



WSBA

WASHINGTON STATE BAR ASSOCIATION

**DISCIPLINARY ADVISORY ROUND TABLE (DART)
2011 – 2012**

**Meeting Minutes
March 14, 2012**

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

Also in attendance were Tom Fitzpatrick, of Talmadge/Fitzpatrick; Tom Andrews, Practice of Law Board (POLB); Julie Shankland, POLB Staff Liaison; Sandra Schilling, POLB Investigative Attorney; and Jeanne Marie Clavere, Professional Responsibility Counsel.

The meeting began at 1:05 p.m.

Roger Leishman acted as Chair for Justice Chambers at Justice Chambers' request. Introductions were made around the table, including over the telephone.

I. Minutes

The minutes of January 11, 2012 were approved.

II. Unauthorized Practice of Law (UPL) by Disbarred Lawyers or Lawyers Not Licensed in Washington

Tom Andrews of the Practice of Law Board (POLB) discussed the issues presented when disbarred Washington lawyers or non-Washington lawyers engage in conduct that gives rise to a UPL complaint. Professor Andrews sought guidance on the appropriate body, the POLB or ODC, to handle such complaints. There was no disagreement that suspended lawyers fall under the jurisdiction of ODC.

Discussion followed on RPC 8.5 which establishes disciplinary authority over out-of-state lawyers practicing in Washington, but is silent on the question of disbarred lawyers. Technically, disbarred lawyers are no longer members of the Association and may be beyond ODC's jurisdiction. Professor Andrews suggested that the jurisdictional issue depends on the interpretation of "lawyer" in RPC 8.5. Discussion followed on the lack of clear legal authority in this area and the complications and ambiguities created by RPC 5.5(c), which allows temporary practice by non-Washington lawyers in a variety of circumstances.

Discussion continued on the difficulty of monitoring the activities of disbarred lawyers and the issue of resources. ODC has extensive files on the pre-disbarment activities of disbarred

lawyers, which the POLB lacks. In addition, the Board has minimal resources, which would be spread even thinner if the POLB were to investigate UPL complaints by disbarred lawyers. ODC recognizes that it has legal authority over the Washington-directed activities of non-Washington lawyers and reviews such grievances on a case-by-case basis from a resource-based perspective, given that one option is to refer the lawyer to his/her home jurisdiction, which has direct authority over the lawyer's license. It was generally acknowledged that the current disciplinary system is not designed to handle proceedings arising from UPL by disbarred lawyers.

Remedies such as use of disciplinary sanctions, reciprocal discipline, contempt proceedings, and referral to the Attorney General or county prosecutors were discussed. Overall, each of the remedies involves a variety of impediments that make them ineffective. Professor Andrews and Julie Shankland discussed the POLB's referrals to the AGO and county prosecutors, efforts that have resulted in few successful prosecutions on non-lawyers. State and local resources are limited, however, and public safety issues rank higher in priority than UPL violations unless there is significant financial harm. Ms. Shankland commented that structural issues with the cases and problems with complainants adds to the difficulty for prosecutors.

DART discussed the breadth of the problem arising from a regulatory system comprised of 50 different jurisdictions. They referred to potential changes to the Model Rules that would expand cross border practice. Presently, it is estimated that at any given time there are three to six disbarred lawyers engaged in some degree of UPL. WSBA receives a couple of complaints a month involving out-of-state lawyers, and the number is expected to increase. DART also considered the differences in budget between the POLB and ODC.

Finally, DART discussed whether to focus attention on rules or resources. Several suggestions included getting guidance from the court, allocating more resources to the POLB, testing the exercise of disciplinary jurisdiction over an out-of-state lawyer in an appropriate case, seeing how changes to the ABA Model Rules resolve, and examining the models of other jurisdictions.

III. Draft Amendment of Formal Complaint Subcommittee

Doug Ende of the Subcommittee presented a revised draft which incorporated suggestions made by members at the last meeting. Elizabeth Turner discussed concerns regarding ELC 10.3(c) and (d). As written, ELC 10.3(c) would allow the hearing officer to consolidate or join two or more matters. If the multiple formal proceedings are with different hearing officers, there would be an issue over who should make the decision. Ms. Turner suggested placing the decisional authority with the Chief Hearing Officer. She also pointed out under ELC 10.3(d), the review committee's decision to consolidate matters may be overruled by a hearing officer who may decide to sever. It was suggested that actions under section (d) be expressly done on a motion and both sides allowed the opportunity to respond and be heard. Subcommittee members, Joe Nappi and Tom Fitzpatrick concurred with the suggestions.

The draft will be sent back to the subcommittee for further revision.

IV. Disability Counsel Subcommittee

Doug Ende reported that the Subcommittee had held an initial meeting as described in its written report. Members discussed ideas generated by the subcommittee, noting that creating a Disability Counsel Administrator or In-House Disability Counsel seemed to be logical choices. Another idea members found interesting was the concept of recruiting individuals with a demonstrated skill set in disability versus disciplinary skills. Also discussed was the tactical use

of disability assertions in disciplinary proceedings, a practice that seems to have increased. The Subcommittee plans to evaluate the expense of the current system and explore the approaches taken in other jurisdictions, and it will report at a future meeting.

V. Other Matters

ADR Subcommittee

Subcommittee chair Joe Nappi reported that the ELC Task Force is currently working on the BOG's directive to remove the option of using admonitions as a disciplinary action. Earlier, the subcommittee had identified the period between issuance of a review committee hearing order and the filing of a formal complaint as an interval where alternative dispute resolution might be beneficial. Mr. Nappi requested that further discussion of the issue be placed on the agenda for the next meeting.

Expiring Member Appointments

The staff liaison explained that there are four DART members whose appointments are set to expire in July. The expiring members (Susan, Jennifer, Dayna, and Leslie) all agreed to continue to serve at least until the end of the current DART term.

Staff will submit a request to the BOG in April for an extension of those members' terms through September.

Discussion followed on the topic of expanding DART to include representatives from other groups and organizations. Executive Director Paula Littlewood also mentioned DART is nearing the end of its two year term allowed under the charter, and will need to address its role in the upcoming annual report to the BOG.

Adjournment

The meeting adjourned at 2:50 p.m.