

STATE OF MINNESOTA
IN SUPREME COURT

A-8

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

ORDER

IT IS HEREBY ORDERED that a hearing be had before this court in the courtroom of the Minnesota Supreme Court on Tuesday, July 24, 1984, at 9:30 a.m. to consider proposed amendments to Rule 24, Minnesota Rules on Lawyers Professional Responsibility. A copy of such proposed amendments is attached hereto.

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 all citizens, including members of the bench and bar, desiring to be heard shall file briefs or petitions setting forth their positions and shall notify the Clerk of Appellate Courts in writing on or before July 16, 1984 of their desire to be heard on the proposed rules. Ten copies of each brief, petition or letter should be supplied to the Clerk.

DATED: April 17, 1984.

BY THE COURT

OFFICE OF
APPELLATE COURTS
FILED

APR 17 1984

WAYNE TSCHIMPERLE
CLERK



Douglas K. Amdahl, Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

A-8

In re Petition to Amend Rule 24,
Minnesota Rules on Lawyers
Professional Responsibility

PETITION

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Lawyers Professional Responsibility Board (Board) and the Director of Lawyers Professional Responsibility (Director) hereby petition the court to amend Rule 24, Minnesota Rules on Lawyers Professional Responsibility (RLPR), to read as follows:

RULE 24. COSTS, AND DISBURSEMENTS, EXPENSES AND LEGAL FEES

(a) Costs. Unless this Court orders otherwise or specifies a higher amount, the prevailing party in any disciplinary proceeding decided by this Court shall recover costs in the amount of \$500 \$1,000.

(b) Disbursements. Unless otherwise ordered by this Court, orders otherwise, the prevailing party in any disciplinary proceeding decided by this Court shall recover, in addition to the costs specified in subdivision (a), all disbursements necessarily incurred after the filing of a petition for disciplinary action,

~~under Rule 12. Recoverable disbursements in proceedings before a referee or this Court shall include including~~ those normally assessed in appellate proceedings in this Court together with those which are normally recoverable by the prevailing party in civil actions in the district courts.

(c) Director's Expenses. In cases where this Court imposes discipline, this Court may also require the respondent to pay all or part of the other expenses reasonably incurred by the Director in the investigation and proceeding, including but not limited to reimbursement for the service of process, certified copies of records in any public office, reproduction costs, brief printing, postage, telephoning, adverse examinations, depositions and copies, court reporter fees, expert witness fees, witness fees and expenses, and compensation and reasonable expenses of experts and investigators employed on a contractual basis.

(d) Director's legal fees. In cases where this Court imposes discipline, this Court may also require respondent to reimburse the Director for all or part of the time spent by the

Director and his staff in investigating and presenting the matter.

~~(e)~~ (e) Time and manner for taxation of costs and disbursements. The procedures and times governing the taxation of costs and disbursements and for making objection to same and for appealing from the clerk's taxation shall be as set forth in the Rules of Civil Appellate Procedure.

~~(d)~~ (f) Judgment for costs, and disbursements, expenses and legal fees. Costs, and disbursements, expenses and legal fees taxed under this Rule shall be inserted in the judgment of this Court in any disciplinary proceeding wherein suspension or disbarment is ordered. No suspended attorney shall be permitted to resume practice and no disbarred attorney may file a petition for reinstatement if the amount of the costs, and disbursements, expenses, and legal fees taxed under this Rule has not been fully paid, unless this Court orders otherwise.

In cases where respondent is disciplined but not suspended or
disbarred, respondent's right to continue the practice of law
shall be conditioned upon payment of assessed costs, disbursements,
expenses and legal fees within a reasonable time period as fixed
by this Court, unless this Court orders otherwise.

Petitioners request that this amendment apply to all cases wherein a referee hearing is held after the date of the court's order amending Rule 24, RLPR, and that it apply to all costs, disbursements, expenses and legal fees incurred in said cases whether incurred before or after the amendment.

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

Dated: Feb 9, 1984 By Robert F. Henson
Robert F. Henson, Chairman
Attorney No. 44271

The Director of Lawyers Professional Responsibility hereby joins in the above petition.

Dated: 2-3-84 Michael J. Hoover
Michael J. Hoover
Director of Lawyers Professional
Responsibility
Attorney No. 47053
444 Lafayette Road - 4th Floor
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STATE OF MINNESOTA
IN SUPREME COURT

In re Petition to Amend Rule 24,
Minnesota Rules on Lawyers
Professional Responsibility

DIRECTOR'S
MEMORANDUM

This memorandum is submitted by the Director of Lawyers Professional Responsibility in support of the accompanying petition to amend Rule 24, Minnesota Rules on Lawyers Responsibility (RLPR).

This memorandum addresses the question whether the taxation permitted under proposed Amended Rule 24, RLPR, constitutes a "fine" so as to require a "jury." The rationale behind proposed Rule 24, RLPR, supports the position that such taxation is not a fine and is therefore permissible without a "jury" hearing.

The purpose of a disciplinary proceeding is not to punish an attorney, but to guard the administration of justice and to protect courts, the legal profession, and the public. See In re Hanson, 258 Minn. 231, 103 N.W.2d 863 (1960). Another authority summed up this rationale as follows:

A "disciplinary proceeding" against an attorney is not the trial of an action or a suit between adverse parties, but an inquiry or investigation by the court into the conduct of one of its own officers to determine his fitness to continue as a member of the legal profession.

In re Rerat, 224 Minn. 124, 28 N.W.2d 168 (1947).

As such, the taxation imposed under Rule 24, RLPR, was clearly not intended to be punishment in the form of a fine. The taxation permitted under Rule 24 is merely a reimbursement for

costs, disbursements, expenses and legal fees. This conclusion is clear in light of the civil nature of a disciplinary proceeding as well as the nature of costs themselves.

The weight of case law authority holds that costs are not considered to be penalties. One such authority stated:

"Costs" are not a penalty imposed on the losing party for his misconduct but are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court.

Harmon v. Pac. Tel. & Tel. Co., 201 Cal. App. 2d 453, 20 Cal. Rptr. 118 (1962). See also Golub v. Golub, 336 So.2d 693 (Fla. App. 1976), Harvey v. Lewis, 10 Mich. App. 23, 158 N.W.2d 809 (1968), and Hayman v. Morris, 37 N.Y.S.2d 884 (1942).

Since costs are not penalties, it follows that costs are not fines. In drawing this distinction, one court declared:

A fine is a sum of money exacted, as a pecuniary punishment, from a person guilty of an offense, while costs are but statutory allowances to a party for his expenses incurred in an action. The former is, in its nature at least, a penalty, while the latter approaches more nearly a civil debt.

Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1936). Clearly, then, costs are not fines. LaRue v. Burns, 268 N.W.2d 639 (Iowa, 1978).

Closely paralleling this rationale, the weight of authorities have concluded that costs are a part of the burden of litigation and, as such, no litigant is deprived of a constitutional right by statutes which impose such costs. Harmon v. Pac. Tel. & Tel. Co., 201 Cal. App.2d 453, 20 Cal. Rptr. 118 (1962), Harvey v. Lewis, 10 Mich. App. 23, 158 N.W.2d 809 (1968), and Hayman v. Morris, 37 N.Y.S.2d 884 (1942).

Specifically, a leading authority stated:

Costs are statutory allowances recoverable by the successful party as an incident to the main adjudication. They are neither part of the damages claimed, nor a penalty and need not be specifically pleaded or claimed.

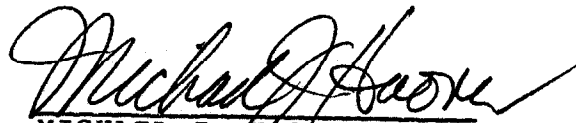
Golub v. Golub, 336 So.2d 693 (Fla. App. 1976). Therefore, the taxation of costs does not require a "jury" to afford the unsuccessful party an opportunity to be heard.

Conclusion

Since a judgment in a disciplinary proceeding is not intended as punishment or a penalty, the taxation imposed under Rule 24, RLPR, is not a fine and thus, no jury is required. The taxation is permissible as a reimbursement for costs, disbursements, expenses and legal fees.

Dated: March 30, 1984.

Respectfully submitted,



MICHAEL J. HOOVER
DIRECTOR OF LAWYERS PROFESSIONAL
RESPONSIBILITY
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444 Lafayette Road, 4th Floor
St. Paul, Minnesota 55101
(612) 296-3952

RULE 24

<u>TRANS #</u>	<u>REQUESTS ARGUMENT</u>
31	John E. Daubney
33	George L. May
34	Michael J. Hoover

CHIEF JUSTICE AMDAHL

A-8

R-1-24

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PETITION TO AMEND
RULE 24, MINNESOTA RULES
ON LAWYERS PROFESSIONAL
RESPONSIBILITY

MEMORANDUM IN OPPOSITION TO
PROPOSED AMENDMENTS

This memorandum is submitted in opposition to the petition of the Lawyers Professional Responsibility Board and the Director of Lawyers Professional Responsibility to amend Rule 24 of the Minnesota Rules on Lawyers Professional Responsibility, which petition appeared in the April 20, 1984, edition of Finance and Commerce.

The thrust of the proposed amendments is directed at increasing taxable costs by 100% in disciplinary proceedings, broadening the scope of recoverable disbursements in these proceedings up to and through the appellate level, creating two new areas of revenue generation for the Director of Lawyers Professional Responsibility called "Director's Expenses" and "Director's Legal Fees", and finally requiring payment of all of these cost items should the Director prevail in disciplinary proceedings leading to disbarment or suspension. A lawyer who is not suspended or disbarred, but is simply disciplined, is also

required to pay all of these items unless this Court orders otherwise.

For the reasons discussed below, the signatories to this memorandum believe that the proposed amendments are unnecessary and represent an extreme and unwarranted set of financial sanctions which neither the public nor the lawyers of Minnesota deserve to have imposed.

1. FINANCIAL NECESSITY FOR THE PROPOSED AMENDMENTS IS QUESTIONABLE.

The Minnesota State Bar Association at its recent meeting in June recommended that lawyer's license fees be increased in the amount of \$16.00 per active practicing lawyer for the sole purpose of funding the office of the Director of Professional Responsibility. The proposed amendments would provide yet still another increase in funding for the Director which would ostensibly be rendered unnecessary by the recently recommended increase in license fees being placed into effect.

As this Court is well aware, each lawyer who is admitted to the bar in Minnesota pays a sizable license fee annually. With the new increase the fee for an active lawyer will be \$82.00. Approximately \$50.00 of this fee will go to fund the Director and the operations of his office. If the proposed amendments are adopted, the very real possibility of over-

funding or duplicative revenue raising by the Director exists. The Director has not addressed this issue in the Petition or in his accompanying memorandum.

2. THE PROPOSED COSTS, DIRECTOR'S EXPENSES AND DIRECTOR'S LEGAL FEES ARE HARSH, UNPRECEDENTED AND VIOLATIVE OF DUE PROCESS.

Under the proposed rules a prevailing party in a disciplinary proceeding can tax costs in the amount of \$1,000.00, a 100% increase over the current amount. Civil litigants in Minnesota who prevail can only tax statutory costs of \$10.00. A genuine question exists as to whether the "costs" in Rule 24 are really penalties in light of this extraordinary difference.

In addition, many attorneys who go through a disciplinary proceeding and lose can ill afford the prospect of having to pay such a substantial charge. The amount of the proposed costs is harsh and constitutes an unnecessary further aggravation to the disciplined lawyer.

In the instance where the lawyer who the Board and Director are seeking to discipline prevails, the proposed rule allows him to tax costs in the amount of \$1,000.00. The reality of this situation is that these taxed costs come from all of the lawyers in the State. The Director in this situation has no genuine exposure for errors in judgment or

other mistakes that may have led him to improvidently bring a disciplinary action against an attorney who has not violated the Code of Professional Responsibility.

In the end it is the lawyers of Minnesota who are faced with having to fund the very high costs and disbursements which would be taxed by a prevailing lawyer under Proposed Rules 24(a) and (b).

The Director's Expenses and Director's Legal Fees are new items which the proposed Rules 24(c) and (d) provide can be recovered by the Director in the event discipline is imposed by this Court. There is no precedent in Minnesota's administrative law or other related law for the imposition of these types of expenses against a losing party. The recovery of attorney's fees is generally authorized only when there is a specific contract permitting it or a statute authorizing such recovery. That is not the situation here.

Furthermore, awarding investigation costs and legal fees, in addition to any other type of sanction such as disbarment, suspension or reprimand, goes far beyond any rational or remedial considerations in disciplinary situations. Generally, attorneys under charges involving disciplinary violations are required to hire counsel to represent them, to conduct an investigation of the facts, and to prepare a defense or defenses

to the allegations brought by the Director. As the Court can well understand, this is an expensive process for a lawyer against whom discipline is being sought. To make that lawyer pay the Director's investigation costs and legal fees which were involved in leading to that attorney's discipline, simply because the lawyer exercised his right to defend himself, is plainly too harsh and may very well constitute a denial of due process of law. In addition, the threat that the Director could recover his expenses and legal fees if a matter were litigated could lead many accused lawyers, already faced with the high costs of defense, to forego their right to defend themselves. The result would be to wring admissions and other concessions from them unjustly through plain and simple coercion.

CONCLUSION

The signatories to this memorandum believe that disbarment, suspension or reprimand are adequate and sufficient sanctions for disciplinary proceedings. Further imposition of financial burdens such as investigatory costs and the Director's legal fees, we feel, are totally unwarranted.

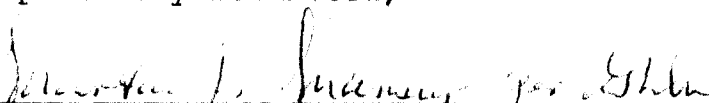
We believe that the enactment of these proposed Rules would invite coercive practices. A threat of the extrac-

tion of costs of investigation and attorney's fees from a lawyer who is being threatened with disciplinary action is a weapon which can be used to discourage the lawyer's exercise of his right to a fair hearing and consideration of any charges of unethical conduct.

Furthermore, the awarding of these high costs, disbursements, attorney's fees, and costs of investigation as proposed, may be singularly discriminatory against attorneys. We have no knowledge of any other group of professionals or laymen who are faced with such onerous consequences as a result of an unfavorable outcome in litigation.

Dated: July 18, 1984.

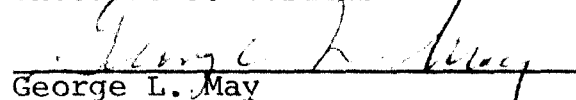
Respectfully Submitted,



Martin J. Mansur, Judge of the
District Court, First Judicial
District



Theodore J. Collins



George L. May