



WSBA

WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY ADVISORY ROUND TABLE (DART) 2011 – 2012

Meeting Minutes September 14, 2011

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

In attendance: Tom Fitzpatrick, Talmadge/Fitzpatrick

The meeting began at 1:05 p.m.

I. Minutes

The minutes of May 18, 2011 were approved.

II. Diversion Subcommittee Report

The committee materials included information regarding the conduct of diversion evaluations, available diversion terms, and costs of participating in the diversion program. Subcommittee chair Jennifer Cannon-Unione discussed the referral and eligibility determination by ODC and the evaluation interview by a non-ODC staff clinical psychologist. Since 2003, approximately 370 lawyers have gone through diversion. Typically, contract duration is one year or less, but some diversion contracts provide for terms of up to two years. The program is considered a success by its administrator.

Ms. Cannon-Unione reported that Bruce Redman of ODC is compiling information from states which have diversion programs and has identified seven jurisdictions that offer diversion at the intake stage. Over 25 states have some form of diversion program. The subcommittee is exploring the concept of supplementing the program to provide for increased access. Several key issues were identified by the subcommittee: the diversion interview by a psychologist, the role of ODC in determining eligibility, and the admission-of-misconduct requirement.

After reviewing information on how the evaluation by the psychologist is conducted, the committee felt that any perceived stigma associated with this component of the program was not reflective of how the interview process actually functions. The committee agreed that a possible

approach is to adjust the public perception of the program through improved messaging. Although the self-care contracts previously associated with the program have long been eliminated, the committee acknowledged that to the extent those perceptions persist, they may be contributing to reluctance to participate in diversion in some cases.

Discussion ensued about the initial eligibility determination by disciplinary counsel and the program's overall availability to members. Mr. Fitzpatrick explained that the determination by ODC is inherent in the process since diversion is a rule within the ELCs and diversion applies only to specific types of minor misconduct. Mr. Ende noted that diversion is offered as soon as possible for cases in which it seems appropriate.

The committee discussed the program's admission-of-misconduct requirement. Mr. Ende explained that, by rule, the respondent must agree to the misconduct in a diversion declaration in order to be eligible for diversion. Regarding what becomes public, he stated that if the respondent breaches the contract, the declaration becomes public—though, not the terms of the contract. The committee discussed whether the requirement might be changed to allow admission to the facts of the allegation without admitting to a rules violation, in order to address the concerns of potential participants while providing stipulated facts for disciplinary counsel to charge if the diversion contract is subsequently breached for noncompliance.

The committee also discussed changing the diversion process to offer diversion at an early phase (possibly at intake), before extensive investigation is done; consideration of the degree of harm in determining eligibility; gathering data on success rates of participation and recidivism.

III. ADR Subcommittee Report

Subcommittee chair Joe Nappi reported that the ELC Drafting Task Force adopted the DART recommendations regarding ELC 10.12 (settlement conference) and incorporated it into its report submitted to the BOG for the September 23, 2011 BOG meeting. The Chair thanked the subcommittee for its work.

The subcommittee is currently exploring other ADR opportunities for mediation and identified two periods under consideration.

1. The period between the Review Committee's order authorizing the filing of a formal complaint and the actual filing.
2. At the appellate stage, after the Findings of Fact and Conclusions of Law are issued by the hearing officer and before review by the Disciplinary Board.

The subcommittee will consider whether or not it is appropriate or advisable to allow mediation during those stages. Some concerns raised include the use of resources and whether mediation may cause further delay in the disciplinary process.

Discussion ensued about whether mediation could occur while review is pending at the Supreme Court. Several members indicated that it may be difficult to engage in negotiations at that stage, because even if the parties stipulate, the case is still submitted to the Court for plenary review on the full record.

IV. Amendment of Formal Complaint

Doug Ende and Tom Fitzpatrick reported they are developing a draft amendment to ELC 10.7 relating to amending complaints and it is hoped that the language will be ready by the next meeting. Since the revisions to the ELCs have already gone to the BOG for consideration, this proposal would have to be submitted as a sole recommendation from the DART to the BOG. Mr. Ende and Mr. Fitzpatrick requested that Mr. Nappi be involved in the process as the proposal may impact the responsibilities of the Chief Hearing Officer.

The Chair created a subcommittee consisting of Doug Ende, Tom Fitzpatrick, and Joe Nappi to develop policy and procedures for a proposed amendment to ELC 10.7 to amend formal complaints.

V. Draft Annual Report

The Chair asked the members for comments to the draft annual report. After a brief discussion, a number of changes and additions were suggested.

The Chair will incorporate the members' suggestions and submit a revised draft by the next meeting. The Chair also requested the subcommittee chairs submit brief statements on the issues and work of their subcommittee for inclusion in the report. It was suggested that the committee minutes also be referenced in the draft report.

VI. Discussion

The committee discussed potential speakers to invite and offer perspectives on specific issues. Possible presenters include: someone as the "voice of the public"; Dan Crystal and Bruce Redman for diversion; Julie Shankland and/or someone who previously served as disability counsel in disability proceedings.

Tom Fitzpatrick spoke briefly on the emerging issue of the escalating number of disability cases and the lack of disability counsel able to handle the caseload. He anticipates the problem will worsen in the near future given the number of aging lawyers in the profession.

VII. Other Matters

Regarding public dissemination of DART's work, the staff liaison confirmed the information is contained in the meeting minutes which are posted on the committee's webpage on the WSBA website.

To avoid a scheduling conflict with some of the members, the committee agreed to move the time for the November 9, 2011 meeting to 2 pm - 4 pm.

The meeting adjourned at 2:10 p.m.