



WSBA

WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY ADVISORY ROUND TABLE (DART) 2010 – 2011

Meeting Minutes May 18, 2011

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

In attendance: Tom Fitzpatrick, Talmadge/Fitzpatrick, Geoff Gibbs, Chair, ELC Drafting Task Force

The meeting began at 1:01 p.m.

I. Minutes

The minutes were corrected and subsequently approved.

II. ADR Subcommittee Report

Subcommittee Chair Joe Nappi reported on its review of the proposed settlement conference option in ELC 10.12. In evaluating ways to make settlement conferences more available during the course of disciplinary proceedings, the subcommittee identified two potential concerns: use of requests for settlement conferences as a delay tactic, and the likelihood that the process has little chance of success if all parties are not motivated to participate. The subcommittee agreed that these issues would be alleviated by limiting the time frame for holding settlement conferences to not less than 30 days prior to the scheduled hearing date, and by specifying that a post-scheduling-order settlement conference should be available only by agreement of the parties. Mr. Ende noted that these limitations helped to address but did not completely eliminate his concerns regarding tactical delay.

The subcommittee's draft revision to the proposal also permits the assigned hearing officer to serve as the settlement-conference officer. If the settlement conference is unsuccessful, the assigned hearing officer could conduct the hearing only by agreement of the parties. Mr. Nappi stated the draft prepared by Mr. Ende, which consolidates all the settlement conference provisions in a new paragraph (h), represents the version recommended by the subcommittee.

Members discussed the usefulness of settlement conferences when the violations or the underlying facts are disputed. Mr. Ende commented that settlement discussions are likely to be most productive when the primary issue is sanction, i.e., when a party admits to facts constituting a violation but disagrees about the severity of the ensuing discipline.

After further discussion, the Round Table revised the draft amendment to proposed ELC 10.12 as follows:

(h)(3) Factors Considered. When making a determination about whether to order a settlement conference, the hearing officer shall consider whether such a conference will be helpful in light of the complexity of the issues, the extent to which the relevant facts ~~are disputed, whether~~ or the violations charged are disputed, or any other relevant factor.

The subcommittee will submit the draft amendments to the ELC Drafting Task Force in advance of its May 19 meeting. Geoff Gibbs, Chair of the ELC Drafting Task Force, will report back to the Chair after the meeting. The Board of Governors is expected to consider the ELC revisions at its July 2011 meeting.

III. Diversion Subcommittee Report

Subcommittee Chair Jennifer Cannon-Unione reported that the subcommittee had made progress on its review of diversion systems, finding that not all states have a diversion program and that those that do have adopted various approaches based on the different organizational and procedural approaches of their discipline systems. Ms. Cannon-Unione noted that the subcommittee took close looks at Arizona's and Colorado's models, and that Arizona's recently revised program is based on Colorado's; she also mentioned some diversion program components used in Nevada, Oregon, and Texas. Ms. Underhill observed that although Oregon has a diversion rule on the books, to her knowledge it is never used.

Ms. Cannon-Unione stated that the subcommittee explored the idea of modifying the ODC intake process to incorporate diversion or other alternatives-to-discipline at an earlier stage of the process, which is an approach used in Colorado. She noted that WSBA is in the process of reorganizing some existing organizational staffing structures, including the Lawyer's Assistance Program, which will likely have an impact on the staffing of WSBA's diversion program. It was suggested the subcommittee continue to explore the idea as the re-organization is further defined.

Ms. Cannon-Unione discussed a question from the previous meeting on why Arizona did not require stipulation to the misconduct as a diversion prerequisite. Apparently, a discipline judge is assigned to monitor the diversion and in case of breach, the case goes before the judge familiar with the allegation. In addition, Arizona disciplines for the breach rather than the underlying misconduct. Mr. Ende added that because Colorado diverts some cases much earlier in the process, it makes diversion decisions on initial documentation only. In contrast, Washington does not consider diversion until more information is known about the respondent and the situation. Overall, the subcommittee found the diversion criteria to be generally similar across all programs, but with some differences in structure and how and when diversions are initiated.

There was further discussion on the similarity of diversion programs to deferred prosecutions and on the issue of admission to misconduct. Mr. Ende commented that the policy behind admission of misconduct serves as a strong incentive for lawyers to successfully complete the diversion, which is also the objective of ODC, while saving the Bar resources by avoiding the need to begin the investigation all over again should the diversion be terminated.

The Chair queried whether the subcommittee should develop an alternative deferred-prosecution or other disposition model, tweak the existing rules, or recommend new rules. He summarized previous ideas to modify diversion: changing the intake approach, using other professionals to conduct evaluations, and using psychological assessment only as needed. He emphasized that it would be a worthwhile objective to expand diversion to include more members.

The report ended with a discussion on use of judges or adjudicators to monitor diversions. According to respondent's counsel representatives, there are no firm opinions for or against such an approach, but there may be an impression that involvement by a judge increases the perception that the diversion is a serious matter and it may encourage the respondent to successfully complete the program.

The Diversion Subcommittee will continue to work on the issue and report back in the fall.

IV. Draft Annual Report

The Chair distributed a rough draft of the annual report to be submitted to the Supreme Court and the Board of Governors and sought comments. The Chair stated the intent of the report is informational only.

Joe Nappi recommended including the specific ELC changes approved by the Committee. Governor Roger Leishman suggested DART monitor the ongoing ELC revision process and consider weighing in when the amendments are published for comment. Mr. Ende requested the opportunity to forward minor suggested corrections directly to the Chair.

The Round Table discussed changes to DART's website to clarify that the Round Table seeks input and feedback from the membership and the public on disciplinary issues. Several members voiced concerns that it could encourage public appeals of individual grievance cases to DART.

There was general consensus not to change the website. The Round Table also decided to put the report over to the next meeting in September.

V. Schedule of Future Meetings

A proposed schedule of future meeting dates was reviewed and approved, as follows:

- Sept. 14, 2011
- Nov. 9, 2011
- Jan. 11, 2012
- March 14, 2012
- May 9, 2012

VI. Discussion

Amendment of Complaints

The Chair briefly discussed a previous recommendation by Doug Ende and Tom Fitzpatrick regarding amendment of complaints.

The Chair requested Mr. Ende and Mr. Fitzpatrick prepare a draft to institutionalize the recommendation.

Appointment of Counsel in Disability Cases

Tom Fitzpatrick reminded the Round Table of the problem reported on at the March meeting of providing counsel for lawyers in disability cases. WSBA is obligated to appoint counsel for lawyers who are in proceedings because it is alleged that they lack capacity to practice and/or are unable defend themselves in disability proceedings. Currently, there is an increasing inventory of disability matters, there are not enough volunteer lawyers to handle disability cases, there is a backlog in appointments, and the volume of cases has had an appreciable fiscal impact on WSBA. With the anticipated aging lawyer population and economic factors, the number of disability cases is likely to increase and remain high. Mr. Gibbs stated this was an important policy issue, one in which the ELC Task Force has explored, although the needed solution is not necessarily achievable by rule amendment. He offered to provide DART with the minutes of the Task Force's discussions.

Statute of Limitations on Grievance Filing

Mr. Gibbs reported that the item has been addressed by the ELC Drafting Task Force without a recommendation for change, but noted that he would raise the issues again before the conclusion of the Task Force's work.

Burden of Proof in Discipline Matters

Mr. Gibbs reported that the ELC Drafting Task Force had discussed possible revision of the "clear preponderance" standard, but no changes were recommended. He opined that the Task Force was hesitant to propose alteration of the standard since it is an issue uniquely within the province of the Court. The Round Table discussed the possibility that if the clear-preponderance burden was challenged on appeal and the Court held it to be constitutionally insufficient, such a holding could affect other pending cases. Mr. Fitzpatrick recommended that the Round Table take up this issue. Mr. Gibbs stated he will ensure that the Task Force position is made clear in its final report to the Board.

Voluntary Permanent Retirement Status for Senior Lawyers

Doug Ende reminded the Round Table of the issue of an appropriate status for aging lawyers who ought to discontinue practice but are disinclined to resign. Such lawyers may begin to experience low level ethics problems, but it is not necessarily appropriate to subject them to disciplinary action or to rehabilitate them to continue practice. Under the current system, there is

an absence of a dignified “exit strategy,” because many lawyers do not want to end a long career with a resignation. Mr. Ende suggested that the Round Table take up the issue of alternative approaches, such as the permanent voluntary retirement status recommended by the APRL-NOBC Joint Committee on Aging Lawyers in 2007. Mr. Gibbs commented the WSBA President-elect is focused on the issue of the aging population of the Bar and succession planning. DART could possibly coordinate with BOG efforts in this area. Governor Leishman stated he will consult with other BOG officers to see if this issue would be appropriate for DART’s consideration.

Adjournment

The meeting adjourned at 2:45 p.m.

The next meeting will be September 14, 2011.