# Minutes – September 10, 2009 ELC Drafting Task Force

Present: Geoff Gibbs, Chair, Erika Balazs (phone), Randy Beitel, Kim Boyce, James Danielson, Seth Fine, Bruce Johnson, Patrick Sheldon, David Summers, Norma Linda Ureña, Charlie Wiggins, Matt Williams (phone), and Scott Busby, Reporter

## Call to Order/Approval of Minutes

The Chair called the meeting to order at 10:00 a.m. and called for amendments or additions to the draft minutes from the July 22, 2009 meeting. Hearing none, the Chair deemed the minutes approved.

### **Subcommittee Reports**

### Subcommittee C:

Mr. Wiggins reported for Subcommittee C. Mr. Wiggins related that the subcommittee found the BOG approved items more controversial than anticipated and characterized the report as a request by the subcommittee for guidance. He began by reviewing ABA Recommendation 4, which encompassed Disciplinary Board review of disbarment and suspension recommendations. While rejecting the ABA's suggestion to eliminate mandatory Board review of suspension and disbarment recommendations, the BOG accepted the idea of streamlined review. Currently, hearing officer recommendations of suspension or disbarment trigger the production of the entire record for Board review. Under the process endorsed by the BOG, only the hearing officer's findings and recommendation would be disseminated to the Board, from which the Board could initiate sua sponte review. The subcommittee was in favor, but not unanimously. Mr. Wiggins invited Mr. Sheldon and Mr. Beitel to comment.

Mr. Sheldon stated his view that if neither party wishes to appeal, then the hearing officer's recommendation should move forward. Sua sponte review by the Board in such cases would be a burden to both parties, and particularly burdensome for respondents. Mr. Fine suggested that if costs are the problem, a rule could be instituted that costs related to Board review would not be assessed against a respondent when the Board institutes sua sponte review. Mr. Sheldon remarked that the issue is not simply "costs" imposed by rule, but attorney fees incurred by the respondent as well as time and stress.

Mr. Beitel noted that ODC would agree, not seeing any particular utility in Board sua sponte review. However, ODC views sua sponte Board review as a hypothetical rather than practical issue since it rarely, if ever, occurs.

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Mr. Danielson said that while he is generally in favor of no automatic Board review in cases where neither party wishes to appeal, he is concerned about the Board "cherry-picking" cases for review. Mr. Danielson also felt that proportionality ought to be addressed at the Board level and felt that the rule would benefit from some reporting requirement.

Mr. Fine reminded the group of the unique role of the Board as the only body that reviews the entire range of cases, and the only point in the process that includes the community at large. Though expressing little desire to tamper with matters on which ODC and a respondent are in agreement, Mr. Fine endorsed the idea that the Board would see reports of all cases and have the right of sua sponte review.

Mr. Wiggins observed that the Board already reviews everything and can recommend sua sponte review at every level of discipline. In his experience, sua sponte review rarely happens. He reminded the group that this proposal was meant to ameliorate the expense involved in automatic review.

Ms. Boyce noted that the disciplinary process is adversarial and the community conscience factor is always a part of the adversarial process. In other parts of our justice system, individual judges make decisions that are not reviewed. Ms. Boyce shared Mr. Danielson's concern for cherry-picking of cases and issues by the Board under a system of sua sponte review. Mr. Beitel noted that proportionality would not be affected because hearing officer decisions have no precedential value; only Supreme Court decisions come into proportionality review. Mr. Danielson shared his concern that a hearing officer decision that is affirmed by the court without appeal becomes a precedent.

The Chair articulated the consensus that the group does not favor automatic review. The Chair also shared the BOG's discussion of the issue. He polled the group on the issue of a system of sua sponte rather than automatic Board review of suspension and disbarment recommendations. He acknowledged that the result, 7 in favor and 5 opposed, demonstrated the controversial nature of the issue. The Chair then directed Subcommittee C to develop and submit draft language to the task force as a whole reflecting the BOG's recommendation for a system of sua sponte Board review of suspension and disbarment recommendations.

Mr. Wiggins moved on to the BOG recommendation that the right of appeal in suspension and disbarment recommendations be extended to ODC. The ABA recommendation was to eliminate any right of appeal and to make all review discretionary. The BOG Discipline Committee disagreed, and the BOG eventually approved the Discipline Committee's recommendation to add a right of appeal for ODC to the rule. Mr. Wiggins reported that Subcommittee C favored the recommendation but not unanimously. The Chair opened the floor for comment.

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Mr. Sheldon shared his dissenting opinion that allowing ODC the right of appeal would burden respondents who chose not to exercise their right of appeal without any benefit to the public, because the Court reviews all suspension and disbarment recommendations anyway. Mr. Fine agreed; he did not see the asymmetry as a problem. Mr. Beitel said that ODC sees the asymmetry as an issue of public perception of fairness. The current asymmetrical system is perceived by the public as a justice system by lawyers for lawyers and represents a serious credibility gap between the profession's view and the public's view of the regulation of lawyers. ODC supports a symmetrical system of review, either discretionary or by right of both parties.

The Chair polled the group on confirming a right of appeal in ODC: 6 were in favor; 4 were opposed. The Chair shared the BOG's strong position that the right of appeal should be equal in respondents and ODC and directed Subcommittee C to develop and submit draft language to the task force as a whole.

Mr. Wiggins moved on to the issue of who should administer reprimands. The ABA suggested that the Chief Justice of the Supreme Court should sign reprimands. Subcommittee C recommends that the WSBA President should continue to sign reprimands. After some discussion, the group recognized that one benefit to changing the current practice would be to move direct involvement with the disciplinary system away from the BOG. The Chair polled the group on recommending that the WSBA President continue to sign reprimands. 9 were in favor; 2 opposed. The Chair will address the issue with incoming WSBA President Sal Mungia.

Mr. Wiggins moved on to the BOG-approved proposal that ELC 14.2 be amended to provide that a lawyer who has been disbarred, suspended, or placed on disability status may not work in a law office or as a paralegal. The subcommittee's poll was 4 to 1 in favor, reflecting its concern for the danger that working as a paralegal becomes a subterfuge for the continued practice of law. The Chair called for comment.

Mr. Danielson supported the change, but suggested broader language. He shared the concern in his area that certain disbarred lawyers were working for law offices as investigators but still practicing law. Mr. Sheldon expressed the minority view that the proposal is too harsh because it would deprive a respondent in this situation of the ability to earn a living. Mr. Beitel pointed out that the onus is already on other lawyers, under RPC 5.8(b)(2), to refrain from "maintaining an office for the practice of law in a room or office used in whole or in part" by a disbarred or suspended lawyer. The proposed amendment to ELC 14.2 would extend a corresponding responsibility to the suspended or disbarred lawyer. Ms. Ureña opined that the rule assumes that all disbarred lawyers are evil, when in fact they may have simply made a mistake.

The Chair noted a question that had not yet been put forward: whether there should be any process by which a disbarred lawyer could apply for permission to

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work in a law office. The Chair then polled the group on the proposed addition to ELC 14.2 that a suspended or disbarred lawyer may not work in a law office or as a paralegal. 6 were in favor; 4 opposed. In light of the close vote, the Chair directed Subcommittee C to continue work on draft language comporting with the BOG's recommendation, but noted that the subcommittee may submit a minority report.

### Subcommittee A:

Mr. Johnson reported that Subcommittee A had identified 34 proposals for that were ready for discussion and approval by the task force as a whole. Discussion of these items was postponed to the task force's November consent calendar.

### Subcommittee B:

Mr. Fine reported that Subcommittee B had identified 13 proposals with draft language that are ready for the consent calendar. He will submit the text of the proposals for the task force's January consent calendar.

### **Next Meetings**

Thursday, November 5, 2009, 10:00 a.m. to 12:00 noon Consent Calendar: entries from Subcommittee A Deadline for materials: Tuesday, October 27, 2010

Thursday, January 14, 2010, 10:00 a.m. to 12:00 noon Consent Calendar: entries from Subcommittee B Deadline for materials: Tuesday, January 5, 2010

Thursday, February 11, 2010, 10:00 a.m. to 12:00 noon Consent Calendar: entries from Subcommittee C Deadline for materials: Tuesday, February 2, 2010

## Adjournment

The Chair adjourned the meeting at 11:25 a.m.

Minutes Respectfully Submitted by

Scott Busby Disciplinary Counsel ELC Task Force Reporter