WSBA

WASHINGTON STATE BAR ASSOCIATION

# ELC DRAFTING TASK FORCE

## Meeting Agenda

**June 10, 2010**
**10:00 a.m. to 1:00 p.m.**
**Washington State Bar Association**
**1325 Fourth Avenue – Suite 600**
**Seattle, Washington 98101**

1. **Call to Order/Preliminary Matters** (10:00 a.m.)
   - Approval of April 8, 2010 meeting minutes [pp. 706-712]
   - Posted for information only – two memos from ODC [pp. 713-716]
2. **Consent Calendar**
   - Subcommittee C [pp. 717-730]
3. **Discussion**
   - Subcommittee A – Request for Guidance [ pp. 731-732]
   - Subcommittee C – Recommendations held over from April 8, 2010 [pp. 733-735]
   - Subcommittee B – May 27, 2010 Report [pp. 736-749]
   - Subcommittee C – New discussion items [pp. 750-758]
   - Memo re: ELC 13.3(b) [pp. 759-760]
3. **Future meeting schedule**
   - August 12, 2010, 10:00 a.m. to 12:00 noon
     - Materials Deadline: Tuesday, August 3, 2010
   - October 14, 2010, 10:00 a.m. to 12:00 noon
     - Materials Deadline: Tuesday, October 5, 2010
4. **Adjourn** (1:00 p.m.)

**DRAFT Minutes – April 8, 2010**
**ELC Drafting Task Force**

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

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## Call to Order

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

## Preliminary Matters

The Chair called for corrections to the draft minutes from the March 10, 2010 meeting. Corrections were suggested to p. 679. The Chair called for objections and, hearing none, deemed the minutes adopted as corrected.

The Chair informed the group that he would be making a presentation to the April Board of Governors (BOG) meeting regarding items approved by the Task Force as a whole. He assured the Task Force that this presentation would be a first reading only, intended to bring the BOG up to date on the Task Force's work. The Chair shared his intention to ultimately present the Task Force's work as a complete package of integrated draft rule changes.

## Subcommittee B's Recommendations – held over from March 10, 2010

### ELC 5.1(f) – (recovery of fees & costs against a serial vexatious grievant) (p.686-687):

Mr. Fine explained that this proposal is a companion to the previously approved vexatious grievant rule. Mr. Beitel shared his concerns that: (1) the rule provides for fees and costs to disciplinary counsel or to respondent, but not to an accused serial vexatious grievant who successfully defends against being declared a serial vexatious grievant; (2) the rule would needlessly prolong the litigation process without a corresponding benefit; and (3) the rule would be perceived as having a chilling effect on the filing of legitimate grievances. Mr. Ende agreed that if the evil the rule seeks to remedy is the litigious activity of vexatious grievants, adding another litigation process is not the right approach. Mr. Ende expressed his support for the vexatious grievant rule, but pointed out that the rule is controversial. The ABA has expressed its concern about any provision that might have a chilling effect on filing grievances. That organization would be appalled at a rule that imposes costs on a grievant, no matter how vexatious.

Mr. Bulmer said that the subcommittee had considered all of these comments and recommended the rule anyway. The rule would only chill vexatious grievants because it only applies to a narrowly defined set of serial vexatious grievants. The Chair entertained a motion to adopt the subcommittee's proposed language. Mr. Wiggins noted that review of a decision under the proposed rule is completely discretionary and suggested that the rule needs a guarantee of review by a court. Mr. Carpenter expressed concern that the Court's time would be wasted with frivolous appeals by vexatious grievants using the appeals process as an extended forum. Mr. Fine moved that the proposal be amended to include a right of appeal under 12.3. The Chair deemed the motion seconded. With only one vote in favor, the motion to amend failed.

Mr. Bulmer moved to amend the proposal to remove reference to an advisory letter. The Chair deemed the motion seconded. With 8 in favor and none opposed, the amendment passed. Mr. Bulmer moved to send the proposal back to the subcommittee to add the grievant to the list of parties who may request fees/costs under the rule. With 3 in favor and 6 opposed, the motion to amend failed. The Chair reminded the group that a motion to adopt the subcommittee's proposed language for ELC 5.1(f) was still on the table. With 2 in favor and 8 against, the motion failed.

**ELC 5.6(d) – (review committee dismissal of grievances) (p. 688)**

Mr. Fine noted that the proposed language merely clarifies the existing rule. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

**ELC 6.5 – (diversion contract not admissible in other proceedings) (p. 688)**

Mr. Fine explained that the proposed language did not represent a substantive change in the rule, but clarified the current practice. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

**ELC 7.4 & 8.5 – (lawyer stipulating to disability must be represented) (p. 689)**

Mr. Fine explained that the revisions would provide authority to appoint a lawyer for a respondent who stipulates to disability. The revisions address the due process concern that arises when a lawyer who stipulates to not being mentally capable to practice law is nonetheless assumed to be competent to sign the stipulation without representation. Mr. Bulmer moved to amend the proposed ELC 7.4 to read "When the stipulation is based on the lawyer's mental incapacity …." With 6 in favor and 3 opposed, the motion carried. The Chair entertained a motion to adopt the proposed revisions to ELC 7.4 & 8.5 as amended. After

some discussion of the costs attendant upon appointing counsel, the Chair called a vote on the motion to adopt. With 9 in favor and 1 opposed, the motion carried and the proposed language was adopted as amended.

**ELC 7.7 – (clarify WSBA's duty to keep records of custodianships) (p. 689)**

The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

**ELC 9.1 – (Alford stipulations) (pp. 690-691, 698)**

Mr. Fine noted that the second set of Subcommittee B's proposals (p. 698) included an amendment to the proposed language on 690-91. The Chair asked whether there was any opposition to the subcommittee's complete proposal, including the language on p. 690-91 as amended by p. 698. Hearing no opposition, the Chair deemed the proposal approved.

**ELC 9.X & 9.2 – (reciprocal discipline for resignation in lieu of discipline) (pp. 691-692)**

Mr. Fine explained that new ELC 9.X allowed for reciprocal discipline when a lawyer has resigned in lieu of discipline in another jurisdiction. The proposed changes to ELC 9.2 were meant to avoid the reciprocal "boomerang effect:" when Washington disciplines a lawyer who is admitted in another jurisdiction, that jurisdiction imposes reciprocal discipline, then the reciprocal discipline becomes the subject of a reciprocal discipline proceeding in Washington, and so on. Mr. Beitel moved to amend the proposed language to refer to "disciplinary action" rather than "discipline." The Chair asked whether there was any opposition to the amendment. Hearing none, the Chair deemed the amendment approved.

Mr. Bulmer expressed concern that providing for reciprocal discipline on resignation in lieu of discipline in another jurisdiction assumed that the discipline avoided in the other jurisdiction was disbarment. He expressed further concern that the proposed rule would require a respondent lawyer to try before the Supreme Court, on short notice, a case that was not litigated in the other jurisdiction. Mr. Ende noted that it is not unusual that lawyers in other jurisdictions faced with very serious allegations are offered the opportunity to be done with the matter without proceedings, but are not required to admit misconduct. This process allows a lawyer to evade discipline in the other jurisdiction while placing the burden of prosecuting misconduct on the WSBA, when all the evidence is in the other jurisdiction. The proposed rule allows a respondent to respond to the show cause order and explain why he or she should not be disbarred. Mr. Ende noted that this is not a heavy burden where the discipline avoided was not disbarment and that the burden on the discipline

system in Washington is far greater. Mr. Beitel moved to amend the proposed language to give a responding lawyer 60 days, rather than 30, to respond to the show cause order in these cases. With 9 in favor and none opposed, the amendment carried.

Mr. Fine requested, on behalf of the subcommittee, that the Task Force vote on the proposed changes to ELC 9.2 separately from the proposed new ELC 9.X. The Chair called for a vote on Subcommittee B's proposed changes to ELC 9.2, as amended. With 11 in favor and none opposed, the motion carried and the proposed changes to ELC 9.2 were adopted as amended. The Chair then called for a vote on the subcommittee's proposed new ELC 9.X as amended. With 8 in favor and 1 opposed, the motion carried and new ELC 9.X was adopted as amended.

**Subcommittee C's Recommendations – held over from March 10, 2010**

Mr. Wiggins explained that the first two items on the subcommittee's report had been approved via the consent calendar at the last meeting, but subcommittee member Sheldon had requested that the Task Force re-open the discussion. However, Mr. Sheldon was not present at the meeting. The Chair noted that Mr. Sheldon may ask the Task Force to reconsider its adoption of these provisions on another occasion.

**New ELC 11.14 – (Board Motions) (p. 695)**

Mr. Wiggins introduced proposed new ELC 11.14, which provides for motions practice before the Board in matters pending before the Board under Title 11. Mr. Fine moved to strike section (h) (minor matters). Mr. Beitel explained that the proposed rule was modeled after ELC 10.8, which has a similar provision. The Chair called for a vote on the motion to amend. With 2 in favor and 6 opposed, the motion failed. Mr. Fine moved to amend 11.14(f) to replace the word "must" with "will," making the section read "… the Chair will promptly rule …" Mr. Wiggins pointed out that modeling the language on the options in ELC 1.3 (definitions), there were three options: "may," "must," or "should." Further, the rule on which proposed ELC 11.14 is modeled (ELC 10.8) reads "must." The Chair called for a vote on the amendment. With 2 in favor and 8 opposed, the amendment failed. The Chair called for a vote on a motion to adopt proposed ELC 11.14 as submitted. With 10 in favor and none opposed, the motion passed and proposed ELC 11.14 was adopted as submitted.

**ELC 11.1 & 11.2 – (Board review of HO dismissal) (p. 694, 414)**

Mr. Wiggins explained that the subcommittee recommends adoption of ODC's proposal for a provision in ELC 11.1 & 11.2 subjecting a hearing officer's dismissal of all claims under ELC 10.10(a) to Board review. The draft language for the proposed change is on p. 414. The Chair called for a vote on a motion to

adopt the proposed language on p. 414. With 10 in favor and none opposed, the motion passed.

**New ELC 11.X, 11.9, & 11.12 – (Board policies to be reflected in the ELC) (pp.672-673)**

Mr. Wiggins explained that the proposed additions would place Board policies on case scheduling orders, page length and format of briefs, and time for oral arguments into the ELC. Ms. Shankland opposed the idea, noting that putting the policies into the rules makes them harder for the Board to change. Mr. Beitel noted that adding the policies to the ELC makes the process more transparent. Mr. Bulmer noted that the current system works well, in that the parties receive a copy of the policies when review begins. Mr. Beitel pointed out that all of the proposed revisions to the ELC that are adopted by the BOG will be submitted to the Supreme Court for approval, while currently the Board operates on policies that have not been approved by the Supreme Court. Mr. Wiggins observed that the court rules are where one would expect to find these provisions regarding the appeals process. Ms. Shankland objected that the proposal had not gone to the Board, which consequently had not had an opportunity to review its policies before went into a court rule. The Chair called for a vote on a motion to adopt the subcommittee's proposed language on pp. 673-673. With 4 in favor and 6 opposed, the motion failed.

**Subcommittee B: New Supplement Report**

**ELC 5.1(c)(3)(B) – (Challenge to Disclosure Decision) (p. 696)**

Mr. Fine explained that this proposal replaces a proposal previously adopted by the Task force allowing a grievant or respondent to challenge disciplinary counsel's decision to withhold, or not to withhold, a portion of a response to a grievance. Mr. Ende pointed out that the new proposed language lacks a time frame within which a challenge could be brought. Mr. Beitel moved to amend the proposal to add "within 20 days of the date of mailing of the decision" to the end of the first sentence. With 8 in favor and none opposed, the motion carried. The Chair asked whether there was any opposition to the proposal as amended. Hearing none, the Chair deemed the proposal as amended approved.

**ELC 5.6(b) – (Dismissal of grievance file if no timely request for review) (p. 697)**

Mr. Fine explained that when the Task Force adopted a proposed change to ELC 5.6(b) clarifying that dismissal of a grievance becomes final if there is no timely request for review, the Task Force also asked Subcommittee B to simplify the language of the proposed addition. The Chair asked whether there was any opposition to the new, simplified language. Hearing none, the Chair deemed the proposal as amended approved.

**ELC 9.2(a) – (Reciprocal Discipline) (p. 698)**

Mr. Fine explained that the proposed change to ELC 9.2(a) limits the duty to self-report discipline from other jurisdictions to public discipline. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal approved.

**ELC 9.2(b) – (Reciprocal Discipline) (p. 699)**

Mr. Fine explained that this proposal eliminates the requirement that copies of discipline imposed in other jurisdictions be certified copies. The Chair asked whether there was any opposition. Hearing none, the Chair deemed the proposal as amended approved.

## Subcommittee C: Supplemental Proposals

**ELC 12.3 – (Appeal) (p. 700)**

Mr. Wiggins explained that the subcommittee had refined the language of the previously approved amendments to ELC 12.3 and added draft language to clarify when an appeal must be filed and to provide information about the payment of the filing fee, making these provisions parallel with the RAP. Mr. Fine asked about a provision for indigent parties since the amendments would require the filing fee to be paid at the time of filing. A discussion of filing fees ensued, in which it was noted that the proposed ELC 12.3(d) would be inconsistent with the RAP because the language requires payment at the time of filing with no provision for waiver of the fee for indigent appellants. Mr. Fine moved that the group refer the proposal back to the subcommittee to work on the issue of filing fees. The Chair asked whether there was any opposition to the motion. Hearing none, the Chair deemed the motion approved and the proposal was referred back to Subcommittee C.

The Chair concluded the meeting, noting that the balance of Subcommittee C's supplemental proposals (pp. 701-704) would be taken up at the next meeting.

## Next Meetings

Thursday, May 13, 2010, 9:00 a.m. to noon
Consent Calendar: Subcommittee A
Deadline for Materials: Tuesday, May 4, 2010

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

## Adjournment

The Chair adjourned the meeting at 1:00 p.m.

Minutes Respectfully Submitted by

Scott Busby
Disciplinary Counsel
Task Force Staff Reporter

# Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: April 13, 2010
RE: Disability Proceedings To Be Public
ELC 3.3(b)

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**Proposal:**

Currently, all disability proceedings are non-public. This appears to be out of step with other determinations of incapacity, chief of which are guardianship proceedings. Such proceedings have moved beyond the era when mental disabilities were always dealt with behind closed doors. These days, such proceedings are done in open court with appropriate protective measures to seal the medical reports or similar materials. We believe the public interest requires doing the same for lawyer disability proceedings. This would have the added benefit of conforming the practice at the hearing and Board stages with the Supreme Court's current practice of a public proceeding at the Court level for an appeal of a disability proceeding.

We are proposing amendments to ELC 3.3(b) to define when in the various Title 8 proceedings a matter would become public. We have attempted to draw that line to conform to where that line is drawn for disciplinary proceedings, which is when a decision maker has ordered a proceeding.

We have proposed a new ELC 3.3(c) to deal with when particular information in a disability proceeding should be subject to a protective order. While we incorporate the procedure of protective orders under ELC 3.2(e), we use the substantive standard set forth in GR 15(c)(2), which provides for redaction or sealing when "justified by identified compelling privacy or safety concerns that outweigh the public access to the court record."

In the conforming amendments to ELC 3.1(b) and ELC 3.2(a), we retain the non-public nature of materials submitted to a review committee regarding a potential guardianship matter under ELC 8.9, but make public review committee materials that formed the bassis of an order under ELC 8.2 requiring a hearing to determine incapacity to practice law. We also propose a bit of wordsmithing of the list of rules at the end of ELC 3.2(a) to make it more sensical.

## Draft Rule Change

### ELC 3.3 APPLICATION TO STIPULATIONS, DISABILITY PROCEEDINGS, AND DIVERSION CONTRACTS

. . . .

**(b) ~~Application to~~ Disability Proceedings Public**. Disability proceedings under title 8 are ~~confidential~~ public upon:

(1) an automatic transfer under rule 8.1(a);
(2) a review committee ordering a hearing under rule 8.2(a);
(3) a hearing officer or panel ordering supplemental proceedings under rule 8.3(a);
(4) the Board approving a stipulation to disability inactive status under rule 8.5(c);
(5) a review committee authorizing the filing of a petition for limited guardianship under rule 8.9(d); or
(6) filing of a petition for reinstatement under rule 8.8(a).

~~However, a grievant may be advised that a lawyer against whom the grievant has complained is subject to disability proceedings. The following information is public:~~

~~(1) that a lawyer has been transferred to disability inactive status, or has been reinstated to active status; and~~
~~(2) that a disciplinary proceeding is deferred pending supplemental proceedings under title 8.~~

**(c) Protection of Information In Disability Proceedings.** Information in any proceeding under Title 8 of these rules should be protected by a protective order under the procedure of rule 3.2(e) when justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the information.

**(~~c~~ d) Diversion Contracts.**

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### ELC 3.1 OPEN MEETINGS AND PUBLIC DISCIPLINARY INFORMATION

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**(b) Public Disciplinary Information.** The public has access to the following information subject to these rules:

(1) the record before a review committee and the order of the review committee in any matter that a review committee has ordered to hearing or ordered an admonition be issued;
(2) the record upon distribution to a review committee or to the Supreme Court in proceedings based on a conviction of a felony or serious crime, as defined in rule 7.1(a);
(3) the record upon distribution to a review committee or to the Supreme Court in proceedings under rule 7.2;
(4) a statement of concern to the extent provided under rule 3.4(f);
(5) the record and order upon approval of a stipulation for discipline imposing a sanction or admonition, and the order approving a stipulation to dismissal of a matter previously made public under these rules;
(6) the record before a hearing officer or panel;

(7) the record and order before the Board in any matter reviewed under rule 10.9 or title 11;
(8) the bar file and any exhibits and any Board or review committee order in any matter that the Board or a review committee has ordered to public hearing, or any matter in which disciplinary action has been taken, or any proceeding under Title 8 or rules 7.1-7.6;
(9) in any disciplinary matter referred to the Supreme Court, the file, record, briefs, and argument in the case;
(10) a lawyer's resignation in lieu of disbarment under rule 9.3; and
(11) any sanction or admonition imposed on a respondent.

## ELC 3.2 CONFIDENTIAL DISCIPLINARY INFORMATION

**(a) Scope of Confidentiality.** All disciplinary materials that are not public information as defined in rule 3.1(b) are confidential, and are held by the Association under the authority of the Supreme Court, including but not limited to materials submitted to a review committee under rule 8.9 or information protected by rule 3.2(b), rule 3.3(~~b~~c), rule 5.4(b), rule 5.1(c)(3), a protective order under rule 3.2(e), ~~rule 3.2(b),~~ or court order, or other applicable law (e.g., medical records, police reports, etc.).

# Memo

To: ELC Drafting Task Force
From: Office of Disciplinary Counsel
Date: April 13, 2010
RE: Clarify Procedure When Respondent Fails to Attend Hearing
ELC 10.13(b)

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**Proposal:**

ELC 10.13(b) lays out the evidentiary result when a respondent who has notice of a hearing fails without good cause to attend the hearing. It has been noted that although the rule clearly implies that the hearing continues on when this happens, the rule is not explicit on this point. We suggest that the rule be made explicit with the following language.

**Draft Rule Change:**
**ELC 10.13 DISCIPLINARY HEARING**

**. . . .**

**(b) Respondent Must Attend.** A respondent given notice of a hearing must attend the hearing. Failure to attend the hearing, without good cause, may be grounds for discipline. If, after proper notice, the respondent fails to attend the hearing, the hearing may proceed, and the hearing officer or panel:

(1) may draw an adverse inference from the respondent's failure to attend as to any questions that might have been asked the respondent at the hearing; and
(2) must admit testimony by deposition regardless of the deponent's availability. An affidavit or declaration is also admissible, if:
    (A) the facts stated are within the witness's personal knowledge;
    (B) the facts are set forth with particularity; and
    (C) it shows affirmatively that the witness could testify competently to the stated facts.

# Memo

To: ELC Drafting Task Force
From: Subcommittee C
Date: June 2, 2010
RE: Items For the Consent Calendar at June 10, 2010 Meeting

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Subcommittee C submits the following for the June 10, 2010 Consent Calendar:

**We recommend the following proposals be approved via the consent calendar:**

**1.** The Task Force has previously approved our recommended changes to ELC 12.3 and 12.4 (Materials 650-510. The Task Force asked the Subcommittee to correct a few typographical errors and to make a provision for the filing fee to be waived in the event of indigency. We recommend adoption by consent of the following rule changes. The new language regarding waiver of filing fees is at ELC 12.3(d) and ELC 12.4(e).

**ELC 12.3 APPEAL** [Redline]

**(a) ~~Respondent's~~ Right to Appeal.** The respondent lawyer or disciplinary counsel has the right to appeal a Board decision recommending suspension or disbarment. There is no other right of appeal.

**(b) Notice of Appeal**. ~~To appeal, the respondent~~ The appealing party must file a notice of appeal with the Clerk within ~~15~~ 30 days of service of the board's decision on ~~the respondent~~ that party.

**(c) Subsequent Notice By the Other Party.** When a timely notice of appeal has been filed by a party, if the other party wants relief from the Board's decision, that party must file a notice of appeal with the Clerk within 14 days after service of the notice filed by the other party.

**(d) Filing Fee.** The first party to file a notice of appeal must, at the time the notice is filed, either pay the statutory filing fee by check payable to the Clerk of the Supreme Court, or apply to the Clerk of the Supreme Court for a waiver of the filing fee and other costs imposed by the Supreme Court upon a showing of indigency.

**(e) Service.** A party filing any notice of appeal must serve the other party.

**ELC 12.3 APPEAL** [Clean Copy]

**(a) Right to Appeal.** The respondent lawyer or disciplinary counsel has the right to appeal a Board decision recommending suspension or disbarment. There is no other right of appeal.

**(b) Notice of Appeal.** The appealing party must file a notice of appeal with the Clerk within 30 days of service of the board's decision on that party.

**(c) Subsequent Notice By the Other Party.** When a timely notice of appeal has been filed by a party, if the other party wants relief from the

Board's decision, that party must file a notice of appeal with the Clerk within 14 days after service of the notice filed by the other party.

**(d) Filing Fee.** The first party to file a notice of appeal must, at the time the notice is filed, either pay the statutory filing fee by check payable to the Clerk of the Supreme Court or apply to the Clerk of the Supreme Court for a waiver of the filing fee and other costs imposed by the Supreme Court upon a showing of indigency.

**(e) Service.** A party filing any notice of appeal must serve the other party.

**ELC 12.4 DISCRETIONARY REVIEW** [Redline]

**(a) Decisions Subject to Discretionary Review.** Respondent or disciplinary counsel may seek discretionary review of Board decisions under rule 11.12(e) not ~~recommending suspension or disbarment~~ subject to appeal under rule 12.3. ~~are subject to Supreme Court review only through discretionary review.~~ The Court accepts discretionary review only if:

(1) the Board's decision is in conflict with a Supreme Court decision;

(2) a significant question of law is involved;

(3) there is no substantial evidence in the record to support a material finding of fact on which the Board's decision is based; or

(4) the petition involves an issue of substantial public interest that the Court should determine.

**(b) Petition for Review.** ~~Either party~~ Respondent or disciplinary counsel may seek discretionary review by filing a petition for review with the ~~Court~~ Clerk within ~~25~~ 30 days of service of the Board's decision on respondent.

**(c) Content of Petition; Answer; Service; Decision.** A petition for review should be substantially in the form prescribed by RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in that rule to the Court of Appeals are considered references to the Board. The appendix to the petition or an appendix to an answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d) – (h) governs answers and replies to petitions for review and related matters including service and decision by the Court.

**(d) Subsequent Petition By Other Parties.** If a timely petition for discretionary review is filed by the Respondent or disciplinary counsel, and the other party wants relief from the Board's decision, he or she must file a petition for discretionary review with the Clerk within 14 days after service of the petition filed by the other party.

**(e) Filing Fee.** The first party to file a petition for discretionary review must, at the time the petition is filed, either pay the statutory filing fee by check payable to the Clerk of the Supreme Court , or apply to the Clerk of

the Supreme Court for a waiver of the filing fee and other costs imposed by the Supreme Court upon a showing of indigency.

**(~~d~~ f) Acceptance of Review.** The Court accepts discretionary review of a Board decision by granting a petition for review. Upon acceptance of review, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

**ELC 12.4 DISCRETIONARY REVIEW** [Clean Copy]

(a) **Decisions Subject to Discretionary Review.**

Respondent or disciplinary counsel may seek discretionary review of Board decisions under rule 11.12(e) not subject to appeal under rule 12.3. The Court accepts discretionary review only if:

(1) The board's decision is in conflict with a Supreme Court decision;
(2) A significant question of law is involved;
(3) There is no substantial evidence in the record to support a material finding of fact on which the Board's decision is based; or
(4) The petition involves an issue of substantial public interest that the Court should determine.

(b) **Petition for Review.** Respondent or Disciplinary Counsel may seek discretionary review by filing a petition for review with the Court within 30 days of service of the Board's decision.

(c) **Content of Petition; Answer; Service; Decision.** A petition for review should be substantially in the form prescribed by RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in the rule to the Court of Appeals are considered references to the Board. The appendix to the petition or an appendix to an answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d)-(h) governs answers and replies to petitions for review and related matters including service and decision by the Court.

**(d) Subsequent Petition By Other Parties.** If a timely petition for discretionary review is filed by the Respondent or disciplinary counsel, and the other party wants relief from the Board's decision, he or she must file a petition for discretionary review with the Clerk within 14 days after service of the petition filed by the other party.

**(e) Filing Fee.** The first party to file a petition for discretionary review must, at the time the petition is filed, either pay the statutory filing fee by check payable to the Clerk of the Supreme Court, or apply to the Clerk of the Supreme Court for a waiver of the filing fee and other costs imposed by the Supreme Court upon a showing of indigency.

**(f) Acceptance of Review.** The Court accepts discretionary review of a Board decision by granting a petition for review. Upon acceptance of re-

view, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

**2.** The proposal regarding requests to transmit additional portions of the record at p. 505 of the Materials to amend ELC 12.5:

**ELC 12.5 RECORD TO SUPREME COURT** [Redline]

**. . . .**

**(e) Additions to Record.** Either party may request that the Clerk transmit additional portions of the record to the Court prior to or with the filing of the party's last brief. Thereafter, either ~~Either~~ party may ~~at any time~~ move the Court for an order directing the transmittal of additional portions of the record to the Court.

**ELC 12.5 RECORD TO SUPREME COURT** [Clean Copy]

**. . . .**

**(e) Additions to Record.** Either party may request that the Clerk transmit additional portions of the record to the Court prior to or with the filing of the party's last brief. Thereafter, either party may move the Court for an order directing the transmittal of additional portions of the record to the Court.

**3.** The proposal regarding the presumptive effective date of a suspension or disbarment at p. 506 of the Materials to amend ELC 13.2 and ELC 12.8:

**ELC 13.2 EFFECTIVE DATE OF SUSPENSIONS AND DISBARMENTS** [Redline]

Suspensions and disbarments are effective on the date set by the Supreme Court's order or opinion, which will ordinarily be seven days after the date of the order or opinion. If no date is set, the suspension or disbarment is effective ~~on the~~ seven days after the date of the Court's order or opinion.

**ELC 12.8 ~~EFFECTIVE DATE OF OPINION~~ MOTION FOR RECONSIDERATION** [Redline]

~~**(a) Effective when Filed.** An opinion in a disciplinary proceeding takes effect when filed unless the Court specifically provides otherwise.~~

~~**(b) Motion for Reconsideration.**~~ A motion for reconsideration may be filed as provided in RAP 12.4, but the motion does not stay the judgment or delay the effective date of a suspension or disbarment unless the Court enters a stay.

**ELC 13.2 EFFECTIVE DATE OF SUSPENSIONS AND DISBARMENTS** [Clean Copy]

Suspensions and disbarments are effective on the date set by the Supreme Court's order or opinion, which will ordinarily be seven days after the date of the order or opinion. If no date is set, the suspension or disbarment is effective seven days after the date of the Court's order or opinion.

**ELC 12.8 MOTION FOR RECONSIDERATION** [Clean Copy]

A motion for reconsideration may be filed as provided in RAP 12.4, but the motion does not stay the judgment or delay the effective date of a suspension or disbarment unless the Court enters a stay.

**4.** The proposal to clarify the current practice of service by mail of reprimands at p. 507 of the materials:

**ELC 13.4 REPRIMAND** [Redline]

**(a) Administration.** The Association administers a reprimand to a respondent lawyer by written statement signed by its President, and served by mail on the Respondent.

**(b) Notice and Review of Contents.** The Association must serve the respondent with a copy of the proposed reprimand by mail. Within five days of service of the proposed reprimand, the respondent may file a request for review of the content of the proposed reprimand. This request stays the administration of the reprimand. When timely requested, the Disciplinary Board reviews the proposed reprimand in light of the decision or stipulation imposing the reprimand and may take any appropriate action. The Board's action is final and not subject to further review. If no request is received, the content of the reprimand is final, and the reprimand is administered.

**ELC 13.4 REPRIMAND** [Clean Copy]

**(a) Administration.** The Association administers a reprimand to a respondent lawyer by written statement signed by its President, and served by mail on the Respondent.

**(b) Notice and Review of Contents.** The Association must serve the respondent with a copy of the proposed reprimand by mail. Within five days of service of the proposed reprimand, the respondent may file a request for review of the content of the proposed reprimand. This request stays the administration of the reprimand. When timely requested, the Disciplinary Board reviews the proposed reprimand in light of the decision or stipulation imposing the reprimand and may take any appropriate ac-

tion. The Board's action is final and not subject to further review. If no request is received, the content of the reprimand is final, and the reprimand is administered.

**5.** The proposal removing obsolete language from ELC 13.5 at p. 508 of the Materials:

**ELC 13.5 ADMONITION** [Redline]
**(a) By a Review Committee.**
(1) A review committee may issue an admonition when investigation of a grievance shows misconduct.
(2) A respondent lawyer may protest ~~either~~ the review committee's ~~or the Board's prehearing~~ issuance of an admonition by filing a notice to that effect with the Clerk within 30 days of service of the admonition. Upon receipt of a timely protest, the admonition is rescinded, and the grievance is deemed ordered to hearing.
**. . . .**

**ELC 13.5 ADMONITION** [Clean Copy]
**(a) By a Review Committee.**
(1) A review committee may issue an admonition when investigation of a grievance shows misconduct.
(2) A respondent lawyer may protest the review committee's issuance of an admonition by filing a notice to that effect with the Clerk within 30 days of service of the admonition. Upon receipt of a timely protest, the admonition is rescinded, and the grievance is deemed ordered to hearing.
**. . . .**

**6.** The proposal at p. 510 of the materials to amend ELD 13.5 regarding the effect of a rescinded admonition:

**ELC 13.5 ADMONITION** [Redline]
**(a) By a Review Committee.**
(1) A review committee may issue an admonition when investigation of a grievance shows misconduct.
(2) A respondent lawyer may protest either the review committee's or the Board's prehearing issuance of an admonition by filing a notice to that effect with the Clerk within 30 days of service of the admonition. Upon receipt of a timely protest, the admonition is rescinded, and the grievance is deemed ordered to hearing. <u>A rescinded admonition is of no effect and may not be introduced into evidence in any disciplinary proceeding or appeal.</u>

. . . .

**ELC 13.5 ADMONITION** [Clean Copy]

**(a) By a Review Committee.**

(1) A review committee may issue an admonition when investigation of a grievance shows misconduct.

(2) A respondent lawyer may protest either the review committee's or the Board's prehearing issuance of an admonition by filing a notice to that effect with the Clerk within 30 days of service of the admonition. Upon receipt of a timely protest, the admonition is rescinded, and the grievance is deemed ordered to hearing. A rescinded admonition is of no effect and may not be introduced into evidence in any disciplinary proceeding or appeal.

. . . .

**7.** The proposal at p. 514 of the Materials to amend ELC 13.9(k) regarding costs and expenses assessed as the result of non-cooperation:

**ELC 13.9 COSTS AND EXPENSES** [Redline]

. . . .

**(k) Costs in Other Cases**. Rule 9.1 governs costs and expenses in cases resolved by stipulation. Rule 8.6 governs assessment of costs and expenses in disability proceedings. Rule 5.3(f) governs assessment of costs and expenses pursuant to a respondent's failure to cooperate.

. . . .

**ELC 13.9 COSTS AND EXPENSES** [Clean Copy]

. . . .

**(k) Costs in Other Cases**. Rule 9.1 governs costs and expenses in cases resolved by stipulation. Rule 8.6 governs assessment of costs and expenses in disability proceedings. Rule 5.3(f) governs assessment of costs and expenses pursuant to a respondent's failure to cooperate.

. . . .

**8.** A proposal to amend ELC 13.7 to clarify that the Lawyer's Fund for Client Protection must be repaid as a condition of any reinstatement, following a suspension or disbarment, as follows:

**ELC 13.7 RESTITUTION** [Redline]

**(a) Restitution May Be Required.** A respondent lawyer who has been sanctioned under rule 13.1 or admonished under rule 13.5(b) may be ordered to make restitution to persons financially injured by the respondent's conduct or the Lawyer's Fund for Client Protection.

**(b) Payment of Restitution.**
(1) A respondent ordered to make restitution must do so within 30 days of the date on which the decision requiring restitution becomes final, unless the decision provides otherwise or the respondent enters into a periodic payment plan with disciplinary counsel.
(2) A respondent ordered to make restitution to the Lawyer's Fund for Client Protection must do so within 30 days of the date on which the decision requiring restitution becomes final, unless the decision provides otherwise or the respondent enters into a periodic payment plan with the Lawyer's Fund for Client Protection Board.
(~~2~~ 3) Disciplinary counsel or the Lawyer's Fund for Client Protection Board may enter into an agreement with a respondent for a reasonable periodic payment plan if:
(A) the respondent demonstrates in writing present inability to pay restitution, and
(B) disciplinary counsel consults with the persons owed restitution.
(~~3~~ 4) A respondent may ask the Chair to review an adverse determination by disciplinary counsel of the reasonableness of a proposed periodic payment plan for restitution. The Chair directs the procedure for this review. The Chair's ruling is not subject to further review. If the Chair determines that the Board should review the matter, the Chair directs the procedure for Board review and the Board's decision is not subject to further review.
**(c) Failure To Comply.** A respondent's failure to make restitution when ordered to do so, or to comply with the terms of a periodic payment plan may be grounds for discipline.

**ELC 13.7 RESTITUTION** [Clean Copy]
**(a) Restitution May Be Required.** A respondent lawyer who has been sanctioned under rule 13.1 or admonished under rule 13.5(b) may be ordered to make restitution to persons financially injured by the respondent's conduct or the Lawyer's Fund for Client Protection.
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(3) Disciplinary counsel or the Lawyer's Fund for Client Protection Board may enter into an agreement with a respondent for a reasonable periodic payment plan if:

(A) the respondent demonstrates in writing present inability to pay restitution, and

(B) disciplinary counsel consults with the persons owed restitution.

(4) A respondent may ask the Chair to review an adverse determination by disciplinary counsel of the reasonableness of a proposed periodic payment plan for restitution. The Chair directs the procedure for this review. The Chair's ruling is not subject to further review. If the Chair determines that the Board should review the matter, the Chair directs the procedure for Board review and the Board's decision is not subject to further review.

**(c) Failure To Comply.** A respondent's failure to make restitution when ordered to do so, or to comply with the terms of a periodic payment plan may be grounds for discipline.

**9.** The proposal at p. 504 of the materials that the Clerk not transmit the record to the Supreme Court until the filing fee has been paid:

**ELC 12.5 RECORD TO SUPREME COURT** [Redline]

**(a) Transmittal.** The Clerk should transmit the record, including the filing fee in the case of a notice of appeal, to the Supreme Court within 30 days of the filing of the notice of appeal, service of the order accepting review, or filing of the transcript of oral argument before the Board, if any. Notwithstanding these deadlines, the Clerk should not transmit the record to the Supreme Court prior to the payment of the filing fee or the appealing party has provided proof that the Supreme Court has waived the filing fee.

. . . .

**ELC 12.5 RECORD TO SUPREME COURT** [Clean Copy]

**(a) Transmittal.** The Clerk should transmit the record, including the filing fee in the case of a notice of appeal, to the Supreme Court within 30 days of the filing of the notice of appeal, service of the order accepting review, or filing of the transcript of oral argument before the Board, if any. Notwithstanding these deadlines, the Clerk should not transmit the record to the Supreme Court prior to the payment of the filing fee or the appealing party has provided proof that the Supreme Court has waived the filing fee.

. . . .

**10.** The proposal at p. 515-17 of the materials to update Title 14:

## TITLE 14 – DUTIES ON SUSPENSION, ~~OR~~ DISBARMENT, OR RESIGNATION IN LIEU OF DISBARMENT [Redline]

**ELC 14.1 NOTICE TO CLIENTS AND OTHERS; PROVIDING CLIENT PROPERTY** [Redline]

**(a) Providing Client Property.** A lawyer who has been suspended from the practice of law, disbarred, has resigned in lieu of disbarment, or has been transferred to disability inactive status must provide each client or the client's substituted counsel upon request with the client's assets, files, and other documents in the lawyer's possession, regardless of any possible claim of lien under RCW 60.40.

**(b) Notice if Suspended for 60 Days or Less.** A lawyer who has been suspended for 60 days or less under rule 13.3 must within ten days of the effective date of the suspension:

(1) notify every client involved in litigation or administrative proceedings, and counsel for each adverse party (or the adverse party directly if not represented by counsel), of the suspension, the reason therefor, and of the lawyer's consequent inability to act as a lawyer after the effective date of the suspension, and advise each of these clients to seek prompt substitution of another lawyer. If the client does not substitute counsel within ten days of this notice, the lawyer must advise the court or agency of the lawyer's inability to act; and

(2) notify all other clients of the suspension, the reason therefor, and consequent inability to act during the suspension. The notice must advise the client to seek legal advice elsewhere if needed during the suspension.

**(c) Notice if Otherwise Suspended, ~~or~~ Disbarred, or Resigned in Lieu of Disbarment.** A lawyer who has been disbarred, has resigned in lieu of disbarment, or has been suspended for more than 60 days, for nonpayment of dues, or under title 7 or APR 11 must within ten days of the effective date of the disbarment or suspension:

(1) notify every client of the lawyer's suspension, disbarment or resignation in lieu of disbarment, the reason therefor, and of the lawyer's consequent inability to act as the client's lawyer ~~and the reason therefor~~, and advise the client to seek legal advice elsewhere;

(2) advise every client involved in litigation or administrative proceedings to seek the prompt substitution of another lawyer. If the client does not substitute counsel within ten days of being notified of the lawyer's inability to act, the lawyer must advise the court or agency of the lawyer's inability to act; and

(3) notify counsel for each adverse party in pending litigation or administrative proceedings, or the adverse party directly if not represented by counsel, of the lawyer's suspension, disbarment, or resignation in lieu of

disbarment, the reason therefor, and the inability to act further on the client's behalf.

**(d) Notice if Transferred to Disability Inactive Status**. A lawyer transferred to disability inactive status, or his or her guardian if one has been appointed, must give all notices required by section (c), except that the notices need not refer to disability.

**(e) Address of Client**. All notices to lawyers, adverse parties, courts, or agencies as required by sections (b), (c), or (d) must contain the client's name and last known address, unless doing so would disclose a confidence or secret of the client. If the name and address are omitted, the client must be advised that so long as his or her address remains undisclosed and no new lawyer is substituted, the client may be served by leaving papers with the clerk of the court under CR 5(b)(1) in pending superior court actions, and that comparable provisions may allow similar service in other court proceedings or administrative actions.

**ELC 14.2 LAWYER TO DISCONTINUE PRACTICE** [Redline]

A disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment, or a lawyer transferred to disability inactive status, must not practice law after the effective date of the disbarment, resignation in lieu of disbarment, suspension, or transfer to disability inactive status, and also must take whatever steps necessary to avoid any reasonable likelihood that anyone will rely on him or her as a lawyer authorized to practice law. This rule does not preclude a disbarred or suspended lawyer, or a lawyer who has resigned in lieu of disbarment, or a lawyer transferred to disability inactive status, from disbursing assets held by the lawyer to clients or other persons or from providing information on the facts and the lawyer's theory of a case and its status to a succeeding lawyer, provided that the ~~suspended or disbarred~~ lawyer not be involved in any discussion regarding matters occurring after the date of the suspension, resignation in lieu of disbarment, or disbarment. The lawyer must provide this information on request and without charge.

**ELC 14.3 AFFIDAVIT OF COMPLIANCE** [Redline]

Within 25 days of the effective date of a lawyer's disbarment, resignation in lieu of disbarment, suspension, or transfer to disability inactive status, the lawyer must serve on disciplinary counsel an affidavit stating that the lawyer has fully complied with the provisions of this title. The affidavit must also provide a mailing address where communications to the lawyer may thereafter be directed. The lawyer must attach to the affidavit copies of the form letters of notification sent to the lawyer's clients and opposing counsel or parties and copies of letters to any court, together with a list of

names and addresses of all clients and opposing counsel or parties to whom notices were sent. The affidavit is a confidential document except the lawyer's mailing address is treated as a change of mailing address under APR 13(b).

**ELC 14.4 LAWYER TO KEEP RECORDS OF COMPLIANCE** [Redline]
A lawyer who has been disbarred, suspended, has resigned in lieu of disbarment, or has been transferred to disability inactive status must maintain written records of the various steps taken by him or her under this title, so that proof of compliance will be available in any subsequent proceeding.

## TITLE 14 – DUTIES ON SUSPENSION, DISBARMENT, OR RESIGNATION IN LIEU OF DISBARMENT [Clean Copy]

**ELC 14.1 NOTICE TO CLIENTS AND OTHERS; PROVIDING CLIENT PROPERTY** [Clean Copy]
**(a) Providing Client Property.** A lawyer who has been suspended from the practice of law, disbarred, has resigned in lieu of disbarment, or has been transferred to disability inactive status must provide each client or the client's substituted counsel upon request with the client's assets, files, and other documents in the lawyer's possession, regardless of any possible claim of lien under RCW 60.40.
**(b) Notice if Suspended for 60 Days or Less.** A lawyer who has been suspended for 60 days or less under rule 13.3 must within ten days of the effective date of the suspension:
(1) notify every client involved in litigation or administrative proceedings, and counsel for each adverse party (or the adverse party directly if not represented by counsel), of the suspension, the reason therefor, and of the lawyer's consequent inability to act as a lawyer after the effective date of the suspension, and advise each of these clients to seek prompt substitution of another lawyer. If the client does not substitute counsel within ten days of this notice, the lawyer must advise the court or agency of the lawyer's inability to act; and
(2) notify all other clients of the suspension, the reason therefor, and consequent inability to act during the suspension. The notice must advise the client to seek legal advice elsewhere if needed during the suspension.
**(c) Notice if Otherwise Suspended, Disbarred, or Resigned in Lieu of Disbarment.** A lawyer who has been disbarred, has resigned in lieu of disbarment, or has been suspended for more than 60 days, for nonpayment of dues, or under title 7 or APR 11 must within ten days of the effective date of the disbarment or suspension:
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quent inability to act as the client's lawyer, and advise the client to seek legal advice elsewhere;
(2) advise every client involved in litigation or administrative proceedings to seek the prompt substitution of another lawyer. If the client does not substitute counsel within ten days of being notified of the lawyer's inability to act, the lawyer must advise the court or agency of the lawyer's inability to act; and
(3) notify counsel for each adverse party in pending litigation or administrative proceedings, or the adverse party directly if not represented by counsel, of the lawyer's suspension, disbarment, or resignation in lieu of disbarment, the reason therefor, and the inability to act further on the client's behalf.
**(d) Notice if Transferred to Disability Inactive Status**. A lawyer transferred to disability inactive status, or his or her guardian if one has been appointed, must give all notices required by section (c), except that the notices need not refer to disability.
**(e) Address of Client**. All notices to lawyers, adverse parties, courts, or agencies as required by sections (b), (c), or (d) must contain the client's name and last known address, unless doing so would disclose a confidence or secret of the client. If the name and address are omitted, the client must be advised that so long as his or her address remains undisclosed and no new lawyer is substituted, the client may be served by leaving papers with the clerk of the court under CR 5(b)(1) in pending superior court actions, and that comparable provisions may allow similar service in other court proceedings or administrative actions.

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**ELC 14.4 LAWYER TO KEEP RECORDS OF COMPLIANCE** [Clean Copy]
A lawyer who has been disbarred, suspended, has resigned in lieu of disbarment, or has been transferred to disability inactive status must maintain written records of the various steps taken by him or her under this title, so that proof of compliance will be available in any subsequent proceeding.

**We recommend via the consent calendar that no action be taken regarding the following proposals:**

**11.** As to the item listed on the Matrix under ELC 13.3(b) to "Clarify effect of failure to comply with duties on suspension under ELC 14 on reinstatement under ELC 13.3(b)," recommend no action based on ODC withdrawing the suggestion.

**12.** As to the item on the Matrix under ELC 13.3(b)(1) to "Add requirement for reinstatement from suspension that lawyer establish compliance with duties on suspension under Title 14," recommend no action based on ODC withdrawing the suggestion.

# Memo

To: Geoffrey Gibbs
Chair, ELC Drafting Task Force

From: Bruce Johnson
Subcommittee A

Date: May 22, 2010

RE: Discussion Issue for ELC Drafting Task Force
Should Disability Proceedings Be Public? ELC 3.3(b).

---

At our May 19, 2010 meeting the Subcommittee took up the April 13, 2010 Memo from ODC regarding whether disability proceedings should be public (Note: the memo is in the Materials at pp. 713-715). ODC explained its support for the proposal, as stated in the memo. Kurt Bulmer explained his opposition to the proposal, explaining that these proceedings can be so embarrassing to a lawyer, that if they were done in public proceedings, the lawyer would never be able to restore his or her reputation, even if they were successful in proving their competence to practice law.

The Subcommittee determined that this proposal would be a major policy change, and should have a "first reading" consideration by the Task Force at the June meeting in order to get a sense of the Task Force as to the proposal before the Subcommittee attempts to further consider the proposal.

# Memo

To: ELC Drafting Task Force
From: ODC
Date: June 2, 2010
RE: NOBC List Serve Inquiry On Confidentiality of Disability Proceedings

We posted an inquiry on the NOBC List Serve, asking jurisdictions whether their disability proceedings are public. We got 19 replies. In 11 jurisdictions the disability proceedings are confidential. In 7 jurisdictions the disability proceedings are public. In one jurisdiction it is discretionary on a case by case basis with the Court. It should be noted that in one of the jurisdictions (Pennsylvania) where the disability proceedings are confidential, their disciplinary proceedings are also confidential.

| NOBC List Serve – Are Disability Proceedings Public | | | |
|---|---|---|---|
| **Jurisdiction** | **Confidential** | **Public** | **Other** |
| Arizona | X | | |
| Ohio | | X | |
| Connecticut | | | Discretionary with Court as to whether to hold in public. "The court shall, in exercising discretion, weigh the public policy in favor of open proceedings, as well as the duty to protect the public, against the attorney's right to medical and mental health privacy and ability to pursue a livelihood." Sec. 2-56 |
| Pennsylvania | X (but disciplinary hearings are also confidential) | | |
| Iowa | | X | |
| Virginia | X | | |
| Colorado | X | | |
| New Mexico | | X - but can be sealed on motion. | |
| Nevada | | X – Proceedings public, but pleadings confidential | |
| Texas | X | | |
| Oregon | | X | |
| Alaska | X | | |
| D.C. | X | | |
| North Carolina | | X | |
| Maryland | | X | |
| North Dakota | X | | |
| Wisconsin | X (but file public after disability transfer is ordered) | | |
| Idaho | X | | |
| California | X (but respondent lawyer may waive confidentiality) | | |

# Memo

To: ELC Drafting Task Force
From: Subcommittee C
Date: 3/28/10 [edited 4/14/10]
RE: Supplemental Proposals held over from the April 8, 2010 Task Force Meeting

. . . .

At the March 10, 2010 meeting, the Task Force approved on the consent calendar proposed amendments to ELC 12.4 [see Materials 651-52]. Consistent with the changes above to ELC 12.3, we have refined that language and have also considered the proposals of ODC set forth at pp. 424-25 to amend this rule to clarify where an appeal is filed and to provide information as to the payment of the filing fee. As a result, we propose the following changes be considered on the consent calendar in lieu of our prior recommendations at p. 651-52 of the Materials:

**ELC 12.4 DISCRETIONARY REVIEW** [Redline]

**(a) Decisions Subject to Discretionary Review.** Respondent or disciplinary counsel may seek discretionary review of Board decisions under rule 11.12(e) not ~~recommending suspension or disbarment~~ subject to appeal under rule 12.3. ~~are subject to Supreme Court review only through discretionary review.~~ The Court accepts discretionary review only if:

(1) the Board's decision is in conflict with a Supreme Court decision;

(2) a significant question of law is involved;

(3) there is no substantial evidence in the record to support a material finding of fact on which the Board's decision is based; or

(4) the petition involves an issue of substantial public interest that the Court should determine.

**(b) Petition for Review.** ~~Either party~~ Respondent or disciplinary counsel may seek discretionary review by filing a petition for review with the ~~Court~~ Clerk within ~~25~~ 30 days of service of the Board's decision on respondent.

**(c) Content of Petition; Answer; Service; Decision.** A petition for review should be substantially in the form prescribed by RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in that rule to the Court of Appeals are considered references to the Board. The appendix to the petition or an appendix to an answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d) – (h) governs answers and replies to petitions for review and related matters including service and decision by the Court.

**(d) Subsequent Petition By Other Parties.** If a timely petition for discretionary review is filed by the Respondent or disciplinary counsel, and

the other party wants relief from the Board's decision, he or she must file a petition for discretionary review with the Clerk within the later of:

(1) 14 days after service of the petition filed by the other party, or

(2) the time for filing a petition under subsection (b) of this rule.

**(e) Filing Fee.** The first party to file a petition for discretionary review must, at the time the petition is filed, pay the statutory filing fee by check payable to the Clerk of the Supreme Court.

**(~~d~~ f) Acceptance of Review.** The Court accepts discretionary review of a Board decision by granting a petition for review. Upon acceptance of review, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

**ELC 12.4 DISCRETIONARY REVIEW** [Clean Copy]

(a) **Decisions Subject to Discretionary Review.**

Respondent or disciplinary counsel may seek discretionary review of Board decisions under rule 11.12(e) not subject to appeal under rule 12.3. The Court accepts discretionary review only if:

(1) The board's decision is in conflict with a Supreme Court decision;

(2) A significant question of law is involved;

(3) There is no substantial evidence in the record to support a material finding of fact on which the Board's decision is based; or

(4) The petition involves an issue of substantial public interest that the Court should determine.

**(b) Petition for Review.** Respondent or Disciplinary Counsel may seek discretionary review by filing a petition for review with the Court within 30 days of service of the Board's decision.

**(c) Content of Petition; Answer; Service; Decision.** A petition for review should be substantially in the form prescribed by RAP 13.4(c) for petitions for Supreme Court review of Court of Appeals decisions. References in the rule to the Court of Appeals are considered references to the Board. The appendix to the petition or an appendix to an answer or reply may additionally contain any part of the record, including portions of the transcript or exhibits, to which the party refers. RAP 13.4(d)-(h) governs answers and replies to petitions for review and related matters including service and decision by the Court.

**(d) Subsequent Petition By Other Parties.** If a timely petition for discretionary review is filed by the Respondent or disciplinary counsel, and the other party wants relief from the Board's decision, he or she must file a petition for discretionary review with the Clerk within the later of:

(1) 14 days after service of the petition filed by the other party, or

(2) the time for filing a petition under subsection (b) of this rule.

**(e) Filing Fee.** The first party to file a petition for discretionary review must, at the time the petition is filed, pay the statutory filing fee by check payable to the Clerk of the Supreme Court.

**(f) Acceptance of Review.** The Court accepts discretionary review of a Board decision by granting a petition for review. Upon acceptance of review, the same procedures apply to matters subject to appeal and matters subject to discretionary review.

3. We also submit for consideration on the consent calendar the following proposal regarding ELC 11.12(g), based on the proposal of ODC at p. 503 of the materials. The current rules are silent as to what happens in this situation and the following proposal merely sets forth the current practice:

**ELC 11.12 DECISION OF BOARD** [Redline]

**. . . .**

**(g) Decision Final Unless Appealed**. The Board's decision is final if neither party files a notice of appeal ~~nor~~ a petition for review within the time permitted by title 12 or upon the Supreme Court's denial of a petition for discretionary review. When a Board decision recommending suspension or disbarment becomes final because neither party has filed a notice of appeal or petition for discretionary review, the Clerk transmits to the Supreme Court a copy of the Board's decision together with the findings, conclusions and recommendation of the hearing officer for entry of an appropriate order.

**ELC 11.12 DECISION OF BOARD** [Clean Copy]

**. . . .**

**(g) Decision Final Unless Appealed**. The Board's decision is final if neither party files a notice of appeal or a petition for review within the time permitted by title 12 or upon the Supreme Court's denial of a petition for discretionary review. When a Board decision recommending suspension or disbarment becomes final because neither party has filed a notice of appeal or petition for discretionary review, the Clerk transmits to the Supreme Court a copy of the Board's decision together with the findings, conclusions and recommendation of the hearing officer for entry of an appropriate order.

May 27, 2010

To: Geoff Gibbs, Chair
ELC Drafting Task Force

From: Seth Fine, Chair
Subcommittee B

Re: Final Subcommittee B Report

This supplements the Subcommittee B reports dated December 29 (p. 614-29), February 2 (p. 653-68), and March 29 (p. 696-99). The Subcommittee has now concluded review of all proposals referred to it. It recommends adoption of the following additional proposals:

## 1. ELC 5.6:

[Note: The only new portions of this proposal are subdivisions (c) and (e). These provisions would require a Review Committee to give notice before it makes a grievance public against the advice of disciplinary counsel. The remainder of the proposal represents language already approved by the Task Force (p. 616, 623-24, 658, 688, and 697).]

**ELC 5.6 DISPOSITION OF GRIEVANCE**
**(a) Dismissal by Disciplinary Counsel.** Disciplinary counsel may dismiss grievances with or without investigation. On dismissal, disciplinary counsel must notify the grievant of the procedure for review in this rule.
**(b) Review of Dismissal.** A grievant may request review of dismissal of the grievance by delivering or depositing in the mail a request for review to the Association no later than 45 days after the Association mails the notice of dismissal. Mailing requires postage prepaid first class mail. If review is requested, disciplinary counsel may either reopen the matter for investigation or refer it to a review committee. If no timely request for review is made, the dismissal is final and may not be reviewed. Disputes regarding timeliness may be submitted to a review committee. A grievant may withdraw in writing a request for review, but thereafter the request may not be revived.
(**c) Report in Other Cases.** Disciplinary counsel must report to a review committee the results of investigations except those dismissed or diverted. The report may include a recommendation that the committee order a hearing or issue an advisory letter or admonition.
**(d) Authority on Review.** In reviewing grievances under this rule, a review committee may:
(1) dismiss the grievance;
(~~1~~ 2) affirm the dismissal;
(~~2~~ 3) dismiss the grievance and issue an advisory letter under rule 5.7;
(~~3~~ 4) issue an admonition under rule 13.5;

(4 5) order a hearing on the alleged misconduct; or
(~~5~~ 6) order further investigation as may appear appropriate.
**(e) Issuing Admonition or Ordering Hearing without Recommendation from Disciplinary Counsel.** When the review committee decides to issue an admonition or order a matter to hearing, and such action has not been recommended by disciplinary counsel, the committee shall issue notice of its intended action and state the reasons therefor. The matter shall be set for reconsideration by a review committee. The grievant, the respondent lawyer, and disciplinary counsel may submit additional materials. On reconsideration, the committee may take any action authorized by subsection (d) of this rule.
**(f) Action Final.** Except as provided in subsection (e), a review committee's action under this rule is final and not subject to further review.

## 2. ELC 5.3, 5.4, 5.5, and new 5.6:

[Note: This package of proposals deals with protection of confidential information. It includes procedures for raising objections to disciplinary counsel's investigative demands. The Subcommittee recommends that the Task Force reconsider its adoption of amendments dealing with objections to investigative demands (p. 621-23) and adopt these provisions instead.
The proposal includes a new ELC 5.6. The existing rules 5.6 and 5.7 would have to be renumbered accordingly.]

### ELC 5.3 INVESTIGATION OF GRIEVANCE

**(a) Review and Investigation.** Disciplinary counsel must review and may investigate any alleged or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to practice law, whether disciplinary counsel learns of the misconduct by grievance or otherwise. If there is no grievant, the Association may open a grievance in the Association's name.
**(b) Preliminary Request for Response.** Following review of a matter under section (a), disciplinary counsel may request a preliminary written response from a respondent lawyer. If a request for information (1) requests only the respondent lawyer's preliminary written response, and (2) neither includes any other request for specific information nor requests that the respondent lawyer furnish or permit inspection of specific records, files, and accounts, the request is not subject to objection under section (i).
**(~~b~~ c) Adjunct Investigative Counsel.** Disciplinary counsel may assign a case to adjunct investigative counsel for investigation. Disciplinary counsel assists in those investigations and monitors the performance of adjunct investigative counsel. On receiving a report of an investigation by an adjunct investigative counsel, disciplinary counsel may, as appears appropriate, request or conduct additional investigation or take any action under these rules.
**(~~c~~ d) Deferral by Disciplinary Counsel**.
(1) Disciplinary counsel may defer an investigation into alleged acts of misconduct by a lawyer:

(A) if it appears that the allegations are related to pending civil or criminal litigation;
(B) if it appears that the respondent lawyer is physically or mentally unable to respond to the investigation; or
(C) for other good cause, if it appears that the deferral will not endanger the public.

(2) Disciplinary counsel must inform the grievant and respondent of a decision to defer or a denial of a request to defer and of the procedure for requesting review. A grievant or respondent may request review of a decision on deferral. If review is requested, disciplinary counsel refers the matter to a review committee for reconsideration of the decision on deferral. To request review, the grievant or respondent must deliver or deposit in the mail a request for review to the Association no later than 45 days after the Association mails the notice regarding deferral.

**(~~d~~ e) Dismissal of Grievance Not Required**. None of the following alone requires dismissal of a grievance: the unwillingness of a grievant to continue the grievance, the withdrawal of the grievance, a compromise between the grievant and the respondent, or restitution by the respondent.

**(~~e~~ f) Duty To Furnish Prompt Response**. Any lawyer must promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation.

**(g) Investigative Inquiries.** Upon inquiry or request, any lawyer must:

(1) furnish in writing, or orally if requested, a full and complete response to inquiries and questions;
(2) permit inspection and copying of the lawyer's business records, files, and accounts;
(3) furnish copies of requested records, files, and accounts;
(4) furnish written releases or authorizations if needed to obtain documents or information from third parties; and
(5) comply with ~~discovery conducted~~ investigatory subpoenaes under rule 5.5.

**(~~f~~ h) Failure To Cooperate**.

(1) *Noncooperation Deposition.* If a lawyer has not complied with any request made under ~~section (e)~~ this rule or rule 2.13(d) for more than 30 days, disciplinary counsel may notify the lawyer that failure to comply within ten days may result in the lawyer's deposition or subject the lawyer to interim suspension under rule 7.2. Ten days after this notice, disciplinary counsel may serve the lawyer with a subpoena for a deposition. Any deposition conducted after the ten-day period and necessitated by the lawyer's continued failure to cooperate may be conducted at any place in Washington State.

(2) *Costs and Expenses*.

(A) Regardless of the underlying grievance's ultimate disposition, a lawyer who has been served with a subpoena under this rule is liable for the actual costs of the deposition, including but not limited to service fees, court reporter fees, travel expenses, and the cost of transcribing the deposition, if ordered by disciplinary counsel. In addition, a lawyer who has been served with a

subpoena for a deposition under this rule is liable for a reasonable attorney fee of $500.

(B) The procedure for assessing costs and expenses is as follows:

(i) Disciplinary counsel applies to a review committee by itemizing the cost and expenses and stating the reasons for the deposition.

(ii) The lawyer has ten days to respond to disciplinary counsel's application.

(iii) The review committee by order assesses appropriate costs and expenses.

(iv) Rule 13.9(e) governs Board review of the review committee order.

(3) *Grounds for Discipline.* A lawyer's failure to cooperate fully and promptly with an investigation as required by ~~section (e)~~ this rule or rule 2.13(d) is also grounds for discipline.

**~~(g~~ i) Objections.** A lawyer who receives an investigative **i**nquiry under section (g) of this rule may object as provided in rule 5.6.

**ELC 5.4 PRIVILEGES**

**. . . .**

**(b) Attorney-Client Privilege.**

(1) *Assertion In Response to Investigative Inquiries.* In response to an investigative inquiry made under rule 5.3 (g), or an investigatory subpoena under ELC 5.5, unless a lawyer makes an objection under rule 5.6, a ~~A~~ lawyer may not assert the attorney-client privilege or other prohibitions on revealing ~~client confidences or secrets~~ information relating to the representation of a client as a basis for refusing to provide information ~~during the course of an investigation~~.

(2) *Duties of Disciplinary Counsel.* Disciplinary counsel receives, reviews and holds attorney-client privileged and other confidential client information under and in furtherance of the Supreme Court's authority to regulate the practice of law. Disclosure of information to disciplinary counsel is not prohibited by RPC 1.6 or RPC 1.9, and such disclosure does not waive any attorney-client privilege. ~~but information obtained during an investigation involving client confidences or secrets must be kept confidential to the extent possible under these rules unless the client otherwise consents.~~ If the lawyer identifies the specific information that is privileged or confidential and requests that it be treated as confidential, the Association must, ~~to the extent possible~~ absent authorization under rule 5.6, maintain the confidentiality of information provided by a lawyer in response to an inquiry or request under these rules.

(3) *Non-Disclosure.* No information identified as confidential under this rule may be disclosed or released under Title 3 of these rules unless the client or former client consents, which includes consent under rule 5.1(b). Nothing in these rules waives or requires waiver of any lawyer's own privilege or other protection as a client against the disclosure of confidences or secrets.

**ELC 5.5 ~~DISCOVERY BEFORE FORMAL COMPLAINT~~ INVESTIGATORY SUBPOENAS**

**(a) Procedure***.* Before filing a formal complaint, disciplinary counsel may issue a subpoena for a deposition ~~depose either a respondent lawyer or a witness, or issue~~

~~requests for admission to the respondent~~ or to obtain documents without a deposition. To the extent possible, CR 30 or 31 applies to depositions under this rule, however the respondent need not be given notice of a subpoena. ~~CR 36 governs requests for admission.~~

**(b) Subpoenas ~~for Depositions~~.** Disciplinary counsel may issue subpoenas to compel the respondent's or a witness's attendance, and/or the production of books, documents, or other evidence, at a deposition or without a deposition. CR 45 governs subpoenas under this rule, but the notice required by CR 45(b)(2) need not be given. Subpoenas ~~must be served as in civil cases in the superior court and~~ may be enforced under rule 4.7.

**(c) Challenges.** Challenges by non-lawyers to subpoenas under this rule may be made to the chief hearing officer, who may issue a protective order under rule 3.2(e).

**(~~c~~ d) Cooperation.** Every lawyer must promptly respond to subpoenas ~~discovery~~ and requests and inquiries from disciplinary counsel, subject to the provisions of rule 5.3 and rule 5.4.

**(~~d~~ e) Objections By Lawyers.**

(1) To protect confidential client information, or for other good cause shown, a respondent lawyer may object under rule 5.6 to an investigative subpoena issued pursuant to this rule.

(2) ~~Any objection must be made prior to the due date for the response to the inquiry~~. A timely objection suspends any duty to respond as to the subpoena until a ruling has been made.

**ELC 5.6 REVIEW OF OBJECTIONS TO INQUIRIES AND MOTIONS TO DISCLOSE [new rule]**

**(a) Review Authorized.** The chief hearing officer, or a hearing officer designated by the chief hearing officer, may hear the following matters:

(1) When a lawyer has objected under rule 5.3(i) to an investigative inquiry;
(2) When a lawyer has objected under rule 5.5(e) to an investigatory subpoena; and
(3) When disciplinary counsel seeks authorization under rule 5.4(b) to disclose confidential information.

(**b) Procedure.**

(1) An objection must clearly and specifically set out the challenged inquiry or request and the basis for the objection.
(2) A motion to authorize use in an investigation of confidential information must clearly state the information which has been identified as confidential and the investigatory use for which disciplinary counsel seeks authorization.
(3) When deemed necessary by the chief or other hearing officer considering the matter, that hearing officer may conduct an in camera review of confidential client information.
(4) In considering an objection under this rule, the chief or other hearing officer should consider factors including:
    (A) the relevance and necessity of the information to the investigation;
    (B) whether the information requested by the inquiry is likely to lead to information relevant to the investigation;
    (C) the availability of the information from other sources;

(D) the sensitivity of the information and potential impact on the client, including the client's right to effective assistance of counsel;
(E) the expressed desires of the client;
(F) whether the objection was made before the due date of the request or inquiry; and
(G) whether the burden of producing the requested information outweighs the likely utility of the information to the investigation.

(5) In considering a motion to authorize disciplinary counsel to disclose information identified as confidential client information under this rule, the chief or other hearing officer should consider factors including:
(A) the relevance and necessity of the disclosure of the information to the investigation;
(B) whether the investigative disclosure is likely to lead to information relevant to the investigation;
(C) the sensitivity of the information and potential impact on the client of the investigative disclosure, including the client's right to effective assistance of counsel;
(D) the expressed desires of the client; and
(E) whether the burden of producing the requested information outweighs the likely utility of the information to the investigation.

**(c) Ruling.** In ruling on an objection, the chief or other hearing officer may deny the objection, or sustain the objection in whole or in part, and may establish terms or conditions under which specific information may be withheld, provided, maintained, or used. In ruling on a motion to authorize disclosure, the chief or other hearing officer may grant or deny the motion in whole or in part, and may establish terms or conditions for the investigative use of specific information. When appropriate, a ruling may take the form of, or may accompany a protective order under rule 3.2(e).

**(d) Award of Expenses**. If the hearing officer determines that the position of either disciplinary counsel or the objector was raised in bad faith, that party may be required to pay reasonable expenses and attorney fees resulting from the objection.

**(e) Review.** Any ruling by the chief or other hearing officer under this rule shall be subject to review as an interim ruling under rule 10.9.

[Note: This proposal uses identical language in 5.6(b)(4)(G) and 5.6(b)(5)(E). Following the last Subcommittee meeting, Mr. Beitel suggested that this language does not make sense in the latter provision. He suggested that 5.6(b)(5)(E) be changed to: "whether the above factors outweigh the likely utility of the information to the investigation." The Subcommittee did not have an opportunity to review this suggestion.]

## 3. ELC 9.2:

[Note: This proposal is based on the Chambers proposal at p. 399-402, but with major modifications. It also incorporates the ODC proposals at p. 395 and 397.]

**ELC 9.2 RECIPROCAL DISCIPLINE AND DISABILITY INACTIVE STATUS; DUTY TO SELF-REPORT**

**(a) Duty To Self-Report Discipline or Transfer to Disability Inactive Status.** Within 30 days of being publicly disciplined, or being transferred to disability inactive status in another jurisdiction, a lawyer admitted to practice in this state must inform disciplinary counsel of the discipline or transfer.

**(b) Procedure in Case of Disbarment, Suspension, or Transfer to Disability Inactive Status.**

**(b 1) Obtaining Order.** Upon notification from any source that a lawyer admitted to practice in this state was disciplined disbarred, suspended, or transferred to disability inactive status in another jurisdiction, disciplinary counsel must obtain a certified copy of the order and file it with the Supreme Court.

**(c 2) Supreme Court Action.** Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in this state has been disciplined disbarred, suspended, or transferred to disability inactive status in another jurisdiction, the Supreme Court orders the respondent lawyer to show cause within 30 days of service why it should not impose the identical discipline or disability inactive status. The Association must personally serve this order, and a copy of the order from the other jurisdiction, on the respondent under rule 4.1(b)(3).

**(d 3) Deferral**. If the other jurisdiction has stayed the discipline or transfer, any reciprocal discipline or transfer in this state is deferred until the stay expires.

**(e 4) Discipline or Transfer To Be Imposed.**

(1 A) Thirty days after service of the order under section (c), the Supreme Court imposes the identical discipline or disability inactive status unless disciplinary counsel or the lawyer demonstrates, or the Court finds, that it clearly appears on the face of the record on which the discipline or disability transfer is based, that:

(A i) the procedure so lacked notice or opportunity to be heard that it denied due process;

(B ii) the proof of misconduct or disability was so infirm that the Court is clearly convinced that it cannot, consistent with its duty, accept the finding of misconduct or disability;

(C iii) the imposition of the same discipline would result in grave injustice;

(D iv) the established misconduct warrants substantially different discipline in this state;

(E v) the reason for the original transfer to disability inactive status no longer exists; or

(F vi) appropriate discipline has already been imposed in this jurisdiction for the misconduct.

(2 B) If the Court determines that any of the factors in subsection (1) subdivision (A) exists, it enters an appropriate order. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that imposing the same discipline is not appropriate.

**(5) Effective Date of Suspension.** If the lawyer provided notice to disciplinary counsel pursuant to subsection (a), any suspension under this rule shall take effect

on the same date as the suspension in the other jurisdiction, unless (i) the lawyer requests that the suspension take effect on a different date or (ii) disciplinary counsel demonstrates that a different effective date is appropriate. Such effective date may be retroactive. If the lawyer did not provide notice pursuant to subsection (a), or the lawyer requests a different effective date, the suspension shall take effect on the date established by ELC 13.2.

**(6) Notice of Intent Not To Contest Identical Discipline.** Either party may notify the Court that it will not contest the imposition of identical suspension, disbarment, or transfer. Upon receiving such notice from both parties, the Court may enter an order imposing such discipline or transfer without further notice or hearing.

**(c) Procedure in Case of Public Discipline Other Than Disbarment or Suspension.**

Upon receiving notification that a lawyer received public discipline in another jurisdiction other than disbarment or suspension, the Association must provide public notice pursuant to ELC 3.5. In any disciplinary proceeding, such discipline may be considered as if equivalent discipline had been imposed in this state. If either disciplinary counsel or the lawyer believes that different action is appropriate under the standards set out in subdivision (b)(4), the party may file a motion in the Supreme Court.

**(f d) Conclusive Effect.** Except as this rule otherwise provides, a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct or should be transferred to disability inactive status conclusively establishes the misconduct or the disability for purposes of a disciplinary or disability proceeding in this state.

**(e) Prior Matter In Washington.** No action will be taken against a lawyer under this rule when the lawyer has already been the subject of discipline, disability transfer, or other final disposition of a grievance, disciplinary proceeding, or disability proceeding in Washington for the same conduct that is the basis for discipline, resignation, or disability transfer in another jurisdiction.

## 4. ELC 9.3 (4-2 vote):

[Note: This is a non-substantive modification of the ODC proposal at p. 400-03.]

**ELC 9.3 RESIGNATION IN LIEU OF ~~DISBARMENT~~ DISCIPLINE**

**(a) Grounds.** A respondent lawyer who desires not to contest or defend against allegations of misconduct may, at any time before the answer in any disciplinary proceeding is due, or thereafter with disciplinary counsel's consent, resign his or her membership in the Association in lieu of further disciplinary proceedings.

**(b) Process.** The respondent first notifies disciplinary counsel that the respondent intends to submit a resignation and asks disciplinary counsel to prepare a statement of alleged misconduct and to provide a declaration of costs and a proposed resignation form. After receiving the statement and the declaration of costs, if any, the respondent may resign by signing and submitting to disciplinary counsel ~~a signed resignation,~~ the resignation form prepared by disciplinary counsel, sworn to or affirmed under oath and notarized, ~~that~~ which must include the following:

(1) ~~includes~~ Ddisciplinary counsel's statement of the misconduct alleged ~~misconduct~~ in the matters then pending. ~~and either an admission of that misconduct or a statement that while not admitting the misconduct the respondent agrees that the Association could prove by a clear preponderance of the evidence that the respondent committed violations sufficient to result in respondent's disbarment;~~

(2) Respondent's statement that he or she is aware of the alleged misconduct stated in disciplinary counsel's statement and that rather than defend against the allegations, he or she wishes to permanently resign from membership in the Association.

(~~2~~3) Respondent's affirmative~~ly~~ acknowledg~~es~~ment that the resignation is permanent including the statement:

> "I understand that my resignation is permanent and that any future application by me for reinstatement as a member of the Washington State Bar Association is currently barred. If the Supreme Court changes this rule or an application is otherwise permitted in the future, it will be treated as an application by one who has been disbarred for ethical misconduct, and that, if I file an application, I will not be entitled to a reconsideration or reexamination of the facts, complaints, allegations, or instances of alleged misconduct on which this resignation was based."~~;~~

(~~3~~4) ~~assures that the respondent will~~Respondent's agreement:

(A) to notify all other jurisdictions in which the respondent is or has been admitted to practice law of the resignation in lieu of ~~disbarment~~ discipline;

(B) to seek to resign permanently from the practice of law in any other jurisdiction in which the respondent is admitted; ~~and~~

(C) to provide disciplinary counsel with copies of any of these notifications and any responses; and

(D) acknowledging that the resignation could be treated as a disbarment by all other jurisdictions.

(~~4~~5) ~~assures that the respondent will~~Respondent's agreement to:

(A) notify all other professional licensing agencies in any jurisdiction from which the respondent has a professional license that is predicated on the respondent's admission to practice law of the resignation in lieu of ~~disbarment~~ discipline;

(B) seek to resign permanently from any such license; and

(C) provide disciplinary counsel with copies of any of these notifications and any responses~~;~~.

(~~5~~6) ~~states~~ Respondent's agreement that when applying for any employment or license the respondent agrees to disclose the resignation in lieu of ~~disbarment~~ discipline in response to any question regarding disciplinary action or the status of the respondent's license to practice law~~;~~.

(~~6~~7) ~~states that the respondent agrees~~ Respondent's agreement to pay any restitution or additional costs and expenses ordered by ~~the~~ a review committee, and attaches payment for costs as described in section (f) below, or states that the respondents will execute a confession of judgment or deed of trust as described in section (f)~~; and~~.

(~~7~~8) ~~states~~ Respondent's agreement that when the resignation becomes effective, the respondent will be subject to all restrictions that apply to a disbarred lawyer.

**(c) Public Filing.** Upon receipt of a resignation meeting the requirements set forth above, and the costs and expenses and any executed confession of judgment or deed of trust required under section (f), disciplinary counsel will endorse the resignation and promptly cause~~s~~ it to be filed with the Clerk as a public and permanent record of the Association.

**(d) Effect.** A resignation under this rule is effective upon its filing with the Clerk. All disciplinary proceedings against the respondent terminate except disciplinary counsel has the discretion to continue any investigations deemed appropriate under the circumstances to create a record of the respondent's actions. The Association immediately notifies the Supreme Court of a resignation under this rule and the respondent's name is forthwith stricken from the roll of lawyers. Upon filing of the resignation, the resigned respondent must comply with the same duties as a disbarred lawyer under title 14 and comply with all restrictions that apply to a disbarred lawyer. Notice is given of the resignation in lieu of ~~disbarment~~ discipline under rule 3.5.

**(e) Resignation is Permanent.** Resignation under this rule is permanent. A respondent who has resigned under this rule will never be eligible to apply and will not be considered for admission or reinstatement to the practice of law nor will the respondent be eligible for admission for any limited practice of law.

**(f) Costs and Expenses.** ~~(A)~~ If a respondent resigns under this rule, the expenses under rule 13.9(c) are $1,000 ~~for any proceedings for which an answer was not due when the respondent notified disciplinary counsel of the respondent's intent to resign under section (b)~~. With the resignation, the respondent must pay this $1,000 expense, plus all actual costs ~~for which disciplinary counsel provides documentation, up to an additional $1,000~~ as defined by rule 13.9(b). If the respondent demonstrates inability to pay these costs and expenses, instead of paying this amount, the respondent must execute, in disciplinary counsel's discretion, a confession of judgment or a deed of trust for that amount. Disciplinary counsel may file a claim under section (g) for costs not covered by the payment, confession of judgment, or deed of trust.

~~(B) If at the time respondent serves the notice of intent to resign, an additional proceeding is pending against the respondent for which an answer has been filed or is due, disciplinary counsel may also file a claim under section (g) for costs and expenses for that proceeding.~~

(**g) Review of Costs, Expenses, and Restitution.** Any claims for restitution or for costs and expenses not resolved by agreement between disciplinary counsel and the respondent may be submitted at any time, including after the resignation, to a review committee in writing for the determination of appropriate restitution or costs and expenses. The Lawyers' Fund for Client Protection may request review including a determination by the review committee of whether any funds were obtained by the respondent by dishonesty of, or failure to account for money or property entrusted to, the respondent in connection with the respondent's practice of law or while acting as a fiduciary in a matter related to the respondent's practice of law. The review committee's order is not subject to further review and is the final assessment of restitution or costs and expenses for the purposes of rule 13.9 and may be enforced as any other order for

restitution or costs and expenses. The record before the review committee and the review committee's order is public information under rule 3.1(b).

**ELC 3.1 OPEN MEETINGS AND PUBLIC DISCIPLINARY INFORMATION**

**. . . .**

**(b) Public Disciplinary Information.** The public has access to the following information subject to these rules:

**. . . .**

(10) a lawyer's resignation in lieu of ~~disbarment~~ discipline under rule 9.3; and

**. . . .**

**ELC 3.5 NOTICE OF DISCIPLINE**

**(a) Notice to Supreme Court.** The counsel to the Board must provide the Supreme Court with:

(A) a copy of any decision imposing a disciplinary sanction when that decision becomes final;

(B) a copy of any admonition, together with the order issuing the admonition, when the admonition is accepted or otherwise becomes final; and

(C) a copy of any resignation in lieu of ~~disbarment~~ discipline.

**(b) Other Notices.** The counsel to the Board must also notify the following entities of the imposition of a disciplinary sanction or admonition, a resignation in lieu of ~~disbarment~~ discipline, or the filing of a statement of concern under rule 3.4(f) as follows, in such form as may appear appropriate:

(1) the lawyer discipline authority or highest court in any jurisdiction where the lawyer is believed to be admitted to practice;

(2) the chief judge of each federal district court in Washington State and the chief judge of the United States Court of Appeals for the Ninth Circuit;

(3) the National Discipline Data Bank; and

(4) the Washington State Bar News.

**. . . .**

**(d) Notices of Suspension, Disbarment, Resignation in Lieu of ~~Disbarment~~ Discipline, or Disability Inactive Status.** The Association must publish a notice of the disbarment, suspension, resignation in lieu of ~~disbarment~~ discipline, or transfer to disability inactive status of a lawyer in the Washington State Bar News and electronic or other index or site maintained by the Association for public information. The Association must provide copies of these notices to the news media in a manner designed to notify the public in the county or region where the lawyer has maintained a practice. For a transfer to disability inactive status, no reference may be made to the specific disability.

**(e) Notice to Judges.** The Association must promptly notify the presiding judge of the superior court of the county in which the lawyer maintained a practice of the lawyer's disbarment, suspension, resignation in lieu of ~~disbarment~~ discipline, or transfer to

disability inactive status, and may similarly notify the presiding judge of any district court located in the county where the lawyer practiced, or the judge of any other court in which the lawyer may have practiced or is known to have practiced.

**ELC 3.6 MAINTENANCE OF RECORDS**

**(a) Permanent Records.** In any matter in which a disciplinary sanction has been imposed or the lawyer has resigned in lieu of discipline under rule 9.3, the bar file and transcripts of the proceeding are permanent records. Related file materials, including investigative files, may be maintained in disciplinary counsel's discretion. Exhibits may be returned to the party supplying them, but copies should be retained where possible.

. . . .

**RPC 5.8 MISCONDUCT INVOLVING DISBARRED, SUSPENDED, RESIGNED, AND INACTIVE LAWYERS**

(a) A lawyer shall not engage in the practice of law while on inactive status, or while suspended from the practice of law for any cause.

(b) A lawyer shall not engage in any of the following with an individual who is a disbarred or suspended lawyer or who has resigned in lieu of ~~disbarment~~ discipline:

(1) practice law with or in cooperation with such an individual;

(2) maintain an office for the practice of law in a room or office occupied or used in whole or in part by such an individual;

(3) permit such an individual to use the lawyer's name for the practice of law;

(4) practice law for or on behalf of such an individual; or

(5) practice law under any arrangement or understanding for division of fees or compensation of any kind with such an individual.

## 5. ELC 7.1 and 1.5 and RPC 8.4:

[Note: This draft was reported, without a recommendation, in the Subcommittee B report of January 5, 2010 (p. 627-29). It does not appear that the Task Force acted on the draft, so it is repeated here.]

**ELC 7.1 ~~INTERIM SUSPENSION FOR~~ PROCEDURE ON CONVICTION OF A CRIME**

**(a) Definitions.**

(1) "Conviction" for the purposes of this rule occurs upon entry of a plea of guilty, unless the defendant affirmatively shows that the plea was not accepted or was withdrawn, or upon entry of a finding or verdict of guilty, unless the defendant affirmatively shows that judgment was arrested or a new trial granted.

(2) ~~"Serious crime" includes any:~~

~~(A) felony;~~

~~(B) crime a necessary element of which, as determined by its statutory or common law definition, includes any of the following:~~

~~● interference with the administration of justice;~~

~~● false swearing;~~
~~● misrepresentation;~~
~~● fraud;~~
~~● deceit;~~
~~● bribery;~~
~~● extortion;~~
~~● misappropriation; or~~
~~● theft; or~~

~~(C) attempt, or a conspiracy, or solicitation of another, to commit a "serious crime".~~ "Felony" includes any crime denominated as a felony in the jurisidiction in which it is committed.

**(b) ~~Court Clerk To Advise Association~~ Reporting of Conviction**. When a lawyer is convicted of a ~~crime~~ felony, ~~the clerk of the court must advise the Association of the conviction, and on request provide the Association with certified copies of any order or other document showing the conviction~~ the lawyer must report the conviction to disciplinary counsel within 30 days of the conviction as defined by this rule.

**(c) Disciplinary Procedure ~~upo~~n Conviction.**

(1) If a lawyer is convicted of a felony, disciplinary counsel must file a formal complaint regarding the conviction. Disciplinary counsel must also petition the Supreme Court for an order suspending the respondent lawyer during the pendency of disciplinary proceedings. The petition for suspension may be filed before the formal complaint.

(2) ~~If a lawyer is convicted of a crime that is not a felony, disciplinary counsel may refer the matter to a review committee to determine whether the crime is a serious crime. If so, disciplinary counsel proceeds in the same manner as for a felony.~~

~~(3)~~ If a lawyer is convicted of a crime that is ~~neither~~ not a felony ~~nor a serious crime~~, the review committee may consider~~s~~ a report of the conviction in the same manner as any other ~~report of~~ possible misconduct by a lawyer.

**(d) Petition.** A petition to the Supreme Court for suspension under this rule must include a copy of any available document establishing the fact of conviction. ~~If the crime is not a felony, the petition must also include a copy of the review committee order finding that the crime is a serious crime.~~ Disciplinary counsel may also include additional facts, statements, arguments, affidavits, and documents in the petition. A copy of the petition must be personally served on the respondent, and proof of service filed with the Court.

**(e) Immediate Interim Suspension**.

(1) Upon the filing of a petition for suspension under this rule, the Court determines whether the crime constitutes a ~~serious crime~~ felony as defined in section (a).

~~(1) If the crime is a felony, the Court must enter an order immediately suspending the respondent from the practice of law.~~

(2) If the crime is ~~not~~ a felony, the Court conducts a show cause proceeding under rule 7.2(b) ~~to determine if the crime is a serious crime. If the Court determines the crime is a serious crime, the Court must enter an order immediately suspending the respondent from the practice of law~~. The respondent must be suspended absent an affirmative showing that the respondent's continued practice of law will not be

detrimental to the integrity and standing of the bar and the administration of justice, or be contrary to the public interest.

(3) If the Court determines that the crime is not a ~~serious crime~~ felony, upon being so advised, the Association processes the matter as it would any other grievance.

(~~3~~4) If suspended, the respondent must comply with title 14.

(~~4~~5) Suspension under this rule occurs:

(A) whether the conviction was under a law of this state, any other state, or the United States;

(B) whether the conviction was after a plea of guilty, nolo contendere, not guilty, or otherwise; and

(C) regardless of the pendency of an appeal.

**(f) Duration of Suspension**. A suspension under this rule must terminate when the disciplinary proceeding is fully completed, after appeal or otherwise. A copy of the final decision, stipulation or order terminating the disciplinary proceeding will be provided to the Court.

**(g) Termination of Suspension**.

(1) *Petition and Response.* A respondent may at any time petition the Board to recommend termination of an interim suspension. Disciplinary counsel may file a response to the petition. The Chair may direct disciplinary counsel to investigate as appears appropriate. If disciplinary counsel recommends that the suspension should be terminated, the Clerk will transfer the petition and response to the Court for its consideration.

(2) *Board Recommendation.* If either party requests, the Board must hear oral argument on the petition at a time and place and under terms as the Chair directs. The Board may recommend termination of a suspension only if the Board makes an affirmative finding of good cause to do so. There is no right of appeal from a Board decision declining to recommend termination of a suspension.

(3) *Court Action.* The Court determines the procedure for its consideration of a recommendation to terminate a suspension.

~~**(h) Notice of Dismissal to Supreme Court.** If disciplinary counsel has filed a petition for suspension under this rule, and the disciplinary proceedings based on the criminal conviction are dismissed, the Supreme Court must be provided a copy of the decision granting dismissal whether or not the respondent is suspended at the time of dismissal.~~

**ELC 1.5 VIOLATION OF DUTIES IMPOSED BY THESE RULES**

A lawyer violates RPC 8.4(*l*) and may be disciplined under these rules for violating duties imposed by these rules, including but not limited to the following duties:

. . . .

- pay costs, rule 5.3(f) or 13.9~~.~~ ; or
- report the lawyer's felony conviction, rule 7.1(b).

**RPC 8.4 MISCONDUCT.**

It is professional misconduct for a lawyer to:

. . .

(o) Fail to report the lawyer's felony conviction to disciplinary counsel as required by ELC 7.1.

# Memo

To: ELC Drafting Task Force
From: Subcommittee C
Date: June 2, 2010
RE: Items For Recommended For Discussion at June 10, 2010 Meeting

**We recommend the following proposals be considered for discussion by the full Task Force:**

**1.** Mr. Sheldon has asked that the full Task Force have a discussion regarding the issue of granting ODC the same right of appeal to the Supreme Court as respondents. This issue was previously discussed by the Task Force in September 2009, at which time the Task Force noted the Board of Governors decision to add a right of appeal for ODC, and following discussion, voted 6 to 4 to provide a right of appeal for ODC. See minutes at pp. 549-50. Based on that direction, the Subcommittee has prepared the appropriate amendments to ELC 12.3 and ELC 12.4. Mr. Sheldon does not contest any provision of the drafting of the proposed amendments to ELC 12.3 or ELC 12.4, instead, he asks that the Task Force reconsider the decision to allow ODC a right of appeal. The Subcommittee recommends that the Task Force have the discussion requested by Mr. Sheldon. Because there is no objection to the particular wording of the proposed amendments to ELC 12.3 and ELC 12.4, we have included the proposed amendments on the consent calendar, subject, of course, to any decision by the Task Force to reconsider the decision to allow ODC a right of appeal.

**2.** By a vote of 4 to 1, the Subcommittee recommends the Task Force approve the following proposed amendment to ELC 13.9. This is a modification of the original ODC proposal (Materials p. 512-13) to provide for costs and expenses when reciprocal discipline is imposed. The Subcommittee modified that proposal to provide for such costs and expenses only after a contested reciprocal proceeding that has required briefing.

> **ELC 13.9 COSTS AND EXPENSES** [Redline]
>
> **(a) Assessment.** The Association's costs and expenses may be assessed as provided in this rule against any respondent lawyer who is ordered sanctioned or admonished<u>, or against whom reciprocal discipline is imposed after a contested reciprocal discipline proceeding</u>.
>
> **. . . .**
>
> **(c) Expenses Defined.** "Expenses" for the purposes of this rule means a reasonable charge for attorney fees and administrative costs. Expenses assessed under this rule may equal the actual expenses incurred by the Association, but in any case cannot be less than the following amounts:
> (1) for an admonition that is accepted under rule 13.5(a), $750;

(2) for a matter that becomes final without review by the Board, $1,500;
(3) for a matter that becomes final upon a reciprocal discipline order under rule 9.2 or rule 9.3, in a matter requiring briefing at the Supreme Court, $1,500;
(~~3~~ 4) for a matter that becomes final following Board review, without appeal to the Supreme Court, a total of $2,000;
(~~4~~ 5) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review but not requiring briefing, a total of $2,500; and
(~~5~~ 6) for a matter appealed to the Supreme Court or in which the Court accepts discretionary review in which briefing is required, a total of $3,000.

**(d) Statement of Costs and Expenses, Exceptions, and Reply.**

(1) *Timing.* Disciplinary counsel must file a statement of costs and expenses with the Clerk within 20 days from any of the following events:

(A) an admonition is accepted;
(B) the decision of a hearing officer or panel or the Board imposing an admonition or a sanction becomes final;
(C) a notice of appeal from a Board decision is filed and served; ~~or~~
(D) the Supreme Court accepts or denies discretionary review of a Board decision~~.~~ ; or
(E) entry of a final decision imposing reciprocal discipline under rule 9.2 or rule 9.X in a matter requiring briefing at the Supreme Court.

(2) *Content*. A statement of costs and expenses must state with particularity the nature and amount of the costs claimed and also state the expenses requested. Disciplinary counsel must sign the statement, and this signature constitutes a certification that all reasonable attempts have been made to insure the statement's accuracy.
(3) *Service*. The Clerk serves a copy of the statement on the respondent.
(4) *Exceptions.* The respondent may file exceptions no later than 20 days from service of the statement of costs and expenses.
(5) *Reply.* Disciplinary counsel may file a reply no later than ten days from service of any exceptions.

**. . . .**

**ELC 13.9 COSTS AND EXPENSES** [Clean Copy]

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**. . . .**

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(4) *Exceptions.* The respondent may file exceptions no later than 20 days from service of the statement of costs and expenses.

(5) *Reply.* Disciplinary counsel may file a reply no later than ten days from service of any exceptions.

**. . . .**

**3.** By a vote of 3 to 1, with 1 abstention, the Subcommittee recommends that the Task Force reject the ODC proposal set forth at p. 429 – 31 of the Materials to eliminate the distinction between sanctions and admonitions, which would make an admonition a type of sanction. The change proposed by ODC would make the following change to ELC 13.1, along with a number of other conforming changes to other rules:

**ELC 13.1 SANCTIONS AND REMEDIES** [Redline]
Upon a finding that a lawyer has committed an act of misconduct, one or more of the following may be imposed:
**(a) Sanctions**.
(1) Disbarment;
(2) Suspension ~~under rule 13.3~~; ~~or~~
(3) Reprimand~~.~~ ; or
~~**(b) Admonition.**~~ (4) An admonition ~~under rule 13.5~~.
**(~~c~~ b) Remedies.**
(1) Restitution;
(2) Probation;
(3) Limitation on practice;
(4) Requirement that the lawyer attend continuing legal education courses;
(5) Assessment of costs; or
(6) Other requirements consistent with the purposes of lawyer discipline.

**ELC 13.1 SANCTIONS AND REMEDIES** [Clean Copy]
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**(a) Sanctions**.
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(4) An admonition.
**(b) Remedies.**
(1) Restitution;
(2) Probation;
(3) Limitation on practice;
(4) Requirement that the lawyer attend continuing legal education courses;
(5) Assessment of costs; or
(6) Other requirements consistent with the purposes of lawyer discipline.

**4.** The Subcommittee recommends the Task Force discuss ABA Recommendation No. 22, to have the Disciplinary Board and the Supreme Court administer reprimands, as opposed to the current provision in ELC 13.4(a) which provides that "The Association administers a reprimand to a respondent lawyer by written statement signed by it's President." The Subcommittee notes the action by the Board of Governor's reflected in their January 22, 2009 Minutes (Materials at p. 474). By a vote of 10-1-1, the Board of Governors adopted the ABA recommendation that the Disciplinary Board and the Court administer reprimands. The Subcommittee notes, however, that this recommendation was part of a series of recommendations to remove the administration of lawyer discipline from the WSBA. That specific recom-

mendation was rejected, which removes much of the reason behind the proposal to change the current system of the President of the WSBA signing reprimands. The Subcommittee discussed that the Chief Justice could sign the reprimands, but it was pointed out that the Chief's administrative duties are quite extensive and that this addition could be problematic. Given that, the Subcommittee considers the President of the WSBA to be the next most impressive person to sign a reprimand and therefore the best choice. By a vote of 4-0-1 the Subcommittee voted to recommend that despite the Board of Governors' January 22, 2009 action, that the Task Force recommend rejection of ABA Recommendation 22 and that we retain the current provisions in ELC 13.4(a) providing for reprimands to be issued by the Association and signed by the WSBA President.

**5.** The Subcommittee recommends the Task Force discuss the recommendation of a hearing officer (Materials at p. 241) that a respondent lawyer who is found to not have violated the RPC be allowed to recover costs from the WSBA. The Subcommittee vote on the proposal was three members voting to leave the cost provisions the way they are, and two members voting to allow recovery of costs by a respondent when all charges are dismissed.

The Subcommittee has had lively discussions on this topic. Ron Carpenter opposed the proposal, noting that the WSBA was doing the task that had been delegated by the Court, and that such a cost provision would potentially chill ODC from pursuing that task as appropriate. Julie Shankland noted that unlike civil litigation, where the parties decide how they will pursue the litigation, ODC is not in charge of what cases it brings. She noted that Review Committees order matters to hearing, including matters that have not been recommended by ODC for hearing. Randy Beitel noted that because this is not civil litigation, using economic factors is inappropriate, because to the extent that economic issues control, the goal of delivering justice to the public will likely suffer. Mr. Beitel noted while he prefers retaining the current cost provisions, that rather than introduce an economic based system with endless prevailing party analysis for costs, he would consider the complete elimination of costs from the system, as that would assure that only justice issues would be influencing prosecutorial decisions. Patrick Sheldon supported the proposal, indicating that the costs to a respondent to defend an action can be very significant and that these costs are rarely covered by insurance. He indicated that this is an issue of fairness.

Charlie Wiggins indicated that he was torn by the issue, and was interested in knowing how often this happens. Mr. Beitel reported back to the Subcommittee with the following information:

> I checked the records from the Board of Governors reports for the three-year time period January 1, 2007 – December 31, 2009:
> 2007 - No matters dismissed by hearing officer after hearing.
> 2008 - Two matters dismissed by hearing officer after hearing:
> Matter One: Dismissed 10/7/08

Matter Two: Dismissed (no date available – because the original dismissal by disciplinary counsel was more than three years ago, file and computer entry destructed per ELC 3.6 based on respondent request.)

2009 - One matter dismissed 1/12/09 by hearing officer after hearing.

Summary: In the last three years, there have been a total of three cases dismissed by hearing officers following a hearing. Essentially, one a year. This should be compared to the disciplinary actions imposed in these years: 73 disciplinary actions in 2007, 81 disciplinary actions in 2008 and 62 disciplinary actions in 2009. While a not insubstantial of the disciplinary actions were the result of stipulations rather than hearing officer decisions, it is still apparent that dismissals by hearing officers following hearings is a distinct rarity.

Mr. Beitel indicated that one of the three matters involved a grievance that was originally dismissed by disciplinary counsel. The grievant protested, and the Review Committee ordered an admonition. The Respondent then protested the admonition and by operation of the rule, the matter was deemed ordered to hearing. It is little wonder that the matter was dismissed by the hearing officer, but reflects that unlike civil litigation where costs are sometimes used to reign in overzealous litigants, the Office of Disciplinary Counsel is not always in control of what cases are ordered to hearing. Mr. Beitel argued that without bringing some cases that are close calls, we are not doing the job necessary to protect the public.

Ron Carpenter submitted additional written comments for the Subcommittee on May 14, 2010:

**Comments submitted by Ron Carpenter- 5/14/10:**

ELC 13.9(a) generally provides for an assessment of allowable costs and expenses in favor of the Bar Association (Association) against an attorney "who is ordered sanctioned or admonished." ELC 13.9(g) additionally provides for an assessment for costs and expenses "in favor of the Association" upon the filing of an opinion by this Court imposing a sanction or an admonition. It is significant to note that ELC 13.9(g) makes reference to following the *procedures* set forth in RAP Title 14, but it does not define or establish a substantive right to seek costs and expenses other than as to the Association (contrary to the less specific language of RAP 14.2, which specifies that any party that "substantially prevails on review" will be awarded costs). The purpose statements[1] that accompanied ELC 13.9(a)&(g) respectively when

[1] These purpose statements were adopted directly from the "COMMENTS TO Proposed RULES FOR ENFORCEMENT OF LAWYER CONDUCT (ELC) and Related Amendments to the RULES OF PROFESSIONAL CONDUCT (RPC) ADMISSION TO PRACTICE RULES (APR) and GENERAL RULES (GR) Prepared by Randy Beitel Reporter, Discipline 2000 Task Force"

they were published in the advance sheets for comments on April 16, 2002 (145 Wn.2d Proposed –at 181 and 182) stated in pertinent portions:

> Section (a) is derived from RLD 5.7(a) with no substantive change. Under this rule costs and expenses may be assessed only against a respondent lawyer. The Discipline 2000 Task Force considered and rejected the concept to allow costs and expenses to be assessed against the Association. (emphasis mine)

and

> Section (g) is derived from RLD 5.7(f), modified to allow assessment when an opinion of the Supreme Court imposes an admonition.[2]

There are sound reasons for a distinction as to who is entitled to an award of costs in attorney discipline matters, as opposed to general litigants involved in appellate review of trial courts matters. In the administrative process of attorney discipline, unlike general litigation in the lower courts, there is no prevailing party below in the classic sense. The Association is charged with the responsibility of determining if professional misconduct has occurred, and then with making a nonbinding recommendation as to the appropriate nature of any discipline to be imposed by the Supreme Court if the Court upholds any of the Board's findings as to professional misconduct. Pursuant to the Court rules, the Association's duty is to ensure the appropriate regulation of attorney conduct; it has no specific client, nor does it ever prevail during that process in the same manner as a party in normal civil litigation. Its duty under the applicable court rules is to simply conduct the initial hearings on complaints and report its findings and recommendation to the Supreme Court; see ELC 12.2(b).

Although ELC 12.1 states that the Rules of Appellate Procedure serve as a guideline for review by this Court, it does provide: "except as to matters specifically dealt with in these rules." Therefore, one seems forced to conclude that the more specific language of ELC 13.9(a) and (g) is controlling over the general language of RAP 14.2 (that is broader in its designation of who is entitled to be awarded costs in that it allows the award to any party that "substantially prevails on review" in general appellate review matters). Clearly, applying these standards, counsel subject to disciplinary proceedings would not be entitled to an award of costs pursuant to any reasonable interpretation and application of the language of ELC 13.9(a) and (g).

[2] This statement is somewhat incomplete in that the rule (both as proposed and adopted) makes reference to the imposition of either a sanction or an admonition, not merely an admonition.

One only needs to refer to page 41 of the May 2010 edition of the Washington State Bar News, the 11th line "Discipline", to determine that the revenue collected for conducting disciplinary proceedings is far outdistanced by the almost oppressive costs incurred by the Association to conduct disciplinary proceedings (recovery being only about 2% of what is expended yearly by the Association) - the operating net loss is in part paid by every attorney in this state who pays bar dues. Given that there is always presumably at least a probable cause to believe that misconduct has occurred, and that disciplinary proceedings need to be implemented to protect the public, to ever allow costs to be recouped by responding counsel, would most likely have a "chilling effect" on disciplinary counsel's determination to proceed with disciplinary proceedings. The Association's disciplinary counsel are the designated enforcement arm of the system - tantamount to a prosecuting attorney in the criminal arena - and as such should not be dissuaded in doing what they feel is appropriate or vigorously pursuing discipline by the looming threat that, if unsuccessful, costs could be imposed against the Association.

**6.** The Subcommittee recommends that the Task Force discuss the proposal of a rule amendment to ELC 11.13 that would provide for the availability of sanctions at the Disciplinary Board. By a consensus, the Subcommittee recommends that the Task Force reject the proposal.

**ELC 11.13 CHAIR OR BOARD MAY MODIFY REQUIREMENTS AND IMPOSE SANCTIONS** [Redline]

(a) Upon written motion filed with the Clerk by either party, ~~for good cause shown~~ or on its own motion, the Chair or Board may modify the time periods in title 11, and make other orders as appear appropriate to assure fair and orderly Board review.

(b) ~~However, the~~ The time period for filing a notice of appeal in rule 11.2(b)(3)(A) may not, however, be extended or altered.

(c) The procedures and sanctions in RAP 18.9(a) and (d) apply to matters before the Disciplinary Board. The Chair is considered to be the commissioner or clerk for the purposes of this rule.

**ELC 11.13 CHAIR OR BOARD MAY MODIFY REQUIREMENTS AND IMPOSE SANCTIONS** [Clean Copy]

(a) Upon written motion filed with the Clerk by either party, or on its own motion, the Chair or Board may modify the time periods in title 11, and make other orders as appear appropriate to assure fair and orderly Board review.

(b) The time period for filing a notice of appeal in rule 11.2(b)(3)(A) may not, however, be extended or altered.

(c) The procedures and sanctions in RAP 18.9(a) and (d) apply to matters before the Disciplinary Board. The Chair is considered to be the commissioner or clerk for the purposes of this rule.

WSBA

**Office of the General Counsel**

**Elizabeth A. Turner**
Assistant General Counsel

direct line: 206-239-2109
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e-mail: elizabetht@wsba.org

To: ELC Task Force

From: Elizabeth Turner, Assistant General Counsel

Re: Proposed companion amendment to ELC 13.3(b)

Date: June 2, 2010

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Bob Welden and I staff the Lawyers' Fund for Client Protection. It is our understanding that Subcommittee C is proposing an amendment to ELC 13.7, at least in part based on our request that the ELCs specifically require repayment to the Lawyers' Fund as a condition of reinstatement. Subcommittee C has concluded that their proposed amendment to ELC 13.7 provides sufficient protection; however, Mr. Welden and I believe there should be a companion edit to ELC 13.3(b), just in case someone tries to argue that reimbursement to the LFCP Fund is not really required for reinstatement after suspension because it isn't mentioned in the suspension rule. Please note that in making this proposal we do not mean to suggest that Subcommittee C's work is lacking in any sense of the word; Subcommittee C has been diligently producing excellent work. We are just trying very hard to anticipate and close any possible loopholes regarding reimbursement to the Fund and believe that it is most efficient to present proposed amendments in writing, instead of drafting at "meetings of the whole," wherever possible.

## *ELC 13.3 SUSPENSION*

**(a) Term of Suspension.** A suspension must be for a fixed period of time not exceeding three years.

**(b) Reinstatement.**

(1) After the period of suspension, the Association administratively returns the suspended respondent lawyer to the respondent's status before the suspension without further order by the Court upon:

(A) the respondent's compliance with all current licensing requirements; ~~and~~

(B) disciplinary counsel's certification that the respondent has complied with any specific conditions ordered, and has paid any costs or restitution ordered or is current with any costs or restitution payment plan; and

(C) counsel for the Lawyers' Fund for Client Protection Board's certification that the respondent has paid any restitution ordered to be paid to the Fund, or is current with any agreed-upon repayment plan.

(2) A respondent may ask the Chair to review an adverse determination by disciplinary or LFCP Board counsel regarding compliance with the conditions for reinstatement, payment of costs or restitution, or compliance with a costs or restitution payment plan. On review, the Chair may modify the terms of the payment plan if warranted. The Chair determines the procedure for this review. The Chair's ruling is not subject to further review. If the Chair determines that the Board should review the matter, the Chair directs the procedure for Board review and the Board's decision is not subject to further review.