Meeting Minutes: Joint Committee on Attorney Standards

August 30, 2024 Meeting
10:00 a.m. Call to Order

Zoom

Members Present
Prof. Michael McGinniss, Chair
Taylor Olson
Hon. Jerod Tufte
Judge Charles Neff
Leah Carlson
Mike Krumwiede
Tom Dickson
Abby Siewert
David Barrett
Kayla Effertz Kleven

Members Absent
William Guy III
Joe Morrissette
Lawrence King

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

Chair McGinniss called the meeting to order and introduced new members. Justice Tufte asked for correction of the spelling of his name in the November 17, 2023 minutes. With that correction, Mr. Krumwiede moved approval of the minutes, seconded by Mr. Dickson and the motion carried. Ms. Effertz Kleven abstained.

Rule 1.16

Chair McGinniss provided background on the proposed amendments for the new members. The general sense at the November meeting was that the Rule is consistent with what we feel is desirable in North Dakota. The amendments essentially codify what's implicit in the rules already. The request in November was for Staff to write up how the language would appear in North Dakota's Rule 1.16 because our numbering is a little different. The new comment language provides some guidance and explanation. An ABA formal opinion was shared as well to explain how the rule works. The changes aren't meant to create a burden but to promote scrutiny on suspicious aspects of particular clients which may exist at the formation of the relationship or arise during the relationship. This is not strict liability. Chair McGinniss opened it up for discussion.

Ms. Carlson looked at everything and reviewed the changes and agrees it basically puts into practice what we already do as attorneys. Mr. Barrett agreed. He works with clients nationally and internationally and these are all good things to do anyway and he believes attorneys are doing them. There's more fraud potential with the internet and we routinely reject things that don't smell right. Mr. Barrett moved to approve the changes, seconded by

Mr. Dickson. The motion carried.

Continuing Legal Ed. R. 3 and Admission to Practice R. 7

Ms. Hulm explained the amendments to Rule 3 come from Mr. Weiler and the amendments to Rule 7 come from her. The genesis of revising these rules has to do with the Legislature. For the past few years the Legislature has been getting into some of the particulars of licensing in all areas including lawyers. One of the senators has a particular interest and he believes that commerce is affected and we'll have more lawyers coming into our state if we change some of our standards. He would like to see no CLE requirements. The other issue is the gap between the bar exam and when someone can be admitted based on the score. Currently, the score is only valid for two years after which time the lawyer must wait until they've been practicing for 5 years. Ms. Hulm explained that the limitation isn't to keep people out but more about how long a score could be valid to show competency when that individual isn't actively practicing law. North Dakota has the lowest score in the country. In order to maintain that level of competency, the proposal is to extend the validity of the score if someone is actively practicing.

Mr. Weiler explained that there has been a three legislative session claim that licensing agencies are a detriment to the workforce in North Dakota which simply isn't true. There still need to be standards and it's very easy to come to North Dakota and practice law. Ms. Hulm and the Board of Law Examiners have been very good about explaining to the Legislature that licensing of attorneys is squarely in the judicial branch purview. However, there is a senator who is very passionate that CLEs should be eliminated so they agreed to look at the CLE requirement. There are 8 states that require 45 hours, 6 that require 15 per year, the majority of states (24) require 36 every 3 years or 12 every year. There are 4 states that do not have a CLE requirement including DC. Mr. Weiler does not agree that CLEs should be eliminated as laws change and attorneys still need ethics. A few years ago, a change was made to allow 30 of the 45 to be self-study where it used to be only 15. The CLE Commission is recommending a reduction from 45 hours to 36 hours every 3 years with 3 still being ethics. The self-study credits would be reduced from 30 to 24. They are also asking for an increase of the CLE fee from $25 to $50. He noted it's been $25 for a very long time.

Ms. Carlson asked what licensure is being reference in regards to the test score. Ms. Hulm explained that it presupposes that the individual would be licensed in another state already. Ms. Siewert asked if the 5 years contemplates that they have been practicing the entire time. Ms. Hulm stated that it doesn't have to be 100% of the time or full-time. The "deemed by the Board to demonstrate competency" provides that discretion.

Mr. Dickson agrees with the reduction in the number of CLEs. He does agree that there still needs to be some CLEs required as it's not only a time for education, but also for lawyers to get together in an informal setting. Mr. Krumwiede noted that he does a lot of continuing education in his work and they have the same issue arising with the Legislature. He doesn't like the reduction but understands the reasoning. Mr. Weiler noted that every board was required to meet with the Labor Commissioner following last legislative session and the Labor Commissioner is required to submit a report to the Legislature. He's not sure what will come out of that study or report. Mr. Barrett asked about carry-over credits. Mr. Weiler

stated that 15 can be carried over and that change was made a few years ago. Attorneys can also have their reporting period changed to align with MN for those individuals licensed in both states.

Ms. Carlson moved to approve the amendments to section 7(B), seconded by Mr. Dickson. The motion carried.

Mr. Weiler asked if comments will be taken on the change. Justice Tufte explained that the Court has a monthly rules session and anyone can submit comments or appear and ask to be heard. Most, but not all, proposed amendments go out for public comment and he suspects these would as well. Ms. Hulm noted the next session is September 11.

Ms. Carlson moved to approve the amendments to section 7(C), seconded by Mr. Dickson. The motion carried.

Mr. Dickson moved to approve the change to the number of CLE hours required, seconded by Ms. Carlson. The motion carried. Mr. Barrett moved to approve the fee increase, seconded by Mr. Dickson. The motion carried.

Admission to Practice R. 3 and Rules of Professional Conduct R. 5.5

Chair McGinniss explained that under Rule 5.5, in-house counsel is among the categories that don't need specific licensure to do work for their entity. The proposed changes to Rule 3 is to conform with the ABA model rule included in the materials. The changes make clear that a law firm general counsel whose client is the law firm would be encompassed. Ms. Erickson noted that in-house counsel is not frequently complained about but once in awhile they do get a complaint and one has been disciplined in the last couple of years so the modification is a good one. Ms. Carlson asked if there is a timeline for when they need to be registered. Ms. Hulm stated generally it would be before but she would have to dig further for a definite answer. Ms. Erickson explained that for those who have been disciplined it was very apparent that there were zero efforts made to become registered. She thinks there's some guidance in the pro hac vice admission that's clearly defined in days so that would likely be used as a benchmark.

A typo was noted with "included" appearing twice in the explanatory note. With the correction, Mr. Dickson moved to approve the amendments to Rule 3. Mr. Barrett seconded and the motion carried.

Ms. Carlson moved to approve the amendments to Rule 5.5 and Mr. Dickson seconded. It was pointed out that the word "in" is missing on page 63, sub 2. Ms. Carlson and Mr. Dickson approved the amendment to the motion. The motion carried.

Ms. Erickson noted that Justice Crothers initially asked that we look at other provisions of Rule 5.5 as well. She explained there are lawyers from Minnesota, practicing for a Minnesota firm but working from Fargo termed "invisible lawyers." She's had calls about this and she doesn't believe this is a violation of the rules. Ms. Hulm pointed out that there

are comments that specifically state you cannot maintain an office in North Dakota and practice law. Ms. Erickson thinks there's a question of whether a home office would count and she would like to see it clarified. Chair McGinniss stated that even if the attorney has a physical office and practicing no law pertaining to that state there's a pretty broad understanding that you have a presence but not for the practice of law in this jurisdiction. It's certainly something the committee should look at and make clear. Ms. Erickson will work on Staff regarding some proposed language.

Rules of Lawyer Discipline 3.1, 4.4, 6.1

Ms. Hulm explained there will likely be the most discussion on Rule 3.1 so that will be left for last. Looking at Rule 6.1, Ms. Hulm explained that currently, any file dealing with discipline is kept permanently. They would like the ability to scan those files in rather than keep all the paper files. The proposed amendments to Rule 4.4 were brought by disciplinary counsel. It's becoming more difficult to get a certified copy from other jurisdictions. Often they receive a copy from the lawyer. She thinks it's reasonable to take this as a credible copy. The Supreme Court had questioned whether the term "credible copy" is used elsewhere in the rules. Staff noted it doesn't appear anywhere else in our rules or other states' rules. Chair McGinniss asked what would make it credible and would the rule need to define it. Justice Tufte was one of those who raised the question of what it means. He understands it to mean that the credibility comes from the "in the issuing jurisdiction" portion. He's less sure that credibility can be derived from what is provided by the attorney facing discipline. Ms. Erickson clarified that they always verify even if they receive the copy from the attorney. If they are able to verify it with the issuing jurisdiction they feel it would be sufficient. Justice Tufte suggested using "shall obtain a copy of the disciplinary order verified by the issuing jurisdiction" rather than "credible copy."

Chair McGinniss suggested either received from or verified by the issuing jurisdiction since sometimes it's received directly from the other jurisdiction and sometimes it's received from another source such as the attorney in question and is verified by the issuing jurisdiction. Ms. Effertz Kleven has experience with licensing boards and would support Chair McGinniss' suggestion. Justice Tufte moved to amend to state "from or verified by the issuing jurisdiction." Mr. Dickson seconded and the motion carried.

Judge Neff pointed out that certified appears in line 7 as well. Ms. Carlson moved to strike "certified" in line 7, seconded by Mr. Dickson. The motion carried.

Mr. Dickson moved to approve the amendments to Rule 6.1. Ms. Carlson seconded and the motion carried.

Ms. Hulm then explained that the provision in Rule 3.1 being struck has been problematic for years. There's informal proceedings and formal proceedings. The informal proceedings are confidential and not disclosed to anyone. This is in relation to the informal proceedings which result in dismissal of the complaint or an admonition. The attorney can appeal this to the Disciplinary Board. The proposed amendment would eliminate the second appeal to the Supreme Court. There have been parties who have been successful in challenging an admonition with the Supreme Court, however, the issue is that the standard is the same for

seeking leave to appeal and the appeal itself. Additionally, disciplinary counsel is at a disadvantage because they can't actually make an argument. The information is all confidential so they are unable to challenge the allegations made by the appealing attorney. There's no record to base anything on and the discipline is sometimes based on something completely different from what the attorney argues in the appeal. They did discuss whether there could be a lesser standard for seeking leave to file the appeal but they weren't able to come up with something that made sense. A record would also be needed. Ultimately, the proposal was just to eliminate the provision.

Ms. Erickson confirmed the disadvantage disciplinary counsel experiences. She is unable to disclose what was in the report or what was discussed at the inquiry committee level. She noted that one member put forward the Runge opinion for members to review. She explained that things have been done to address the concerns brought up in that case such as having everyone in the same room and getting a copy of the investigative report to the parties. Other states do not have this level of review for informal discipline. She believes we either need to get rid of it or come up with something new.

Ms. Carlson asked about the process. Ms. Erickson explained when the Board considers the appeal they have the report and the minutes form the inquiry committee and all materials considered so they actually have more information at the Board level than the Supreme Court receives. Ms. Carlson asked what the procedure typically is in other states. Ms. Erickson responded that it stops at the Board level. It was noted that Chair McGinniss was disciplinary counsel in the Delaware process when he lived there. Chair McGinniss explained that in Delaware there was no appeal from the committee level at all. However, informal discipline was only done by consent.

Mr. Dickson explained that the process matters to the lawyers of North Dakota. He believes the Runge decision provides some context. The inquiry committee is a meeting and not a hearing. In the Runge case he received a letter of admonishment and he had never been sanctioned previously. They sought review with the Disciplinary Board where there was no hearing and no meeting and the Disciplinary Board came back with a one sentence letter affirming the admonishment. He explained leave has to be sought to appeal and it isn't easy. He believes the final review by the Supreme Court is critically important to the integrity of the system. Many lawyers lack faith in the committees and Board. He's tired of hearing it's difficult and too much work and he doesn't care what other states do. He is opposed to the amendment. Ms. Carlson joined in the opposition. She read some of the case law on the issue and does not feel its unclear. She would want the ability to appeal to the Supreme Court if her license were on the line even for something as simple as an admonishment.

Ms. Hulm asked if Mr. Dickson would be opposed to working on a standard and opening up the record. Mr. Dickson believes there is a standard. Ms. Hulm noted that the standard is to overturn it and if you get leave to appeal the ultimate decision has really already been made. Ms. Erickson pointed out that this is something the Supreme Court has struggled with as well and it isn't a matter of not wanting to work hard but it needs clarification. Chair McGinniss can see how it would be difficult to resolve if the standard for leave is the same as the ultimate standard. Ms. Carlson understands the standard of review to be de novo and whether there's clear and convincing evidence of a violation.

Ms. Effertz Kleven moved to approve the amendment. Chair McGinniss seconded. Mr. Barrett moved to table the motion without prejudice for discussion at a later meeting. Justice Tufte seconded the motion to table the motion. Based on Ms. Erickson's difficult with the lack of record and the confidentiality issue he believes there are areas that can be explored. The motion carried with two opposed and one abstention.

Chair McGinniss proposed a subcommittee look at Rule 3.1. Ms. Erickson, Ms. Hulm, Mr. Dickson and Ms. Carlson volunteered to serve on the subcommittee.

The next meeting with be November 22, 2024 at 10am. Having completed the agenda, the meeting adjourned.