



WSBA

WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY ADVISORY ROUND TABLE (DART)

Meeting Minutes January 11, 2012

Members present: Hon. Tom Chambers, Susan Bergman (phone), Jennifer Cannon-Unione, Doug Ende, Tom Fitzpatrick, Roger Leishman, Paula Littlewood, Joe Nappi, Leslie Peterson, Elizabeth Turner, Dayna Underhill (phone), Tom Waite, and Darlene Neumann (Staff Liaison).

In attendance were: Kurt Bulmer, Attorney at Law, Julie Shankland, Assistant General Counsel, and Joanne Abelson, Senior Disciplinary Counsel

The meeting began 1:04 p.m.

Welcome and introductions were made around the table, including over the telephone.

I. Minutes

The minutes of November 9, 2011 were approved.

II. Appointment of Disability Counsel

Kurt Bulmer, an attorney who has served as disability counsel, and Julie Shankland, Assistant General Counsel, addressed DART on the issue of disability counsel. Mr. Bulmer explained that under the Rules for Enforcement of Lawyer Conduct (ELC), the bar association is required to appoint counsel for disabled respondents who are unrepresented.

Mr. Bulmer and Ms. Shankland discussed the lack of experienced disability counsel, delays in the appointment process, and the issues representing difficult personalities. Disabled respondents can become angry, irrational, paranoid, or threatening. Another disability is age-related where legal skills have deteriorated and the lawyer fails to see the need to retire from practice.

Mr. Bulmer stated that the ideal disability counsel would possess expertise in working with the disabled and experience in the disciplinary process. Of the 8 lawyers on the referral list, 3 to 4 are used on a regular basis, with only 2 experienced in both disability and disciplinary proceedings. Ms. Shankland described a process of appointing counsel that can take 3-4 weeks or more because of the difficulty in finding someone willing to do it. In addition, under the ELCs, the respondent attorney has 20 days to retain counsel of his/her choosing, so the association doesn't make an appointment until at least 20 days after the proceedings have commenced.

Mr. Bulmer estimated disability cases can cost up to \$200,000-\$300,000 per year and take 30-40 hours. Although the bar pays a reasonable fee structure, many lawyers are unsure of the process and fearful of dealing with the disabled. He suggested creating a pool of 10-15 lawyers, teaching them how to do disability cases, and providing mentoring resources. The training should also address issues in disability cases. Ms. Shankland suggested modeling a system after the one used for Conflict Review Officers (CRO).

Ms. Shankland estimated there are about 10 disability cases/year, with most resulting from a respondent lawyer's assertion of a disability during disciplinary proceedings. There are also a number of stipulated transfers to disability status. Tom Waite stated disability cases make up less than 10% of Disciplinary Board cases, with only a few being notably complex and time-consuming. The committee discussed whether some respondents might be helped without necessarily being removed from practice by being placed on automatic interim suspension. Joanne Abelson of ODC noted that the ELC provide for a mandatory suspension only when the lawyer asserts incapacity.

Members also discussed the aging lawyer population and the apparent need for more fitness reviews happening at the "back end" of a lawyer's career. Since there is no mandatory reporting in Washington, it was suggested that more education might be done about the responsibility of firm managers or partners to recognize when disability issues arise.

The Chair appointed a 5 member subcommittee to analyze the issue and develop a proposal. Doug Ende, Kurt Bulmer, and Julie Shankland agreed to serve on the subcommittee. They will determine the remaining 2 members.

III. Draft Amendment of Formal Complaint

Doug Ende presented the subcommittee's recommended changes to the ELC 10.7 (Amendment of Formal Complaint) with parallel changes to ELC 10.3 and 2.5. Joe Nappi suggested the last sentence of ELC 10.7(a) dealing with the hearing officer include language that would expressly allow the hearing officer to deny the respondent's motion or a portion of it. Members discussed whether there are or should be equivalent procedures when facts or allegations are deleted from the complaint. The process is controlled by a motion to dismiss, or disciplinary counsel may simply choose not to prosecute the allegations.

Roger Leishman contrasted the amendment process to CR 15 and inquired whether the process would allow flexibility for hearing officers to read prejudice more broadly, and if there were standards for the hearing officer to apply when ruling on motions for unrelated amendments. Mr. Ende noted that the rule provides for referral to a review committee in situations where additional information may be needed, and there is no expressed standard for when the review committee may consolidate or order a matter to hearing.

The committee discussed submitting the draft to stakeholders. Other than DART, which is representative of the stakeholders, it was suggested the opportunity for further review would occur once the proposed amendment is published for comment by the Supreme Court. Kurt Bulmer informed DART that a respondent's counsel group will be forming and they would be interested in commenting. Mr. Leishman also suggested DART could make a request to the ELC Task Force to review the changes, but it was noted that the ELC Task Force is winding down.

Subcommittee members will continue to refine the proposal and report back at the next meeting.

IV. WSBA CLE Proposal

Executive Director Paula Littlewood and Doug Ende discussed holding a bar-sponsored CLE to educate members on the new amendments to the ELCs once they are adopted and published by the Supreme Court. The CLE could be modeled after one given when the Rules of Professional Conduct were substantially amended in 2006. The timing would need to be coordinated with the Court's timeline. Since it is estimated that any proposed rule changes would not become effective until sometime in 2013, this is currently not a time sensitive issue. Several members suggested offering ethics credits to encourage more member participation in the CLE.

V. Other Matters

May 9, 2012 Meeting

Due to a scheduling conflict, the Chair advised members that the May 9 meeting will need to be rescheduled. The staff liaison was directed to email members with proposed new dates.

Practice of Law Board

The Chair reported on a recent meeting the Court had with the Practice of Law Board (POLB) and expressed an interest in having presenters speak to DART. He discussed the issue of due process in the POLB's determinations. The POLB uses an investigative lawyer to gather information on a complaint and to issue a report. The respondent may submit a response to the complaint. A closed hearing is held and the POLB makes a determination on whether the unauthorized practice of law (UPL) was committed. The respondent has no right to appear or have counsel. All determinations are based on the record and held to a standard of proof "beyond a reasonable doubt". Discussion followed on the difficulty of determining the sufficiency of facts based on the written record, and the prosecutorial appearance of the process when the investigative lawyer meets with the POLB behind closed doors. The Chair noted the POLB operates with volunteers and limited resources. The Chair also mentioned that the Court and the POLB had discussed the problem of unauthorized practice by disbarred lawyers.

Member Referendum

Paula Littlewood informed DART of a member-initiated referendum vote to occur on March 7 which, if approved, would roll back member license fees from \$450 to \$325. Voting will last 30 days.

ABA Commission on Ethics 20/20

Tom Fitzpatrick announced that ethics proposals coming out of the ABA Commission on Ethics 20/20 will likely have fundamental impacts on the practice of law. Doug Ende offered to forward detailed information on the proposals to members via the staff liaison if anyone so desired.

Adjournment

The meeting adjourned at 2:45 p.m.