



## Suitable Representative - Rulemaking Workgroup

### MEETING NOTES

December 7, 2016 ~ 9:00am – 12:00pm

**Attendees:** Ed Pesik, Johnette Sullivan, Jeff Manson, Barb Cleveland, Sheri Sawyer, Barbara Harris, Pete Wogsland, Laura Bradley, Maggie Leland, Evelyn Cantrell, David Lord, Elizabeth Flavin, Lisa Brodoff, Terry Orphy, Stacy Graff

**Absent:** Neil Gorrell, Lorraine Lee

**Welcome:** Chief Lorraine Lee

Chief Lee welcomed workgroup members to the meeting. She noted that the subcommittees have prepared draft rule language based on feedback from subcommittee members. The leads for each subcommittee will present on their draft rule language.

**Substantive Discussion:** Ed Pesik

- Accommodation Response – review subcommittee draft
- Assessment Criteria – review subcommittee draft
- Training – review Ed’s draft
- Data Collection – review Ed’s draft

#### Accommodation Response Subcommittee

Johnette shared the draft language proposed by the Accommodation Response subcommittee. Two items to consider are whether a notice of withdraw may be appropriate, and what should be the timeline for the process.

Johnette stated that we do not currently have a pool of suitable representatives, so it will take time to find suitable candidates and establish the pool. Ed noted that the ADA coordinator will be acting as expeditiously as possible.

Ed stated the main issue is who pays the cost for a suitable representative. Lisa noted that the ADA requires no cost to the parties. Pete noted that the factors are weighted towards attorneys; however, the representative does not have to be an attorney. Elizabeth stated that by excluding references to attorneys it leaves the rule open to others. Jeff noted that they are just factors and not elements. Lisa stated that it is not exclusive to attorneys; if we start adding exceptions, she thought it would limit the rule. Laura agreed with Lisa.

Johnette explained some subcommittee members raised the issue of possible discrimination against other parties when granting accommodations to one party. Laura stated the basic premise of the rule is that a party has a disability and needs accommodation. Lisa stated that the *Franco Gonzales* case addresses the concern (the case was a decision of the US District Court for Central District of California). Pete noted that the issue is not settled – the *Franco* decision was not a published opinion. Laura explained that there are other types of accommodation and the issue does not rise to the same level.

Johnette stated that the administrative process is the service for purposes of equal access to OAH services by parties. OAH's service is the hearing not the accommodation; the representation is an accommodation for a disability. Maggie noted the question is whether the party has equal service/access. Johnette noted that if we appoint a non-attorney it does not mean that we are providing less service or unequal service to other parties. Ed stated it is about a party's access to the process.

Jeff stated that we need to make the process fair. He stated the Code of Ethics already requires ALJs to ensure equal access and balancing the scale for all parties including pro se parties. Johnette noted that any party can refer for a suitable representative (not just the party with a disability). Elizabeth stated that we need to focus on this as an ADA process. Barbara raised the issue of whether OAH's proposed rule is reconciled with any other authority. She noted that everyone is entitled to an administrative hearing but is concerned that expanding rights to include appointment of a representative by OAH does not reconcile with other rules.

#### Assessment Criteria

Jeff shared the draft rule language proposed by the Assessment Criteria subcommittee.

Ed raised the question of whether a party has the ability to consent. Laura noted it is a difficult challenge to determine whether a party needs accommodation assistance. Lisa stated this issue would be covered during training to the ALJs; best practices will come out of the training and discussion.

Jeff noted that the term, "unable to meaningfully participate" is standard terminology throughout the draft rule. Maggie raised the question of whether the party is requesting a "suitable representative" or an "accommodation." Ed noted this will be part of the training for ALJs. Johnette noted that the ADA coordinator will be assessing what type of accommodation is needed. Terry mentioned there are concerns about how the ADA coordinator or other entity will determine the disability and the accommodation. Terry asked what training/experience/qualifications will they have to make these decisions?

Ed posed the question of whether the ADA coordinator needs clinical/diagnostic training. David noted that there can be a request for documentation under the ADA that a person has a disability but it is not required. Laura suggested giving a letter to the party's doctor and have them tell the ADA coordinator what the limitations are. Ed noted that the ADA coordinator engages in the fact-finding process to make determinations.

Jeff suggested that the Accommodation Response and Assessment Criteria draft language sections be reconciled into one.

Johnette raised an issue regarding the use of the term "legal guardian" (in subsection 5). Parents can be a legal guardian and not necessarily court-appointed. **Jeff will reword that language.**

A question was raised on how to sequester the ADA accommodation data and what to sequester in PRISM. This should be a separate process from the hearing information. The concern is HIPPA data and the improper release of information.

A suggestion was made to make subsections 8, 9, and 10 separate and not include the language under Assessment or Accommodation; it may be more appropriate to put them under a general applicability section.

### Training and Data

Ed shared the draft rule language proposed for training and data.

Elizabeth noted that the model rules from the 2014 CR-101 filing have a list of factors that should be included.

Johnette noted that in subsection (3)(c) “persons” refers to a pool of suitable representative candidates – what is the required training for them? Jeff stated that there should be two types of training: skills training and OAH orientation. **Ed will reword this language.**

Elizabeth stated that she would like to see a report on cases that go to the ADA coordinator and whether they are ALJ requests or appellant requests. Lisa noted that the model rules from the 2014 filing discuss the types of data needed to be collected.

Ed stated that we will develop and post a report on our public website which includes data. Ed stated how often to report and what data to report still needs to be determined.

### **Assignments and Adjournment:**

- Next steps
- Next meeting date

Following are the next steps:

- Ed and Barb will merge the two drafts into one document by 12/31 and make it consistent with the rule format.
- Ed will circulate the merged document to the workgroup for review and comment.
- Comments from all subcommittee meetings will be shared; may schedule an in person or webinar meeting, if needed.
- The target to publish the CR-102 is by February 2017.
- Meeting notes and the CR-101 will be posted to the public website.

The next in person meeting will be held on 2/13/17 in Olympia. The remaining issues to discuss are cost, liability, and training requirements. **Barb will send a meeting invite to workgroup members.**