

Minutes  
(unofficial until approved)  
Joint Committee on Attorney Standards  
Ramada Hotel, Bismarck  
March 27, 2015

Members Present

Judge Michael Sturdevant, Chair  
Jeremy Bendewald  
Judge Dann Greenwood  
Kara Johnson  
Michael McGinniss  
Alex Reichert  
Justice Dale Sandstrom  
Jason Steffenhagen  
Dan Ulmer  
Jason Vendsel  
Brenda Blazer\*  
Tom Dickson\*  
Brent Edison\*  
Dave Maring\*  
Pat Monson\*  
Zachary Pelham\*

\* - Temporary members for lawyer discipline  
system review

Staff

Jim Ganje  
Tony Weiler

Members Absent

George Ackre  
Duane Dunn  
Judge Paul Jacobson  
Nick Thornton

Also Present

Penny Miller, Secretary, Disciplinary Board

Chair Sturdevant called the meeting to order at 10:00 a.m. and drew Committee members' attention to minutes of the January 23, 2015, meeting (meeting material, pp. 2-13). Mike McGinniss noted the following corrections: p. 4 - in the 1<sup>st</sup> full paragraph, clarify that the Delaware system consists of a statewide committee that sits in three panels, and replace "probably" with "probable"; p. 9 - typographical error in Brent Edison's name; p. 11 - modify the motion language in the 4<sup>th</sup> paragraph to reflect that draft amendments contemplate disciplinary counsel authority to "recommend", rather than "impose", consent admonition.

**It was moved by Dan Ulmer, seconded by Dave Maring, and carried that the minutes as corrected be approved.**

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

### Disciplinary System - Case Statistics

Chair Sturdevant drew attention to tables and graphs setting out disciplinary complaints and dispositions for 2008-2014 (meeting material, pp. 14-16). He noted that there seems to be a downward trend in filings from 2012/2013 to 2014.

Brent Edison said the downward trend in complaints has continued into 2015. He said some part of the trend may be attributable to limitations imposed on those who have tended to file numerous complaints, but that would not fully explain the general downward trend.

Penny Miller explained that the description of case types represents a rough summary of complaint categories identified when the complaints are first filed.

### Draft Rule Amendments - Rules 2.4, 2.5, 3.1, and 4.3 (meeting material, pp. 17-25)

At the request of Chair Sturdevant, staff reviewed 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. The draft amendments are intended to reflect the general discussion at the January 23 meeting. Components of the draft amendments:

- Rule 2.4:
- \*Removing inquiry committee responsibility for investigating complaints (transferred to disciplinary counsel) [p.18, lines 7-10]
  - \*Modifying inquiry committee authority to dismiss to reflect possible dismissal authority of disciplinary counsel [p.18, line 13]
  - \*Removing Section F regarding consequences for failure (by investigator other than disciplinary counsel) to complete reports or investigations [p.19, lines 1-5]
- Rule 2.5:
- \*Disciplinary counsel authority to receive and screen complaints for possible summary dismissal and to investigate complaints [p.20, lines 8-9]
  - \*Disciplinary counsel authority to dismiss a complaint or recommend consent admonition, consent probation, or participation in a lawyer assistance program (diversion) with consent of the lawyer [p.20, lines 13-15]
  - \*Process by which disciplinary counsel would submit to the inquiry committee a list of complaints considered subject to dismissal and complaints for which consent admonition, consent probation, or diversion is recommended. Opportunity for inquiry committee review and direct further

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

investigation; dismissals imposed by counsel if no further investigation is directed; consent admonition, consent probation, or diversion imposed by inquiry committee if considered appropriate [p.21, lines 9-26]

Staff noted that the dismissal process component was included in Rule 2.5 simply to illustrate the link to disciplinary counsel. The amending language, if retained, would be transferred to Rule 3.1, the general procedure rule.

- Rule 3.1:      \*Clearly reflecting that complaints are filed with disciplinary counsel, with assignment to appropriate inquiry committee for any appropriate future action [p.22, lines 5-8]  
                  \*Revisions to draft summary dismissal amendments reviewed at January 23 meeting [p.22, lines 13-27]  
                  \*Incorporating language from Rule 2.4F providing that failure to timely complete an investigation does not prejudice the complaint [p. 23, lines 4-5]  
                  \*Item for discussion: time within which disciplinary counsel must file a written report with the inquiry committee chair [p.23, lines 22-23]  
                  \*Requiring that disciplinary counsel serve the written report on the lawyer and complainant when the report is filed with the inquiry committee chair [p.24, lines 2-3]
- Rule 4.3:      \*Draft amendments related to probation monitoring (reviewed at January 23 meeting) [p. 25, lines 8-17]

With respect to various consent disciplines, Dan Ulmer asked what would occur if the lawyer did not consent. For example, he asked, would the lawyer then be entitled to a hearing before the inquiry committee. Staff said the draft amendments contemplate that the lawyer will have already consented to the proposed discipline submitted to the inquiry committee.

Brent Edison said if the lawyer did not consent to the proposed sanction, there would be an appearance before the inquiry committee, with the committee then deciding on the appropriate sanction or whether to initiate a formal process.

Brent Edison drew attention to draft amendments to Rule 4.2 he had submitted which would establish a procedure for stipulations based on Washington lawyer discipline rules (meeting material, pp. 30-34). He said if there is a consent agreement, the agreement would contain sufficient information so the reviewer would have enough information to make an informed decision about whether the agreement should be approved. He said his draft amendments would provide for a

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

stipulated agreement at any time in the process as another alternative. Components of the draft amendments:

- Complaint resolved by stipulation at any time, with the stipulation setting out the form of discipline, terms and conditions of probation, and other appropriate provisions [p. 30, amendments to Rule 4.2B]
- A disclosure that the lawyer waives certain procedural rights that may be available in the absence of the stipulation [p.30, new paragraph (5) to Rule 4.2B]
- New Section C to Rule 4.2 setting out the contents of the stipulation [p.30]
- New Section D to Rule 4.2 setting out the process by which the stipulation may be approved or rejected by the inquiry committee or disciplinary board, including expedited review by the three-member panel. Also describing process for review by the Supreme Court [p.30]
- New Section E to Rule 4.2 describing process if a stipulation is rejected [p.30]
- New Section F to Rule 4.2 addressing failure by the lawyer to comply with the stipulation [p.30]

In summary, Brent Edison said the system can be improved by expediting the process for dismissal of complaints and for stipulations with lawyer cooperation. He said the inquiry committee process could then be reviewed to provide more due process protections when complaints are not dismissed. He suggested that a process for expediting diversion from discipline, when appropriate, should be considered.

In response to a question from Judge Sturdevant, Brent Edison said the draft amendments to Rule 4.2 address two situations involving consent to discipline: 1) Section A applies when the lawyer offers a conditional admission in exchange for particular discipline and the admission is then submitted to a hearing panel for consideration; and 2) Amendments to Section B would apply to situations in which there is a stipulation at any time in the process. He said the suggested changes would allow negotiations between disciplinary counsel and the lawyer at the beginning of the process.

Brent Edison drew attention to new Section F (p.31), which addresses the rejection of a stipulation. The intent, he said, is that the new provision would apply at both the pre-formal and formal stages.

In response to a question from Dave Maring, Brent Edison said currently disciplinary counsel has no authority to speak for the inquiry committee until the committee has acted on a complaint in

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

some way. He said disciplinary counsel has no authority to negotiate at the informal level before the matter has been before the inquiry committee and subsequently assigned to counsel for investigation.

Kara Johnson explained that in the investigative report submitted to the inquiry committee it may be noted that disciplinary counsel has communicated with the lawyer and the lawyer is willing to accept a particular discipline.

In response to a question from Penny Miller regarding the number of complaints resolved by stipulation at the inquiry committee level, Brent Edison said there is a limited number since there is little negotiation that occurs at that level.

Tom Dickson observed that if investigation is assigned to disciplinary counsel, there appears to be more communication with the lawyer. He said his experience is that if investigation is conducted by a member of the inquiry committee there is very little communication with the lawyer.

With respect to the draft amendments to Rule 2.5, Brent Edison suggested there could be a process for summary dismissals and dismissals, as the amendments contemplate, and then a different process for discipline by consent as represented in the draft amendments to Rule 4.2.

Tom Dickson noted the expanded authority contemplated for disciplinary counsel under the various draft amendments and wondered what particular role and responsibilities would remain for inquiry committees. Brent Edison responded that there have been concerns expressed about imposition of admonitions without adequate due process protections and the suggested amendments are intended to address that concern. He said the consequence of the amendments would be that inquiry committees could dismiss complaints or have a process for approving probation or admonitions with the consent of the lawyer or refer matters for formal charges. He said his suggested amendments contemplate that disciplinary counsel would conduct the investigation, the lawyer can agree to a stipulation, and then an expedited process would be in place for review of the stipulation by a three-member panel.

Alex Reichert said he is concerned about providing more options to disciplinary counsel at the expense of removing authority from the inquiry committees.

Zachary Pelham said he is concerned that the draft amendments to Rule 4.2 appear to provide no opportunity for the complainant to be heard regarding the stipulated disposition of the complaint.

Brent Edison responded that the committee should consider dispensing with the requirement that the complainant appear at the inquiry committee level. He said an exception could be provided if there is an issue of credibility, as the ABA Report recommends. He said the ability to appeal to

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

the disciplinary board could be retained. He said the draft amendments to Rule 4.2 contemplate that if there is a stipulated agreement that proceeds through the expedited process, then the complainant would not have standing to object. But, he said, if the agreement is accepted by the inquiry committee or disciplinary board, then the right of appeal could be available. He agreed that if a stipulation is under consideration, there should be opportunities for discussion with the complainant.

Penny Miller noted that her office fields many calls from the public about lawyer conduct. She said the rules are not only directed to due process for lawyers, but also to responding to public concern about lawyer conduct. She said limiting or removing opportunities for participation or input from complainants is problematic.

Brent Edison agreed that protection of the public is the paramount objective of the rules. But, he said, the current process is too unwieldy and takes too long. The goal, he said, is to ensure the process works well, relieves undue burdens on inquiry committee members, and adequately protects the public interest.

Brenda Blazer asked whether the suggestion is that the complainant would not have the opportunity to appear if there is a stipulation, but could appear if there is no stipulation. Brent Edison reiterated that he would suggest elimination of the requirement that the complainant have the opportunity to appear.

Brenda Blazer disagreed with the suggestion that the complainant not be given the opportunity to appear. She said listening to the complainant when appearing has sometimes resulted in a different disposition for the complaint. Dan Ulmer agreed it is important that the complainant be given the opportunity to appear.

Pat Monson observed that if investigation is conducted by inquiry committees there is the potential for differing investigative styles and limited time for an inquiry committee member may impede the investigation. The consequence may be that the complainant may not consider the complaint to have been adequately reviewed. She said an important consideration is that if investigation is conducted by disciplinary counsel, as the rule amendments provide, and there is greater opportunity for a thorough and competent investigation, then there is a greater chance that the complainant will be satisfied with the opportunity to be involved in the process and the outcome.

Dan Ulmer generally agreed but said he still considers it important that the complainant have the opportunity to actually appear before the inquiry committee.

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

With respect to the expedited, three-member panel process set out in the draft amendments to Rule 4.2, Jason Vendsel asked whether the review could be conducted by telephone and whether the complainant could also participate in that manner.

In response to a question from Penny Miller, Brent Edison said the draft amendments do not address whether the investigative report will have been distributed before the stipulation is agreed to. He said language could be added to require that the investigative report must be included with the stipulation. However, he said the intention of the amendments is that sufficient detail would be provided to support the stipulation.

In response to a question from Pat Monson regarding draft Section B(5) regarding waiver of procedural rights [p.30], Brent Edison said the waiver provision recognizes that if a lawyer admits to the misconduct and agrees to the stated discipline, then the lawyer could forego the various procedural elements that are part of the normal process.

Following further discussion, **it was moved by Alex Reichert and seconded by Mike McGinniss that the Committee tentatively approve the draft amendments to Rule 4.2 as a working proposal.**

With respect to the draft amendments related to approval of the stipulation by the disciplinary board [p.31], Mike McGinniss asked whether the board or three-member panel could request additional information before acting on the stipulation.

Brent Edison explained that there have been instances in which a stipulation was submitted to the disciplinary board and, if rejected, a hearing was held. He said the process suggested in the amendments would likely operate in a similar fashion. Mike McGinniss suggested it may be useful to indicate whether it would be necessary for the matter to go back to the initial stage if the stipulation is rejected. An alternative, he said, may be to enable the three-member panel to conduct a further hearing. Brent Edison agreed that since the stipulation contemplates that the lawyer would by-pass the inquiry committee process, there would be little gained by restarting the process if rejection of the stipulation is considered. The authority for the three-member panel to hold a hearing, he said, would be helpful in that situation.

In response to a question from Justice Sandstrom, Brent Edison said the stipulation would be entered into between the lawyer and disciplinary counsel. He said the amending language permitting a stipulation “at any time” could permit the stipulation before an investigation is conducted.

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

Justice Sandstrom emphasized that the expedited process contemplated by the amendments could result in an agreement between the lawyer and disciplinary counsel without the complainant ever having had the opportunity to be heard.

In response to a question from Brenda Blazer, Brent Edison said a “stated form of discipline” under the draft amendments could be an admonition, which is a private form of discipline. He said it may be necessary to clarify the public nature of the discipline if a higher level discipline is imposed.

After further discussion, **it was moved by Justice Sandstrom and seconded by Mike McGinniss that the motion be amended to include modification of the proposed amendment to Rule 4.2, Section B, to read: “Any disciplinary matter may be resolved by stipulation at any time after investigation and an opportunity for any complainant to have been heard.”**

In response to a question from Alex Reichert, Justice Sandstrom said since the stipulation can occur “at any time”, it is uncertain how the proposed amendments generally relate to other elements of the process. Consequently, it is unclear whether the complainant’s opportunity to be heard would be before disciplinary counsel, the inquiry committee, or the disciplinary board. The general purpose of the motion to amend, he said, is to prevent a complaint from being resolved by stipulation without the complainant ever having been involved.

Following discussion, **the motion to amend carried.** (Alex Reichert - no). Alex Reichert explained that his preference is that the draft amendments to Rule 4.2 be approved as presented to establish a working draft, with any further amendments to be considered later.

The motion, as amended, **carried.**

At this point, Dan Ulmer and Jason Steffenhagen left the meeting due to previous commitments.

Chair Sturdevant then drew attention to the draft amendments to Rules 2.4, 2.5, and 3.1 and requested further discussion or Committee action.

**It was moved by Mike McGinniss, seconded by Alex Reichert, and carried that the draft amendments to Rule 2.4 be tentatively approved.**

With respect to the draft Section C of Rule 2.5 establishing a process for dismissals and consent discipline [p.21, lines 9-26], Kara Johnson noted that the reference to the lawyer not being

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

required to respond to the complaint [line 22] is correct only with respect to summary dismissals. The lawyer must respond to the complaint when other dispositions are to be considered.

Staff noted that draft Section C would be relocated to Rule 3.1, which is the general procedural rule. The draft section was included in Rule 2.5 simply because of proximity to rule provisions related to disciplinary counsel.

**It was moved by Jason Vendsel and seconded by Alex Reichert that the draft amendments to Rule 2.5 [pp. 20-21] be tentatively approved.**

Brent Edison suggested that, since the amendments to Rule 4.2 address stipulations/consent discipline, that the language in draft Section C related to consent discipline and diversion should be deleted from Section C.

Dave Maring drew attention to the language in Section C related to inquiry committee member response within ten days of the mailing of the list of complaints subject to dismissal. He reiterated his earlier concern that the provision is stated in the negative, i.e., a committee member must object to dismissal of a complaint to require further consideration. He said he would prefer affirmative agreement with dismissal. Additionally, he said ten days after mailing may be too short a time within which to expect a response from an inquiry committee member. He drew further attention to the amendments to Rule 4.2 which would establish a three-member panel for expedited review of an offered stipulation. He suggested that a similar process could be used to review complaints for which disciplinary counsel is recommending dismissal.

Brent Edison explained that the process set out in Section C is generally similar to the process in judicial discipline rules for review of complaints identified for summary dismissal. He said the practice is that if there is any communication from a Judicial Conduct Commission member about a possible summary dismissal, then the matter proceeds to further investigation.

After further discussion, **it was moved by Dave Maring and seconded by Zachary Pelham that the motion be amended to include modification of draft Section C in Rule 2.5 to provide for review of recommended dismissals by a three-member panel similar to that contemplated in amendments to Rule 4.2.**

In response to a question from Mike McGinniss, Dave Maring said his motion does not contemplate involvement by the complainant in the process for reviewing the recommended dismissal.

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

Alex Reichert wondered whether the three-member panel approach is essentially providing a lesser review than that set out in the draft amendments, which would provide an opportunity for review by all inquiry members.

Staff said a possible method for reviewing the subject matter of the competing motions may be to review alternative drafts: 1) a draft revision of Section C which limits the process to summary dismissals and dismissals, and 2) a draft revision of Section C which provides review of recommended dismissals by a three-member panel.

Brenda Blazer said the current draft Section C process is likely a workable approach with respect to summary dismissals. However, she said she would favor review by the entire inquiry committee of complaints recommended for dismissal.

Jeremy Bendewald asked whether it is necessary that inquiry committees be assigned complaints arising only in the committee's district. He also asked whether it would be feasible to stagger quarterly meetings of inquiry committees so summary dismissals, for example, could be reviewed by any inquiry committee, thereby shortening the time for review.

Brent Edison noted that the ABA Report recommends one state-wide inquiry committee that meets periodically in three-member panels.

Following further discussion, **it was moved by Justice Sandstrom and seconded by Alex Reichert that further discussion of amendments to Rule 2.5 be postponed until the next meeting.** The motion to postpone takes precedence over the pending motions.

In response to a question from Dave Maring, Committee members agreed alternative drafts could be prepared for review at the next meeting.

The motion **carried.**

Dave Maring said he is not opposed to more than three members of the inquiry committee reviewing recommended dismissals. The primary goal, he said, is to provide for an affirmative agreement with respect to disciplinary counsel's recommendations.

With respect to the draft language in Section C of Rule 2.5, Kara Johnson noted diversion, as a disposition, is related specifically to the lawyer assistance program. She wondered whether the reference may be too limiting. For example, she said, if there is an issue of a lawyer's trust account management, there are online trust account classes that could be assigned for the lawyer to complete. That, she said, could be a form of diversion apart from the lawyer assistance program.

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

Brent Edison agreed and suggested that the Committee consider more alternatives to deal with lesser misconduct without imposing discipline. He noted, for example, that Washington's Rules for Enforcement of Lawyer Conduct permit a review committee to issue an advisory letter to a lawyer if the conduct constitutes a violation of the rules but does not warrant an admonition or sanction. He said other jurisdictions issue warning letters. He said the Washington rules provide a broader array of possible elements of diversion and suggested the Committee may wish to review the rules for possible amendments to North Dakota rules. He noted specifically Washington Rules 5.8, 6.1, 6.2, 6.3, 6.5, and 6.9. He said the rules may provide a basis for amendments to address recommendations in the ABA Report.

Chair Sturdevant said North Dakota Rule 6.6 related to diversion and additional information will be considered at the next meeting.

Other Issues

Penny Miller drew attention to Rule 3.1D(8) [meeting material, p.24], which governs, in part, appeal to the disciplinary board of an inquiry committee decision and further appeal to the Supreme Court. She said the rule does not establish a time limit within which the board's decision may be the subject of a petition for leave to appeal to the Supreme Court. Additionally, she said there is a lack of detail with respect to the record for purposes of appeal.

Tom Dickson said there should be a requirement for a record or minutes of inquiry committee proceedings. He said there should be an indication of members present, members absent, votes cast, and other relevant information.

Kara Johnson agreed there should be a specified timeframe for appeals.

With respect to the record related to a complaint, Brent Edison said currently part is with the inquiry committee, part is with disciplinary counsel's office, and part is with the secretary of the disciplinary board. He suggested the rules should provide that disciplinary counsel must maintain a docket and, upon appeal, the docket is certified by counsel with respect to what constitutes the record.

Penny Miller suggested the rule should be more specific regarding the standard of review for the disciplinary board when reviewing an inquiry committee decision. She also noted Rule 3.1D(9) [meeting material, p.24], which requires the investigative report to be filed with the secretary of the board after disposition by the inquiry committee. She said if the informal process would be handled within disciplinary counsel's office, there is then the related question of where records would more appropriately be maintained.

Minutes  
Joint Committee on Attorney Standards  
March 27, 2015

After discussion, **it was moved by Kara Johnson, seconded by Tom Dickson, and carried that the Committee review draft amendments to address the issues noted with respect to the appeal process.**

Mike McGinniss drew attention to the draft amendments to Rule 4.3 regarding probation monitoring [meeting material, p. 25]. He asked whether the Committee will further consider the draft.

Staff noted that the draft amendments, which were previously reviewed, set out a general process for monitoring probation and compliance with probation conditions, without the extended detail contained in the ABA Report.

**It was moved by Mike McGinniss, seconded by Dave Maring, and carried that the Committee tentatively approve the draft amendments to Rule 4.3.**

#### Conclusion

Chair Sturdevant said the Committee will further review draft rule amendments at the next meeting. He asked that Committee members review the ABA Report recommendation regarding the inquiry committee structure (one statewide committee with three-member hearing panels). He said the Committee should be prepared to reach a firm conclusion regarding the Report's recommendation.

There being no further discussion, the meeting was adjourned at 1:05 p.m.