

Minutes – June 10, 2010 ELC Drafting Task Force

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

Call to Order

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

Approval of Minutes

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

Consent Calendar

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

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send payment for the appellate filing fee, in what form, and whether the fee would be returned if the appeal were withdrawn.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

Subcommittee A – Request for Guidance

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

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

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

Subcommittee C: Recommendation Held Over From April 8th

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

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

Subcommittee B: Report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Next Meetings

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

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

Announcements & Adjournment

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

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

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter