



WSBA

WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY ADVISORY ROUND TABLE (DART) 2011 – 2012

Meeting Minutes June 27, 2012

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

Also in attendance: Tom Fitzpatrick of Talmadge/Fitzpatrick.

The meeting began at 1:05 p.m.

I. Minutes

The minutes of March 14, 2012 were approved. It was noted that in April, the Board of Governors (BOG) approved extending the appointments of members Dayna Underhill, Jennifer Cannon-Unione, Leslie Peterson, and Susan Bergman to the end of the fiscal year, September 30, 2012.

II. Draft Amendment of Formal Complaint (ELC 10.7 and 10.3)

Mr. Ende presented the ninth draft of the suggested amendments, noting that the most recent revisions were mostly changes recommended by Assistant General Counsel Elizabeth Turner, and the changes have been reviewed by the subcommittee and Ms. Turner, who approved of the draft.

Tom Waite moved, seconded by Joe Nappi, to forward the proposed amendments to the BOG for consideration at its July meeting. The motion was approved unanimously.

III. ADR Subcommittee

Mr. Nappi reviewed other potential options for ADR processes identified by the subcommittee in its November report, recalling that of the two options, the subcommittee determined that only one appeared feasible: the interval between issuance of a Review Committee's hearing order and the filing of a formal complaint. Mr. Nappi sought input from DART, but also commented that it

may be premature to make a recommendation because the existing proposal to modify the ELC to include a settlement conference procedure has yet to be adopted or tried. Mr. Nappi noted that unless DART decided to further address the issue, the subcommittee's work would be at an end, as this was the last meeting.

This led to a discussion about the future of DART.

VI. Discussion on DART

The Chair commented that the Court is pleased with DART's work and finds it to be a valuable forum for the discussion of issues affecting the disciplinary system, and is interested in seeing the advisory group continued. The Chair suggested a motion be made to recommend to the BOG and the Court that the DART be continued indefinitely. Discussion ensued about the timing of such a recommendation and the fiscal and staffing impact of continuing the DART in light of the 2012 license fee referendum.

It was observed that according to its charter DART was created for an initial two-year period, subject to evaluation and review by the BOG and the Court. Presumably, a recommendation to continue its existence beyond the pilot-period would be included in DART's annual report. Since the last report was submitted only six months ago, the Chair felt it would be premature to issue another report again before the end of WSBA's fiscal year, and indicated a preference to issue the next annual report at the end of the calendar year. Members discussed a suggestion to recommend that DART continue for two more years subject to another review at that time.

The Chair agreed to draft a memo to the BOG to recommend the DART be continued for another period of two years. Mr. Ende expressed an intention to abstain from the motion, citing reduced budget and staff resources in ODC in the wake of the license-fee referendum.

Discussion followed about the issue of how DART might be staffed in the future and where it ought to reside. Ms. Littlewood expressed some reservations about the resource and appearance impact of DART being staffed by WSBA, and recalled there had been discussion during the Discipline Review Committee process about DART being staffed through the Supreme Court, but that recommendation was not made in the final report that went to the Board of Governors.

Discussion continued about the composition of DART. The Chair noted the value of DART is limited by its membership, which is currently comprised of mostly WSBA employees and appointees, with only two lawyers and two non-lawyers making up the rest. It was suggested that including representatives of other groups would broaden its perspective.

It was determined that further discussion between the Court and the Bar on the placement, staffing, and composition of DART is necessary before any recommendations are made. The issue was tabled to the next meeting in September.

IV. Disability Counsel Subcommittee

Mr. Ende reported on the results of a National Organization of Bar Counsel (NOBC) listserv survey regarding the models used in other jurisdictions and WSBA's expenditure on appointed disability counsel in recent years. He described a variety of methods used by other states, from

very informal to moderately organized processes, none of which seemed to offer a readily adaptable model for Washington. In fact, many states do not even appoint disability counsel. A review of the last five years (2007 to 2012) showed that costs are variable and difficult to budget, with the trend indicating that expenditures are increasing.

At its last meeting, the subcommittee focused on three ideas: 1) a Disability Counsel Administrator and Disability Counsel Panel—similar to the Chief Hearing Officer and hearing officer model, which would require amending the ELC; 2) in-house, part-time WSBA Disability Counsel; 3) part-time, outside contract lawyer using a system similar to RFP competitive bidding/contract by governmental entities providing public criminal defense. Mr. Ende noted that the General Counsel’s office had concerns about the in-house counsel option. DART members inquired about the cost of an outside contractor to handle disability cases. To get a better sense of the cost, the subcommittee would need to figure out the number of hours spent on an average case; the information exists but has not been compiled. Also discussed was the limited ability of even experienced volunteer disability counsel to recognize and deal with the mental health issues that typically arise.

VIII. Suspended Sanctions

The Chair included in the materials, an Alaska State Bar disciplinary order allowing for suspended sanction and supervised probation. Given DART’s work on identifying expanded opportunities for ADR and diversion in the disciplinary process, the Chair found this approach interesting. Washington’s ELC does not include the option of suspending sanctions. Mr. Ende commented that it is not a procedure found in the ABA Model Rules for the Enforcement of Lawyer Conduct either. Since little is known about the procedure and the experience of states that use it, the DART would have to conduct research before determining whether it should be considered as an option here. Ms. Underhill commented on the experience of one of her partners who had case where the suspension was held in abeyance after certain conditions were required to be satisfied; for example, if a respondent with substance-abuse issues demonstrates significant recovery during the disciplinary process. DART also discussed the impact on clients who may be affected by a lawyer’s suspension. The Chair requested that members provide DART with additional information if there is interest in looking at the issue further.

VII. Reciprocal Discipline

The Chair shared for informational purposes a recent change to the language of the show-cause orders issued by the Court in reciprocal discipline cases. The Chair observed that in some situations, where a respondent has served the entire period of suspension in another state but has not practiced in Washington, a reciprocal suspension ordered prospectively has the impact of additional, rather than reciprocal, “punishment.” The Chair described attempts to resolve the issue by a rule change, which was rendered unnecessary after collaborative work with Mr. Ende resulted in a relatively simple resolution to the problem, i.e., revising the form of the Court’s orders.

The meeting adjourned at 2:20 p.m.