Foster, Denise

From: Anne Seidel [anne@anneseidel.com]
Sent: Tuesday, April 30, 2013 2:16 PM
To: Foster, Denise
Cc: 'Phillip Ginsberg'; 'Stephen C. Smith'; 'Brett Purtzer'; 'Lee Ripley'; 'Kurt Bulmer'; 'ahmlawyers.com, david'; 'Tom Fitzpatrick'; 'kagan carneylaw.com'; 'Patrick C. Sheldon'; 'Strait, John'
Subject: Comments on proposed changes to the ELC
Attachments: Resp cnsl ELC comments.pdf

Dear Ms. Foster,

I am attaching comments about the proposed changes to the Rules for Enforcement of Lawyer Conduct. These comments are submitted on behalf of the lawyers whose names appear at the end of the attachment, all of whom are copied on this email.

Thank you.

Sincerely,

Anne Seidel

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RESPONDENT'S COUNSEL DISCUSSION GROUP

Thank you for the opportunity to comment on the proposed revisions to the Rules for Enforcement of Lawyer Conduct (ELC). The following comments are submitted on behalf of those listed below. We are lawyers who represent respondents in lawyer discipline cases. These comments are based on our collective experience in numerous lawyer discipline matters.

Elimination of Admonitions. Decades ago, the Supreme Court directed hearing officers and the Disciplinary Board to use the *ABA Standards for Imposing Lawyer Sanctions* to determine sanctions in lawyer discipline cases. *See, e.g., In re* Johnson, 114 Wn.2d 737, 745 (1990). The *ABA Standards* list four sanctions: admonition, reprimand, suspension, and disbarment. Admonition is the presumptive sanction under the Standards for an isolated act of neglect that causes little or no harm. The *ABA Standards* define admonition "as a form of non-public discipline which declares the conduct of the lawyer to be improper, but does not limit the lawyer's right to practice."

The proposed ELC eliminate admonition as a possible outcome. Currently admonitions are removed from a lawyer's record after five years. Proposed ELC 13.11 states that if the presumptive sanction under the *ABA Standards* is admonition, then the lawyer should receive a reprimand. Proposed ELC 13.10 similarly makes reprimand the "identical discipline" for reciprocal discipline if a lawyer receives a public admonition in another state. A reprimand has a far more serious consequence on a lawyer's career than either an admonition under the current rules (which is public but removed after five years) or an admonition under the *ABA Standards*. This is particularly true for young lawyers who could be practicing for decades into the future. With the internet, clients have ready access to lawyer discipline information, making the effect of a reprimand much more severe than it used to be.

Converting admonitions into reprimands will also make less serious lawyer discipline cases harder to resolve, as lawyers will be much more willing to go to hearing rather than accept a permanent public discipline record. In addition, we understand that the ABA is undertaking a review of the *Standards* and believe it would be prudent to wait for that process to be completed before enacting a rule that departs from the current *Standards*.

The proposed ELC also create a new outcome, called "warning letter," in proposed ELC 5.8. The Reporter's Explanatory Comments about proposed ELC 5.8 state, "The suggested amendments are part of a package of suggested amendments to multiple rules (ELC 5.8, 13.1, 13.5, 13.6, 13.10, 13.11, and other rules from which references to admonitions have been deleted) intended to substitute 'warning letters' for public admonitions." Consistent with this intent, we propose that ELC 13.10 and 13.11 be modified by substituting "warning letter" for "reprimand" in each rule. The proposal for those two rules substitutes reprimand, not warning letter, for public admonition. Our proposal would keep Washington's standards consistent with the four levels of sanction under the *ABA Standards*. We would alternatively favor a nonpublic admonition identical to admonition under the *ABA Standards*.

Diversion. Diversion permits a lawyer who has committed misconduct to avoid public discipline by admitting to the misconduct and completing specified requirements geared toward assisting the lawyer in preventing recurrence of the misconduct. Whether a lawyer is offered diversion is

completely in the discretion of the Office of Disciplinary Counsel. We have two concerns about the proposed ELC regarding diversion.

First, ELC 3.6 requires ODC to maintain diversion records for ten years, even though the record of any other dismissed grievance may be destroyed after three years. This is twice as long as admonitions were kept, even though diversion is often an alternative to an admonition. If the lawyer applies for any of numerous positions that require discipline checks (which includes WSBA committee appointments), the diversion will be disclosed, making the lawyer's chances of selection much lower. Some lawyers today will agree to diversion to avoid going to hearing even though they do not agree with ODC's analysis that they violated a rule. Lawyers will be less likely to agree to diversion knowing it will be on their record for so long. We favor a rule permitting ODC to maintain diversion records for longer than three years if there is reason to believe the records will be needed but oppose a mandatory ten year retention requirement. We recommend not adopting the proposed change to ELC 3.6(b) regarding diversions.

Second, whether a lawyer is permitted to enter into diversion is completely within ODC's discretion. Whether a lawyer is offered diversion is often the most important decision from the lawyer's perspective, because if the lawyer is not offered diversion, the matter will become public. In addition, a lawyer not offered diversion will not be given the help needed to prevent future problems. Decisions by ODC that are far less material to the respondent, such as whether a matter should be deferred pending related litigation, are subject to review by a review committee. ELC 5.3(c)((proposed ELC 5.3(d)). Similarly, ODC cannot file a formal complaint without a review committee's agreement. ELC 5.6(c) (proposed ELC 5.7(c)). And the proposed ELC also permit review of ODC's decision to disclose a response to the grievant (proposed ELC 5.1(c)(3)(B)) and of ODC's investigative inquiries and subpoenas (ELC 5.6).

We recommend that ELC 6.1 be amended to include the right to request a review committee consider the denial of a request for diversion, using the same procedure set forth for deferrals in current ELC 5.3(c) (5.3(d) in the proposed ELC).

Conduct of hearing officers and disciplinary board members. The proposed ELC 2.3(h) and 2.6 use language from the former Code of Judicial Conduct (CJC). For disciplinary board members, this is limited to the standard for disqualification; for hearing officers, the rule provides standards for both disqualification and other areas of hearing officer conduct. The CJC was substantially revised in 2011 to make the Code consistent with the ABA Model Code for Judicial Conduct. Proposed ELC 2.6(a) states the CJC is "useful guidance" for hearing officers, yet the ELC has not been updated to reflect the changes to the CJC. Proposed ELC 2.3(h) and 2.6 are inconsistent with the terminology used in the CJC, as the ELC uses "should" when the CJC uses "shall". *Compare, e.g.,* CJC 2.11(A) ("A judge **shall** disqualify himself or herself . . . ") with proposed ELC 2.3(h) ("A Board member **should** disqualify him or herself . . .") and proposed ELC 2.6(d)(4) ("Hearing officers **should** disqualify themselves . . .") (emphases added).

The current CJC is more specific than the former and contains more comments. Because hearing officers and disciplinary board members are volunteers, they have far less experience than judges in determining whether to recuse. They would benefit from the more specific guidance in the current CJC. And if hearing officers and disciplinary board members are subject to the same standards as judges, they can look at decisions providing guidance for judges to determine their duties.

We therefore recommend that proposed ELC 2.3(h) & (i) and 2.6(a)-(d) be replaced with the updated language from the corresponding Canons of the CJC. Tom Fitzpatrick, a member of this group, served on both the ABA Commission that wrote the Model CJC and the Washington Task Force that reviewed the model code and made the recommendations to the Washington Supreme Court which was the basis for the adoption of the new Washington CJC in 2011, and based on his experience with the CJC, sees no reason for the ELC to deviate from the CJC.

Time for filing prehearing dispositive motions. The proposed change to ELC 10.10(c) significantly shortens the respondent's time to file a dispositive prehearing motion. Although the Reporter's Explanatory Comments state the change is proposed to make the ELC consistent with CR 12(b) and (c), this change does not do so. CR 12(c) permits either party to file a motion for judgment on the pleadings at any time. The proposed change to ELC 10.10(c) permits only disciplinary counsel to do so and limits respondents to motions to dismiss. Under the Civil Rules, a CR 12(c) motion for judgment on the pleadings is identical to a CR 12(a) motion to dismiss for failure to make a claim, except it is made later in the proceeding. *P.E. Systems, LLC v. CPI Corp.*, Wn.2d ___, 289 P.3d 638, 641 (2012).

Currently, either party may file a prehearing dispositive motion within 30 days of the time for filing an answer. The proposed rule requires the respondent to file such a motion by the time the answer is due, but disciplinary counsel may file it 30 days after the answer is filed. Many respondents do not obtain counsel until after the answer is due, meaning counsel would be unable to file a dispositive motion.

There is little reason to require such motions to be brought so early in the proceedings. Little substantive action typically occurs in the month following the deadline for the answer. If judgment on the pleadings is appropriate, significant time and expense in having a hearing will be avoided.

We recommend that the Court reject the proposed change to ELC 10.10(c).

Permitting lawyers who are not respondents to object based on privilege. Proposed ELC 5.5(e) permits respondent lawyers to object to subpoenas to protect confidential client information or for other good cause. Although the title of the subsection is "objections by lawyers," the rule does not permit lawyers who are not respondents to object. We favor deleting the word "respondent" from proposed ELC 5.5(e) so all lawyers have the same ability to protect confidential client information from disclosure.

Respectfully submitted,

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