

Minutes  
(unofficial until approved)  
Joint Committee on Attorney Standards  
Radisson Hotel, Bismarck  
June 16, 2015

Members Present

Judge Michael Sturdevant, Chair  
George Ackre  
Jeremy Bendewald  
Kara Johnson  
Michael McGinniss  
Alex Reichert  
Justice Dale Sandstrom  
Jason Steffenhagen  
Nick Thornton  
Brenda Blazer\*  
Dave Maring\*  
Pat Monson\*  
Zachary Pelham\*

\* - Temporary members for lawyer discipline system review

Staff

Jim Ganje  
Tony Weiler

Members Absent

Tom Dickson\*  
Duane Dunn  
Judge Dann Greenwood  
Judge Paul Jacobson  
Dan Ulmer  
Jason Vendsel

Also Present

Petra Mandigo Hulm, Deputy Clerk of the Supreme Court  
John Olson, Chair, Lawyer Assistance Committee

Chair Sturdevant called the meeting to order at 11:50 a.m. and drew Committee members' attention to minutes of the March 27, 2015, meeting (meeting material, pp. 2-13).

**It was moved by Dave Maring, seconded by Pat Monson, and carried that the minutes be approved.**

Ethics 20/20 Project - Update. Chair Sturdevant noted that the Committee had previously completed its review of amendments to the Model Rules of Professional Conduct resulting from the ABA's Ethics 20/20 project. The Committee had then submitted proposed amendments to North Dakota's Rules of Professional Conduct to the SBAND Board of Governors for review and comment. He said the Board completed its review and provided a letter indicating support for the

amendments. Consequently, he said, the proposed amendments would be submitted to the Supreme Court for consideration.

### **Lawyer Discipline System Review - Cont'd**

#### Inquiry Committee Structure

Chair Sturdevant drew attention to the ABA Report's recommendation that the current inquiry committee structure (three regional committees) should be replaced with a statewide committee with three-member panels to consider complaints. He requested Committee discussion and a decision regarding whether there should be any changes to the current inquiry committee structure.

Dave Maring said he is inclined to support the ABA Report recommendation, but wondered whether those who have served on an inquiry committee would consider it a feasible alternative.

Brenda Blazer said she is not convinced that the statewide structure recommended in the ABA Report would be an effective alternative. She said a principal concern is whether the complainant would retain the opportunity to appear before the inquiry committee - or hearing panel in the ABA Report.

Pat Monson wondered whether travel time would become a significant impediment for panel members. She recounted a recent experience with the Judicial Conduct Commission which entailed a significant amount of travel and participation time. She cautioned that if travel commitment becomes a factor then such participation methods as telephone conferences may increase and those methods tend to be much less effective in conducting hearings. She also noted that a statewide process may increase the cost of operation for the system.

In response to a question from Nick Thornton regarding the use of ITV or Skype, Pat Monson said that while those technologies might be options, there is an important element of personal communication and interaction that is lost.

Alex Reichert observed that inquiry committees are the only entities in the State Bar Association that are regional. Additionally, he said a significant difference between the current structure and the ABA Report recommendation is the size of the entity that would hear the complaint: a three-member hearing panel as the Report recommends versus the current nine-member inquiry committees.

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With respect to the regional structure of the inquiry committees, Pat Monson said the regional approach is important as it then involves members that have some familiarity with lawyers and law practice in the area.

Kara Johnson said diverse practice areas represented in committee membership is a benefit. She said there is an important advantage in the different backgrounds and perspectives represented in the larger inquiry committee membership.

Pat Monson agreed and said there will be less collective experience with a three-member hearing panel, which will likely result in less debate when reviewing a complaint and reaching a decision. She noted that lay committee members are likely to be more vocal and involved when part of a larger group than when lay membership consists of only one of a three-member panel.

Justice Sandstrom noted that the principal concern in the ABA Report, which informed the recommendation for a statewide committee with three-member panels, is the perception that a complainant is at a disadvantage when the complaint is heard by a more local entity.

Zachary Pelham observed that North Dakota is a small state with a relatively small legal community. That, he said, should be kept in mind when considering a one size fits all approach.

Dave Maring suggested that whether a change in inquiry committee structure is feasible may depend on conclusions about how the process might be changed, such as the role and scope of authority of disciplinary counsel and whether the process will accommodate appearances by the complainant and the respondent.

Mike McGinniss agreed that an idea of the preferred decision structure would assist in reaching conclusions about whether or how the inquiry committee part of the system should be modified.

Staff noted that Tom Dickson, who was unable to attend the meeting due to an unexpected commitment, had at a previous meeting expressed his opposition to changing the current inquiry committee structure.

Following discussion, **it was moved by Alex Reichert and seconded by George Ackre that the current inquiry committee structure be retained.**

Justice Sandstrom observed that there are several considerations related to the inquiry committee structure, such as the objective of developing a process for the expeditious disposition

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of groundless complaints, and modifications that may enable more frequent meetings to consider complaints rather than conducting meetings every three months or so.

Brenda Blazer said she favors retaining the three disciplinary districts. But, she said, it may be feasible for a three-member panel to handle the less complex, less time-consuming complaints. The full inquiry committee, she said, could then consider the more complex complaints.

Tony Weiler said that from an Association standpoint, it is fairly clear that diminishing or eliminating regional inquiry committees would be generally opposed. However, he said, changes in the process to more expeditiously resolve complaints and generally improve operation would be viewed more favorably.

After further discussion, the motion **carried**.

Cont'd Review - Draft Rule Amendments - Rules 2.4, 2.5, and 3.1 (meeting material, pp. 14-25)

Committee members then turned to continued review of draft amendments and revised draft amendments to Rules 2.4, 2.5, and 3.1 generally related to transfer of various authorities to disciplinary counsel and a process for dismissal of complaints by disciplinary counsel. Note - page references relate to June 16 meeting material.

Rule 2.4 (District Inquiry Committees). Staff said the draft amendments were initially reviewed and approved at the March 27 meeting and would make the following changes:

- \*Remove inquiry committee responsibility for investigating complaints (transferred to disciplinary counsel) [p.15, lines 7-10]
- \*Modify inquiry committee authority to dismiss to reflect possible dismissal authority of disciplinary counsel - cross reference to Rule 3.1C [p.15, line 13]
- \*Remove Section F regarding consequences for failure (by investigator other than disciplinary counsel) to complete reports or investigations [p.16, lines 1-5]

Alex Reichert asked whether the alignment of the district inquiry committees should be reviewed in light of the recent changes to judicial district boundaries. There was no consensus that inquiry committee districts should be modified.

There were no additional revisions to draft amendments.

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Rule 2.5 (Disciplinary Counsel). Staff said draft amendments to Rule 2.5 were reviewed at the March 27 meeting. Revisions resulting from that meeting, he said, were the removal of various consent dispositions from disciplinary counsel authority and address consent stipulations in Rule 4.2, and inclusion of counsel responsibility for records retention. As revised, he said the draft amendments reflect the following changes:

- \*Disciplinary counsel authority to receive and screen complaints for possible summary dismissal and to investigate complaints [p.17, lines 11-12]
- \*Disciplinary counsel authority to dismiss a complaint in accordance with procedures in Rule 3.1C [p.17, line 16]
- \*Disciplinary counsel responsibility to maintain permanent records of discipline and disability matters [p.18, lines 7-8]

With respect to records retention responsibilities, Kara Johnson noted that disciplinary counsel retains records only with respect to informal proceedings. She said records related to formal proceedings are maintained by the Secretary of the Disciplinary Board. Petra Hulm agreed and said that if a disciplinary case comes to the Supreme Court, the records are not returned to disciplinary counsel at the conclusion of the case.

Committee members agreed the general issue of records retention should be discussed further.

Rule 3.1 - General Procedures. Staff explained that the revised draft amendments reflect general discussion at the March 27 meeting and the Committee's conclusion to review alternative amendments to Rule 3.1C with respect to the disposition of dismissals and the related authority of disciplinary counsel.

Staff said *Alternative A* represents the draft amendments reviewed at the March 27 meeting which contemplate: 1) a process by which disciplinary counsel would submit to the inquiry committee a list of complaints considered subject to summary dismissal or dismissal after investigation, 2) an opportunity for inquiry committee review and to direct further investigation; 3) dismissals imposed by counsel if no further investigation is directed [p.19, lines 23-27, p. 20, lines 1-15].

Staff said *Alternative B* represents modifications discussed at the March 27 meeting: 1) retention of a process by which disciplinary counsel would submit to the inquiry committee a list of complaints considered subject to summary dismissal or dismissal after investigation; 2) summary dismissal by disciplinary counsel after review by inquiry committee and no request for further

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investigation; 3) designation of a three-member panel (membership to be identified) to review complaints recommended for dismissal after investigation by disciplinary counsel; 4) panel must affirmatively approve dismissal.

Justice Sandstrom asked how, as a practical matter, an inquiry committee would meet to direct that disciplinary counsel undertake further investigation of a complaint.

Kara Johnson said the draft amendments related to summary dismissals and committee member opportunity to object is a process similar to that used in the judicial discipline process. In that process, she said, a list of complaints for which summary dismissal is considered appropriate is distributed by disciplinary counsel with a request to review and offer any comments or objections. If a judicial conduct commission member objects, she said, the full investigative report is condensed and the report and other related information is distributed to the commission.

Staff noted that the draft amendments, similar to Rule 10 of the judicial discipline rules, do not explicitly identify the step in the process between a member objecting to or expressing concerns about a dismissal and the subsequent review by the three-member panel in the draft amendments or the commission in Rule 10.

Brenda Blazer said she preferred Alternative B. She noted that the process for summary dismissal is the same under both alternatives, with the principal difference being panel involvement when dismissal after investigation is at issue. She said inquiry committee members - through the panel or otherwise - should have the opportunity to review these latter dismissals.

Kara Johnson emphasized that disciplinary counsel does not want to have an adjudicative role. Consequently, she said, inquiry committee involvement in some fashion is preferred.

Mike McGinniss said he also preferred Alternative B. He said the main advantage of the three-member panel is that the entire inquiry committee is not tied up in a review of the recommended dismissal.

Following additional discussion, **it was moved by Dave Maring, seconded by Mike McGinniss, and carried that the Committee select Alternative B as the vehicle for further discussion and any additional revisions.**

Alex Reichert wondered whether one member objecting should be enough to cause disciplinary counsel to conduct further investigation or whether, alternatively, the objecting member should convince the remaining members that additional investigation is considered necessary.

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Dave Maring drew attention to placement of the draft language related to panel approving or rejecting the recommended dismissal [p. 21, lines 10-11]. He suggested the language should more appropriately be placed immediately after language related to appointment of the three-member panel as it describes the responsibility of the panel. Additionally, he suggested the language related to the panel directing additional investigation should be revised to clarify that the panel may “also” direct additional investigation “before deciding to approve or reject” the recommended disposition. Committee members agreed with the suggestions.

Alex Reichert said it is unclear why the entire committee would review a recommended summary dismissal, but only a three-member panel of the committee would review a recommended dismissal after further investigation.

Petra Hulm asked whether the draft process contemplates situations in which the panel might recommend that an admonition be imposed if the recommended dismissal is rejected. Committee members generally agreed that the hearing process would go forward in such a situation.

Brenda Blazer explained that her support for Alternative B is linked to the opportunity for the complainant to appear and be heard. She expressed concern that the draft dismissal process may not afford that opportunity if the matter is considered by the three-member panel.

Justice Sandstrom agreed that if the process has progressed past the summary dismissal stage and a dismissal is considered after an investigation, then the complainant should have the opportunity to be heard.

Staff noted that under Section D(6) [p.22, lines 16-19] there is no notice of the opportunity to appear provided to the complainant if the complaint is subject to summary dismissal.

Pat Monson said in her experience complainants have quite often participated by telephone. She said there may be a concern depending on whether the three-member panel meets by telephone or in person.

Brenda Blazer emphasized that the complainant should have the option and opportunity to appear in person.

Dave Maring noted the Committee’s, and the ABA Report’s, concern with the time taken in the current process to dispose of complaints. He said one goal was to refine the process to more expeditiously handle complaints. Nevertheless, he said he is not averse to providing an opportunity

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for the complainant to appear, either in person or by telephone, before the three-member panel considering dismissal after investigation.

Kara Johnson said the draft process for summary dismissals will be generally expeditious as it will allow disposition within ten days of the review of the list of recommendations provided by disciplinary counsel.

With respect to the membership of the three-member panel [p.21, lines 8-9], Mike McGinniss suggested the panel should consist of no more than two lawyers and at least one public member. Committee members agreed.

Dave Maring drew attention to the draft language relating to an inquiry committee member's request for further review of a particular complaint "within 10 days" of the date the list of complaints was "mailed" [p.20, line 29]. He asked whether technology could not provide a better way of transmitting the list than by mail since ten days may be insufficient in light of mailing and delivery time.

Kara Johnson said disciplinary counsel is able to email information to lawyers, but emailing is more difficult with respect to complainants.

Petra Hulm said the interpretation of the rules is that electronic service is not permissible. Additionally, she said, information related to disciplinary cases at the informal stage is confidential and email is not regarded as sufficient to protect the confidential status. She said thought has been given to the possibility of setting up a password-protected pdf program in which each inquiry committee would have a different password, which would enable emailing information. But, she said, the rules do not currently provide for that method of service and there is concern about the ability to protect the confidentiality of the information.

Dave Maring agreed with the concern about the ability to ensure confidentiality if email is used. As an alternative, he suggested changing the ten day timeframe to fourteen days and retaining the mailing language.

**It was moved by Mike McGinniss and seconded by Dave Maring that the draft language be modified as described.**

In response to a question from Alex Reichert, Kara Johnson said information indicates that in most jurisdictions summary dismissals are handled within three days. But, she said, the timeframe depends on the kind of review process in place. She said most jurisdictions do not have the review

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process contemplated in the draft for summary dismissals; the disposition is handled exclusively by disciplinary counsel.

Dave Maring said electronic distribution for summary dismissals may be worth considering if a password-protected system can be developed.

Petra Hulm explained that a particular version of Adobe is required for a password-protected pdf process. That, she said, may be an added expense for inquiry committee members.

After further discussion, the motion **carried**.

Staff then drew attention to the draft language in Rule 3.1, Section D(8) regarding the timeframe [time period to be selected] for submitting a petition for leave to appeal a disciplinary board determination to the Supreme Court [p.23, lines 6-7].

Petra Hulm noted that the timeframe for an appeal of an inquiry committee decision to the disciplinary board is thirty days.

In response to a question from Chair Sturdevant, Committee members agreed a similar timeframe would be appropriate for appeals to the Supreme Court from a disciplinary board determination.

Committee members next reviewed the appropriate standard of review for consideration by the disciplinary board of an inquiry committee disposition - Rule 3.1, Section D(8) [p. 23, line 2 - discussion item].

**It was moved by Alex Reichert and seconded by Nick Thornton that the standard of review should be *de novo* for questions of law and arbitrary and capricious for questions of fact.**

Mike McGinniss noted that the standard of review for a petition for leave to appeal to the Supreme Court is whether the board acted “arbitrarily, capriciously, or unreasonably”. He suggested the same standard could be used with respect to board review of inquiry committee decisions.

Pat Monson said information that comes to the disciplinary board on appeal is often quite limited.

Brenda Blazer observed that at the inquiry committee level there are no conclusions of law or findings of fact. She said instituting the suggested standards of review may confuse the process. She said she would prefer using the same standard that is used for petitions for leave to appeal: arbitrarily, capriciously, or unreasonably.

**With the consent of the second, the motion was amended to identify “arbitrarily, capriciously, or unreasonably” as the standard for board review of inquiry committee decisions.**

Mike McGinniss drew attention to the requirement in Rule 3.1, Section D(5), that disciplinary counsel must submit a written investigative report within 60 days of a yet-to-be-identified event [p. 22, lines 11-12]. The event to be identified is related to the transfer to disciplinary counsel of investigation responsibilities. He suggested as an event triggering the 60-day timeframe the docketing or receipt of the complaint.

Kara Johnson asked when the 60 day timeframe would apply if lists of complaints are sent every 30 days to the inquiry committee, with 14 days provided for review.

Mike McGinniss suggested requiring filing the written report within 60 days of receiving the complaint or receiving a request for further investigation, whichever is later. Committee members agreed the suggested language should be included in revised amendments for review.

#### Rule 4.2 - Discipline by Consent

Committee members next reviewed draft amendments to Rule 4.2, Discipline by Consent, based on amendments presented by Brent Edison at the March 27 meeting [pp.26-28]. There were additional revisions requested at the March 27 meeting related to the opportunity for any complainant to have been heard before a stipulation to consent is approved [p. 26, line 12].

**It was moved by Mike McGinniss and seconded by Brenda Blazer to approve the revised draft amendments.**

Kara Johnson noted language in Section D providing that approval of the stipulation may be granted at any point “during an investigation or otherwise”. She suggested that the noted language be deleted since it appears unnecessary.

**It was moved by Kara Johnson and seconded by Mike McGinniss that the motion be amended to include the additional revision.**

With respect to a lawyer's consent to a sanction, Pat Monson asked what is contemplated by an appearance by the complainant.

Kara Johnson said current practice is that disciplinary counsel always contacts the complainant and discusses the stipulation and why it is being considered as a disposition.

Justice Sandstrom said affording the opportunity to the complainant to be heard when a stipulated consent to discipline is considered is an added element in supporting the public's trust and confidence in the process.

Following further discussion, **the motion, as amended, carried.**

Rule 6.6 (Diversion from Discipline) - Review of Washington Rules for Enforcement of Lawyer Conduct

Chair Sturdevant drew attention to Rule 6.6, Diversion from Discipline, and related Washington rules [pp. 29-39]. He noted that at the March 27 meeting Brent Edison had suggested the Committee review the Washington rules as they provide a greater level of detail regarding diversion than does current Rule 6.6. He said Committee members agreed to review the Washington rules.

Staff briefly reviewed the ABA Report's recommendations related to modifications regarding diversion from discipline, with the general recommendation being that the rule should provide greater detail regarding when diversion is available and the kinds of diversion that can be imposed.

Kara Johnson said more clarity regarding diversion options would be helpful, particularly when diversion is appropriate and when it should not be an option.

Chair Sturdevant noted the option under the Washington rules for an advisory letter to the lawyer which essentially serves as a caution to the lawyer that certain conduct may become a disciplinary issue.

Chair Sturdevant then welcomed John Olson, Chair of the Lawyer Assistance Committee, for comments regarding lawyer assistance, diversion, and the Washington rules.

John Olson said he favors the idea of an advisory letter as a mechanism for notifying a lawyer that information has come to the attention of the investigative body which indicates conduct by the lawyer that may result in discipline. He said he would support the additional guidance provided in

the Washington rules. He said it would be helpful for disciplinary counsel and inquiry committees to have more detail and direction in Rule 6.6.

Mike MCGinniss agreed and said the Washington rules provide useful guidance regarding when diversion is appropriate. With respect to the Washington rule regarding the advisory letter [p.32], he noted the last provision of the rule which provides that the letter cannot be introduced into evidence in any subsequent disciplinary hearing. He said there may be situations in which the issuance of a letter should be admissible as evidence.

Kara Johnson observed that the advisory letter may be a useful tool for inquiry committees.

In response to a question from Chair Sturdevant, Committee members agreed draft revisions to Rule 6.6 incorporating Washington rule provisions should be prepared for review.

#### Additional Rule Amendments

Staff drew attention to the Summary of Lawyer Discipline Report Recommendations with annotations indicating Committee actions to date [pp.40-47]. Committee members reviewed recommendations for rule amendments that have not yet been considered:

*Rule 1.3 (Forms of Discipline)* - ABA Report recommendation to amend Rule 1.3A(5) to clarify that an admonition is private discipline. There was agreement that an amendment is unnecessary.

*Rule 2.1 (Disciplinary Board)* - ABA Report recommendation to amend the rule to provide for review of an appeal of a dismissal by the Disciplinary Board Chair. There was agreement that an amendment is unnecessary.

*Rule 2.2 (Operations Committee)* - ABA Report recommendations to amend the rule to clarify membership and to expand Operations Committee responsibilities. Dave Maring, Operations Committee Chair, explained that the main responsibilities of the Committee are to review biennial budget requests, provide broad oversight and management of the system, regularly review the system's budget status, and to interview and hire disciplinary staff. He said it may be beneficial to add some detail regarding committee responsibilities.

In response to a question from Chair Sturdevant regarding the recommendation that a lay member be included in the committee's membership, Kara Johnson said it may be helpful to have a lay member who had previously served on an inquiry committee or the disciplinary board.

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Dave Maring noted that the ABA Report recommends that the lay member *not* have previous experience as an inquiry committee or disciplinary board member. He said a lay member without any experience in the system may not bring greater understanding but may be important from the standpoint of transparency and public perception.

After discussion, Committee members agreed to defer consideration of possible amendments.

With respect to remaining rule amendments recommended in the ABA Report, staff said draft amendments related to less complex issues would be prepared for review at the next meeting.

There being no further discussion, the meeting was adjourned at 3:00 p.m.