



# WSBA

WASHINGTON STATE BAR ASSOCIATION

## **DISCIPLINARY ADVISORY ROUND TABLE (DART) 2010 – 2011**

### **Meeting Minutes January 19, 2011**

Members present: Tom Chambers (Chair), Dayna Underhill (for second hour only), Doug Ende, Elizabeth Turner, Jennifer Cannon-Unione, Leslie Peterson, Paula Littlewood, Roger Leishman, Joe Nappi (phone), Ted Stiles (phone) and Darlene Neumann (staff liaison). Susan Bergman was excused.

In attendance: Tom Fitzpatrick, Talmadge/Fitzpatrick ; Peter Ehrlichman, Dorsey & Whitney LLP

The meeting began at 1:08 p.m. Introductions were made of all members and guests present.

### **I. Minutes**

Minutes of the previous meeting were corrected and subsequently approved.

### **Chair's Remarks**

Following a presentation by respondent's counsel Tom Fitzpatrick at the November meeting, the Chair discussed inviting a member of the public to address DART from the point of view of the consumer. It was suggested that a former lay member of the Disciplinary Board who served several years ago would be preferable. Members were asked to provide names or other suggestions to the Chair.

The Chair stated that although there is no set agenda for DART, he would like the group to continue to discuss the perception that the disciplinary process is too contentious and prosecutorial and to consider whether or not it is necessary to institutionalize steps in the process (for example, when complaints are filed, how counts are added and options for resolution prior to hearing).

The Chair recalled efforts in the 1990's to bring about reforms and changes to the disciplinary process and introduced Peter Ehrlichman who was there to speak on diversion and mediation.

## **II. ADR Solutions – Peter Ehrlichman**

### **Diversion**

Mr. Ehrlichman discussed the history and background of the mediation and diversion programs. He had served on the BOG Discipline Committee and a Joint Task Force on Discipline, which examined the earlier ABA recommendations. In December 1995, the task force recommended the formation of an office of mediation, a lawyers' practice assistance program, use of LAP as an alternative to discipline, and establishment of diversion, ADR, and other assistance programs. In February 1996, the recommendations were adopted. APR 16 established the mediation program in 1999, and a diversion rule was added to the Rules for Lawyer Discipline in 2001.

Mr. Ehrlichman cited several studies supporting diversion, including an August 2006 report of the Washington discipline system by the ABA Committee on Professional Discipline, which concluded that diversion worked well, served its purpose, provided a service to the public, and was helping lawyers. A March 2008 report by the WSBA's diversion administrator showed that from 2003-2008, there were 200 lawyers in diversion or that had completed diversion, resulting in their grievances being dismissed.

Mr. Ehrlichman discussed the discipline system and what he saw as a "fork in the road" where many lawyers in the discipline system are not an immediate threat to the public, and that it would be preferable to help them with interventions like contractual supervision, tutorials, ethics schooling, and other programs. He provided copies of an 2003 Emory Law Journal article on the Arizona State Bar's diversion program. The study analyzed data over a 10-year period, involving 450 lawyers and over 650 charges. The study showed that the program significantly reduced the number of repeat grievances against lawyers who participated in diversion versus those who did not. Mr. Ehrlichman opined that the Arizona study is worth considering since Washington's diversion program also has the ability to divert a broad range of problems.

### **Discussion**

Tom Fitzpatrick discussed his clients' perceptions of diversion.

- Required assessment testing ("battery of tests") by a psychologist to qualify for diversion. This is viewed as an obstacle, particularly if the misconduct is unrelated to psychological issues.
- Admission of misconduct as a term of the contract. If the client fails to complete or violates the terms of the contract, the admission will be used against him/her. In addition, some respondents do not believe their conduct merits discipline and the requirement to stipulate to misconduct discourages them from taking the diversion option.
- If an additional grievance is filed, the diverted matter can return again.
- Possible stigma attached to being interviewed by a mental health professional.

Chief Disciplinary Counsel Doug Ende explained that only cases defined as less serious misconduct are afforded the option of diversion. The assessment is not a "battery of tests," but a brief question and answer interview by the Diversion Administrator, who is a staff

psychologist. ODC has not experienced the diversion interview as a barrier to participation by respondents. Only a small number of diversion cases involve substance abuse or mental health issues, the majority involve other issues. The diversion administrator (psychologist) acts as a neutral, skilled interviewer who is able to assess the likelihood of a respondent completing the program and identify other behavioral issues not readily apparent to disciplinary counsel. Because diversion is costly in terms of resources and time, the evaluation is a worthwhile step in that it can help to identify candidates that are unlikely to succeed and to tailor diversion components to individual needs.

The admission of misconduct is important because if a contract fails, which can happen two or three years into the diversion, significant time has passed since the original conduct, and the disciplinary investigation or proceeding must begin again, which can be a significant resource issue. Factual stipulation is not believed to present a significant barrier to participation. Overall, there have been relatively few diversion terminations. To ODC's knowledge, there have not been any situations where diversion was terminated and the respondent received a sanction other than an admonition or reprimand, except where there was additional misconduct involved.

Members discussed lowering the program requirements to allow more lawyers into diversion. Mr. Ehrlichman opined the benefits of diversion may outweigh the issue of someone who does not want to stipulate to misconduct. Diversion participants are placed under supervision for two years and are less likely to re-offend.

Members discussed the role of the grievant and whether diversion or other alternative amounts to cutting a deal, taking away the grievant/victim's ability to find closure. Mr. Ende stated the grievant is not a party to the proceeding, but rather is akin to a complaining witness in a criminal case. The grievant receives notice of the lawyer's diversion and may comment, but cannot overrule disciplinary counsel's decision. However, some components of the diversion contract, such as restitution, may be related to and benefit the grievant.

Mr. Ehrlichman suggested it would be beneficial to survey the number of respondents who are interviewed and rejected (as unsuitable) or who self-reject before proposing any tweaks to the rule.

### **Mediation Discussion**

Mr. Ehrlichman noted that there is hardly any mention of mediation in the ELCs other than in ELC 6.1. There is nothing in the system to urge or force ODC and respondents into off-record, informal resolution and settlement before hearing. When the WSBA's ADR program (sunsetting in 2008) was adopted, the original intent was to create a mediation component in the discipline process. Mr. Ehrlichman commented that somehow things got "off the tracks" when the ADR program was limited to fee disputes between lawyers and clients.

He discussed the use of mediation in private civil practice, the requirement in federal court under FRCP 39.1, and King County Superior Court's pilot program for mandatory mediation. The King County program forces parties to engage in mediation before the deadline for discovery. The idea is to "nudge" plaintiffs and defendants to resolve things in mediation in order to save time and energy for all concerned. If mediation is implemented in the

disciplinary process, Mr. Ehrlichman noted that perceptions may need to be addressed, such as lawyers preferring to fight rather than settle and the lack of interest by ODC.

He shared a story of a case he had worked on previously as special disciplinary counsel to illustrate the problem of procedural impediments within the system that caused the delay of a respondent to resign. Because the respondent had already filed an answer to the formal complaint, he was prevented from being able to resign immediately under ELC 9.3. Mr. Ehrlichman suggested it may be necessary to look at the rules in terms of allowing quick resolution to protect both the public and the profession.

Mr. Ende noted that the particular procedural impediment mentioned by Mr. Ehrlichman has been discussed and will likely be remedied in the ELC Drafting Task Force process. Mr. Ende further observed that discipline includes components of both criminal and civil systems and is also unique in many respects. With respect to the likelihood of successful mediations, there is not a continuum of settlement possibilities, such as dollars in the civil system and length of sentence in the criminal system; rather, the discipline system has discrete forms of sanction, and there is a big gap between a reprimand and a suspension, and between a suspension and a disbarment. He informed members of a draft ELC amendment where hearing officers would hold settlement conferences, which would in effect be mediation.

Mr. Fitzpatrick raised the issue of the difficulty in convincing clients to agree to mediation because of lawyers' attitude and bias towards their own position, and their failure to see the value of alternative resolution. To instill confidence in mediation, the mediator would need to be experienced and knowledgeable of the lawyer discipline system.

The Chair thanked Mr. Ehrlichman for his presentation. The Chair was very much interested in the "fork in the road" concept representing different alternatives for resolution at various stages within the discipline process, beginning when a complaint is filed. Those alternatives may be mediation, ADR or other options. The Chair asked Mr. Ende to provide a detailed report on the ELC mediation proposal for the next meeting. He also wanted the members to begin focusing on developing specific proposals.

Governor Leishman raised the issue of transparency in the system and public access under proposed new GR 12.4, and the possibility of people getting out of the system before their names become public. The opportunity to resolve issues should be allowed, but any proposals need to be mindful of the implications for public access.

Members discussed whether other states have diversion programs. The Chair asked member Jennifer Cannon-Unione to research Arizona's diversion program. Mr. Fitzpatrick offered to contact the ABA Center for Professional Responsibility for information on other states.

Members discussed the timing of mediation. Governor Leishman suggested they contact the prosecution and defense bars to find out their opinion on when mediation is used most effectively. Mr. Ende stated that while there is no single answer, in general mediation should be done as early as possible to save resources. ODC's experience has been that unrepresented respondents tend not to engage in serious settlement discussions until late in the process. Mr. Fitzpatrick suggested the best chance for mediation would be after the complaint is filed

because unlike civil cases, a great deal of the investigation has already been done by the parties.

**Summary of items for consideration at the next meeting:**

- Finding a former lay member or members of the Disciplinary Board or other persons to be “voice of the public” (Forward suggestions to the Chair)
- Status report on ELC mediation proposal (Doug Ende)
- Proposals for deferred prosecution, expanding/removing barriers to diversion, or other alternative approaches
- Report on diversion programs:
  - Arizona State Bar Diversion Program (Jennifer Cannon-Unione)
  - Other states (information from ABA Center for Professional Responsibility (Tom Fitzpatrick))

**Adjournment**

The meeting adjourned at 3:05 p.m.

The next meeting will be March 16, 2011, from 1 p.m – 3 p.m.