

## **Meeting Minutes: Joint Committee on Attorney Standards**

**October 10, 2022 Meeting**

**10:00 a.m. Call to Order**

**Zoom**

### **Members Present**

Nick Thornton, Chair  
Jeremey Bendewald  
Hon. Paul Jacobson  
William Guy III  
Thomas Dickson  
Mike Krumwiede  
SuAnn Olson  
Kevin Chapman  
Leah Carlson

### **Members Absent**

Taylor Olson  
Hon. Jerod Tufte  
Duane Dunn  
Paul Myerchin  
Abby Siewert

### **Others Present**

Sara Behrens, Staff  
Tony Weiler, Staff  
Kara Erickson  
Petra Hulm

Chair Thornton called the meeting to order at 10:04 am and directed members' attention to the minutes from the October 28, 2021 minutes which were approved.

### **Rule 5.5**

Staff explained what she heard from the State Board of Law Examiners regarding failure of attorneys to register as in-house counsel. There were two admonishments and an inquiry committee complaint.

Mr. Dickson brought up a situation where an investigation was conducted of a law office in North Dakota. Towards the end of the investigation, the firm doing the investigating was disqualified due to a conflict and the matter was transferred to an out-of-state law firm whose lawyer was not licensed in North Dakota. The lawyer signed the report as an investigator. He wondered if that would constitute the unauthorized practice of law. Mr. Chapman asked the nature of the investigation. Mr. Dickson explained it was a workplace harassment complaint. Chair Thornton noted there used to be a committee that would review and give guidance on whether something is a violation but it disbanded in 2019 and there is no good guidance on what is or is not the unauthorized practice of law.

Ms. Erickson explained that it's typically her office that these complaints come to and the guiding provision has been whether it happened in this jurisdiction. She tried a case on that with respect to oil and gas title opinions and lost. The thought process is that if the out-of-state lawyer is doing all the work outside of North Dakota, never visits North Dakota and simply reviews materials it isn't necessarily the unauthorized practice of law. If the lawyer comes here and have contacts and are doing something where they are physically present

then it could be unauthorized practice. If filings aren't being made then it depends. In North Dakota we have requirements for ADR registration so we have some nuances depending on the circumstances. We have an opinion on in-house counsel for an insurance company. The attorney didn't have to register in North Dakota so you may want to look at that one. From what Mr. Dickson explained, Ms. Erickson does not believe it would be unauthorized practice of law. The "in this jurisdiction" language has been removed in the rule and in-house counsel move around so we may want to think about that language.

Mr. Dickson asked if it would be investigated if a complaint were filed. Ms. Erickson responded that it would be. Ms. Erickson noted our Rule 5.5 is one of the strictest in the country. Many states won't discipline someone not from their state but we do. Rule 5.5(b) states "in this jurisdiction on a temporary basis." Her understanding is that the issue is with something in Rule 3. She thinks it is the C provision in Rule 3 and the fact that we don't have that part in our 5.5(d). We almost would have to go line by line and figure out what is being requested.

Ms. Hulm explained that when 5.5 was adopted we didn't really go with the model rule and her sense is that they want the committee to re-look at it and decide whether we need to include anything or wholly redo it. Ms. Olson wondered if we should start with the model and see if changes need to be made to line up with what we want for North Dakota. Chair Thornton noted that is largely what we did but out-of-order.

Ms. Erickson explained that in 2016, it was the foreign lawyer part and we decided we didn't need to make the change because it isn't a big issue but Justice VandeWalle asked that we reconsider. He felt strongly we needed it due to some things going on nationally. She doesn't believe it is a substantive part of the issues we're talking about now. She is no longer on the committee but suggests that it might be beneficial to look at 5.5 and try and do something where we can more clearly see where the distinctions are. Whether that's underlining or bold letters to show where the nuances lie so we can see what's being requested. Rule 3 is missing some of the provisions being changed but has some of the other language being struck. Mr. Dickson moved to adopt Ms. Erickson's suggestion, Ms. Carlson seconded and the motion carried.

#### Assistance Program

Ms. Hulm explained that there is no program developed yet, but the intent is to add additional extension services and monitoring. Alcohol and drug use which could overlap with mental health issues. The lawyer assistance program is not comfortable with reporting people who do not comply. We had referred some conditional admissions to LAP and they would help with some of the monitoring and reporting but she understands the reluctance in reporting violations when the program was at a base-level supposed to be a voluntary confidential program. The Court feels this is an opportunity to look at a more extensive program. Staff had mentioned there is a mental health committee looking at some of this with the judges. The problem with either the Court or Ms. Erickson's office running this is the discipline piece. The physician's program has some extensive monitoring and such and may be a good model. This is a big project and likely needs a task force or subcommittee to look at it. It's likely too late this biennium as far as funding so we may need to look at going to the legislature the next biennium but the details need to be worked out.

Mr. Weiler thinks the LAP has been very successful. They haven't had any judges in the program but they are members of the bar and if any of them wish to avail themselves of the

LAP then they will try to help them. He isn't sure LAP is the right program for judges though but it doesn't mean that it isn't a very successful, good program. Since he started in his role, there have been 80 or so lawyers go through the program. The amount of effort put into lawyer wellness should not go unnoticed. There's also a members assistance program which offers 8 free sessions a year and it doesn't get used much. Mr. Weiler explained the process and noted that it is difficult to find volunteer mentors. An IAP is created and the mentors then assist the lawyer. We meet once a month and go over every mentor report. He doesn't think many people know what LAP is and what we do even though he talks about it as much as possible. Making us a mandatory reporter puts us in a position we struggled with in the past. It takes the role from more social worker to probation officer. He thinks 20% of the 80 or so probably came from diversion or an order and the remainder have been voluntary or reported by others who were concerned. He has had conversations with the Board of Governors about what we can do differently to make the program better. He wants to be part of the solution and the BOG is committed as well. Almost every state that has this type of program has a full-time director but we are a small state with a small bar. While judges could use the program, finding a mentor for that scenario might be very difficult. Our program isn't a good fit for judges. He noted that Minnesota, Montana, South Dakota, and Kansas are not mandatory reporters. We don't have the capacity to follow-up on a lot of past program participants but some of them have become mentors in the program. He does not think we need to dismantle the LAP.

Chair Thornton wondered if we need funding and then we develop the program or do we develop the program and then find funding. We also need to think about how it would work with the existing LAP. Ms. Hulm's suggestion is that it not be put completely on this committee. She thinks there should be some review of what we could develop before we look at how to fund it. We first need to get the right people to the table. Chair Thornton asked if this a request to the Supreme Court to form a task force or to the BOG to form a task force. Ms. Hulm thinks the Court wants this committee to manage it at least initially.

Mr. Weiler plans to look for a quarter-time contract-licensed individual to help with the LAP notwithstanding everything we've talked about. He wants someone to help with intakes, mentor training, follow-up and advertisement of the program. He sees a way to keep the LAP but having a different entity contracted to do the mandatory reporting. He's happy to be part of a subcommittee and he has many contacts with other programs out there.

Mr. Dickson commented that Mr. Weiler and SBAND have done a masterful job in administering the LAP. The role of the mentor is part friend, part social worker, part attorney and many of the issues in the diversion program have to do with the office management. It isn't all addiction. The mentors do not want to have to report anything. If you put that requirement on them the mentor pool will dry up. We're still attorneys and we have a strong need for confidentiality.

Ms. Erickson sees it as adding another tool in the toolbox. We want something to add in to fulfill some of the reporting requirements. In some instances of diversion there needs to be that person because it is a diversion program and something is being contemplated and not done so we need to make sure that it doesn't need to progress to formal proceedings. We've talked about various people who could be part of a subcommittee and she would be happy to help. We may want to invite someone from Judicial Conference as well. The funding needs to be figured out as well before going to the legislature. Chair Thornton will work on a list of individuals to invite and a letter to see if we can form a task force. Mr. Weiler

stated that Diane Wehrman from Vogel should be invited and he has contacts with several health care providers. He's had some conversations with the PHP and maybe they would contract to do that on a per case basis so if someone is needing to test then they get the report from a third-party entity. Ms. Erickson thinks someone from the disciplinary board and inquiry commission would be appropriate. Ms. Hulm wears three hats so there may be suggestions from each hat. It is possible that PHP would be an option to look at but they can only take a percentage. Ms. Erickson stated there are some concerns about that group.

Mr. Bendewald moved to create a subcommittee, Mr. Dickson seconded and the motion carried.

Mr. Weiler suggested having a non-attorney on the subcommittee and noted we have three on this committee. We may also want someone with experience in counseling, addiction and mental health.

Mr. Dickson moved to adjourn, Ms. Carlson seconded and the motion carried.