

Minutes
(unofficial until approved)
Joint Committee on Attorney Standards
Radisson Hotel, Bismarck
September 11, 2015

Members Present

Judge Michael Sturdevant, Chair
George Ackre
Jeremy Bendewald
Duane Dunn
Judge Dann Greenwood
Kara Johnson
Michael McGinniss
Justice Dale Sandstrom
Nick Thornton
Dan Ulmer
Jason Vendsel (until 12:40 p.m.)
Tom Dickson* (until 12 Noon)
Brenda Blazer*
Dave Maring*
Zachary Pelham*

* - Temporary members for lawyer discipline system review

Staff

Jim Ganje
Tony Weiler

Members Absent

Judge Paul Jacobson
Alex Reichert
Jason Steffenhagen
Pat Monson*

Also Present

Penny Miller, Clerk of the Supreme Court;
Secretary, Disciplinary Board

Chair Sturdevant called the meeting to order at 10:00 a.m. and drew Committee members' attention to minutes of the June 16, 2015, meeting (September 8, 2015, mailing). Corrections and explanations were noted on p. 2, 4th full paragraph (replace "Judicial Conduct Commission" with "Disciplinary Board"); p. , 2nd paragraph (description of records retention practices is with regard to *future* practice, not current practice); p. 6, 2nd full paragraph (investigative report is "prepared", rather than "condensed" if judicial conduct commission member objects to recommended summary dismissal).

It was moved by Brenda Blazer, seconded by Mike McGinniss, and carried that the minutes, with the noted corrections and explanations, be approved.

Lawyer Discipline System Review - Cont'd

Rule Amendments - Cont'd Review

Chair Sturdevant drew attention to the summary of rule amendments (meeting material, p.2) and the following amendments (meeting material, pp.3-26). Staff explained that the rule amendments include revisions to amendments previously reviewed by the Committee and rule amendments based on the ABA Report recommendations which the Committee has not yet considered. Committee members then reviewed the respective amendments.

Rule 2.3. Hearing Panels (meeting material, p.3). Staff said the amendment in Section A (meeting material - p.3, line 6) follows the ABA Report's recommendation that the chair of the Disciplinary Board should appoint the hearing panel chair.

Kara Johnson said the amendments reflects current practice and recommended that the amendment be approved.

Dave Maring drew attention to the last clause of Section A which provides that a hearing panel "may be a hearing officer designated from among district court or surrogate judges". He asked whether the provision has ever been used.

Penny Miller said there was a situation long ago in which a judge was appointed to conduct a hearing.

Brenda Blazer suggested the language should be deleted from the rule.

Following discussion, **it was moved by Tom Dickson, seconded by Kara Johnson, and carried that the noted language be deleted from Section A.**

In response to a question from Chair Sturdevant regarding the appointment of the hearing panel chair, **it was moved by Dave Maring, seconded by Mike McGinniss, and carried that the amendment to Section A (p.3, line 6) be approved.**

Rule 2.4. District Inquiry Committees (meeting material, pp.4-6). Staff noted that the Committee had previously tentatively approved amendments to the rule to reflect transfer of investigative responsibilities to disciplinary counsel.

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Judge Sturdevant noted language in Section B related to the appointment of special members for the purposes of conducting investigations. He suggested the language may not be necessary in light of the transfer of investigative responsibilities to disciplinary counsel.

It was moved by Justice Sandstrom, seconded by Brenda Blazer, and carried that Rule 2.4, as previously approved, be further amended to remove “Special Members” on p.4, line 12, and to remove related language on p.4, lines 14-20.

Rule 2.5. Disciplinary Counsel (meeting material, pp.7-9). Staff reviewed revisions resulting from the June 16 meeting and additional new amendments related to ABA Report recommendations:

June 16 meeting revisions: Limiting counsel record retention responsibility to records of informal matters - Section B(10), and adding a provision regarding issuance of an advisory letter after dismissal (new Section C).

Additional rule amendments from ABA Report recommendations:1) removing counsel responsibility to advise the board, hearing panels, and inquiry committees - Section B(2) revised as B(4); 2) adding new Section D generally prohibiting ex parte communications between disciplinary counsel and disciplinary board, hearing panels, inquiry committees, or Supreme Court.

With respect to new Section C regarding issuance of an advisory letter, staff noted language in the last paragraph (meeting material, p. 6, lines 15-17) generally prohibiting introduction of the advisory letter as evidence in a subsequent disciplinary proceeding except in *yet to be identified* circumstances.

Mike McGinniss said the general prohibition against introduction as evidence - with possible exceptions - is essentially a counterpart to Rule 404(b)(2) of the Rules of Evidence. He said the advisory letter could possibly be introduced and be useful for impeachment purposes in showing knowledge, habit, intent, etc., if the lawyer commits a similar violation.

Tom Dickson asked whether the lawyer would have the opportunity to respond to issuance of the advisory letter. Additionally, he asked whether, in general, an advisory letter process simply adds to the bureaucracy of the process.

George Ackre observed that the committee will have already determined that dismissal of the complaint is warranted, but an advisory letter would be issued indicating that the lawyer was “close” to a violation. He said the initial determination on the complaint should be sufficient and an advisory letter would be unnecessary.

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Brenda Blazer said she favored the opportunity to advise a lawyer with respect to areas of concern that may, if unaddressed, evolve into grounds for a complaint. She said billing practices are often an area in which a lawyer could be advised to improve to forestall future possible disciplinary issues. However, she said she prefers a prohibition against introduction of the letter in a subsequent proceeding as set out in the Washington rule (meeting material, p.28).

Mike McGinniss said the purpose of being able to introduce the letter in a subsequent proceeding would be, for example, to show that the lawyer was in fact “warned” about possible issues with billing practices if the lawyer were to subsequently assert that the lawyer had no idea there were problems in that area.

Judge Sturdevant wondered whether a record of a complaint having been previously filed would be a sufficient safeguard if the advisory letter could not be introduced. Mike McGinniss responded that the earlier complaint may not be sufficient in providing concrete information regarding the nature of the problem, as opposed to information obtained through an investigation that resulted in dismissal.

Penny Miller noted that records with respect to dismissed complaints are expunged after three years. Kara Johnson observed additionally that records, at the stage at which dismissal in this circumstance would occur, are confidential.

Jason Vendsel said that if the conduct is not considered subject to a sanction and the complaint is dismissed, then the matter should be considered resolved.

Mike McGinniss said the general objective is to provide a mechanism - a form of warning - to aid in preventing future misconduct. He said the advisory letter would provide an intermediate step in the process to advise the lawyer of a potential problem.

Dan Ulmer observed that if a complaint is dismissed and that record is confidential, and a similar issue arises again, there ought to be some method for the system to know that the lawyer simply did not get the message about conduct that borders on misconduct.

Tom Dickson said an alternative might be for the inquiry committee to recommend diversion.

Dave Maring said there are merits to both sides of the issue and there are situations in which a lawyer is engaged in conduct that is problematic but not yet sanctionable. He agreed there ought to be some mechanism to aid in addressing the conduct. He said he would lean in favor of some kind of advisory to the lawyer, but he said there are grounds for concern about how the advisory could be used in the future.

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Duane Dunn explained that in the accounting profession if a questionable practice arises a management letter is written which essentially recommends a sort of best practice to be followed. He said an advisory letter to a lawyer could possibly take a similar form.

Kara Johnson noted that a concern of inquiry committees with respect to diversion as an option is that there is uncertainty about the process and extent and elements of diversion. As a result, she said, there have been inquiries about whether it is possible to issue something like an advisory letter to the lawyer. She said several jurisdictions have something like an advisory letter process.

Penny Miller said that in the past there were occasions in which a inquiry committee chair would include in a letter of dismissal a statement about concerns inquiry committee members had about the complained-of conduct, even though dismissal was considered appropriate under the circumstances.

Judge Greenwood observed that if a lawyer's conduct is not considered subject to sanction and the complaint therefore dismissed, then it ought not matter how often similar conduct arises in the future. He said it seems unnecessary to add another step in the process to address situations in which there has been no sanctionable misconduct.

Mike McGinniss said he would prefer to have the option of an advisory letter and, if necessary, would leave aside use of the advisory letter in a subsequent proceeding.

It was moved by Mike McGinniss and seconded by Dave Maring that the advisory letter provision in Section C be tentatively approved with the prohibition against use of the advisory letter in any subsequent proceeding.

Brenda Blazer said she is generally in favor of the motion but drew attention to the reference to inquiry committee versus panel (meeting material, p.8, line 8). She said there is a separate issue regarding the use of three-member panels that should be discussed and consequently a decision would be necessary regarding the panel reference in Section C.

Chair Sturdevant said the noted issue would be reserved for further discussion.

Dave Maring drew attention to Section C(1) [meeting material, p.8, lines 10-11] regarding a ground for issuance of the advisory letter: that the conduct constitutes a violation but does not warrant an admonition or sanction. He asked whether there are circumstances in which there is such a violation.

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Kara Johnson said sometimes technical, relatively minor rule violations will occur that do not seem to warrant a disciplinary measure.

After further discussion, **the motion carried** (11-yes; 2-no [Tom Dickson, George Ackre]).

Committee members next reviewed new Section D, which would prohibit ex parte communications between disciplinary counsel and members of an inquiry committee, hearing panel, the disciplinary board, or the Supreme Court (meeting material, p.8, lines 18-28, p. 9, line 1). Staff said the draft amendment reflects an ABA Report recommendation.

Judge Sturdevant said the ex parte prohibition is related to the draft amendment that would remove the disciplinary counsel duty of advising the board, inquiry committees, and hearing panels on legal issues related to discipline and disability (meeting material, p.7, lines 22-23).

Kara Johnson said she understands the principal concern addressed by the ABA Report recommendation. But, she said, there are often issues encountered by inquiry committees, for example, where there may be a need for input and a second opinion.

Brenda Blazer cited a recent question regarding whether press coverage and cameras would be allowed in an inquiry committee proceeding. The conclusion, she said, was that cameras would not be allowed since the process is confidential at that stage.

Penny Miller noted that the disciplinary board has contract staff assistance for purposes of research, drafting of documents, and other matters. She said her office has often responded to procedural questions from inquiry committees and the disciplinary board.

Dave Maring noted Section D(2), which provides that a violation of the section is a ground for lawyer or judicial discipline. He said the provision seems somewhat harsh and wondered whether there would be a potential for abuse.

Judge Greenwood asked whether the provision is necessary at all since a violation of the rules, of which Section D would be a part, is a basis for discipline.

Mike McGinniss agreed there appeared to be no necessary reason for including the provision. Brenda Blazer also agreed.

It was moved by Mike McGinniss, seconded by Dave Maring, and carried that Section D(2) [meeting material, p. 8, line 28, and p.9, line 1] be removed.

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Jason Vendsel asked if there are particular situations in which *ex parte* communications between disciplinary counsel and an inquiry committee, for example, were necessary. Brenda Blazer responded that sometimes there are questions regarding a particular process or how a complaint should be handled. She said such issues may be less frequent if investigative responsibilities are transferred to disciplinary counsel.

Justice Sandstrom noted that *ex parte* communications would be permissible with respect to scheduling and administrative purposes. He suggested it may be helpful to include “procedural” purposes also.

Jason Vendsel said matters of procedure could encompass a broad area of activities. Dave Maring agreed the concept is broad but noted that the draft language requires disclosure of the communication to all other parties.

It was moved by Justice Sandstrom, seconded by Mike McGinniss, and carried that Section D(1) be modified to permit *ex parte* communications for procedural purposes [meeting material, p.8, line 21]. (Jason Vendsel - no).

It was moved by Dave maring, seconded by Mike McGinniss, and carried that draft Section D, as modified, be approved.

Chair Sturdevant drew attention to the *draft amendment to Section B(2) [revised as Section B(4)]* [meeting material, p.7, lines 22-23] which would remove the duty of disciplinary counsel to advise inquiry committees, the disciplinary board, and hearing panels on legal issues related to discipline and disability. The draft amendment reflects an ABA Report recommendation.

Penny Miller noted that annual training is provided by disciplinary counsel for those involved in the disciplinary process. She said the rule language related to advising is very broad. She wondered whether removing the provision might inhibit the ability of disciplinary counsel to provide training and education programs.

Judge Greenwood said the draft amendment simply would remove the duty to advise, which would not foreclose training and education.

Penny Miller suggested the discussion should clearly reflect that there is no intention to remove the ability to provide training.

Jeremy Bendewald suggested replacing “advise” with “provide training and education”.

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After further discussion, **it was moved by Mike McGinniss, seconded by Jeremy Bendewald, and carried that Section B(2) [revised as Section B(4)] be modified as suggested.**

Dave Maring drew attention to renumbered Section B(9) and the current rule reference to conviction of a serious crime “in Rule 4.1C”. He suggested that the language be changed to “as defined in Rule 4.1C”. Committee members agreed.

It was moved by Jason Vendsel, seconded by Tom Dickson, and carried that Rule 2.5, as further modified, be approved.

Rule 3.1 - General Procedures. Staff explained that the revised draft amendments reflect general discussion at the June 16 meeting and the conclusion to further consider the Alternative B amendments. The amendments, he said, provide for summary dismissals with inquiry committee review and opportunity to object, and recommended dismissals after investigation with review by a panel appointed by the inquiry committee chair which may then approve or reject the recommended dismissal (meeting material, pp. 10-12).

Staff said there are additional draft rule amendments reflecting an ABA Report recommendation that Section D(6) be amended to remove the exception for notice to complainant of opportunity to appear if complainant is considered to pose a threat of harm.

Brenda Blazer expressed concern about the draft review process when summary dismissal or dismissal after investigation is recommended. She said her preference is that a recommended summary dismissal should be reviewed by the three-member panel if there is an objection and recommended dismissals after investigation should be reviewed by the full inquiry committee so the complainant is afforded the right to appear. She said the three-member panel approach poses a specific concern with respect to whether the complainant would be able to appear before disposition of the complaint. She said the draft amendments appear to provide more consideration for summary dismissals if there is an objection, that is, consideration by the full inquiry committee, than would be available for recommended dismissals after investigation, which would be considered by a three-member panel.

Kara Johnson explained that, similar to the summary dismissal process in the judicial discipline rules, a summary dismissal that is objected to by an inquiry committee member would then be further considered by the inquiry committee for purposes of determining whether a regular dismissal is warranted.

Mike McGinniss observed that if a three-member panel reviews a dismissal recommended after investigation, then there likely is an opportunity for the complainant to appear - either in person

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or perhaps by telephone. Additionally, he noted that the basic objective of establishing a three-member panel process was to free up the full inquiry committee to consider more complex complaints.

Dave Maring agreed and said the three-member panel was contemplated as a method of streamlining and expedite the process for considering dismissals.

Brenda Blazer agreed with the ostensible purpose of streamlining and expediting the process, but expressed concern that complainants ought to have an opportunity to present their case before the matter is resolved.

Staff noted Section D(6) [meeting material, p. 13, lines 19-22], which is the current rule provision regarding notice to the complainant. He said if the three-member panel approach is retained and it is thought necessary to clearly afford an opportunity for the complainant to be heard, then the language could be modified to include a reference to the panel.

Brenda Blazer said her preference would be to eliminate the three-member panel option entirely. She said investigation of complaints by disciplinary counsel will serve to considerably streamline and expedite the process. She said if summary dismissal is recommended, there should be an opportunity for the complainant to discuss the matter further with the full inquiry committee. She emphasized that discussion among all inquiry committee members of the merits of a complaint is often the most important part of the process, and that may not occur to the fullest extent with a three-member panel.

Mike McGinniss noted the burdens for volunteers participating in the discipline process and the claims on time and resources if every inquiry committee member must review each dismissal as opposed to review by a three-member panel. Nevertheless, he said there is merit to the efficacy of having the full committee discuss disposition of a complaint.

Dave Maring asked whether the thought is that dismissals recommended after investigation should be treated like summary dismissals in that if there is an objection the recommendation would be considered by the full committee.

Brenda Blazer said her preference would be for that the recommended dismissal should be automatically reviewed by the full inquiry committee.

Dave Maring said he would not necessarily be opposed to the suggested process and noted that transferring investigative responsibilities to disciplinary counsel would represent a significant, expediting change in the process.

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In response to a question from Mike McGinniss regarding timing, Kara Johnson said notice of an inquiry committee meeting is usually provided two weeks in advance of the meeting. She said it is uncertain how the timing element might be affected if disciplinary counsel conducts investigations. She said the hope is that the addition of an assistant or contract investigator would ensure the current timing could be maintained.

Following further discussion, **it was moved by Dave Maring, seconded by Mike McGinniss, and carried that the Committee review a modification to previously reviewed Alternative A comprised of the following elements: 1) an expedited process for summary dismissals, and 2) submission of dismissals recommended after investigation to the full inquiry committee.**

Staff drew attention to a *revision to Section D(5)* resulting from the June 16 meeting - p.13, lines 13-14 - to provide that the investigative report must be provided within 60 days of receiving the complaint or a request for investigation, whichever occurs later.

It was moved by Brenda Blazer, seconded by Mike McGinniss, and carried to approve the amending language.

Staff then drew attention to the *amendment to Section D(6)* (meeting material, p.13, lines 21-22) which would remove the exception to the notice requirement if the inquiry committee chair concludes the complainant poses a threat of harm to the committee. He said the ABA Report recommended deletion of the language.

Dave Maring said the ABA Report expressed concern about labeling a complainant as a threat and suggested relying on the expertise of disciplinary counsel and committee members to determine how appearances are handled.

Brenda Blazer said that in her experience on inquiry committees, the exception has never been used.

Justice Sandstrom suggested that if there is concern about the safety of inquiry committee members, the inquiry committee could obtain a security presence.

Zachary Pelham agreed and suggested the law enforcement could be contacted to provide security if there is a concern. He said he is generally concerned about limiting access to the meeting.

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Following discussion, **it was moved by Judge Greenwood, seconded by Zachary Pelham, and carried that the amendment to Section D(6) be approved.** (Brenda Blazer, George Ackre - no).

Committee members next reviewed a *draft amendment to Section D(8)* resulting from the June 16 meeting (meeting material, p.14, lines 5-6). The revision would establish “arbitrary, capricious, or unreasonable” as the review standard when a person appeals an inquiry committee determination to the disciplinary board.

It was moved by Dave Maring, seconded by Mike McGinniss, and carried that the amendment be approved. (Brenda Blazer - no).

Brenda Blazer explained that proving that the inquiry committee acted arbitrarily, capriciously, or unreasonably may be too high a bar for the appellant.

With respect to Section D(3), Dave Maring noted current rule language that failure for the lawyer to make a timely response to the complaint “is an admission” that the factual allegations are true. He asked whether a categorical declaration that failure to timely respond “is” and admission is too onerous. He suggested “may be” an admission as an alternative. He said current court rules treat failure to submit a brief in a similar fashion.

Mike McGinniss suggested as an alternative that failure to timely respond could be considered “prima facie evidence” that the allegations are true.

Dave Maring drew attention to draft language in Section D(8) regarding submission of a petition for leave to appeal a board determination within 30 days of the determination (meeting material, p. 14, lines 10-11). He wondered whether the time should run from *notice* of the board’s determination.

Following discussion, Committee members agreed the draft language should be modified to reflect submission within “30 days of mailing of notice of the board’s determination”.

It was moved by Justice Sandstrom, seconded by Mike McGinniss, and carried that the Committee reconsider its action by which the amendment to Section D(8) regarding the arbitrary, capricious, or unreasonable standard was approved.

Justice Sandstrom inquired of Brenda Blazer what alternative standard of review might be preferable.

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Brenda Blazer said her concern is more with the entity that would be making the determination and how the standard would be applied. For example, she said there have been occasions when the disciplinary board has returned a determination to an inquiry committee for further consideration without necessarily concluding that a standard of review has been satisfied.

Penny Miller observed that for many years the disciplinary board has used the same standard as the Supreme Court when reviewing board determinations - arbitrary, capricious, or unreasonable - since there is no standard articulated in the rule. To that extent, she said, the proposed language follows current practice.

Following further discussion, **it was moved by Dave maring, seconded by Brenda Blazer, and carried that the amendments to Section d(8) be approved.**

Rule 3.5. Additional Procedures (meeting material, pp. 17-18). Committee members next reviewed draft amendments to Rule 3.5, Section E, which would require a hearing panel chair to schedule at least one prehearing conference to be held as soon as practicable after a petition for discipline has been filed. Staff said the draft amendments reflect a recommendation set out in the ABA Report.

Kara Johnson said a scheduling order is a fairly standard practice in the current process. She noted the requirement in the draft language that the conference be scheduled soon after the petition is filed. Most often, she said, a prehearing conference is scheduled after an answer is due or received.

It was moved by Judge Greenwood, seconded by Mike McGinniss, and carried that the draft language be modified to require scheduling a prehearing conference as soon as practicable after the time for a response has elapsed.

It was moved by Kara Johnson, seconded by Jeremy Bendewald, and carried that the draft amendments to Rule 3.5, Section E, as modified, be approved.

Rule 4.1. Criminal Conduct (meeting material, pp. 19-20). Staff said the draft amendments to Sections D, E, and G, of the rule reflect a recommendation from the ABA Report to provide for the immediate suspension of a lawyer upon a finding of guilt. He said current rule language is linked to conviction.

Mike McGinniss observed that the change, which is included in the ABA model rule, is aimed at promoting public trust and confidence in the profession. He said the premise is that the fact of the lawyer having been found guilty is sufficient to support immediate suspension since a judgment of conviction may not occur for some time after a finding of guilt.

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Dave Maring asked whether a finding of guilt would include a guilty plea. Additionally, he drew attention to the amending language in Section D which provides that the court may set aside a interim suspension “after affording disciplinary counsel notice and an opportunity to be heard”. He asked whether notice and an opportunity to be heard should also be provided to the lawyer.

After discussion, **it was moved by Dave Maring, seconded by Brenda Blazer, and carried that the noted language be revised to include notice and an opportunity to be heard for the lawyer.**

With respect to a finding of guilt, Mike McGinniss said it may be sensible to provide for an “either/or”, that is, a finding of guilt *or* conviction.

Following further discussion, **it was moved by Mike McGinniss, seconded by Jeremy Bendewald, and carried that references in Sections D, E, and G to a finding of guilt be replaced with references to a finding of guilt or conviction, or variations thereof.**

It was moved by Mike McGinniss, seconded by Kara Johnson, and carried that the draft amendments to Rule 4.1, as modified, be approved.

Rule 6.3. Notice of Status (meeting material, pp. 21-23). Staff said the draft amendments to Rule 6.3 are based on an ABA Report recommendation that a disbarred or suspended lawyer should be prohibited from maintaining a presence in an office where the practice of law is conducted and that the lawyer should be required to remove any indicia of the title of lawyer. The Report also recommends that noncompliance should be considered contempt. The draft amendments are with respect to the rule title, a new Section D and a new Section H.

Justice Sandstrom noted the prohibition in new Section D against the lawyer undertaking any new legal matters “prior to the effective date of the order, if not immediately” (meeting material, p.21, line 20). He wondered whether anything of significance is added to the prohibition by the time reference.

Dave Maring suggested that the noted language could be simply deleted from the draft language.

Justice Sandstrom observed that “shall” is used often in the draft language and should likely be modified to reflect current drafting conventions with respect to the use of “shall”, “must”, and “may not”.

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It was moved by Dave Maring, seconded by Mike McGinniss, and carried that new Section D be modified as suggested.

It was moved by Brenda Blazer, seconded by Dave Maring, and carried that new Section H regarding contempt be approved.

Rule 6.6.Diversion from Discipline (meeting material, pp.24-26). Staff said the draft amendments follow from the Committee's June 16 meeting discussion and the conclusion to consider language incorporating Washington rule provisions regarding kinds of misconduct for which diversion may be inappropriate (Section C) [p.24-25] and specific kinds of diversion (Section E) [p. 25]. He said additional amendments to Sections D, G, and H were included to generally conform to Washington rule provisions.

Kara Johnson said the additional language in the rule would provide useful guidance with respect to when diversion may be considered as an alternative to discipline. Additionally, she noted the reference in Section C(4)[p.25, line 2] to the lawyer having been previously sanctioned "or admonished". She said the reference to admonition would not be applicable under the current rule. She suggested the reference be deleted.

Dave Maring drew attention to the kinds of diversion listed in new Section E and asked whether mediation or arbitration should be included as a form of diversion.

George Ackre observed that diversion can be both proactive and reactive and there may be instances in which arbitration or mediation may be a part of diversion to assist in improving a lawyer's future conduct.

Kara Johnson asked whether it is disciplinary counsel or the inquiry committee that should approve diversion.

Tony Weiler wondered whether there are instances in which disciplinary counsel would be approving the individualized assistance plan.

Kara Johnson responded that disciplinary counsel should not be an adjudicator. But, she said, there is some concern that it sometimes takes several months for diversion to be approved.

Brenda Blazer agreed there should probably be some method of involving disciplinary counsel earlier in the process with respect to diversion. Otherwise, she said, the process often takes too long before participation by a lawyer in a diversion program can get underway.

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Staff noted that under the Washington rule, similar to the ABA model rule, disciplinary counsel is responsible for referring a lawyer to diversion and for monitoring compliance.

Tony Weiler suggested disciplinary counsel should have authority similar to that set out in the Washington rule. Brenda Blazer agreed.

Kara Johnson said that it is appropriate that the inquiry committee direct the contours of diversion, but perhaps then enable disciplinary counsel to generally monitor program participation and compliance by the lawyer.

Mike McGinniss agreed and said the adjudication and referral to diversion could perhaps be done by the inquiry committee and then follow-up could be left with disciplinary counsel. He said compliance or non-compliance could then be reported to disciplinary counsel.

Following further discussion, Committee members agreed draft amendments should be prepared for review which place greater authority and responsibility with disciplinary counsel with respect to diversion.

Justice Sandstrom noted the reference in Section A to a lawyer assistance program committee "established pursuant to Administrative Rule 49". He said a more accurate description would be to the committee established "by" the rule. Committee members agreed.

Rule 6.3. Notice of Status - Further Discussion

Kara Johnson drew attention to part of new Section D which would prohibit a disbarred or suspended lawyer, for example, from maintaining a presence in an office where the practice of law is conducted (meeting material, p. 21, line 22; p. 22, lines 1-3). She said it is currently permissible for a suspended lawyer to act as a paralegal in a law office. She said the prohibition in the draft new section would represent a change to that practice.

Mike McGinniss suggested it is preferable to have a bright-line rule regarding the scope of permissible activity by a disbarred or suspended lawyer. He said it is difficult to effectively monitor the activities of a suspended lawyer who might be acting as a paralegal in a law office.

Kara Johnson said her intention in noting the possible impact of the new language was to ensure the Committee's discussion reflected an awareness of the probable effect of the new provision if adopted.

Standard of Proof - Inquiry Committee

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Kara Johnson noted that the rules have never been explicit with respect to the standard of proof employed by inquiry committees in determining whether misconduct has occurred. She said the Supreme Court in *Toth v. Disciplinary Board* had concluded that “clear and convincing evidence” should apply as the burden of proof in informal proceedings. She suggested the relevant rule should be amended to reflect that standard. Committee members agreed.

Other Matters

Staff drew attention to the remaining discussion points noted on the agenda: the ABA Report recommendations regarding expanded duties for the Operations Committee, with respect to which the Committee deferred discussion, and regarding development of a Disciplinary Board policy about use of previously undisclosed investigative reports for impeachment purposes.

With respect to Section D(3), Dave Maring noted his earlier concern with respect to current rule language that failure for the lawyer to make a timely response to the complaint “is an admission” that the factual allegations are true. He asked that Committee members consider for the next meeting whether a “may be” construction is a better approach.

Chair Sturdevant said the intention is that the Committee will conclude its work in response to the ABA Report at its November meeting.

There being no further discussion, the meeting was adjourned at 2:05 p.m.