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Joint Committee on Attorney Standards

North Dakota Supreme Court
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STATE OF NORTH DAKOTA

Hon. Dann E. Greenwood, Chair
51 Third St. E, Suite 202
Dickinson, ND 58601
Phone: (701) 227-3150

April 29, 2016

Honorable Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard
Bismarck, ND 58505-0530

Re: Rule 1.2, Rules of Professional Conduct - Proposed Amendments

Dear Chief Justice VandeWalle:

The Joint Procedure Committee, chaired by Justice Dale Sandstrom, recently recommended to the Supreme Court rule amendments related to limited scope representation. Specifically, the Committee proposed amendments to Rule 11 of the Rules of Civil Procedure and Rule 11.2 of the Rules of Court to include procedural details applicable to limited appearances by a lawyer on behalf of a party, particularly a self-represented party. The Committee discussed the importance of a written agreement between the lawyer and party when there is limited scope representation, but concluded that such a requirement would be more appropriately addressed in Rule 1.2 of the Rules of Professional Conduct, which governs the scope of representation and allocation of authority between the lawyer and client. The Committee did agree, however, that there *should be* a written agreement between the lawyer and self-represented party which precisely defines the scope of representation.

In its submission of proposed amendments to the Supreme Court, the Joint Procedure Committee suggested that the Joint Committee on Attorney Standards review the proposed amendments and consider whether a writing requirement should be included in Rule 1.2. The Supreme Court thereafter referred the matter to the Joint Committee for review. At its February meeting, the Joint Committee reviewed the amendments proposed by the Joint Procedure Committee and considered additional background provided by Justice Sandstrom.

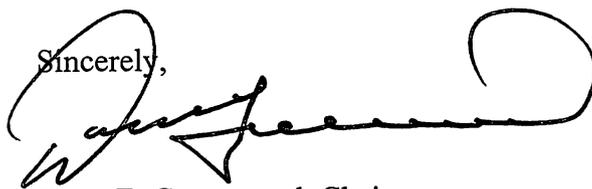
As noted, Rule 1.2 does not contain a writing requirement in the black-letter rule with respect to a client's consent to limited scope representation. However, Comment [6] of the Rule does provide that "[o]btaining the client's consent in writing is the preferred practice. Lack of a writing may make it difficult to prove client consent

if a dispute arises later". After discussion, the Joint Committee agreed that a writing requirement would be a beneficial addition to the rule. A writing would facilitate a clear definition of the scope of representation, which would protect both the lawyer and the client. The Joint Committee, therefore, proposes an amendment to paragraph (c) of the black-letter rule to provide that client consent must be in writing. An amendment to Comment [6] is also proposed to remove current language describing consent in writing as a preferred practice.

The Joint Committee approved the amendments for submission to the Supreme Court, pending review and comment by the SBAND Board of Governors as required by Administrative Rule 38, Section 3B. The Board of Governors has reviewed the Committee's proposed amendments and, by a letter dated April 25, 2016, from Joe Wetch, SBAND President, has indicated its approval of the proposed amendments. A copy of the letter is included.

I am pleased to submit the Joint Committee's proposed amendments to the Supreme Court for its consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Dann E. Greenwood". The signature is fluid and cursive, with a large loop at the end.

Dann E. Greenwood, Chair
Joint Committee on Attorney Standards

DEG/

cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje



State Bar Association of North Dakota

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Tony J. Weiler • *Executive Director*

April 25, 2016

Hon. Dann E. Greenwood
Judge of the District Court
51 Third St. E., Ste. 202
Dickinson, ND 58601

Re: Joint Committee on Attorney Standards

Dear Judge Greenwood,

I am in receipt of letters from the Joint Committee on Attorney Standards dated March 2, 3, and 4. Each letter contained Rules modified by the JCAS, and sent to the State Bar Association's Board of Governors under Administrative Rule 38 for review and comment.

The Board met this past Saturday, and reviewed the proposed changes to the Rules of Professional Conduct and to the Admission to Practice Rules. The Board discussed each suggested change and has no substantive comments in opposition. In fact, the Board passed three separate motions approving the changes explained by, and attached to, each of your separate letters.

The Board of Governors and I thank you and your committee for all the hard work you do.

Sincerely,

A handwritten signature in cursive script that reads "Joseph A. Wetch Jr.".

Joseph A. Wetch Jr.
President

PROPOSED AMENDMENTS

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

1 (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the
2 objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means
3 by which they are to be pursued. A lawyer may take such action on behalf of the client as impliedly
4 authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle
5 a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with
6 the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

7 (b) A lawyer's representation of a client, including representation by appointment, does not constitute
8 an endorsement of the client's political, economic, social or moral views or activities.

9 (c) A lawyer may limit the scope of the representation if the client consents in writing after
10 consultation.

11 (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows
12 is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course
13 of conduct with a client and may counsel or assist a client to make a good faith effort to determine
14 the validity, scope, meaning or application of the law.

15 Comment

16 Scope of Representation

17 [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be
18 served by legal representation, within the limits imposed by law and the lawyer's professional
19 obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must
20 also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client
21 about such decisions. With respect to the means by which the client's objectives are to be pursued,
22 the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is
23 impliedly authorized to carry out the representation.

1 [2] On occasion, however, a lawyer and a client may disagree about the means to be used to
2 accomplish the client's objectives. Clients generally defer to the special knowledge and skill of their
3 lawyer with respect to the means to be used to accomplish their objectives, particularly with respect
4 to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such
5 questions as the expense to be incurred and concern for third persons who might be adversely
6 affected. The lawyer should consult with the client and seek a mutually acceptable resolution of any
7 disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the
8 client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client
9 may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(4).

10 [3] At the outset of a representation, the client may authorize the lawyer to take specific action on
11 the client's behalf without further consultation. Absent a material change in circumstances and
12 subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however,
13 revoke such authority at any time.

14 [4] In a case in which the client appears to have limited capacity, the lawyer's duty to abide by the
15 client's decisions is to be guided by reference to Rule 1.14.

16 Independence From Client's Views or Activities

17 [5] Legal representation should not be denied to people who are unable to afford legal services, or
18 whose cause is controversial or the subject of popular disapproval. By the same token, representing
19 a client does not constitute approval of the client's views or activities.

20 Agreements Limiting Scope of Representation

21 [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or
22 by the terms under which the lawyer's services are made available to the client. Paragraph (c) allows
23 the lawyer to limit the scope of representation if the client consents. ~~Obtaining the client's consent~~
24 ~~in writing is the preferred practice. Lack of a writing may make it difficult to prove client consent~~
25 ~~if a dispute arises later.~~ When a lawyer has been retained by an insurer to represent an insured, for
26 example, the representation may be limited to matters related to the insurance coverage. A limited
27 representation may be appropriate because the client has limited objectives for the representation.
28 In addition, terms upon which representation is undertaken may exclude specific means that might

1 otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that
2 the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

3 [7] Although an agreement for a limited representation does not exempt a lawyer from the duty to
4 provide competent representation, the limitation is a factor to be considered when determining the
5 legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See
6 Rule 1.1.

7 [8] All agreements concerning a lawyer's representation of a client must accord with these Rules and
8 other law. See, e.g., Rules 1.1, 1.8 and 5.6.

9 Criminal, Fraudulent, and Prohibited Transactions

10 [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a
11 crime or fraud. The prohibition, however, does not preclude the lawyer from giving an honest
12 opinion about the actual consequences that appear likely to result from a client's conduct. Nor does
13 the fact that a client uses advice in a course of action that is criminal or fraudulent of itself, make a
14 lawyer a party to the course of action. There is a critical distinction between presenting an analysis
15 of legal aspects of questionable conduct and recommending the means by which a crime or fraud
16 might be committed with impunity.

17 [10] When the client's course of action has already begun and is continuing, the lawyer's
18 responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing,
19 except where required or permitted by Rule 1.6. The lawyer is required to avoid assisting the client,
20 for example, by drafting or delivering documents that the lawyer knows are fraudulent or by
21 suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client
22 in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or
23 fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.
24 See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the
25 lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation
26 or the like. See Rule 4.1.

27 [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings
28 with the beneficiary.

1 [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence,
2 a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax
3 liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general
4 retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that
5 determining the validity or interpretation of a statute or regulation may require a course of action
6 involving disobedience of the statute or regulation or of the interpretation placed upon it by
7 governmental authorities.

8 [13] If a lawyer comes to know or reasonably should know that a client expects assistance not
9 permitted by these Rules or other law or if the lawyer intends to act contrary to the client's
10 instructions, the lawyer must consult with the client regarding the limitations on the lawyer's
11 conduct. See Rule 1.4(a)(5).

12 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
13 as amended 10/21/83, 02/03/84, 03/16/84, 05/23/84, 06/27/84; Minutes of the Joint Committee on
14 Attorney Standards on 11/15/02, 02/28/03, 09/25/03, 11/19/04, 02/26/16.