NORTH CAROLINA COMMISSION ON THE ADMINISTRATION OF LAW & JUSTICE

Legal Professionalism Committee – Subcommittee 2
Report and Minutes of March 24, 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 at 10:00 a.m. by thanking everyone for their participation—especially Ms. Jean, who participated as a guest on behalf of the State Bar.

Mr. Erteschik noted that the purpose of the call was to discuss the issue of potential State Bar structural reform in further detail so that the Subcommittee would be prepared to report back to the full Committee at its next meeting.

Presentation by Commission Staff

After the full Committee's last meeting, the Commission's Research Associate, Emily Portner, began extensive research on two issues: (1) whether, in other states, the legislature or the state supreme court decides what constitutes "the practice of law"; and (2) whether, in other states, state bars are supervised by the judicial branch. Mr. Erteschik also solicited materials from the State Bar, which provided additional materials related to these issues.

Before the conference call, Ms. Portner circulated a packet of research materials to the Subcommittee. These included the following:

- a 50-state survey, which the State Bar provided, about how state bars in other states are structured;
- an ABA survey describing the relationship between select unified state bars and their state judiciaries;
- a 50-state comparison of "who defines the practice of law" based on an ABA compilation of the definitions in each state; and
- excerpts from a historical article by the NC Bar Association about the inception of the State Bar.

During the call, Ms. Portner gave a thorough description of each of these materials, as well as a description of additional research.

Ms. Portner noted, among other things, that North Carolina's State Bar structure appeared to be different from most states. One of the differences, she reported, is that in most states, the Supreme Court defines the practice of law—in some cases through rulemaking. In North Carolina, by contrast, the legislature defines the practice of law.

Ms. Portner also noted the ABA's position on these issues, as described in the Preamble to its Model Rules of Professional Conduct: that state supreme courts should have the ultimate authority for regulating the legal profession.

Subcommittee Discussion

Mr. Erteschik suggested that the Subcommittee discuss potential State Bar structural reform in the context of the research materials that Ms. Portner and the State Bar had circulated.

Mr. Erteschik began by inviting Mr. Merritt to describe a point that Mr. Merritt had raised by e-mail: that the ABA survey did not accurately take into account various programs that the Supreme Court created and has asked the State Bar to play a role in administering. These include IOLTA, the Client Security Fund, the Chief Justice's Commission on Professionalism, and the State Bar's collaboration with the Supreme Court in certain areas. Mr. Erteschik agreed with Mr. Merritt that these points were well-taken.

Representative Daughtry noted that State Bar structural reform would require close study. It would not, for example, be a short-session bill. He noted,

however, that in a recent meeting of the State Bar and Bar Association at which the issue was discussed, there appeared to be initial support from lawyer-legislators.

Mr. Erteschik pointed out that, in neighboring Virginia, the Supreme Court defines what constitutes "the practice of law" and also supervises the State Bar.

Mr. Erteschik then asked Mr. Merritt whether the State Bar would be opposed to structural reform to make the Supreme Court, rather than the legislature, responsible for defining what constitutes "the practice of law." Mr. Merritt reported that the State Bar did not have a position on that issue.

The discussion then turned to whether the State Bar should report directly to the Supreme Court (or its designee).

Mr. Erteschik explained that, in his view, the State Bar should not report directly to the seven members of the Supreme Court, but rather to the Supreme Court's designee—for example, a judicial body appointed by the Supreme Court (or the Chief Justice), which would be charged with supervising the State Bar in both the areas of ethics rules and lawyer discipline.

Mr. Merritt pointed out that, in his view, the Supreme Court already supervises the State Bar on the ethics side by approving and, in some cases, rejecting the State Bar's ethics rules. Mr. Merritt also noted that any changes to the State Bar's regulations must be approved by the Supreme Court. Mr. Erteschik noted that he recalled a discussion of this issue from the State Bar's perspective in the brief the State Bar submitted in the federal Legal Zoom litigation on the issue of active supervision. Mr. Erteschik offered to send, and later did send, a copy of this brief to the Subcommittee for its review.

Mr. Erteschik then inquired whether, in the State Bar's view, the Supreme Court currently supervises lawyer discipline. Mr. Merritt responded that the Supreme Court supervises the State Bar's disciplinary process only to the extent that the State Bar's disciplinary decisions are appealed to the Court of Appeals and, in some cases, appealed further to the Supreme Court.

Mr. Erteschik shared his view that, under the U.S. Supreme Court's *Dental Board* decision, this would not be deemed "active supervision," because, as the Federal Trade Commission recently explained in a guidance paper, active supervision must come before the regulatory action. Mr. Erteschik offered to send, and did send, a copy of the FTC guidance paper to the Subcommittee for its review.

Mr. Merritt shared his view that, apart from the issue of "active supervision," he did not believe that an individual disciplinary action would have sufficient anticompetitive effects on the market (as opposed to an effect on the individual

licensee), and, therefore, would be unlikely to implicate the federal antitrust laws. He also stated that the *Dental Board* decision and subsequent FTC guidance made clear that filing lawsuits or bringing disciplinary actions would not implicate the Sherman Act unless the litigation was a sham. Mr. Merritt stated that structural issues should not be driven by concerns over the *Dental Board* decision but by what would be the most effective way to regulate lawyers in the public interest.

Mr. Erteschik pointed out that, under federal antitrust law, the "anticompetitive effects" issue is a distinct issue from the "active supervision" issue. Mr. Erteschik further shared his view that the phrase "active supervision" is not just a term of art in antitrust cases involving licensing boards, but rather, is a feature of good government.

Justice Orr agreed with Mr. Erteschik's comments about the public-policy benefits of actively supervising licensing boards like the State Bar. He further shared his view that many North Carolina lawyers do not feel comfortable with their regulators, and that they view the State Bar as an adversary. Along these lines, Justice Orr suggested that the State Bar needed to hear from lawyers and others about whether the State Bar's approach to lawyer discipline was appropriate.

To that end, Justice Orr suggested an external review of the State Bar in connection with the full Committee's examination of whether "active supervision" of the State Bar is desirable. Justice Orr shared his view that it is not sufficient to accept the State Bar's assurances that it handles lawyer discipline appropriately.

Mr. Erteschik asked whether the State Bar was opposed to reporting directly to a judicial branch commission—for example, a State Bar Oversight Commission within the judicial branch, with members appointed by the Supreme Court (or the Chief Justice). Mr. Merritt responded that the State Bar's lawyer regulation and discipline has proven to be effective, and for that reason, this proposed structural reform was unnecessary.

Mr. Robinson, the Executive Director of the Commission, then asked Mr. Erteschik for his thoughts on how, if State Bar structural reform were introduced, it might be effectuated through legislation.

Mr. Erteschik described how proposed legislation might achieve two objectives:

First, Mr. Erteschik shared his view that the proposed legislation should make the Supreme Court responsible for defining what constitutes "the practice of law."

As part of this reform, Mr. Erteschik suggested the creation of a judicial branch commission appointed by the Supreme Court (or the Chief Justice). This visionary commission—perhaps called the "Commission on the Future of Legal Services"—would be responsible for defining what constitutes "the practice of law," as well as determining whether the delivery of certain future services falls within that definition. In each instance, the Commission's recommendations could then be considered and accepted, rejected, or modified by the Supreme Court as the final arbiter of the definition of "the practice of law."

Second, Mr. Erteschik shared his view that the legislation should allow the Supreme Court to more actively supervise the State Bar.

As part of this reform, Mr. Erteschik suggested the creation of a second judicial branch commission appointed by the Supreme Court (or the Chief Justice). This oversight commission—perhaps called the State Bar Oversight Commission—would be responsible for supervising and approving the final decisions of the State Bar in both the areas of ethics rules and lawyer discipline.

As further support for these proposals, Mr. Erteschik relied in part on the potential policy advantages discussed in the Subcommittee's February 2016 Report. Mr. Erteschik stated that he is confident this structural reform would not require a constitutional amendment, and instead would only require legislation.

A majority of the Subcommittee agreed that the issues described above should be presented to the full Committee for discussion at its next meeting on April 5.

Adjournment

The meeting was adjourned by consensus at about 11:30 a.m.

s/ Andrew H. Erteschik
Andrew H. Erteschik