Meeting Minutes: Joint Committee on Attorney Standards

(*Unofficial until approved)*
September 15, 2017
10:00 a.m. Call to Order

ND Supreme Court Training Center (1st Floor), Room 131
and via GoTo Meeting

State Capitol, Bismarck

Members Present
Jeremy Bendewald (by phone)
Jason Vendsel (by phone)
Hon. Jerod Tufte
Kara Erickson
Hon. Dann Greenwood
Michael McGinniss
Alexander Reichert (by phone)
Bonnie Staiger, Hon. AIA
Nicholas Thornton (by phone)
Hon. Paul Jacobson (by phone)

Members Absent
Duane Dunn
Thomas Dickson
Jason Steffenhagen
George Ackre

Others Present
Lindsey Nieuwsma, Staff
Tony Weiler, Staff
Andrew Askew, Young Lawyer Rep, SBAND
Dan Traynor, ABA Delegate, SBAND

Chair Greenwood called the meeting to order at 10:05 am. He introduced the members that were present. He referred the members to the minutes of the March 24, 2017 meeting (*meeting materials p. 1-7)*. Prof. McGinniss requested a correction of the spelling of his name on the fourth paragraph on page five of the minutes. **Justice Tufte moved to approve the minutes as amended and Prof. McGinniss seconded. The motion carried.**

Amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct – Supreme Court Referral

Chair Greenwood introduced the first topic on the agenda, Model Rule 8.4, which was addressed at the last meeting and tabled until this meeting. Staff explained the meeting materials. Tony Weiler introduced Dan Traynor, ABA Delegate for the SBAND Board of Governors and Andy Askew, Young Lawyer Representative for the SBAND Board of Governors, who were present at the meeting. Mr. Weiler also noted that Judge Jim Hill serves as the State Delegate for North Dakota on the ABA House of Delegates. Mr. Traynor, Mr. Askew, and Judge Hill were invited to the meeting to provide background and their thoughts on the amended Model Rule 8.4. Judge Hill was not able to attend.

Mr. Traynor provided brief background on the development of the rule by the ABA. Mr. Traynor stated that the model rule was considered at the August 2016 ABA meeting. At the ABA meeting, he raised concerns with respect to the model rule, as were expressed in a Gavel article he wrote. He commented that the Gavel article was written prior to the vote on the rule and there were changes made that helped to address some of the areas of concern that were expressed. He stated, however, that he still has the same concerns that were raised in the article. Mr. Traynor said in speaking with Judge Hill, he shares the concern that Model Rule 8.4(g) as adopted by the ABA is very troubling and North Dakota's existing Rule 8.4(f) is a better rule.

Mr. Traynor's concerns with Model Rule 8.4(g) arose out of information provided by the ABA, information provided by Prof. McGinniss in advance of the vote, and by how the Model Rule has been received by other jurisdictions and other academics after the vote. Mr. Traynor stated that he believed the model rule was overbroad, vague, and imposes viewpoint discrimination that could be used as a partisan political weapon against those with unpopular views. He pointed out that mainstream views can change and have changed over a short period of time. Further, in North Dakota views are not typically as progressive as in other areas of the country, though the interpretation of the rule may be influenced by mainstream views in other areas.

Mr. Traynor also provided hypothetical examples to demonstrate the difficulty in defining what is "conduct related to the practice of law?" The rule is unclear on how "conduct related to the practice of law" would be interpreted, which is concerning. He commented that North Dakota's rule requires that the conduct is "prejudicial to the administration of justice," which would be connected to conduct in a courtroom, to the individual's work as a lawyer that is harmful to the profession.

Mr. Traynor addressed the issue of whether harassment in the workplace would subject attorneys to discipline. He stated that the disciplinary system does very good job, however, in many jurisdictions a disciplinary violation is not accompanied with a criminal charge or conviction. He could not recall an instance where those who received a disciplinary sanction for criminal acts were criminally prosecuted. He stated that the model rule does not necessarily provide the appropriate remedy for bad behavior in the workplace. There are civil laws that address that behavior which are better because they provide an award to the victim. The model rule remedy provides the victim with no benefit because it only affects the offending lawyer's livelihood. Mr. Traynor concluded that he does not like the Model Rule 8.4(g).

Ms. Erickson also expressed concerns with the model rule; one consequence of the rule would be turning employees that are lawyers into mandatory reporters of misconduct, which places them in difficult situation. Although the rule is well-intentioned, there are collateral issues, such as this, that were not considered.

Prof. McGinniss agreed with Mr. Traynor's comments. He added that the definition of discrimination in Model Rule 8.4(g) goes beyond the employment discrimination situations that would be actionable under civil law and gave examples. He also commented that the model rule imposed explicit viewpoint discrimination by excluding conduct undertaken to promote diversity. Prof. McGinniss commented that the rule does not require a showing of severity or pervasiveness of the discrimination or any of the standards required in civil cases. He referenced academic articles noting that the Rules of Professional Conduct are being used to incite a culture shift; the threat of the disciplinary process is used to steer ideas and behavior. Prof. McGinniss stated that he does not agree that the Rules of Professional Conduct are designed to be a tool for culture shift, but reflect a baseline of conduct for lawyers for the protection of the public. He said that there are other avenues available, e.g. education, to increase civility, values, and professionalism. He added that his concern has grown since the previous meeting based on his research and the responses from other jurisdictions.

Chair Greenwood invited comments from Andy Askew, SBAND Young Lawyer Representative. Mr. Askew commented that the August meeting was his first experience at ABA, which was somewhat overwhelming. He provided some background related to the discussion of the model rule at the August meeting. Mr. Askew said that he did vote for the model rule initially; he liked the idea of moving the conversation forward and the model rule has done that. He commented that he was not sure that the model rule was ready for adoption in North Dakota as drafted. He encouraged the committee and others to continue to discuss the topics raised in the rule. He pointed out that, although discussion is important, in order to see how a rule plays out in practice and is interpreted in practice it first needs to be adopted and enforced. He said that he appreciated the comments that were made and encouraged the committee to continue the discussion and find ways to tailor the rule to ensure that a strong stance would be taken against any type of discrimination or harassment. He added that there are civil remedies available; however, the protections afforded are not as robust as they need to be to protect new associates or others.

Chair Greenwood invited additional comments. **Alex Reichert moved to recommend rejection of ABA Model Rule 8.4(g)**. **Michael McGinniss seconded.**

Chair Greenwood asked for discussion on the motion. Ms. Staiger stated that the issue reminds her of the criticisms that the profession and the bench has received over the years within the context of social engineering and advocating. She stated that she would vote in favor of the motion.

Justice Tufte commented that his main concern was with respect to the issue of free speech and referenced the articles written by Prof. Volokh on the issue (*meeting materials p. 29*). He commented that the model rule would likely chill debate and legitimate discussion by lawyers. He added that lawyers provide a unique contribution to the contentious public debates that the rule implicates. He also commented that he was not sure that that the model rule gives the proper boundaries to disciplinary counsel for purposes of enforcement. Ms. Erickson agreed. He stated that he was in support of the motion. Mr. Weiler pointed out that several states that have rejected the model rule and referenced the memorandum in the materials outlining other state actions (*meeting materials p. 31-35*). The memorandum demonstrates that North Dakota is not alone in its concerns.

Mr. Thornton asked whether there has been any pushback or negative response from the public in other states that have rejected the rule. Prof. McGinniss responded that to the extent the public has weighed in, the response has mainly been opposition to the model rule. Depending on the publication, the media has responded in different ways; e.g. the NY Times responded favorably to the rule. The logic supporting the rule has not been public protection, but primarily to initiate a change to the profession and lawyers' interactions with other lawyers. There has been some discussion about the effect on client selection and the concern about the lawyers' ability to reject representation of clients for things that the lawyers find objectionable. Prof. McGinniss does not have a concern with respect to the public's perception of a rejection of this model rule.

Mr. Traynor commented on the misconduct example of sexual harassment or discrimination of an associate attorney by a senior attorney that was discussed at the ABA meeting; he stated that the effect of a disciplinary sanction, such as a thirty day suspension from practice or reprimand, was likely not going to benefit the associate because of the effect it would have on the working relationship. A departure from employment and a civil lawsuit would likely be a preferable route for the associate. Ms. Erickson agreed. He commented that it was rare that the discrimination or harassment will rise to level of disbarment. Prof. McGinniss commented that he had a case in Delaware that included conduct that rose to the level of criminal violations, resulting in a long suspension and eventual disbarment; but there are consequences for those types of behavior. Mr. Traynor added that typically the criminal sanctions will lead, and the disciplinary consequences will follow. Prof. McGinniss and Justice Tufte both commented that the difficulty in freely discussing and analyzing the rule already illustrates the danger of the rule and the chilling effect on meaningful discussion of the rule and underlying issues that the rule implicates.

Chair Greenwood commented that he did not favor adoption of the rule. He clarified that the reason for rejecting the rule was not for the purpose of protecting lawyers from disciplinary actions, but that there are other more appropriate and effective avenues available to accomplish the purpose of the proposed rule. Chair Greenwood called for a vote on the earlier motion. **The motion carried.**

Chair Greenwood thanked the ABA delegates, Mr. Askew and Mr. Traynor for attending, and they left the meeting.

Procedure – Matters for Consideration

Chair Greenwood moved on to a procedural question that had been raised. There was some uncertainty whether issues may be brought to the committee by the committee members and/or the general public or whether all matters must come into the committee by referral from the SBAND Board of Governors or the Court. Staff provided her interpretation of Administrative Rule 38, which governs the Joint Committee on Attorney Standards. Staff stated that her interpretation of AR 38 was that the committee was not barred from taking up issues from its members or the general public. She suggested that this committee could use a procedure used by the Joint Procedure Committee, which would allow members or the public to bring issues to the committee, and the committee members would vote on whether the issue will be taken up for consideration. Chair Greenwood called for discussion on the issue.

Prof. McGinniss commented that the procedure seemed sensible and added that a vote agreeing to consider a matter did not necessarily mean that the committee would take action on an issue, but it would be considered. Chair Greenwood asked if any member wished for more than a majority vote to take up a topic. Justice Tufte suggested that it be a majority of the full committee membership, not just those present at the meeting. Prof. McGinniss agreed. **Justice Tufte moved to adopt an internal procedure that matters brought to the committee by members or the public must be approved for consideration by a majority of the full committee membership. Prof. McGinniss seconded.**

Mr. Reichert suggested that there be a one meeting delay between the vote to take up an issue for consideration and the committee consideration and discussion of the issue in order to provide more notice. **Mr. Reichert moved to amend the motion accordingly. Prof. McGinniss seconded. Justice Tufte accepted the amendment to the motion. Amendment carried.** Mr. Reichert requested a clarification of whether the motion was intended to approve an internal procedure or to modify the administrative order. Chair Greenwood responded that the intent was to create an internal procedure. Mr. Thornton requested clarification on whether the full membership of the committee would include extended membership, such as for the Ethics 20/20 project. Justice Tufte clarified that he intended it to be a majority of the regular membership was intended; Prof. McGinniss agreed. Chair Greenwood called for a vote on the amended motion. **The amended motion to adopt an internal procedure requiring that matters brought to the committee by members or the public must be approved for consideration by a majority of the full committee membership and there must be a one meeting delay between the vote to take up an issue for consideration and the committee consideration and discussion of the issue. The amended motion carried.**

<u>Consideration of Rules 1.2 and 8.4 related to medical marijuana</u>

Chair Greenwood moved on to the next topic; consideration of potential amendments to N.D.R.Prof.Conduct Rules 1.2 and 8.4. He commented that the topic was considered at the last meeting, but given the new procedure that was just approved, a vote should be taken to approve the topic for consideration by the committee. **Prof. McGinniss moved to take up the issue for consideration and to include March as the first meeting in order to allow the topic to be discussed and considered today. Ms. Staiger seconded.** Justice Tufte expressed concern with suspending the new rule immediately after adoption and clarified that this will be a one-time exception only. Prof. McGinniss stated that he also intended, in his motion, that it be a one-time exception to the procedural rule.

Mr. Vendsel asked whether there were reasons to take up the issue immediately or whether consideration could be delayed until the December meeting instead. Ms. Erickson and staff responded that they have received multiple phone calls from attorneys requesting information or guidance on what they could tell their clients who were seeking advice about medical marijuana matters. Ms. Erickson also received a call from a representative who had concerns and would like the issue addressed. There was further discussion about the urgency of the issue, or lack thereof, and the review process by the SBAND Board of Governors that must occur if a rule change is proposed. The general consensus was that the committee should consider the matter sooner rather than later. Chair Greenwood called for a vote on the motion. **The motion carried.**

Prof. McGinniss reviewed the discussion from the March meeting. He stated that he was favorable to Pennsylvania's rule 1.2(e) (*meeting materials p. 61*). He commented that he liked the concept of a general rule that does not address marijuana specifically. The rule also insulates the integrity of the lawyer and discourages cooperation with any illegal activity. The goal of the rule is to get the client enough information to make an informed decision about the proposed course of action. He stated that he also considered the concern discussed at the last meeting of requiring lawyers to counsel on all legal consequences. To address that concern, he proposed that the Pennsylvania rule be amended to state, "To the extent required by Rule 1.1, the lawyer shall counsel client…." This would tie the requirement to inform to the current competence rule; in some situations, competence may not require the lawyer to counsel the client about all legal consequences that may exist for a proposed course of conduct. This would provide some flexibility to determine what is required based on the particular situation.

Mr. Reichert asked Prof. McGinniss what the difference between a reference to Rule 1.1 and the Pennsylvania rule would be. Prof. McGinniss responded that the Pennsylvania rule is emphatic that a lawyer cannot counsel or assist a client *unless* the lawyer counsels about all legal consequences. If it is broader rule that addresses more than just medical marijuana, such as other clashes between federal and state law that may occur, than the rule would not require counseling unless federal law is relevant to the particular practice area of advice. Mr. Reichert summarized that the proposed change would make the rule a little less stringent in some circumstances; Prof. McGinniss agreed.

Mr. Weiler asked whether Comment 9 to N.D.R.Prof.Conduct Rule 1.2 would be implicated in the issue. Prof. McGinniss commented that Comment 9 is intended to address the mens rea for lawyer, or whether a lawyer acted knowingly. In this context, the violation of federal law is known and the comment does not provide the protection desired. Ms. Erickson agreed.

Mr. Reichert commented that he liked the Pennsylvania rule, as opposed to the other states' rules which address medical marijuana specifically because it provides broader guidance to lawyers anytime federal supremacy is invoked. There was discussion of other areas of law where this may be applicable, such as the Montana Firearms Freedom Act. Justice Tufte commented that the Pennsylvania law reads very broadly with respect to counsel that the lawyer must provide about legal consequences and approved of the proposal suggested by Prof. McGinniss. Prof. McGinniss added that the goal of the rule is to address areas where there is a clash between state and federal law and to allow the lawyer to provide robust information to the client so that the client can make an informed decision about how to proceed. The client is the person at risk when a lawyer feels that they cannot have a candid conversation with the client about behavior that is permitted or not. The lack of a rule impedes ability to facilitate informed decision-making by clients.

Ms. Erickson commented that the questions she has received from lawyers are whether they can narrowly tailor their advice to a client for a limited representation so they can give the clients *some* advice. The concern was that there are other important collateral consequences and issues that should be addressed, and if the representation is too narrow, the lawyer is unable to provide good legal advice on the broader scope of the issues.

Mr. Thornton asked whether the provision should be amended to require a lawyer to counsel on conduct expressly permitted by federal law, where there was a reverse situation of a conflict with state law, such as under immigration laws. After discussion, the committee consensus was to retain the rule language proposed by Prof. McGinniss, which was limited to conduct expressly permitted by state law.

Ms. Erickson moved to direct staff to draft an amendment to N.D.R.Prof.Conduct Rule 1.2 in accordance with the committee's discussion. Prof. McGinniss seconded. Mr. Weiler brought up that the SBAND Board of Governors would be discussing the issue at a meeting this afternoon. There was discussion of the procedure and the timeframe for submitting the rule draft to the Board for review and then to the Court. The consensus was that the draft could be created during the meeting to expedite the timeframe for review by the Board of Governors and the Court. **Ms. Erickson withdrew her motion and Prof. McGinniss withdrew his second.**

Staff dictated the proposed amendment to create N.D.R.Prof.Conduct Rule 1.2(e): "A lawyer may counsel or assist a client regarding conduct expressly permitted by North Dakota law. To the extent required by Rule 1.1, a lawyer shall counsel such a client about the legal consequences, under other applicable law, of the client's proposed course of conduct." Mr. Reichert moved to recommend to the Supreme Court the adoption of the rule as dictated by staff, subject to the SBAND Board of Governors' approval. Prof. McGinniss seconded. The motion carried.

<u>Continuing Legal Education Requirements – Supreme Court and Minority Justice Implementation Committee referrals</u>

Chair Greenwood moved on to the topic of continuing legal education requirements. Staff explained that the committee received two referrals related to minimum continuing legal education requirements; the Supreme Court requested a review of the new ABA model rule on minimum continuing legal education (MCLE) requirements and the Minority Justice Implementation Committee requested that the committee consider the adoption of a rule requiring education credits for diversity and/or elimination of bias, either as an additional requirement or as one of the required ethics credits.

Staff provided background on the changes recommended by Model Rule and reviewed the materials (*meeting materials p. 112-162)*. In response to a question from Mr. Reichert, Mr. Weiler responded that approximately 1/3 of North Dakota bar is dually licensed in

North Dakota and Minnesota; Minnesota lawyers are required to take elimination of bias courses under Minnesota CLE requirements.

Ms. Erickson commented that it may be preferable to hear from SBAND Education Commission before consideration by this committee. Mr. Reichert suggested that, if a change is made to the North Dakota MCLE requirements, it would be beneficial to have the same requirements as Minnesota. Prof. McGinniss agreed.

Chair Greenwood asked for input regarding work prior to the next meeting. Ms. Erickson suggested additional research and input from the SBAND CLE commission.

There was discussion about the recommendations for dedicated elimination of bias credits and dedicated mental health and substance abuse credits. Mr. Weiler commented that the bar does have several members that are dually licensed in Minnesota and North Dakota, so SBAND does often apply for elimination of bias credits, which are applicable to the North Dakota ethics credits requirements. Mr. Weiler also noted that the North Dakota ethics credits rule specifically references elimination of bias credits and contemplates that they will satisfy the three ethics credits required per reporting period. Mr. Weiler commented on the ABA MCLE recommendation to require a mental health and substance abuse credit. SBAND has made a special effort in recent years to provide courses about the Lawyer Assistance Program, which addresses addiction and mental health issues.

Mr. Reichert clarified the distinction in categories for the ABA's model requirements and Minnesota's CLE requirements; the ABA recommends separate credits for four categories 1) general course work, 2) mental health and substance abuse, 3) ethics, and 4) elimination of bias, Minnesota requires three categories 1) general course work, 2) ethics, and 3) elimination of bias, which may be satisfied through mental health and substance abuse courses. Mr. Reichert recommended three areas, rather than four.

Judge Jacobson left the meeting at this point.

Mr. Vendsel commented that he would not be in favor of adding a North Dakota requirement just because Minnesota does it. He added that SBAND does a good job of making those courses available. He does not want to impose more CLE rules, especially if the SBAND Education Commission does not recommend more requirements.

Ms. Staiger commented that after hearing the discussion, it sounds like North Dakota has already addressed those topics, they are just categorized differently in the rule requirements. Chair Greenwood clarified that the North Dakota rules allow for credits in each of those topic areas, but the MCLE model rules require each category to be segregated and separately satisfied.

Prof. McGinniss suggested that the rule could potentially increase the ethics credits from three to four to add "space" for the recommended topic areas.

Mr. Weiler stated that he would like to analyze Minnesota's rule to determine the requirements for approval of elimination of bias credits. There was discussion of the process for approving courses by the CLE Commission in North Dakota and Minnesota. He stated that the SBAND CLE Commission needs to have input on this issue and should consider the model rule and whether there are enough course offerings in the elimination of bias area.

Chair Greenwood commented that there are a limited number of CLE offerings in North Dakota, as compared to other states with larger cities, and lawyers may have difficulty finding courses to satisfy all the areas recommended by the ABA rule. Mr. Weiler commented that SBAND does have a robust course offering every year, but there are other CLE providers and lawyers are receiving their CLE's from several sources. He provided background on SBAND's course offerings; he stated that he was interested in offering more racial and ethnic diversity CLE and continuing to focus on mental health.

Ms. Staiger said that this conversation seemed to echo the earlier discussion regarding Model Rule 8.4; the comments about cultural engineering and steering people's attitudes seemed applicable here, also. She stated that she was inclined to keep the status quo.

Mr. Weiler said that he would like to take the issues referred to the committee by the Court and the Minority Justice Implementation Committee to the SBAND Education Commission and report back to this committee.

Mr. Thornton moved to table the topic until the SBAND Education Commission can consider it and provide a recommendation to the committee. Mr. Vendsel seconded. The motion carried.

Mr. Reichert also requested that the Education Commission consider a review of podcast-type educational programming. He commented that there is exceptional programming available that may not fall within the rule requirements right now. Mr. Weiler agreed that a review may be appropriate given changing technology and said that the 15 hour cap on self-study may not be enough. Mr. Weiler said that the Education Commission will meet before the next Attorney Standards meeting. Mr. Thornton requested that Mr. Weiler relay to the Minority Justice Implementation Committee the sentiment that this committee considers the issue referred by the MJI Committee to be important, but the members would like to receive input from the Education Commission prior to taking any action. Mr. Weiler and staff agreed to relay that information at the November Minority Justice Implementation Committee meeting.

Mr. Weiler will consult with staff regarding Education Commission's position after the issues have been considered.

Chair Greenwood noted that the next meeting is scheduled for December 29, 2017.

Having no further business, the meeting adjourned at 11:00 am.

Meeting Materials

- March 24, 2017 meeting minutes (*meeting materials p. 1-7*)
- ABA letter (*meeting materials p. 8-9)*
- ABA Rule 8.4 Amendments and Report (Revised 109) (*meeting materials p. 10-27)*
- Prof. Michael McGinniss material submissions (*meeting materials p. 28-30*)
- Memo: State Action on Model Rule 8.4(g) (*meeting materials p. 31-35*)
- ABA Center for Prof. Resp. article: The Intersection of Professional Duties and Federal Law as States Decriminalize Marijuana (*meeting materials p. 36-42)*
- Ohio Advisory Opinion 2016-6 (*meeting materials p. 43-49)*
- Other states Rule 1.2 Amendments (*meeting materials p. 50-68)*
    - Ohio (*p. 50-53*)
    - Colorado (*p. 54-57*)
    - Alaska (*p. 58-60*)
    - Pennsylvania (*p. 61-63*)
    - Washington (*p. 64-68*)
- SBAND Ethics Opinion 14-02 regarding personal use (*meeting materials p. 69-71)*
- Maryland's Medical Marijuana Law (State Bar Position Chart) (*meeting materials p.72- 108; chart on p. 96*)
- Rhode Island Ethics Advisory Panel Op. 2017-01(*meeting materials p. 109-111*)
- ABA Amended Model Rule for MCLE letter (*meeting materials p. 112-114*)
- Minority Justice Implementation Committee letter (*meeting materials p. 115-116*)
- ABA Model Rule for Minimum Continuing Legal Education (Resolution 106) (*meeting materials p. 117-147*)
- ABA Model Rule MCLE State by State Chart (*meeting materials p. 148-162*)