WSBA

DISCIPLINE COMMITTEE

Meeting Agenda

April 28, 2008
12:00 p.m. to 4:00 p.m.
Washington State Bar Association
1325 Fourth Avenue – 6th Floor – Baker & St. Helens Rooms
Seattle, Washington 98101

1. **Call to Order/Preliminary Matters**
   - Approval of Minutes of February 27, 2008 meeting
2. **Report of Discipline Committee**
   - Discussion & Review of preliminary recommendations from the Board of Governors Discipline Committee (Report with Recommendations Attached).
   - Discussion and Review of the revised version of the arbitration rules and regulations from Task Force 5 (Copy of Rules and Regulations Attached).
3. **Other Business/Good of the Order**
4. **Adjourn**

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Minutes – February 27, 2008
Board of Governors Discipline Committee

Present: Doug Lawrence, Chair, Stan Bastian (phone), Doug Ende, Mark Johnson, Amanda Lee (phone), Paula Littlewood, Sal Mungia, Julie Shankland, Ed Shea (phone), Bob Welden, Kristal Wiitala,

Absent: Anthony Butler, Ellen Dial, Brenda Williams

Excused: James Danielson, Geoffrey Gibbs, Elizabeth Turner

Call to Order

The Chair called the meeting to order and confirmed the purpose of the meeting: for the Core Group to finish review of the final reports of Task Forces 2, 4, and 5; voice questions and/or concerns; achieve consensus where possible; and refer the recommendation back to the Task Force for more work where consensus is not possible; all preparatory to presenting the Core Group's findings to the Committee of the whole.

Preliminary Matters

The Chair called for corrections to the minutes of the Committee's December 12, 2007 and January 25, 2008 meetings. The minutes were approved with one modification to attendance.

The Chair asked that members email him with their availability for four potential meeting dates and times: (1) Thursday, March 13, 2008, from 9:00 a.m. to 1:00 p.m.; (2) Thursday, March 13, 2008, from noon to 4:00 p.m.; (3) Friday, March 14, 2008, from noon to 4:00 p.m.; and (4) Monday, March 31, from 9:00 a.m. to 1:00 p.m. The Chair will use that input to set the next meeting date and notify the members.

Task Force Reports

Task Force 5

Bob Welden summarized the Task Force's recommended responses. [Please see materials for details of the Task Force's recommendations]

ABA Recommendation 27 – payee notification in third party settlements. The Task Force noted that this rule has been previously proposed in Washington, with no great success. The trial bar has expressed that such notification would interfere in lawyer-client relations. Inquiry with ODC has revealed that the instances of this type of misconduct (a lawyer receiving and

cashing a settlement check without informing the client) are low. The Task Force also noted that this rule has been adopted only in New York and New Jersey. The Task Force concluded that this recommendation should not be adopted. Chief Disciplinary Counsel Doug Ende submitted that the rule is a good idea that would in occasional cases prevent wrongdoing, but discipline does not perceive such wrongdoing as a significant problem in Washington at present.

President Elect Mark Johnson moved to adopt the Task Force's recommendation and Governor Sal Mungia seconded. The Chair called for objections and receiving none deemed the Task Force's recommendation as to ABA Recommendation 27 approved with one abstention.

ABA Recommendation 26 – instituting a "client option" fee arbitration program. Mr. Welden declared the Task Force's support for this recommendation. He gave a brief history of WSBA's consideration of the idea in the past. Mr. Welden observed that the Lawyers Fund for Client Protection (LFCP) sees numerous matters where arbitration would be beneficial, particularly in connection with "non-refundable" fee arrangements. When a lawyer accepts such a fee and appears and/or does some work short of completion, the LFCP will refer the applicant to WSBA's Fee Arbitration program for a determination of how much of the fee the lawyer has earned. Clients in this situation often experience frustration because WSBA's current Fee Arbitration program is voluntary, and the lawyer often does not agree to participate. The Task Force recommends adopting ABA Recommendation 27 and has submitted a draft of a "client option" fee arbitration rule. Mr. Johnson voiced the concern that mandatory fee arbitration, though laudable, is an unworkable idea.

Concern: Participating in a fee arbitration program may jeopardize malpractice insurance coverage. Since fee disputes often arise from client dissatisfaction with the results obtained in the representation, malpractice and breach of fiduciary duty issues will come up in the context of fee arbitration. A lawyer must notify his or her carrier of potential malpractice claims. Insurance carriers may not want a lawyer-policyholder to participate in fee arbitration because one can not successfully limit the issues to the amount of the fee for work performed.

These types of programs have been working in New Jersey and California, among other states, for 25 years and more.

Concern: Such a program would result in litigating quasi-malpractice claims in an inappropriate forum, which would jeopardize the lawyer's position in a subsequent malpractice lawsuit. The client could still sue for malpractice if he or she does not like the result of the fee arbitration.

The Task Force will investigate how other states with established arbitration programs handle this issue. The rule also includes a provision regarding interpleading of malpractice claims.

Concern: Will the client agreeing to such an interpleader truly understand that he or she is signing away his or her right to a jury trial on potential malpractice claims? This may result in actually litigating the malpractice claim in a forum that does not have all of the discovery procedures and protections of the court system.

There is some provision for discovery in the rule. The arbitrator may order discovery.

Concern: The Disciplinary Board and ODC are already cracking down on unreasonable non-refundable fees in criminal defense. Charging an unreasonable fee is already a violation of the RPC. Since the rules already cover the issue, a mandatory fee arbitration program is not necessary.

Question: The fees in dispute may not be small; they might be as much as $800,000. Significant fee disputes are nearly always coupled with malpractice allegations and should be resolved in the court system.

The courts may be the right place for such large amounts in dispute. The courts are not the right place to resolve smaller fee disputes. The discipline system is not a substitute for prompt dispute resolution. There is a gap in protection for the public.

Observation: Insurance carriers may prefer fee arbitration as cheaper than going to court.

Paula Littlewood suggested that a jurisdictional limit be placed on the amount in dispute in the rule. Mr Welden recommended that the Committee table this issue until the Task Force receives more information from other states on how they handle malpractice issues.

The Chair called for objections to tabling discussion of ABA Recommendation 26. Hearing none, the Chair deemed the discussion tabled.

Task Force 4

President Stan Bastian presented Task Force 4's recommendations. [Please see materials for details of the Task Force's recommendations]

ABA Recommendation 13 – interim suspension in other circumstances.
The ABA's recommendation consisted of three parts: (1) eliminate review

committee review of ODC petitions for interim suspension for threat of harm to the public; (2) eliminate the requirement for personal service on Respondent; and (3) eliminate the show cause proceeding, but allow Respondent a two-day window to contest the interim suspension order after it is entered. The Task Force interpreted this recommendation as part of the ABA's effort to separate discipline from WSBA management. The Task Force recommended that this recommendation not be adopted. Mr. Ende noted that he viewed these recommendations as not particularly tied to the ABA's philosophy of separating discipline from WSBA but more directed toward making the process for suspension of dangerous lawyers more efficient.

Observation: The review committee process does build in a delay, but the protections afforded by the process outweigh the concerns for delay. Personal service is a concern as it causes additional work and delay when a Respondent lawyer evades service. The show cause proceeding is a lesser concern as the Court does a good job of setting the infrequent interim suspension hearings in a timely manner.

Question: Does ODC object to the concern regarding personal service? Would good faith efforts at personal service and actual notice meet the requirements of the rules as they stand?

Personal service is of concern to ODC as it causes additional work and delay when Respondent lawyers evade service or is difficult to locate. However, ELC 4.1 does allow for substituted service if the Respondent lawyer cannot be found in Washington State. ODC must make a record of attempts at personal service to show that the Respondent lawyer cannot be found in Washington State. The time it takes to make the record would be saved if alternative methods of service were available in the first instance.

Concern: Personal service is important because it protects substantial rights. There does need to be a way to deal with Respondent lawyers who evade personal service.

Question: How do other states handle this problem?

Question: Would telephone service be sufficient?

Concern: Expressing discomfort with telephone service.

The Chair suggested that the language of the rule be modified to reference alternatives to personal service. It was suggested that, since alternatives are available under ELC 4.1, the language does not need modification. The Chair called for objections to adopting the recommendations of Task Force 4 on ABA recommendation, on the condition that Mr. Ende confirm the availability of

alternatives to personal service. Hearing no objections, the Chair deemed the Task Force's recommendations conditionally adopted.

ABA Recommendation 14 – changes to ELC 8.1, 8.2, and 8.8 regarding procedures for transfer to disability inactive status. The Task Force recommended that no changes be made to these rules.

The Chair called for objections, and hearing none deemed the Task Force's recommendation as to ABA Recommendation14 adopted.

ABA Recommendation 21 – changes to ELC 13.1 regarding changing admonition to a sanction, allowing for probation without sanction or admonishment, and encouraging the Supreme Court to issue more written discipline decisions. The Task Force concluded that the current distinction between sanctions and admonitions is important and should be retained. The Task Force was not in favor of imposing probation when a lawyer has not been admonished or sanctioned; diversion is a more efficient way to handle these cases. While the Task Force acknowledged that more written opinions from the Supreme Court would be helpful, the Task Force did not find it within its purview to direct the Court in this manner. The Task Force recommends making no changes to ELC 13.1.

Observation: The irony of suggesting the Supreme Court issue more written decisions in light of ABA Recommendation 20 to make review of suspension and disbarment recommendations from the DBoard discretionary, which would have the opposite effect.

The Chair called for objections to adopting Task Force 4's recommendation not to adopt ABA Recommendation 21. Hearing no objections, the Chair deemed the Task Force's recommendation adopted.

ABA Recommendation 23 – admonitions should not be imposed following hearing, limiting the hearing officer's choices to reprimand, suspension, and disbarment. The Task Force recommends no change to the current system.

Comment: A hearing officer's ability to issue an admonition was deliberately added to the system to allow more flexibility. That flexibility should be maintained as it preserves procedural protections.

The Chair called for objections to adopting Task Force 4's recommendation not to adopt ABA Recommendation 23. Hearing no objections, the Chair deemed the Task Force's recommendation adopted.

ABA Recommendation 24 – prohibiting a disbarred or suspended lawyer from working as a paralegal. The Task Force agrees that the rule should be clarified to clearly prohibit a disbarred or suspended lawyer from working as a paralegal or legal assistant.

Comment: This is a great change. Careful drafting will be needed to clarify what type of work by suspended/disbarred lawyers is prohibited. Would this preclude work in a government agency that employs lawyers? The legislature?

Question: Why shouldn't we allow disbarred/suspended lawyers to provide certain kinds of assistance to a lawyer, for example, research assistance?

Opening this door creates a risk of covert practice of law by individuals removed from practice by the Court in order to protect the public. This goes directly to public protection.

Comment: Formal ethics opinion 184 already addresses this issue.

The Chair called for objections and hearing none deemed that Task Force 4's recommendation to adopted ABA Recommendation 24 adopted with the provision that careful drafting will be needed and a footnote that the BOG has addressed this issue in formal ethics opinion 184 in a manner consistent with the Task Force's recommendation.

ABA Recommendation 25 – changes to how probation is imposed and implemented. The Task Force recommends no changes to probation.

Comment: The ABA's recommendation seems to envision a much more formal approach to probation, with the probation function being handled in-house to a degree inconsistent with Washington practice and procedures. Washington's probation system seems to be functioning well.

Comment: Diversion seems to meet the needs the ABA seeks to address with this recommendation.

The Chair called for objections to adopting Task Force 4's recommendation not to adopt ABA recommendation 25. Hearing no objections, the Chair deemed the Task Force's recommendation adopted.

Task Force 2

Governor Kristal Wiitala summarized Task Force 2's recommendations. [Please see materials for details of the Task Force's recommendations]

ABA Recommendation 2 – increasing the number of review committees. The Task Force does not recommend adopting the ABA's recommendations for increasing the number of or changing the make up of the review committees. The Task Force does recommend amending the ELC to allow two members of a review committee to act as a quorum.

Hearing only positive comments, the Chair called for objections to adopting Task Force 2's recommendations. Hearing no objections, the Chair deemed the Task Force's recommendations as to ABA Recommendation 2 adopted.

ABA Recommendation 3 – addressing quality issues at the hearing officer level. The Task Force recognized the importance of improving the quality of hearing officers but was unable to reach a decision as to how to implement such improvement. The Task Force submitted three alternatives: (1) reduce the pool of hearing officers to 50 and retain the policy of no compensation; (2) reduce the pool of hearing officers to 30 with no compensation; and (3) adopt the Discipline 2000 recommendation to reduce the pool to ten hearing officers and reserve the issue of compensation pending the outcome of WSBA study on compensating volunteers. The Task Force does recommended amending the ELC to allow the Chief Hearing Officer to remove a hearing officer at any time without cause and to provide for initial appointment of two years to allow greater opportunity for initial experience and provide for reappointment every four years.

Mr. Ende explained ODC's position supporting the option of a pool of 10 compensated hearing officers. The situation is better at present than it was prior to 2002 when the Chief Hearing Officer and Hearing Officer Selection Panel were created, but quality issues remain. With a panel of up to 66, individual hearing officers do not get sufficient experience to handle cases knowledgably and reliably. Further improvement will be promoted by appointing substantially fewer but more highly qualified and trained hearing officers. The system is currently dealing with a matter in which the DBoard remanded a case for a new trial owing to hearing officer misconduct that rose to the level of a denial of due process. Ms. Shankland noted that this was the second such incident in recent years. Remands necessitated by hearing officer misfeasance imposes a significant burden on the discipline system.

Comment: A reduction to a pool of 10 hearing officers would allow the appointing body to be more selective and choose candidates of the highest caliber, and would ensure that such candidates became experienced at trying disciplinary cases. Currently the appointment process fills more of a gate-keeping function: keeping the obviously incompetent out of the pool.

Comment: Experience does improve performance, even in highly qualified individuals. We should require the best hearing officers available to protect the profession and the public.