



WSBA

WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY ADVISORY ROUND TABLE (DART) 2010 – 2011

Meeting Minutes November 10, 2010

Members present: Hon. Tom Chambers (Chair), Susan Bergman, Doug Ende, Tom Fitzpatrick, Roger Leishman, Paula Littlewood, Joe Nappi (phone), Leslie Peterson, Ted Stiles (phone), Elizabeth Turner, Dayna Underhill, and Darlene Neumann (staff liaison). Jennifer Cannon-Unione was excused. Geoffrey Gibbs, Chair of the ELC Drafting Task Force and Scott Busby, Office of Disciplinary Counsel, also attended.

The meeting began 2:05 p.m.

Welcome and Introductions

Welcome and introductions were made around the table, including over the telephone.

Minutes

Minutes from September 15, 2010 were approved.

Update on WSBA Enforcement of Lawyer Conduct (ELC) Drafting Task Force

Geoffrey Gibbs, former WSBA Governor and current Chair of the ELC Drafting Task Force, gave an overview of the background and purpose of the Task Force and stated the review of the ELCs was a comprehensive, on-going process. He discussed the Board of Governors' ("BOG") analysis of whether to remove the disciplinary system from the WSBA and place it directly under the control of the Supreme Court, which the ABA recommended in 1993. The BOG did not recommend the "de-unification", in part because the discipline system operates independently without any interference from the BOG and the Supreme Court remains the final arbiter of lawyer discipline in Washington.

The ABA recommendation to replace the current system of volunteer, non-compensated hearing officers with professional, paid hearing officers was also not adopted. Mr. Gibbs stated that the use of volunteers is appropriate because they are independent, hearings are conducted fairly, and overall, the volunteers are up to the task. He noted the Supreme Court does not always follow the recommendations of the Disciplinary Board, and concerns of grievants and respondent lawyers are dealt with fairly by the Court.

Mr. Gibbs described the composition of the ELC Task Force and the organization of subcommittees. Each subcommittee includes someone from the “prosecution” side, the “defense” side, and hearing officers or other interested parties. He explained the subcommittees are assigned specific ELC titles to review. Each subcommittee proposed recommendations, many of which deal with substantive issues, to the ELC, including concerns brought by members of the public. The Task Force created a comprehensive matrix containing proposed ELC rule changes, the ABA’s recommendations, draft language, and adoption by the respective subcommittees, which is updated after each Task Force meeting. The matrix is viewable online at www.WSBA.org under Committees.

In total, Mr. Gibbs reported the Task Force is considering approximately 200 changes to the ELCs; of those approximately 130 have been acted on by the task force and 60 remain. The Task Force expects to complete the remaining work in the next 1-2 meetings. The first reading of the proposed ELC changes is expected to take place at the March 2011 BOG meeting, with a second reading in June 2011. Once they are finally approved by the BOG, the recommendations will be sent to the Supreme Court for consideration.

Discussion

Roger Leishman asked how the Task Force has handled the problem of perception regarding volunteer hearing officers, independence, and the disciplinary system’s relationship to the WSBA’s Disciplinary Counsel and General Counsel offices. Mr. Gibbs replied the issue was not directly debated by the Task Force because it is a BOG policy. He explained the priority of the Task Force is focused on procedural issues (such as, for example, length of response times), and more substantive issues (such as the processes for addressing issues related to competency of respondent lawyers), and that the policies underlying the structure of our discipline system are not really the Task Force’s focus.

Regarding independence of the system, Mr. Gibbs stated the Chief Hearing Officer, the hearing officers, and the Disciplinary Board are staffed by the Office of General Counsel. The Office of Disciplinary Counsel has its own staff. He noted that a “Chinese wall” is built between the hearing officers and the Disciplinary Board and the staff of ODC. The BOG receives only general information about the handling of discipline cases and exerts no influence on the hearing officer’s recommendations. Because staffing for the Disciplinary Board and the hearing officers both come from the General Counsel’s office, Mr. Gibbs acknowledged there is the potential for the perception of an appearance of fairness.

Mr. Leishman estimated that one-third of the BOG’s budget is for the prosecution process and there may be line items that generate expense due to discipline cases. Mr. Gibbs explained that when on occasion a line item expense for discipline appears, the BOG is not provided with any substantive information about the case. Mr. Fitzpatrick asked how much time the Office of General Counsel spends staffing the hearing officers and the Disciplinary Board. Elizabeth Turner stated the Disciplinary Board is staffed by another individual within OGC, and takes between half to three quarters time of that person’s time. She added that OGC also conducts hearing officer trainings, handles procedural items, and provides general assistance, but does not consult on discipline cases. The Clerk to the Disciplinary Board is also housed in OGC.

Perspectives and Perceptions.

Prior to discussion of agenda item III, the Chair explained that he had sent a letter last August to various interested parties requesting their input on issues and concerns in the discipline system. The Chair received a letter from lawyer Shawn Newman and passed out copies at the meeting. The Chair commented that Mr. Newman writes of what he perceives to be an overly adversarial and prosecutorial process which begins when a complaint is filed and when the respondent lawyer disagrees with it, the case takes on a life of its own. Mediation or other alternative solutions are non-existent. The Chair suggested the Round Table examine these issues.

The Chair introduced Tom Fitzpatrick, whose firm represents respondent lawyers in disciplinary proceedings. Mr. Fitzpatrick spoke briefly about his background and involvement with various ABA committees and commissions dealing with model rules and judicial conduct. He cited a lack of uniformity in ethical standards because of today's national and international practice. Because Washington developed its own procedural rules for lawyer discipline, he said it is difficult to analyze and compare Washington with other discipline systems. Mr. Fitzpatrick stated the disciplinary process today has become very adversarial in nature; in the past it was seen as an "old boy's club" and the public had little confidence in the system, and perhaps now it is too far the other way.

He listed multiple concerns about due process:

- Adversarial attitude at the beginning and throughout the process
- Excessive charging by prosecutors
- Insensitive form letters
- General bias in favor of the rights of grievants
- Lack of comparable rights for respondent lawyers
- Immediate demands for lawyer's response (2 weeks)
 - Little concern for the burden this places upon lawyers
- Lack of burden of proof on the grievant
- No set time frame for WSBA to respond after the lawyer's response is received
- No statute of limitations on filing grievances

Mr. Fitzpatrick commented his clients do not have much confidence in the fairness of the judicial proceedings because of the blended functions within the Bar. He noted this was a concern of the ABA as well when they recommended transferring the disciplinary process to an independent arm of the Supreme Court. He stated the concerns are more than perceptions and cited the lack of transparency of the Review Committees of the Disciplinary Board and their involvement in both "probable cause" review of ODC hearing recommendations and appeals of hearing officer decisions.

- Hearing Officers

Mr. Fitzpatrick commented the practice of hearing officers requesting the respondent lawyer submit proposed findings of fact and conclusions of law, including proposed sanctions if found liable, is a due process and appearance issue. He opined that while many hearing officers are conscientious and well meaning, they are volunteers burdened by the amount of time and effort it takes to adjudicate a case. In some cases, he stated the issues may be complex and require a deep understanding of the Rules of Professional Conduct (RPC) and its nuances. Mr. Fitzpatrick pointed out the

longstanding ABA position on the structure of discipline systems is to move away from an integrated system to a full-time, independent discipline system. He commented that California has a separate state bar court. He discussed the problem of large pools of volunteer hearing officers who are not called upon and, therefore, may be “rusty”. The move to fewer numbers of hearing officers means a smaller pool, but more trainings are required which take up the volunteer’s time. Mr. Fitzpatrick opined that having professional hearing officers, especially for complex cases would improve the quality of the adjudicative process.

- Burden of Proof

Mr. Fitzpatrick commented the “clear preponderance” burden of proof is unique to the discipline process and is little understood. He questioned the need to have such a standard, especially when other professions use the equivalent of “clear and convincing,” and suggested the issue might be addressed by the Task Force.

- Proportionality

The ABA has standards for sanction analysis based on the conduct and mental state of the lawyer. Mr. Fitzpatrick raised concerns about whether or not cases in Washington are proportionate since the Bar maintains all knowledge of discipline cases and can easily raise them, while the defense must pull cases together. He suggested the creation of a table which would be accessible to all. He cited the difficulty of counseling a client without more information on proportionality for analysis and comparison. For solo practitioners or smaller firms, he believed this to be a particular problem since they do not have access to expertise on proportionality. Dayna Underhill noted the Oregon Bar has annotated RPCs and the Discipline Reporter is also accessible to members. She believed this helps resolve cases more quickly.

- Admonitions

Mr. Fitzpatrick was critical of the practice by the Review Committees to issue admonitions on their own when Bar Counsel does not recommend it, and subsequent publishing of the information in the Bar News.

- Statute of Limitations

Mr. Fitzpatrick raised the issue of the lack of a statute of limitations in the ELC. The rationale behind this policy is to protect the public interest. Mr. Fitzpatrick stated that most of the time, this is not the case. Few lawyers keep their files forever and without a statute of limitations, lawyers are faced with a never ending problem of reaching back. The ability of the Bar to open grievances on its own also means a grievance against the lawyer may be brought even after the underlying case has resolved. He stated the Bar can still “zap” the lawyer. Vexatious clients can harass lawyers by filing grievance after grievance. He suggested that there needs to be a better process to deal with grievances that become a cycle of complaint, dismiss, appeal. Mr. Fitzpatrick acknowledged the ABA model rules do not contain a statute of limitations.

Mr. Leishman asked if Washington departed from an integrated system, what the consequences of altering the system would be, whether changing the dynamic would pose a risk. Mr. Fitzpatrick stated Washington has a good bench-bar relationship, and he feels the structure would not fundamentally change to alter that relationship. He pointed out that traditional methods of

practice are changing and relying exclusively state-based regulation may be impractical in today's multijurisdictional and global practices.

- Diversion

Mr. Fitzpatrick opined diversion was a good program, but suggested it might be improved to encourage deferred prosecutions with the use of ADR or other solutions to get more cases out of the system.

Discussion

Mr. Gibbs stated it is not particularly beneficial to evaluate the quality of the Washington system from the standpoint of a purely ABA perspective. He commented the self-regulating model in Washington works well and the Bar strives to avoid the appearance of being a “good old boys” network. He acknowledged the disciplinary process becomes adversarial in nature when grievances become complaints, but did not agree with the perception that the process is overly adversarial from the start. Regarding the statute of limitations, Mr. Gibbs stated it had not surfaced as an issue in the ELC Drafting Task Force; however, he agreed it is a valid issue and will place it on the Task Force’s agenda. On hearing officers, Mr. Gibbs pointed out the volunteers are vetted and respondent lawyers have a greater assurance that volunteer hearing officers will better understand the view point of solo practitioners as opposed to professional hearing officers. Mr. Gibbs stated he will add the burden of proof issue to the Task Force’s agenda since there is a perception that it is not clearly understood. There was discussion as to where the standard originated and that it may be up to the Court to address any change to the burden of proof standard. Mr. Gibbs found the argument on proportionality interesting and stated that access to a database must be balanced with the need for confidentiality. He suggested the Task Force may address the issue. Further discussion followed on stipulations and the Supreme Court’s deference to agreement by parties, even if the Court observes that it may not be the correct sanction in the given circumstance.

The Chair acknowledged that there was little time left for any responses by Mr. Ende, Ms. Turner, or anyone else, and wondered if we would need to allow time for response at the next meeting. With five minutes left, Mr. Nappi, on the phone, stated that a number of the concerns raised by Mr. Fitzpatrick are not new and appreciated the comments made by Mr. Fitzpatrick. Ms. Turner and Executive Director Littlewood stated likewise.

The Chair announced that Peter Ehrlichman will address the Round Table on ADR solutions at the next meeting.

Adjournment

The meeting adjourned at 4:00 p.m.