Minutes – April 8, 2010 ELC Drafting Task Force

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

Call to Order

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

Preliminary Matters

The Chair called for corrections to the draft minutes from the March 10, 2010 meeting. Corrections were suggested to p. 679. The Chair called for objections and, hearing none, deemed the minutes adopted as corrected.

The Chair informed the group that he would be making a presentation to the April Board of Governors (BOG) meeting regarding items approved by the Task Force as a whole. He assured the Task Force that this presentation would be a first reading only, intended to bring the BOG up to date on the Task Force's work. The Chair shared his intention to ultimately present the Task Force's work as a complete package of integrated draft rule changes.

Subcommittee B's Recommendations – held over from March 10, 2010

ELC 5.1(f) – (recovery of fees & costs against a serial vexatious grievant) (p.686-687):

Mr. Fine explained that this proposal is a companion to the previously approved vexatious grievant rule. Mr. Beitel shared his concerns that: (1) the rule provides for fees and costs to disciplinary counsel or to respondent, but not to an accused serial vexatious grievant who successfully defends against being declared a serial vexatious grievant; (2) the rule would needlessly prolong the litigation process without a corresponding benefit; and (3) the rule would be perceived as having a chilling effect on the filing of legitimate grievances. Mr. Ende agreed that if the evil the rule seeks to remedy is the litigious activity of vexatious grievants, adding another litigation process is not the right approach. Mr. Ende expressed his support for the vexatious grievant rule, but pointed out that the rule is controversial. The ABA has expressed its concern about any provision that might have a chilling effect on filing grievances. That organization would be appalled at a rule that imposes costs on a grievant, no matter how vexatious.

Mr. Bulmer said that the subcommittee had considered all of these comments and recommended the rule anyway. The rule would only chill vexatious grievants because it only applies to a narrowly defined set of serial vexatious grievants. The Chair entertained a motion to adopt the subcommittee's proposed language. Mr. Wiggins noted that review of a decision under the proposed rule is completely discretionary and suggested that the rule needs a guarantee of review by a court. Mr. Carpenter expressed concern that the Court's time would be wasted with frivolous appeals by vexatious grievants using the appeals process as an extended forum. Mr. Fine moved that the proposal be amended to include a right of appeal under 12.3. The Chair deemed the motion seconded. With only one vote in favor, the motion to amend failed.

Mr. Bulmer moved to amend the proposal to remove reference to an advisory letter. The Chair deemed the motion seconded. With 8 in favor and none opposed, the amendment passed. Mr. Bulmer moved to send the proposal back to the subcommittee to add the grievant to the list of parties who may request fees/costs under the rule. With 3 in favor and 6 opposed, the motion to amend failed. The Chair reminded the group that a motion to adopt the subcommittee's proposed language for ELC 5.1(f) was still on the table. With 2 in favor and 8 against, the motion failed.

ELC 5.6(d) – (review committee dismissal of grievances) (p. 688)

Mr. Fine noted that the proposed language merely clarifies the existing rule. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

ELC 6.5 – (diversion contract not admissible in other proceedings) (p. 688)

Mr. Fine explained that the proposed language did not represent a substantive change in the rule, but clarified the current practice. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

ELC 7.4 & 8.5 – (lawyer stipulating to disability must be represented) (p. 689)

Mr. Fine explained that the revisions would provide authority to appoint a lawyer for a respondent who stipulates to disability. The revisions address the due process concern that arises when a lawyer who stipulates to not being mentally capable to practice law is nonetheless assumed to be competent to sign the stipulation without representation. Mr. Bulmer moved to amend the proposed ELC 7.4 to read "When the stipulation is based on the lawyer's mental incapacity" With 6 in favor and 3 opposed, the motion carried. The Chair entertained a motion to adopt the proposed revisions to ELC 7.4 & 8.5 as amended. After

some discussion of the costs attendant upon appointing counsel, the Chair called a vote on the motion to adopt. With 9 in favor and 1 opposed, the motion carried and the proposed language was adopted as amended.

ELC 7.7 – (clarify WSBA's duty to keep records of custodianships) (p. 689)

The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

ELC 9.1 – (Alford stipulations) (pp. 690-691, 698)

Mr. Fine noted that the second set of Subcommittee B's proposals (p. 698) included an amendment to the proposed language on 690-91. The Chair asked whether there was any opposition to the subcommittee's complete proposal, including the language on p. 690-91 as amended by p. 698. Hearing no opposition, the Chair deemed the proposal approved.

ELC 9.X & 9.2 – (reciprocal discipline for resignation in lieu of discipline) (pp. 691-692)

Mr. Fine explained that new ELC 9.X allowed for reciprocal discipline when a lawyer has resigned in lieu of discipline in another jurisdiction. The proposed changes to ELC 9.2 were meant to avoid the reciprocal "boomerang effect:" when Washington disciplines a lawyer who is admitted in another jurisdiction, that jurisdiction imposes reciprocal discipline, then the reciprocal discipline becomes the subject of a reciprocal discipline proceeding in Washington, and so on. Mr. Beitel moved to amend the proposed language to refer to "disciplinary action" rather than "discipline." The Chair asked whether there was any opposition to the amendment. Hearing none, the Chair deemed the amendment approved.

Mr. Bulmer expressed concern that providing for reciprocal discipline on resignation in lieu of discipline in another jurisdiction assumed that the discipline avoided in the other jurisdiction was disbarment. He expressed further concern that the proposed rule would require a respondent lawyer to try before the Supreme Court, on short notice, a case that was not litigated in the other jurisdiction. Mr. Ende noted that it is not unusual that lawyers in other jurisdictions faced with very serious allegations are offered the opportunity to be done with the matter without proceedings, but are not required to admit misconduct. This process allows a lawyer to evade discipline in the other jurisdiction while placing the burden of prosecuting misconduct on the WSBA, when all the evidence is in the other jurisdiction. The proposed rule allows a respondent to respond to the show cause order and explain why he or she should not be disbarred. Mr. Ende noted that this is not a heavy burden where the discipline avoided was not disbarment and that the burden on the discipline

system in Washington is far greater. Mr. Beitel moved to amend the proposed language to give a responding lawyer 60 days, rather than 30, to respond to the show cause order in these cases. With 9 in favor and none opposed, the amendment carried.

Mr. Fine requested, on behalf of the subcommittee, that the Task Force vote on the proposed changes to ELC 9.2 separately from the proposed new ELC 9.X. The Chair called for a vote on Subcommittee B's proposed changes to ELC 9.2, as amended. With 11 in favor and none opposed, the motion carried and the proposed changes to ELC 9.2 were adopted as amended. The Chair then called for a vote on the subcommittee's proposed new ELC 9.X as amended. With 8 in favor and 1 opposed, the motion carried and new ELC 9.X was adopted as amended.

Subcommittee C's Recommendations – held over from March 10, 2010

Mr. Wiggins explained that the first two items on the subcommittee's report had been approved via the consent calendar at the last meeting, but subcommittee member Sheldon had requested that the Task Force re-open the discussion. However, Mr. Sheldon was not present at the meeting. The Chair noted that Mr. Sheldon may ask the Task Force to reconsider its adoption of these provisions on another occasion.

New ELC 11.14 - (Board Motions) (p. 695)

Mr. Wiggins introduced proposed new ELC 11.14, which provides for motions practice before the Board in matters pending before the Board under Title 11. Mr. Fine moved to strike section (h) (minor matters). Mr. Beitel explained that the proposed rule was modeled after ELC 10.8, which has a similar provision. The Chair called for a vote on the motion to amend. With 2 in favor and 6 opposed, the motion failed. Mr. Fine moved to amend 11.14(f) to replace the word "must" with "will," making the section read "... the Chair will promptly rule ..." Mr. Wiggins pointed out that modeling the language on the options in ELC 1.3 (definitions), there were three options: "may," "must," or "should." Further, the rule on which proposed ELC 11.14 is modeled (ELC 10.8) reads "must." The Chair called for a vote on the amendment. With 2 in favor and 8 opposed, the amendment failed. The Chair called for a vote on a motion to adopt proposed ELC 11.14 as submitted. With 10 in favor and none opposed, the motion passed and proposed ELC 11.14 was adopted as submitted.

ELC 11.1 & 11.2 – (Board review of HO dismissal) (p. 694, 414)

Mr. Wiggins explained that the subcommittee recommends adoption of ODC's proposal for a provision in ELC 11.1 & 11.2 subjecting a hearing officer's dismissal of all claims under ELC 10.10(a) to Board review. The draft language for the proposed change is on p. 414. The Chair called for a vote on a motion to

adopt the proposed language on p. 414. With 10 in favor and none opposed, the motion passed.

New ELC 11.X, 11.9, & 11.12 – (Board policies to be reflected in the ELC) (pp.672-673)

Mr. Wiggins explained that the proposed additions would place Board policies on case scheduling orders, page length and format of briefs, and time for oral arguments into the ELC. Ms. Shankland opposed the idea, noting that putting the policies into the rules makes them harder for the Board to change. Mr. Beitel noted that adding the policies to the ELC makes the process more transparent. Mr. Bulmer noted that the current system works well, in that the parties receive a copy of the policies when review begins. Mr. Beitel pointed out that all of the proposed revisions to the ELC that are adopted by the BOG will be submitted to the Supreme Court for approval, while currently the Board operates on policies that have not been approved by the Supreme Court. Mr. Wiggins observed that the court rules are where one would expect to find these provisions regarding the appeals process. Ms. Shankland objected that the proposal had not gone to the Board, which consequently had not had an opportunity to review its policies before went into a court rule. The Chair called for a vote on a motion to adopt the subcommittee's proposed language on pp. 673-673. With 4 in favor and 6 opposed, the motion failed.

Subcommittee B: New Supplement Report

ELC 5.1(c)(3)(B) – (Challenge to Disclosure Decision) (p. 696)

Mr. Fine explained that this proposal replaces a proposal previously adopted by the Task force allowing a grievant or respondent to challenge disciplinary counsel's decision to withhold, or not to withhold, a portion of a response to a grievance. Mr. Ende pointed out that the new proposed language lacks a time frame within which a challenge could be brought. Mr. Beitel moved to amend the proposal to add "within 20 days of the date of mailing of the decision" to the end of the first sentence. With 8 in favor and none opposed, the motion carried. The Chair asked whether there was any opposition to the proposal as amended. Hearing none, the Chair deemed the proposal as amended approved.

ELC 5.6(b) – (Dismissal of grievance file if no timely request for review) (p. 697)

Mr. Fine explained that when the Task Force adopted a proposed change to ELC 5.6(b) clarifying that dismissal of a grievance becomes final if there is no timely request for review, the Task Force also asked Subcommittee B to simplify the language of the proposed addition. The Chair asked whether there was any opposition to the new, simplified language. Hearing none, the Chair deemed the proposal as amended approved.

ELC 9.2(a) – (Reciprocal Discipline) (p. 698)

Mr. Fine explained that the proposed change to ELC 9.2(a) limits the duty to self-report discipline from other jurisdictions to public discipline. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

ELC 9.2(b) – (Reciprocal Discipline) (p. 699)

Mr. Fine explained that this proposal eliminates the requirement that copies of discipline imposed in other jurisdictions be certified copies. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal as amended approved.

Subcommittee C: Supplemental Proposals

ELC 12.3 – (Appeal) (p. 700)

Mr. Wiggins explained that the subcommittee had refined the language of the previously approved amendments to ELC 12.3 and added draft language to clarify when an appeal must be filed and to provide information about the payment of the filing fee, making these provisions parallel with the RAP. Mr. Fine asked about a provision for indigent parties since the amendments would require the filing fee to be paid at the time of filing. A discussion of filing fees ensued, in which it was noted that the proposed ELC 12.3(d) would be inconsistent with the RAP because the language requires payment at the time of filing with no provision for waiver of the fee for indigent appellants. Mr. Fine moved that the group refer the proposal back to the subcommittee to work on the issue of filing fees. The Chair asked whether there was any opposition to the motion. Hearing none, the Chair deemed the motion approved and the proposal was referred back to Subcommittee C.

The Chair concluded the meeting, noting that the balance of Subcommittee C's supplemental proposals (pp. 701-704) would be taken up at the next meeting.

Next Meetings

Thursday, May 13, 2010, 9:00 a.m. to noon Consent Calendar: Subcommittee A

Deadline for Materials: Tuesday, May 4, 2010

Thursday, June 10, 2010, 10:00 a.m. to noon Consent Calendar: Subcommittee B

Deadline for Materials: Tuesday, June 1, 2010

<u>Adjournment</u>

The Chair adjourned the meeting at 1:00 p.m.

Minutes Respectfully Submitted by

Scott Busby Disciplinary Counsel Task Force Staff Reporter