



**Legal Professionalism Committee – Subcommittee 2
Report and Minutes of February 25, 2016 Conference Call**

Commissioners participating: Representative Leo Daughtry
Drew Erteschik
Judge Robby Hassell
Mark Merritt
Justice Bob Orr

Commission staff participating: Will Robinson
Emily Portner

Guests participating: Katherine Jean

Issues discussed:

Introduction

Mr. Erteschik began the call by thanking everyone for their participation—especially Ms. Jean, who participated as a guest on behalf of the State Bar. The purpose of the call was to develop potential topics for the full Committee’s consideration.

Mr. Erteschik reiterated Ms. Arrowood’s suggestion from earlier meetings that the subcommittees should avoid allowing the scope of potential topics to become so broad that the full Committee’s final report is not helpful. Mr. Erteschik suggested that the Subcommittee limit its proposals to no more than three topics for the full Committee to consider.

Proposals of Topics for Consideration by the Committee

The Subcommittee discussed three proposed topics for the full Committee’s consideration:

(1) Examination of ABA Resolution 105

Mr. Merritt noted that, earlier this month, the ABA adopted Resolution 105, a copy of which is attached to these minutes. Resolution 105 provides model regulatory objectives for state regulators considering how to regulate nontraditional legal service providers. These nontraditional legal services providers include online businesses, as well as practitioners like the limited-license legal technicians recently authorized in the state of Washington.

Mr. Merritt shared additional information from his participation in the National Conference of Bar Presidents' mid-year meeting, during which Resolution 105 was discussed. At the ABA mid-year meeting, there was also substantial debate over whether, by adopting Resolution 105, the ABA would be endorsing the practice of law by non-lawyers.

Mr. Merritt noted that Resolution 105 was drafted by the ABA's Commission on the Future of Legal Services, the ABA commission charged with similar responsibilities as the Legal Professionalism Committee here in North Carolina. He further shared that the goal of Resolution 105 is for states to analyze whether to adopt these objectives as their own.

For these reasons, Mr. Merritt proposed that the full Committee examine whether North Carolina should adopt the model objectives in Resolution 105.

After some discussion, a majority of the Subcommittee agreed to submit this topic to the full Committee for its consideration.

(2) External examination of the State Bar

Justice Orr noted that, in recent years, the State Bar and the Board of Law Examiners have been criticized for their approach to lawyer admission and lawyer discipline. Justice Orr shared his view that these areas of lawyer regulation are in need of external examination.

With respect to lawyer admission, Justice Orr expressed concern about the barriers to entry for new lawyers and the Board of Law Examiners' handling of the admissions process. He also raised the issue of whether North Carolina should adopt the uniform bar exam.

With respect to lawyer discipline, Justice Orr expressed concern about the State Bar's approach to disciplinary proceedings generally, and specifically those involving criminal defense lawyers, such as Chris Mumma. He further shared his view that, under the current adversarial/prosecutorial structure for lawyer discipline, the burdens (including financial costs) on lawyers facing prosecution for alleged ethical violations are too high.

For these reasons, Justice Orr proposed that the full Committee consider whether to recommend that an independent entity—for example, a legislative committee or a group of independent consultants—perform an external examination of the State Bar and the Board of Law Examiners. Justice Orr also suggested that the full Committee examine whether the State Bar and Board of Law Examiners should perform an internal examination.

Mr. Merritt questioned the need for an external review of the State Bar. He noted that, in many areas where the State Bar has regulatory authority, no problems have been identified with the State Bar’s conduct. These areas include the issuance of ethical opinions, the administration of lawyer responsibilities (payment of dues and CLE), the oversight of programs such as IOLTA, LAP, and the Client Security Fund, and authorized practice. Mr. Merritt noted in the last year that the State Bar handled approximately 2000 grievances and has received feedback about three cases, including the Mumma case. Mr. Merritt stated that the State Bar is open to ways it can improve, but questioned the need for an external review without ascertaining what the actual issue is to be addressed and the scope of the problem.

After some discussion, a majority of the Subcommittee agreed to submit this topic to the full Committee for its consideration.

(3) Increasing the Supreme Court’s role in regulating lawyers

Mr. Erteschik noted that North Carolina is unique among the states in its approach to lawyer regulation because the State Bar does not report directly to the Supreme Court. By contrast, under the model used in other states, the state’s highest appellate court has final responsibility for regulating lawyers. Often, the state’s highest appellate court—rather than the legislature—is responsible for defining, in the first instance, what constitutes “the practice of law.”

Mr. Erteschik shared his view that North Carolina would benefit from adopting a model under which the Supreme Court supervises the State Bar and regulates the practice of law—including defining, in the first instance, what constitutes “the practice of law.” Mr. Erteschik suggested three potential benefits to this structural change:

First, Mr. Erteschik suggested that this model would better enable the State Bar to respond to rapid changes in how legal services are delivered. Under the current structure, the General Assembly defines the practice of law. As the delivery of legal services constantly evolves, however, the General Assembly must continually assess what constitutes “the practice of law”—a complex, burdensome, and unenviable task, especially for a legislative body. Given the growing innovation in the delivery of legal services, Mr. Erteschik suggested that this burden will only

increase in the future, as evidenced by North Carolina’s recent experience with the legislative effort to address the challenges brought about by Legal Zoom.

By contrast, in a model where the Supreme Court regulates lawyers and defines the practice of law, the General Assembly would be relieved of the burdens described above. Furthermore, Mr. Erteschik stated, the judicial branch is in the best position to define, in the first instance, what constitutes “the practice of law”—particularly as technological advances put increasing pressure on traditional definitions.

Second, Mr. Erteschik suggested that placing the State Bar under the supervision of the Supreme Court would eliminate fears (well-founded or not) that the State Bar is violating the federal antitrust laws. Following the U.S. Supreme Court’s February 2015 decision in *FTC v. N.C. Dental Board*, there have been several high-profile antitrust lawsuits against the State Bar. These lawsuits focus on the fact that the State Bar is controlled by “active market participants”—that is, lawyers who regulate lawyers.

Mr. Erteschik suggested that the State Bar will be vulnerable to these lawsuits until—in the words of the U.S. Supreme Court in *Dental Board*—it is “actively supervised.” Judicial branch supervision of the State Bar (if accomplished *prior* to regulatory action) would constitute “active supervision”; this would cure the problem. Therefore, in Mr. Erteschik’s view, placing the State Bar under the supervision of the Supreme Court would help alleviate concerns that the State Bar will be subject to federal antitrust liability.

Third, Mr. Erteschik suggested that placing the State Bar under the supervision of the Supreme Court could yield additional benefits in the areas of public trust and confidence. This structural change could, perhaps, resolve some of the issues identified above in connection with Proposed Topic 2. At a minimum, placing the State Bar under the supervision of the Supreme Court could improve the public perception that disciplinary matters are handled fairly and impartially.

For these reasons, Mr. Erteschik proposed that the full Committee examine whether North Carolina should place the State Bar under the supervision of the Supreme Court, its Chief Justice, or the Chief Justice’s designee (for example, the Director of AOC, another judicial branch official, or a judicial branch council).

Mr. Merritt responded that the North Carolina Supreme Court already has a role in the administration of the State Bar that is recognized in Chapter 84, and that the Supreme Court reviews and approves or rejects any rule or regulation initially adopted by the State Bar. Mr. Merritt also noted that in other states where the supreme court is more directly responsible for the state bar, the state bar structure and staff looks very much like the one we have in North Carolina. Mr. Merritt further expressed his belief that antitrust risks for the State Bar are

minimal, and are even further reduced if the guidance set forth in the Dental Board case is followed.

After some discussion, a majority of the Subcommittee agreed to submit this topic to the full Committee for its consideration.

Adjournment

The meeting was adjourned by consensus at about 3:00 p.m.

s/ Andrew H. Erteschik
Andrew H. Erteschik