

No. C8-84-1650 & C1-84-2140
STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

SEP 23 1994

FILED

In re:

Amendment of the Rules of
Professional Conduct and
Rules on Lawyers Professional
Responsibility

PETITION OF MINNESOTA STATE BAR ASSOCIATION

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully petitions this Honorable Court to amend the Rules on Lawyers Professional Responsibility to establish two pilot programs to provide for mandatory mediation of minor attorney disciplinary matters and mandatory arbitration of attorney-client disputes. Petitioner also requests an amendment to the Minnesota Rules of Professional Conduct ("Rules") to permit a party who is also an attorney to communicate directly with a represented adverse party in certain circumstances.

In support of this Petition, MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys authorized to practice before this Honorable Court and the other courts of the state.

2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish the standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05 (1992).

3. This Honorable Court has adopted the Rules of Professional Conduct, effective September 1, 1985, as the standard of professional responsibility for lawyers admitted to practice in Minnesota. This Honorable Court has since amended those rules from time to time.

4. This Honorable Court has adopted the Rules on Lawyers Professional Responsibility governing procedures for enforcing and administering the Rules of Professional Conduct and supervising the practice of law in Minnesota. These rules have also been amended from time to time.

Mediation of Minor Disciplinary Complaints

5. In 1993 this Honorable Court appointed an Advisory Committee to Review Lawyer Discipline in Minnesota and to Evaluate the Recommendations of the American Bar Association McKay Report. This Advisory Committee is commonly referred to as the Dolan-Henson Committee after its co-chairs, Minneapolis attorneys Janet Dolan and Robert Henson. The Dolan-Henson Committee issued a report to this Court recommending establishment of a pilot program to mediate appropriate client complaints alleging minor misconduct against their lawyers. Following the issuance of the Dolan-Henson Committee report to this Court, Petitioner MSBA appointed a subcommittee of its Rules of Professional Conduct Committee to study the mediation pilot project proposal ("Mediation Subcommittee"). The Mediation Sub-committee met on several occasions and studied the issues raised by the ABA and Dolan-Henson Committee report. The Mediation Sub-committee thereafter issued its report and recommendations to the MSBA. Those recommendations were considered and debated at the MSBA convention held in Duluth, Minnesota, on June 25, 1994. At that time the House of Delegates and General Assembly of the MSBA voted to approve and recommend to the Court this proposed amendment.

6. The MSBA accordingly respectfully recommends and requests this Court to amend the Rules on Lawyers Professional Responsibility to add a new Rule 6X as follows:

**Rule 6X. PILOT MEDIATION PROGRAM FOR
COMPLAINTS AGAINST LAWYERS IN _____,
AND _____ BAR
ASSOCIATION DISTRICTS**

a) **Scope of the Program.** This rule, rather than Rule 6(b), shall apply from [a date that is six months from the adoption

of this rule] through [three years from the date of commencement] to any complaint against a lawyer whose principal office is located in [list counties].

b) Submission; Referral. If a complaint of a lawyer's alleged unprofessional conduct is submitted to a District Committee, the District Chair shall promptly forward it to the Director. If a complaint is submitted or forwarded to the Director, the Director shall:

1) Refer it to the District Committee of the district where the lawyer's principal office is located or, in exceptional circumstances, to another District Committee that the Director reasonably selects, with a direction that the complaint be investigated;

2) Investigate it without referral;

3) Refer the complaint for mediation to the District Mediation Project Coordinator or directly to a mediator chosen by the Director. When a complaint is mediated pursuant to this rule, the mediator shall, in all cases, be a trained volunteer mediator who shall be on the Neutral Roster maintained by the State Court Administrator's Office;

4) Refer the complaint to the District Committee with a direction that the complaint be mediated, if found to be appropriate after investigation; or

5) Determine that neither discipline nor mediation is warranted.

c) District Committee Investigation. If the Director refers the complaint for investigation, the complaint shall be investigated as provided in Rule 7. If, in the course of the investigation, the investigator concludes that the complaint can be more appropriately dealt with through mediation, the investigator shall promptly consult the Director. If the Director concurs, the

Director may withdraw the complaint from investigation and refer it for mediation.

d) Mediation. The mediator shall arrange the mediation sessions and shall report at the conclusion of the mediation. The mediator shall conduct the mediation in accordance with generally accepted principles of mediation and in accordance with policies established from time to time by the Director.

1) If the mediator decides that the best interests of the parties or of the public would not be well-served by the mediation, the mediator may terminate the mediation at any time.

2) If a resolution is reached, the mediator shall prepare a written agreement of resolution. The mediator shall report to the District Mediation Project Coordinator or the Director that an agreement has been reached. If either party fails to appear for the mediation session or if no agreement is reached, the mediator shall so report; in that case, the Director shall determine whether to investigate further.

3) The mediation shall be completed within 45 days of the assignment of the mediator. The Director may, upon request of the mediator, extend the time for good cause.

4) A lawyer shall participate in good faith in a mediation held pursuant to these rules; failure to do so is separate grounds for discipline.

5) The mediator may not be called to testify in any proceeding about anything that happened or was said in the mediation. Lawyers who serve as mediators under these rules are not bound by the mandatory reporting rules of Minnesota Rules of Professional Conduct 8.3 to report information learned during the course of the mediation. The mediator may not reveal nor can the mediator be

compelled to disclose the mediator's notes or other material that the mediator has prepared, or any document or other material presented or shown to the mediator by one party in the absence of the other party during the course of the mediation. A communication or document otherwise not privileged does not, however, become privileged because of this rule.

Nothing in this rule prevents the parties from revealing or testifying about communications made during the mediation.

6) The parties may not agree, as part of a resolution through mediation, that the complaining party will waive or settle any claim for legal malpractice.

7) If the complaint is resolved through mediation, the Director shall determine that discipline is not warranted and, after the applicable time period, expunge the records of the matter under Rule 20(d). If additional allegations of the lawyer's misconduct come to the Director's attention before the expunction, the Director may reopen the file and investigate the complaint.

e) Report on the Pilot Program. No later than [two years after the effective date of the pilot program] the Director shall report to the Court on the operation of the pilot program and shall make recommendations.

7. Petitioner believes the foregoing numbering of this rule is appropriate to reflect the experimental nature of this rule and its limited geographic application during the three-year experimentation period.

8. Petitioner is prepared to support and participate in the administration of this pilot program, and has begun to, and will continue to, help make arrangements for participation of interested district bar associations.

Mandatory Arbitration of Fee Disputes

9. An additional recommendation of the Mediation Sub-committee is that the Court establish a pilot project for arbitration of attorney-client disputes with the requirement that this requirement be made mandatory for lawyers. This portion of the Mediation Sub-committee Report was also considered and approved at the MSBA convention in Duluth, and this Petition was authorized with respect to the following rule change.

10. The MSBA accordingly respectfully recommends and requests this Court to amend the Rules on Lawyers Professional Responsibility to add a new Rule 6Y as follows:

**Rule 6Y. PILOT MANDATORY ARBITRATION PROGRAM
FOR ATTORNEY-CLIENT FEE DISPUTES INVOLVING
LAWYERS IN _____, _____ AND
_____ BAR ASSOCIATION DISTRICTS**

a) **Scope of the Program.** This rule shall apply from [a date that is six months from the adoption of this rule] through [two years from the date of commencement] to any fee dispute between a client and a lawyer whose principal office is located in [list counties].

b) **District Fee Arbitration.** If a complaint involves a fee dispute subject to this rule, the Director shall advise the complainant and the respondent of the availability of fee arbitration and may refer the fee dispute to a participating district fee arbitration committee in the district where the lawyer maintains an office. Upon receipt of a referral from the Director or upon the request of a client or a lawyer located in that district the district fee arbitration committee shall contact the client and determine if the client consents to arbitration of the dispute. If the client consents to arbitration of a fee dispute involving a lawyer who maintains an office in the district, the dispute shall be heard by the participating district fee arbitration committee and its results shall be binding. If the amount of the fee claims by the lawyer is greater than the jurisdictional limit of the conciliation courts under Minnesota Statutes Chapter 491A, then the lawyer may decline to arbitrate by notifying the committee in writing. Each district fee

arbitration committee shall adopt rules of procedure to implement this rule.

c) **Report on the Pilot Program.** No later than [15 months after the effective date of the pilot program] the Director shall report to the Court on the operation of the pilot program and shall make recommendations.

11. Petitioner believes the foregoing numbering of this rule is appropriate to reflect the experimental nature of this rule and its limited geographic application during the three-year experimentation period.

12. Petitioner is prepared to support and participate in the administration of this pilot program, and has begun to, and will continue to, help make arrangements for participation of interested district bar associations.

**Ex Parte Communications of
Lawyers Who Are Also Parties**

13. During 1993 and 1994 the MSBA also considered a proposal to amend Rule 4.2 of the Rules of Professional Conduct. This examination arose from a disciplinary proceeding against an attorney who was also a party in a family court matter who had direct settlement discussions with that attorney/party's spouse notwithstanding the fact the spouse was represented by counsel. This Court vacated the private admonition against the attorney litigant, finding that the application of Rule 4.2's prohibition against communication with a represented party was unclear as it applied to the circumstance of the attorney who is also a party to the proceeding. The proposed amendment clarifies Rule 4.2 as with respect to this circumstance.

14. This recommended amendment of Rule 4.2 was considered by the House of Delegates and General Assembly of the MSBA at its annual convention in Duluth on June 25, 1994, and was approved at that time.

15. The MSBA accordingly respectfully recommends and requests this Court to amend Rule 4.2 of the Rules of Professional Conduct as follows:

**RULE 4.2 COMMUNICATION WITH PERSON
REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. ~~A party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the lawyer for the other party, or unless the other party manifests a desire to communicate only through counsel.~~

WHEREFORE, Petitioner MSBA respectfully petitions this Court to:

1. Amend the Minnesota Rules on Lawyers Professional Responsibility to adopt a new Rule 6X as set forth in paragraph 6 above.
2. Amend the Minnesota Rules on Lawyers Professional Responsibility adopt a new Rule 6Y as set forth in paragraph 10 above.
3. Amend Rule 4.2 of the Minnesota Rules of Professional Conduct as set forth in paragraph 15 above.

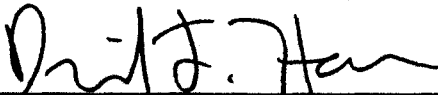
Dated: September 19, 1994.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By Michael J. Galvin, Jr.
Michael J. Galvin, Jr.
Its President

MASLON EDELMAN BORMAN & BRAND
A Professional Limited Liability Partnership

By 
David F. Herr (#44441)

3300 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 672-8350

ATTORNEYS FOR PETITIONER

ADVISORY COMMITTEE

**PROPOSED MODEL AMENDMENTS TO
MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY**

RULE 6. COMPLAINTS

.....
[NEW:]

(d) Opportunity to respond to statements. The District Committee or the Director's Office shall afford the complainant an opportunity to reply to the lawyer's response to the complaint.

RULE 7. DISTRICT COMMITTEE INVESTIGATION

.....
(d) Disposition.

(1) Determination Discipline Not Warranted. If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted, the Director shall so notify the lawyer involved, the complainant, and the Chair of the District Committee, if any, that has considered the complaint. The notification shall:

- (i) ~~May~~ Set forth ~~an~~ a brief explanation of the Director's conclusion;**
- (ii) ~~Shall~~ Set forth the complainant's identity and the complaint's**

substance; and

- (iii) ~~Shall~~ Inform the complainant of the right to appeal under subdivision**

(e).

.....
(e) Review by Lawyers Board. If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal and assign the matter by rotation to a board member, other than an Executive Committee member, appointed by the Chair. The reviewing Board member may:

- (1) approve the Director's disposition; or**
- (2) direct that further investigation be undertaken; or**
- (3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or**
- (4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.**

The reviewing Board member shall set forth an explanation of the Board member's action.

A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed

to a Board member for review under this section.

RULE 9. PANEL PROCEEDINGS

.....
(i) Procedure at Panel Hearing. Unless the Panel for cause otherwise permits, the Panel hearing shall proceed as follows:

- (1) The Chair shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on each charge, and that the Panel will terminate the hearing on any charge whenever it is satisfied that there is or is not such probable cause (or, if an admonition has been issued under Rule 8(d)(2) or 8(e), that the hearing's purpose is to determine whether the panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court);
- (2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which the Director proposes to offer thereon;
- (3) The lawyer may respond to the Director's remarks;
- (4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;
- (5) The parties may present oral arguments; ~~and~~
- (6) The complainant may be present for all parts of the hearing related to the complainant's complaint except when excluded for good cause; and
- (7) The Panel shall either recess to deliberate or take the matter under advisement.

RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS

(a) Petition for Temporary Suspension. In any case where the Director files or has filed a petition under Rule 12, if it appears that a continuation of the lawyer's authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm ~~may result in risk of injury~~ to the public, the Director may file with this Court an original and seven copies of a petition for suspension of the lawyer pending final determination of the disciplinary proceeding. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

.....
(d) Hearing; Disposition. If this Court after hearing finds a continuation of the lawyer's authority to practice law poses a substantial threat of serious harm ~~may result in risk of injury~~ to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.
.....

RULE 20. CONFIDENTIALITY; EXPUNCTION

(a) **General Rule.** The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except:

- (1) As between the Committees, Board and Director in furtherance of their duties;
- (2) ~~In~~ After probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules;
- (3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;
- (4) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected.

(5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege that portions may be deleted.

(6) Where permitted by this Court; or

(7) Where required or permitted by these Rules.

(8) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties.

(9) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer.

(b) **Special Matters.** The following may be disclosed by the Director:

(1) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(2) With the affected lawyers' consent, the fact that the Director has determined that discipline is not warranted;

~~(2)~~ (3) The fact that the Director has issued an admonition;

~~(3)~~ (4) The Panel's disposition under these Rules;

~~(4)~~ (5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e).

~~(5)~~ (6) Information to other members of the lawyer's firm necessary for protection of the firm's clients or appropriate for exercise of responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

Notwithstanding any other provision of this Rule the records of matters in which it has been

determined that discipline is not warranted shall not be disclosed to any person, office or agency except to the lawyer and as between Committees, Board, Director, Referee or this Court in furtherance of their duties under these Rules.

(c) Records after Determination of Probable Cause of Commencement of Referee or Court Proceedings. Except as ordered by the referee or this Court and except for work product, after probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director relating to the matter are not confidential.

(e) (d) Referee or Court Proceedings. Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under these Rules are not confidential.

(d) (e) Expunction of Records. The Director shall expunge records relating to dismissed complaints as follows:

(1) **Destruction Schedule.** All records or other evidence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) **Retention of Records.** Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.