

Minutes
(unofficial until approved)
Joint Committee on Attorney Standards
Ramada Hotel, Bismarck
November 13, 2015

Members Present

Judge Michael Sturdevant, Chair
George Ackre
Duane Dunn
Judge Dann Greenwood
Kara Johnson
Michael McGinniss
Alex Reichert
Jason Steffenhagen
Dan Ulmer
Jason Vendsel
Dave Maring*
Zachary Pelham*

Members Absent

Jeremy Bendewald
Judge Paul Jacobson
Justice Dale Sandstrom
Nick Thornton
Brenda Blazer*
Tom Dickson*
Pat Monson*

* - Temporary members for lawyer discipline system review

Staff

Jim Ganje
Tony Weiler

Also Present

Petra Hulm, Deputy Clerk of the Supreme Court
Jeanne Schlittenhard, SBAND

Chair Sturdevant called the meeting to order at 10:00 a.m. and drew Committee members' attention to minutes of the September 11, 2015, meeting (meeting material, pp. 2-17). The following corrections were noted: remove "habit," and insert "or" after "impeachment purposes" in 5th paragraph, p.4; change "and" to "an" in 5th paragraph after "is" on p.12.

It was moved by Judge Greenwood, seconded by Mike McGinniss, and carried that the minutes, with the noted corrections, be approved.

Lawyer Discipline System Review - Cont'd

Rule Amendments - Cont'd Review

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Chair Sturdevant drew attention to the summary of rule amendments (meeting material, pp.18-19) and the following amendments (meeting material, pp.20-49). Staff explained that the rule amendments include revisions to amendments previously reviewed by the Committee, amendments tentatively approved by the Committee, and rule amendments resulting from the September meeting. Committee members then reviewed the respective amendments.

Rule 2.2. Operations Committee (meeting material, p.20-21). Staff noted that the Committee had deferred discussion of amendments to the rule. He said the draft amendment in Section A would add a lay member to the Operations Committee membership and the draft amendments to Section E would incorporate additional responsibilities for the Operations Committee. The amendments, he said, reflect recommendations in the ABA Report.

With respect to adding lay membership to the Committee, Dave Maring reiterated his earlier concern that there is a consistent problem in finding lay members to serve on bar committees, and it may be difficult for a lay member to come to a full understanding of the disciplinary system without having previously been involved. He suggested that the amendment not be approved.

Kara Johnson agreed and stressed the importance of knowledge about and experience in the discipline system to the work of the Operations Committee.

Alex Reichert asked whether the amendments to Section E would be useful additions in identifying Operations Committee responsibilities.

Kara Johnson observed that development of a caseload system is underway. She said requiring regular reports by rule may be premature. She noted that a summary of cases handled in the disciplinary system is included in each Annual Report of the judicial system.

Dave Maring said draft paragraph (3) regarding regular review of caseload reports is probably unnecessary since draft paragraph (2) regarding general oversight of caseload management efforts would include regular reviews. He stressed that the Operations Committee has become more sophisticated in the last several years and continues efforts to improve its review of system operation. He said draft paragraph (4) regarding annual performance evaluation of disciplinary counsel largely reflects current practice.

After further discussion, **it was moved by Alex Reichert, seconded by Mike McGinniss, and carried that the draft amendments to Section A not be approved and that draft amendments to Section E to include general oversight of caseload management and performance reviews of disciplinary counsel be approved.**

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Rule 2.3. Hearing Panels (meeting material, p.22). Staff said the amendment in Section A regarding appointment of a hearing panel chair by the chair of the disciplinary board reflects an ABA Report recommendation and was approved at the September meeting. He said an additional amendment to Section A to remove reference to a district judge or surrogate judge serving as a hearing panel resulted from the September meeting discussion.

There were no suggested additional amendments to the rule.

Rule 2.4. District Inquiry Committees (meeting material, pp.23-25). Staff noted that the Committee had previously tentatively approved amendments to the rule to reflect transfer of investigative responsibilities to disciplinary counsel. He said an additional amendment resulting from the September meeting is deletion of language in Section B related to special members.

There were no additional amendments to the rule.

Rule 2.5. Disciplinary Counsel (meeting material, pp.26-27). Staff reviewed revisions resulting from the September meeting:

Including as a disciplinary counsel duty the provision of training and education to members of the board, hearing panels, and inquiry committees - renumbered Section B(4), revise new Section C to not allow a limited purpose use for an advisory letter issued to a respondent, and revise new Section D to include communications regarding “procedural” matters as an exception to the prohibition against ex parte communications, and to delete as unnecessary Section D(2) regarding a violation of the ex parte prohibition being a ground for discipline.

He noted that the additional revisions were approved at the September meeting.

Petra Hulm noted that the prohibition against ex parte communications applied to, among others, the “supreme court”. She asked whether “supreme court” relates only to the justices of the Court or if it includes her and Penny Miller in light of their involvement in the disciplinary process.

Kara Johnson said the intent is that “supreme court” would mean only members of the Court. Committee members agreed.

There were no additional amendments to the rule.

Rule 3.1 - General Procedures (meeting material, pp.28-33). Staff explained that the revised draft amendments reflect general discussion at the September meeting and the conclusion to consider revised Alternative amendments to Section C that provide for: a summary dismissal process, review

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of a list of proposed dismissals by inquiry committee members, an opportunity to object, and dismissals recommended following investigation to be submitted to the full inquiry committee (meeting material, pp. 28-29).

Dave Maring said the draft amendments appear to accomplish the objectives outlined during the September meeting discussion and seem to address concerns expressed previously by Brenda Blazer.

Judge Greenwood asked whether involving full inquiry committee review of dismissals after investigation may contribute to delay in disposing of a complaint. Kara Johnson said the regular quarterly meeting schedule for inquiry committees may somewhat slow the process of resolving dismissals recommended after investigation. But, she said, the summary dismissal process will generally expedite the process. Additionally, she noted that investigative reports done by disciplinary counsel will be public, which will aid in providing the respondent lawyer and complainant more information.

With respect to the investigative report being “public”, Dave Maring observed that it would be public to the extent that it is provided to the respondent lawyer and the complainant. Kara Johnson agreed and noted that, at stage of the proceedings addressed in the amendment, the process is informal and confidential.

In response to a question from Judge Greenwood, Kara Johnson said the draft amendments related to summary dismissal would provide for review by inquiry committee members of the recommended dismissal and an opportunity to object to dismissal and request further investigation. If there is no objection, she said, summary dismissal will proceed with a letter issued by disciplinary counsel.

Dave Maring noted the phrase “if the complaint is summarily dismissed” on p.29, line 10. He said the phrase should be deleted as it appears to be a remnant from a previous draft amendment. Committee members agreed with the suggested deletion.

After further discussion, it was moved by Dave Maring, seconded by Mike McGinniss, and carried that Section C, as further revised and with the suggested deletion, be approved.

Dave Maring drew attention to Section A of the rule. He said the first three or so sentences seem awkwardly worded and could be stated more clearly. He suggested that the relevant language be revised as follows:

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“The board or district inquiry ~~committees~~ committee may consider on ~~their~~ its own ~~motions~~ motion alleged grounds for disciplinary action or disability proceedings. All complaints other than those upon motion by the board or a district inquiry ~~committees~~ committee must be in writing, signed by the complainant”

It was moved by Mike McGinniss, seconded by Dave Maring, and carried that Section A be further amended as suggested.

Dave Maring drew attention to Section D(3). He reiterated his earlier concern regarding current language providing that failure by a respondent to timely respond to the complaint “is” an admission that the factual allegations are true. He suggested that the language be modified to replace “is” with “may be deemed”, which would be similar to current court rules regarding failure to timely submit a brief.

Following further discussion, **it was moved by Dave Maring and seconded by Alex Reichert that Section D(3) be amended as suggested.**

Mike McGinniss agreed that “may be deemed” would provide a discretionary element to evaluating the respondent’s failure to timely respond, but it would likely not recognize any evidentiary value in light of the factual element in the rule language. For example, he said, an alternative might be to provide that failure to respond “is a sufficient basis to find” that the factual allegations are true, or that failure to respond is “*prima facie* evidence” that the allegations are true.

Kara Johnson asked how suggested evidentiary-related language would work from a practical perspective. In response to a question from Duane Dunn, she said that if a respondent fails to respond in a timely manner or is nearing the end of the time to respond, disciplinary counsel usually contacts the respondent to inquire about the situation.

Alex Reichert noted that under Rule 3.2 of the Rules of Court, for example, the moving party still has the burden of proving the party is entitled to whatever relief is requested even if the party fails to timely file a brief.

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

Chair Sturdevant drew attention to Brenda Blazer’s earlier comment regarding the alternative references to inquiry committee and hearing panel in Rule 2.5, Section C, regarding the advisory letter. With the revisions to Section C of Rule 3.1, he said the reference to “panel” appears unnecessary. Committee members agreed the revision could be handled as a technical change.

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There were no additional amendments to Rule 3.1.

Rule 3.5. Additional Procedures (meeting material, pp. 34-35). Staff said amendments resulting from the September meeting include language in Section E regarding prehearing conferences, which the Committee approved. An additional amendment is reflected in Section C, which clarifies that clear and convincing evidence, as a standard of proof, applies to informal charges as well as formal charges.

It was moved by Mike McGinniss, seconded by Dave Maring, and carried that Rule 3.5, as further amended, be approved.

Rule 4.1. Criminal Conduct (meeting material, pp.36-37). Staff said the amendments to Sections D, E, and G, of the rule were approved at the September meeting. The amendments reflect a modification to the recommendation from the ABA Report to provide for the immediate suspension of a lawyer upon a finding of guilt. The Committee's additional amendments provide for suspension upon conviction (current rule language) *or* a finding of guilt. The amendments also provide for notice to the lawyer, as well as disciplinary counsel, if the court sets aside or modifies the interim suspension.

In response to a question from Petra Hulm, Mike McGinniss said a finding of guilt would likely include a plea of guilty.

Judge Greenwood suggested that, for purposes of clarification, it may be useful to modify the language in relevant places to indicate that immediate suspension follows from a conviction or from the lawyer having pled or been found guilty of a serious crime.

After discussion, **it was moved by Mike McGinniss, seconded by Dave Maring, and carried that the rule be further amended as suggested.**

There were no additional amendments to Rule 4.1.

Rule 4.2. Discipline by Consent (meeting material, pp.38-40). Staff said the amendments to the rule reflect those previously approved by the Committee.

Kara Johnson noted the reference to "reprimand" as a proposed sanction in revised Section D(1) [p. 39, line 16], which relates to approval by an inquiry committee. She suggested that "reprimand" be replaced with "admonition" since a reprimand is not a sanction available to an inquiry committee.

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It was moved by Mike McGinniss, seconded by Dave Maring, and carried that “a reprimand” on p.39, line 16, be replaced with “an admonition”.

Rule 4.3. Probation (meeting material, p.41). Staff said the amendments to Rule 4.3 had been previously approved by the Committee.

There were no additional amendments to Rule 4.3.

Rule 6.3. Notice of Status (meeting material, pp.42-43). Staff said the amendments reflect modifications reviewed at the September meeting.

Petra Hulm drew attention to language in new Section D which provides that a “respondent may not maintain a presence in or occupy an office where the practice of law is conducted”. She asked whether the language would mean that a lawyer suspended in North Dakota could not practice law if admitted in Minnesota, at least until there is reciprocal discipline in Minnesota.

Mike McGinniss noted that Rule 5.5 of the Rules of Professional Conduct links the safe harbors under that rule with respect to unauthorized practice of law to practice “in this jurisdiction”. He suggested similar language could be included in new Section D.

Following discussion, **it was moved by Mike McGinnis, seconded by Dave Maring, and carried that new Section D be further modified to insert “in this jurisdiction” after “office” on p. 42, line 22.**

Rule 6.6.Diversion from Discipline (meeting material, pp.44-47). Staff said the additional draft amendments follow from the Committee’s September 11 meeting discussion and reflect the conclusion that additional language should be included to place greater authority and responsibility with disciplinary counsel with respect to diversion. He said the additional language in new Section G would involve disciplinary counsel in working with the lawyer to develop the individualized assistance plan, additional language in new Section H would require reporting compliance or non-compliance to disciplinary counsel, and new Section I would require disciplinary counsel to report compliance or non-compliance to the entity that considered the complaint. In the event of non-compliance, counsel would notify the lawyer that the plan is terminated and disciplinary proceedings may be started, resumed, or reinstated and would also make a recommendation to the entity considering the complaint.

Petra Hulm drew attention to new (re-designated) Section K, which is current rule language and provides that a lawyer’s participation in a lawyer assistance program is confidential. She said there is a problem if diversion occurs after a formal petition is filed since, at that stage, the discipline

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proceeding is public. The effect of the Section K language, she said, is that if a petition has been filed, no information can be disclosed about the lawyer's involvement in an assistance program.

Mike McGinniss asked whether it is possible to provide confidentiality for certain portions of the record at the formal stage. Petra Hulm said that may be an option to consider at some point.

Committee members agreed the issue is worth further discussion in the future.

After discussion, **it was moved by Dan Ulmer, seconded by Kara Johnson, and carried that Rule 6.6, as amended, be approved.**

Rule 6.4. Professional Trusteeships (meeting material, pp.48-49). Chair Sturdevant drew attention to draft amendments to Rule 6.4 submitted by Kara Johnson. The draft amendments to Section F would explain how funds in an interest bearing trust account could be distributed if the funds could not be traced back to a particular client. The funds could be applied first to approved fees and costs for the trustee, with the remainder, if any, then deposited into the client protection.

Kara Johnson explained that there is currently no direction regarding how to dispose of funds in a trust account if the funds cannot be linked to a particular client.

Duane Dunn observed that from an accounting standpoint, the first part of Section F encompasses a substantial amount in terms of accounting for and disposing of fees, funds, and assets. He wondered whether the rule should provide more specific guidance for the trustee.

Kara Johnson said the guidance to the trustee is typically set out in the court's order appointing the trustee.

Alex Reichert asked whether disposition of funds should address any creditors or client claims that may be known, in addition to approved fees and costs.

Dave Maring said the amending language could be modified to address those items and then provide that any remaining funds could be deposited in the client protection fund.

Following further discussion, **it was moved by Alex Reichert, seconded by Mike McGinniss, and carried that the draft language be modified to read: "To the extent the funds of an identifiable interest bearing trust account cannot be traced back to a particular client by the professional trustee, the funds may be applied toward client claims, creditors, and the approved fees and costs of the professional trustee, with the remaining amount deposited into the client protection fund"; and that the rule, as amended, be approved.**

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Policy Regarding Use of Investigative Reports. Chair Sturdevant noted the ABA Report recommendation that the Disciplinary Board should adopt a policy regarding the ability of disciplinary counsel to use previously undisclosed investigative reports for impeachment purposes.

Kara Johnson asked whether the context and intent of the recommendation may be affected with the rule amendment requiring the investigative report to be disclosed to the respondent lawyer and the complainant. She said there is probably a less substantial concern about using the report since it would be disclosed.

Mike McGinniss agreed and said the rule amendment indirectly addresses the concern outlined in the ABA Report.

Committee members agreed that the ABA Report recommendation does not require further attention at this time in light of the proposed rule amendment.

State Bar Association Program Enhancements. Chair Sturdevant noted the ABA Report recommendations regarding enhancements to increase availability and access to lawyer assistance programs, expand lawyer assistance program types, and otherwise expand member benefits.

Kara Johnson said there are various efforts underway to expand bar association programs.

Zachary Pelham said he would ensure that the ABA Report recommendations are presented to and discussed by the Board of Governors.

Following further discussion, **it was moved by Alex Reichert, seconded by Mike McGinniss, and carried that the assembled lawyer discipline rule amendments, as further modified, be approved for submission to the Board of Governors for review and, in the absence of any Board comment requiring Committee action, be approved for submission to the Supreme Court for its consideration.**

Conclusion

Chair Sturdevant noted that the third, and final, term for Dan Ulmer will expire January 1. He thanked Dan for his many years of service to the Committee. Chair Sturdevant said his last term will expire as well on January 1. Committee members thanked him for his service to the Committee and his leadership as Committee Chair.

There being no further discussion, the meeting was adjourned at 12:35 p.m.