

Minutes  
(unofficial until approved)  
Joint Committee on Attorney Standards  
Supreme Court Conference Rm/Conference Call  
February 26, 2016

Members Present

Judge Dann Greenwood, Chair  
George Ackre  
Duane Dunn  
Kara Johnson  
Michael McGinniss  
Justice Dale Sandstrom  
Bonnie Staiger  
Nick Thornton  
Jason Vendsel  
Brenda Blazer\*  
Dave Maring\*  
Zachary Pelham\*

\* - Temporary members for lawyer discipline system review

Staff

Jim Ganje  
Tony Weiler

Members Absent

Jeremy Bendewald  
Tom Dickson  
Judge Paul Jacobson  
Alex Reichert  
Jason Steffenhagen  
Pat Monson\*

Also Present

Chief Justice Gerald W. VandeWalle  
Penny Miller, Secretary-Treasurer, State Board of Law Examiners  
Jeanne Schlittenhard, SBAND

Chair Greenwood called the meeting to order at 10:00 a.m. and welcomed Bonnie Staiger, a new member of the Committee appointed by Chief Justice VandeWalle. He then drew Committee members' attention to minutes of the November 13, 2015, meeting (meeting material, pp.4-12). Kara Johnson noted her comment reflected on p.7, 4<sup>th</sup> full paragraph, of the material related to draft amendments concerning summary dismissals. She said it should be clear that the matter being discussed is with respect to summary dismissals only.

**It was moved by Kara Johnson, seconded by Dave maring, and carried that the minutes, with the noted clarification, be approved.**

Lawyer Discipline - Board of Governors Response to Proposed Amendments

Chair Greenwood next drew attention to the Board of Governors' response to the Committee's report and proposed amendments related to the lawyer discipline process. The response is reflected in a letter from SBAND President Joe Wetch which states that the Board generally has no comments regarding the proposed amendments, with one exception. Specifically, the letter explains that the Board does not support a portion of the proposed amendments to Rule 6.3, which generally governs the notice of status of a respondent lawyer who is disbarred, suspended, transferred to disability inactive or incapacitated status, or placed on interim suspension. Specifically, the Board does not support language in proposed Section D which would require that the respondent cause to be removed "any indicia of . . . legal assistant, law clerk, or similar title". There is concern that the proposed language would prevent a respondent lawyer from using the lawyer's law degree for otherwise legitimate purposes, e.g., acting as a law clerk or paralegal/legal assistant in a law office. There is also concern that the prohibition may constitute an illegal restraint of trade or an unlawful restriction on the use of an academic degree.

Staff said the particular amending language is in response to a recommendation included in the ABA Report on the discipline system. The Report emphasized that allowing a disbarred or suspended lawyer to be employed in a law office does not protect existing clients and the public and also poses a risk to other lawyers in the firm if unauthorized practice of law occurs.

Zachary Pelham said the Board is supportive of the Committee's report and proposed amendments generally, but there is a concern about potential restraint of trade if the amendments were adopted. He noted that neither a legal assistant nor a law clerk is required to be licensed.

Brenda Blazer said she would support retaining the proposed amendments to Rule 6.3. She noted the additional concern in the ABA Report about the risk of confusion in public perception about the status and authority of a disbarred or suspended lawyer who occupies a law office.

**It was moved by Brenda Blazer and seconded by Mike McGinniss that the Committee note the Board's concerns, but retain the amendments to Rule 6.3 as initially proposed.**

Mike McGinniss said his research indicates that the proposed limitation has not been widely adopted in other jurisdictions, but approximately twelve jurisdictions do have similar restrictions. He said the principal argument in support of the restriction is linked to public perception and protection. He said there is also the concern, as noted in the ABA Report, that there may be risks for lawyers in the law firm if unauthorized practice of law occurs.

Zachary Pelham said another, more practical, concern is that a disbarred or suspended lawyer may have limited employment opportunities if working as a legal assistant, law clerk, or paralegal is foreclosed.

In response to a question from Dave Maring, Kara Johnson said past history indicates that most lawyers who have been suspended or disbarred have not continued to perform some kind of work in a law office, while a few have. She agreed there is some risk to a supervising lawyer when a suspended lawyer, for example, works as a legal assistant in a law office.

Dave Maring asked whether there is some merit in considering whether the restriction would not be necessary if the period of suspension is relatively short, for example, thirty or sixty days.

Zachary Pelham said a fairly clear line can be drawn between permissible and impermissible activity by a suspended lawyer. For example, he said a suspended lawyer employed as a legal assistant could perform research, while a supervising lawyer would review and sign any pleadings or other legal documents.

Brenda Blazer cautioned that past experience at the inquiry committee level suggests it can be difficult to draw a bright line between work that a lawyer performs and work performed by a legal assistant or paralegal.

Following further discussion, **the motion carried** (Dave Maring, Zachary Pelham - no).

#### Rule 3.2 (Service) - Rules for Lawyer Discipline - Draft Amendments

Committee members next reviewed draft amendments to Rule 3.2, Rules for Lawyer Discipline, referred to the Committee by the Supreme Court (meeting material, pp.25-27). The amendments are intended to reflect recent changes in the Rules of Civil Procedure and Rules of Court and to more clearly describe service requirements in lawyer discipline cases.

Kara Johnson said the draft amendments will likely require further review and modification before they are ready for detailed consideration.

**It was moved by Kara Johnson, seconded by Dave Maring, and carried that the Committee defer consideration of amendments to Rule 3.2 until the next meeting.**

Chair Greenwood thanked Dave Maring, Zachary Pelham, and Brenda Blazer for their participation in considering these remaining lawyer discipline issues.

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### Rule Amendments Related to Practice by Foreign Lawyers

Chair Greenwood next drew Committee members' attention to the referral back to the Committee by the Supreme Court of issues related to practice by foreign lawyers (meeting material, pp.28-59).

Staff explained that during the Committee's review of model rule amendments resulting from the ABA's Ethics 20/20 project, the Committee considered amendments and model rules related to the practice of law by foreign lawyers. Particularly, amendments to Model Rule 5.5 and model rules related to pro hac vice admission and registration of in-house counsel were considered. The Committee noted that North Dakota had adopted a rule on the licensing and practice of foreign legal consultants, but information received by the Committee indicated the rule was rarely used. The Committee ultimately concluded that further rule amendments related to the practice of law by foreign lawyers who may be in the state were unnecessary at the time.

Chair Greenwood then welcomed Chief Justice Gerald VandeWalle for comments regarding issues related to licensing of foreign lawyers.

Chief Justice VandeWalle said his concern is not so much with recommended rule provisions set out in the ABA's Ethics 20/20 report. Rather, he said, his experience with the ABA's International Trade and Legal Services Committee and as chair of a subgroup of the Conference of Chief Justices suggests two possible issues may arise. One issue, he said, is with respect to foreign lawyers who may be practicing law in North Dakota. He said there are foreign companies conducting business in North Dakota and it is unclear whether there are foreign lawyers conducting legal business in the state on behalf of the companies. He said if there are foreign lawyers providing legal services in the state, then there should be some registration process to ensure the presence is known. A larger concern, he said, concerns reciprocity, or lack of it, by foreign jurisdictions if North Dakota lawyers provide legal services in the jurisdiction and North Dakota does not recognize practice by foreign lawyers.

In response to a question from Justice Sandstrom, Chief Justice VandeWalle said it would be helpful to consider at least rule provisions related to foreign lawyers and registration of in-house counsel and perhaps also pro hac vice admission.

Staff noted that the Ethics 20/20 amendments also added language to Rule 5.5 to address the practice of law by foreign lawyers.

Following further discussion, **it was moved by Justice Sandstrom and seconded by Mike McGinniss that the Committee consider draft amendments to Admission to Practice Rule 3 governing pro hac vice admission and registration of in-house counsel and to Rule 5.5, Rules of Professional Conduct, to incorporate to the extent possible model rule provisions related to the practice of law by foreign lawyers.**

Bonnie Staiger noted current rule language related to resident and nonresident lawyers and asked how the language relates to “foreign” lawyers.

Mike McGinniss observed that a nonresident lawyer, for purposes of pro hac vice admission and registration under the current rule, is a lawyer that is licensed in another state or the District of Columbia, but not licensed in North Dakota. ABA model rule provisions related to foreign lawyers contain a definition that is based on the lawyer being licensed or admitted in a jurisdiction outside the United States.

With respect to the presence of foreign companies in North Dakota, Duane Dunn noted that his accounting firm regularly deals with U.S. companies that are owned by companies in other countries.

Jason Vendsel said he has had experience with a Norwegian oil company that has U.S. counsel located in Texas. He said foreign companies tend to have local counsel in the states.

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

Rule 1.18, Rules of Professional Conduct: “Potential Client” versus “Potential Client”.

Chair Greenwood then drew attention to a referral from the Supreme Court to consider application of Rule 1.18 (Duties to Potential Client) to “potential” clients in light of the application of ABA Model Rule 1.18 to “prospective” clients (meeting material, pp. 60-73). The referral suggests the possibility of adding comment language to explain the divergence from the model rule language.

Staff explained that the focus in Rule 1.18 on “potential” clients is a result of amendments recommended by the Joint Committee in 2005 and subsequently adopted. The Committee, at that time, was considering numerous amendments to the Model Rules of Professional Conduct resulting from the ABA’s Ethics 2000 rule review project. During its review of ABA Model Rule 1.18, Committee members noted the use of “prospective client” in (then new) Rule 7.3 of the Rules of Professional Conduct, which governed solicitation or “direct contact with prospective clients”.

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There was concern that there may be a confusing and unintended result from the application in both rules to prospective clients. As a result, the Committee concluded that “potential client” was a more useful formulation in Rule 1.18, more clearly reflected the rule’s focus, and more clearly differentiated circumstances governed by the rule from those governed by the limitations imposed by Rule 7.3 on solicitation of prospective clients.

Additionally, staff explained that the Joint Committee had recently recommended amendments to Rule 7.3, among many other rule amendments, resulting from its review of the ABA’s Ethics 20/20 rule review project. The amendments to Rule 7.3 were adopted effective March 1, 2016. The result of the amendments, he said, is that the focus of Rule 7.3 is no longer upon “prospective” clients. Rather, the rule now addresses “solicitation” as a targeted communication directed to a specific person regarding the provision of legal services.

Mike McGinniss said he would favor modifying Rule 1.18 to follow the model rule’s use of “prospective” client, rather than continue the use of “potential” client and explain in a comment the reason for the difference.

Staff noted that if Rule 1.18 is amended to apply to prospective clients, then essentially technical amendments to two comments to other rules (Rules 1.7 and 1.15) would be necessary. He said the comments include references to “potential” clients which were meant to track the earlier amendments to Rule 1.18.

**It was moved by Mike McGinniss, seconded by Kara Johnson, and carried that amendments to Rule 1.18 and the identified technical amendments to reflect the use of “prospective” client 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.**

Rule 1.2, Rules of Professional Conduct: Writing Requirement for Limited Scope Representation

Chair Greenwood next drew attention to a referral from the Supreme Court to consider possible amendments to Rule 1.2, which governs the scope of representation and allocation of authority between client and lawyer (meeting material, pp. 74-98).

Justice Sandstrom explained that the Joint Procedure Committee, which he chairs, 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.

In its submission of proposed amendments to the Supreme Court, he said, 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 of the Rules of Professional Conduct.

Staff explained that Rule 1.2 does not contain a writing requirement in the black-letter rule. 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”.

**It was moved by Mike McGinniss and seconded by Justice Sandstrom that amendments to include a writing requirement in Rule 1.2( c) and to remove the related language in Comment [6] 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.**

Bonnie Staiger asked whether there were any circumstances in which a lawyer would not want a limited scope agreement in writing.

Mike McGinniss said it is fairly clear that a writing is a benefit both to the client and to the lawyer. He said it minimizes the risk of a client not understanding the scope of legal work to be provided and the lawyer is somewhat protected from future complaints by the client.

Justice Sandstrom observed that a common complaint in lawyer discipline is the lack of communication between the lawyer and client. He said a writing requirement would go some way toward ensuring that the lawyer and client were communicating about the nature of the representation.

Jason Vendsel agreed that an agreement in writing is a best practice. However, he said the concern is that including a writing as an ethical requirement may become a trap for lawyers. For example, he said there could be technical violation of the requirement if there is no writing, but the

client nevertheless does not complain about the representation provided by the lawyer. He wondered whether the perspectives of lawyers involved in criminal defense should be solicited.

Nick Thornton observed that in his experience the issue rarely occurs in criminal defense. He said the issue is most common in family law cases.

After further discussion, **the motion carried.** (Jason Vendsel - no).

#### Admission to Practice Rules - Proposed Amendments

Chair Greenwood next drew attention to amendments to the Admission to Practice Rules proposed by the Board of Law Examiners and referred to the Committee by the Supreme Court (meeting material, pp. 99-122). The amendments are with respect to Rules 2(F), 3(A)(6), and (B) [with related technical amendment to Comment 7 of Rule 5.5, Rules of Professional Conduct), 6.1(A)(1), 7(A)(1), 11(A)(B), and 12.

Penny Miller, Secretary-Treasurer of the Board of Law Examiners, then reviewed the summary of proposed amendments and each amendment in turn.

**It was moved by Justice Sandstrom, seconded by Bonnie Staiger, and carried that the proposed amendments to Rule 2(E) be approved with the additional deletion of “(2)” in the second line of the amending language.**

**It was moved by Justice Sandstrom and seconded by Kara Johnson that the proposed amendments to Rule 3(A)(6) be approved.**

Jason Vendsel noted the amendments, which are intended to provide a different approach in the pro hac vice rule for nonresident lawyers who participate in alternative dispute resolution matters. He described a situation in which an out-of-state lawyer comes to North Dakota to take part in mediation on the lawyer’s case. He asked whether the proposed amendment would result in a violation if the lawyer did not obtain pro hac vice admission.

Penny Miller explained that the purpose of the amendment is to remove the requirement that the lawyer register as in-house counsel under Rule 3(B) and to make the process less burdensome. Additionally, she noted that the rule pertains to North Dakota cases in North Dakota and not to out-of-state cases being handled in North Dakota. She said the focus of the amendment is involvement in a formal mediation, alternative dispute resolution process, rather than, for example, negotiation about a case.

After further discussion, **the motion carried.** (Jason Vendsel - no).

**It was moved by Justice Sandstrom, seconded by Mike McGinniss, and carried that the proposed amendments to Rule 6.1(A)(1) be approved.**

**It was moved by Justice Sandstrom, seconded by Kara Johnson, and carried that the proposed amendments to Rule 7(A)(1) be approved.**

**It was moved by Justice Sandstrom, seconded by Mike McGinniss, and carried that the proposed amendments to Rule 11(A) and (B) be approved.**

**It was moved by Justice Sandstrom, seconded by Kara Johnson, and carried that the proposed amendments to Rule 12 be approved.**

**It was moved by Justice Sandstrom, seconded by Kara Johnson, and carried that proposed amendments, as approved, be further 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.**

#### Licensure of Military Spouse Lawyers

Chair Greenwood drew attention to a referral from the Supreme Court regarding a licensing process for military spouse lawyers (meeting material, pp.123-142).

Staff briefly reviewed background information related to licensing of lawyers who are spouses of military members stationed within the state. He said several jurisdictions have adopted rule provisions allowing for the licensure or certification of the military spouse lawyer. He noted the model rule developed by the Military Spouse JD Network and examples of state rules from Oklahoma, North Carolina, and Colorado. He said the ABA and the Conference of Chief Justices have adopted resolutions supporting implementation of a rule framework to allow military spouse lawyers to practice law in the state in which the military member spouse is stationed.

**It was moved by Justice Sandstrom, seconded by Bonnie Staiger, and carried that the Committee consider draft rule amendments providing a licensing or certification process for military spouse lawyers.**

#### General Business

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Chair Greenwood said the various draft amendments requested by the Committee will be reviewed at April 29 meeting.

There being no further discussion, the meeting was adjourned at 12:10 p.m.