

Minutes
(unofficial until approved)
Joint Committee on Attorney Standards
Radisson Hotel, Fargo
June 10, 2014

Members Present

Judge Michael Sturdevant, Chair
Jeremy Bendewald
Duane Dunn
Judge Dann Greenwood
Kara Johnson
Michael McGinniss
Alex Reichert
Justice Dale Sandstrom
Jason Steffenhagen
Jason Vendsel

Members Absent

George Ackre
Nick Thornton
Dan Ulmer

Staff

Jim Ganje
Tony Weiler

Chair Sturdevant called the meeting to order at 12:15 p.m. and welcomed as new Committee members Jeremy Bendewald and Jason Steffenhagen - appointed by the SBAND Board of Governors, and Duane Dunn - appointed by Chief Justice VandeWalle. He drew Committee members' attention to the June 4, 2014 Attachment - minutes of the March 14, 2014, meeting. It was noted that "presentation" on page 2, 3rd line, should be "representation".

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

Fee Agreements - Criminal Cases - Cont'd Discussion

Chair Sturdevant recounted the Committee's earlier submission of proposed amendments to Rule 1.5, Rules of Professional Conduct, to the Board of Governors for review and comment. The Board responded and expressed general agreement with proposed paragraph (f) of Rule 1.5 in the amendments, which would disallow nonrefundable fees and retainers and would recognize the client's right to terminate presentation. However, the Board unanimously opposed language in proposed paragraph (g) which would provide that fixed fees are the lawyer's property and could be deposited in the lawyer's operating account. (See June 10 Meeting Material, p.3, for the Board's response.) He said the Committee reviewed the response at the March meeting and learned that the

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criminal defense bar had requested an opportunity to present their views at the next Board of Governors meeting in April. Following that discussion, he said, the Board responded again and reaffirmed its earlier conclusions. (See June 10 Meeting Material, p.2, for the Board's second response.) He then requested discussion regarding how the Committee should proceed.

Alex Reichert observed that there is a general sense that flat fee arrangements are the wave of the future. For example, he said, large corporations are turning to flat fee arrangements as a means of managing litigation costs. He said the criminal defense bar remains supportive of the rule amendments as approved by the Committee. He said alternatives might be to submit the rule amendments to the Supreme Court "as is", or continue the review but with consideration of how flat fees arrangements are being handled in other areas of law, such as corporate or insurance law.

In response to a question from Chair Sturdevant regarding the general sentiment of the Board of Governors toward the rule amendments, Tony Weiler said the most significant concern was with treating the fee as the lawyer's property upon receipt. He said the Board may be amenable to an approach that involves depositing a portion of the fee in the lawyer's operating account, but depositing the majority of the fee in the trust account.

Justice Sandstrom reviewed the various issues discussed by the Committee with respect to fee arrangements: when the fee is considered "earned", how the fee is handled (deposit in the operating account or in the trust account), disposition of the fee if the client seeks to terminate representation, and how a client's interests are protected if, for example, the lawyer dies but the fees paid by the client have been dissipated.

Mike McGinniss said there is a degree of predictability associated with the flat fee approach. The question, he said, is how to balance concerns about client protection with a fee arrangement that enables the lawyer to effectively provide services. He noted that the Committee has previously discussed allowing a portion of a fixed fee to be deemed earned upon the occurrence of a single, identified event. He said the portion could be designated by amount or by a percentage of the fee paid. He said there is also a benefit to using a writing to structure the fee arrangement, which provides clarity and understanding for the client.

Justice Sandstrom recalled earlier concerns from the defense bar with the burden associated with segmenting a smaller fee. Also, he said, it has been recognized that opportunity costs for the lawyer in accepting a difficult case is a basis for setting a fixed or flat fee for representation.

In response to a question from Alex Reichert, Tony Weiler said the Board of Governors did not specifically discuss the status of the client protection fund when the proposed amendments were

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reviewed. He explained that there are funds available in the fund but circumstances under which clients can access the fund are very limited. He said the Board has requested that he review operation of the fund and rules governing client protection funds in other jurisdictions to determine whether improvements could be made.

Chair Sturdevant noted the extensive discussion the Committee has had regarding the fee issue and the information and drafts reviewed, and wondered whether the Committee has completed its task in developing a proposal and requesting comments from the Board. He said the options may be to simply submit the proposed amendments to the Supreme Court or inform the Supreme Court that there is an impasse with respect to a solution to the issue. He said there does appear to be general agreement with the proposed rule language disallowing nonrefundable retainers [paragraph f in the amendments].

Justice Sandstrom suggested the other option may be to develop rule language that designates a certain amount of a fee as earned, which can be deposited in the lawyer's operating account, while the remainder of the fee is deposited in the trust account and released on the occurrence of identified trigger events.

Alex Reichert cautioned against establishing arbitrary fee amounts for earned versus unearned as each case and the associated fee is different. He stressed that client protection has a substantial role in ensuring that the client is protected in the event of fee disputes.

Justice Sandstrom observed that the Committee's three new members are comprised of certified public accountants and a forensic accountant. He asked for their perspectives on the fee issue.

Jeremy Bendewald said a nonrefundable fee is most often used in situations in which an accountant is involved as an expert witness. He said his usual fee is on a hourly basis, rather than a fixed fee.

Jason Steffenhagen said a retainer is often used when business valuations are conducted. Otherwise, he said, there is a mix of hourly and flat fees depending on the project. In response to a question from Jason Vendsel, he said the fee, when received, will be deposited into the operating account.

With respect to the proposed amendments submitted to the Board of Governors, Judge Greenwood said he was heartened to see that the Committee would continue the discussion as he is uncomfortable with the approach set out in the amendments. He said the proposed amendments do

not establish a clear line, a clear principle of ethics, while the position expressed by the Board does. He suggested that if the Committee continues the discussion, there should be more emphasis on establishing a clear principle of ethics in the rule language. He said, as a general matter, the reasonableness of a fee will be determined by the circumstances of the case and what is set out in an agreed-to written document. He said the criminal defense bar has suggested that getting a firm agreement is often difficult. But, he said, if the rule language is to move away from a clearly enunciated black-letter ethics principle, then a clear, written fee agreement should be a bearable burden.

Alex Reichert agreed that a written agreement is important and should be obtained in every case. He said it is nearly malpractice to not have some evidence in writing regarding the particulars of the representation and the fee.

Mike McGinniss recalled that the Committee had previously reviewed information about a Wisconsin rule requiring that fee agreements be in writing.

After further discussion, **it was moved by Alex Reichert and seconded by Kara Johnson that further consideration of the rule amendments be postponed until there is information about any Board of Governors action with respect to the client protection fund.**

In explanation of the motion, Alex Reicher said that as a general matter he does not regard rule amendments as necessary since the Supreme Court has provided guidance in the *Hoffman* opinion about proper fee arrangements. Nevertheless, he said, there are concerns about protecting client interests and a significant part of those concerns may be mitigated with changes to how the client protection fund operates. He cautioned that it may be unwise to recommend rule amendments that establish particular fee requirements only to find that changes to client protection fund will have addressed pertinent concerns about how lawyer fees are handled and how clients are protected.

In response to a question from Justice Sandstrom, Tony Weiler said the Board would likely consider information about operation of the fund at its September meeting.

Following additional discussion, **the motion carried** (6-yes, 5-no).

Lawyer Assistance Program Rule Amendments

Chair Sturdevant reviewed the Committee's earlier submission to the Supreme Court of proposed amendments to Administrative Rule 49 regarding the lawyer assistance program and

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submission to the Board of Governors of related proposed amendments to Rule 2 of the Admission to Practice Rules. He said the Administrative Rule 49 amendments have been adopted and the Board has responded indicating its support for the Rule 2 amendments. Consequently, the proposed amendments to Rule 2 will now be submitted to the Supreme Court for consideration.

ABA Commission on Ethics 20/20 - Cont'd Review of Amendments to Model Rules of Professional Conduct

Rule 1.18 - Duties to Prospective Client. Chair Sturdevant drew attention to amendments to Model Rule 1.18, North Dakota Rule 1.18, and related Ethics 20/20 background information. [Meeting Material, pp. 17-21, and 38-40.] He noted that the Committee had briefly reviewed the model rule amendments at an earlier meeting but had deferred final consideration until the Rule 7 series related to advertising was considered.

Staff reviewed the model rule amendments as summarized at the December 2013 meeting.

Mike McGinnis explained that the amendments to model rule Comment [2] resulted from an ABA 2010 formal ethics opinion regarding lawyer websites (Formal Opinion 10-457).

It was moved by Mike McGinnis and seconded by Justice Sandstrom that North Dakota Rule 1.18 be modified to include the model rule amendments to paragraphs (a) and (b) and Comments [1], [2], [4], and [5].

Alex Reichert noted the amending language in Comment [2] which describes how a consultation may likely occur if the lawyer has requested information about a potential representation without a disclaimer or warning regarding any limits on the lawyer's obligations. He asked where the example originated.

Mike McGinnis said the language is likely derived from the ABA ethics opinion.

Judge Jacobson asked what kinds of warnings are contemplated by the Comment language.

Alex Reichert wondered whether it would be useful to include in the Comment the language set out in the ABA opinion. He said if there is a body of disclaimer language that has been approved, it would be helpful to include the information in the comment. Mike McGinnis said his recollection is that the opinion did not set out specific recommended warning language that could be included in the lawyer's communication. Alex Reichert said it would be beneficial to develop general disclaimer or warning language for lawyers to use in advertising communications.

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Kara Johnson agreed standardized language may be useful, but said there is a wide variety of social media by which lawyers could communicate regarding services. Standard language may not work in all media environments.

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

Rule 7.1 - Communications Concerning a Lawyer's Services. Staff explained that the model rule amendment is very limited and relates to the concluding sentence in Comment [3] - North Dakota Comment [2] - which is not included in North Dakota's Comment. Consequently, he said, to incorporate the model comment amendment would require including the sentence not currently in the North Dakota comment so as to amend it.

It was moved by Alex Reichert, seconded by Jason Vendsel, and carried that the model rule amendment not be approved.

Rule 7.2 - Advertising. Staff explained that there are no amendments to the black-letter model rule. He noted that the North Dakota black-letter rule differs substantially from the model rule. He explained further that the model rule amendments are with respect to Comment [1], to which North Dakota Comment [1] is approximately similar; Comments [2] and [3], which are not reflected in North Dakota's rule; Comment [5], which is only slightly similar to North Dakota Comment [5]; and Comments [6] and [7], which have no direct North Dakota counterparts. He noted that the model rule amendment to Comment [1] could be included in North Dakota Comment [1] and the model rule amendments to Comment [5] could be incorporated in some measure in North Dakota Comment [5] as the subject matter (paying others to recommend a lawyer) is the common subject and is related to a black-letter rule provision.

It was moved by Jason Vendsel that the model rule amendments not be approved. The motion died for lack of a second.

It was moved by Justice Sandstrom, seconded by Alex Reichert, and carried that draft amendments be prepared for review to incorporate model rule amendments to Comments [1] and [5] in North Dakota Comments [1] and [5].

Alex Reichert drew attention to paragraph (b) in current Rule 7.2, which requires a lawyer to retain a copy or recording of an advertisement or communication for two years after dissemination. He noted that the copy requirement is not included in the model rule and wondered whether it is a useful requirement given the different electronic mediums by which lawyers may

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advertise. He suggested that the requirement either be deleted or limited to print advertisements or communications.

After discussion, **it was moved by Alex Reichert, seconded by Mike McGinniss, and carried that options to amend paragraph (b) as described be prepared for review.**

Rule 7.3 - Direct Contact with Prospective Clients. Staff explained that black-letter Model Rule 7.3 is generally similar to black-letter North Dakota Rule 7.3, with two notable differences: 1) North Dakota Rule 7.3 does not include the “branding” provision set out in paragraph (d) of the Model Rule, which requires “Advertising Material” to be marked on any communication from a lawyer soliciting professional employment from a prospective client, and 2) North Dakota Rule 7.3 includes, while the model rule does not, paragraph (b)(3), which generally prohibits solicitation that is uninvited or that imposes any involuntary economic costs on the prospective client to respond.

Staff explained further that the model rule amendments remove references to “prospective client” as the focus of solicitation and refer instead to the “target of solicitation”. The intention, he said, is to move away from an arguable focus on a particular person, when “prospective client” is used, and focus instead on contacts with all possible future clients by referring generally to solicitation or to “anyone” needing legal services.

Staff said North Dakota’s comments differ substantially from the model rule comments and, as a result, incorporating any of the more substantive model rule comment amendments may require reviewing more substantial changes to North Dakota’s comments. However, he said the addition of a new Comment [1] in the model rule, which explains targeting of solicitation, could be fairly easily accommodated if the related black-letter rule changes were adopted.

It was moved by Judge Greenwood, seconded by Mike McGinniss, and carried that draft amendments be prepared for review to incorporate model rule amendments to paragraphs (a) and (b), new model rule Comment [1], and related amendments to North Dakota comment references to “prospective client”.

Justice Sandstrom noted the dissent to adoption of rule amendments in 2004 which is set out as part of the rule. He asked whether there is a sense that the current rule’s prohibition [paragraph (a)] against in-person contact to solicit professional employment may be overbroad as the dissent suggests.

Alex Reichert observed that the current rule’s limitation appears to prohibit what may otherwise be a common interaction between a lawyer and potential client. He said it may reach too

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far in an attempt to limit what might be the focus of the rule: exploiting the circumstances of a person who might be in need of legal services.

Mike McGinniss said it may be helpful to modify paragraph (a) to more directly tie the prohibition against in-person contact to a person known to be in need of legal services, i.e., include the “anyone known to be in need of legal services” language set out in paragraph (c) of the model rule.

Following further discussion, **it was moved by Justice Sandstrom, seconded by Mike McGinniss, and carried that draft amendment be prepared for review to further modify paragraph (a) to include the suggested reference.**

With respect to the dissent included with the rule, Justice Sandstrom said a dissent to adoption would not ordinarily be included with a rule. That part of the order for adoption, he said, would normally be accessed by way of an “Amended/Adopted effective” note to the rule. With the advent of the website, he said, such notes are hyperlinked to the order of adoption. He suggested that it would be generally useful to include in the various Rules of Professional Conduct the history of adoption and amendment as is done with most other rules.

It was moved by Justice Sandstrom, seconded by Alex Reichert, and carried that rules under consideration include the suggested reference.

Chair Sturdevant said the assembled rule amendments would be reviewed at the next meeting.

There being no further discussion, the meeting was adjourned at 2:50 p.m.