

Minutes – May 19, 2011
ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Erika Balazs (phone), Randy Beitel, Kim Boyce (phone), Kurt Bulmer, Ron Carpenter (phone), James Danielson (phone), Doug Ende, Bruce Johnson (phone), Joseph Nappi, Jr., Julie Shankland, Elizabeth Turner, Norma Linda Ureña, Matt Williams (phone), and Scott Busby, Reporter

Call to Order/Approval of Minutes

The Chair called the meeting to order at 9:08. Ms. Turner submitted a correction to the minutes from the March 17, 2011 meeting. The Chair called for further corrections. Hearing none, he deemed the minutes approved as corrected.

Feedback from Mailing to Membership

Reisler & Fuller letters re ELC 3.5 (pp. 1077-1080)

The Chair introduced Steven Reisler, who presented his suggestions to the Task Force. Mr. Reisler expressed his concerns about discipline notices posted on the WSBA website for lawyers subject to discipline for criminal convictions. When discipline is predicated on a criminal conviction and the conviction is later expunged, there is no mechanism for the discipline notice to be removed or modified. Mr. Reisler suggested a process whereby a lawyer could request removal of a discipline notice from the website for good cause shown. He opined that such a procedure would necessitate a balancing of the Bar's interest in protecting the public against the lawyer's interests in rehabilitation.

Ms. Shankland pointed out that what is on the website is the public record of disciplinary action, and she asked why Mr. Reisler proposed only removal of the discipline notice from the website rather than expungement of record itself. Mr. Reisler replied that he had suggested this limited solution because it seemed a safer, smaller, initial step.

Mr. Ende raised three concerns: (1) removal of the discipline notice from the website would create an inconsistency whereby the public would receive different information by (a) making an inquiry to the Association and (b) viewing the website; (2) the criminal justice system serves different purposes than lawyer discipline, so the fact of expungement of a criminal conviction does not answer the question of whether discipline based on that conviction should be public; and (3) creating such a procedure would result in many petitions to remove discipline notices, consuming substantial resources. Mr. Ende suggested an alternative procedure to add information about an expungement to the online discipline notice.

Mr. Bulmer expressed his continued opposition to posting discipline notices on the website at all, and he advocated removal of discipline notices from the website after a period of time.

Mr. Beitel did not object to posting the fact of an expungement, but he expressed reservations about posting lawyers' reports of other forms of rehabilitation.

The Chair noted that the issue had been Subcommittee A's responsibility. Ms. Turner stated that the Subcommittee A had discussed Mr. Reisler's proposal, but had recommended no change. She added that the subcommittee had not discussed adding a procedure for requesting expungement of the discipline, rather than removal of the notice from the website.

The Chair suggested giving Subcommittee A the option of reviewing its recommendation in light of today's discussion. Mr. Bulmer moved to refer the issue back to the subcommittee. Mr. Danielson opposed sending the issue back and asked how information provided by a respondent lawyer would be vetted. Mr. Carpenter suggested that a short hearing be held to give the lawyer a chance to prove rehabilitation. He expressed his concern that self-serving statements could be added to discipline postings, and he noted that the Court cannot investigate on its own. Ms. Turner, who drafts Bar News notices, was willing to consider a narrowly structured process to add an "editor's note" upon submission of a certified copy of a court order of expungement. She was not in favor of posting statements authored by respondents, and she opined that holding hearings on the language or content of discipline notices would put a strain on the Association's resources. Ms. Shankland agreed that any remedy should be limited to official, verifiable court orders, and that the Association does not have the resources to investigate these matters.

The Chair called for a vote on the motion to refer the issue back to Subcommittee A. With 6 in favor and 5 opposed, the motion carried and the matter was referred to the subcommittee. Mr. Ende will provide the subcommittee with draft language for adding the fact of expungement to online discipline notice.

Dahl Letter re ELC 2.14 (pp. 1081-1083)

The Chair summarized Mr. Dahl's position that the three year restriction on Hearing Officers, Board members, and BOG members representing respondent lawyers in disciplinary matters is too long. Ms. Shankland noted that the period had been set at three years because the term of service on both the Board and the BOG is three years. Mr. Ende pointed out that a Hearing Officer's term is five years, but the Hearing Officers do not meet regularly as a group. Ms. Turner opined that the process requires every effort to avoid even the appearance of impropriety. Mr. Beitel noted that the Conflicts Review Officer (CRO) position is more akin to disciplinary counsel than an adjudicative position and moved to remove CROs from the list of persons subject to the three year prohibition. The Chair deemed the motion seconded and called for a vote. With 11 in favor and 1 opposed, the motion carried.

Mr. Bulmer stated that he found insulting and unnecessary the suggestion in Mr. Dahl's letter that the three year prohibition was instituted by respondents' counsel to protect their turf.

Hiskes Letter (p. 1084-1085)

The Chair summarized Mr. Hiskes' suggestions regarding disciplinary counsel payroll decisions. After some discussion, Mr. Danielson moved that the group move on to other matters. The Chair polled the group, and with none opposed deemed the motion passed by consensus.

ODC Memos

Mr. Beitel introduced the memos from ODC.

ELC 13.4 (Reprimand) (p.1086)

The draft language reflects changes to the reprimand procedure discussed at the last meeting, replacing a reprimand document with a notice of reprimand. Mr. Nappi suggested that the notice should state that the respondent "is hereby reprimanded." Mr. Bulmer inquired about the "other final documents" referenced in the draft rule. In response to Ms. Turner's question, Mr. Beitel confirmed that the notice of reprimand would be prepared by "Association Counsel" rather than disciplinary counsel in order to avoid the appearance that the prosecutor had added something to the reprimand outside of the adjudication or stipulation that gave rise to it. Ms. Shankland asked who would decide which documents to attach to the notice. Mr. Beitel stated that OGC would do so, observing that the notice of reprimand was designed to be the same as a notice of discipline that is generated when a lawyer is suspended or disbarred. Mr. Danielson opined that the language "Your actions discredit you and the legal profession" should be retained. Mr. Ende noted that the reprimand would be imposed by the attached final decision documents rather than the notice itself. The Chair called for a vote on the proposed language. With 9 favor and 3 opposed, the proposed language was adopted.

ELC 3.1(b) & 3.3(a) (Clean up provisions) (pp. 1087-1088)

Mr. Beitel shared that these revisions were meant to clean up issues that should have been fixed in 2002. The Chair called for a vote, and hearing no opposition, deemed the proposal adopted by consensus.

ELC 9.2 (Reciprocal Discipline and Disability Inactive Status) & 8.10 (Appointment of Counsel) (pp. 1089-1091)

The proposed additions to ELC 9.2 relate to appointment of counsel in reciprocal disability proceedings where the Court orders further proceedings. Mr. Bulmer opined that a disabled lawyer is most in need of representation at an earlier stage in the proceeding, when the Court issues a show cause order. The proposal would provide for appointment of counsel only where the respondent lawyer responds to the show cause order. Mr. Beitel pointed out that this rule applies only to reciprocal proceedings, after a full adjudication in another jurisdiction, and not to an original disability proceeding. Mr. Bulmer would not concede that other jurisdictions provided sufficient protection for the rights of allegedly disabled lawyers. The Chair called for a vote on the proposed additions. With 9 in favor, 2 opposed, and 1 abstaining, the proposed additions to ELC 9.2 & 8.10 were adopted.

ELC 10.13(c) (Respondent to bring requested materials) (p. 1092)

Mr. Beitel presented ODC's concerns that the previously adopted change to ELC 10.13(c) would have a greater affect on disciplinary proceedings than anticipated. Mr. Beitel explained that discovery in disciplinary proceedings is not the same as discovery in civil litigation, while the previously approved change assumes a similar process. This change would make deposition of the respondent necessary in most cases, increasing the cost to both parties. ODC proposed alternate language that provides for a longer response time (20 days), adds a procedure for relief from the requirement to produce, and removes the provision that failure to produce the requested materials can be grounds for discipline. Mr. Bulmer objected that ODC's proposal allows the Bar to request materials it has never asked for before and use them at hearing. He opined that the previously approved change provides a level playing field. The Chair called for a vote on ODC's proposed changes. With 4 in favor and 7 opposed, the proposal failed.

Disciplinary Advisory Round Table (DART) Proposals (pp. 1100-1104)

The Chair discussed three issues that arose at the latest DART meeting relating to the work of the task force:

- (1) "Clear preponderance" of the evidence: DART determined that the Court will need to address this issue since there has been no recommendation from the task force to change the standard to "clear and convincing" or anything else.
- (2) Statute of Limitations : DART made no request for action, but requested that the task force discuss this issue, which it has done.
- (3) ADR procedures: This issue was referred to a DART subcommittee, and the results of the subcommittee's work are represented in the draft language at pages 1100 - 1104. The Chair asked the group if it preferred to take action on the proposed language now or at the June meeting. Mr. Nappi, who serves

on DART, shared that the proposed language reflects the strong message from the DART chair that ADR should be available throughout the discipline process. Several members noted that the proposed language is a refinement of the task force's previous recommendations. The group considered how the proposed changes would interface with the provisions for disqualification of hearing officers. After some discussion the group reached the consensus that the proposed language would not fundamentally change the disqualification process. Ms. Shankland asked whether a request for a settlement conference should be in writing. Mr. Ende opined that such requests should be in writing. Mr. Beitel moved to amend the proposed form for the scheduling order to reflect that a settlement officer is appointed rather than assigned. With none opposed, the proposed amendment passed. The Chair called for a vote on adoption of the DART proposal as amended. The proposed language, as amended, was adopted unanimously.

Mass Memo re ELC 13.9 (Costs) (p. 1093-1099)

The Chair informed the group that this issue is likely to be the subject of discussion at the BOG, and he asked if the task force preferred to discuss the issue now. Mr. Nappi noted that he was not able to vote when the group passed the proposal to strike ELC 13.9, and that he would like the opportunity to vote on the matter. Mr. Bulmer said that he would like more time to review the memo. The Chair called for objections to deferring discussion of the memo to the June meeting. No objections were voiced, and the discussion was deferred.

Next Meeting

June 30, 2011, 9:00 a.m. to noon
Materials deadline, June 21, 2011

The Chair announced that the next, and last, meeting of the task force would include a review of the redline of the proposed changes adopted by the task force. Minority reports should be submitted by July 6, 2011: the deadline for materials for the BOG meeting in July, when the BOG will act on the task force's proposed amendments. The Chair will draft and circulate a cover memo for the redline that will be submitted to the BOG before June meeting of the task force.

Adjournment

The Chair adjourned the meeting at 11:12 a.m.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter