provide the Association with such written declaration or other information as the Association determines is needed to assure that the lawyer is complying with RPC 1.15A. Each active lawyer must complete, execute, and deliver this to the Association by the date specified by the Association.

(b) Noncompliance. Any lawyer admitted to the active practice of law who fails to comply with this rule by the date specified in section (a) may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies. Supplying false information in response to this rule shall subject the lawyer to appropriate disciplinary action.

ELC 1.5 VIOLATION OF DUTIES IMPOSED BY THESE RULES

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

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

To: ELC Drafting Task Force:

From: Elizabeth Turner

Re: Subcommittee A's proposed language for ELC 10.16(a) [materials 642]

Tomorrow we will be considering the rest of Subcommittee A's proposed amendments. Our current proposed language for ELC 10.16(a) reads as follows:

- (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 recommendations.

Subcommittee A has been discussing, electronically, whether we should amend this further. As we have discussed, many hearings last more than one day. While the hearing officer may start working on their decision soon after the hearing, when a transcript is ordered I believe they uniformly want to have the transcript in hand before finalizing their decision. It's my understanding that it is rare for a transcript *not* to be ordered, and that the parties generally understand that the hearing officer needs to see the transcript. Assuming it takes at least a week for the transcript to be received, just adding 10 days to the existing timeline would not establish a realistic timeframe for the hearing officer to review the transcript and draft his/her decision. We obviously don't want to extend things out too far, but we want to have a realistic deadline by which hearing officers should complete their work.

I personally feel much more comfortable if I can review draft language beforehand, rather than drafting "on the fly" in the committee as a whole;

however, Randy Beitel was out of town and was unable to participate in the e-mail string. In addition, the language discussed by the subcommittee has been modified slightly since it was discussed by the subcommittee, to address concerns expressed by others who reviewed the draft language. I therefore think it is most appropriate that this be circulated as an additional amendment proposed by me, rather than the subcommittee.

- (a) **Decision.** Within ~~20~~ 30 days after the proceedings are concluded or (if applicable) the transcript of proceedings is served, 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 recommendations. This deadline may be extended by agreement.

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