

STATE OF MINNESOTA

IN SUPREME COURT

File No. A-8
(Old File 46994)

In re Petition for Amendments
to Minnesota Rules on Lawyers
Professional Responsibility

O R D E R

WHEREAS, the Lawyers Professional Responsibility Board has petitioned the Supreme Court to adopt, effective immediately, the following amendments to the Minnesota Rules on Lawyers Professional Responsibility as follows:

1. Amending Rule 2 of said Rules to read as follows:

RULE 2. PURPOSE

It is of primary importance to the public and to the members of the Bar that ~~complaints~~ cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of and that disability or disciplinary proceedings be ~~brought~~ commenced in those cases where investigation discloses ~~it is~~ they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

2. Amending subsections (a), (d), and (f) of Rule 4 of said Rules to read as follows:

RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

(a) **Composition.** The Board shall consist of:

(1) A Chairman appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chairman; and

(2) Effective not later than February 17 1981, Twelve lawyers having their principal office in this state, six of whom the Minnesota State Bar Association may nominate, and eight non-lawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms shall be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any additional shorter term for which he was originally appointed and any period served as Chairman.

(3) Unless any lawyer members nominated by the Minnesota State Bar Association shall leave the Board for any reason or decline reappointment to the Board, the number of lawyer members nominated by the Minnesota State Bar Association shall be as follows within the periods indicated:

Period	Total Number	Association Nominees
From the date hereof through January 31, 1979	15	9
February 1, 1979 through January 31, 1981	14	8

(d) Panels. The Chairman shall divide the Board into ~~four~~ Panels, each consisting of not less than three lawyer Board members and ~~two non-lawyer members, at least one of whom is a non-lawyer,~~ and shall designate a Chairman and a Vice-Chairman for each Panel. The Board's Chairman or the Vice-Chairman, if any, is a Panel member at any Panel proceeding he attends. Four Three Panel members, at least one of whom is a nonlawyer and at least one of whom is a lawyer, shall constitute a quorum. If a quorum cannot be obtained the Board's Chairman or, if he is unavailable, the Vice-Chairman may assign other Board members for the particular matter. A Panel may refer any matters before it to the full Board.

(f) Approval of petitions. Except as provided in these Rules or ordered by this Court,

no petition for disciplinary action shall be filed with this Court without the approval of a Panel or the Board.

3. Amending subsection (b) of Rule 5 of said Rules to read as follows:

RULE 5. DIRECTOR

(b) **Duties.** The Director shall be responsible and accountable to this Court and, unless this Court otherwise directs, to the Board, for the proper administration of these Rules. The Director shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system and shall make such other reports to this Court as it may order.

4. Amending subsection (a) of Rule 6 of said Rules to read as follows:

RULE 6. COMPLAINTS

(a) **Investigation.** All complaints of lawyers' alleged unprofessional conduct or allegations of disability shall be investigated pursuant to these Rules.

5. Amending Rule 7 of said Rules by modifying subsections (a) and (b) to read as follows and by transferring what is now Rule 8(a) to Rule 7, designating it as subsection (e) and modifying it to read as follows:

RULE 7. DISTRICT COMMITTEE INVESTIGATION

(a) **Assignment; assistance.** The District Chairman may investigate or assign investigation of the complaint to any one or more of the Committee's members, and may request the Director's assistance in making the investigation. The District Chairman may request some or all Committee members to consider the matter. The investigation may be conducted by means of written

and telephonic communication and personal inter-views.

(b) **Report.** The District Chairman or his designee shall report the results of the investigation to the Director. The report shall may include a recommendation that the Director:

- (1) Determine that discipline is not warranted;
- (2) Issue a private warning, an admonition;
- (3) Refer the matter to a Panel, either with or without a recommendation as to the matter's ultimate disposition; or
- (4) Investigate the matter further.

~~{Rule 8}(a)~~ [Rule 7](e) **Notice to complainant.** The Director shall keep the complainant advised of the progress of the proceedings, and shall appropriately notify him of each stage of the proceedings, including:

~~(1) Receipt of the complaint by a District Committee or the Director;~~

~~(2) Notification of reasons for delay under Rule 7(e);~~

~~(3) Removal of a complaint under Rule 7(d),~~
and

~~(4) Receipt of a report under Rule 7(b);~~

6. Amending Rule 8 of said Rules to read as follows:

**RULE 8. NOTICE TO COMPLAINANT,
INVESTIGATION, DISPOSITION**

DIRECTOR'S INVESTIGATION

~~(b)~~ (a) **Initiating investigation.** At any time, with or without a complaint or a District Committee's report, the Director may make such investigation as he deems appropriate as to the conduct of any lawyers or law firms.

(b) Investigatory subpoena. With the Board Chairman or Vice-Chairman's approval upon the

Director's application showing that it is necessary to do this before issuance of charges under Rule 9(a), the Director may subpoena and take the testimony of any person believed to possess information concerning possible unprofessional conduct of a lawyer. The examination shall be recorded by such means as the Director designates. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the examination.

(c) **Disposition**

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

(i) May set forth an explanation of the Director's conclusion;

(ii) The notification to the lawyer shall set forth the complainant's identity and the complaint's substance; and

(iii) Shall inform the complainant of his right to appeal under subdivision (d).

(2) **Warning Admonition.** ~~If~~ In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature, he may issue an admonition. does not warrant discipline but warrants a warning, he The Director shall notify the lawyer of the warning and that in writing:

(i) Of the admonition;

(ii) That the admonition warning is in lieu of the Director's presenting charges of unprofessional conduct to a Panel;

~~(ii)~~ (iii) That the lawyer may within a specified reasonable time, by notifying the Director in writing within fourteen days, demand that the Director so present the charges to a Panel which may affirm or reverse the admonition or instruct the Director to file a Petition for Disciplinary Action in this Court; and

~~(iii)~~ (iv) That unless the lawyer so demands the Director after that time will notify the complainant, if any, the Chairman of the District Committee, if any, that has considered the complaint, that the Director has issued the warning admonition.

If the lawyer makes no demand under clause (iii), the Director shall notify as provided in clause (iv). The notification to the complaint, if any, shall inform him of his right to appeal under subdivision (d).

(3) Stipulated probation. In any matter, with or without complaint, if the Director concludes that a lawyer's conduct was unprofessional and the Board Chairman or Vice-Chairman approves, the Director and the lawyer may agree that the proceedings will be held in abeyance for a specified period up to two years and thereafter terminated, provided the lawyer throughout the period complies with specified reasonable conditions. At any time during the period, with the Board Chairman or Vice-Chairman's approval, the parties may agree to modify the agreement or to one extension of it for a specified period up to two additional years. The Director shall notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, of the agreement and any modification. The notification to the complainant, if any, shall inform him of his right to appeal under subdivision (d). The Director may reinstitute the underlying proceedings if the lawyer consents or a Panel determines that the lawyer has violated the conditions.

~~(3)~~ (4) Submission to Panel. The Director shall submit the matter to a Panel under Rule 9 if:

(i) In any matter, with or without a complaint, the Director concludes that public discipline is warranted; or if

(ii) The lawyer makes a demand under Rule 8~~(e)(2)(ii)~~, subdivision (c)(2)(iii);

(iii) The lawyer consents or a Panel determines that the lawyer has violated conditions under subdivision (c)(3); or

(iv) A panel chairman so directs upon appeal under subdivision (d).

the Director shall submit the matter to a Panel under Rule 9.

(d) Complainant's appeal. If the complainant is not satisfied with the Director's disposition under Rule 8(c)(1), (2) or (3), he 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 to a Panel chairman by rotation. The Panel chairman may approve the Director's disposition or direct that the matter be submitted to a Panel other than his own.

7. Amending Rule 9 of said Rules to read as follows:

RULE 9. PANEL PROCEEDINGS

(a) Charges; setting pre-hearing meeting. If the matter is to be submitted to a Panel, the Director shall prepare charges of unprofessional conduct, set a time and place for hearing by a Panel of the charges assign them to a Panel by rotation, schedule a pre-hearing meeting, and notify the lawyer of:

(1) The charges; and hearing and of the lawyers right to be heard at the hearing

(2) The name, address, and telephone number of the Panel chairman and vice-chairman;

(3) The time and place of the pre-hearing meeting; and

(4) The lawyer's obligation to appear at the time set unless the meeting is reschedule by agreement of the parties or by order of the Panel chairman or vice-chairman. The Director shall also notify the complainant, if any, of the hearing's time and place.

(b) Subpoenas. At the instance of the Director or the lawyer, attendance of witnesses and production of documentary or tangible evidence shall be compelled as provided in Rule 45, Rules of Civil Procedure. The District Court of the District where the hearing will be held shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege.

(e) (b) Admission of charges. The Director shall, if possible, contact the lawyer to determine whether he desires to admit any charges. The lawyer may, if he so desires:

(1) Admit some or all charges; or

(2) Tender an admission of some or all charges conditioned upon a stated disposition. If the lawyer makes such an admission or tender, the Director may proceed under Rule 10(b).

(c) Request for admission. Either party may serve upon the other a request for admission. The request shall be made before the pre-hearing meeting or within ten days thereafter. The Rules of Civil Procedure for the District Court applicable to requests for admissions, govern except that the time for answers or objections is ten days and the Panel chairman or vice-chairman shall rule upon any objections. If a party fails to admit, the Panel may award expenses as permit-

ted by the Rules of Civil Procedure for the District Courts.

(d) Conditional stay. The Panel may, if the Director and the lawyer agree, consent to hold the proceedings in abeyance for a specified period and thereafter discontinue them, provided the lawyer throughout the period complies with specified reasonable conditions.

(d) Deposition. Either party may take a deposition as provided by the Rules of Civil Procedure for the District Courts. A deposition under this Rule may be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by initials in any District Court proceeding.

(e) Pre-hearing meeting. The Director and the lawyer shall attend a pre-hearing meeting. At the meeting:

(1) The parties shall endeavor to formulate stipulations of fact and to narrow and simplify the issues in order to expedite the Panel hearing;

(2) Each party shall mark and provide the other party a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the panel may award expenses of proof as permitted by the Rules of Procedure for the District Courts. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the Panel's permission; and

(3) The parties shall prepare a pre-hearing statement.

(f) Setting Panel hearing. Promptly after the pre-hearing meeting, the Director shall

schedule a hearing by the Panel on charges and notify the lawyer of:

(1) The time and place of the hearing;

(2) The lawyer's right to be heard at the hearing; and

(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman. The Director shall also notify the complainant, if any, of the hearing's time and place. The Director shall send each Panel member a copy of the charges, of any stipulations, of the pre-hearing statement, and, unless the parties agree or the Panel chairman or vice-chairman orders to the contrary, of all documentary exhibits marked at the pre-hearing meeting.

(g) Form of evidence at Panel hearing. The Panel shall receive evidence only in the form of affidavits, depositions or the documents except for testimony by:

(1) The lawyer;

(2) A complainant who affirmatively desires to attend; and

(3) A witness whose testimony the Panel chairman or vice-chairman authorized for good cause. If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by initials in any district court proceeding.

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

(1) The Chairman shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on any charge, and that the Panel will terminate the hearing whenever it is satisfied that there is or is not such probable cause (or, if the Director has issued an admonition under Rule 8(c)(2), 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 he 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 Panel shall either recess to deliberate or take the matter under advisement.

(e) (i) Disposition. After the hearing, the Panel shall either:

(1) Determine that discipline is not warranted there is not probable cause to believe that public discipline is warranted (or, if the

Director has issued an admonition under Rule 8(c)(2), affirm or reverse the admonition); or

~~(2)~~ Instruct the Director to give a warning,

~~(3)~~ Make a finding of unprofessional conduct and issue a reprimand, or

(4) (2) If it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action, either with or without The Panel shall not make a recommendation as to the matter's ultimate disposition.

~~(f)~~ (j) Notification. The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has considered the complaint, of the Panel's action under subdivision ~~(d)~~ or ~~(e)~~ disposition. If the Panel did not determine that there was probable cause to believe that discipline is warranted, the notification to the complainant, if any, shall inform him of his right to petition for review under subdivision (k).

(k) Complainant's petition for review. If the complainant is not satisfied with the Panel's disposition, he may within 14 days file with the clerk of the Supreme Court a petition for review. The clerk shall notify the respondent and the Board Chairman of the petition. The respondent shall be denominated by initials in the proceeding. This Court will grant the review only if the petition shows that the Panel acted arbitrarily, capriciously, or unreasonably. If the Court grants review, it may order such proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may dismiss the petition or, if it finds that the Panel acted arbitrarily, capriciously, or unreasonably, remand the matter to the same or a different Panel, direct the filing of a petition for disciplinary action, or take any other action as the interest of justice may require.

(1) Manner of recording. Proceedings at a Panel hearing or deposition may be recorded by sound recording or audio-video recording if the notification thereof so specifies. A party may nevertheless arrange for stenographic recording at his own expense.

(m) Panel chairman authority. Requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel chairman or vice-chairman. For good cause shown, the Panel chairman or vice-chairman may shorten or enlarge time periods for discovery under this Rule.

8. Amending Rule 10 of said Rules to read as follows:

RULE 10. PROCEDURE UPON ADMISSION OF CHARGES

DISPENSING WITH PANEL PROCEEDINGS

(a) Agreement of parties. The parties by written agreement may dispense with some or all procedures under Rule 9 before the Director files a petition under Rule 12.

(b) Admission or tender of conditional admission. If the Panel so instructs a lawyer admits some or all charges, or tenders an admission of some or all charges conditioned upon a stated disposition, the Director may dispense with some or all procedures under Rule 9 and shall file a petition for disciplinary action together with the lawyer's admission of charges or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rule 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter may be remanded to the same or a different Panel for proceedings under Rule 9.

(c) Criminal conviction. If a lawyer is convicted of a felony under Minnesota statute, a crime punishable by incarceration for more than one year under the laws of any other jurisdiction, or any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, misrepresentation,

fraud, wilfull extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit such a crime, the Director may either submit the matter to a Panel or directly file a petition under Rule 12.

(d) Additional charges. If a petition under Rule 12 is pending before this Court, the Director need not present the matter to a Panel before amending the petition to include additional charges based upon conduct committed before or after the petition was filed.

(e) Discontinuing Panel proceedings. The Director may discontinue Panel proceedings for the matter to be disposed of under Rule 8(c)(1), (2) or (3).

9. Amending subsection (a) of Rule 12 of said Rules to read as follows:

RULE 12. PETITION FOR DISCIPLINARY ACTION

(a) Petition. When so directed by a Panel or by this Court or when authorized under Rule 10, the Director shall file with this Court a petition for disciplinary action. The petition shall set forth the unprofessional conduct charged.

10. Amending subsection (a) of Rule 15 of said Rules to read as follows:

RULE 15. DISPOSITION: PROTECTION OF CLIENTS

(a) Disposition. Upon conclusion of the proceedings, this Court may:

- (1) Disbar the lawyer;
- (2) Suspend him ~~indefinitely~~ or for a stated period ~~of time~~ up to three years;

[Clauses (3) - (6) unchanged]

11. Amending subsection (a) of Rule 16 of said Rules to read as follows:

RULE 16. TEMPORARY SUSPENSION
PENDING DISCIPLINARY PROCEEDINGS

(a) Petition for temporary suspension.
Whenever 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 may result in risk of injury to the public, the Director on direction of a Panel, shall may file with this Court 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 the a Panel, court records, documents or affidavits.

12. Amending Rule 17 of said Rules to read as follows:

RULE 17. FELONY CONVICTION

~~(a) Non-final conviction. Whenever a lawyer is convicted, other than upon his plea of guilty or nolo contendere, of a felony under Minnesota statute or of a crime under the laws of the United States, any state or territory thereof, or any foreign country, punishable by incarceration for more than one year, the Director shall investigate and determine whether a continuation of the lawyer's authority to practice law pending final determination of disciplinary proceedings may result in risk of injury to the public. If he determines in the affirmative, he shall proceed under Rule 16. If he determines in the negative, he shall so notify the Board.~~

~~(b) Final conviction. Whenever a lawyer is convicted, upon his plea of guilty or nolo contendere or upon a judgment not subject to direct appellate review, of an offense specified in Rule 17(a), the Director shall investigate and submit the matter to a Panel under Rule 9. If appropriate, he shall also proceed under Rule 16.~~

(a) Clerk of court duty. Whenever a lawyer is convicted of a felony, the clerk of district court shall send the Director a certified copy of the judgment of conviction.

~~(e)~~ (b) **Other cases.** Nothing in these Rules precludes disciplinary proceedings, where appropriate, in cases of conviction of an offense not punishable by incarceration for more than one year or in case of unprofessional conduct for which there has been no criminal conviction or for which a criminal conviction is subject to appellate review.

13. Amending subsections (a), (b), (d) and (e) of Rule 19 of said Rules to read as follows:

RULE 19. EFFECT OF PREVIOUS PROCEEDINGS

(a) **Criminal conviction.** A lawyer's criminal conviction in any American jurisdiction, even if upon a plea of nolo contendere or subject to appellate review, is, in proceedings upon these Rules, conclusive evidence that he committed the conduct for which he was convicted. The same is true of a conviction in a foreign country if the facts and circumstances surrounding the conviction indicate that the lawyer was accorded fundamental fairness and due process.

(b) **Disciplinary Proceedings.**

[Clause (1) unchanged]

(2) **Previous finding.** A finding by a ~~Panel or equivalent~~ or by a ~~Court~~ in the previous disciplinary proceedings that a lawyer committed conduct warranting reprimand, probation, suspension, disbarment, or equivalent is, in proceedings under these Rules, prima facie evidence that he committed the conduct.

(3) **Previous discipline.** Subject to Rule 404(b), Rules of Evidence, the fact that the lawyer received a warning directed by a Panel or equivalent reprimand, probation, suspension, disbarment, or equivalent in the previous

disciplinary proceedings is admissible in evidence in proceedings under these Rules.

(d) Panel proceedings. Subject to the Rules of Civil Procedure for District Courts and the Rules of Evidence, evidence obtained through a request for admission, deposition, or hearing under Rule 9 is admissible in proceedings before the referee or this Court.

(e) Admission. Subject to the Rules of Evidence, a lawyer's admission of unprofessional conduct is admissible in evidence in proceedings under these Rules.

14. Amending subsection (a) of Rule 21 of said Rules to read as follows:

RULE 21. PRIVILEGE: IMMUNITY

(a) **Privilege.** A complaint or charge, or statement relating to a complaint or charge, of a lawyer's alleged unprofessional conduct, to the extent that it is made in proceedings under these Rules, ~~including proceedings under Rule 6(e)~~, or to the Director or a person employed thereby or to a District Committee, the Board or this Court, or any member thereof, is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the complaint, charge, or statement.

15. By adding a new Rule 28 to said Rules as follows:

RULE 28. DISABILITY STATUS

(a) Transfer to disability inactive status. A lawyer whose physical condition, mental illness, mental deficiency, senility, or habitual and excessive use of intoxicating liquors, narcotics, or other drugs prevents him from competently representing clients shall be transferred to disability inactive status.

(b) Immediate transfer. This Court shall immediately transfer a lawyer to disability inactive status upon proof that:

(1) The lawyer has been found in a judicial proceeding to be a mentally ill, mentally deficient, or inebriate person; or

(2) The lawyer has alleged during a disciplinary proceeding that he is incapable of assisting in his defense due to mental incapacity.

(c) Transfer following hearing. In cases other than immediate transfer to disability inactive status, this Court may transfer a lawyer to or from disability inactive status following a proceeding initiated by the Director and conducted in the same manner as a disciplinary proceeding under these Rules. In such proceedings:

(1) If the lawyer does not retain counsel, counsel shall be appointed to represent him; and

(2) Upon petition of the Director and for good cause shown, the referee may order the lawyer to submit to a medical examination by an expert appointed by the referee.

(d) Reinstatement. This Court may reinstate a lawyer to active status upon a showing that the lawyer is fit to resume the practice of law. The parties shall proceed as provided in Rule 18. The lawyer's petition for reinstatement:

(1) Shall be deemed a waiver of the doctor-patient privilege regarding the incapacity; and

(2) Shall set forth the name and address of each physician, psychologist, psychiatrist, hospital or other institution that examined or treated the lawyer since his transfer to disability inactive status.

(e) Asserting disability in disciplinary proceeding. A lawyer's asserting disability in defense or mitigation in a disciplinary proceeding shall be deemed a waiver of the doctor-patient

privilege. The referee may order an examination or evaluation by such person or institution as the referee designates.

WHEREAS, the Supreme Court wishes to hold a public hearing on this petition,

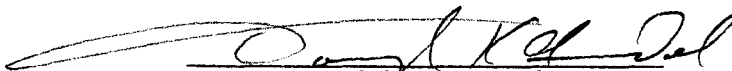
NOW, THEREFORE, IT IS HEREBY ORDERED that a hearing on this petition be held in the Supreme Court Chambers in the State Capitol, Saint Paul, Minnesota, at 2 p.m. on Friday, May 7, 1982.

IT IS FURTHER ORDERED that advance notice of the hearing be given by the publication of this order once in the Supreme Court edition of FINANCE AND COMMERCE, ST. PAUL LEGAL LEDGER and BENCH AND BAR.

IT IS FURTHER ORDERED that interested persons show cause, if any they have, why the proposed petition should not be granted. All persons desiring to be heard shall file briefs or petitions setting forth their objections, and shall also notify the Clerk of the Supreme Court, in writing, on or before April 30, 1982, of their desire to be heard on the matter. Ten copies of each brief, petition, or letter should be supplied to the Clerk.

DATED: March 19, 1982.

BY THE COURT


Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

FILE NO. A-8
(Old File 46994)

In Re Petition for Amendments to
Minnesota Rules on Lawyers
Professional Responsibility.

BRIEF OF DIRECTOR
OF LAWYERS PROFESSIONAL
RESPONSIBILITY IN SUPPORT
OF PETITION

INTRODUCTION

Pursuant to the court's March 19, 1982 order, this constitutes the Director's brief in support of the Lawyers Professional Responsibility Board petition for amendments to the Rules on Lawyers Professional Responsibility.

Several Additional Minor Amendments Are Now Also Proposed

Attached hereto as an Appendix are several additional amendments which appear desirable after further study of the Board's petition. They are as follows:

1. An additional amendment to Rule 4(a)(2) would increase total Board membership to 21 by adding an additional public member. If the Board is to be divided into panels of three, membership of 21 would yield seven full panels. This amendment is proposed after an April 20, 1982 conference involving Justice Otis, Board Chairman Robert Henson, Board member Herbert Lefler, and the undersigned.

2. A rewritten Rule 4(d) would allow the chairman or vice-chairman to designate former Board members and current or former district ethics committee members as hearing panel members for a particular matter. A minor housekeeping amendment to Rule 4(b) is also needed. These amendments have been considered and approved by the Board executive committee.
3. An additional amendment to Rule 21(b) would extend immunity to the substitute panel members authorized by the proposed amendment to Rule 4(d). This amendment has also been approved by the Board executive committee.

The Director believes that the foregoing amendments to the petition are non-controversial and respectfully requests that the court consider them as part of the May 7, 1982 hearing.

The Genesis of the Proposed Rules Amendments

The Rules on Lawyers Professional Responsibility are, of course, the procedural rules which govern disciplinary investigations and proceedings. Since the creation of the Lawyers Professional Responsibility Board in February, 1971, the rules have undergone several major revisions. The last occurred in 1977. In addition, periodic orders have promulgated less sweeping changes.

For at least two years the Board has become increasingly aware that the rules which functioned satisfactorily in the past need major revisions if the Board is to deal with the large volume of

disciplinary proceedings. In 1981, three events spurred the latest petition:

1. In early 1981, former Board Chairman Gerald Magnuson appointed a three-member committee consisting of Board members Kelton Gage, Herbert Lefler, Sr., and Jared How to study panel procedures. The committee met with the Director, respondents' counsel, and others interested in the disciplinary system. Former Board member, Kenneth Kirwin, was hired as a consultant to assist in drafting the proposed amendments. Several Board meetings during 1981 were almost totally consumed with discussion of the proposed amendments. While it is fair to say that the debate concerning many proposals was lively, it is also important to emphasize that the proposed amendments reflect a consensus of the Board and the Director concerning the changes which must be made if the disciplinary system is to function adequately in the next few years.
2. From the Director's perspective, the volume of disciplinary matters and outmoded procedures created a near crisis. The Director filed with this court a report on May 11, 1981, hereinafter referred to as Director's Report.
3. During the 1981 crisis and review, we were fortunate to be visited by an evaluation team sent by the American Bar Association Standing Committee on Professional Discipline. The team spent three days meeting with the court, the Director, Board members, and others in the bar. The

comprehensive study of the disciplinary system resulted in a June, 1981 report, hereinafter referred to as ABA Report, containing over 40 individual recommendations for improvements in the Minnesota disciplinary system. Many of the proposed rules changes are responsive to the recommendations made in the ABA Report.

Overview of the Proposed Amendments

The major changes contemplated by the petition are as follows:

1. Long overdue disability procedures would be created, thereby eliminating the necessity of seemingly harsh disciplinary measures to deal with lawyers whose real problem is incapacity rather than misconduct.
2. Panel proceedings would become true probable cause proceedings.
3. In certain circumstances, panel proceedings would be eliminated completely.
4. Complainants dissatisfied with the Director's disposition or with a panel's disposition would have appeal rights.

A rule-by-rule analysis follows:

Rule 2

This is a simple housekeeping amendment clarifying that the purpose of the system is to investigate cases of disability as well as those of unprofessional conduct.

Rule 4

Several changes are involved here:

1. As explained above, the Board membership would be increased to 21 by adding an additional public member. Since one of the other proposed changes to Rule 4 allows the chairman to divide the Board into hearing panels consisting of not less than three Board members, the addition of another Board member would make the total Board membership evenly divisible by three. The quorum for any individual panel hearing would be reduced from the current four to three. See Standards for Lawyer Discipline and Disability Proceedings, American Bar Association Joint Committee on Professional Discipline, 1979, hereinafter ABA Standards, Standard 3.6; Recommendation 12.6, ABA Report at 23; Director's Report at 14.
2. Each panel would have a chairman and a vice-chairman whose functions are further described in subsequent rules, especially Rule 9.
3. The Director would, in certain cases, be permitted to file a petition without the approval of a panel. These would include cases where the respondent so consented and cases where the respondent is convicted of a felony.

Rule 5

The duties of the Director would include the submission of an annual report to the court covering the operation of the lawyer discipline and disability system. See Recommendation 33.2, ABA Report at 43-44.

Rule 6

This is a mere housekeeping change again providing that allegations of disability should be investigated pursuant to the rules.

Rule 7

Several amendments are involved here:

1. The investigation to be conducted by the district committees is to be limited to written and telephonic communication and personal interviews. The purpose of the proposal is to eliminate any hearing at the district committee level since the rules provide for ample hearings at other stages. See Recommendation 12.5, ABA Report at 22-23.
2. Housekeeping changes are proposed to make recommendations by the committee consistent with the new disciplinary options which would be available under Rule 8.
3. Requirements that the Director notify the complainant of various specific developments in the case are eliminated and replaced with the general admonition that the Director should keep the complainant advised of the progress of the proceedings. The proposed amendment is designed to lessen administrative burdens on the Director's office.

Rule 8

Many changes in this rule are proposed:

1. Rule 8(b) would, for the first time, provide the Director with an investigatory subpoena to compel testimony and production

of documents prior to the issuance of charges. Such subpoena could be issued only with the approval of the Board chairman or vice-chairman. See Recommendation 17, ABA Report at 28-29.

2. What is now known as a warning would become an admonition. If the lawyer accepted the written admonition, the case would be closed. If the lawyer demanded a hearing, the Director would then present charges to a panel pursuant to Rule 9. The panel could affirm or reverse the admonition or instruct the filing of a petition for disciplinary action. See ABA Standard 6.10 which provides that admonitions are to be imposed by counsel. If the respondent refuses to accept an admonition, it is to be vacated and the matter is to be disposed of by formal charges wherein the hearing panel would have the full panoply of dispositions. See also Recommendation 13, ABA Report at 24-25; ABA Standards 8.17 and 8.18.
3. The Director and the respondent would be permitted to agree to private probation provided that the agreement is approved by the Board chairman or vice-chairman. This disposition is contemplated only before a public petition is filed in the supreme court. Probationary dispositions after the filing of a petition in the supreme court would continue to require court approval. This proposed amendment is consistent with ABA Standards 8.10 and 8.19.
4. If the complainant is dissatisfied with the Director's disposition of a case involving either dismissal, an

admonition, or stipulated probation, the complainant could appeal the matter to a panel chairman who could approve the Director's disposition or direct that the matter be submitted to a panel. Since the elimination of the right of review by the Attorney General, there is no appeal from a Director's disposition. While the Board and the ABA Report at 26 supported the elimination of Attorney General review, the result leaves the complainant with no recourse if the Director is underzealous in investigation and disposition. Review by a panel chairman is the method recommended by the ABA. See ABA Standard 8.15 and Recommendation 14.1, ABA Report at 26.

Rule 9

Panel proceedings would be completely revised as follows:

1. Much emphasis would be placed upon pre-panel procedures for discovery including requests for admission, depositions, and pre-hearing meetings, as outlined in proposed Rules 9(c), (d), and (e). See ABA Standard 8.6; Recommendation 17, ABA Report at 28-29.
2. Panel proceedings themselves would become pure probable cause proceedings (except in the rare cases of appeals from Director admonitions). As much evidence as possible would be received in documentary form or by affidavit or deposition. Live testimony would be restricted to the respondent, a complainant who affirmatively desires to attend, or any other witness whose testimony is authorized by the panel chairman or

vice-chairman for good cause. See ABA Standard 8.11;
Recommendation 12.2, ABA Report at 21.

3. Consistent with the panel's role as a probable cause body, its dispositions would be limited severely. The current power to make a finding of professional misconduct and issue a reprimand would be eliminated. The power to recommend final dispositions of public petitions would also be repealed. The panel's options (except in the rare cases of appeals from admonitions) would be limited to determining that probable cause does or does not exist for the initiation of a public disciplinary proceeding in the supreme court. The Board has recommended this curtailment of its functions for several reasons:

- (A) The power of final disposition is inconsistent with the probable cause function. This inconsistency has led to severe expansion of panel proceedings so that every hearing becomes a full due process hearing. In those cases where petitions are directed, the panel hearing is then completely duplicated before a referee. The system can no longer afford the luxury of multiple hearings involving the same parties, the same issues, the same evidence and the same witnesses. The ABA's recommendations in this area were most strenuous. See ABA Report at 19-25.

- (B) The probable cause function is also inconsistent with the power to make a recommendation concerning the final disposition. Such a recommendation should be made only after all of the evidence is heard. If, however, there is to be a full due process hearing before the referee, it is wasteful of panel time to conduct that full hearing merely to obtain a recommendation of a panel concerning final disposition. See Recommendation 12.4, ABA Report at 22.
- (C) The effect of this change would make any reprimand a public reprimand. This is consistent with the ABA Standards which provide that reprimands should be published. ABA Standard 6.9. The Board cannot act both as a probable cause body and retain the power of final disposition. Accordingly, in our system where the Board is a probable cause body, reprimands should be issued only by the court and they should be public. Id.
4. The complainant dissatisfied with a panel disposition could, within 14 days, file with the clerk a petition for review by the supreme court. While such review should be available, it should be granted sparingly. ABA Standard 8.16; Recommendation 14.2, ABA Report at 26.
 5. Records of panel hearings could be made by sound recording instead of by court reporter.
 6. Disputes under the rules before panel hearings commence would be resolved by the panel chairman or vice-chairman.

Rule 10

Since panel proceedings would become pure probable cause proceedings, Rule 10 would, for the first time, permit the filing of petitions under circumstances where there are adequate substitutes for a panel determination of probable cause:

- (1) Where the respondent and the Director agreed, a case could be submitted directly to the court. ABA Standards 11.1 and 11.2; Recommendation 23, ABA Report at 34-35; Director's Report at 14.
- (2) Panel hearings would no longer be necessary prior to the filing of a petition for misconduct involving felony convictions or other specified convictions. ABA Standard 9; Recommendation 22.1, ABA Report at 32-34; Director's Report at 14.
- (3) Once a petition has been, it could be amended or supplemented without the necessity of another panel hearing. Director's Report at 14.

Rule 12

This is a mere housekeeping change to reflect the proposed amendment to Rule 10 which would permit the filing of a petition under certain circumstances without a probable cause hearing.

Rule 15

This rule involves final dispositions and would make clear that suspensions should not be indefinite but should be for stated periods up to three years. This change has been proposed by the

Board in response to the discussion in the ABA Report at 36 as follows:

Rule 15(a)(3) does not require that an order of suspension specify the minimum period of time which must elapse before a lawyer may seek reinstatement. We learned that the court frequently imposes indefinite suspensions, which do not distinguish between acts of misconduct of differing severity. Lawyer Standard 6.3 notes that the duration of the suspension should reflect the nature and extent of the lawyer's misconduct and any mitigating or aggravating circumstances involved.

25. Recommendation: The team recommends that Rule 15 be amended to provide that suspension be imposed for a specified period of time in accordance with Lawyer Standard 6.3.

Rule 16

In order to further streamline panel proceedings, Rule 16 would provide that any time a petition for disciplinary action is authorized, the Director may file a petition for immediate suspension from practice if it appears that continuation of the lawyer's authority to practice pending final discipline may result in risk of injury to the public. This would, for example, permit the filing of a petition for interim suspension based upon conviction of a crime. See Recommendation 22.1, ABA Report at 32-34.

Rule 17

Clerks of court would have the duty to inform the Director of felony convictions involving lawyers. ABA Standard 9.1; Recommendation 22.2, ABA Report 32-34.

Rule 19

Rule 19(a) would, in effect, incorporate the holding of In re Scallen, 269 N.W.2d 834 (Minn. 1978). The remainder of the rule deals with several other minor evidentiary matters.

Rule 21

The amendment to Rule 21(a) is a minor housekeeping amendment eliminating outdated language. As proposed above, the appendix contains an additional amendment to Rule 21(b) extending immunity to substitute panel members.

Rule 28

This rule would create disability proceedings. Disabled lawyers who endanger the interests of clients could be subject to such proceedings even if no misconduct had occurred. Similarly, lawyers who are subject to disciplinary proceedings but who claim disability would be immediately placed on disability status and not permitted to practice law. These procedures are consistent with ABA Standard 12. See also Recommendation 21, ABA Report at 31-32. The undersigned strongly supports the initiation of disability proceedings as a compassionate alternative to harsh disciplinary proceedings where there is either no misconduct or relatively minor misconduct but a very real threat to the public because of the lawyer's incapacity.

CONCLUSION

The proposed rules are hardly perfect and will undoubtedly need future amendment. To some extent, however, this is a trial-and-error system, and we must remain flexible to changing times and

developments. The proposed amendments find their roots in the daily and current experience of the Director and the Board, in the scholarly recommendations of the ABA Standards, and in the expert opinions of the evaluation team. In probability, everyone can find something with which to disagree. We believe the total package is worthy of promulgation. Given the diversity of interests and opinions, it has not been easy to arrive at a consensus among the Board and between the Board members and the Director concerning the proposed rules amendments. The Director believes, however, that the process of studying and proposing these amendments has benefited all within the disciplinary system and strongly urges the court to issue an order adopting the proposed amendments for immediate implementation.

Respectfully submitted,


Michael J. Hoover
Director

APPENDIX

The original petition seeks amendments of subsections a, d and f of Rule 4. In order to increase Board membership to twenty-one by adding an additional public member, Rule 4(a)(2) should be further amended by changing "eight" in the first sentence of Rule 4(a)(2) to "nine" so that the first sentence of Rule 4(a)(2) in its entirety reads as follows:

(2) Twelve lawyers having their principal office in this state, six of whom the Minnesota State Bar Association may nominate, and nine nonlawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms shall be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1.

The remainder of the amendments sought in the original petition concerning 4(a)(2) should also be adopted.

The original petition did not seek to amend Rule 4(b). However, if district ethics committee members and others are permitted to serve as panel members, they should be entitled to the same compensation for expenses as are Board members. Therefore, we suggest that Rule 4(b) be amended to read as follows:

(b) **Compensation.** The Chairman, other Board members, and other panel members shall serve without compensation, but shall be paid their reasonable and necessary expenses incurred in the performance of their duties.

To expand panel resources to include district ethics committee members, the following Rule 4(d) should be substituted in lieu of that contained in the petition:

(d) **Panels.** The Chairman shall divide the Board into ~~four~~ Panels, each consisting of not less than three ~~lawyer~~ Board members and ~~two nonlawyer~~ members at least one of whom is a nonlawyer, and shall designate a Chairman and a Vice-Chairman for each Panel. The Board's Chairman or the Vice-Chairman, if any, is a Panel member at any Panel proceeding he attends. ~~Four~~ Three Panel members, at least one of whom is a nonlawyer and at least one of whom is a lawyer, shall constitute a quorum. If a quorum cannot be obtained The Board's Chairman or, if he is unavailable, the Vice-Chairman may assign ~~other~~ designate substitute Panel members from current or former Board members or current or former District Committee members for the particular matter, provided, that any panel with other than current Board

members must include at least one current lawyer Board member. A Panel may refer any matters before it to the full Board.

In order to extend immunity a further amendment to Rule 21(b) is proposed so that Rule 21(b) would provide as follows:

(b) **Immunity.** Board members, other panel members, District Committee members, the Director, and his staff, shall be immune from suit for any conduct in the course of their official duties.

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4



CROW WING COUNTY

Brainerd, Minnesota 56401

In Reply Reference No. M118

April 14, 1982

John McCarthy
Clerk of Supreme Court
State Capitol
St. Paul, MN 55155

~~A-9~~ A-8

Re: Proposed Amendments to the Rules of Lawyers Professional
Responsibility

Dear Mr. McCarthy:

On May 7, 1982, the full court will consider proposed amendments to the Rules of Lawyers Professional Responsibility. I am a member of the Lawyers Board. Although many of the changes in the Rules have merit, there is one particular change that I do not believe is well advised. I am writing this letter to you and would ask that it be distributed amongst the members of the court for their consideration.

My departure from the board's report concerns the proposed changes to Rule 9. Rule 9 governs the procedure whereby the director submits a matter to a panel of the board for its consideration. After a hearing, the panel must take one of four courses of action:

1. Determine that discipline is not warranted and dismiss the Petition;
2. Instruct the director to give a warning;
3. Make a finding of unprofessional conduct and issue a reprimand;
4. Instruct the director to file with the Supreme Court a Petition for disciplinary action either with or without a recommendation.

The proposed Rules essentially merge a "warning" and a "private reprimand" to form a new sanction called an "admonition". Although



John McCarthy
April 14, 1982
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I'm sure that the present terms are more descriptive, I have no particular difficulty in the renaming of these forms of discipline.

Under the proposed amendment, the panel will have the option of either:

1. Determining that discipline is not warranted and dismissing the Petition; or
2. Instructing the director to file in the Supreme Court a Petition for disciplinary action without any recommendation.

The amendment to Rule 9(e) makes two significant changes. First, the panel cannot determine misconduct on the part of the attorney and admonish the attorney. Second, the panel is precluded from making any recommendation that determines that discipline is warranted. I believe that both these changes are ill advised.

Without giving the matter a great deal of thought, I can think of at least four disadvantages to the new rule:

1. The panel may feel that an attorney has acted improperly but also feel that the matter does not warrant public discipline. The panel may be so reluctant to make the matter public that it would consider a dismissal even though a dismissal would otherwise not be appropriate.
2. An attorney who has committed a relatively minor breach loses a substantial amount of protection from an over zealous director. Where in the past the panel may simply have issued a warning or directed a private reprimand, under the proposed rules the matter must go to the Supreme Court and be a public matter.
3. When such matters are not screened out by the panel, the work load for the Supreme Court will increase. The Supreme Court will have the additional burden of cases of minor unprofessional conduct which would have resulted in the panel's issuance of a warning or a private reprimand.
4. The staff of the director's office is also faced with additional work since matters that go to the Supreme Court require a substantial amount of effort.

In addition, I do not see the wisdom of depriving the panel of the opportunity to make a recommendation to the Supreme Court. The director is not bound by the recommendations. Nevertheless, I would think that the director and the staff of the board would

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welcome the input of the experienced attorneys and lay persons on the board with respect to the ultimate disposition. I would think that this input would also be of assistance to the Supreme Court and to any referee that the court might appoint.

Thank you for permitting me the opportunity of presenting these views to the court.

Sincerely,



Stephen C. Rathke

SCR/cn

cc: Michael Hoover
Robert Hensen

*4-20 -- Copy distributed to
each Justice*