

Minutes – March 10, 2010
ELC Drafting Task Force

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

Call to Order

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

Preliminary Matters

The Chair called for corrections to the draft minutes from the January 14, 2010 meeting. Hearing none, the Chair deemed the minutes approved.

Consent Calendar: Subcommittee C (pp. 638-652)

Mr. Wiggins explained that the consent calendar items submitted by Subcommittee C were rules previously approved by the Board of Governors and included much of the previously approved language. Mr. Fine brought the group's attention to internal inconsistencies in the proposed language for ELC 11.4 (Transcript of Hearing). Mr. Fine moved that the second sentence of the proposed language for ELC 11.4(a) be deleted. The Chair deemed the motion seconded. The motion passed unanimously. Mr. Fine moved to adopt Subcommittee C's consent calendar items as amended. The Chair deemed the motion seconded. With the caveat that typos will be corrected, the motion passed unanimously.

Consent Calendar: Subcommittee B (pp. 653-654)

Mr. Fine explained that Subcommittee B's consent calendar item had been inadvertently omitted from the subcommittee's January submission. Mr. Fine moved to adopt Subcommittee B's consent calendar item. The Chair deemed the motion seconded and the motion carried unanimously.

Subcommittee B's Recommendations

The group moved on to address the recommendations from Subcommittee B that were held over from the January 14, 2010 meeting.

ELC 5.3(a) (Investigation of grievance) (p.656):

Mr. Fine explained that this proposal answers the BOG's adoption of the ABA recommendation that grievances not be opened in the name of the WSBA, where an investigation is initiated without a grievant. Instead, an investigation without a grievant would be opened in the name of the ODC. He moved to adopt the proposed language, the Chair deemed the motion seconded, and the motion passed with one abstention.

ELC 5.1(b) (Grievants, Consent to disclosure) (pp. 655 & 676):

The group moved on to discuss Subcommittee B's recommended changes to ELC 5.1(b) and ODC's counter recommendation. ELC 5.1(b) currently requires disclosure of the contents of the grievance to the respondent lawyer. The subcommittee's recommendation (p. 655) requires disclosure of all information submitted, with two instances in which disclosure may be restricted: (1) when a protective order is issued, and (2) when the grievance is filed under ELC 5.2 (Confidential Sources). ODC's proposal (p. 676) would add a third instance: (3) when necessary to protect a compelling privacy or safety interest of a grievant or other individual.

With the Chair's permission, Mr. Ende introduced Felice Congalton, Sr. Disciplinary Counsel and Intake Manager, and invited her to share her insight on the proposed changes as manager of the ODC team that deals with the issue most often. Ms. Congalton described two examples of situations in which grievants request that their information be withheld from the respondent:

- (1) A grievant who has a confidential address because of abuse by an ex spouse and who is concerned that the ex spouse may obtain the contact information if it is revealed. In this situation, Ms. Congalton generally redacts the contact information from the face of the grievance since the information is not part of the content of the grievance. This course of action is allowed under the current rule because the grievant's contact information is not part of the content of the grievance. However, without ODC's requested addition, the proposed change to ELC 5.1(b) would foreclose this option.
- (2) A grievant is concerned about harassment of third parties by the respondent lawyer or others where a third party has given corroborating information, or where the grievant has proposed a third party as a source for corroborating information. One example is when corroborating evidence is provided by the respondent lawyer's staff. The grievant may fear that the staff member will be fired as a result of the grievance. Currently, in this type of case, Ms. Congalton returns grievant's information, informs the grievant that all information submitted as part of a grievance must be shared with the respondent lawyer, and asks the grievant to resubmit the grievance minus any information that the grievant is not willing to share with the respondent.

In many instances the grievant simply does not respond and the information is lost. ODC's requested addition would prevent the loss of the information by allowing ODC to redact a grievance to protect a third party, or the grievant, where there are privacy and/or safety concerns.

Mr. Bulmer noted that the respondent lawyer has no remedy of review similar to the grievant's remedy of review of a decision to withhold part of the response to a grievance (under ELC 5.1(c)(3)(B)). He stated that he is not opposed to ODC's proposed addition to ELC 5.1(b), but argued for a respondent's right to review the decision. A discussion ensued in which several issues arguments were made: (a) the difference between a grievant submitting information and a respondent's response is that a respondent is required to respond while the grievant has no obligation to submit information; (b) due process does not allow a respondent to be accused in secrecy; (c) any information that ODC relies on in a prosecution must be disclosed; and (d) ODC can never give an absolute assurance that it will never disclose any protected information anyway.

The Chair entertained a motion that the subcommittee's recommendation on p. 655 be amended to add ODC's proposed language from p. 676. The motion carried unanimously. The Chair next entertained a motion to adopt Subcommittee B's recommendation, as amended, leaving the issue of parallel appeal to be addressed by the subcommittee. The motion carried unanimously.

ELC 5.1(c)(3) (protecting private or confidential information in a response to a grievance) (pp. 655-656):

Ms. Turner moved to adopt Subcommittee B's proposal; the Chair deemed the motion seconded. The motion carried unanimously.

ELC 5.1(c)(5) (excluding a grievant from the hearing when the grievant is also a witness) (p. 656):

Mr. Fine moved to adopt Subcommittee B's proposal; the Chair deemed the motion seconded. The motion carried unanimously.

ELC 5.1(e) (vexatious grievant) (reserved from last meeting)

Ms. Turner requested that the group address the question reserved from the January meeting on whether the Chief Hearing Officer (CHO) or the DBoard Chair would rule on a petition to declare a grievant vexatious. The group had reserved the question because Mr. Summers, current CHO, was absent from the January meeting. Mr. Fine moved to adopt the proposal as submitted (leaving the decision in the hands of the DBoard Chair). Mr. Beitel moved to amend the motion to substitute the CHO as decision maker. The group discussed the benefits of both approaches:

In favor of the CHO: (a) in the federal courts, a trial judge makes the decision to declare a litigant vexatious; (b) the CHO position is a long-term position, allowing a consistency in approach; and (c) the decision requires fact finding rather than review of a previous decision.

In favor of the DBoard Chair: (a) the DBoard Chair has the authority to rule on matters not yet filed or ordered to hearing; (b) the DBoard Chair has experience evaluating hundreds of grievances from serving on Review Committees, while the CHO does not; and (c) the difficulty of the decision requires someone higher up the organizational chart.

The Chair called for a vote on the motion to amend. With a vote of 5 in favor and 6 opposed, the motion failed. Under the proposed language for the vexatious grievant rule, the DBoard Chair remains the decision maker.

After a short break, the Chair reopened the discussion of the rule as a whole. Mr. Wiggins expressed his concern that a single person will make the decision restricting a person's right to participate in the system subject to no review, save discretionary review by the Supreme Court. Mr. Summers suggested providing a mechanism for review within the disciplinary system. The group discussed the merits of adding review a mechanism, but did not raise a motion to amend.

Ms. Turner continues to be concerned that the rule allows a respondent lawyer to file a petition to declare a grievant vexatious. She advocated making the rule clear that conduct giving rise to such a determination must occur in the discipline process. Mr. Carpenter disagreed, based on his experience with the broad range of behavior shown by vexatious litigants. The Chair called for a vote. With 11 in favor and 1 opposed, the motion carried and the subcommittee's original proposal was adopted.

ELC 5.3(a), 5.5(d) & 7.2(a) (creating a respondent's right to object to an inquiry or a request for information) (pp. 656-657):

Mr. Fine explained that the proposal spanned several rules to create a process for a respondent to challenge a request for information from bar counsel during the investigation phase of a grievance. He said that the proposed changes included protections against abuse by respondent lawyers: (1) the challenge must be raised prior to the deadline for a response; (2) if the CHO overrules the objection, there is no further review; and (3) CHO may impose expenses and fees on respondents for objections without a substantial basis, subject to review by the DBoard Chair. The Chair opened the floor for discussion

Mr. Ende expressed his strong disagreement with the proposal. The proposal interposes a mechanism into the investigation process that, whether misused or not, will slow to the point of stalling ODCs ability to conduct investigations and process grievances. And the potential for misuse is enormous. ODC has

reached a point where it has eliminated a huge backlog and is operating in real time, as required by the delegation of responsibility by the Supreme Court. This proposal will seriously disrupt ODC's ability to stay there. Mr. Ende said that it is important to understand that this proposal affects the investigation phase, not discovery. Yet the proposed rule interpolates a discovery-like process into the investigation phase where it has no place. He reminded the group that in the criminal process there exist operating mechanisms to complete investigations. ODC has no enforcement arm. The only enforcement mechanism ODC has is the authority granted by the Supreme Court to ask for a prompt and complete response to a grievance and to issue subpoenas. He also reminded the group that there are mechanisms to challenge subpoenas and if the process gets to the point of a petition for interim suspension, the investigative request is reviewed by the Supreme Court.

Mr. Bulmer countered that a respondent lawyer who truly believes that the scope or subject of the request from ODC is too broad or improper faces the risk of suspension for asserting the right to question the request. The risk of loss for asserting important rights is too high. The proposed rule gives the respondent lawyer the opportunity to raise 5th Amendment, over-broadness, and other important issues before the risk is too great.

Mr. Fine said that the analogy to the criminal process supports the rule because judicial intervention is required for police and prosecutors to get information from an unwilling witness. Mr. Beitel noted that when police arrest a person, they are allowed to ask questions. ODC should be allowed to ask the questions. Mr. Fine countered that the arrested subject can "lawyer-up" and refuse to answer without penalty. Mr. Beitel noted that proposed rule allows costs and fees to be assessed against ODC as well as against respondents. He hoped that disciplinary counsel would be judged on a bad faith standard—that no fees or costs would be imposed on either party without a showing of bad faith. He posited that the proposed rule being cost driven would have a negative impact on choices as to which matters are investigated and how.

Mr. Beitel also reminded the group that what usually occurs when a respondent has concerns about the scope of a request for information is that the respondent talks to disciplinary counsel and they come to an agreement. Mr. Bulmer agreed that 99% of the time respondents and/or their counsel work out the issues with disciplinary counsel, but he wants protection for those times when an agreement cannot be reached.

The Chair called for a vote. With 5 in favor and 3 opposed, the motion passed and Mr. Fine's proposed rule was adopted.

ELC 5.5 (Investigatory Subpoenas) (pp. 657-658)

Mr. Fine explained that this rule would allow ODC to subpoena documents without setting a deposition. Mr. Beitel said that ODC cannot support the rule as drafted because it has been altered substantially from the ODC proposal, specifically in the addition of subsection (c) (notice to respondent) and (d) (challenges). The group discussed the problems with allowing notice to respondents: (1) notice is an invitation to tamper; (2) the proposed notice requirement grafts a civil discovery mechanism onto an investigatory/enforcement investigation; and (3) the proposed notice requirement could tie ODC's hands in a way that compromises the investigation.

Mr. Wiggins moved to amend the proposed language to delete subsection (c). Ms. Turner seconded. Mr. Fine made a motion to amend by going back to the original ODC proposal at p. 363. Mr. Beitel seconded. The Chair called for a vote on the second motion. With a vote of 5 in favor and 1 opposed, the motion carried and the language from ODC's proposal at p. 363 was adopted.

ELC 5.6(b) (review of dismissal) (p. 658)

Mr. Fine made a motion to adopt the amendments to ELC 5.6(b) proposed at p. 658. The Chair deemed the motion seconded and called for a vote. The motion carried unanimously.

ELC 5.6(d), (e) (Disposition of Grievance) (p. 658)

Mr. Fine made a motion to adopt the amendments to ELC 5.6(c), (e) proposed at p. 658. The Chair deemed the motion seconded and called for a vote. The motion carried unanimously.

ELC 6.1 (referral to diversion after formal complaint filed) (p. 659)

Mr. Fine made a motion to adopt the amendments to ELC 6.1 proposed at p. 659. The Chair deemed the motion seconded and called for a vote. The motion carried unanimously.

ELC 7.7(a) (appointment of custodian) (p. 659)

Mr. Fine made a motion to adopt the amendments to ELC 7.7(a) proposed at p. 659. The Chair deemed the motion seconded and called for a vote. The motion carried unanimously.

ELC 7.7(d) (allowing WSBA to recover fees/costs of custodianship) (pp. 659-660)

Mr. Fine made a motion to adopt the amendments to ELC 7.7(d) proposed at pp. 659-660. The Chair deemed the motion seconded and called for a vote. The motion carried unanimously.

ELC 9.1(c) (Approval of stipulations, when mandatory) (pp. 660)

Mr. Fine introduced the subcommittee's proposals to amend ELC 9.1 as non-substantive modifications of language proposed by the BOG. He proposed reviewing all of the proposed changes to ELC 9.1, as pulled together in the materials at pp. 666-667. The group decided to address each section separately starting with the proposed language at p. 660-661.

Mr. Fine noted that the BOG's proposed language for ELC 9.1(c)(3) came to a full stop after "manifest injustice." Mr. Wiggins moved to amend the proposal to put a full stop after "manifest injustice." The Chair deemed the motion seconded and called for a vote. The motion carried unanimously. The Chair recognized a motion to adopt the proposed language for ELC 9.1(c) at p. 660 as amended. The motion carried unanimously.

ELC 9.1(d) (Conditional approval) (p. 661)

Mr. Fine explained that this proposal extends the authority to conditionally approve a stipulation to the hearing officer or CHO. Ms. Shankland wanted to make sure that the language would require that a motion to reconsider an order rejecting or conditionally approving a stipulation be filed with the DBoard Clerk as well as served on the hearing officer or CHO. Mr. Fine recommended rephrasing the language later. The Chair recognized a motion and second to accept the concept, but return the proposal to Subcommittee B to rework the language. The motion carried unanimously.

Adjourn

The Chair adjourned the meeting at 1:00 p.m. The Chair proposed extending April's meeting to 3 hours to accommodate material tabled from this meeting (materials pp. 662-675). Ms. Cain will email the group with the details of the extended schedule after confirming conference room availability.

Next Meetings

Thursday, April 8, 2010 10:00 a.m. to 1:00 p.m.
Consent Calendar: Subcommittee A
Deadline for Materials: Tuesday, March 30, 2010

Thursday, June 10, 2010 10:00 a.m. to noon
Consent Calendar: Subcommittee B
Deadline for Materials: Tuesday, June 1, 2010

Adjournment

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter