

Miller, Penny

From: (SUP) Clerk of Court Office 20160082
Sent: Friday, March 11, 2016 8:20 AM
To: Miller, Penny
Subject: FW: Comment on changes to N.D.R. Prof. Conduct 3.1

FILED
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CLERK OF SUPREME COURT
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STATE OF NORTH DAKOTA

From: McCullough, Steven
Sent: Thursday, March 10, 2016 5:22 PM
To: (SUP) Clerk of Court Office
Subject: Comment on changes to N.D.R. Prof. Conduct 3.1

Dear Ms. Miller,

Please accept this as my comment on the proposed amendments to the North Dakota Rules of Professional Conduct, specifically Rule 3.1. I will not be able to attend the scheduled hearing on May 9, due to my docket so this will be my only comment.

Generally, I believe the amendments are well-warranted and I do not take issue with any of them. I believe, however, that some additional language should be inserted into Rule 3.1 (as I will indicate below), to help insure that our lawyer disciplinary system provides the utmost due process to all parties involved. Under both the present and amended language of the Rule, an initial screening of any complaint is conducted (under the amended rule counsel will conduct this screening, instead of an investigator as is the case under the present rule). If it is then determined that if the alleged facts of the complaint (taken as true) could not support a violation of any Rule of Professional Conduct, the complaint may be summarily dismissed. This leads to the conclusion that if a complaint is not summarily dismissed a possible violation of one or more Rules of Professional Conduct may exist.

I suggest simply that when a lawyer receives a copy of a complaint the lawyer be informed of the possible Rule(s) of Professional Conduct which may be at issue. Further, I recognize the process should not be limited to these early-identified rules. My purpose is not to tie the hands of counsel or the District Inquiry Committee, or to limit the scope of their respective findings. Rather, it is to help clarify the issues so that any lawyer that needs to respond to a complaint has some idea of the authority which should be addressed. I fully realize that additional information may come to light later as the disciplinary process moves forward. This is reason why the language I propose would not limit the process to the Rules of Professional Conduct initially identified.

At this early stage of the disciplinary process more often than not the complaints are made by non-law trained individuals and do not specify any Rule of Professional Conduct which a lawyer is alleged to have violated. Further, I do not believe that we should expect non-law trained persons be able to identify specific Rules of Professional Conduct in a complaint. However, if a response from a lawyer is warranted (*i.e.*, the complaint is not subject to summary dismissal), a law trained professional will have already examined and analyzed the complaint and will have determined that if true, the facts alleged in the complaint could compromise a violation of one or more Rules of Professional Conduct. I only seek to allow all parties to know what particular Rules are at issue.

A lawyer deserves to know the possible basis for any possible discipline as early as possible so that he or she is able to competently respond to the complaint. When I was in private practice I did have a complaint made against me, which was dismissed by the District Inquiry Committee. However, the most difficult part of the process was trying to figure out the possible Rules I needed to address in my response to the complaint. I know from talking to other lawyers, they have expressed similar frustrations. I truly believe that adopting the language I propose would help to allow lawyers to more

cogently address complaints, would allow the process to be more focused, and would result in increased fairness and efficiency of our lawyer discipline system.

Therefore, I would suggest the following language be added to Rule 3.1 of the North Dakota Rules of Lawyer Discipline. For your ease of reference I am using the language of the Rule as it would be amended, with my additional language in highlighted yellow.

In regard to Rule 3.1.D.2:

A copy of the complaint, along with an indication of which possible Rules of Professional Conduct the lawyer may have violated if the facts alleged in the complaint are true, must be served on the lawyer.

In regard to Rule 3.1.D.5:

Within 60 days of receiving the complaint or a request for investigation, whichever occurs later, counsel shall file a written report with the chair containing a summary of the investigation and conclusions, the response received from the lawyer, and relevant documents. Counsel's report and conclusions are not limited to the Rules of Professional Conduct initially identified pursuant to Rule 3.1.D.2. An extension may be granted by the chair only upon a showing of good cause. Counsel shall serve the written report upon the lawyer and the complainant at the time the report is filed with the chair.

Thank you for your consideration of this comment.

Honorable Steven E. McCullough
East Central Judicial District Judge