

**Meeting Minutes: Joint Committee on Attorney Standards**

**March 24, 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**

George Ackre (by phone)  
Jason Vendsel  
Hon. Jerod Tufte  
Kara Erickson  
Hon. Dann Greenwood  
Michael McGinniss (by phone)  
Alexander Reichert (by phone)  
Hon. Bonnie Staiger  
Nicholas Thornton (by phone)

**Members Absent**

Duane Dunn  
Hon. Paul Jacobson  
Jason Steffenhagen  
Jeremy Bendewald  
Thomas Dickson

**Others Present**

Lindsey Nieuwsma, Staff  
Tony Weiler, Staff

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 April 29, 2016 meeting (*meeting materials p. 1-5*). **Kara Erickson moved to approve the minutes and Nicholas Thornton seconded. The motion carried.**

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

Chair Greenwood moved on to the first item on the agenda, a referral from the North Dakota Supreme Court to consider the recent amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct. Staff provided background on the Rule 8.4 Amendment and materials, ABA letter (*meeting materials p. 6-7*), ABA Rule 8.4 Amendments and Report (Revised 109) (*meeting materials p. 8-25*), Judicature article: A Speech Code for Lawyers? (*meeting materials p. 26-31*).

Prof. McGinniss has been tracking and researching the rule change and provided additional information. He relayed concerns that have been voiced regarding the expansive scope of the rule. The ABA has been considering this rule change for quite some time and has received many comments. The concerns that have been raised address primarily the breadth of the rule and its potential First Amendment implications. The rule is more expansive than the existing comment in the 8.4 Model Rule and North Dakota's current Rule 8.4 because it expands the scope of the rule beyond representation of a client

to also cover conduct “related to the practice of law” (e.g. law firm meetings, social functions, CLE’s, a law school class). North Dakota rule requires that the conduct be prejudicial to the administration of justice, not just that the conduct be related to the practice of law. Prof. McGinniss expressed a concern with the potential risks to lawyers and restrictions on the freedom of speech created by the ABA Model Rule.

Chair Greenwood asked whether the ABA had already formally adopted the Rule Amendment. Prof. McGinniss stated that the rule had been adopted by a voice vote, but there were still late comments and concerns coming in that may not have been fully addressed.

Mr. Thornton asked Prof. McGinniss whether he would recommend that the topic be tabled until the ABA sorted through the late comments and concerns. Prof. McGinniss answered that the ABA has already finalized the adoption of the Model Rule and was recommending that states adopt the amendments, so the ABA would not be addressing the comments and concerns any further. He noted that there was controversy in Montana regarding the rule and resistance nationwide to the rule.

Ms. Staiger asked whether there was information available about how many states have adopted or rejected the amended rule. Prof. McGinniss responded that he was not aware of any states that had adopted the rule yet. Montana has hotly contested it, to the point that it was not even sent to the committee as typically handled, and a bill was submitted to the legislature to attempt to allow the legislature to intervene in the process. Prof. McGinniss provided information about several academic articles and resources which address the topic. He noted that North Dakota stands in a somewhat different position than other states because it has already implemented the prohibition on bias and prejudice into the text of the rule, rather than in the comments as the previous version of the ABA Model Rule and many other states have done. Prof. McGinniss stated his concern that the proposed rule would have a chilling effect on lawyers’ ability or willingness to speak about controversial issues.

Mr. Weiler noted that the ABA letter (*meeting materials p. 6-7*) states that 25 jurisdictions have already adopted a “black letter rule” prohibiting bias or prejudice, but that would not address the proposed amendment. North Dakota would actually already be counted into that number.

Mr. Reichert stated that the controversy, as he saw it, centered on the phrase “related to the practice of law.” He also noted that there may be a second question regarding the addition of protected classes, ethnicity, gender identity, marital status, and socioeconomic status, which are not currently within the North Dakota rule. He asked Prof. McGinniss whether he was aware of controversy regarding that addition and suggested it was an area that should be considered by the committee. Prof. McGinniss stated that there has been controversy surrounding the additional protected classes because some of the categories are not currently covered under states’ anti-discrimination or employment laws. Mr. Reichert stated he would support the protection of the additional classes. Mr. Thornton asked whether it would be discrimination to decline to take a case based on the client’s

inability to pay the fee; comment 5 to the ABA Model Rule (*meeting materials, p. 10, ln 81-82*) states that a lawyer may charge and collect reasonable fees and expenses for representation and attempts to address that issue.

Ms. Erickson commented that the Center for Professional Responsibility Policy Implementation Committee tracks states' actions on model rules and has resources available to show what other states are doing. With respect to the socioeconomic status issue, disciplinary counsel already receives numerous complaints regarding discrimination. Often, the complaints are that public defenders are not doing a good enough job and other similar complaints.

Ms. Staiger commented that, as she sees it, North Dakota's rules are already partway there. Also, given the controversy surrounding the Model Rule, she is inclined to let the conversations play out and avoid taking a position on the rule until there is greater consensus or understanding of the issues.

**Mr. Reichert moved to table the issue until the fall 2017 meeting. Prof. McGinniss seconded.** Chair Greenwood asked for discussion on the motion. Justice Tufte suggested that the committee invite the new labor commissioner, who is an attorney, to attend the fall meeting and compare and contrast the model rule to the state's discrimination laws. Ms. Erickson also suggested that Prof. McGinniss distribute the articles that he has reviewed to the group so that the members may be better informed about the scope of the controversy. Prof. McGinniss agreed to share the materials.

Chair Greenwood asked Prof. McGinniss for his position on the new model rule; his position is that the current North Dakota rule is sufficient, there is a potential "mismatch" with state discrimination law if the model rule were adopted as amended, and he opposes the adoption of the Model Rule categorically.

Justice Tufte asked if there were materials available that would address the issue of the difference between North Dakota's current rule language referring to "bias and prejudice" and the model rule language which refers to "harassment or discrimination." Prof. McGinniss responded that an article written by Prof. Blackman that he intends to share addresses that topic. He added that there is a concern with the breadth of the term and the objectivity of the term.

Ms. Erickson added that from the disciplinary standpoint, North Dakota's rule is easier to enforce than the model rule language.

Mr. Weiler commented that there are 3 ABA delegates on Board of Governors for SBAND and that it may be helpful to have their input on the issue.

Staff referred the members to the ABA Rule 8.4 Amendments and Report (Revised 109) (*meeting materials p. 8-25*), specifically page 17, which addresses the change in language from "manifestation of bias and prejudice" to "harassment and discrimination." The report states that the ABA's goal was to create a term that was both objective and

subjective. Prof. McGinniss added that the “manifestation of bias or prejudice” language was moved from the rule provision into the comment in the model rule. The effect is that the manifestation of bias or prejudice is still used to define harassment and discrimination. He also noted that the North Dakota rule protects legitimate advocacy; the ABA rule does not protect conduct outside of client representation that still relates to practice of law.

Chair Greenwood asked for suggestions on steps that need to be taken between now and the time when the committee may take the issue up for consideration again. Ms. Erickson suggested that the committee contact the Center for Professional Responsibility Implementation Committee for guidance on how other states have handled the model rule. Prof. McGinniss agreed that input from the labor commissioner and the ABA delegates representatives would be helpful.

**Chair Greenwood called for a vote on the motion to table the issue until the fall 2017 meeting. The motion carried.**

### **Consideration of Professional Conduct Rules 1.2 and 8.4 related to medical marijuana**

Chair Greenwood moved on to the topic of whether a consideration of Rules 1.2 and 8.4 is necessary as they relate to medical marijuana. Ms. Erickson provided some background on the topic. In light of the recent adoption of a medical marijuana initiative in North Dakota, Ms. Erickson noted that it may be beneficial for the committee to understand and be aware of issues that have arisen in other states and are causing a lot of stir in the ethical community on a national level.

Ms. Erickson referred members to the meeting materials outlining the issues that have arisen (*meeting materials p. 32-186*). Ms. Erickson said that from her standpoint, Rule 1.2 relating to representation of clients, such as businesses or banks, involved with business of medical marijuana and legitimate advocacy of those clients was a more pressing issue. Because marijuana is still illegal under federal law, advising or assisting those clients or individuals on matters related to marijuana would likely be a violation of Rule 1.2. Ms. Erickson commented that she is not necessarily advocating a rule change or review, but is recommending that the committee be aware of and track the related issues and legislation.

Ms. Erickson referred the members to the chart in the meeting materials (*p. 174*) which summarizes actions that states have taken with respect to the issue. The most common approach appears to be a comment to Rule 1.2 of the Professional Rules.

Staff gave a brief summary of the three ways that states have typically addressed the issue, 1) prohibition on advising or assisting clients on matters related to marijuana; Maine has been the only state to take this approach, 2) a grant of immunity from disciplinary action either by rule, in comment to the rule, or in Minnesota, by statute and 3) most commonly, through rule or comment, states allow representation and assistance of clients provided the attorney also advises on federal law and policy.

Mr. Reichert asked generally where the controversy exists because there are many instances in which state and federal law conflict, e.g. labor law or environmental law, and we do not allow attorneys to counsel clients to violate federal law in those instances. In his view, the bigger issue may be a lawyer who is using marijuana under a valid prescription from a doctor or a lawyer who uses marijuana in a state where it is legal. Ms. Erickson noted that North Dakota has issued an ethics opinion on lawyer use, which is contained in the meeting materials (p. 147-149). Currently, if a lawyer travels out of state, uses marijuana, and is reported, the lawyer should be prosecuted.

Staff commented that other states have addressed lawyer use of marijuana, typically through ethics opinions, but not as many states as have addressed the representation issues.

Ms. Staiger asked whether SB 2344 may potentially address the issue. Ms. Erickson stated that it is unlikely and it would be preferable to handle the issue through court rule.

Justice Tufte commented that the Pennsylvania approach appeared to be the most useful example because it does not address marijuana explicitly, and lawyers may counsel on conduct expressly *permitted* by state law. Typically, the law prohibits conduct rather than expressly permits it, thus the rule is tailored to exclude counsel on conduct which is not expressly allowed. He expressed a concern, however, with potential overbreadth of the language requiring lawyers to counsel about legal consequences of other applicable laws. It may be unwise to place a burden on lawyer to be knowledgeable about other state or federal laws outside of their experience or specialty; we do not require lawyers to advise on federal law on other issues. Prof. McGinniss agreed.

Mr. Thornton added that he struggled with the provision requiring advice on federal law because, in some circumstances, e.g. immigration, criminal collateral consequences, it is a good practice to require lawyers to be knowledgeable and counsel on federal issues, including the risk of federal prosecution for marijuana offenses. In others, however, the issues are nuanced and there are very few areas where lawyers are required to counsel on federal law. **Mr. Thornton moved to table the issue.** He commented that the North Dakota medical marijuana bill is not through legislature yet. Mr. Reichert said that he would second a motion to table until a definite time. **Mr. Thornton amended the motion to table the issue until the fall 2017 meeting. Mr. Reichert seconded.**

Chair Greenwood asked for any further discussion. Mr. Vendsel asked that if SBAND moves from monitoring to involvement, that Mr. Weiler provide an update to the committee. Mr. Weiler commented that SBAND is not taking a position right now and that he does not foresee it doing so in the future.

Mr. Ackre expressed a concern and posed the question of what type of process would an attorney use to assure that he had advised on all collateral laws. For instance, would the attorney be required to use a canned memorandum to provide to the client, and if so, could that memorandum be used by the federal government in a prosecution of the client? He commented that members should consider those issues, also.

Ms. Erickson reiterated that this may not be an issue that the committee is required to take up, but that it is beneficial to be informed and aware of what is happening around the nation should any action need to be undertaken. Mr. Weiler commented that it was prudent and an important issue that lawyers will need to be educated on. He appreciated that the issue was addressed and commented that it was timely and relevant. He commented that SBAND has discussed doing a CLE on the issue, with respect to even the differences between North Dakota and Minnesota. Ms. Staiger also expressed her thanks to Ms. Erickson for bringing the issue forward.

Mr. Reichert asked if the committee was required to receive referrals from the Supreme Court or SBAND Board of Governors in order to act or whether it could take up issues *sua sponte*. Staff indicated that she would look into the issue. Mr. Vendsel commented that the committee spent a lot of time on super lawyers, which was raised by a committee member. Mr. Thornton commented that he raised an issue as a nonmember regarding fees and was directed to submit the issue to the court and board under Administrative Rule 38, so a referral may be necessary.

**Chair Greenwood called for a vote on the motion to table the issue until the fall 2017 meeting. The motion carried.**

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

### **Meeting Materials**

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- April 29, 2016 minutes (*meeting materials p. 1-5*)
- Amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct – Supreme Court Referral
- ABA letter (*meeting materials p. 6-7*)
- ABA Rule 8.4 Amendments and Report (Revised 109) (*meeting materials p. 8-25*)
- Judicature article: A Speech Code for Lawyers? (*meeting materials p. 26-31*)
- ABA Center for Prof. Resp. article: The Intersection of Professional Duties and Federal Law as States Decriminalize Marijuana (*meeting materials p. 32-38*)
- Ohio Advisory Opinion 2016-6 (*meeting materials p. 39-45*)
- Other states Rule 1.2 Amendments (*meeting materials p. 46-64*)
  - Ohio (*p. 46-49*)
  - Colorado (*p. 50-53*)
  - Alaska (*p. 54-56*)
  - Pennsylvania (*p. 57-59*)
  - Washington (*p. 60-64*)
- North Dakota Engrossed SB 2344 – Compassionate Care Act (*meeting materials p. 65-146*)

- SBAND Ethics Opinion 14-02 regarding personal use (*meeting materials p. 147-149*)
- Maryland's Medical Marijuana Law: Transactional and Ethical Perspectives For Real Estate Practitioners, 5 U. Balt. J. Land & Dev. 85 (*meeting materials p. 150-186*)