Minutes
(unofficial until approved)
Joint Committee on Attorney Standards
Ramada Hotel, Bismarck
November 7, 2014

Members Present	Members Absent
Judge Michael Sturdevant, Chair	Judge Paul Jacobson
George Ackre	Pat Monson*
Jeremy Bendewald	Dan Ulmer
Duane Dunn	
Judge Dann Greenwood	
Kara Johnson	
Michael McGinniss	
Alex Reichert	
Justice Dale Sandstrom	
Jason Steffenhagen	
Nick Thornton	
Jason Vendsel	
Brenda Blazer*	
Judge James Hill*	
Tom Dickson*	
Dave Maring*	
Brent Edison*	

* - Temporary members for lawyer discipline system review

Staff	Others Present
Jim Ganje	Penny Miller, Secretary, Disciplinary Board
Tony Weiler	Al Austad, ND Association for Justice

Chair Sturdevant called the meeting to order at 10:00 a.m. and drew Committee members' attention to minutes of the September 12, 2014, meeting.

It was moved by Kara Johnson, seconded by Alex Reichert, and carried that the minutes be approved.

Chair Sturdevant next reviewed referral to the Committee by the Supreme Court of an ABA team's review of the disciplinary system, which resulted in a Report and Recommendations. He said the Supreme Court referral directed that temporary members be added to the Committee to assist in review of the report. He welcomed the following individuals who have agreed to serve as temporary

members: Brenda Blazer (private practice and past Inquiry Committee Chair), Judge James Hill (previous representation of lawyers against whom complaints had been filed), Tom Dickson (private practice, including representation of lawyers against whom complaints had been filed), Dave Maring (private practice, Chair of disciplinary system's Operations Committee), and Brent Edison (Disciplinary Counsel). Chair Sturdevant noted that designation of a member of the SBAND Board of Governors to serve as a temporary member is pending. He said Pat Monson, who is participating on behalf of the Disciplinary Board, was unable to attend due to a family commitment.

In response to a question from Dave Maring, Chair Sturdevant said temporary members would participate fully in the Committee's assigned review, including regular voting privileges.

At the request of Chair Sturdevant, staff provided a brief summary of the ABA Report and Recommendations. He drew attention to the bound background material that would serve as the common reference point for the Committee's review (Summary of the ABA Report Recommendations, ABA Report on the Lawyer Discipline System, North Dakota Rules for Lawyer Discipline, and selected ABA Model Rules noted in the Report). Staff noted that the Summary is divided into two sections: one related to recommendations related generally to system infrastructure and operation (Items 1-13) and the second related to rule amendments recommended in the Report.

Committee members then commenced general discussion and review of the ABA Report and Recommendations.

Alex Reichert noted that the Report contains several recommendations that affect the Disciplinary Board's budget or otherwise require new funding. He asked whether the Committee is expected to evaluate and make recommendations with respect to new budget items and other recommended changes such as web-site development.

Chair Sturdevant said the Committee could express its support for a particular recommendation notwithstanding that a future budget request may be necessary to implement the recommendation.

In response to a question concerning the Disciplinary Board's current budget request (to be considered during the upcoming legislative session), Brent Edison explained that the Board's biennial budget request has been prepared and submitted. He said additional funds were included in the budget request to begin partial implementation of some of the Report's recommendations. He said the requested funding primarily relates to additional space, moving expenses, and contracting for investigative services in the second year of the biennium.

Brent Edison explained that the current disciplinary process is essentially a compromise between the ABA model rules and system changes that have been adopted over the past couple of decades. He said while the system relies heavily on volunteers, it is important to continue volunteer involvement in some measure. He said a problematic feature of the current process is that investigation is combined with adjudication, given the responsibilities of the inquiry committees. From an operational standpoint, he said, the ABA Report would result in more work for disciplinary counsel's office. But, he said, if the process is streamlined and meritless complaints are easier to dismiss, then more time would be available for complex cases. He noted that one method of easing the burden on inquiry committee members, including committee chairs, may be to use professional investigators, so that investigation is, in fact, separated from the adjudicative function. He said it may be beneficial for disciplinary counsel to have the ability to negotiate with the subject lawyer in the early stage, with the possible imposition of consent probation or an admonition as a means of disposing of the case earlier. He said there also should be clarification of the status of the investigator's report - whether it is available or not to the subject lawyer.

In response to a question from Alex Reichert, Brent Edison said a possible alternative might be a pilot project in which one or more inquiry committee chairs would assign all complaints to disciplinary counsel. That, he said, may provide the opportunity to determine whether a system rearrangement as contemplated in the Report is feasible.

In response to a question from Brenda Blazer, Brent Edison said summary dismissal authority would not be included in a pilot project as rule amendments would be necessary to confer that authority on disciplinary counsel.

In response to a question from Duane Dunn regarding the volume of complaints, Penny Miller said 204 *new* cases were opened in 2014. She said there was a total 397 files available in 2013 for consideration. Brent Edison said 74 of the 204 new files were summarily dismissed and 146 were dismissed after investigation.

Dave Maring observed that transfer of investigation responsibility to disciplinary counsel would represent a significant change in the system in terms of personnel and budgeting. He said some investigations can be very time consuming and the commitment of disciplinary counsel resources could be substantial.

With respect to the Report's recommendation regarding inquiry committee structure, Brenda Blazer said inquiry committees serve an important purpose and she would be very concerned about an effort to eliminate the current structure.

In response to a question from Justice Sandstrom, Mike McGinnis explained that the Delaware system, in which he served as disciplinary counsel, was also reviewed by the ABA in 2002. He said the system structure was similar to the recommendations in the Report: disciplinary counsel, conducted investigations; there is a review committee somewhat similar to an inquiry committee which could impose consent admonition and probation. He said several hundred complaints were docketed per year and counsel had the authority to dismiss. He said the review panel generally met once per month in person.

In response to a question from Duane Dunn regarding an online complaint form, Mike McGinniss said the complaint was available online, but complaints were required to be submitted on paper.

Penny Miller noted that information regarding the Disciplinary Board, relevant rules, and a brochure describing how to file a complaint are available on the Supreme Court's website.

Judge Hill said the central issue relates to the inquiry committee structure and how they function. He noted there is concern about the confidentiality of the inquiry committee process. He emphasized that the organized bar will expect to be included in a discussion about restructuring the disciplinary process. He noted that if the inquiry committee process is modified as the Report recommends, participation by the organized bar will be severely limited.

After further discussion, **it was moved by Alex Reichert and seconded by Mike McGinnis that the Committee endorse Item 1 in the Summary – the recommendation for larger work space, better signage and security for disciplinary counsel, and enhanced public accessibility for the system.**

In response to a question from Dave Maring, Brent Edison said the present budget request includes approximately $46,500 for leasing of additional space and about $25,000 to contract for an investigator in the second year of the biennium. He said various technology enhancements were included in the previous budget.

Following additional discussion, the motion was **withdrawn**, with consent of the second.

Tom Dickson observed that the structure of the present system is generally sound and he is satisfied with the inquiry committee structure. Major restructuring, he said, does not seem necessary.

Penny Miller said one rule change that should be considered is a provision to allow greater use of technology, such as secure electronic transmission of confidential information to inquiry committees.

George Ackre said he has represented lawyers before inquiry committees and the complaints have ultimately been dismissed, but seemed to have taken more time than necessary. He said he would support any changes to the system that result in more expeditious resolution of complaints, but he would oppose more authority transferred to disciplinary counsel.

Judge Hill noted that he has served as an inquiry committee chair, worked on previous changes to lawyer discipline rules, represented lawyers before inquiry committees and the Supreme Court, and served on the Judicial Conduct Commission. He said his experience has made clear that due process considerations are of utmost importance. He said the ABA Report should be analyzed critically and weighed against the needs of a small state like North Dakota with a relatively small bar.

Penny Miller said that efforts are underway with respect to some of the "Operational Infrastructure" items listed in the Summary. For example, she said, there is funding in the current budget for additional work space as Brent Edison had indicated; work is ongoing with respect to developing a uniform complaint form; greater use of technology with respect to case management is being pursued; using technology to streamline the complaint filing process is under consideration; and training for professional staff is occurring, although there is no training that is specific to the inquiry committees. With respect to a stand-alone website for the disciplinary system, she reiterated that information is available on the Supreme Court's website. She noted that in some other jurisdictions with web-based information about the process, the entire disciplinary history of a lawyer is accessible. She asked whether the Committee would consider that a beneficial approach.

Judge Hill suggested that many of the operational items are changes that could be considered by the Operations Committee without the need for rule changes.

Chair Sturdevant explained that the operational items are before the Committee for general review simply because they are part of the ABA Report. He said the Committee's principal work would be with respect to possible rule amendments.

Brent Edison agreed that operational items generally could be handled within the system. He said consideration of an operational issue could likely be discussed in greater detail if it affected the practicality of a possible rule change.

Judge Greenwood stressed the need to identify the core objectives to be achieved, which would then allow the details to fall in place. He agreed with the earlier comment that it would be cause for great concern if elimination of inquiry committees was pursued. He also agreed that, if there is sufficient funding, use of investigators should be considered since the adjudicating body should not also be the investigating entity. He agreed with the Report recommendation to prohibit ex parte communications between disciplinary counsel and the disciplinary board.

In response to a question from Jason Vendsel, Brenda Blazer said the inquiry committee process tends to be most time consuming for the committee chair as all information is submitted on paper, which must be reviewed and a decision made regarding whether summary dismissal is warranted. She said she would prefer that summary dismissals not be handled by the inquiry committee chair, which would then free up time and resources for the inquiry committee to focus on more complex cases. She suggested there should be a different method of appointing committee members. She said greater weight should be placed on someone who, as a member, is willing to commit the time and do the work.

In response to a question from Justice Sandstrom, Brenda Blazer said summary dismissal by disciplinary counsel would be the preferred approach. If a complaint is not summarily dismissed, she said, then the matter would be taken up by the inquiry committee.

Brent Edison explained that the rules governing the Judicial Conduct Commission provide for summary dismissal by disciplinary counsel. He said counsel submits a report every thirty days outlining complaints that would be subject to summary dismissal. He said members of the Commission can object to a particular summary dismissal and direct further investigation. He said if there is no objection within ten days of submission of the report, then summary dismissal proceeds. He said summary dismissal by his office would likely be workable.

Justice Sandstrom noted that under the current system a complaint moves through several steps before summary dismissal can be considered. Brenda Blazer agreed and said lawyers take complaints against them very seriously, which underscores the need for expeditious disposition of the complaint.

With respect to the general task before the Committee, Chair Sturdevant said discussion indicates that most of the budget-related items identified in the Report are being addressed in some fashion. He asked whether the Committee should entertain motions or statements of consensus with respect to the budget-related items.

With respect to Item 1 [larger work space, better signage and security, and enhanced public accessibility], **it was moved by Justice Sandstrom, seconded by Mike McGinniss, and carried that the Committee endorse Item 1.**

With respect to Item 3 [development of a stand-alone website], **it was moved by Alex Reichert and seconded by George Ackre that the Committee reject Item 3.**

Judge Greenwood asked whether it is feasible to have a “stand-alone” website that is linked through the Supreme Court’s website.

In response to a question from Alex Reichert regarding the cost of a separate website, Brent Edison said he would work with the judicial branch IT department to determine whether there is a cost consideration.

Justice Sandstrom said a stand-alone website could be linked to the Supreme Court's website.

Penny Miller said the primary question is the kind and amount of information that would be available on the website. Brent Edison said there is benefit to posting opinions and other information that are accessible to the public.

In response to a question from Dave Maring, Brent Edison said the other technology-related issue is whether to develop a separate case management system for the disciplinary system.

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

It was moved by Alex Reichert and seconded by Judge Hill that the Committee endorse Item 3.

For purposes of further discussion, Judge Hill asked what the expectations might be for the kind of website and website contents.

Jason Vendsel expressed concern about general approval of implementing a website. He said the kinds of information to be placed on the website should be identified. Judge Greenwood agreed with the concern and said it is important to include links to applicable rules.

Mike McGinnis said he understood the general approach to the Report's recommendation is not wholesale adoption of a particular recommendation, but consideration of the recommendation and approval in whole or in part. He said he would support the general concept of implementing a stand-alone website for the disciplinary process, with particulars to be identified later. Tom Dickson agreed with the stated approach.

Brenda Blazer noted that the website of the Board of Medical Examiners includes all information about a doctor involved in the process. Similarly, she said the website of the Board of Nursing provides access to a wide range of information, including dismissed complaints. She said current disciplinary rules would place limits on the kind of information that could be disclosed on a public website.

Dave Maring said it would be within the purview of the Disciplinary Board to determine what information would be posted to a website. He said he would support the motion with the

understanding that the intention is to approve the concept of a stand-alone website, which would be developed by the disciplinary counsel in conjunction with the Board.

Justice Sandstrom said the Committee should consider making recommendations about contents of the website at some point.

Duane Dunn suggested approval of the concept with consideration of possible contents to added as a future agenda item.

Committee members agreed with the later consideration possible contents suggested by Justice Sandstrom and Duane Dunn.

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

With respect to Item 4 [development of a uniform complaint form], Jason Vendsel said he is supportive of a uniform form so long as the form must be printed, completed, and submitted by mail, rather than using a fillable online form that could filed electronically. Tom Dickson agreed. He said those seeking to file a complaint should undertake the effort to prepare a proper complaint.

With respect to a uniform complaint, Brent Edison said issues to consider include whether to retain the requirement that the complaint be signed by the complainant and whether to have an information form that would provide pertinent information to ease the task of the investigator.

Judge Greenwood stressed the importance of ensuring the process is easily accessible.

Jason Vendsel said the counterpoint of easy access is that making initiation of complaints easier may well increase the number of frivolous complaints.

George Ackre suggested the possibility of providing a guide to completing a complaint, with instructions and other information the complainant should consider.

Following further discussion, **it was moved by Alex Reichert, seconded by Mike McGinniss, and carried that the Committee endorse development of a uniform complaint form, with the requirement that the form must be printed, completed, signed, and submitted by mail.**

At this point, Tom Dickson left the meeting due to a prior commitment.

With respect to Item 6 [streamlining the complaint filing process], Chair Sturdevant suggested deferring consideration until some of the related rule amendments are considered.

With respect to Item 8 [formal training for professional staff and volunteers], **it was moved by Justice Sandstrom, seconded by Alex Reichert, and carried that the Committee endorse Item 8.**

With respect to Item 9 [provide resources enabling disciplinary counsel to use services of an investigator], Brenda Blazer asked if there is an estimate of the amount of time counsel's office commits to investigative work. Kara Johnson said investigation time varies as some complaints are relatively simple, while others are very complex.

After further discussion, **it was moved by Dave Maring, seconded by Judge Greenwood, and carried that the Committee endorse Item 9.**

Justice Sandstrom suggested the Committee review the rule recommendations in the Report, particularly those involving transfer of some duties to disciplinary counsel and summary dismissal authority for disciplinary counsel.

Brent Edison said there appears to be some consensus from previous discussion about summary dismissal authority. He said that authority for disciplinary counsel would necessarily include filing the complaint with counsel. He noted that the authority has been provided to counsel in the judicial discipline process under Rule 10 of the rules governing the Judicial Conduct Commission.

It was moved by Justice Sandstrom, seconded by Mike McGinniss, and carried that draft amendments placing summary dismissal authority with disciplinary counsel, as in the judicial discipline rules, be prepared for review.

With respect to Item 10 [provision for probation monitors], staff said implementing the recommendation would require amendments to Rule 4.3.

Brent Edison said probation monitoring, as the Report explains the concept, would require more resources but would improve operation of the system. He said there is a concerted effort to clearly define conditions of probation at the outset. He said the onus is on the lawyer to submit a report on compliance. He said the more substantive policy decision is whether to develop more tools to route lawyers away from discipline to some alternative in lieu of discipline.

It was moved by Alex Reichert and seconded by Mike McGinnis that draft amendments to provide for probation monitoring be prepared for review.

In response to a question from Judge Sturdevant regarding SBAND resources for alternatives to discipline, Tony Weiler said there are discipline funds that might be accessed for alternative discipline initiative. He said asking volunteers to commit more time in these efforts is always a struggle. He said SBAND would likely support CLE and other efforts in areas such as law office practice management that will assist lawyers in avoiding situations that may lead to involvement in the disciplinary process.

Brenda Blazer said inquiry committees have often considered an alternative to public discipline, such as probation, monitoring, or referral to a particular program, that will better assist the lawyer in correcting problematic conduct. However, she said, the system does not work particularly well in handling repeat offenders, which are most often involved in practice management difficulties. She said the probation monitoring concept is attractive, but there are several underlying factors that will determine whether it is workable.

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

Committee members then generally discussed Item 12 [expansion of SBAND member benefits, including law office practice management, mediation program, ethics and trust accounting, mentorship program].

Tony Weiler said the SBAND Board of Governor would likely support efforts related to better law office practice management.

Brenda Blazer asked whether there is a national program on practice management that a lawyer could attend. Kara Johnson said it appears that each state generally develops its own program.

Tony Weiler wondered whether development of a practice management team to develop a program should be considered.

Chair Sturdevant drew Committee members' attention to Item 2 [open and transparent nomination process for vacancies on the Disciplinary Board - announcement of vacancies on Supreme Court's website - consideration of a nominating committee to review applications]. He requested Committee discussion regarding the item.

Tony Weiler summarized the current process when a Board vacancy arises: an announcement of the vacancy is placed on the SBAND website, applicants are reviewed by the Board of Governors, and three names for each vacancy are submitted to the Supreme Court.

Dave Maring observed that it is often a struggle to find three nominations to submit to the Court and making the process more complex would be a mistake. He said more transparency about the process for filling vacancies is a good idea, but there is no need to change the current process.

Jason Vendsel said the current process seems adequate except for a possible greater publication effort regarding vacancies.

After further discussion, **it was moved by Alex Reichert, seconded by Dave Maring, and carried that the Committee endorse Item 2 with respect to openness and transparency but not endorse any recommended revisions of the nomination process itself.**

There being no further discussion, the meeting was adjourned at 1:55 p.m.