

WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY ADVISORY ROUND TABLE

May 19, 2021

Meeting Minutes

Members present: Justice Mary Yu (Chair), Hugh Spitzer, Doug Ende, Jeff Gates, Elizabeth Rene, Norma Ureña, Terra Nevitt, Randy Petgrave, Lee Ripley, Kevin Bank, Julie Shankland, and Darlene Neumann, (Staff Liaison). Absent: Lea Galanter, Jane Smith, and Russell Knight (BOG Liaison). In attendance: Thea Jennings (ODC Discipline Programs Manager), Ben Attanasio (Discipline Counsel), Rachel Agent (Discipline Analyst), and Nancy Hawkins (Family Law Section Liaison).

Meeting (held via Zoom) called to order at 1:00 p.m. Welcome and introductions followed.

Purpose of the meeting

Chair Justice Yu explained the purpose of the meeting, the Court's decision to extend the comment period on the proposed RDI rules at the WSBA Board of Governors' request, and the opportunity for DART as a group to provide input or comment, or to comment as individuals.

The chair discussed the background of the Rules for Discipline and Incapacity (RDI), which if adopted, would replace the ELCs and transform the current discipline system, also have a budgetary impact among other issues. The chair noted the proposed changes have elicited strong opinions from segments of the bar. At least one DART member has opted to recuse from discussions related to the RDI. With that, the chair emphasized the importance of maintaining the integrity of the comment process and a fair forum for thoughts, comments, and ideas.

Request for comments and explanation of the Court's process

Two members thought the proposed rules appear reasonable and the proposed Title 8 Incapacity Proceedings to be a vast improvement over the current rule. Several members commented the terminology change from "disability proceedings" to "incapacity proceedings" is a more accurate description.

Issues of Concern and Discussion

Rule 5.11 Closure of Investigation. A member expressed a concern that the proposed rule revises the current practice of ODC dismissing grievances, substituting the term "closure" instead. He commented that identifying the disposition as closure rather than dismissal may affect a respondent's malpractice insurance. Another concern was removing the process for adjudicative review of dismissal decisions when a grievant disagrees with it. If new information is received, there is no defined process for review and it is unclear who would make decisions about newly received information. Other comments included the short timeline for appointed counsel to respond to a show cause order after an interim

suspension petition is filed due to delays in receiving relevant information and client consultation necessary to prepare a response, and replacing the current adjudicative system of checks and balances (review of ODC deferral and withholding decisions) in the proposed structure.

Discussion followed on adjudicative review of dismissals and other investigative decisions and the enormous amount of staff and volunteer resources it requires. Volunteers typically spend a substantial amount of time and effort to review each decision. Data from 2016 to 2020 showed that very few decisions were changed as a result. Given those findings, the rule drafters concluded that reviewing dismissals and other investigative decisions is not the best use of staff or volunteer time. The change in terminology from “dismissal” to “closing” also more precisely describes the action since the Office of Disciplinary Counsel does not act in an adjudicative capacity to “dismiss” a case. ODC simply closes the file.

Role of volunteers including members of the public. Concerns were raised about changes to the role of volunteers. Under the new system, volunteers would serve under the Office of Regulatory Adjudicators (ORA). In the current system, volunteers serve on the Disciplinary Board and on review committees. Volunteers are still participants in the discipline system, but organized differently under the ORA.

Impartiality of professional adjudicators. Several members expressed concern over the impartiality of professional adjudicators who are lawyers regulated by the Bar and would be employees of the Bar. The public perception over whether they would be truly independent and impartial while situated at the Bar is a significant concern.

In the current system, a “wall of separation” exists between the Office of Disciplinary Counsel, the chief hearing officer (CHO) and hearing officers, the Disciplinary Board, and the administrative support to the adjudicators provided by the Office of General Counsel. The Court appoints the CHO, hearing officers, and the members of the Disciplinary Board, who act independently of the Bar and ODC. Proponents emphasized that as now, no lines would be crossed between the investigatory function and the adjudicatory function in the new system. A member pointed out that administrative logistics may be more important than employee status to maintain impartiality, and noted that in the court system prosecutors and judges are housed on different floors in the same building. However as an integrated bar, it seems very unlikely that the ORA would be relocated to Olympia to reside under the Court.

Lack of comments from the minority bar associations on the proposed rules. Members were unsure why none of the minority bars has offered comment. Norma Ureña volunteered to contact the MBAs and raise awareness of the proposed RDI and report back to DART. Bar staff will provide assistance with the outreach efforts.

Ideas

A pro bono counsel for unrepresented respondents. Members suggested a pro bono counsel specifically trained in the discipline system to provide consultation and advice to unrepresented respondents. Many solos or small firm practitioners are not financially able to afford representation in disciplinary proceedings and this resource would be very beneficial. Other ideas included providing education on how to deal with unhappy clients and avoiding problems that lead to malpractice claims, etc.

Timeline of proposed rules

The chair discussed the timeline of July 29, 2021, when the comment period expires, and the next steps in the court's review process.

Minutes

The minutes of August 5, 2020, were deemed approved.

Draft Technical ELC Amendments

Doug Ende discussed draft technical ELC amendments to codify the emergency interim measures ordered by the court during the COVID-19 health emergency last year. The orders made remote work on disciplinary proceedings possible using electronic methods. When the orders expire, the system will revert to its traditional paper processes again. The draft changes apply primarily to authorize electronic service and electronic transmission of documents and papers, except for one unrelated minor change regarding confidentiality of information. Discussion followed on protecting personal data, data encryption, and cost factors to ensure privacy protection.

Adjournment

Meeting adjourned 2:17 p.m.