# Minutes – June 30, 2011 ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Erika Balazs (phone), Randy Beitel, Ron Carpenter (phone), Doug Ende, Seth Fine, Bruce Johnson (phone), Joseph Nappi, Jr. (phone), Julie Shankland, Elizabeth Turner, Norma Linda Ureña (phone), Scott Busby, Reporter, and Nan Sullins, AOC/Supreme Court Liaison

# **Call to Order/Approval of Minutes**

The Chair called the meeting to order at 9:05 a.m. The minutes from the May 19, 2011 meeting were approved with one correction.

# <u>Subcommittee A Memo re ELC 3.5(c) - Modification of Website Discipline Notice (pp. 1118-22)</u>

Subcommittee A reviewed and approved draft language submitted by Mr. Ende that addresses issues raised by Mr. Reisler regarding published discipline notices where discipline is based on a criminal conviction that is later expunged. Under certain conditions, updated information would be added to the website discipline notice. Mr. Johnson noted that the subcommittee had approved the draft with no opposition. Mr. Ende noted that he had provided a copy to Mr. Reisler, but Mr. Reisler had not responded. With none opposed, the proposed changes to ELC 3.5(c) were adopted.

# ODC Memo re ELC 13.8(a) - Stipulating to Admonition with Probation (p. 1123)

Mr. Beitel presented the proposed change to ELC 13.8(a), clarifying the rule to allow probation in the context of a stipulation to admonition. Mr. Beitel moved that the proposed change be adopted. With none opposed, the motion carried.

# Ende-Shankland Memo re Diversity Language in Title 2 (pp. 1124-1127)

Mr. Ende presented the memo and introduced guest Chach Duarte-White, WSBA's Diversity Program Manager. Mr. Ende also pointed out an omission in proposed ELC 2.2(e); the list at the end of the paragraph should include ELC 2.7. Mr. Ende shared the BOG's concerns with promoting diversity in the Disciplinary Board. The proposed changes to Title 2 address those concerns by increasing the minimum number of members of the Board and severing the link to congressional districts in appointing lawyer members. The Chair commented that the BOG's consideration of diversity was not limited to the discipline system.

The Chair called for discussion. Mr. Fine stated his support for removing the geographic component, but suggested that leaving the minimum number of

members currently in the rule would allow more flexibility. He noted that non-lawyer members are difficult to find, and increasing the minimum number might cause problems. Mr. Ende and Ms. Turner shared Ms. Shankland's view that no fewer than 10 lawyers and 4 non-lawyers is the most workable minimum number of Board members.

Mr. Nappi supported the new minimum number of Board members, but shared his fear that removing the requirement for one lawyer member from each congressional district would result in the Board membership being dominated by King County. Mr. Beitel singling out one element of diversity, such as geography, allows that element to trump the others. The proposed changes would make all elements of diversity equal and make the rule more flexible. Mr. Ende stated two reasons for severing the link to congressional districts: (1) the provision in the proposed general diversity rule (ELC 2.2(e)) that makes geography a stated element of diversity addresses concerns for geographic diversity, and (2) the current geographical diversity requirement unduly restricts the selection process, in light of the frequent difficulty in finding volunteers in certain districts.

Mr. Carpenter suggested adding a limit to the number of Board members from any single congressional district to the proposed changes. Ms. Duarte-White noted that no other category of diversity is so explicitly protected. Making all categories equally protected would allow greater flexibility in promoting diversity in all categories. Mr. Nappi opined that geographic diversity is intrinsically different from the other categories and that the other areas of diversity should be considered within each geographic district. Ms. Balazs expressed her support of Mr. Nappi's position. Mr. Carpenter moved that his proposed revision to the proposed changes be adopted. The Chair called for a vote. With 3 in favor and 4 opposed, the revision failed.

The Chair then called for a vote on the proposed changes as submitted. With 4 in favor and 3 opposed, the proposed changes—with the addition of the reference to ELC 2.7 to proposed ELC 2.2(e)—were adopted.

# Mass Memo re Changes to ELC 13.9 (pp. 111-1117) $^{1}$

Julie Mass, WSBA Director for Finance and Administration, presented her concerns regarding the proposed elimination of ELC 13.9 providing for recovery of costs and expenses. First, the BOG and the Budget Committee are trimming the WSBA budget to avoid an increase in licensing fees. This may necessitate cutting programs. Taking away a source of revenue would exacerbate the budgetary problems the WSBA currently faces. To put the problem in perspective, the yearly revenue from this source is approximately equivalent to one disciplinary counsel's salary. Removing this source of revenue would necessitate significant cuts to the disciplinary budget and/or elsewhere.

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<sup>&</sup>lt;sup>1</sup> For scheduling reasons, this item was moved from the beginning to the end of the agenda.

Second, it is common practice in regulatory systems to require those whose conduct necessitates the expenditure of disciplinary resources to pay a part of the costs, rather than have all those costs borne by the entire membership. In addition, removing the costs provision removes an incentive for lawyers to cooperate with the disciplinary system and thereby keep costs down. Ms. Mass opined that it is worth the time and effort to collect costs, because the time and effort are small in relation to the costs recovered.

Ms. Turner noted the importance of having a mechanism to force compliance in cases of non-cooperation. Mr. Nappi noted that recent discipline cases illustrate the problems associated with non-cooperation: disciplinary counsel, hearing officers, and the Disciplinary Board have been sued; excessive, dilatory motions filed; etc. Mr. Nappi opined that it is important for the non-cooperating respondent to pay some of the costs of such conduct.

Mr. Ende raised two points in favor of assessing costs: (1) in having a system of assessing costs, Washington is aligned with the majority of other jurisdictions and with the ABA Model Rules; and (2) if there is a risk of unfairness in imposing costs in a particular case, the rules already provide that the hearing officer, the Disciplinary Board, and the Supreme Court have discretion to not impose costs.

Mr. Carpenter agreed, and opined that it is important to hold those who commit misconduct accountable. Mr. Fine stated his view that it is fair to impose the costs of the discipline system on erring attorneys rather than entirely on their innocent colleagues.

Ms. Shankland noted that she initially did not vote on this issue because she did not believe that it made sense to impose costs if they were not collectible. But she feels strongly that lawyers who commit misconduct should bear part of the cost.

Ms. Turner moved to rescind the earlier vote and reinstitute ELC 13.9 including the proposed changes previously adopted by the task force (pp. 974-976). The Chair called for a vote. With none opposed, the motion passed. ELC 13.9, as amended by previously approved proposals, will be reinstated in the Task Force's recommendation to the BOG.

#### **Review of Redline & Final Amendments**

# Technical Amendment to ELC 9.1(d)(5)(A) (p. 1175)

Mr. Beitel raised technical concerns with the proposed amendments to ELC 9.1(d)(5)(A) and proposed that the word "approval" be changed to "review." The Chair treated the suggestion as a motion to amend and called for a vote. With none opposed, the motion passed.

## ELC 2.5(e)(2)(J) & 2.5(g) (p. 1135)

Mr. Ende raised a concern with the current language of ELC 2.5(e)(2)(J) and 2.5(q). Both provisions concerning the chief hearing officer contain references to policies or requirements established by the BOG. These provisions bring the BOG into policy making decisions about the operation of the discipline system, where the task force's approach had been to remove BOG involvement. Ms. Turner agreed. The Chair shared that the Governors do not believe that they have "no role" in the disciplinary process because the WSBA is a unified bar. But the Governors do recognize that the BOG has no role in individual discipline cases. Mr. Fine expressed discomfort with making substantive changes at this point without the involvement of the entire task force. Ms. Turner noted that this meeting has always been reserved for reviewing the redline and making any necessary changes. She suggested that 2.5(e)(2)(J) be amended to read "supervises hearing officer training in accordance with established policies" and that 2.5(g) be amended to strike "or the Board of Governors." Ms. Turner moved to remove the reference to the BOG in ELC 2.5(e)(2)(J) and 2.5(g). The Chair called for a vote. With one opposed (Mr. Fine), and one abstaining (Mr. Nappi), the motion carried.

## ELC 2.14 (Restrictions on Representation) (p. 1141)

Mr. Ende pointed out that the last sentence of the previously approved new ELC 2.14 addresses two separate issues that should be expressed separately. The Chair asked Mr. Ende to develop language to be distributed to task force members by email either later that day or the following day. [Reporters Note: the language developed by Mr. Ende was distributed and approved via email, and has been incorporated into the final redline.]

# New ELC 5.6 (Review of Objections) (p.1158)

Mr. Beitel asked that the reporter's reference to language for 5.6(d) that was not adopted be deleted. The Chair approved the deletion as a technical correction.

### <u>Adjournment</u>

The Chair thanked the task force members and staff for their work on the task force. He will draft and distribute his final report to the BOG and present the report and the redline at the July BOG meeting, where the issue is set for action. The Chair reminded the group that the deadline for submitting minority reports to Margaret Shane, the Chair, and Staff Reporter is July 6, 2011.

The Chair adjourned the meeting at 10:25 a.m.

Minutes Respectfully Submitted by

Scott Busby Disciplinary Counsel Task Force Staff Reporter