Minutes – August 12, 2010
ELC Drafting Task Force

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

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Call to Order

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

Approval of Minutes

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

Subcommittee A: Final Report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Next Meetings

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

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

Adjournment

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

Minutes Respectfully Submitted by

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