

September 2, 2016

20160082

Penny Miller  
Clerk of the Supreme Court  
600 E. Boulevard Ave.  
Bismarck, ND 58505-0530

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
SEPTEMBER 2, 2016  
STATE OF NORTH DAKOTA

RE: Notice of Comment, Supreme Court No. 20160082

Dear Ms. Miller:

This letter is written in regards to the proposed amendments to the North Dakota Rules for Lawyer Discipline. These proposed rule amendments are a dramatic change in attorney disciplinary procedures and its revision warrants a careful review of the potential impact. While there are several positive changes to the disciplinary process proposed in these amendments, we are writing to express our concern with those changes that we oppose.

We are opposed to the amendment of Rule 2.4 to provide one statewide inquiry committee with matters being heard before a three-member hearing panel. Presently, the Northeastern District Inquiry Committee is composed of nine members, including six attorneys and three lay persons. Our members represent a diverse array of practice areas and experience levels. For many cases, our committee engages in a dynamic discussion of the matter. This discussion often includes valuable input from the attorney members that may have experience in a similar area of the law. Our lay members also provide worthwhile insight into the perceptions the public may have relevant to the issue before our committee. Because of the familiarity and respect created over time, our members are comfortable sharing opinions and input on a particular case. We have had several matters where a number of our committee members disagreed on whether a violation occurred or the appropriate discipline for the matter. In these cases, the number of committee members participating in the discussion helps guide our decision making so that our committee is able to reach a sound and reasonable resolution of the matter.

Our committee is concerned the proposed changes to Rule 2.4 may diminish the reasoned analysis that presently takes place in our committee discussion. The proposed rule reduces the number of members reviewing each matter to a three-member panel. The reduced number of members reviewing each case would result in a diminished discussion and limited familiarity with the relevant practice area in question.

We are opposed to the amendment of Rule 2.4(H) to allow hearings of the three-member panel to take place over interactive audio or audio-video communication. In light of the fact that each three-member panel would be composed of one individual from each disciplinary district, it would be likely that many of these meetings would occur via interactive audio or audio-video communication. When complainants and respondents appear before our committee, we are able to assess the credibility of each individual. This credibility assessment would likely not be as effective over interactive audio or audio video communication. Additionally, the discussion between the panel members would be less vibrant and effective if the meetings were not held in person.

Lastly, we are opposed to the amendment of Rule 3.1(D)(5) which would require the release of the investigative report to the complainant and respondent prior to a hearing on the matter. At this time, the investigative report is provided only to Disciplinary Counsel and the members of our committee. This report typically provides a summary of each party's position, the applicable rules, any supplementary information gathered in the investigation, and a recommended disposition. Presently, the investigator can be very candid in their assessment of the weight of the evidence or the credibility of the parties. This likely would not be the case if the report was disclosed to the parties. Additionally, by disclosing this report to the complainant in advance of the hearing, it may deter a complainant from appearing if the recommended disposition is a dismissal. The complainants are often lay people that may not know what information would be relevant to the committee in making its determination on the potential ethical violation. Oftentimes, information gathered at the complainant's appearance is more relevant than the information provided in the complaint. Therefore, it would be detrimental if complainants were discouraged from appearing before the committee based on a recommended disposition that may not be the disposition actually imposed by the panel.

In summary, we are concerned the proposed rule changes would diminish the strength and credibility of the current disciplinary system. If the proposed amendments are implemented, the benefits of the in-depth and thorough review and analysis put into each matter before the inquiry committee would be diminished.

While we are opposed to the above-referenced rule amendments, we would like to propose an alternative that may be a less dramatic change to the current system while still addressing the concerns raised in the American Bar Association's Report. The proposed rule removes the substantial burden of investigating complaints and drafting reports from the volunteers on our committee and places this duty upon Disciplinary Counsel. If Disciplinary Counsel is undertaking the investigations of all complaints, it would be less burdensome for our members to meet more frequently. We suggest leaving in place the three regional inquiry committees, but instead have each committee meet more frequently, such as every other month. This would expedite the process that a complaint would move through the system while not overburdening the volunteers on the committee. Additionally, consistency would be ensured by having one entity, the Office of Disciplinary Counsel, complete the investigations and make recommended dispositions before all three committees across the state.

Thank you for the opportunity to comment on the proposed rule changes to the attorney disciplinary procedures. If you have any questions or concerns, please do not hesitate to contact any member of our committee.

Sincerely,

/s/ Timothy Dittus, Committee Chair & Attorney Member

/s/ Bruce Gibbins, Attorney Member

/s/ James Higgins, Lay Member

/s/ Steve Johnson, Lay Member

/s/ Donna Remer, Lay Member

/s/ Scott Stewart, Attorney Member

/s/ Susan Swanson, Attorney Member

/s/ Brett Venhuizen, Attorney Member

/s/ Haley Wamstad, Attorney Member

NORTHEASTERN DISTRICT INQUIRY COMMITTEE