

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

ORDER FOR HEARING TO CONSIDER PROPOSED
AMENDMENTS TO THE RULES OF THE BOARD
ON JUDICIAL STANDARDS

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on March 16, 1999 at 2:00 P.M., to consider the recommendations of the Minnesota Supreme Court Advisory Committee on Rules of the Board on Judicial Standards to amend the Rules of the Board on Judicial Standards. A copy of the final report of the committee is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before March 12, 1999, and
2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before March 12, 1999.

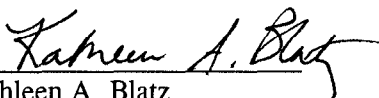
Dated: November 30, 1998

BY THE COURT:

OFFICE OF
APPELLATE COURTS

DEC 1 1998

FILED


Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

In re Rules of the Board on Judicial Standards

Recommendations of the Minnesota Supreme Court
Advisory Committee on Rules of the Board on Judicial Standards

Final Report

October 15, 1998

Hon. Thomas Butler (retired), Albert Lea, Chair

Richard Beens, Minneapolis
Jerry W. Blackwell, Minneapolis
Edward J. Cleary, St. Paul
Hon. Terence M. Dempsey, St. James
Hon. James C. Harten, St. Paul
Hon. John L. Holahan, Minneapolis
Ann L. Iijima, St. Paul
Robert W. Johnson, Anoka

Charles E. Lundberg, Minneapolis
Kathleen A. Meyerle, Rochester
Hon. Stephen L. Muehlberg, Stillwater
Vivian Jenkins Nelson, Minneapolis
Kathleen M. Picotte Newman, Bloomington
Nicholas Ostapenko, Duluth
Jacqueline Regis, St. Paul
DePaul Willette, Mendota Heights

Michael B. Johnson, St. Paul
Staff Attorney

**ADVISORY COMMITTEE ON RULES OF THE
BOARD ON JUDICIAL STANDARDS**

Summary of Committee Recommendations

The Advisory Committee on the Rules of the Board on Judicial Standards was appointed in May, 1998, and directed to review and make recommendations regarding: (a) appropriate procedures for handling matters involving conduct of a judge occurring prior to the assumption of judicial office; (2) clarification of instances where the Board on Judicial Standards may take independent action or shall make a recommendation to the Supreme Court for sanctions against a judge; and (3) any additional necessary changes in the Rules to improve the judicial disciplinary process.

The Advisory Committee recommends that in most situations the initial investigation of matters involving conduct of a judge occurring prior to the assumption of judicial office should be conducted by the Lawyers Professional Responsibility Board, which would consider whether discipline as a lawyer is warranted. The results of the investigation and any further lawyer disciplinary proceedings would be provided to the Board on Judicial Standards, which would consider whether judicial discipline is warranted. The Advisory Committee's proposal attempts to maximize available investigative resources while preserving due process and the appropriate separation of the lawyer and judicial disciplinary functions.

The Advisory Committee also recommends that instances where the Board on Judicial Standards may take independent action can best be described in general terms as "conduct that is unacceptable but not so serious as to warrant further discipline by the Supreme Court." Additional cross-references are proposed to further differentiate applicable procedures. No other changes are recommended at this time.

History of Judicial Discipline for Pre-Bench Conduct

The decision that a judge is subject to judicial discipline for conduct occurring before assumption of judicial duties was announced by the Minnesota Supreme Court in

1977 in the case titled *In Re Gillard*.¹ Disciplinary proceedings were commenced against Judge Gillard by the Lawyers Professional Responsibility Board for conduct that occurred prior to Judge Gillard's appointment to the district court. Judge Gillard filed a writ of prohibition claiming that the Lawyers Board lacked jurisdiction. After the Court denied the writ, the Lawyers Board filed a petition with the Supreme Court recommending disbarment. The Court appointed a referee, who held an extensive hearing, made findings of fact, conclusions of law, and recommended that the Supreme Court disbar Judge Gillard.²

The Board on Judicial Standards was invited to participate in the oral arguments on the matter, and argued that if Judge Gillard is disbarred he should be removed from office without further proceedings before the Judicial Standards Board. The Supreme Court ultimately disagreed, and postponed its decision on the disbarment proceeding to allow the Judicial Standards Board to consider whether removal was warranted. In referring the matter the Court held that the referee's findings of fact and conclusions were amply supported by the evidence and would not be subject to collateral attack in proceedings before the Judicial Standards Board. In addition, the Board's consideration of additional evidence was limited to matters stipulated between the parties or allowed by the Board.³

At the Judicial Standards Board hearing, Judge Gillard offered to introduce testimony of one witness, who was not present at the lawyer disciplinary hearing. The witness was deposed and the Judicial Standards Board reviewed the deposition transcript. The Judicial Standards Board determined that the testimony was inadmissible as a collateral attack, and concluded that removal was warranted. It was careful to add, however, that the testimony, if admitted, would not have altered the Board's conclusion. After hearing arguments from the Board and Judge Gillard, the Supreme Court ordered the removal and disbarment of Judge Gillard.⁴

¹ *In re Gillard*, 260 N.W.2d 562, 564, footnote 2 (Minn. 1977) ("*Gillard I*").

² *Gillard I*, *supra*, at 563.

³ *Gillard I*, *supra*, at 563, 564.

⁴ *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) ("*Gillard II*"). The order was filed June 30, 1978, almost two years after the initial disciplinary proceedings were commenced by the Lawyers Professional Responsibility Board (July 7, 1976).

While the proceedings involving Judge Gillard were pending, the Court was also considering a complete revision of the rules for the Board on Judicial Standards based on the American Bar Association's Standards Relating to Judicial Discipline and Disability Retirement.⁵ ABA Standards 3.1 and 7.13 placed exclusive jurisdiction over pre-bench conduct with the judicial disciplinary body, provided that if the highest Court eventually determines that removal is warranted, the Court shall notify the judge and the lawyer disciplinary body and give them an opportunity to be heard on the lawyer discipline, if any, to be imposed. The Comment to ABA Standard 3.1 states:

It is to the benefit of the public and necessary for the independence of the judicial office that questions regarding the propriety of conduct of an active judge should be within the exclusive jurisdiction of the [judicial] commission. This is true whether the conduct occurred prior to or while holding the judicial office.

Jurisdictional uncertainties between the commission and a lawyer disciplinary board about the conduct of judges who are also lawyers impede the judicial and lawyer disciplinary processes. Judicial and lawyer disciplinary processes differ as to tribunal, standards of conduct, and the public office involved. Rules specifying which body has jurisdiction and when that jurisdiction attaches should be promulgated by the court. Failure to resolve these conflicts will leave both disciplinary processes open to uncertainties of *res judicata* and collateral estoppel, and may subject the judge whose conduct is in question to multiple proceedings.

In addition, the commentary to the related ABA Standard 7.13 states:

Misconduct by a judge which requires removal is so serious that the lawyer disciplinary board should have the opportunity to recommend disbarment or other discipline against the judge as a lawyer. When a judge is removed from the bench, the lawyer disciplinary board should have the opportunity to be heard on the issue of lawyer discipline before he is restored to practice. The judge should be aware of the possibility of this further sanction, and be heard on the matter.

Shortly after ordering the removal and disbarment of Judge Gillard, the Supreme Court incorporated ABA Standards 3.1 and 7.13 as Rules 2(c) and 13(g), of the Rules of the Board on Judicial Standards.⁶ In 1986, The Supreme Court modified Rule 13(g) to its

⁵ Standards Relating to Judicial Discipline and Disability Retirement, Approved Draft (February 1978). The standards were prepared by a Joint Committee on Professional Discipline of the Appellate Judges' Conference and the ABA's Standing Committee on Professional Discipline. John McNulty of Minneapolis chaired the ABA Standing Committee, and Minnesota Supreme Court Associate Justice John Todd was a member of the subcommittee that drafted the Standards.

⁶ Order of Minnesota Supreme Court, dated July 5, 1978.

present form by requiring that notice to the Lawyers Professional Responsibility Board be made promptly after the Judicial Standards Board files a recommendation for removal.⁷

The issue of pre-bench conduct did not arise again until a July 1997 auditor's report alleged that, before becoming a judge, a county commissioner may have committed a felony when he allegedly had a county employee write a letter that falsely claimed county approval of a tax abatement on property the commissioner owned. The report also criticized the judge/former commissioner for voting on tax abatements without disclosing his conflict of interest as a co-owner of the property.⁸

Approximately five months later a grand jury issued an indictment charging three gross misdemeanor violations.⁹ Shortly thereafter, the Judicial Standards Board requested \$100,000 from the legislature to continue its investigation.¹⁰ Within two months, however, the criminal charges were dismissed, and the Judicial Standards Board issued a public reprimand to the judge/former commissioner for voting on tax abatements in which he and a former client had an interest.¹¹

Advisory Committee Process

The Advisory Committee met four times to discuss the issues outlined by the Court. The Advisory Committee examined how the issues were handled by other jurisdictions. Draft recommendations were circulated and discussed by the committee, and a proposed final draft was submitted for comment to the Board on Judicial Standards and the Lawyers Professional Responsibility Board.

⁷ Order #C4-85-697 (Minn., filed May 23, 1986).

⁸ Gustafson, *Judicial Board asks that judge be suspended with pay pending investigation*, Minneapolis Star Tribune, Aug. 7, 1997. Shaffer, *Paid suspension sought for judge*, St. Paul Pioneer Press, Aug. 8, 1997.

⁹ Browning, *Grand jury charges local judge*, St. Paul Pioneer Press, Dec. 20, 1997.

¹⁰ Browning, *Money sought for judge probe*, St. Paul Pioneer Press, Jan. 29, 1998. The Judicial Standards Board has an annual budget of \$30,000 to conduct investigations and prosecute disciplinary actions. During the first year of a biennium, the board may draw down on the next year's budget, making a total of \$60,000 available.

¹¹ Minnesota Board on Judicial Standards Press Release, dated March 13, 1998 (citing Minn.R.Prof.Cond. 1.11(c)). The judge/former commissioner was also required to pay \$1,000 to reimburse the Board for costs of investigation and to complete 20 hours of continuing legal education on legal ethics within one year.

Summary of Advisory Committee Recommendations

Format of Report. The Advisory Committee's proposed amendments and explanatory comments begin on page 8 of this report. The proposals are listed sequentially, beginning with the Rules of the Board on Judicial Standards ("R.Bd.Jud.Std.") and then the Rules on Lawyers Professional Responsibility ("R.L.Prof.Resp.").

Pre-bench Conduct. The changes affecting pre-bench conduct are incorporated in both the Rules of the Board on Judicial Standards ("R.Bd.Jud.Std.") and the Rules on Lawyers Professional Responsibility ("R.L.Prof.Resp.") as follows:

1. Modify R.Bd.Jud.Std. 1(d)(10) to allow the director and staff of the Office of Lawyers Professional Responsibility to serve as special counsel to the Board on Judicial Standards in matters involving pre-bench conduct;
2. Modify R.Bd.Jud.Std. 2(b) to permit both the Judicial Standards Board and the Lawyers Board to exercise their respective jurisdiction in matters involving pre-bench conduct;
3. Add a new R.Bd.Jud.Std. 5(4) and R.L.Prof.Resp. 20(a)(10) authorizing the exchange of information between the two disciplinary boards and their staff in matters involving pre-bench conduct;
4. Modify R.Bd.Jud.Std. 6(d)(1)(i) acknowledging the new procedure under new R.Bd.Jud.Std. 6Z and R.L.Prof.Resp. 6Z;¹² and
5. Add new R.Bd.Jud.Std.6Z and R.L.Prof.Resp. 6Z setting forth the process for handling complaints concerning pre-bench conduct.

The Advisory Committee recommends that in most situations the initial investigation of matters involving conduct of a judge occurring prior to the assumption of judicial office should be conducted by the Lawyers Professional Responsibility Board, which would consider whether discipline as a lawyer is warranted. The results of the investigation and any further lawyer disciplinary proceedings would be provided to the Board on Judicial Standards, which would consider whether judicial discipline is

¹² This combination of numbering and lettering was selected because the Rules on Lawyers Professional Responsibility already contain a rule 6X and 6Y, and the logical place for the subject in the Rules of the Board on Judicial Standards is somewhere between existing R.Bd.Jud.Std. 6 and 7.

warranted. The Advisory Committee's proposal attempts to maximize available investigative resources while preserving due process and the appropriate separation of the lawyer and judicial disciplinary functions.

This approach is flexible in that it does not require that the Judicial Standards Board wait until the Lawyers Board has completed its process. The appropriate separation of the lawyer and judicial disciplinary functions may require the boards to proceed at different speeds. If circumstances dictate a full adversarial hearing on the lawyer disciplinary issues, however, the proposed rules allow the use of the hearing record and findings and conclusions of the lawyer disciplinary process in the judicial disciplinary process.

Independent Action by the Judicial Standards Board. The changes affecting independent action by the Board on Judicial Standards are incorporated in the Rules of the Board on Judicial Standards ("R.Bd.Jud.Std.") as follows:

1. Modify R.Bd.Jud.Std. 2(a) to recognize that the Judicial Standards Board may make certain summary dispositions (proposed public reprimands, and non-public warnings, conditions, counseling, treatment, and assistance);
2. Modify R.Bd.Jud.Std. 6(d)(1)(ii) to indicate when a proposed public reprimand may be issued by the Board (when a judge's conduct is unacceptable under one of the grounds for judicial discipline that does not merit formal proceedings or further discipline by the Supreme Court); and
3. Modify R.Bd.Jud.Std. 7(a)(1) to recognize the Board's authority to issue proposed public reprimands and avoid confusion over when the Board must issue a Statement of Charges; and
4. Modify R.Bd.Jud.Std. 11(d)(5) to further distinguish between proposed public reprimands issued by the Board and further discipline issued by the Supreme Court after a formal recommendation from the Board.

R.Bd.Jud.Std. 6(d)(1)(ii) authorizes the Board to issue a proposed public reprimand to a judge, which is subject to a judge's right to demand a formal hearing before the reprimand is made public. Confusion exists under existing R.Bd.Jud.Std. 11, which lists a reprimand as one form of discipline that the Board may recommend to the Court based on clear and convincing evidence in the hearing record. R.Bd.Jud.Std

7(a)(1) further exacerbates this confusion by requiring the executive secretary to prepare a Statement of Charges after a finding of sufficient cause to proceed. The proposed changes are designed to eliminate confusion and make the rules more consistent.

The proposed change to R.Bd.Jud.Std. 6(d)(1)(ii) is designed to provide the board with guidance regarding when it is appropriate to proceed directly to a proposed public reprimand. Essentially, the proposal allows such a reprimand for conduct that is unacceptable but not so serious as to warrant further discipline by the Supreme Court (e.g., a censure). Although one Advisory Committee member described the task of defining this standard as “a bit like nailing Jell-O to a wall,” the Committee believes that the proposed language offers some guidance and perspective. The standard must be measured against the rule’s procedural protection that allows a judge an opportunity to requesting a formal proceeding before the reprimand is disclosed to the public. In essence the proposal codifies the Board’s past practice of attempting to insist on public disclosure as part of any negotiated resolution where unacceptable conduct is involved.

Effective Date

The Advisory Committee recommends that these proposed rule changes become effective after the bench and bar have had an opportunity to review them and offer their comments to the Court. The proposals have been approved by the Judicial Standards Board and the Lawyers Board, neither of which requires significant lead time for implementation purposes. The Court may, however, want to invite the comments of the state bar association, the Conference of Chief Judges, the Minnesota District Judges Association, and others either by holding a public hearing or establishing a notice and comment period.

AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]

[R.Bd.Jud.Std.] RULE 1. ORGANIZATION OF BOARD

* * *

(d) **Duties and Responsibilities of Executive Secretary.** The executive secretary shall have duties and responsibilities prescribed by the board, including the authority to:

- (1) Receive complaints and allegations as to misconduct or disability;
- (2) Make preliminary evaluations;
- (3) Conduct investigations of complaints as directed by the board;
- (4) Recommend dispositions;
- (5) Maintain the board's records;
- (6) Maintain statistics concerning the operation of the board and make them available to the board and to the Supreme Court;
- (7) Prepare the board's budget for approval by the board and administer its funds;
- (8) Employ and supervise other members of the board's;
- (9) Prepare an annual report of the board's activities for presentation to the board, to the Supreme Court and to the public;
- (10) Employ, with the approval of the board, special counsel, private investigators or other experts as necessary to investigate and process matters before the board and before the Supreme Court. The use of the attorney general's staff prosecutors or law enforcement officers for this purpose shall not be allowed. The use of the Director and staff of the Office of Lawyers Professional Responsibility for this purpose shall be allowed if the matter involves conduct of a judge, other than a Supreme Court Justice, that occurred prior to the judge assuming judicial office. Individuals employed or providing assistance under this section shall be deemed to be counsel to the Board on Judicial Standards for the purposes of these rules.

* * *

Advisory Committee Comment—1998 Amendment

Rule 1(d)(10) has been modified to allow the use of the Director and staff of the Office of Lawyers Professional Responsibility to provide investigative and support services in situations involving conduct that occurred prior to a judge assuming judicial office. Related changes grant the Lawyers Professional Responsibility Board jurisdiction to consider whether such conduct

**AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]**

33 warrants lawyer discipline. R.Bd.Jud.Std. 2; R.L.Prof.Resp. 6Z(a). It is contemplated that
34 complaints about the conduct of a judge occurring prior to the judge assuming judicial office will
35 be investigated in the first instance by the Office of Lawyers Professional Responsibility
36 [R.Bd.Jud.Std. 6Z(b); R.L.Prof.Resp. 6Z(b)(2)], and the results would be disclosed to the Board on
37 Judicial Standards. R.Bd.Jud.Std. 5(a)(4); R.L.Prof.Resp. 20(a)(10). This allows for efficient and
38 effective use of investigative resources by both disciplinary boards. Related changes also
39 authorize the use of the hearing record, findings, and recommendations of the lawyer disciplinary
40 process in the judicial disciplinary process. R.Bd.Jud.Std. 6Z(d); R.L.Prof.Resp. 6Z(b)(4).

41 Rule 1(d)(10) prohibits the use of the staff of the Office of Lawyers Professional
42 Responsibility when the pre-bench conduct at issue involves a Supreme Court Justice because the
43 office's director and staff are appointed and compensated by the Court. If such a case were to
44 arise, it is contemplated that the Office of Lawyers Professional Responsibility would follow
45 existing conflict procedures, which include assigning a former attorney or Board member to review
46 and follow up on patently frivolous complaints and hiring outside counsel and investigators to
47 handle other complaints. The prohibition against the use of office staff does not prohibit
48 communication of confidential information between the two boards regarding matters involving the
49 conduct of a justice occurring prior to assumption of judicial office.

50 Modifications to Rule 1(d)(10) also clarify that individuals employed or providing
51 assistance to the executive secretary and the board are considered counsel to the board for
52 purposes of these rules. This ensures, for example, that the immunity and privilege provisions
53 under Rule 3 and the confidentiality and work product provisions under Rule 5 apply to these
54 individuals when they are assisting the executive secretary and the board.

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57 **[R.Bd.Jud.Std.] RULE 2. JURISDICTION AND POWERS OF BOARD**

58 (a) **Powers in General.** The board shall have the power to receive complaints,
59 investigate, conduct hearings, make certain summary dispositions, and make
60 recommendations to the Supreme Court concerning:

- 61 (1) Allegations of judicial misconduct;
- 62 (2) Allegations of physical or mental disability of judges;
- 63 (3) Matters of voluntary retirement for disability; and
- 64 (4) Review of a judge's compliance with Minn.St. § 546.

65 (b) **Jurisdiction Over Full-Time and Part-Time Judges.** The board shall have
66 jurisdiction over the conduct of all judges, including full time judges, retired judges
67 subject to assignment, and conciliation court referees and other part time judges.
68 This jurisdiction shall include conduct that occurred prior to a judge assuming
69 judicial office. ~~In cases of full time judges, including retired judges subject to~~
70 ~~assignment, this jurisdiction shall be exclusive. In cases of part time judges,~~
71 ~~including referees of conciliation court, t~~The board shall have exclusive jurisdiction
72 in matters involving conduct occurring in a judicial capacity. The Lawyers

AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]

73 Professional Responsibility Board ~~may also exercise~~ shall have jurisdiction to
74 consider whether discipline as a lawyer is warranted in matters involving conduct of
75 any judge occurring prior to the assumption of judicial office and conduct of a part-
76 time judge, including referees of conciliation court, not occurring in a judicial
77 capacity, ~~including conduct occurring prior to the assumption of judicial office.~~

78
79 * * *

80 **Advisory Committee Comment—1998 Amendment**

81 Rule 2(a) has been amended to recognize that the board may make certain summary
82 dispositions. These dispositions include proposed public reprimands under Rule 6(d)(1)(ii), which
83 are subject to a judge's right to demand a formal hearing before the reprimand is made public, and
84 nonpublic warnings, conditions, counseling, treatment, and assistance directed by the Board under
85 Rule 6(f).

86 Rule 2(b) has been modified to permit the Lawyers Professional Responsibility Board to
87 also exercise jurisdiction to consider whether discipline as a lawyer is warranted in matters
88 involving conduct of any judge occurring prior to the assumption of judicial office. The procedure
89 to be followed in these situations is set forth in rule 6Z of these rules.

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91
92 [R.Bd.Jd.Std.] RULE 5. CONFIDENTIALITY

93 (a) **Before Formal Complaint and Response.** Except as otherwise provided in this rule,
94 all proceedings shall be confidential until the Formal Complaint and response, if any,
95 have been filed with the Supreme Court pursuant to Rule 8. The board shall establish
96 procedures for enforcing the confidentiality provided by this rule.

97 (1) Upon determination that there is insufficient cause to proceed, the
98 complainant, if any, shall be promptly notified and given a brief explanation
99 of the board's action. The complainant shall also be promptly notified of any
100 disposition pursuant to Rule 6(f).

101 (2) If at any time the board takes action as may be authorized pursuant to Rule
102 6(d)(1)(ii), such action shall be a matter of public record.

103 (3) Any action taken by the board pursuant to Rule 6(f) may be disclosed to the
104 chief justice, chief judge and/or district administrator of the judicial district in
105 which the judge sits. Such disclosure is at the discretion of the board and shall

**AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
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106 be for the purpose of monitoring future conduct of the judge and for assistance
107 to the judge in modifying the judge's conduct. To the extent that any
108 information is disclosed by the board pursuant to this provision, the chief
109 justice, chief judge and/or district administrator shall maintain the
110 confidentiality of the information in accordance with Rule 5.

111 (4) Information may be disclosed between the board or executive secretary and the
112 Lawyers Professional Responsibility Board or the director in furtherance of
113 their duties to investigate and consider conduct that occurred prior to a judge
114 assuming judicial office.

115

116 **Advisory Committee Comment—1998 Amendment**

117 Rule 5(a) has been modified by the addition of clause (4) to permit the exchange of
118 information between the two disciplinary boards and their staff in situations involving conduct of
119 a judge that occurred prior to the judge assuming judicial office. See also R.L.Prof.Resp.
120 20(a)(10). Both the Board on Judicial Standards and the Lawyers Professional Responsibility
121 Board have jurisdiction in such cases. R.Bd.Jud.Std. 2(b); R.L.Prof.Resp. 6Z.

122

123

124 **[R.Bd.Jud.Std.] RULE 6. PROCEDURE PRIOR TO SUFFICIENT CAUSE**
125 **DETERMINATION**

126 * * *

127 **(d) Sufficient Cause Determination.**

128 (1) The board shall promptly consider the results of the investigation. If the board
129 determines that there is sufficient cause to proceed, it shall either:

130 (i) comply with Rule 7, or where authorized under rule 6Z(c), proceed
131 directly to Rule 8; or

132 (ii) if the judge's conduct was unacceptable under one of the grounds for
133 judicial discipline that does not merit formal proceedings or further
134 discipline by the Supreme Court, issue a public reprimand. Prior to the
135 issuance of a public reprimand pursuant to this Rule 6(d)(1)(ii), the judge
136 shall be served with a copy of the proposed reprimand and a notice setting
137 forth the time within which these rules require the judge to either submit

AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]

173 (b) **Investigation.** Complaints of a judge’s unprofessional conduct occurring
174 prior to the judge assuming judicial office shall be investigated by the Office
175 of Lawyers Professional Responsibility and processed pursuant to the Rules
176 on Lawyers Professional Responsibility. The Board on Judicial Standards
177 may suspend a related inquiry pending the outcome of the investigation and/or
178 proceedings.

179 (c) **Authority of Board on Judicial Standards to Proceed Directly to Public**
180 **Charges.** If probable cause has been determined under Rule 9(j)(ii) of the
181 Rules on Lawyers Professional Responsibility or proceedings before a referee
182 or the Supreme Court have been commenced under those rules, the Board on
183 Judicial Standards may, after finding sufficient cause under Rule 6 of the
184 Rules of the Board on Judicial Standards, proceed directly to the issuance of a
185 formal complaint under Rule 8 of those rules.

186 (d) **Record of Lawyer Discipline Admissible in Judicial Disciplinary**
187 **Proceeding.** If there is a hearing under rule 9 or rule 14 of the Rules on
188 Lawyers Professional Responsibility, the record of the hearing, including the
189 transcript, and the findings and conclusions of the panel, referee, and/or the
190 Court shall be admissible in any hearing convened pursuant to rule 10 of the
191 Rules of the Board on Judicial Standards. Counsel for the judge and the board
192 may be permitted to introduce additional evidence, relevant to alleged
193 violations of the Code of Judicial Conduct, at the hearing under rule 10.

194

195 Advisory Committee Comment—1998 Amendment

196 Rule 6Z outlines the process for handling complaints concerning conduct by a judge
197 before assuming judicial office. Related changes grant the Lawyers Professional Responsibility
198 Board jurisdiction to consider whether such conduct warrants lawyer discipline, while the Board
199 on Judicial Standards retains jurisdiction to consider whether the same conduct warrants judicial
200 discipline. R.Bd.Jud.Std. 2; R.L.Prof.Resp. 6Z(a).

201 The provisions of Rule 6Z(a)-(d) are repeated in R.L.Prof.Resp. 6Z(b)(1)-(4). The
202 committee felt that repetition of the significant procedural provisions was more convenient and
203 appropriate than a cross-reference.

204 Rule 6Z(a) requires the staff of the Lawyers Professional Responsibility Board and the
205 Judicial Standards Board to notify each other about complaints concerning conduct by a judge
206 occurring before the judge assumed judicial office. Notice is not required if ll proceedings

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207 relating to the inquiry, investigation or complaint have been resolved before the judge assumed
208 judicial office.

209 Rule 6Z(a) neither increases nor decreases the authority of the executive secretary or
210 Office of Lawyers Professional Responsibility to investigate or act on any matter. That authority is
211 governed by other rules. Rule 6Z(a) merely establishes a mutual duty to provide notice about
212 complaints or inquiries concerning conduct of a judge occurring before the judge assumed judicial
213 office.

214 Although a fair number of complaints received by the executive secretary and the Office
215 of Professional Responsibility are frivolous, there have been relatively few complaints concerning
216 conduct occurring prior to a judge assuming judicial office. Thus, the committee believes that this
217 procedure will not result in a needless duplication of efforts.

218 Under rule 6Z(b) it is contemplated that complaints about the conduct of a judge
219 occurring prior to the judge assuming judicial office will be investigated in the first instance by the
220 Office of Lawyers Professional Responsibility, and the results would be disclosed to the Board on
221 Judicial Standards. R.Bd.Jud.Std. 5(a)(4); R.L.Prof.Resp. 20(a)(10). This allows for efficient and
222 effective use of investigative resources by both disciplinary boards.

223 Rule 6Z(c) authorizes the Board on Judicial Standards to proceed directly to issuance of a
224 formal complaint under rule 8 when there has been a related public proceeding under the Rules on
225 Lawyers Professional Responsibility involving conduct of a judge that occurred prior to the judge
226 assuming judicial office. In these circumstances the procedure under rule 7 may only serve to
227 delay the disciplinary process.

228 Rule 6Z(c) does not prohibit the Board on Judicial Standards from proceeding to public
229 disciplinary proceedings in cases in which only private discipline (e.g., an admonition) has been
230 imposed under the Rules on Lawyers Professional Responsibility for conduct of a judge occurring
231 prior to the judge assuming judicial office. In these cases, the Board on Judicial Standards would
232 be required to follow Rule 7 (unless, of course, the matter is resolved earlier, for example, by
233 dismissal or public reprimand).

234 Rule 6Z(d) authorizes the use of the hearing record and the findings and
235 recommendations of the lawyer disciplinary process in the judicial disciplinary process. This is
236 intended to streamline the judicial disciplinary hearing when there has already been a formal fact
237 finding hearing in the lawyer disciplinary process, and permits the Court to rule on both
238 disciplinary matters as quickly as possible.

239 Under rule 6Z(d) it is contemplated that the hearing record and the findings and
240 conclusions of the lawyer disciplinary process will be the first evidence introduced in the rule 10
241 judicial disciplinary hearing. Counsel for the board and the judge may be permitted to introduce
242 additional evidence relevant to alleged Code of Judicial Conduct violations at the hearing.
243 Counsel must be aware that there may be situations in which the introduction of additional
244 evidence will not be permitted. See, e.g., *In re Gillard*, 260 N.W.2d 562, 564 (Minn. 1977) (after
245 review of hearing record and findings and conclusions from lawyer disciplinary process, Supreme
246 Court ruled that findings would not be subject to collateral attack in the related judicial
247 disciplinary proceeding and that additional evidence may be introduced only as a result of a
248 stipulation or order of the fact finder); *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978)
249 (upholding removal and disbarment where Board on Judicial Standards as factfinder refused to
250 consider additional testimony but allowed filing of deposition and exhibits and made alternative
251 findings based on those filings). Although the rules do not expressly provide for a pre-hearing
252 conference, it is contemplated that admissibility issues will be resolved by the presider of the fact
253 finding panel sufficiently in advance of the hearing to allow the parties adequate time to prepare
254 for the hearing.

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257 [R.Bd.Jud.Std.] **RULE 7. PROCEDURE WHERE SUFFICIENT CAUSE**
258 **FOUND**

259 (a) **Statement of Charges.**

260 (1) If no reprimand is issued under Rule 6(d)(1)(ii) After a finding of sufficient
261 cause to proceed, the executive secretary shall prepare a Statement of Charges
262 against the judge setting forth the factual allegations and the time within
263 which these rules require the judge to serve a written response. Where more
264 than one act of misconduct is alleged, each shall be clearly set forth.

265 * * *

266 **Advisory Committee Comments—1998 Amendments**

267 The cross reference to Rule 6(d)(1)(ii) recognizes that in certain situations
268 the Board may proceed directly to a proposed reprimand (which is subject to a
269 judge's right to demand a formal hearing before the reprimand is made public) in
270 lieu of formal charges under Rules 7 and 8.

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273 [R.Bd.Jud.Std.] **RULE 11. PROCEDURE FOLLOWING FORMAL HEARING**

274 * * *

275 (d) **Recommended Discipline.** Based on clear and convincing evidence in the hearing
276 record, the board shall make a recommendation to the Supreme Court of any of the
277 following sanctions:

278 (1) Removal;

279 (2) Retirement;

280 (3) Imposing discipline as an attorney;

281 (4) Imposing limitations or conditions on the performance of judicial duties;

282 (5) ~~Reprimand or c~~ensure;

283 (6) Imposing a civil penalty;

284 (7) Suspension with or without pay; or

285 (8) Any combination of the above sanctions.

AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]

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288 Advisory Committee Comment—1998 Amendment

289 Rule 11(d)(5) has been modified by deleting reprimand from the list of sanctions that may
290 be issued after a formal hearing. Under Rule 6(d)(1)(ii), a reprimand may be issued by the board
291 without resort to formal proceedings in situations involving conduct that is unacceptable under one
292 of the grounds for judicial discipline but not so serious as to warrant further discipline, such as a
293 censure, by the Supreme Court.

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298 **[R.L.Prof.Resp.] RULE 6Z. COMPLAINTS INVOLVING JUDGES**

299 (a) **Jurisdiction.** The Lawyers Professional Responsibility Board has jurisdiction
300 to consider whether discipline as a lawyer is warranted in matters involving
301 conduct of any judge occurring prior to the assumption of judicial office and
302 conduct of a part-time judge, including referees of conciliation court, not
303 occurring in a judicial capacity. The Board on Judicial Standards may also
304 exercise jurisdiction to consider whether judicial discipline is warranted in
305 such matters.

306 (a) **Procedure for Conduct Occurring Prior to Assumption of Judicial Office.**

307 (1) **Complaint; Notice.** If either the executive secretary or the Office of
308 Lawyers Professional Responsibility makes an inquiry or investigation, or
309 receives a complaint, concerning the conduct of a judge occurring prior to
310 assumption of judicial office, it shall so notify the other. Notice is not
311 required if all proceedings relating to the inquiry, investigation or
312 complaint have been resolved before the judge assumes judicial office.

313 (2) **Investigation.** Complaints of a judge's unprofessional conduct occurring
314 prior to the judge assuming judicial office shall be investigated by the
315 Office of Lawyers Professional Responsibility and processed pursuant to
316 the Rules on Lawyers Professional Responsibility. The Board on Judicial
317 Standards may suspend a related inquiry pending the outcome of the
318 investigation and/or proceedings.

AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]

319 (3) Authority of Board on Judicial Standards to Proceed Directly to
320 Public Charges. If probable cause has been determined under Rule
321 9(j)(ii) of the Rules on Lawyers Professional Responsibility or
322 proceedings before a referee or the Supreme Court have been commenced
323 under those rules, the Board on Judicial Standards may, after finding
324 sufficient cause under Rule 6 of the Rules of the Board on Judicial
325 Standards, proceed directly to the issuance of a formal complaint under
326 Rule 8 of those rules.

327 (4) Record of Lawyer Discipline Admissible in Judicial Disciplinary
328 Proceeding. If there is a hearing under rule 9 or rule 14 of the Rules on
329 Lawyers Professional Responsibility, the record of the hearing, including
330 the transcript, and the findings and conclusions of the panel, referee,
331 and/or the Court shall be admissible in any hearing convened pursuant to
332 rule 10 of the Rules of the Board on Judicial Standards. Counsel for the
333 judge and the board may be permitted to introduce additional evidence,
334 relevant to violations of the Code of Judicial Conduct, at the hearing under
335 rule 10.

336

337 Advisory Committee Comment—1998 Amendment

338 Rule 6Z outlines the process for handling complaints concerning conduct by a judge
339 before assuming judicial office. Rule 6Z(a) grants the Lawyers Professional Responsibility Board
340 jurisdiction to consider whether such conduct warrants lawyer discipline, while the Board on
341 Judicial Standards retains jurisdiction to consider whether the same conduct warrants judicial
342 discipline. R.Bd.Jud.Std. 2.

343 The procedural provisions of Rule 6Z(b)(1)-(4) are identical to those in R.Bd.Jud.Stds.
344 6Z(a)-(d). The committee felt that repetition of the significant procedural provisions was more
345 convenient and appropriate than a cross-reference.

346 Rule 6Z(b)(1) is identical to R.Bd.Jud.Std. 6Z(a) and requires the staff of the Lawyers
347 Professional Responsibility Board and the Judicial Standards Board to notify each other about
348 complaints concerning conduct by a judge occurring before the judge assumed judicial office.
349 Notice is not required if all proceedings relating to the inquiry, investigation or complaint have
350 been resolved before the judge assumed judicial office.

351 Rule 6Z(b)(1) neither increases nor decreases the authority of the executive secretary or
352 Office of Lawyers Professional Responsibility to investigate or act on any matter. That authority is
353 governed by other rules. Rule 6Z(b)(1) merely establishes a mutual duty to provide notice about
354 complaints or inquiries concerning conduct of a judge occurring before the judge assumed judicial
355 office.

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**AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]**

356 Although a fair number of complaints received by the executive secretary and the Office
357 of Professional Responsibility are frivolous, there have been relatively few complaints concerning
358 conduct occurring prior to a judge assuming judicial office. Thus, the committee believes that this
359 procedure will not result in a needless duplication of efforts.

360 Under rule 6Z(b)(2) and its counterpart R.Bd.Jud.Std. 6Z(b), it is contemplated that
361 complaints about the conduct of a judge occurring prior to the judge assuming judicial office will
362 be investigated in the first instance by the Office of Lawyers Professional Responsibility, and the
363 results would be disclosed to the Board on Judicial Standards. R.Bd.Jud.Std. 5(a)(4);
364 R.L.Prof.Resp. 20(a)(10). This allows for efficient and effective use of investigative resources by
365 both disciplinary boards.

366 Rule 6Z(b)(3) is identical to R.Bd.Jud.Std. 6Z(C) and authorizes the Board on Judicial
367 Standards to proceed directly to issuance of a formal complaint under R.Bd.Jud.Std. 8 when there
368 has been a related public proceeding under the Rules on Lawyers Professional Responsibility
369 involving conduct of a judge that occurred prior to the judge assuming judicial office. In these
370 circumstances the procedure under R.Bd.Jud.Std. 7 may only serve to delay the judicial
371 disciplinary process.

372 Rule 6Z(b)(3) does not prohibit the Board on Judicial Standards from proceeding to
373 public disciplinary proceedings in cases in which only private discipline (e.g., an admonition) has
374 been imposed under the Rules on Lawyers Professional Responsibility for conduct of a judge
375 occurring prior to the judge assuming judicial office. In these cases, the Board on Judicial
376 Standards would be required to follow R.Bd.Jud.Std. 7 (unless, of course, the matter is resolved
377 earlier, for example, by dismissal or public reprimand).

378 Rule 6Z(b)(4) is identical to R.Bd.Jud.Std. 6Z(d) and authorizes the use of the hearing
379 record and the findings and recommendations of the lawyer disciplinary process in the judicial
380 disciplinary process. This is intended to streamline the judicial disciplinary hearing when there has
381 already been a formal fact finding hearing in the lawyer disciplinary process, and permits the Court
382 to rule on both disciplinary matters as quickly as possible.

383 Under rule 6Z(b)(4) it is contemplated that the hearing record and the findings and
384 conclusions of the lawyer disciplinary process will be the first evidence introduced in the judicial
385 disciplinary hearing. Counsel for the board and the judge may be permitted to introduce additional
386 evidence relevant to alleged Code of Judicial Conduct violations at the judicial disciplinary
387 hearing. Counsel must be aware that there may be situations in which the introduction of
388 additional evidence will not be permitted. See, e.g., *In re Gillard*, 260 N.W.2d 562, 564 (Minn.
389 1977) (after review of hearing record and findings and conclusions from lawyer disciplinary
390 process, Supreme Court ruled that findings would not be subject to collateral attack in the related
391 judicial disciplinary proceeding and that additional evidence may be introduced only as a result of
392 a stipulation or order of the fact finder); *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978)
393 (upholding removal and disbarment where Board on Judicial Standards as factfinder refused to
394 consider additional testimony but allowed filing of deposition and exhibits and made alternative
395 findings based on those filings). Although the Rules of the Board on Judicial Standards do not
396 expressly provide for a pre-hearing conference, it is contemplated that admissibility issues will be
397 resolved by the presider of the fact finding panel sufficiently in advance of the hearing to allow the
398 parties adequate time to prepare for the hearing.

401 [R.L.Prof.Resp.] **RULE 20. CONFIDENTIALITY; EXPUNCTION**

402
403 (a) **General rule.** The files, records, and proceedings of the District Committees, the
404 Board, and the Director, as they may relate to or arise out of any complaint or charge

**AMENDMENTS TO RULES OF THE BOARD ON JUDICIAL STANDARDS [R.Bd.Jud.Std.] AND
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY [R.L.Prof.Resp.]**

405 of unprofessional conduct against or investigation of a lawyer, shall be deemed
406 confidential and shall not be disclosed, except:

407 * * *

408 (10) As between the Director and the Board on Judicial Standards or its
409 executive secretary in furtherance of their duties to investigate and consider
410 conduct of a judge that occurred prior to the judge assuming judicial office.

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412 Advisory Committee Comment—1998 Amendment

413 Rule 20 has been modified to permit the exchange of information between the two
414 disciplinary boards and their staff in situations involving conduct of a judge that occurred prior to
415 the judge assuming judicial office. See also R.L.Prof.Resp. 20(a)(10). Both the Board on Judicial
416 Standards and the Lawyers Professional Responsibility Board have jurisdiction in such cases.
417 R.Bd.Jud.Std. 2(b); R.L.Prof.Resp. 6Z.

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