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CALENDAR OF EVENTS & CLE SEMINARS

December 4-5
Real Property, Probate & Trust
Law Section Seminar
Fargo

Additional seminars will be added for 2009. All dates subject to change.

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Supporting the Third Branch

Only one in three people can name the three branches of government and only one in seven can name the Chief Justice of the United States Supreme Court. At the same time, two out of three can name at least one of the judges on “American Idol.” The public’s lack of basic knowledge about the judicial system and its role in our democracy should give us cause for concern, because, as Andrew Jackson stated: “All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary.”

In North Dakota the judicial branch is not just forty-two district court judges and five supreme court justices. We, the members of the Bar, are all part of that system. When we took the Attorney’s Oath and Pledge to become a North Dakota attorney, we promised to defend the Constitution, maintain respect for the judiciary, and serve as an officer of the court. The Oath reads:

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of North Dakota; and that I will faithfully discharge the duties of the office of attorney and counselor at law according to the best of my ability. …

The Pledge, in part, reads:

On my Honor, I do solemnly promise:
I will maintain respect for Courts of Justice and Judicial Officers; …
I will perform faithfully my responsibilities as an officer of the Court and protector of individual rights; …

In North Dakota and around the country, the judicial branch has been the subject of unfair attacks. One of the reasons for these attacks is the emotional volatility of cases handled by the courts. In a divorce trial, the issues can include lack of marital fidelity, division of property, spousal support, and custody of children. The outcome of the trial not only affects the divorcing couple, but also affects children, grandparents, friends of the family, and others. Seldom are both parties happy with the judge’s decision. Often, both parties are unhappy. This may lead to unfair criticism of the judiciary.

In a civil case other than divorce, there is also room for parties to be unfairly critical of the judge. A judge’s decision on summary judgment, statute of limitations, and in limine motions can devastate the case of one side or the other. Rulings on hotly contested evidentiary issues can play a significant role in the outcome of the trial. The handling of a criminal case also brings a judge under close scrutiny and creates an atmosphere ripe for criticism.

As lawyers, there are things we can do to reduce the level of unfair criticism of the judicial branch. One of them is to recognize how our words and conduct may influence our clients’ reactions. Do we suggest, in the wake of an adverse ruling, that the judge is lacking in knowledge or intellect? Do we declare that the judge is biased because of having attended law school with the opposing attorney or living on the same side of town as the opposing party? As lawyers, we feel the pain, along with our clients, when things don’t turn out as planned. As officers of the court, we should make sure our words aren’t uttered as an angry reaction in the heat of the moment. Rather, our comments should be made after thoughtful reflection and reasoned analysis. That doesn’t mean that our First Amendment rights or those of our clients should be restricted. If there is a real problem with the conduct of a judge, it should be reported through the informal complaint procedure or to the Judicial Conduct Commission. If we are simply venting frustration, however, we should choose our words carefully.

A summary standard contained in the Professionalism Aspirations adopted by the Minnesota Supreme Court in 2001 makes this point. It states:

Lawyers and judges owe each other respect, diligence, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the court and the profession.

Second, since the public’s knowledge of the third branch is so important and the public’s respect for the third branch is equally important, we, as attorneys, should help foster knowledge and respect by education. We all know non-lawyers who don’t know the difference between the federal court system and the state court system or don’t know that state district court judges hold trials with witnesses and exhibits and the supreme court judges hold trials without them. Therefore, we, as attorneys, should help foster knowledge and respect by education.
court decides cases on the record. As North Dakotans become better informed about our third branch of government, they may be less likely to level unfair criticism. Thereafter, if they still choose to be critical, it is more likely to be informed and reasoned criticism. As officers of the court, we should each do our part to make sure our North Dakota citizens know more about the third branch of government than they do about “American Idol.” We can do this by providing information about the judicial branch to our clients and to our friends, relatives, and acquaintances. We can also do it by volunteering our time to speak at meetings of civic groups and clubs to provide important information to them about the third branch of government.

Third, if baseless attacks are leveled against the judiciary, the Bar Association has been authorized to respond. A resolution passed at the 2008 Annual Meeting of the Bar Association states:

NOW THEREFORE, we, the members of the State Bar Association of North Dakota, reaffirm our unwavering support for fairness and impartiality in our American System of Justice and our North Dakota Judicial System, and hereby authorize and direct our Board of Governors to take reasonable efforts to support and defend our judicial system from all baseless attacks on its fairness and impartiality.

The third branch of government, at times of unfair attack and unjustified criticism, needs the supportive voice of the Bar Association and the lawyers of this state.

Two members of the North Dakota Bar were called up for active duty by their Army Reserve Legal Services Organization this past year to provide assistance to soldiers seeking disability benefits.

Lieutenant Colonel Bruce Romanick of Bismarck, who has been a judge of the South Central Judicial District since 2000, spent 400 days at Fort Sam Houston in San Antonio, Texas. Lieutenant Colonel David Jones of Grand Forks, who has been Grand Forks County States Attorney since 1995, spent nearly six months at Fort Lewis, Washington.

They are among the three North Dakotans who are affiliated with the 87th U.S. Army Reserve Legal Services Organization. The other is McLean County States Attorney Ladd Erickson.

As part of their routine reserve duties, those in the 30-plus member unit, which is based in Salt Lake City, provide legal services to troops that are being mobilized. Romanick, Jones and Ladd work with the units in North Dakota and South Dakota and offer them legal services as they are deployed and when they return, and to their families while they are away.

The unit was activated in response to concerns that wounded soldiers, especially those fighting in Iraq and Afghanistan, were not receiving the care and services they should upon returning home. 18 members of the 87th LSO were deployed to Ft. Lewis, Ft. Sam Houston, and Walter Reed Army Medical Center to assist the soldiers before physical and medical evaluation boards, which determines whether injured soldiers are fit for continued military service, and to make

Continued on page 6
Recent North Dakota Law Review Issue Receives Response from State Lawyers

When Volume 83, Number 4 of the North Dakota Law Review was published, it earned the distinction of attracting more attention than any other North Dakota Law Review in recent history. Its content drew criticism from many state lawyers, especially those in the State Bar Association of North Dakota Family Law Section.

The issue was a “Future of the Family Symposium,” and it sought articles on the “legal future of the family.” The call for articles, which had a deadline of December 31, 2007, stated: “In light of many recent federal and state constitutional amendments regarding marriage, the NDLR is concerned about the legal definitions of family and marriage, as well as other implicated issues such as abortion, adoption, and tax. The NDLR desires to provide its readers with arguments for either following the traditional definitions of family and marriage in projecting the future of these institutions, or in proposing a change to those definitions. We specifically plan to analyze these topics through the lenses of two methodologies, namely constitutional law and family law. We encourage legal scholars and practitioners to frame their perspectives through the lens of one of the two methodologies, or even to analyze the interplay of their legal positions through both methodologies.”

Criticism of the articles in the journal, which was published in July, was that both sides of the legal arguments were not presented, with most of the articles showing a bias toward “traditional family values.” Some of those critical of the articles in the issue were concerned the content of journal might be interpreted as reflecting the views of the family lawyers in the state.

Dean Paul LeBel, dean of the UND School of Law, issued a statement to the subscribers at the end of July addressing the criticism. He acknowledged that the views expressed by the authors of the articles urging a narrow definition of marriage and family “have drawn strong criticism wherever they have appeared, including the Law Review.” He wrote that the opinions in the articles in the volume “do not represent a position of the University of North Dakota, the UND School of Law, the State Bar Association of North Dakota, or the North Dakota Law Review. The University and the School of Law are welcoming and inclusive educational communities in which all individuals are respected and supported.”

LeBel also wrote that he was “confident that the Law Review continues to be committed to presenting diverse viewpoints on such important topics, and remains willing to include perspectives critical of those expressed in the current volume.”

Kathryn R.L. Rand, associate dean for academic affairs and research at the UND School of Law, is faculty advisor to the Law Review. “A defining aspect of the Law Review is that it, like nearly all law reviews, is student-edited,” says Rand. “Students serve as the gatekeepers of the journal articles, and students make the decisions about the content, not the dean or faculty.”

A law review is intended to provide learning experiences for law students, says Rand. “They learn about legal scholarship and how to properly cite and support arguments.” But, she says the students have also learned from the criticism that has been raised about the content of that issue.

Because it is student-led, Rand says the journal’s editorial staff changes every year. “There was quite a lag between the time this issue was conceived, produced and published, and three different editorial boards were involved in it.”

She says the students who conceived the idea for the issue actively sought out a wide range of perspectives on family law topics. “They contacted more than 75 potential authors who were evenly split on their views. However, the articles that were submitted were not as balanced as the editors had intended.”

The decision by the editors to publish the articles that had been submitted was done, Rand says, with a long view in mind and that it would contribute to the national scholarly coverage of family law issues. “They reasoned that this would not be the first or last of articles they would publish on family law. And, in fact, the most recent issue of the Law Review has two articles related to family law.”

North Dakota Law Review Supported by SBAND

Almost since its inception the North Dakota Law Review has published the proceedings of the Bar Association’s General Assembly. As a result the Law Review has been referred to as the journal of the State Bar Association of North Dakota.

In return for printing and disseminating its minutes, the Bar Association for many years has paid $10 per licensed member to the Law Review. Currently the Bar’s support for the Law Review totals approximately $18,000, a small fraction of the actual cost of publishing the journal.

Executive Director Bill Neumann says SBAND recognizes the Law Review is student-edited, and doesn’t belong to the law school dean, the faculty or the State Bar Association. “We are proud of the job the students do with this publication, and the role it plays in the education of law students and as the state’s scholarly law journal.”
that promote less traditional views.”

Kara O’Connor Gansmann was editor-in-chief of the Law Review during the 2006-07 school year when the family law issue was conceived. “We solicited a great number of articles and had a commitment from several authors for articles on both sides of the issue. In the end many of them didn’t deliver the articles they promised to write.”

Gansmann is now a junior chamber attorney for 14th Court of Appeals Judge Kem Thompson Frost in Houston. “I can say with great assurance that it was our intention to present both sides on that topic. People are welcome to their own opinions on family law, and it was not our intention to shape opinions by the articles that appeared in the issue.”

Rand believes this may have brought a greater awareness of the legal issues as well as the Law Review to North Dakota’s bench and bar. “It may have made some in the state think about how they can contribute to the public debate on legal issues through contributing articles to the Law Review in the future.”

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decisions on disability compensation and retirement.

"Bringing more lawyers into the process was one of the ways the Army responded to provide better care and representation to soldiers going through the disability process," says Romanick.

At Fort Sam Houston, Romanick managed the four attorneys and three paralegals in the Office of Soldier's Counsel representing soldiers going before the evaluation boards. Later in the tour he was designated Chief of Client Services, adding five attorneys and nine support staff from the legal assistance office and claims office under his supervision "There were an average of twenty physical evaluation board hearings scheduled each week."

The physical evaluation boards consisted of a president, usually a Colonel, a personnel management officer and a doctor who would review the soldiers' files and make decisions based on arguments by the lawyers representing them.

"It was the attorneys' job to guide the soldiers through the hearing process," he says, meeting with them several times to prepare their cases. "With professional lawyers helping them, it allowed a greater opportunity for the soldiers to get a 'fair shake.'"

In most cases, Romanick says the board would rule whether the soldiers were unfit to continue service, and what type of severance or disability benefits they would be given.

"Sometimes there were soldiers who did not want to leave the army and the soldier's counsel would assist them in attempting to be found fit."

At Fort Lewis, Jones worked exclusively with the Office of Soldier's Counsel, to represent soldiers when they appeared before a three-person board consisting of one doctor and two senior officers. "We would immerse ourselves on a case-by-case basis on the condition of our clients. We all tried to do as much as we could for our clients."

Jones says a lot of his work involved immersion in medical issues, such as post-traumatic stress or brain injuries. "We also worked with clients with skeletal muscular injuries, such as the back and neck."

Romanick and Jones returned home in July and found that work responsibilities in their absences were adequately handled.

"Several judges stepped in to handle the workload at the South Central District Court," says Romanick, "Among them were Judge Benny Graff, who came out of retirement to my calendar for five months."

The Grand Forks County Commission hired attorney Christopher Griffin to step in for Jones in his absence, and upon his return, Griffin was hired to remain in the state attorney's office through the end of 2008.

Following this service, both Romanick and Jones plan to retire from the Army Reserve.

Romanick joined the Army in 1989 and served on active duty as a military lawyer at Fort Carson, Colorado and in Saudi Arabia and Kuwait during Operation Desert Storm. He has served in the Army Reserve since 1993 and intends to retire from the reserve by the end of the year.

Jones enlisted in the Army in the early 1980s and has been in the reserve since leaving active duty. He changed his retirement plans to remain in active status to complete his time at Fort Lewis, and expects to retire soon.

Romanick and Jones believe they provided a valuable service to the soldiers. "There's no question that with more representation by lawyers the soldiers usually got a better outcome in their hearing," says Romanick.

"There were many instances when I felt good about what I was able to do for my clients. It's a large system for them to navigate without help," says Jones.
Family Mediation Pilot Program
Showing Great Promise

By Cathy Ferederer
Family Law Mediation Program Administrator

Custody and visitation disputes are never easy. The pain and anger felt by parents can be immeasurable. Recognizing the emotional toll that custody and visitation disputes take on members of a family, the North Dakota Unified Court System (the Court) has worked with the Joint Alternative Dispute Resolution Committee to pursue alternative dispute resolution in family cases. Over the last six months the Court has implemented such an alternative, the Family Mediation Program (Program). The Program is a pilot designed to provide pre & post-trial mediation services in cases where custody or visitation are in dispute. It has been implemented in the Northeast Central and South Central Judicial Districts.

The purpose of the Program is to minimize family conflicts, encourage shared decision-making, and support healthy relationships and communication among family members by trying to resolve custody and visitation disputes through mediation. Through the skills of a mediator, parents are encouraged to work together to create an agreement that reflects each parent's unique contribution to their child's upbringing and is in the best interest of the child.

Since the inception of the Program on March 1, 2008, one hundred twenty-three (123) cases from the two pilot districts have been referred to the program. Of those one hundred twenty-three (123) cases, eighty-one (81) cases have been accepted into the program. The other cases were screened out due to settlements being reached prior to mediation, domestic violence issues, or one party living out of state.

At this time, completed paperwork has been received on thirty (30) cases. In twenty-three (23) of the thirty (30) completed cases issues in the case were resolved through the mediation process. Seventy-three (73) percent of the parties completing evaluations post mediation agreed or strongly agreed with the statement “Overall, I am satisfied with the mediation process,” while twenty-four (24) percent indicated a neutral feeling in regards to that statement and only three (3) percent disagreed with the statement. Seventy-five (75) percent of the parties indicated they agreed or strongly agreed with the following statement, “Mediation is better than going to court” and seventy-four (74) percent agreed or strongly agreed with the statement, “We were able to put the needs of the children first”. Though these are preliminary numbers and a much more thorough analysis has yet to be completed these trends seem to be consistent with the body of literature suggesting that the use of alternative dispute resolution methods at an early stage in the process increases party satisfaction and increases communication, and reduces acrimony.

The Program was developed through the vision and leadership of a subcommittee of the Joint Alternative Dispute Resolution Committee. The subcommittee submitted a draft protocol and administrative order to the Court in November 2007 which was then approved by the Court in February of 2008. Since the program began mediators have been selected to provide services in the two pilot districts. The mediators have attended training directly geared for the Program which outlined the policies, procedures, and evaluation of the program and provided training on the use of the domestic violence screening tool developed for the program. A mentoring project was developed to provide observation opportunities, skill building, and evaluation to enhance the skills of mediators. The mentoring project has been very well received and has the potential to be replicated in an effort to build a base of knowledgeable and experienced mediators across the state.

A request for proposals was released by the Court in March 2008 and an independent evaluator, Greacen Associates, LLC was selected in April 2008 to conduct an extensive, independent evaluation of the Program. The evaluation will measure the effectiveness of the Program by looking at various factors including litigant satisfaction with the process, improvements in communication between parties, number of agreements reached in cases, and number of post-judgment litigations. The information gathered in the evaluation process will be used to improve the program and develop best practices for successful replication.

Pre-implementation data has been collected and will be compared to data collected post-implementation. The evaluation includes two comparison districts, the East Central Judicial District and the Northwest Judicial District. Data will be gathered from both the pilot and comparison districts in order to give a clearer understanding of the outcomes for litigants in the pilot districts.
Momentum

By Paul LeBel, Dean
University of North Dakota School of Law

All members of SBAND, whether graduates of the UND School of Law or not, have a stake in the success of the school. We are, in a very real sense, a school that belongs to and impacts all of you. Our progress in educating our students translates directly into favorable prospects for the profession in this state over the coming decades.

For that reason, you can share in our excitement that, by every measure, we have just completed one of the most successful years in the long history of our school. As we look ahead, we can anticipate that the momentum we have built up will continue to carry us forward to even greater accomplishments.

Among the indicators of our success and predictors of a positive future, I’d especially call your attention to:

Faculty hiring.
Our permanent tenure-track faculty was strengthened by the addition of four outstanding people who joined us as at the rank of Assistant Professor of Law.

• Kendra Fershee is a Tulane law graduate who practiced in New York and taught at the law school at Penn State; last year she was a Visiting Assistant Professor at our law school. Professor Fershee teaches Lawyering Skills and Employment Discrimination.

• William Johnson is a University of Michigan law graduate who has practiced with Foley & Lardner in Milwaukee. Professor Johnson teaches in the contracts and commercial law curriculum, and brings an international business transactions expertise to our school.

• Keith Richotte graduated from the University of Minnesota law school, received his LL.M. from the University of Arizona, and will soon complete his Ph.D. in American Studies from the University of Minnesota; last year he served as the Northern Plains Indian Law Center Fellow at the law school. Professor Richotte teaches Federal Indian Law, American Indians and American Law, and Jurisprudence.

• Rhonda Schwartz received her M.L.S. degree from the University of Pittsburgh prior to obtaining her J.D. and her Ph.D. in Educational Leadership from UND; she has served as Assistant Director of the Law Library and most recently as Interim Director. Professor Schwartz is the Director of the Law Library, and also teaches Advanced Legal Research.

Student enrollment.
Our enrollment has grown more than 20% in the last 4 years, bringing us to our full capacity of 245-250 students. The combination of the high quality of the education we provide, the success of our graduates in bar admission and job placement, and our very low tuition has earned us national recognition as a “bargain” law school. The 65% of our current 1L class who are North Dakota residents are joined by students from across the country and around the world.

Faculty productivity.
The caliber of instruction our students receive is directly proportional to the scholarly productivity of our faculty. During this past year, our faculty published books and articles that advanced the intellectual state of the art within their areas of expertise and they delivered presentations of their work to academic and professional audiences nationally and internationally. Quantitatively and qualitatively, this law school has never had a faculty whose work is making such a significant difference to our students, to our profession, and to the academy.

Student engagement.
Our students remain deeply engaged in the cocurricular, extracurricular, and service activities that are such an important supplement to the formal education we provide. Legal education at UND is not a spectator sport, and our students graduate having had valuable experience outside the classroom. Of special note is the performance of our Trial Team in winning the American College of Trial Lawyers regional competition and earning a place in the national finals.

The momentum of our school is sustained by a positive feedback loop in which each area of success fuels the others. A world-class faculty produces work that makes them leaders in their fields and more effective educators. The quality of the education our students receive equips them to succeed in their career pursuits. The professional success of our graduates and the increased visibility of our faculty raise the profile of our school. The heightened awareness by others of how good we are plays an important role in recruiting and retaining a world-class faculty and in attracting students who are eager to take advantage of the distinctive educational experience we offer.

You can take legitimate pride in the accomplishments of our school. At the same time, you can be confident that our faculty and staff are committed to building on the success we have enjoyed and will continue the progress we are making. As we go into the legislative session in 2009, you can help us keep the momentum going by reminding your legislators that investing in the success of our School of Law is responsible governing.
“Today, you identify yourself as a member of the legal profession,” Rebecca Thiem, president of the State Board of Law Examiners, told the lawyers who were admitted to the North Dakota Bar on September 15.

She said a law license is a special privilege but it comes with responsibility. “It is sometimes hard to keep a sense of idealism because there are many difficulties with the practice of law.”

The ceremony was presided over by the North Dakota Supreme Court, with Justice Mary Maring administering the oath.

Others speakers during the ceremony in the House Chambers at the State Capitol in Bismarck also shared advice on the practice of law. Ryan Bernstein, counsel to Governor Hoeven, advised the new lawyers to “look for a job that reflects your principles. Do something that you believe in.”

Chief Deputy Attorney General General Thomas Trenbeath said, “It is no small achievement to be where you are today.” He quoted Aristotle, who urged moderation and being mindful of the downside of excess. “At the end of the day, if you can’t pat yourself on the back, at least be able to look at yourself in the mirror.”

“This is a time to look forward,” said University of North Dakota Law School Dean Pau LeBel. “But as you look forward, keep in mind where you stand and how you got there. As you set out on this great adventure, remember the lessons of those teachers who opened the door for you.”

State Bar Association of North Dakota President-Elect Jane Dynes told the lawyers that they will be the architect of their own individual professional path. She encouraged them to volunteer some of their time to an organization they care about. “Act with honor in your career and you will achieve respect.”

The 44 individuals admitted to the bar based on their bar examination are:

- Griselt Andrade
- Brian Balstad
- Megan Bjerke
- Christopher Cooper
- Patrick Dixon
- Elizabeth Elsberry
- Aubrey Fiebelkorn-Zuger
- Jamie Goulet
- Mark Grainger
- Eeva Greenley
- Andrew Halldin
- Amanda Harris
- Stephanie Hayden
- Ashley Holmes
- Benjamen Johnson
- Kara Johnson
- Kimberlie Larson Likness
- Christopher Lindblad
- Garrett Ludwig
- James Martens
- Samantha Miller
- Chad Moldenhauer
- Stacy Moldenhauer
- Juessica Mostad
- Matthew Nisbet

Admitted for having met all of the requirements for admission based on eligibility by test score:
- Joel Boon
- Robert Quick
- Christopher Rausch
- Jacob Rodenbiker
- Jesse Rongitsch
- Jade Rosenfeldt
- Brandon Rowenhurst
- McLain Schneider
- Jordan Schuetzle
- Charles Sheeley
- Erica Shively
- Sean Smith
- Zachary Smith
- Amy Strankowski
- Jayme Tenneson
- William Thomason
- John Wangberg
- Stephanie Wels
- Peter Zuger

Admitted by motion:
- Kyle Pender
- Robert Quick
- Christopher Rausch
- Jacob Rodenbiker
- Jesse Rongitsch
- Jade Rosenfeldt
- Brandon Rowenhurst
- McLain Schneider
- Jordan Schuetzle
- Charles Sheeley
- Erica Shively
- Sean Smith
- Zachary Smith
- Amy Strankowski
- Jayme Tenneson
- William Thomason
- John Wangberg
- Stephanie Wels
- Peter Zuger
New Child Support Rules
By Jim Fleming
ND Human Services Department, Child Support Office

The last issue of The Gavel included a summary of changes to the child support guidelines that were prompted by legislation passed during the 2007 legislative session. At the same time those changes were being pursued, a separate set of proposed changes had been recommended by the Child Support Guidelines Drafting Advisory Committee and were proposed by the Department of Human Services.

By law, the child support guidelines, which are promulgated by administrative rule, must be reviewed at least once every four years. The drafting advisory committee, which is created by statute (N.D.C.C. § 14-09-09.7(4)), held three open meetings in the summer of 2006 to review the guidelines and propose any needed changes. The committee included two legislators, a district court judge, a tribal court judge, a private attorney, a child support payer, and a custodial parent. For the first time, the committee also included representatives from the Medicaid and Temporary Assistance for Needy Families (TANF) programs within the Department of Human Services. At the conclusion of the meetings, the committee presented its recommendations, which were adopted by the Department and issued as a proposed rule in August 2006.

A public hearing followed, which included extensive comments. A final rule with changes based on those comments was adopted by the Department in June 2008, reviewed by the Legislative Council’s Administrative Rules Committee in September 2008, and went into effect on October 1, 2008.

The guidelines were first adopted as administrative rules in 1991, and the 2006 meetings were the fourth quadrennial review of the guidelines. As one might expect from the fifth time that the guidelines were being comprehensively reviewed, a number of areas that had been extensively revised and updated in the past were left untouched. These areas included:

- **Self-employment** (subject to a few clarifications and changes for consistency)
- **Foster care**
- **Extended visitation**
- **Multiple family calculations**
- **Imputation to incarcerated obligors**
- **The schedule of child support amounts**
- **The permitted grounds for rebutting the guidelines**

By a large margin, the most committee discussion occurred in the area of imputed income. Several committee members presented situations they were familiar with in which the effort to impute income to an unemployed or underemployed obligor led to unfair or uncollectible amounts of support being due.

Under the new guidelines, there continues to be a three-part test for imputing income to an unemployed or underemployed obligor. Income is imputed based on the greatest of:

1. 40 hours per week at minimum wage;
2. Six-tenths of the statewide average earnings for individuals with similar work history and qualifications; or
3. 90% of the obligor’s greatest monthly earnings in any 12 consecutive months in the last twenty-four months.

The rule was changed to look at statewide average earnings rather than earnings in the community (defined as any place within 100 miles of the obligor’s actual residence) because, as a practical matter, it was becoming increasingly difficult to obtain income information by occupation that was broken down by geographical region of the state. The best source for that kind of information is Wages for ND Jobs, a publication of Job Service North Dakota, but many occupations include only a statewide average. The fact that only 60% of the statewide average is used in the guidelines already accounts for the variation in incomes around the state for a given occupation.

The second major change in the imputation formula was shortening the look-back period for an obligor’s average earnings from 36 months to 24 months. Under the change, only earnings from the past two years are relevant for determining the imputed income of an unemployed or underemployed obligor. This change addresses the concerns of some of the committee members about imputed income that is too high and leads to unfair and uncollectible amounts of child support because it is based on earnings from the not-too-recent past.

The reduction in the look-back period ties nicely with a policy change of the Child Support Enforcement Program that allows for review of a child support obligation by the program upon request when an order is less than three years old if certain life-changing events have happened, such as a substantial change in income (up or down) or being activated or deactivated from the military service.

The last major change in the imputation formula pertains to imputation at 100% of previous earnings if an obligor makes a voluntary change in employment resulting in a reduction of income. The following example explains the change. Assume a firefighter or brain surgeon who is physically or mentally unable to continue in his or her employment. For legitimate health reasons, the obligor begins a second career and is now earning less income. Under the prior guidelines, this would generally be considered a voluntary change in employment, and lead to imputed income based on 100% of the person’s former earnings. However, it was a change motivated by the long-term health of the obligor, not by an effort to reduce child support. Under the amendments, an obligor can avoid the 100% imputation by providing a legitimate reason for the voluntary job change other than reducing his or her obligation. One committee member noted that the
change will likely result in 100% imputation for voluntary changes in employment being reserved for the egregious cases.

Other minor changes in imputation are to impute minimum wage income for only 20 hours per week when the obligor is a minor or under age 19 and still attending high school (to encourage the obligor to complete high school), and to avoid a presumed annual increase in income of 10% for uncooperative obligors if accurate income information can be obtained from other sources.

The second major area of change is in the area of extrapolating income. Although very few words have been changed in the guidelines, the intent of the change is to enhance the ability of parties and their attorneys to forecast future income of an obligor and establish an appropriate child support amount. This is a change to the approach previously taken in cases like Korynta v. Korynta, 2006 ND 17, and Logan v. Bush, 2000 ND 203. As with the changes in imputation and the revised policy on reviewing obligations, the goal is to increase the number of child support cases where the child support obligation reflects the present income of the obligor. This improves the fairness of the obligation and the likelihood of collecting the full amount due for the family.

The last major change in the new guidelines is the addition of language to the split custody and equal physical custody sections dealing with offsets, and is in response to the decision in Simon v. Simon, 2006 ND 29. The amendments clarify that the offsets are for payment purposes only, and do not alter the requirement that a separate obligation be computed for each parent. As amended, the full obligation of a parent, without being reduced by the offset, is due if the parent's child begins receiving public assistance. Prior to the change, situations had arisen in which parents with similar income and split custody of two siblings, or equal physical custody of a child, had no “net” child support obligation and were able to avoid or significantly reduce the reimbursement the parent owed to taxpayers for supporting the obligor's child or children.

A more minor change of note for obligors who work on the road on a frequent basis is the increase in the deduction from gross income for lodging expenses required as a condition of employment from thirty dollars per night to fifty dollars per night or actual documented costs, whichever is greater. Another change is intended to clarify that income averaging to address fluctuations in income is equally permitted whether the obligor is employed by a third party or self-employed.

More detail and citations to these changes can be found at:
An unofficial version of the administrative rules that shows the changes can be found at:
http://www.nd.gov/dhs/services/childsupport/docs/previouschildsupportguidelineswithchangesshown.pdf

The next review of the child support guidelines will begin in summer of 2010, and the Department invites your comments on further changes that should be considered.
Wireless Computer Networks Part I

By Daniel J. Crothers, Justice, North Dakota Supreme Court

This is the third in a series of articles about the lawyer’s use of technology. The first article discussed using email while preserving the lawyer’s duty of confidentiality and preserving the attorney-client privilege.

The second article covered confidentiality issues associated with the use of cellular and portable telephones. This is the first of two pieces examining ethical implications of communicating confidential client information using wireless computer networks. Part I provides a light overview of the technical requirements and issues connected with wireless networks. Having this background, Part II will focus more directly on the ethical and legal issues.

Wireless Networks

Wireless computer networks are also known as wireless local area networks, “WLAN” or “Wi-Fi.” Whichever label is preferred, the concept represents the use of radio technology to connect two or more computers or computer devices.

Computers equipped with wireless network cards can connect directly using peer-to-peer networking. In a peer-to-peer network there is no access point (“AP” or wireless access point, “WAP”) controlling the connected computers. Rather, the computers are connected to each other. The benefits of peer-to-peer networking include simplicity, speed and no need for hardware and wiring external to the computers themselves. Detriments include limited flexibility and lack of security. The security concerns are discussed more fully below and in Part II.

Computers with wireless capability more commonly use a WAP to connect to a network of other computers, to the internet, or to other peripheral devices such as printers and scanners. WAPs typically are used in homes, offices and public places such as airports, book stores, coffee shops, hotels and public libraries so that computers can be connected without the need for extensive wiring and cabling. Obvious advantages of wireless networking include mobility, convenience and low cost. Cost savings are realized not only from the relatively inexpensive wireless equipment but also from not having to run cables to each network user.

The benefits of a wireless network are achieved with a corresponding set of detriments, including - compared to a traditional hardwired network - a relative lack of security, slower speed, limited range and intermittent reliability problems. Again, our focus is on the lack of security.

WLAN (In)security

WLAN connected computers communicate with each other using frequency modulation or FM radio waves. This is the same radio spectrum used by portable telephones. These WLAN radio transmissions are subject to interception and to redirection.

A WLAN user’s first concern is whether the access point is legitimate. The second concern centers on whether the data transmitted through an otherwise legitimate WLAN is secure.

First, a malicious user can set up a WLAN with a fake login page that appears legitimate. The fake WLAN allows a user to login as if it was the legitimate site, except that the malicious user monitors the computer transmissions with the goal of capturing valuable information. Unfortunately, if a malicious user wants to mimic a legitimate site, there is little a casual user can do to detect the rogue system. The only easy protection is to not use public access points unless their legitimacy is known to be trustworthy.

Assuming legitimacy of the WLAN, the second concern regards security of the network to which a user connects. Many of the networks are found to be “unsecured wireless networks,” meaning that the WLAN access point and the computer communicate with each other with no encryption and nothing to prevent anyone from using the wireless access point or from attempting to gain access to the computer resources attached to the access point. No active security is the default setting for nearly all consumer wireless access points on the market.

Wireless access points nearly always have some sort of encryption security that can be activated. “Wired Equivalent Privacy” or WEP was the most widely available encryption prior to 2003. After WEP was found to be easily hacked, the industry created Wi-Fi Protected Access, commonly known as WPA and WPA2. WPA and WEP are technologies that encrypt the traffic on your network. That is, they scramble it so that an attacker can’t make any sense of it. To unscramble it at the other end, all systems using it must know a ‘key’ or password.

“WPA and WEP provide both access control and privacy. Privacy comes from the encryption. Access control comes from the fact that someone must know the password to use your network.”

Users who must connect to a computer network or to the internet using a public WLAN with no access control should strongly consider using a virtual private network (“VPN”). Using the term broadly, a VPN consists of software by that same name sold by Cisco (or similar products by other companies), or by connecting to an internet website like www.accessanywhere.net. Using a VPN provides the remote user with secure and encrypted access to their organization’s network via the internet. “[B]y encrypting data at the sending end and decrypting it at the receiving end, [a VPN] send[s] the data through a ‘tunnel’ that cannot be ‘entered’ by data that is not properly encrypted.”

My research has not revealed an ethics opinion or a court decision requiring an
encrypted WLAN login or the use of a VPN. However, Part II of this series will examine why these types of security measures should be considered when communicating and safe keeping your client's confidential information.

1 "Wi-Fi" is a registered trade name of the Wi-Fi Alliance. See www.wi-fi.com
2 A location offering wireless access to the Internet is commonly referred to as a “hotspot.” See http://en.wikipedia.org/wiki/Hotspot_(Wi-Fi). Hotspots are both free and available only for a fee, either per diem or by subscription. Web sites exist that list free hotspots. See, e.g., http://www.wiffreespot.com. Other sites focus on locating fee-based hotspots. See http://www.wifihotspotlist.com/
3 See http://en.wikipedia.org/wiki/IEEE_802.11
4 Id.
5 This article provides a non-technical overview of WLAN security. More technical treatments abound for those interested or needing additional details. See, e.g., http://www.drizzle.com/~aboba/IEEE/
6 See http://techdir.rutgers.edu/wireless.html
7 See http://en.wikipedia.org/wiki/Wired_Equivalent_Privacy
8 Id.
9 http://techdir.rutgers.edu/wireless.html
10 Id.
11 See http://searchsecurity.techtarget.com/sDefinition/0,sid14_gci213324,00.html
12 Id.

A History of Helping People

Dan Dunn graduated from UND School of Law in 1991, with distinction. He has been certified as a Civil Trial Specialist by NBTA and the Minnesota State Bar Association and has a highly successful jury trial record. Chambers USA, a publication which ranks attorneys in the United States, has this to say about Dan:

“Dan Dunn is a ‘class act,’ according to his clients. ‘Modest, very personable and totally prepared to work hard and try a case,’ it is no surprise Dunn is popular among clients. He deals both in commercial litigation and PI cases and recently achieved favorable verdicts in automobile products liability and trucking accident claims.”

Dan accepts referrals in these practice areas:

- Personal Injury
- Wrongful Death
- Business/Commercial Litigation

Dan also assists attorneys with focus groups (abbreviated mock trials to assist in identifying trial issues/case value) and is available to serve as a mediator.

Call Dan to discuss referrals, focus groups and mediations at 701-241-4141.
“Plain English” is a term that comes up often when the members of the state’s Pattern Jury Instruction Commission meet three times a year. Established by the North Dakota Supreme Court Administrative Rule 23, the commission has existed since 1985.

The Pattern Jury Instruction Commission consists of 12 members: six lawyers who are appointed by the State Bar Association of North Dakota’s Board of Governors, and six judges who are appointed by the North Dakota Judicial Conference. Members serve three-year terms and can serve three consecutive terms, or nine years.

As stated in Administrative Rule 23, pattern jury instructions are in place to improve accuracy in the statement of the law, juror comprehension of instructions, impartiality of the instructions, uniformity in the treatment of similar cases, time savings in the trial court, and reduction in appellate court workload.

“Our goal is to create a pattern jury instruction that might not be used word for word, but will hopefully provide a usable guideline for attorneys and judges,” says Jennifer Hauge, Staff Attorney for the commission. “We strive to use ‘plain English’ rather than legalese.”

The Commission reviews instructions when the relevant law changes, when a Supreme Court opinion discusses an instruction, or upon receiving comments from attorneys and judges. Hauge says Commission members encourage feedback from judges and members of the bar. “We occasionally receive correspondence from an attorney or judge explaining how they used the instruction and suggesting we review the instruction and possibly amend it to incorporate their change. The Commission really appreciates this feedback, because it helps us to know we are meeting the needs of the practicing bar.”

As staff attorney, Hauge says she monitors developing case and statutory laws, especially following a legislative session. “One of my responsibilities is to watch for new or amended laws that may affect the instructions and need to be addressed.”

The Commission is currently finishing a review of all instructions to make sure they are current. Many instructions have remained unchanged since 1986, and the Commission has spent a couple years reviewing each instruction to modernize the language and assure compliance with new laws or interpretations.

After attending the first National Conference on Pattern Jury Instructions last April, Hauge believes North Dakota is doing as well as any other state in this area. “We are fortunate to have a small bar and few communication barriers between judges and lawyers. We also have the full support of the Chief Justice, which is not the case in every state,” she says. “We do not have nearly the volume of pattern jury instructions some other states do, but we believe we do not need a separate instruction for every possible situation.”

Hauge says commission members seek suggestions from North Dakota’s lawyers and judges on how to improve existing instructions or develop new ones. Judge Wade Webb of Fargo chairs the commission, and contact information for him and other members is on the SBAND website. The Pattern Jury Instructions are also available on the SBAND website. Agendas, minutes, and draft instructions can be viewed on the North Dakota Supreme Court website.

In addition to Webb, the other commission members are: Judge Mikal Simonson, Valley City; Duane Lillehaug, Fargo; Judge Gary Lee, Minot; Tracy Vigness Kolb, Bismarck; Paul Myerchin, Bismarck; Judge Zane Anderson, Dickinson; Brad Beehler, Grand Forks; Larry Boschee, Bismarck; Alvin Boucher, Grand Forks; and Judge Gail Hagerty, Bismarck.
## 2008-2009 Committee Appointments

### Advisory Council
**To The Office of Administrative Hearings**
- **Illona Jeffcoat-Sacco**, Bismarck Chair 2009 328-2400
- **Alan Hoberg**, 2009 328-3260
- **Stephen Little**, Bismarck 2010 222-1761
- **Connie Portscher**, Minot 2010 857-6660
- **Vince Ficik**, Dickinson 2010 483-1178
- **DeNae Kautzmann**, Bismarck 2010 663-3223
- **Lawrence Spears**, Bismarck 2011 258-1899
- **Timothy Wahlin**, Bismarck 2011 328-3800
- **Bradley Peterson**, Bismarck 2009 258-4270
- **Jasper Schneider**, Fargo 2009 235-4481
- **Douglas Bahr**, Bismarck 2009 328-3640

### Consumer Protection Committee
- **John Bjornson**, Bismarck, Chair 2009 328-2916
- **Dwight Eiken**, Williston 2010 577-2000
- **Alice Senechal**, Grand Forks 2010 775-3117
- **Bradley Cruff**, Valley City 2011 845-8526
- **Carey Goetz**, Bismarck 2011 258-7899
- **Alisha Ankers**, Fargo 2011 237-5544
- **Todd Sattler**, Bismarck 2011 845-8526
- **Michael Montgomery**, Fargo 2009 235-8000
- **Julie Buechler Boschee**, Bismarck 2009 222-8089

### Continuing Legal Education Committee
- **Peter Welte**, Grand Forks, Chair 2010 780-8281
- **Krista Andrews**, Fargo 2011 235-3300
- **William Kirschner**, Fargo 2010 293-5297
- **Casey Jo Jacobson**, Bismarck 2010 222-0441
- **Tracy Gompf**, Moorhead, MN 2011 429-0604
- **Lynn Bouhey**, Bismarck 2011 751-1485
- **Robin Forward**, Bismarck 2011 328-3875
- **Jackie Anderson**, Fargo 2009 237-5544
- **Mitch Armstrong**, Bismarck 2009 258-0630
- **Illona Jeffcoat-Sacco**, Bismarck 2009 328-2400
- **Bradley Beehler**, Grand Forks 2009 772-7266

### Editorial Board
- **Nancy Morris**, Fargo, Chair 2009 297-7070
- **Jan DeRemer**, Buxton 2009 775-8849
- **Julie Krenz**, Bismarck 2009 328-2210
- **Hon. Carol Kapsner**, Bismarck 2009 328-2221
- **Joseph Heringer**, Bismarck 2010 255-7400
- **Jeanne McLean**, Grand Forks 2010 777-2104
- **Annette Bendish**, Mandan 2010 328-2311
- **Tiffany Johnson**, Bismarck 2011 223-2890
- **Michael Hurly**, Devils Lake 2011 662-4077
- **Sheldon Smith**, Bismarck 2011 258-0630

### Ethics Committee
- **Dann Greenwood**, Dickinson, Chair 2011 225-6074
- **Joseph Wetch**, Fargo 2010 232-8957
- **Dale Rivard**, 2010 780-8281
- **Adele Page**, Fargo 2010 237-3423
- **Tag Anderson**, Bismarck 2009 328-3640
- **Jim Hill**, Bismarck 2009 224-2177
- **Tony Weiler**, Bismarck 2009 224-0430
- **Douglas Bahr**, Bismarck 2011 328-3640
- **Frederick R. Fremgen**, Jamestown 2011 252-6688
- **Al Boucher**, Grand Forks 2011 775-3117

### Information and Service Committee
- **Cynthia Schaar**, Jamestown, Chair 2009 252-2090
- **Jeanne McLean**, Grand Forks 2011 777-2104
- **Dave Lindell**, Washburn 2010 462-8566
- **Tracy Laaveg**, Grafton 2010 331-9833
- **Zachary Pelham**, Bismarck 2011 223-2890
- **Linda Catalano**, Fargo 2011 232-4495
- **Dale M. Kadlec**, Fargo 2011 281-6707
- **Jim Vukelic**, Bismarck 2009 222-1908
- **Paul Sanderson**, Bismarck 2009 223-2711

*(All section chairs are also on this committee)*
**Inquiry Committee Southeast**

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**Inquiry Committee West**

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**Inquiry Committee Northeast**

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**Joint Alternative Dispute Resolution Committee**

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**Supreme Court Appointees**

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**Joint Alternative Dispute Resolution Committee (cont’d.)**

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*(Terms end January 1st)*

**Joint Attorney Standards Committee**

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**SBAND Appointees**

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<td>Sandi Tabor, Bismarck, Chair</td>
<td>2009</td>
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<td>Jean Hannig, Fargo</td>
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<td>Pat Ward, Bismarck</td>
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<td>Dianna Kindseth, Bismarck</td>
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<td>Clare Carlson, Bismarck</td>
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*(Terms end January 1st)*

**Member Services Committee**

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<tr>
<td>Mike Wagner, Bismarck</td>
<td>2011</td>
<td>530-9410</td>
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<tr>
<td>Lisa Gibbens, Cando</td>
<td>2010</td>
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<td>Paul Sanderson, Bismarck</td>
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<td>Valeska Hermanson, Williston</td>
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<td>Maureen Holman, Fargo</td>
<td>2009</td>
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**Joint Civil Legal Services to the Poor Committee**

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<tr>
<td>Penny Miller, Bismarck</td>
<td>2011</td>
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<td>Christine Hogan, Bismarck</td>
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<td>Representative Duane DeKrey</td>
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**SBAND Appointees**

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<td>Representative Duane DeKrey</td>
<td>2010</td>
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Joint Civil Legal Services to the Poor Committee (cont’d.)

Legal Services Appointees

- Jim Fitzsimmons, New Town 2009 627-4719
- Richard LeMay 2010 852-4369
- Valeska Hermanson 2011 577-6771
- Duane Houdek 2010 328-2200

Joint SBAND/NDMA Committee

- Jane Voglewede, Fargo, Chair 2010 234-6957
- Jason Vendsel, Minot 2009 852-2544
- Murray G. Sagsveen, St. Paul 2010 651.695.2780
- Nola McNeally, Fargo 2010 235-6000
- Bruce Levi, Bismarck 2011 223-9475
- Sean O. Smith, Bismarck 2009 258-4000
- Roddey Pagel, Bismarck 2009 250-2500
- Randall Hanson, Grand Forks 2009 775-5595

Legislative Committee

- Sandi Tabor, Bismarck, Chair 2010 328-2210
- Garry Gunderson, Bismarck 2009 255-6060
- Joel Gilbertson, Bismarck 2009 258-7899
- Sherry Mills Moore, Bismarck 2009 222-4777
- John Olson, Bismarck 2009 222-3485
- Brenda Neubauer, Bismarck 2009 355-1078
- Hon. Gail Hagerty, Bismarck 2010 222-6682
- Judge Allan Schmalenberger 2010 227-3150
- Dan Kuntz, Bismarck 2011 530-1016
- Jack McDonald, Bismarck 2010 223-5300
- Lawrence King, Bismarck 2011 223-2711
- Carlee McLeod, Bismarck 2011 223-5300
- Malcolm Brown, Bismarck 2011 224-8825
- James Fleming, Bismarck 2011 328-3582

Lawyer Assistance Program Committee

(SBAND Appointees)

- Leslie Oliver, Bismarck 2009 258-7899
- Thomas Ribb, Dickinson 2010 483-0011
- Mark Larson, Minot 2011 839-1777

(Terms end June 30th)

Supreme Court Appointees

- Maureen Holman, Fargo, Chair 2009 232-8957
- David Bossart, Fargo 2010 271-8030
- Richard Olafson, M.D, Fargo 2011 328-2200

ND Commission for Continuing Legal Education

 Rule 2, N.D.R. Continuing Legal Ed.

- Connie Cleveland, Fargo Chair 2009 239-6797
- Dan Buchanan, Jamestown 2010 252-6204
- Steven Lamb, Fargo 2010 280-1100
- Annette Bendish, Bismarck 2010 328-2400
- Mark Douglas, Williston 2009 774-0510
- Thomas Jackson, Bismarck 2011 258-4270
- Lisa McEvers, Bismarck 2011 328-2660

Civil Legal Assistance Committee

- LaRoy Baird, Bismarck, Chair 2009 223-6400
- C. Nicholas Vogel, Fargo 2010 237-6983
- Sandra Kuntz, Dickinson 2010 227-1841
- Bonnie Storhakken 2010 202-1733
- John Grinsteiner, Bismarck 2009 222-6622
- Karl Liepitz, Bismarck 2009 530-1081
- Kent Morrow, Bismarck 2009 255-1344
- DeAnn Pladson, Fargo 2011 241-4141
- James Fitzsimmons, New Town 2011 627-4719

Law School and Young Lawyers Liaison Committee

- Michael J. Williams, Fargo, Chair 2011 241-4141
- Ryan Bernstein, Bismarck 2010 530-2340
- Kim Radermacher, Ellendale 2010 349-3665
- Jennifer Stanley, Minot 2009 852-2544
- Scott Strand, Moorhead 2010 218-236-4900
- Paul LeBel, Grand Forks 2009 777-2104
- Bob Pesall, Flandreau SD 2010 605-573-0274
- Kenneth Trace, Williston 2009 577-2000
- Berly Nelson, Fargo 2010 237-8957
- Christopher Nyhus, Mandan 2011 667-3350

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- Jane Dynes, Fargo, Chair 2009 232-8957
- David L. Petersen, Grafton 2009 352-2810
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(Administrative Rule 23)
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Tracy Vigness Kolb, Bismarck 2011 223-2711
Hon. Zane Anderson, Dickinson 2009 227-3150
Brad Beehler, Grand Forks 2011 772-7266
Hon. Wade Webb, Fargo 2009 241-5680
Alvin Boucher, Grand Forks 2009 775-3117
Hon. John Greenwood, Jamestown 2009 252-9044
Larry Boschee, Bismarck, Chair 2009 223-2890
Hon. Gary Lee 2009 857-6637
Hon. Gail Hagerty 2009 222-6682
Paul Myerchin, Bismarck 2010 250-8968
Duane Lillehaug, Fargo 2010 241-4141
Jennifer Hague, Carson 2010 520-3360
(Judges appointed by Supreme Court / Jennifer is hired by Commission)
(Terms end January 1st)

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Diane Melbye, Dickinson, Chair 483-1700

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Dwain Fagerlund, Crookston MN,Chair 218.281.4000

Real Property, Probate & Trust Law Section
Grant Shaft, Grand Forks, Chair 772-8156

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Rodger Mohagen, Fargo, Chair 293-8344

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Sandi Tabor, Bismarck 258-7117

Young Lawyers Section
Scott Strand, Moorhead, Chair 218-236-4900

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Bruce Quick, Fargo, Chair 237-6983

Government Lawyers Section
Matt Sagsveen, Bismarck, Chair 328-3640

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Sandi Tabor, Bismarck 258-7117
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Dennis Johnson, Watford City 444-2211
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On September 18, a plaque replica of the Southeast cornerstone of the US Capitol was dedicated at a formal ceremony at the State Capitol. The plaque was dedicated to the memory of Warren E. Burger, Chief Justice of the Supreme Court from 1969-1986, and will be permanently displayed at Bismarck’s federal building.

The event coincided with the 215th anniversary of the laying of the nation’s cornerstone, and was organized by Bismarck’s “Mr. Constitution,” Floyd Boutrous. Boutrous has been a tireless advocate for promoting education about the US Constitution in the state.


Joe Satrom emceed the event, while Sister Thomas Welder provided the invocation. The Century High School Patriot Band and Jazz Choir provided color guard and music.
COURTHOUSE FEATURE

County Courthouses Significant for their Role in State’s Judicial, Political and Architectural History

GRAND FORKS COUNTY COURTHOUSE
Still Grand at 95

“This is a very pretentious county courthouse, built on a generous site of three quarters of a block, and but one block from the heart of the business center. It represents a monument to the prosperity and progressiveness of Grand Forks County, and will ever stand out as one of the best achievements of North Dakota.”

These words were written about the newly completed Grand Forks County Courthouse the April 26, 1914, “Progress Edition” of the Grand Forks Herald. The construction of the building had begun a year earlier. It is the largest and most expensive of the 13 North Dakota courthouses designed by the Buechner and Orth architecture firm of St. Paul, Minnesota, between 1904 and 1919. Its construction cost was $200,000.

The white limestone building is in a modified Classical Revival style, and it is topped with a massive cast iron dome. Standing on top of the dome is statue of Justice on a pedestal. Unlike all other Buechner and Orth courthouses in the state, this rectangular building does not have central pavilions. Its rotunda with skylight, terrazzo floors and marble wainscoting on first floor halls and stairways are similar to other Buechner and Orth courthouses.

“This is a grand old courthouse,” says District Court Judge Joel Medd, who has worked in the building since 1979. He says its rotunda is especially notable, with its painted murals of pioneers and Conestoga wagons, Indians, barge traffic and farm scenes.

“Many people stop to take in the murals when they are in the building,” says Medd. “The rotunda area is very functional for swearing-in ceremonies and public receptions.”

Recent remodeling has improved technology and air circulation in the building. Medd says a new third-floor courtroom was added following the unification of the district and county courts that merged two clerks office into one office on the first floor.

“The new third-floor courtroom is very nice,” Medd says. “Looking at it you would think it was one of the original courtrooms.”

Although the courthouse is located in the downtown area that was seriously affected by the Grand Forks flood in 1997, Medd says flood waters did not go beyond the basement level. “Significant records and veterans’ artifacts in the basement were lost,” he says, “and it required renovation, but the courtrooms and offices upstairs were not affected.”

The Grand Forks County Courthouse is a great place to work, Medd says. “The county commissioners have treated the court system very well.”

Watercolor painting by Ric Spryncynatyk.
No issue in recent years has invoked more e-mail discussion between members of the ABA House of Delegates than the proposed amendment to Model Rule of Professional Conduct 1.10 which has been offered by the ABA Standing Committee on Ethics and Professional Responsibility. The original amendment was placed on the floor in August at the ABA Annual Meeting in New York. The debate was vocal and passionate. The ABA’s House of Delegates voted to postpone consideration of the proposed amendment to Rule 1.10 that would have permitted the screening of certain kinds of conflicts created by laterally-hired attorneys. The vote to table the proposal until February 2009 was approved by a vote of 192 to 191.

It is appropriate to re-visit the proposed rule as a predicate to the expected debate to come in February in Boston.

The Proposed Rule
The proposal presented and which will be debated in February 2009 reads: “RESOLVED, That the American Bar Association adopts the following amendment to Model Rule of Professional Conduct 1.10: Imputation of Conflicts of Interest: General Rule
(e) notwithstanding paragraph (a), and in the absence of a waiver under paragraph (c), when a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.”

Summary of the Recommendation and Issue that this Proposed Rule Seeks to Address
The present recommendation (which presumably will remain in the present form since no amendments were offered in August) would amend ABA Model Rule of Professional Conduct 1.10 - “Imputation of Conflicts of Interest: General Rule” - to prohibit imputation of disqualification within a law firm of one lawyer’s conflict of interest to all other lawyers in the firm, provided that an appropriate screening mechanism is established.

The Executive Summary which accompanies the proposed rule change attempts to cite the reason for the change and how specifically the new language will address the cited problems found in the existing language. The current Model Rule 1.10 permits lawyers to move from government service, or from positions as judges, arbitrators or law clerks, into a new firm without their conflicts of interest from previous representations being imputed to all other lawyers in their new firm. That language is incorporated into Rules 1.11 and 1.12 of the N.D. R. Prof. Conduct. The conflicts of lawyers moving from one private firm to another are at present imputed to all of the lawyers in the new firm. That is the current language of present Rule 1.10, N.D. R. Prof. Conduct.

The amendment of the Model Rule (if adopted by the House of Delegates and subsequently by the Supreme Court of North Dakota) will permit the screening of a lawyer who would be unable to represent a party because of a conflict from his or her former practice in another firm, so that other lawyers in the firm could undertake a representation that that lawyer could not undertake.

Even with the substantial revisions to the ND Rules of Professional Conduct adopted August 1, 2006 the language of Rule 1.10 did not change. The ND Supreme Court in Heringer v. Haskell, 536 N.W.2d 362 (N.D. 1995) thoroughly vented the issues regarding what Rule 1.10 requires. It can reasonably be argued that the practice of law today in North Dakota is not so dissimilar to what the Supreme Court described in 1995. If that is true, then the chance of a rule change which would eliminate the automatic imputation of a conflict of interest (even if adopted as a Model Rule by the ABA) might be difficult in North Dakota. The Court in Heringer commented: “In this case, the trial court expressed its belief that the “person on the street” would not find representation in these circumstances objectionable. From our perspective, however, we believe the “person on the street” would view a law firm "switching sides" in the middle of a dispute to be highly objectionable. A layperson typically will not bother with the finer points of access versus knowledge, or attempts to shield attorneys within the same firm from confidential information. Rather, the layperson's view is simple: the firm represented one side of the lawsuit and now wants to represent the other side. In this instance, the simplistic view is also the correct one. In order to preserve public confidence in the legal profession, and to insure the confidentiality and integrity of client information, the firm must not be allowed to "switch sides" when attorneys remaining in the firm had access to the former client's file.

We are also mindful of the nature of private law practice in this state. We do not have
large firms with hundreds (or even dozens) of lawyers in various firm groups or sections, working in different buildings or different cities. In such cases, it may be common for the firm’s attorneys to not discuss their cases or have general access to all of the firm’s files. This case, however, involves a three-person law firm which admittedly had no policy or other safeguards to restrict access to files and information among the attorneys. Furthermore, as is what we believe to be the common experience in North Dakota law firms, it was not uncommon for these attorneys to discuss their cases with each other. Under these circumstances, it is reasonable and justified to infer that each attorney had access to, and therefore knowledge of, all confidential information of the firm’s clients. Heringer v. Haskell, id. at p. 367.

**What Screening is Proposed Under the New Language?**

The debate will go beyond the “sacred trust” argument and will likely center on what is an appropriate “screening mechanism” which would protect the sacred rule of confidentiality. North Dakota Rule 1.10 (b) (3) does reference “screening” under certain circumstances but does not seek to define it in the body of that rule but rather directs the lawyer to the definition contained in Rule 1.0 (n).

(n) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of a firm’s procedures that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

So the question is how effective is the North Dakota screening mechanism envisioned by this rule and can it be effective if the Model Rule is modified to eliminate the automatic imputation of a conflict of interest?

The sponsoring committee of the Model Rule opines that they are firmly convinced that screening is as effective in the context of private lawyers changing firms as it has been for many years in the context of lawyers moving from government service to private practice. That hypothesis will be the subject of considerable debate.

Keeping in mind that a similar proposal of the Ethics 2000 Commission advanced in 2002 was rejected by the House of Delegates the issue remains divisive. Interestingly the sponsoring committees point to a number of states who have adopted screening mechanisms (including North Dakota) as a basis for suggesting that the time has come to revisit the rule and adopt what it sees as a “unifying model” rule.

**Conclusion**

From time to time the House of Delegates seems to get back to its substantive roots when it discusses changes to the Model Rules of Professional Conduct. When it does the debates are sharp and precise. No other topic seems to bring more heated debate than modifying in any way the concept of conflicts of interest. The attempt to amend ABA Model Rule of Professional Conduct 1.10 will be hotly contested. As always your comments and thoughts are welcome and appreciated.
ETHICS OPINIONS

Opinion 08-04

The Ethics Committee received a letter request for an opinion, dated May 5, 2008, regarding the assertion that the requesting attorney is a necessary witness who ought to withdraw.

Rule 3.7 of the North Dakota Rules of Professional Conduct addresses this inquiry.

The opinion of this Committee does not bind a court of law deciding a motion to disqualify an attorney. An Ethics Committee opinion provides safe harbor in an ethical inquiry addressing whether attorney discipline is warranted and then only for acts that come after the opinion is issued. The Committee does not address the initial formation of an attorney client relation between the employer and the employee.

Assumed Facts

This Committee issues its opinion to a requesting attorney assuming the information provided by the requesting attorney is fact.

An employee [hereinafter Employee] of Requesting Attorney brought suit over physical and psychological injury stemming from an assault. Requesting Attorney is providing legal representation for Employee while having knowledge of Employee's work performance, injuries, and finances. Opposing counsel claims Employee's work performance, injuries, and finances are trial issues and that Requesting Attorney is a necessary witness on these issues and therefore disqualified from continuing to represent Employee.

Prior to the assault, Requesting Attorney's firm included, Requesting Attorney, Office Manager, and Receptionist. These four are aware and have knowledge of the facts and circumstances regarding work performance, injuries, and finances. Receptionist and Office Manager have even more knowledge on these issues than Requesting Attorney.

When it comes to work performance, Requesting Attorney, Attorneys B, Office Manager, and Receptionist all have the same information.

Requesting Attorney does not have direct knowledge about Employee's wages, lost wages, hours worked, etc., so, information on these topics would have to come from Office Manager.

After the assault, Requesting Attorney's firm added Attorney C and Assistant to Requesting Attorney. These newer members also possess knowledge about residual effects of the injury.

If Requesting Attorney withdraws from the representation, Employee will be required to retain another lawyer who is not Employee's first choice and will participate only at a significantly increased cost.

Questions

Requesting Attorney asks whether opposing counsel's assertion that Requesting Attorney is likely to be a necessary witness at trial requires Requesting Attorney to withdraw from the case even if:

1. There are others inside the firm and out with the same or more knowledge on the issues; or
2. The Employee would have to deal with increased costs and inconveniences due to changing lawyers.

Discussion

Rule 3.7 of the North Dakota Rules of Professional Conduct deals with the subject of the lawyer expected to testify at trial. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

1. The testimony relates to an uncontested issue;
2. The testimony relates to the nature and value of legal services rendered in the case; or
3. Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by a conflict of interest.

1. Whether the Requesting Attorney is a necessary witness.

North Dakota has recognized that a lawyer will be deemed a necessary witness only when the lawyer is the sole available source for the information, that the information relates to a contested issue, and the information the lawyer has to offer on the issue is material. Sargent County Bank v. Wentworth, 500 N.W.2d 862, 871 (N.D. 1993) (evidence is "unobtainable elsewhere"); SBAND Ethics Committee, Opinion Number 01-04 at 5.

In a 1990 opinion the North Dakota Supreme Court recognized that more than "a mere declaration of an intention to call opposing counsel as a witness" is required to warrant disqualification. Thompson v. Goetz, 455 N.W.2d 580, 587 (N.D. 1990). The party seeking disqualification must satisfy a high burden which includes showing no other witness can testify to the facts. Thompson v. Goetz, 455 N.W.2d at 588. It is well accepted that "[a]n attorney is a necessary witness, under this rule, where no other person can testify in the place of the attorney." Northbrook Digital LLC v. Vendio Services, Inc., 2008 WL 2390740, 20 (D. Minn. 2008) (citing Humphrey ex rel. State of Minnesota v. McLaren, 402 N.W.2d 535, 541 (Minn. 1987) (discussing substantially similar predecessor rule)).

The requesting attorney states others possess the same information that opposing counsel would seek by having the Requesting Attorney testify. So long as the other persons are available to testify at trial on the issues, then the Requesting Attorney's testimony is not necessary as the term is used in Rule 3.7.

2. Whether increased costs and the inconveniences related to changing lawyers constitute substantial hardship.

Requesting Attorney provides the premise that if Requesting Attorney must withdraw, then Employee would have to find a new lawyer who would not be Employee's first choice and who would induce more expenses.

The general proviso of Rule 3.7 is: the lawyer who testifies for his client at trial must withdraw. One exception to the general rule is withdrawal is not mandated if it would work a substantial hardship on the client.

"...[C]ourts have generally rejected arguments that a lawyer's long-standing relationship with a client, involvement with the litigation from its inception, or financial hardship to the client are sufficient reasons to invoke the "substantial hardship" exception to the advocate-witness rule." Jones v. City of Chicago, 610 F.Supp. 350, 361 (D.C. Ill. 1984). It has been recognized that every case requiring disqualification due to testifying involves inconvenience and if this level of inconvenience were to amount to substantial hardship the exception would swallow the rule. U.S. v. Peng, 602 F.Supp. 298, 303 (D.C.N.Y. 1985); M a y's Family Centers, Inc. v. Goodman's, Inc., 590 F.Supp. 1163, 1165 (D.C. Ill. 1984).

The situation where the litigant has secured a favorable rate from a lawyer who is a friend or a relative has also been viewed. It is understood that in these situations, if disqualification is required, the client will be forced to obtain counsel at a higher rate. In Barrett, the court found that this increased expense did not
amount to hardship. The court explained, “[i]t can be argued that disqualifying plaintiffs’ daughter from representing them would merely place plaintiffs on a par with most other litigants, in that they would have to make a decision about whether to incur the expenses associated with prosecuting the litigation.” Barrett v. Floyd, 1990 WL 17876, 1 (E.D. Pa. 1990).

Courts have recognized disqualification and subsequent change of counsel can be a substantial hardship in cases where complicated litigation has been in progress a long time. Sargent County Bank v. Wentworth, 500 N.W.2d 862, 872 (N.D. 1993); but see Jamieson v. Slater, 2006 WL 3421788, 8 (D. Ariz. 2006) (three year representation and cost of new counsel insufficient to establish substantial hardship). Here, though, we have not been provided with facts suggesting unusually complex or protracted representation.

When considering the hardship issue and the argument that the lawyer has been involved with the complicated litigation a long time, courts have viewed how much the hardship is of the party’s own making. Jones v. City of Chicago, 610 F. Supp. 350, 361 (D.C. Ill. 1984). Where it was foreseeable either when the attorney client relationship was formed or at some point after that the lawyer might be a necessary witness but the pair forged ahead anyway, the party is ill positioned to argue that disqualification will constitute a hardship. General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704, 714-715 (C.A. Mich. 1982).

Conclusion

The Requesting Attorney is not required to withdraw so long as others are available to testify to the issues at trial. Were the information unobtainable elsewhere and the Requesting Attorney otherwise satisfied the criteria for being a necessary witness likely to testify at trial, the increased expenses and inconveniences associated with changing counsel would not constitute substantial hardship amounting to an exception to the requirement for withdrawal.

This opinion offers safety to the requesting attorney as set out in Rule 1.2(B) of the North Dakota Rules of Lawyer Discipline.

This opinion was drafted by Fritz Fremgen and unanimously approved by the Committee on the 3rd of September August 2008.

Opinion 08-05

The Committee received a request for an opinion seeking advice if the Requesting Attorney is required by North Dakota Rule of Professional Conduct 1.19 to pack and pay postage on a client’s file when representation has been terminated and all appeal periods have run. Also, may the former client be required to bring his own paper and copy the files under supervision of the Requesting Attorney’s assistant?

Assumed Facts

The Requesting Attorney was retained on immigration action and had represented the client at the Ninth Circuit Court of Appeals and in Immigration Court in Montana. The Requesting Attorney resides in Fargo, North Dakota, and the client resides in Great Falls, Montana. Following completion of the action, in which the client owed him in excess of $9000 in legal fees, the client requested a copy of his file. The Requesting Attorney responded to the client that the file is available at the Requesting Attorney’s office and the client can pick up the file whenever the client wishes. Also, the Requesting Attorney would not charge the former client for cost of the copier or toner, but would request that the client provide their own paper. The copying of the file would be completed under supervision of the Requesting Attorney’s assistant.

The following questions were asked of the committee:

1. Is the Requesting Attorney required pack and ship the file back to the client when the Requesting Attorney is no longer being retained or is the attorney only required to make the file ready for the client for retrieval at the Requesting Attorney’s office?
2. May the former client be required to bring their own paper and copy the files under supervision of the Requesting Attorney’s assistant?

Discussion

Disputes regarding the return of a client’s file have been an issue for quite some time. Upon termination of representation, an attorney has a duty to provide papers and property to the client. N.D.R. Prof. Conduct 1.16(e) provides that:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client only to the extent permitted by N.D.R. Prof. Conduct 1.19.

The comments that immediately follow N.D.R. Prof. Conduct 1.16(e) also provide that the “lawyer must take all reasonable steps to mitigate the consequences to the client.” Comments, N.D.R. Prof. Conduct 1.16(e) (2006).

Furthermore, N.D.R. Prof. Conduct 1.15(d) provides that “a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.”

The question remains as to which documents the client is entitled after termination of representation. Rule 1.19 was enacted to provide guidance regarding items to which a client is entitled questions associated with lawyer and client issues regarding files and property. Comments, N.D.R. Prof. Conduct 1.19 (2006).

N.D.R. Prof. Conduct 1.19(b) defines what constitutes a client’s files, papers or property:

1. All papers and property provided by the client to the lawyer other than as payment.
2. All pleadings, motions, discovery, memoranda, and other litigation materials which have been executed and served or filed regardless whether the client has paid the lawyer for drafting and serving and/or filing the document(s).
3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.
4. All items of potential evidentiary value regardless of whether the client has reimbursed the lawyer for any costs or expenses which the lawyer has advanced, including depositions, expert opinions and statements, business records, and witness statements.

Items which are not client’s files, papers, or property are defined in N.D.R. Prof. Conduct 1.19(e) and include:

1. Pleadings, discovery, motion papers, memoranda, and correspondence which have been drafted but not filed, sent, or served, unless the client has already paid for the drafting and creating of the item(s).
2. Drafted but unsigned or undelivered estate plans, title opinions, contracts, documents regarding the formation, operation, dissolution, or termination of business or other associations or governing the relationship of those involved in them, or any
unexpected or undelivered document, unless the client has already paid for the drafting and preparation of the item(s).

3. Any lawyer work product not expressly defined as client files, papers, or property by paragraph (b).

Both Rule 1.15, which governs turning over papers during representation, and Rule 1.16, which governs turning over papers when declining or terminating representation, "impose an obligation to deliver or surrender items to which the prospective client is entitled." Comments, N.D.R. Prof. Conduct 1.19(1) (2006).

While the above cited rule does not provide any guidance as to whether the Requesting Attorney is required to pack and ship the file to the client, the issue was addressed in Disciplinary Board v. Anseth, 1997 ND 66, 562 N.W.2d 385. In Anseth, after termination of employment, an attorney practicing in Williston, North Dakota had failed to turn over to the client also located in Williston, North Dakota the original files upon termination of representation. Id. at ¶¶ 2-5. The Court stated that a "lawyer who has withdrawn or has been discharged by the client has a duty to surrender promptly all papers and other property to which the client is entitled." Id. at ¶ 23 (quoting Ann. Model Rules of Prof'l Conduct R. 1.16(d) ann. at 256 (3d ed. 1996)). However, the Court continued by stating that the attorney did not have to bear the cost of returning the documents, the attorney should just have them readily available for pick up by the client. Id. (citing Maine State Bar Ass'n, Prof'l Ethics Comm'n, Op.120 (1991), which states "since the transfer of the file would ordinarily be for the benefit of the client, it seems reasonable to require the client to assume the cost of mailing or other form of delivery if he is unwilling to pick (the file) up a the attorneys' office").

Anseth was decided in 1997, six years prior to the adoption of N.D.R. Prof. Conduct 1.19. Comment 1 of N.D.R. Prof. Conduct 1.19 provides, "Rule 1.15 governing turning over papers during the representation, and Rule 1.16 governing turning over papers when declining or termination representation, impose an obligation to deliver or surrender items to which the client or prospective client is entitled." Although the comments to Rule 1.19 provide that an obligation is made to surrender or deliver the items to which the former client is entitled, it is unclear what impact, if any, Rule 1.19 would have on a situation similar to the one posed by Anseth.

In 1999, the Ethics Committee of the Colorado Bar Association took a different stance on surrendering papers to the client upon termination of representation. Colorado RPC 1.16(d) provides that upon termination of employment, a lawyer shall surrender papers and property to which the client is entitled. The committee further states that the use of the term "surrender" is intentional and establishes an affirmative obligation to relinquish possession after demand.

In the matter involving the Requesting Attorney, the Requesting Attorney has a duty to turn over the file to the client and make the file readily available for the client's retrieval as outlined by N.D.R. Prof. Conduct 1.16. The Requesting Attorney is also required to "promptly deliver to the client" property that the client is entitled to receive. N.D.R. Prof. Conduct 1.15(b) (2006). However, as provided in Anseth, surrendering or delivering to the client his or her file does not entail the cost of shipping. But note that both the client and attorney in Anseth resided in the same city in North Dakota while the Requesting Attorney and client reside approximately 700 miles apart. Due to the distance between the requesting attorney and his client, a question arises whether the Requesting Attorney should ship the file to his client. The Committee is not in a position to determine whether a particular distance would necessitate the mailing of the file. The second issue involves whether the Requesting Attorney may require the client to bring his own paper and copy the files under the supervision of Requesting Attorney's assistant. In this case, the client has requested a copy of the file from the Requesting Attorney. The original file as outlined in Rule 1.19(b) should be turned over to the client. If the Requesting Attorney wishes to make copies of the file, he or she may do so, but the client should not be charged for the copies. N.D.R. Prof. Conduct 1.19(f) provides that:

In connection with the return of any file or paper, including client files or papers, a lawyer may make copies for the retention by the lawyer. The client may not be charged for the copies. Additionally, N.D.R. Prof. Conduct 1.19(c) provides that a "lawyer may not condition the return of client files, papers, or property on payment of copying costs." The Requesting Attorney is seeking to split the cost of copies into various parts and charge the client for the cost of the paper. As provided by N.D.R. Prof. Conduct 1.19(c) and (f), the client should not be charged for the copies made by the Requesting Attorney.

If the client has requested a copy of their file, the Requesting Attorney may only charge for the cost of copying for the client, or electronically retrieving for the client, the client's files, papers, and property, when the client has, prior to termination when the client has previously agreed to in writing to reimburse the lawyer for the copying and retrieval expenses. N.D.R. Prof. Conduct 1.19(d) (2006). However, this requirement under N.D.R. Prof. Conduct 1.19(d) is only applicable where the attorney has not previously provided a copy to the client.

Conclusion
The Requesting Attorney shall surrender and deliver the client's file to the client if requested by the client upon termination of representation as provided under N.D.R. Prof. Conduct 1.19(b) and (e). However, the Requesting Attorney is not under a responsibility to pack or ship the file to the client.

If the client requests a copy of their file, unless a copy has been previously provided to the client, the Requesting Attorney may charge for a copy of the file if the client has previously agreed in writing to reimburse the client pursuant to N.D.R. Prof. Conduct 1.19(d).

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline which states:
A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Dale Rivard and adopted by unanimous vote on 3rd of September, 2008.

DISCIPLINARY ACTIONS
SUSPENSION ORDERED

Loren C. McCray

A Hearing Panel of the Disciplinary Board found that, in his activities related to "credit repair," Loren McCray violated N.D.R. Prof. Conduct 1.5 relating to fees; N.D.R. Prof. Conduct 4.1 relating to truthfulness in statements to others; N.D.R. Prof. Conduct 7.3(a)
relating to direct conduct with prospective clients; N.D.R. Prof. Conduct 8.4(c), (f), and (g) relating to misconduct; N.D.R. 5.5(e) relating to the unauthorized practice of law; and N.D.R. Lawyer Discipl. 1.2A(3) and (8) relating to grounds for discipline. The Hearing Panel found McCray had not violated N.D.R. Prof. Concurt 5.4 relating to professional independence of a lawyer. The Hearing Panel recommended McCray be suspended from the practice of law for 120 days and pay $7,808.66 for the costs of the disciplinary proceeding.

A majority of the Supreme Court adopted the Hearing Panel’s recommendation that McCray violated the above N.D.R. of Prof. Conduct and N.D.R. Lawyer Discipl. The Court further concluded that there was clear and convincing evidence McCray violated N.D.R. Prof. Conduct 5.4. The Court ordered that McCray be suspended from the practice of law for six months and one day beginning October 1, 2008, and that he pay the costs of the disciplinary proceeding in the amount of $7,808.66.

**SUSPENSION ORDERED**

Rudolph A. Tollefson


In the Stipulated Facts, Tollefson admitted he was assigned by the Commission on Legal Counsel for Indigent Defense ("Commission") to represent Daniel Mulske in an appeal to the Supreme Court. Tollefson also admitted he was advised the Appellant’s Brief was due by November 13, 2007, but he failed to file the brief or get an extension to file. Further, Tollefson admitted was given notice by letter from the Clerk of the Supreme Court that he had until December 6, 2007 to show good cause why the action should not be dismissed, or the matter would be referred to the Supreme Court for authority to issue an order dismissing the appeal.

Tollefson admitted he informed the Commission, via telephone on November 26, 2007, that the Appellant’s Brief would be mailed that day. Tollefson further admitted he did not file the brief and intentionally and falsely informed the Commission that he had mailed it to the Supreme Court. Tollefson admitted the Commission was required to request an extension to allow another attorney to be substituted upon learning the brief had not been filed. The motion was granted, and the appeal was eventually heard on the merits. See Mulske v. State, 2008 ND 46, 747 N.W.2d 136.

Tollefson admitted his conduct violated N.D.R. Prof. Conduct 1.1, Competence, which provides that a lawyer shall provide competent representation to a client; N.D.R. Prof. Conduct 1.3, Diligence, which provides that a lawyer shall act with reasonable diligence and promptness in representing a client; N.D.R. Prof. Conduct 1.4, Communication, which provides that a lawyer shall reasonably consult with the client about the means by which the client’s objectives are to be accomplished, explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and promptly comply with the client’s reasonable requests for information; and N.D.R. Prof. Conduct 1.16(b), Declining or Terminating Representation, which provides that a lawyer may withdraw from representation if withdrawal can be accomplished without material adverse effect on the interests of the client.

The Hearing Panel considered mitigating factors under N.D.R. Stds. Imposing Lawyer Sanctions 9.32(a), absence of a disciplinary record; 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and 9.32(f), inexperience in the practice of law. The Hearing Panel concluded suspension would be an appropriate sanction under N.D.R. Stds. Imposing Lawyer Sanctions 4.42(a), because Tollefson knowingly failed to perform services for a client and caused injury, or potential injury, to a client.

Tollefson consented to suspension from the practice of law for six months, effective October 22, 2008, and payment of the costs of the disciplinary proceeding in the amount of $250. The Court accepted the Stipulation, Consent to Discipline and Recommendation of the Hearing Panel. The Court further ordered that Tollefson comply with N.D.R. Discipl. 6.3 regarding notice of status.

**INTERIM SUSPENSION ORDERED**

Dennis D. Fisher

On August 13, 2008, an Application for Interim Suspension of Dennis D. Fisher, with supporting documents, including certified copies of criminal judgments in City of Fargo v. Fisher, Fargo Municipal Court Case Nos. 412843 through 412846, was filed under N.D.R. Lawyer Discipl. 4.1D by Paul W. Jacobson, Disciplinary Counsel. The criminal judgments show that Fisher pled guilty to the crimes of simple assault, theft (2 counts), and disorderly conduct.

N.D.R. Lawyer Discipl. 4.1D provides that upon the filing with the Court of a certificate or other satisfactory evidence of conviction demonstrating that a lawyer has been convicted of a serious crime, the Court shall enter an order immediately suspending the lawyer pending final disposition of a disciplinary proceeding predicated upon the conviction.

Under N.D.R. Lawyer Discipl. 4.1C, a serious crime is any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit any of those crimes.

City of Fargo, N.D., Ordinances § 10-0602 (1992) provides that theft as defined by chapter 12.1-23 of the North Dakota Century Code is unlawful and prohibited within the jurisdiction of the City of Fargo. ND Century Code § 12.1-23-02 states “A person is guilty of theft if he: 1. Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof; 2. Knowingly obtains the property of another by deception or threat; or 3. Knowingly receives, retains or disposes of property of another which has been stolen, with intent to deprive the owner thereof.”

The Court is satisfied that the evidence presented demonstrates that Fisher pleaded guilty to and was convicted of two misdemeanor counts of theft. Fisher’s convictions for theft constitute a serious crime for the purposes of N.D.R. Lawyer Discipl. 4.1C and N.D.R. Lawyer Discipl. 4.1D.
Medical Malpractice Referrals

Lee R. Bissonette has been representing victims with catastrophic injuries caused by medical negligence for over 25 years. Included in those cases are 26 cases involving brain-damaged children caused by birth injuries, poor neonatal care, or failure to diagnose meningitis. All of these cases have resulted in recoveries in excess of $1 million. He assisted clients in obtaining recoveries in 2004 and 2005 that ranked among the top recoveries in Minnesota, including the top reported medical malpractice recovery for 2004. Mr. Bissonette is licensed in North Dakota and has worked with North Dakota referring attorneys for over 20 years.

Practice Areas:
- Personal Injury Plaintiff: Medical Malpractice
- Personal Injury Plaintiff: General

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Policy Board Completes Draft Rules of Juvenile Court Procedure

Here is a summary of the rules:

Rule 1 - Scope and Purpose – this rule provides that the Rules of Juvenile Procedure will govern all matters under the Uniform Juvenile Court Act;

Rule 2 - Hearing Time – this rule sets out deadlines for hearings in juvenile matters;

Rule 3 - Contents of Petition – this rule indicates what items must be included in a juvenile petition and defines who can be a party to a juvenile matter;

Rule 4 - Interested Persons – this rule defines who, other than the parties, can formally participate in a juvenile matter;

Rule 5 - Summons – this rule deals with procedure for issuance of a summons, the contents of a summons, and some consequences of the issuance of a summons;

Rule 6 - Service of Summons – this rule sets out the methods that may be used for the service of a summons;

Rule 7 - Service After Summons – this rule provides for service of documents in a juvenile matter after commencement by service of a summons;

Rule 8 - Provisional Hearing – this rule lists requirements for provisional hearings conducted when service of the summons has been made by publication;

Rule 9 - Continuance – this rule indicates when continuances are allowed and sets out procedures for obtaining continuances;

Rule 10 - Presence; Default – this rule indicates when parties and attorneys have the right and responsibility to be present at court proceedings and when an order of default may be issued;

Rule 11 - Notice of Alibi Defense – this rule sets out requirements for claiming an alibi defense in delinquent or unruly child matters;

Rule 12 - Discovery – this rule provides procedures for conducting discovery in juvenile matters;

Rule 13 - Subpoena – this rule sets out subpoena requirements and procedures for issuing and serving a subpoena;

Rule 14 - Motions – this rule covers motions in juvenile matters, providing requirements for motions, indicating when a motion may be made and how it may be served, and setting out time limits and deadlines;

Rule 15 - Notice – this rule deals with the general requirement to provide notice of orders and judgments and specific requirements to provide notice in particular situations;

Rule 16 - Modification and Vacation of Orders – this rule sets out the circumstances that must exist before an order can be modified and the procedures for requesting modification of an order;

Rule 17 - Juvenile Court Lay Guardian ad Litem – this rule provides detailed guidelines for the appointment of lay guardians ad litem in juvenile court matters.

The draft rules are posted in their entirety on the North Dakota Supreme Court website at http://www.ndcourts.gov/court/committees/juv_pol/agendas/drafts.htm. The Board welcomes comments on the draft rules.
JUDGE’S CORNER

U.S. Circuit Court Judge Kermit E. Bye, Fargo, was elected to a two-year term as Chairman of the American Bar Association Conference of State Delegates at the ABA annual meeting in New York City in August. The state delegates are members of the nominating committee whose responsibility it is to nominate the officers and Board of Governors of the ABA. The state delegates’ other responsibilities include leading their respective delegations in the 435-member House of Delegates, the official policy-making body of the ABA.

Currently, North Dakota has two additional delegates: Bismarck lawyer James Hill represents the State Bar of ND, and Chief Justice Gerald VandeWalle represents the Conference of Chief Justices.

Judge Bye, a Hatton native, is a past president of SBAND, and has long been active on national and international levels, previously as a member of the ABA Board of Governors, in addition to being a delegate at large.

Judge Bye was appointed to the U.S. Court of Appeals for the Eighth Circuit by President William Clinton in 2000; prior thereto he practiced law in Fargo for 32 years, preceded by three years as a Special Assistant Attorney General in Bismarck, and another three years as an Assistant U.S. Attorney in Fargo.

Judge Bye maintains his headquarters in the Quentin N. Burdick U.S. Courthouse in Fargo.
NDSU Honors
Ryan Bernstein & David Maring

Two lawyers were honored with alumni awards at North Dakota State University's Homecoming on October 3, 2008. Ryan Bernstein was presented the Horizon Award that “honors an individual who has achieved outstanding career accomplishments within ten years of graduation from NDSU.” Bernstein is Legal Counsel and Senior Policy Advisor to North Dakota Governor John Hoeven. After law school, Bernstein served as law clerk to North Dakota Supreme Court Justice Dale V. Sandstrom, and U.S. Magistrate Judge Charles Miller. Prior to law school, Bernstein served as the student member on the North Dakota Board of Higher Education, and as an advisor to Governor Edward Schafer.

David Maring was presented the Heritage Award for Alumni Service that “recognizes an individual who has demonstrated outstanding support of time and talent to NDSU projects or activities.” Maring has been an active member of the NDSU community and served on the Alumni Association's Board of Directors from 1993-2003. He served as President from 1999-2001 and Chair of the Board from 2001-2003. He practices with Maring Williams Law Office PC. He currently serves as President of the State Bar Association of North Dakota. He is married to North Dakota Supreme Court Justice Mary Muehlen Maring.

Both Bernstein and Maring are also graduates of the University of North Dakota School of Law.

MYSTERY LAWYER

Each issue will feature one lawyer identified only by his or her unique activities not related to the law. E-mail your answer to justine@sband.org by Friday, December 5; the winner will be chosen through a drawing of all correct responses, receiving not only fame and glory, but also a $15 coupon good for an upcoming SBAND CLE. (Members of the lawyer's firm or organization are disqualified).

This attorney wears many hats and juggles many things; she is affectionately known as the “Beer Lady” at the Capitol, sometimes as “Your Honor” when conducting administrative hearings, and as “Mom” to nine-year old twin boys ... all of which require her to find facts, apply the law, impose order and make rulings! She has a degree in elementary education, is passionate about education law and design, and serves on the Board of Trustees for the Anne Carlsen Center and the Ronald McDonald House. Just who is this mystery lawyer?

August Mystery Lawyer - Bill Neumann
August Mystery Lawyer Winner - Wes Argue

E-mail your answer to justine@sband.org.
Consent to Discipline is freely and voluntarily rendered, and she is fully aware of the implications of this consent. Triplett is also aware that there is presently pending a proceeding involving allegations that grounds for discipline exist.

Constance Triplett represented Tracy Carlson in a domestic matter; she did not provide Carlson with an accounting of the costs and fees of the representation when requested to do so by the client or her subsequent attorney.

Triplett was notified of the complaint that was filed against her with the Disciplinary Board, and was informed of her obligation, under paragraph 3.1(D)(3), NDRLD, to submit a written response within twenty days of the complaint. She did not forward a response.

The conduct of Constance L. Triplett violated the following Rules of Professional Conduct: Rule 1.15(d) Safekeeping Property & Professional Insurance Disclosure, RPC, which provides that upon request the lawyer shall promptly render a full accounting regarding funds to the client; and Rule 8.1, Bar Admission & Disciplinary Matters, RPC, and Rule 1.2(A)(8), NDRLD, through the violation of Rule 3.1D(3), NDRLD by not submitting a written response within twenty days of the informal complaint.

Constance L. Triplett has been reprimanded by the Hearing Panel for violation of the above rules, and has been ordered to pay costs of the proceedings in the amount of $250.

The ND Supreme court ordered that Dennis D. Fisher's license to practice law in North Dakota is suspended effective August 21, 2008, and until further order of the Court, pending final disposition of a disciplinary proceeding predicated upon the convictions. The Court further ordered that Fisher comply with N.D.R. Lawyer Discipl. 6.3 regarding Notice of Status.

MEMORIALS

The North Dakota Bar Foundation has received the following memorial contributions:

In memory of Austin G. Engel, Jr. (October 3, 2008)
State Bar Association of North Dakota

In memory of John F. LaQua (August 22, 2208)
State Bar Association of North Dakota

In memory of James H. Williams (September 15, 2008)
State Bar Association of North Dakota

In memory of Richard C. Taylor (September 19, 2008)
State Bar Association of North Dakota

In memory of Kay A. Graff, wife of Judge Benny Graff (October 20, 2008)
Chief Justice Gerald VandEwalle

PROPOSED AMENDMENT TO SBAND CONSTITUTION

A proposed Amendment to the SBAND Constitution has been filed with the Association. Pursuant to Article 11.1 of the Constitution, notice to the members of the form and content of the proposed amendment must be published in not less than two official publications of the Association prior to action on the proposal. The Constitution may be amended at any meeting upon a two-thirds vote of the members who have voted upon amendments which have been proposed and filed with the Association.

The proposed Amendment will be brought before the members of the Association for consideration on June 11, 2009 at the General Assembly meeting during the Bar Association Annual Meeting (or such other date set for the General Assembly meeting). The proposed Amendment is to add the words, “a member of the Young Lawyers Section selected by that Section” to Article 5.1. As amended, Article 5.1 would read as follows:

The Board of Governors consists of: the President, the President-Elect, the Secretary-Treasurer and the Immediate Past President of the Association; the Association’s elected delegate to the House of Delegates of the American Bar Association; a representative from each judicial district of the State of North Dakota, determined according to procedures specified in the By-Laws; a member of the Young Lawyers Section selected by that Section; and the Dean of the Law School of the University of North Dakota.

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ETHICS & DISCIPLINE

The Gavel November 2008
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