Minutes
(unofficial until approved)
Joint Committee on Attorney Standards
Radisson Hotel, Bismarck
January 23, 2015

Members Present	Members Absent
Judge Michael Sturdevant, Chair	George Ackre
George Ackre	Judge James Hill*
Jeremy Bendewald	Judge Paul Jacobson
Duane Dunn	
Judge Dann Greenwood	
Kara Johnson	
Michael McGinniss	
Alex Reichert	
Justice Dale Sandstrom	
Jason Steffenhagen	
Nick Thornton	
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

Chair Sturdevant called the meeting to order at 10:00 a.m. and welcomed Zachary Pelham who is the designated representative of the SBAND Board of Governors for the discipline system review. He then drew Committee members' attention to minutes of the November 7, 2014, meeting (meeting material, pp. 2-12). Misspellings of Mike McGinniss's name were noted.

It was moved by Dan Ulmer, seconded by Kara Johnson, and carried that the minutes as corrected be approved.

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Lawyer Discipline System Review - Cont'd

Committee members then continued review and discussion of the ABA Report on the Lawyer Discipline System and the Report's recommendations.

Chair Sturdevant drew attention to data regarding disciplinary complaints included in the meeting material (pp. 13-17), which sets out statistics for years 2009-2013. The data is included each year in the judicial system's Annual Report He noted that the ABA Report recommends that the Disciplinary Board be required to publish an annual report regarding system operations and activities. He said the current yearly compilation of actions regarding disciplinary cases seems an adequate avenue of information.

Brent Edison observed that the ABA Report also addressed the importance of issues related to the timely and efficient disposition of complaints. He said that may imply a greater monitoring role for the system's Operations Committee.

At the request of Chair Sturdevant, staff reviewed draft rule amendments resulting from the November 7 meeting discussion (meeting material, pp. 18-25). He said draft amendments to Rule 4.3 (meeting material, p.18) would establish a process by which disciplinary counsel would monitor a lawyer's compliance with conditions of probation imposed in a given case. He said the draft amendments depart from the ABA Report's recommendation in not setting out a detailed process to be followed after a report of noncompliance. Instead, he said, the amendments link to Rule 1.3B, which triggers reconsideration of imposition of probation if there is failure to comply with probation conditions. He said draft amendments to Rule 2.5 (meeting material, pp.19-20) would place with disciplinary counsel the responsibility to receive and screen all complaints to determine whether summary dismissal is appropriate. He said draft amendments to Rule 3.1 (meeting material, pp.21-25) would require that complaints be filed with and evaluated by disciplinary counsel. A process by which complaints could be identified for summary dismissal by disciplinary counsel is included which tracks the process currently in place for the judicial discipline process (Rule 10A, Rules of the Judicial Conduct Commission). He noted that the amendments are preliminary and would require additional amendments to other rules if the various changes were pursued.

Staff said the rule amendments to Rules 2.5 and 3.1 do not reflect the complete transfer of investigatory responsibilities to disciplinary counsel, as the ABA Report recommends, as the Committee had not yet discussed that modification.

Chair Sturdevant said a basic issue underlying possible rule amendments is the status and structure of the current inquiry committees. He noted that the ABA Report recommends substantial changes to the current structure. He requested Committee discussion on the structure of the inquiry

committees and whether any modifications should be considered as a prelude to further discussion of rule amendments.

Brent Edison suggested a possible alternative could be the Delaware system, which has a statewide panel, with three panels that meet monthly. He said the panels have more authority than simply probably cause determinations, which is the scope of authority recommended for inquiry committees by the ABA Report. He said an advantage of the statewide entity is probable cause determinations are made every thirty days instead of quarterly. However, he said, it is possible to address issues identified in the ABA Report while maintaining the current inquiry committee structure.

Mike McGinniss said the Delaware process uses a preliminary review committee for screening purposes, which is somewhat similar to the process recommended in the ABA Report. The committee meets monthly to make probable cause determinations and consider and approve, if appropriate, offers of private sanctions, admonitions, and probation. He said consent of the respondent is required. If the respondent does not consent, he said, then the committee would approve the filing of a petition for discipline with the equivalent of the Disciplinary Board.

In response to a question from Justice Sandstrom, Mike McGinniss said all investigations were conducted by disciplinary counsel, as well as summary dismissals. He said the Delaware process operated with about three disciplinary counsel and used an investigator for forensic accounting.

Brent Edison said he estimated that one additional employee (investigator, paralegal, or other) would be needed in his office to support expanded responsibilities.

In response to a question from Dave Maring, Mike McGinniss said summary dismissals by disciplinary counsel were not reviewed.

Dan Ulmer observed that there would be no appeal, with the rule amendments, of a summary dismissal by disciplinary counsel. He said the complainant should have the opportunity for a review of the summary dismissal decision. That, he said, would serve both transparency and fairness for complainants, who are most often lay people, involved in the process

Kara Johnson said that as a practical matter a complainant can always file a new complaint if an earlier complaint has been dismissed.

Nick Thornton suggested that if an appeal of a summary dismissal decision is considered there should be a limit of one appeal, generally similar to the process followed in post-conviction relief cases. He said rules should guard against manipulation of the process.

Alex Reichert said an alternative may be to provide notice to the complainant that summary dismissal is being considered.

Zachary Pelham noted that the ABA Report focused on a public perception that a discipline process run by lawyers favors lawyers. He said there may be merit to informing the complainant that there is a review process and, perhaps, that the complainant would have the opportunity to submit additional information to the reviewing body.

On the general question of changes to the current inquiry committee structure, Tom Dickson said he would oppose wholesale changes to the structure. He said he would support changes to the process to lessen the burden on inquiry committee chairs.

Brent Edison said there has been little reaction to the fact that there is no appeal to summary dismissals in the judicial discipline process. Dan Ulmer observed that there may be a difference between a complaint about a judge and a complaint about a lawyer who, for example, is alleged to have stolen money from a client.

Brent Edison agreed that if the complainant were to have more explanation regarding disposition of the complaint then there may be more acceptance of the disposition.

Pat Monson explained that currently the inquiry committee chair reviews complaints and determines whether the conduct of the lawyer would be a violation. The inquiry committee would then consider summary dismissal if the conduct, if true, would not be a violation of the rules. She said the inquiry committee minutes would reflect that the allegations did not rise to the level of a violation. She wondered whether that would satisfy a concern about the reason for summary dismissal.

Dave Maring said that if disciplinary counsel is to have the responsibility for investigating complaints, then it seems sensible that counsel would make the first call regarding summary dismissal. With respect to the draft amendments to Rule 3.1C, he said the process of sending a list of complaints subject to summary dismissal to the inquiry committee for review and comment within ten days is a review process from the negative. That is, he said, a committee member must object to summary dismissal of a particular complaint to trigger further consideration. He said he would prefer a positive process, that is, that the inquiry committee affirmatively agrees with disciplinary counsel's

determination to summarily dismiss. Additionally, he agreed that the letter sent to the complainant should provide a full explanation of why summary dismissal was considered appropriate.

In response to a question from Dan Ulmer, Brent Edison said eighty-three days is the average time taken for summary dismissal of a complaint. He noted that national statistics indicate North Dakota is an outlier in taking longer for summary dispositions. With respect to the positive approach suggested by Dave Maring, he said requiring affirmative approval by the inquiry committee would likely require more meetings and consequently would likely take more time.

Dave Maring suggested that conference call meetings could be an option for considering summary dismissals by disciplinary counsel. He said a process in which one person makes the decision may be distasteful to the public. There is, he said, a certain inherent advantage to group review.

Pat Monson observed that a goal of streamlining the process is to ensure that meritless complaints are expeditiously addressed. She said the intent is not to hide how the process works but to save time for everyone and conserve resources.

Kara Johnson said inquiry committee chairs and other committee members are burdened with a significant amount of work. Summary dismissal by disciplinary counsel, she said, is one way to lessen that burden.

After further discussion, **it was moved by Alex Reichert and seconded by Nick Thornton that the draft amendments to Rules 2.5 and 3.1 be modified as follows: responsibility of disciplinary counsel for all investigations, submission to the relevant inquiry committee of the list of complaints set for summary dismissal, include an explanation to the complainant of the summary dismissal.**

With respect to the draft amendment to Rule 3.1 regarding disciplinary counsel's submission of a list of complaints considered for summary dismissal, Dan Ulmer asked what specific information would be provided. Brent Edison said that in the judicial discipline context a memorandum is prepared for each case which discusses the allegation and explains why summary dismissal is considered appropriate. The actual complaint is not included. He said a similar process would be followed under the draft amendments.

In response to a question from Tony Weiler, Brenda Blazer observed that it may be difficult, simply because of conflicting schedules and availability, to assemble inquiry committee members more frequently than quarterly to review a list of complaints set for summary dismissal.

Tony Weiler noted that if inquiry committees cannot meet more frequently, then the ostensible objective of shortening process time with summary dismissal by disciplinary counsel may not be achieved.

Alex Reichert said the process contemplated in the draft amendments would not necessarily require a meeting of the inquiry committee. A list would be sent to inquiry committee members and a committee member could request further consideration of a particular complaint. If there is no such request within ten days, he said, then the summary dismissal would proceed.

Brent Edison agreed that under the draft amendments if there is an objection to summary dismissal or request for further consideration, then the complaint would be pulled from the list and the normal process of investigation and review would occur.

In response to a question from Alex Reichert, Brent Edison said summary dismissal authority would not require more resources for his office as his office currently reviews all complaints. He said funding was included in the disciplinary board's budget request for investigative staff in the second year of the biennium.

At this point, Dave Maring left the meeting due to a prior commitment.

Tom Dickson said transferring investigation responsibilities to disciplinary counsel would be a significant change in the process. He suggested it would be worthwhile to solicit the opinions of present and past inquiry committee chairs with regard to such a change.

Brenda Blazer said initially there was concern about the concept of disciplinary counsel conducting all investigations, but in light of how investigation responsibilities are assigned and handled she is reconsidering whether concern is warranted.

Pat Monson agreed. She said investigation by inquiry committee members themselves is likely not as critical as members asking questions of and observing the respondent lawyer and complainant. She said there also would likely be consistency of interpretation with one investigator, which is sometimes lacking when investigations are conducted by individual inquiry committee members. She said making an inquiry committee essentially a hearing panel, rather than an investigative as well as adjudicative body, is the best use of the inquiry committee.

Brent Edison said the most troubling aspects of the current process are the dual roles of disciplinary counsel and ex parte communications with the inquiry committees and the disciplinary board. He said it seems the most effective way of addressing these issues is for investigation to be done by disciplinary counsel, with the investigation results and recommendations shared with respondent's counsel and submitted to the inquiry committee. He said the respondent or respondent's counsel could either attend the presentation to the inquiry committee or waive the appearance.

Following further discussion, **the motion carried**. Chair Sturdevant said Dave Maring had indicated that he would support the motion.

It was moved by Alex Reichert and seconded by Nick Thornton that related draft amendments be prepared to clarify submission by disciplinary counsel to the inquiry committee of the investigative report and recommendations regarding disposition, and to provide for the sharing of the report and recommendations with the respondent and complainant before any hearing.

Brenda Blazer observed that sometimes there is a recommendation for discipline but discipline is not imposed based on the results of the hearing process. She said the complainant may be disappointed by that result having been previously informed of the recommendation. She agreed that if the recommendation is shared with one side, it should be provided to the other side. But, she said, it is not uncommon for the inquiry committee to reverse the recommendation.

Judge Sturdevant wondered whether disciplinary counsel should simply be reporting findings instead of recommendations for discipline.

Brent Edison said counsel will analyze the rules and the alleged conduct and there must be some conclusion regarding how the rules apply. He said a recommendation arguably is useful at least to the respondent going into the hearing.

Mike McGinniss noted that the ABA Report recommended that disciplinary counsel be given the authority, in addition to summary dismissal, to dismiss a complaint after an investigation. He said information could be submitted to the inquiry committee without the need for approval of the dismissal. He said the process would avoid the need for a hearing to dismiss the complaint.

Justice Sandstrom said there likely should be some avenue for separate consideration of disciplinary counsel's conclusion to dismiss a complaint. He suggested a process similar to that being considered for summary dismissals.

With the consent of the second, the motion was amended to include authority of disciplinary counsel to dismiss a complaint after investigation, accompanied by the review process related to summary dismissal.

Brenda Blazer said there is value in the face to face interaction with the respondent and complainant in considering the merits of the complaint. She said sometimes it is not known whether the complaint has merit, particularly when lay people assemble complaints. She said additional information often arises during the hearing before the inquiry committee that was not evident in the complaint.

Judge Greenwood wondered whether the submission of a list of complaints set for dismissal and the ten day review process might simply create another level of bureaucracy in the process. He said an alternative is for disciplinary counsel to simply recommend dismissal to the inquiry committee.

At this point, Jason Vendsel left the meeting due to a prior commitment.

Brenda Blazer noted that there is still the opportunity for appeal to the Disciplinary Board following a post-investigation dismissal.

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

Chair Sturdevant explained that there are two residual process issues related to disciplinary counsel authority. The ABA Report, he said, recommends that the authority to impose an admonition or consent probation be transferred to disciplinary counsel. Both are now imposed by the inquiry committee. He requested Committee discussion on the two issues.

With respect to disciplinary counsel authority to impose an admonition, Brenda Blazer said the authority should remain with the inquiry committee.

Alex Reichert wondered whether the authority could be placed with both disciplinary counsel and the inquiry committee.

Bent Edison noted that the ABA Report recommendation contemplates admonition by disciplinary counsel, but with the consent of the respondent and approval of the Disciplinary Board chair. He said an extension of disciplinary counsel authority with respect to summary dismissal and dismissals might be that disciplinary counsel would have authority to negotiate with respondent a proposed consent admonition subject to approval of the inquiry committee.

Alex Reichert said the approach may be a way of sifting out simpler cases more expeditiously.

Mike McGinniss said that an admonition recognizes there has been a violation of the rules. There is value, he said, in having an adjudicative body review imposition of the admonition.

Alex Reichert suggested that disciplinary counsel be given authority to impose an admonition with consent, which would be approved or rejected without hearing by the inquiry committee. In response to a question from Dan Ulmer, he said the ten day review approach considered for summary dismissals and dismissals would not be included. He said imposition of admonitions are likely not as time sensitive and could therefore be handled on a quarterly basis.

Brent Edison suggested disciplinary counsel should have the authority to negotiate an agreed-upon disposition. He said the authority of the inquiry committee, then, would be to approve the consent agreement.

Mike McGinniss said an alternative might be for disciplinary counsel to submit a negotiated consent to discipline to the inquiry committee chair. Then, he said, the committee could decide whether to approve the negotiated consent or whether a hearing should be held.

Brent Edison wondered whether the complainant would be required to appear at the hearing if one is held.

In response to a question from Justice Sandstrom, Brent Edison said the complainant is not currently involved in negotiated agreements regarding discipline.

Alex Reichert said expediting the process is worthwhile since a great many complaints are arguably not serious, but are nevertheless significant for the respondent lawyer involved in the process. He said the process should allow the inquiry committees to focus their efforts on more complex matters.

Justice Sandstrom suggested that the complainant should be given the opportunity to be heard on the issue of consent discipline.

Pat Monson said one approach may be to discuss with the complainant the possibility of a consent admonition being imposed and whether the complainant agrees or disagrees. She said there is less concern if some level of discipline will be imposed; the issue of complainant input is more of an issue with respect to dismissals. She said as a general matter a complainant tends to be satisfied if some kind of sanction will be imposed.

Brenda Blazer observed that her experience has been that most complainants seek the most serious sanction for the lawyer. She said discussions between the complainant and disciplinary counsel may be a workable alternative.

Justice Sandstrom said he is inclined to oppose the recommendation to transfer consent admonition authority to disciplinary counsel. He said the complainant should have the opportunity and a venue in which to be heard.

Judge Sturdevant asked whether notice could be given to the complainant of the opportunity to object to the consent admonition. Brent Edison wondered whether the matter would automatically go to a hearing with an appearance by the complainant if the complainant objected.

After further discussion, **it was moved by Alex Reichert and seconded by Pat Monson that draft amendments be prepared for review as follows: allow disciplinary counsel, in addition to an inquiry committee, to impose a consent admonition; incorporate the ten day review/object process reflected in the draft summary dismissal and dismissal amendments, except provide that the sanction comes from the inquiry committee.**

In response to a question from Mike McGinniss, Alex Reichert said the motion would not include notice to the complainant regarding a hearing if there is an objection. He said he is comfortable that disciplinary counsel will have discussed the consent admonition with the complainant.

Justice Sandstrom said he would oppose the motion. He said there is an important interest in protecting the public and the complainant should have the ability to be heard.

Following further discussion, **the motion carried.** ["No" votes: Justice Sandstrom, Duane Dunn, Dan Ulmer, Brenda Blazer, Zachary Pelham. Abstentions: Brent Edison, Kara Johnson].

The Committee then turned to discussion of the ABA Report's recommendation that disciplinary counsel be given authority to impose probation with the consent of the respondent lawyer. The recommendation includes a provision that if the lawyer objects, disciplinary counsel should recommend that the inquiry committee find probable cause for filing a formal petition.

Brent Edison suggested an approach similar to that discussed for consent admonitions could be considered for probation with consent and diversion with consent.

Mike McGinniss agreed that the issue could likely be resolved without consideration by the inquiry committee.

Justice Sandstrom observed that, generally, probation is a penalty for some kind of violation, with conditions that the person must satisfy. He asked whether, in the disciplinary context, there has been a finding that a rule violation has occurred and then the respondent lawyer is placed on probation.

Brent Edison responded that currently an inquiry committee might conclude there should be discipline, but that probation for a certain period with identified conditions would be appropriate. He said in the event of noncompliance the inquiry committee could reconsider its previous action.

With respect to a general process, Judge Greenwood agreed that for consistency consent admonitions, probation with consent, and diversion with consent should be treated similarly.

After further discussion, **it was moved by Alex Reichert and seconded by Mike McGinniss that draft amendments be prepared to establish a process for probation with consent and diversion with consent similar to the draft amendments regarding consent admonitions.**

Brenda Blazer observed consent probation is often an effective measure with respect to solo practitioners who are having law office management difficulties. She said a common condition is that the lawyer attend law office management classes to address any deficiencies. These situations, she said, likely pose less of an issue with respect to complainant involvement. For that reason, she said she is more comfortable with the suggested process for probation with consent than for consent admonitions.

Tony Weiler noted that SBAND has been reviewing programs to provide assistance in addressing law office practice management issues.

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

The Committee next reviewed draft amendments to Rule 4.3 regarding probation monitoring.

Staff explained that the draft amendments generally incorporate the monitoring process recommended in the ABA Report. He said the draft amendments differ from the report recommendation in not including the very detailed process for responding to noncompliance. Instead, he said, the amendments link to Rule 1.3B, which provides for reconsideration of the matter and possible imposition of further discipline in the event of noncompliance. He said the Committee might consider discussing whether to follow the more elaborate noncompliance process set out in the ABA Report.

Brent Edison said the current rule is lacking in detail regarding procedures for the revocation of probation.

In response to a question from Alex Reichert regarding whether probation is imposed without conditions, Brent Edison said there are some situations in which probation is imposed with the condition that there be no further complaints within a certain period of time.

Chair Sturdevant said the draft amendments would be held over to the next meeting for further review.

There being no further discussion, the meeting was adjourned at 1:40 p.m.