



WSBA

WASHINGTON STATE BAR ASSOCIATION

DISCIPLINARY ADVISORY ROUND TABLE (DART) 2011 – 2012

Meeting Minutes November 9, 2011

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

Also in attendance were Michael Badger, Associate Director of WSBA Lawyers Assistance Program, Dan Crystal, WSBA Diversion Administrator, and Bruce Redman, ODC Intake Disciplinary Counsel.

The meeting began at 2:03 p.m.

Welcome and introductions were made around the table.

I. Minutes

The minutes of September 14, 2011 were approved.

II. Draft Annual Report to Washington Supreme Court and WSBA Board of Governors

Joe Nappi moved to adopt, seconded by the Chair. The motion passed unanimously.

III. ADR Subcommittee Report

Subcommittee chair Joe Nappi reported on the subcommittee's discussions regarding two points in the disciplinary process that had been identified as potential additional opportunities for ADR:

1. Following Review Committee authorization of a formal complaint and before the filing of the formal complaint.
2. After the hearing officer's Finding of Facts and Conclusions of Law and Recommendation (FFCL), and before further action by the Disciplinary Board.

The subcommittee discussed concerns expressed by ODC that formally expanding ADR would be premature given that the discipline system has not yet implemented the settlement conference

procedure proposed for incorporation into the ELC. The subcommittee unanimously recommended against option #2 because of procedural impediments to appellate mediation after a hearing officer has issued a decision and the matter is jurisdictionally subject to Disciplinary Board review. As for option #1 however, the subcommittee concluded that ADR may be beneficial to both sides at that juncture because it would offer the respondent an opportunity to participate in the process and provide ODC with another “tool” which they can use to help resolve cases at a point where they already offer stipulated resolutions. The subcommittee sought the committee’s input on whether they should forge ahead and develop a process.

Discussion

The committee discussed the availability of mediators and possible use of hearing officers to serve as mediators, an idea which had been discussed at previous meetings. Mr. Nappi stated there are a number of hearing officers who would be highly qualified. It was suggested that an alternative resource might be alumni of the Disciplinary Board or former hearing officers. It was noted that such individuals would have unique knowledge of the discipline system which outside mediators are unlikely to possess.

Mr. Nappi and Doug Ende discussed concerns about the practicalities of implementing settlement conferences and expect some issues will arise which may require further refinement of the process. Mr. Ende noted that the Supreme Court has yet to adopt the proposed settlement-conference provision in the ELC. In the meantime, there may be ways to use informal mediation by agreement in the normal course of stipulation negotiations.

No consensus was reached on action by the subcommittee. Further discussion deferred to the next meeting.

IV. Diversion Subcommittee Report

Subcommittee chair Jennifer Cannon-Unione discussed a report compiled by Bruce Redman of ODC summarizing diversion systems used in other states. She noted the similarities and differences between Washington and other programs. For example, disciplinary counsel in some other states monitor the diversion contract for compliance, whereas in Washington that responsibility is delegated to the diversion administrator, a non-ODC staff person. Also, a majority of states do not require an admission of misconduct as a prerequisite to diversion.

Dan Crystal, WSBA Diversion Administrator, passed out information on diversion, discussed how the program functions, and answered questions from the committee.

Intake Diversion

Mr. Redman reported that 12 states offer intake diversion, with diversion decisions based on limited information (grievance, response, court docket, or other written information). If there is clear documentary evidence of a problem, such as multiple grievances on the same issue or multiple DUI offenses, diversion may be offered on a “take it or leave it” basis. The logic behind the policy is to quickly resolve the grievance, expend less investigation resources, and remove uncertainty about disposition of the grievance for the respondent. According to Mr. Redman, states that offer intake diversion report that it is successful and has a good participation rate.

Diversions Evaluation

The committee discussed the perception that the evaluation discourages participation. Mr. Crystal stated that the program strives to be transparent. Initially, the respondent is directed to a webpage describing exactly how the evaluation will be conducted. The diversion administrator evaluates whether the respondent has gained any insight about the conduct which led to the violation during a structured discussion of the grievance. The evaluation also determines the level of motivation to complete the contract and includes discussion of possible terms. Michael Badger, Associate Director of the WSBA Lawyers Assistance Program, also handles some diversion cases, and emphasized that it is not a psychological evaluation but more of an interview tailored towards the issues and to finding the best contract terms for the respondent. In this respect, the diversion administrator's report serves as an advisory role to ODC.

Other members pointed out that without the independent evaluation there could be further harm (to the public) by allowing lawyers to fall through the cracks and miss underlying problems which may be revealed during an evaluation. The same "tip of the iceberg" concern was also expressed about the intake diversion process based on limited information and investigation.

Mr. Ende suggested the evaluation's negative perception might be based on past events and DART's assumption that it acts as a deterrent may not be accurate without knowing the specific reasons why respondents choose to decline.

Admission to Misconduct

Mr. Redman reported that some of the programs that do not require an admission of misconduct have explained that the intent is to avoid any obstacle to acceptance of a diversion offer. Mr. Ende noted that ELC 6.6 does not expressly require a lawyer to admit a violation of the RPC; rather, the rule requires an affidavit "setting forth the respondent's misconduct." However, he had concerns that without an admission to facts and violations, if the diversion was terminated for noncompliance, it would be resource-intensive for ODC to obtain evidence after a lapse of 2-3 years. The committee discussed the concept of waiver of the right to dispute allegations of misconduct, similar to a procedure used in the criminal context. Roger Leishman suggested a model whereby a non-compliant lawyer is disciplined for the diversion breach under RPC 8.4 rather than for the underlying misconduct. Referring to the Arizona model, Mr. Ende stated that the essential purpose of the discipline system is to protect the public, and that purpose is better served by public discipline for the original misconduct rather than a procedural violation. It was pointed out that such a model would not necessarily prevent ODC from investigating or prosecuting the original violation.

Comparison to Other Models

Mr. Crystal reported Washington's diversion program currently has 37 participants. Participants are required to attend mandatory ethics school and, typically CLE programs in relevant areas. Roughly 30% are referred to law office management (LOMAP), 20% for ethics consultation, and 15% to counseling. The diversion administrator monitors attendance at counseling, but otherwise receives no information about the sessions. The contract terms are now shorter (generally 1 year) than before and more reflective of the conduct that led to the grievance. Due to the program's increased transparency, the participant knows what to expect. Mr. Crystal stated the challenges are monitoring participants who are slow to follow through, but found compliance not to be an insurmountable issue in most cases. Of the two which terminated last year, they were related to substance abuse problems.

The summary report of other states found that most diversions are most often used for office management, communication problems, and substance abuse issues. Mr. Redman discussed Colorado and Arizona as models for expansion as both offer intake diversion early in the grievance process, with limited information. Colorado, which is not a mandatory bar, employs a large staff to handle intake diversion and diverts 50-60 lawyers per year. Arizona, a mandatory bar, modeled their program after Colorado and has 3-4 disciplinary counsel focused on intake screening. For its size, Mr. Redman said Washington's success rate is fairly good at 90%.

The committee discussed how the capacity of Washington's program would be affected, in terms of staffing, if the program were to be expanded. Mr. Badger believed their process can be adjusted and they would be able to handle more cases. Mr. Crystal reported that he does one diversion per week on average. Mr. Ende opined that Washington has a successful program and thought it would be possible to extend it.

V. Draft Amendment of Formal Complaint

Deferred to next meeting.

VI. HALT Position Paper

In the short time remaining, Roger Leishman stated that in regards to HALT's recommendation #3 (public disclosure of private admonitions and sanctions), the BOG has declined to adopt a proposal by the ELC Drafting Task Force relating to public admonitions and directed the Task Force to identify alternatives to its recommendation.

Further discussion deferred to next meeting

VII. Other Matters

Doug Ende stated that WSBA Assistant General Counsel Julie Shankland will speak at the next DART meeting regarding appointed counsel on lawyer disability cases, together with a lawyer who has served as appointed disability counsel.

Adjournment

The meeting adjourned at 3:55 p.m.