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REPORT OF THE
SUPREME COURT ADVISORY COMMITTEE
ON LAWYER DISCIPLINE

APRIL 15, 1985

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April 17, 1985

Honorable Douglas K. Amdahl
Chief Justice
Supreme Court of Minnesota
230 State Capitol
St. Paul, Minnesota 55155

Dear Chief Justice Amdahl:

On behalf of the members of the Committee, I am pleased to forward to you the final report of the Supreme Court Advisory Committee on Lawyer Discipline.

In the seven months of its work, the Committee has involved a broad spectrum of individuals representing the bar, the public and the various entities within the Minnesota lawyer discipline system. Their participation has been invaluable in the formulation of our recommendations. The Committee also wishes to give its special thanks for the outstanding efforts of Sue K. Dosal, State Court Administrator, and Judith L. Rehak, Supreme Court Administrative Services Director.

While the findings and recommendations contained in this report represent the final conclusion of the Committee, the revisions to the Rules on Lawyers Professional Responsibility contained in the appendix are considered to be draft proposals.

Review of these proposals by the Director, the Board and other interested members of the bar and public would greatly aid the Committee's work. If the Court concurs, we would propose that this report be distributed widely with the indication that comments concerning the rules be directed to me, on behalf of the Committee, by July 15, 1985. This should provide sufficient time for response following the annual convention of the Minnesota State Bar Association. The Committee would propose to refine the draft revisions to the rules based on responses received and submit its final recommendations for Rules revision to the Court by the fall of this year.

The Committee appreciates having had this opportunity to assist the Supreme Court in its administration of the Minnesota lawyer discipline system. At your direction, the Committee stands ready to continue its work on the rules.

Respectfully submitted,

Nancy C. Dreher
Chairperson, Supreme Court Advisory Committee on Lawyer Discipline

NCD:jal
Encl.
cc: Committee Members
Sue K. Dosal
Judith L. Rehak

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SUPREME COURT ADVISORY COMMITTEE
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COMMITTEE MEMBERSHIP

CHAIR	NANCY C. DREHER
MEMBERS	WILLIAM J. BAUDLER
	JAMES R. BETTENBURG
	HOWARD M. GUTHMANN
	TERRY HOFFMAN
	DAVID P. MURRIN
	ARTHUR NAFTALIN
	RICHARD L. PEMBERTON
	EUGENE M. WARLICH

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I. INTRODUCTION

A. Appointment of the Committee

The Minnesota lawyer discipline system has grown and changed in its fourteen years of existence. The system has evolved from a decentralized structure in its early years to a highly centralized organization today. The Director's Office has increased from a staff of two handling a relatively few number of cases per year to a staff of 19 processing over 1,000 cases annually.

In recent years, the discipline system has been the subject of increasing criticism from the bar. The perceived deficiencies most frequently cited are the increased cost and delay in processing complaints, the centralization of the disciplinary structure, an excessively adversarial posture of the Director's Office, and the inappropriate treatment of the "innocent" lawyer.

These concerns have resulted in a reluctance by the bar to support recent requests for higher attorney registration fees to fund increased costs of the system. The Minnesota State Bar Association opposed a 64 percent increase request in 1982. In 1984, it supported a further 30 percent increase in attorney registration fees, but petitioned the Supreme Court to appoint an oversight committee to evaluate the lawyer discipline system.

Note: In all instances throughout this report, the use of the masculine form of the word is intended to be gender-neutral.

On September 21, 1984, the Supreme Court named a nine member advisory committee (Committee) to:

> "...study the lawyer discipline process, procedures and operations of the Minnesota Lawyers Professional Responsibility Board, to report to the Court and the Bar and, if changes are deemed needed, to recommend such changes for the consideration of the Court."

The Committee consisted of four lawyer and two non-lawyer members nominated by the Minnesota State Bar Association, and two lawyer members and one non-lawyer member selected by the Supreme Court (Court). Members of the Committee include:

William J. Baudler, Attorney at Law, Austin, Minnesota.

James R. Bettenburg, Attorney at Law, St. Paul, Minnesota.

Nancy C. Dreher, Attorney at Law, Minneapolis, Minnesota.

Howard M. Guthmann, Certified Public Accountant, St. Paul, Minnesota.

Terry Hoffman, Minnesota Public Utilities Commission, St. Paul, Minnesota.

David P. Murrin, Attorney at Law, Minneapolis, Minnesota.

Arthur Naftalin, Hubert H. Humphrey Center for Public Affairs, Minneapolis, Minnesota

Richard L. Pemberton, Attorney at Law, Fergus Falls, Minnesota.

Eugene M. Warlich, Attorney at Law, St. Paul, Minnesota.

The Committee is grateful for the generous cooperation and support it has received from many individuals and groups. Our task would not have been possible without the assistance of the staff of the State Court Administrator's office and the financial aid of the Minnesota State Bar Association. We also are appreciative of the willingness

of members of the bar, the Board and the Court to discuss candidly their concerns about the discipline system and to explore with the Committee possible solutions. Finally, the Committee is particularly grateful to the Director and his staff for their invaluable assistance throughout this study including the prompt and complete responses to the Committee's requests for information and the full cooperation received during the Committee's review of the operations of the Director's Office.

The Committee has attempted to evaluate thoroughly the Minnesota lawyer discipline system and to make constructive suggestions for its improvement. Generally, the Committee has restricted its findings to those areas where improvements can be made and has excluded discussion of operations that are functioning effectively. Nevertheless, the Committee recognizes that the Minnesota lawyer discipline system has earned a national reputation for strong enforcement and that it has always been in the forefront of needed change. The current Director received national recognition amongst his peers for his outstanding contributions to the lawyer discipline field by being selected as President of the National Organization of Bar Counsel. In recent years, several rules changes relating to the expunction of records and expanded respondent appeal rights have been adopted to increase the fairness in the discipline system. Concern for the disability aspects of many disciplinary matters has led to creative dispositions that have salvaged many careers. Structural and administrative modifications have been implemented to streamline the system and make it more efficient. The Court, the Board, the district ethics committees and the discipline staff are

to be commended for their dedication to effective disciplinary enforcement, for their efforts in processing a caseload which has increased substantially over the past fourteen years, and for their willingness to propose and to make refinements which have enhanced and strengthened the discipline system.

B. The Work of the Committee

The Committee met nineteen times during the course of its work, which began on October 20, 1984 and concluded on April 15, 1985. The initial meetings focused on the formulation of the Committee's mission. Five issues were identified for Committee review: 1) the adequacy of resources and their appropriate utilization, 2) the allocation of authority/accountability among disciplinary agencies, 3) the involvement of the profession in the system, 4) uniformity in administration within the system, and 5) the identification of a guiding philosophy.

Eight meetings were spent in fact-finding regarding the organization and operation of the discipline system. The perceptions of a broad based group of judges, lawyers and citizens were solicited concerning existing problems and possible solutions. Individuals appearing before the Committee as resource guests included:

Douglas K. Amdahl	Chief Justice, Minnesota Supreme Court
R. Walter Bachman	President, Hennepin County Bar Association and Former Director of Professional Responsibility
David S. Doty	President, Minnesota State Bar

	Association
Michael F. Fetsch	Chairman, Ramsey County District Ethics Committee
Robert F. Henson	Chairman, Lawyers Professional Responsibility Board
Michael J. Hoover	Director, Lawyers Professional Responsibility
Glenn E. Kelley	Associate Justice, Minnesota Supreme Court
Charles W. Kennedy	Member, Lawyers Professional Responsibility Board and Former Chairman, Seventh District Ethics Committee
William R. Kennedy	Chief Public Defender, Hennepin County
Leonard J. Keyes	President-Elect, Minnesota State Bar Association
Gwen M. Lerner	Member, Lawyers Professional Responsibility Board, Executive Committee
John D. Levine	Member, Lawyers Professional Responsibility Board, Executive Committee
Gerald E. Magnuson	Former Chairman, Lawyers Professional Responsibility Board
Michael McGlennen	Assistant Public Defender, Hennepin County
John C. McNulty	Attorney-at-Law, Minneapolis, Minnesota and Former Vice Chairman of ABA Committee on Professional Discipline
Jack Nordby	Attorney-at-Law, Minneapolis, Minnesota
Alan Ruvelson	Former Member, Lawyers Professional Responsibility Board Executive Committee (Public Member)
Robert M. Shaw	Member, Lawyers Professional Responsibility Board Executive Committee (Public Member)

Bruce C. Stone	Retired District Judge and Lawyers Professional Responsibility Board Referee
Thomas Swain	Member, Lawyers Professional Responsibility Board Executive Committee (Public Member)
Donald E. Weise	Chairman, Hennepin County District Ethics Committee
Martha Zachary	Former Member, Lawyers Professional Responsibility Board Executive Committee (Public Member)

A management review of the operations of the Director's Office also was undertaken by the Committee with the assistance of Sue K. Dosal, State Court Administrator, Judith L. Rehak, Supreme Court Administrative Services Director and Georgene L. Riegel, Law Office Management Consultant. During December, 1984 and January, 1985 interviews were conducted with each employee of the Director's Office. In addition, Committee members conducted a substantive audit of a sample of open and closed cases processed by the Director's Office.

The final nine meetings were spent discussing issues, making recommendations and preparing this Report to the Court, with draft proposed Rules changes.

C. Historical Background

The Rules on Lawyers Professional Responsibility (Rules) were promulgated by the Minnesota Supreme Court in 1971. The Rules established the Lawyers Professional Responsibility Board (Board) to

administer the discipline system and to serve as a tribunal in public discipline petitions to determine probable cause, to issue a private reprimand or to order private probation. The Rules further provided for the employment of a Director and such other professional discipline staff as authorized by the Court to investigate and, where appropriate, to prosecute complaints of unethical conduct against lawyers. The Rules incorporated many of the recommendations regarding structure, practice and procedure outlined by the ABA Special Committee on Evaluation of Disciplinary Enforcement. However, district ethics committees, comprised of volunteer lawyers in each of the 21 district bar associations, were authorized to continue to perform most of the investigative work and to retain the authority to dispose of complaints by dismissal or admonition, without prior Director approval.

Since that time, the Rules have undergone two significant revisions. In 1977, the Rules were amended to require the central filing of all complaints with the Director and to shift final authority for the disposition of cases from the district committees to the Director.

By 1981, the discipline system was experiencing significant increases in workload due to the centralization of the structure which took place under the 1977 amendments to the Rules, and to a heightened public awareness of the system and a resulting growth in the number of complaints. Backlog and delays were increasing and important educational and administrative functions languished under the burden of the disciplinary caseload.

To assist the Board in determining an appropriate solution to these problems, a team of individuals representing the ABA Standing Committee on Professional Discipline was invited in 1981 to evaluate the discipline system. As a result of this evaluation, the Rules were revised the following year to divest the Board of its authority to impose private reprimands and private probation and to restrict it only to the determination of whether probable cause exists to believe that unethical conduct occurred which warrants public discipline. Other changes were suggested which also were implemented. In some cases, changes were made in form but not in practice so that those operations continued to function as they had in the past. A number of other ABA recommendations, particularly those relating to staffing, prioritization of the workload and intra-agency relationships, were not adopted. Some of the Committee's recommendations are similar to those contained in the 1981 ABA Report which were not implemented. The Committee believes that its creation is, in part, attributable to the failure to adopt some of the 1981 recommendations.

D. Current Status

From 1971-1980, the number of complaints filed each year increased from approximately 400 to over 900. For the past five years the caseload of the Director's Office has remained fairly constant at 900-1,000 complaints annually.

The backlog of cases has grown steadily. As shown below, the number of pending cases at year end has increased in all but four of the

past fourteen years.

Number of Files Opened, Closed and Pending
1971 - 1984

Year	Files Opened	Files Closed	Number of Pending Files
1971	525*	367	158
1972	551	514	195
1973	485	467	213
1974	501	432	282
1975	475	483	274
1976	556	507	323
1977	634	572	385
1978	632	670	347
1979	690	602	435
1980	919	721	633
1981	927	758	802
1982	1013	1146	669
1983	921	968	622
1984	1069	1005	686

Source: Office of Lawyers Professional Responsibility
*Includes 125 cases transferred to the Director's Office.

The vast majority of the complaints received by the Director are disposed of privately. Last year fifteen percent of the complaints were summarily dismissed upon initial screening. An additional 67 percent were dismissed after investigation by a district committee or by the Director's Office. Twelve percent involved either an admonition or private probation. As shown below, only six percent of the cases disposed of last year involved public discipline.

Number and Type of Disposition
1984

Type of Disposition	Number	Percent (%)
Summary Dismissal	149	15
DNW/Dismissal[1]	659	67
Private Admonition	97	10
Private Probation	20	2
Supreme Court Discipline	60	6
	985[2]	100

Source: Office of Lawyers Professional Responsibility

[1]Discipline Not Warranted. Includes panel dismissal dispositions.

[2]Excludes 20 cases transferred to Board on Judicial Standards, involving duplicate complaints, or for which the Board was without jurisdiction.

Thus, relatively few of the approximately 1,000 cases processed by the system each year involve adjudicatory hearings. Last year, ten cases were brought before a Board panel for determination as to whether probable cause exists for public discipline. Six cases were tried to a referee and 12 cases were heard by the Supreme Court. An additional 21 stipulated dispositions were presented to the Court. The number of cases requiring a hearing has dropped substantially since the 1982 amendment to the Rules divesting Board panels of their dispositional authority.

However, delay in processing cases currently exists. Although district ethics committees are required by rule to investigate and to recommend a disposition to the Director within 45 days, the average age of cases returned to the Director is 3.2 months. On the

average, it is taking an additional 2.6 months for the Director to issue a dismissal for those cases initially handled by the district committee. In 1984, cases retained by the Director's Office for investigation and subsequently dismissed averaged 11 months old at disposition. The average age of cases disposed by admonition was 15 months, and cases resulting in stipulated private probation required nearly two years to complete. The average age of cases disposed by the Court varied from 12-35 months depending on the type of discipline imposed. In addition, the Committee was informed that more than a year's delay is involved in securing a reinstatement. The table below displays the average age of cases at disposition during 1984.

Number and Age of Cases at Disposition
1984

Type of Dispostion	Number	Age (Months)
Summary Dismissal	149	0
Dismissal after DEC Investigation	548	6
Dismissal after Director Investigation	107	11
Admonition by Director	97	15
Private Probation by Director	20	22
Admonition Reversed by Panel	1	13
Dismissal by Panel	3	27
Court Reprimand	13	18
Court Probation	6	30
Court Suspension	25	27
Court Disbarment	13	35
Court Transfer to Disability Status	1	12
Other	22	--

Source: Office of Lawyers Professional Responsibility

During January, 1985, the Committee reviewed a sample of open cases assigned to each of the Director's Office attorneys, a sample of

summary dismissals, and a sample of dismissed cases initially referred to district committees for investigation. In general, the sample audit confirmed the fact that most dismissed complaints, which represent the bulk of the cases, are processed within six months. However, some cases disposed of by dismissal, and a significant percentage of cases in which discipline was, or would be, warranted involved long delays in disposition. The review indicated that some of the delay is attributable to lack of lawyer cooperation during discovery or to procedural motions and appeals. Often, however, many months elapse with no activity. The Committee found that it takes so long to process some cases that several new complaints against the lawyer are sometimes filed before the initial complaint is completed.

The number of pending cases which are old is substantial. In December, 1984, there were 241 pending cases over one year old. This represented 35 percent of the system's total pending caseload. However, the Director and the Executive Committee recently targeted cases over one year old for priority processing. By April 9, 1985, the number of pending cases over one year old had been reduced to 168.

The Committee's review of files also revealed that the Director's Office has pending a number of cases involving serious misconduct which can be expected to consume a substantial amount of time and resources to prosecute. Such cases are in the nature of complex white collar crimes which are becoming a more significant segment of the caseload of state and federal prosecutors. The Committee was

unable to ascertain whether the number of complex cases has increased in recent years. However, Director's Office staff believe that the caseload will always contain a limited number of complex cases.

The vast majority of complaints processed through the system result in a decision that discipline is not warranted. However, a number of cases processed by the system involve serious charges and deserve vigorous prosecution. The resource needs to achieve prompt determination of dismissal in the vast majority of cases thus are constantly competing with the need for adequate resources to pursue fully the few very serious cases of misconduct which are filed each year. Both needs must be met in a balanced way to insure the continued willingness of the bar to fund the system adequately and to contribute substantial amounts of pro bono time in support of its operations. To accomplish this, the Committee recommends changes in Director's Office operations to make more efficient use of available resources; clarification of the lines of authority and accountability among the Court, the Board and the Director's Office; structural modifications to restore authority to district committees and Board panels; and additional revisions to enhance procedural fairness. The Committee's findings and recommendations in each of these areas are set forth in the following sections of this report.

II. OPERATIONS OF THE DIRECTOR'S OFFICE

In Fiscal Year 1985, the Board was authorized an operating budget of $764,000. Although a portion of that budget is allocated to support expenses of the volunteer board, nearly eighty percent of the budget funds the cost of the Director's Office staff. Currently, the Director's Office consists of nineteen employees including one Director, six attorneys, one law clerk, four paralegals, an office manager and six clerical employees.[1]

Although the legal staff of the Director's Office have limited backgrounds in private practice, the four senior staff attorneys have significant lawyer discipline experience. The Director has worked with the office for over seven years and the three senior lawyers each have three years or more lawyer discipline experience. The Committee notes the dedication of this staff in devoting its considerable energy, talents and overtime hours to the work of the office. The work product of the lawyers in the Director's Office was observed by the Committee to be of extremely high quality.

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[1] Staffing level is as of December, 1984 when the Committee conducted its review of the Director's Office.

Most staff attorneys carry a caseload of over 100 files. In spite of the volume, a high degree of quality and consistency is maintained. Testimony of staff lawyers and of Board members indicated that a special type of employee, one who can deal with stress situations, is required to perform consistently and well in this high-volume office.

Paper processing in the office has been made extremely efficient through the development of procedural manuals. The staff of the Director's Office have prepared a comprehensive procedures manual which details the processes and procedures which are used in moving a case from the filing of the complaint through final disposition including probation and the collection of judgments. Specialized manuals for different sections of the office including a telephone manual and legal assistant's procedures manual also have been prepared. Manuals are periodically revised so that they are relatively up-to-date in presenting the employees with the current operating procedures.

In addition, the Director and his staff have prepared forms for virtually every routine office function, from pattern paragraphs used in dismissal and admonition letters to cover letters, routing forms, and report generation forms. Use of these forms has permitted the office to cope with the increased volume of work and yet maintain a high quality work product.

The Director's Office also has employed technology to improve productivity. Word processing equipment is used extensively. Moreover, the office currently is in the process of automating its recordkeeping system. The automated system will make possible the efficient generation of case statistical information, pending case information, and case monitoring information.

The budget of the Board has increased 87 percent from July 1, 1981 to the present. Much of the increase has been for additional personnel. Until the 1983 increase in Minnesota lawyer registration fees, the cost per attorney of Minnesota's lawyer discipline system was not disproportionate when compared to states of comparable size. However, the 1984 fee increase placed the Minnesota fee above those of similar states.

BUDGET FOR DISCIPLINE
1983-1984[1]

State	Number of Lawyers[2]	1983 Budget Allocation Per Lawyer ($)	1984 Budget Allocation Per Lawyer ($)
Colorado	11,772	50	50
Maryland	13,571	41	41
MINNESOTA	13,850	45	60
Virginia	17,179	46	46
Washington	11,475	43	43
Wisconsin	12,834	46	46

[1]Source: Disciplinary Enforcement Surveys, 1983 and 1984: ABA Center for Professional Responsibility.

[2]Total number of lawyers paying dues/fees.

The Committee recognizes the dedication of the Director's Office staff, and the steps it has taken to streamline office procedures, maintain quality and improve productivity. However, the Committee finds a need for improvement in the Director's Office in the following areas: 1) prioritization of work and resources, 2) employee turnover, 3) staffing configuration, 4) delegation of authority and 5) case monitoring and management reporting. The Committee believes that until turnover rates are reduced and the recommendations of this Committee with respect to case management, staffing and prioritization are implemented, it is not possible to make a judgment as to whether the Director's Office is over funded or under funded.

A. Prioritization of Work and Resources

The Committee finds a need for greater prioritization of the office's workload and resources. Currently, only limited monitoring of time spent on individual cases is done. Time allocation guidelines for time expenditure by staff on various categories of cases individually and as an office do not exist. Thus, the amount of time to be expended on files is left to the individual discretion of the attorney.

The Executive Committee and the Director should develop and monitor resource allocation goals to assure that the limited attorney resources of the Director's Office are being spent according to Board-approved priorities.

1. Recommendation: Total attorney and paralegal resources should be allocated on the basis of the following five categories of case/activity: 1) Public, 2) Admonition, 3) Discipline Not Warranted (DNW), 4) Administrative Department (disclosure/expunctions, professional corporations/ judgments, probation, and advisory opinions), and 5) Office Administration. The Director, subject to the approval of the Executive Committee, should determine the appropriate formula for allocating staff resources to these case/activity types. The Director and the Executive Committee should compare actual resource expenditures by the Director's Office with these allocation goals on a quarterly basis.

The lack of individual supervision or policies regarding time expenditures on particular types of cases on occasion has resulted in excessive time expenditures on less important files. The implementation of articulated time guidelines for various categories of cases would limit individual discretion by requiring a conscious determination that a particular case is worth a greater than normal expenditure of time.

2. Recommendation: Time parameters for the allocation of legal resources on individual cases should be established. Consultation with the Director, at least by junior staff, should be required to exceed these time expenditure guidelines. Similar time guidelines should be established for paralegal resources.

Effective allocation of available resources cannot begin until management has the necessary information with which to judge how the legal staff and the paralegals are spending their time. Although staff currently report hours in terms of broad casework and administrative categories, time expenditures by individual file are not reported.

3. Recommendation: Attorneys and paralegals should be required to keep time reports on their cases as well as record the time spent in administrative and office management matters. These reports should be reviewed by the Director and the Executive Committee on a regular basis.

In addition, the Committee found that specific case management techniques are not in place for the complex cases. As a result, excessive resources may be spent on one complex case while others, including some very serious cases, receive less attention than they deserve or are stalemated.

4. Recommendation: A litigation plan should be developed at the earliest, practicable time for any complex case which is expected to consume an abnormally large amount of office resources. The plan should include, at least (1) a realistic and appropriate staffing decision, (2) a discovery plan and budget, (3) an estimate of the strength/weakness of each count and consideration of limiting the number of counts to be prosecuted, (4) consideration of the use of pro bono or a paid consultant in evaluating the strength of the case, (5) consideration of the appointment of a private attorney or a special assistant director to prosecute the case, (6) consideration of computerizing portions of the documentation or work product, (7) consideration of the use of litigation support services not available in the Director's Office, such as accountants, tax specialists and the like, and (8) plans for internally absorbing the demands of the case by the use of temporary clerical and law clerk assistants or temporarily re-ordering the office priorities. The Executive Committee should be notified of the pendency of such cases and approve the litigation plan to be followed by the Director's Office. It should review the plan, against actual experience, at least every quarter. The Executive Committee should support the Director's Office with extra resources in order to deal with complex cases or require a limitation of the scope of the proceedings.

The limited resources of the Director's Office should be judiciously employed. Towards that end, the initial screening of complaints should identify matters which can more appropriately go forward in an alternative forum prior to commencing a lawyer discipline

investigation. The Director's Office currently screens out, as appropriate, matters in which judicial or administrative proceedings are already underway. The Committee commends the Director for this practice. It is suggested, however, that the Director also consider requiring complainants, alleging grievances for which an alternative forum is readily available, to exhaust those remedies first. Criminal matters in which the complainant-defendant should pursue post conviction relief proceedings exemplify this category of complaint.

> 5. Recommendation: The Director should adopt a policy requiring complainants to exhaust their remedies in readily available alternative forums before initiating a disciplinary investigation. Criminal matters in which the complainant-defendant should pursue post conviction relief proceedings are an example of the type of case which should appropriately be diverted.

An additional category of complaint which warrants consideration for at least initial diversion to alternative forums is that alleging conduct which, by itself, does not appear to constitute an ethical violation. Complaints in the nature of fee disputes currently are referred to the fee arbitration board. The Committee urges similar treatment of complaints that appear to be solely those of possible malpractice. Complaints alleging conduct that appears to involve only possible malpractice should be returned to the complainant with the comment that the complainant may need the advice of independent counsel to determine whether civil proceedings are appropriate.

> 6. Recommendation: The Director's Office should continue its practice of referring fee arbitration disputes, and should adopt a policy that complaints alleging conduct which may involve solely a matter of possible malpractice typically should be returned to the complainant with a

comment regarding retention of independent counsel.

The Director's Office is charged with the responsibility for collecting professional corporation registration fees and annual reports. Total clerical and attorney time spent on this function is not great. Nevertheless, the Committee finds that this function is unrelated to the discipline system and more appropriately belongs with the attorney registration function which is administered by the Court.

7. Recommendation: The Court should transfer the responsibility for collecting professional corporation registration fees and annual reports from the Director's Office to the attorney registration staff of the Court.

B. Turnover

Excessive turnover in the non-lawyer staff was found by the Committee. In December, 1984, when the Committee interviewed the staff, only two of the twelve non-lawyer staff had been employed by the office more than eight months. There also have been a number of office administrators in the last several years. This degree of turnover has an adverse impact on the organization. Office administrators have not had sufficient tenure to develop the position. Unusual amounts of staff time are spent in the hiring and termination process. Funds are expended for advertising. Additional time of experienced staff must be diverted for training and supervision of inexperienced employees. Staff does not develop expertise to handle unusual problems expeditiously. Turnover also wastes resources because new personnel must be reeducated in pending

cases previously assigned to others. Some cases, for example, have had multiple changes of both attorneys and paralegals.

The Committee urges the Director's Office to perform exit interviews and submit follow-up questionnaires to each terminating employee as a means of identifying the causes of turnover. The results of these interviews and questionnaires should be used by the Director and the Executive Committee, as may be appropriate, to make internal administrative changes and to provide support and justification for Court action, if necessary.

> 8. Recommendation: The Director should implement an exit interview/questionnaire system for all terminating employees. The results of this system should be used by the Executive Committee and the Director to identify causes of prejudicial terminations and to make appropriate changes in an attempt to reduce employee turnover.

C. Staffing

Review of office operations indicated that the existing staffing level is probably adequate for current workload demands, particularly if turnover could be reduced and if some changes in assignments were made to maximize staff capacity.

In November, 1984, the attorney complement was increased from five to seven positions including one Director, one First Assistant, two Attorney II positions and three Attorney I positions. While additional time is necessary to assess authoritatively the adequacy of this staffing level, it appears that seven positions should be sufficient if adjustments in work assignments are made.

During the last half of 1984 there was an apparent imbalance in attorney assignments. Of the seven attorneys, two spent most of their time on one lengthy trial; the First Assistant was assigned 50-70 percent to administration and spent most of the remainder on two panel matters and several oral argument cases; and the three junior attorneys were assigned admonitions and DNWs. The remaining senior assistant director was assigned most of the trial work, a substantial amount of the brief preparation for the office and a disproportionately large number of Board panel cases. The resulting backlog and delay in trial work were due, in part, to the lack of experience of the junior attorneys and inability to handle these types of cases. The limited attorney experience is attributable to the fact that the Director has not been hiring from the outside above the Attorney I class. Thus, the current staffing configuration of Attorney I and II positions is based on the experience of the incumbent, not on the experience needs of the office.

Hiring only at the Attorney I level should not be the practice as it fails to assure that the needs of the office will be matched by the experience of the new employee. Past history demonstrates that attorneys with strong litigation backgrounds can be recruited from the outside for the Attorney II level class and adequately trained and effectively functioning within a relatively short period (2-3 months).

9. Recommendation: The Director and the Executive Committee should review the current staffing configuration

and identify the percentage of attorney time which should be dedicated to the two basic classes of work: 1) appellate and trial litigation and 2) admonition and discipline not warranted investigation and disposition. This evaluation should serve as the basis for determining the number of positions required in the Attorney I and II classifications. Hiring from the outside into the Attorney II classification should occur when necessary to acquire an experienced litigator.

The volume of cases processed by the Director's Office is high and consists of a significant number of complex files. Limited resources require the careful deployment of office time and funds to handle the workload. Seasoned judgment is essential in distinguishing the serious from the minor matters and in focusing on the strongest counts in each. It is important that the complement of seasoned trial lawyers be sufficient to insure that younger lawyers are adequately trained. Prior litigation experience also is desirable to insure that the Director's Office legal staff develops decision-making skills. Given its present size, at least one attorney, in addition to the Director, should have substantial prior litigation experience.

10. Recommendation: At a minimum, one attorney, in addition to the Director, should have had substantial litigation experience (five or more years) prior to appointment.

Currently, there are four legal assistant positions. However, 80 percent of one position is devoted to the performance of administrative duties. Five to ten percent of the duties of the remaining three positions also involve clerical functions. Use of legal assistants has been restricted primarily to file organization, drafting correspondence and telephoning witnesses and complainants.

One position specializes in reviewing the books and records of law firms.

Because of the turnover experienced by the office, the most senior legal assistant had seven months experience in the office at the time of the Committee's interviews. Several had been employed for two months or less. However, with adequate training and experience legal assistants should be capable of preparing initial drafts of at least some types of charges, petitions, deposition summaries, affidavits, pre-hearing statements, interrogatories and requests for admissions. Limited legal research should also be considered for assignment to this class of positions.

The use of one legal assistant position almost entirely for clerical functions is inappropriate. The minor clerical functions of the other legal assistants also should be shifted to the extent possible.

The recapture of 80 percent time from the one administrative legal assistant position and an additional 15 percent from the remaining three positions for paralegal functions should enable several legal assistants to be fully trained in the review and analysis of books and records of law firms and in litigation functions which in the past have been subspecialties assigned to only one position. Moreover, this additional time should make possible the transfer, under proper supervision, of some of the more routine functions from attorneys to legal assistants.

11. Recommendation: Clerical duties of the administrative

legal assistant should be transferred to clerical employees. Administrative and clerical functions performed by other legal assistants should also be shifted, to the extent practical, to clerical employees. The Director should consider the assignment of additional case-related work, now performed by attorneys, to the legal assistants.

D. Delegation

The Committee finds insufficient delegation of authority within the Director's Office for disciplinary processing and for office administration. In both areas, a greater delegation could result in improved productivity.

All dispositions, from summary dismissals to public discipline petitions, are personally reviewed and approved by the Director. Final screening by the Director increases staff time spent on each case and the delay in final disposition. Final authority for summary dismissal and discipline not warranted (DNW) dispositions should be delegated to Assistant Directors. Although this creates a potential for inconsistency among staff decisions, inconsistencies should be kept within tolerable limits through adequate supervision, Director's post-review, and the availability of an appeal by the complainant.

12. Recommendation: Delegate final authority for disposing of cases by summary dismissal and DNW to Assistant Directors after an adequate training period.

The administrative structure and operation of the office also reflect an insufficient delegation of authority. The administrative hierarchy of this 19 person office includes: the Director, the

First Assistant Director, the Administration Committee, the Office Administrator, the Legal Assistant Supervisor and the Word Processing Supervisor. In addition, one attorney is assigned to each of the following administrative functions involved in the disciplinary process: disclosure/expunctions; professional corporations/judgments; probation; and advisory opinions. These activities are supervised by the First Assistant Director and by the Director.

The size of the office warrants administrative authority being placed only with the Director and the Office Administrator. Individuals can be called upon or committees formed on an as needed basis to assist the full time administrative personnel in formulating new office policies and in training new employees.

While the Committee believes that the Director should have had substantial litigation experience prior to appointment, it concludes that administration must be a primary concern of the Director if the office is to function effectively. For that reason, the Director should carry a more limited caseload than other staff attorneys. It is essential that the Director spend time in bringing previous litigation experience to bear in evaluating the merits of individual cases and in allocating attorney and paralegal resources to the caseload of the office. The administrative responsibilities of the Director also should include direct supervision of the office's legal staff; case assignments and prioritization of workload; legal staff training; supervision and direct oversight of work product;

intra-office communications; final approval of budget and major financial decisions; and liaison with the Supreme Court, the Board, the bar and the district committees.

The Office Administrator should be given direct responsibility for supervision, hiring, discipline, evaluation and training of all non-legal staff; general supervision of the legal assistants in all non-legal functions; preparation of budget recommendations and responsibility for control of office expenditures; general maintenance of space, supplies and equipment; reporting to the Director regarding all levels of operations within the office including problems of a significant nature, proposed solutions, and policy recommendations.

13. Recommendation: The Administration Committee should be discontinued and the First Assistant Director removed from the administrative hierarchy except in the absence of the Director or when serving as a training supervisor for new attorney staff. Direct supervision of Assistant Directors and Legal Assistants should rest with the Director. Final authority should be delegated to the Office Administrator for all matters concerning clerical staff and clerical processing; for facilities, supplies, and equipment acquisition within budgetary limitations, and for the interpretation and application of established office policies. The Office Administrator should be responsible for studying office operations generally and for making recommendations to the Director for changes in the workflow or assignment patterns to improve productivity, enhance the quality of work or reduce the cost of operations. The Word Processing Supervisor and Legal Assistant Supervisor positions should be reduced to lead worker. Immediate supervisory responsibility for these units should be assigned to the Office Administrator.

E. Case Monitoring and Management Reporting

Currently, a significant amount of statistical data is collected by

the Director's Office. Reports generated by the office include:

- Quarterly Case Aging Report for District Committees
- 45 Day District Committee Case Monitoring Report
- Monthly Attorney Case List
- Attorney and Legal Assistant Time Sheets by Generic Category (e.g. Casework, Administration)
- Quarterly Administrative Department Statistical Reports
- Case Filing and Disposition Statistical Report
- Summary of Public Matters Report
- Statistical Report of Case Aging by Category of Case
- Statistical Report of Cases Over One Year Old
- Word Processing Report
- Monthly Budget Report

The Committee, however, finds that some information collected is not used, and other information is not collected that is needed. For example, a monthly case listing is prepared for each attorney in chronological order, which highlights the oldest cases assigned to each attorney. However, at the time of the Committee's interviews, this information was being used infrequently to monitor the office caseload. Attorneys and legal assistants record their time expenditures by generic classification (e.g. casework, administration), but not by individual case. Time records by specific case would yield valuable information in monitoring the time spent on individual cases and on types of cases to assure conformance with office standards and priorities.

Reports which would provide the Board and the Court with information necessary to monitor system performance are not generated. Few management reports appear to be produced for the Board other than monthly case filing and disposition reports and budget reports. Although the Director is required by rule to provide an annual report to the Supreme Court, such a report has not been issued since 1981.

Case monitoring reports which indicate exceptions to timely disposition and whether or not the limited resources are being utilized in conformance with Board policy should be produced. Improved case monitoring and management reporting are particularly important as the Committee found significant delays in the current system. As was noted by the American Bar Association's Standing Committee on Professional Discipline in its 1981 evaluation of the Minnesota lawyer discipline system:

> "Inaction and delay in processing complaints contributes to a decrease in public confidence in the ability of the profession to protect society and results in potential harm to the innocent lawyer accused of professional misconduct."[2]

The Executive Committee and the Director should establish time standards to serve as benchmarks or guidelines for the movement of cases through the discipline process. These time guidelines should be designed to deal with the vast majority of matters (85-90%) which involve routine processing. The more complex cases may, and appropriately should, exceed the guidelines. Since complex cases typically can be identified at an early stage, the Director and Executive Committee should consider establishing an individualized schedule for their processing. A system for monitoring those cases exceeding the general time guidelines or the individualized case processing schedule should be implemented.

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[2] Evaluation of the Discipline System in the State of Minnesota: Final Report, June, 1981, P. 7. American Bar Association Standing Committee on Professional Discipline.

14. Recommendation: Reports that produce no valuable information should be eliminated. A case monitoring system should be implemented to more closely track the progress of both individual cases and the caseload of the office. Filing-to-disposition time standards for various categories of cases should be established. Exception reports should be generated at least monthly that identify cases exceeding the filing-to-disposition time limits. Individual cases in which the amount of time expended by staff attorneys has exceeded the office policy for that type of case also should be flagged. In addition to the standard filing and disposition statistics, the case monitoring system should identify the total percentage of attorney time expended by the office on the five types of cases/activity discussed in Recommendation 1 above (Public, Admonition, DNW, Administrative Department, and Administration). The monthly case listings for Assistant Directors should be regularly monitored. The Director should be responsible for discussing the results of these reports with the attorney staff and with the Executive Committee.

Although from time to time the Director's Office has been able to reduce the backlog and the associated delay in processing discipline cases to acceptable levels, its success in doing so has been sporadic, at best. Although delay is not a concern to some charged lawyers, it is often of concern to complainants, to some individual lawyers, and to the public.

The Committee has recommended that the Executive Committee establish filing to disposition time standards and monitor adherence to them. Once that is done, it should consider proposing a rule change which would allow the complainant or the accused lawyer whose case is not being processed within these guidelines to petition the Executive Committee for prompt determination.

15. Recommendation: Having set dispositional time guidelines, the Executive Committee should promulgate a rule which would allow the lawyer or the complainant to petition the Executive Committee for a prompt hearing or

disposition.

The Committee also found in its file review considerable delay in some instances between the time a matter is submitted to a referee and the issuance of a decision. Testimony of one referee suggested that a sixty day time limit be established between the time charges are referred to the referee and the return of the findings. The Committee believes that this proposal can be accomplished administratively by the Court.

16. Recommendation: The Court should consider the inclusion of a return date in its order assigning a referee to a public matter as a means of insuring expeditious processing. Motions for extension of time should be granted for good cause shown.

There are able attorneys in this state familiar with the substantive law of ethics. If, in the opinion of the Executive Committee, delays have reached, or will in the future reach, unacceptably high levels, the Executive Committee should seek assistance on a pro bono basis from lawyers experienced in the ethics area to participate in a "crash" program to reduce the backlog of the Director's Office.

17. Recommendation: The Executive Committee should closely monitor the delay situation and if, in its opinion, delay has reached unaccceptably high levels, it should request that the Supreme Court call upon the Minnesota State Bar Association to provide a "blue-ribbon" group of lawyers familiar with the substantive law of ethics in the various areas of practice to provide pro bono assistance to the Director's Office on a crash program basis.

F. Facilities

Board member and referee testimony taken by the Committee cited problems with inadequate facilities for panel proceedings and

referee hearings. The Director's Office has only one small conference room. Arrangements for hearing rooms to accommodate additional panel proceedings, particularly evidentiary hearings before referees which require a larger or more formal setting have to be made on an ad hoc basis. Scheduling appropriate spaces often has been difficult. Conference rooms in hotels have been rented and the longer referee hearings have been required to move to several different locations during the course of the proceedings. Inadequate facilities wastes personnel time and undermines the dignity of the proceedings.

18. Recommendations: The Court should assure the adequacy of permanent hearing room facilities for the Board in the proposed Judicial Building. In the interim the State Court Administrator is urged to assist the Director's Office in locating adequate facilities.

III. AUTHORITY/ACCOUNTABILITY

In 1981, the Minnesota lawyer discipline system was evaluated by a distinguished team representing the American Bar Association Standing Committee on Professional Discipline. In its final report, the team wrote:

> "From our interviews and personal observations, the team perceives a need to clarify the relationships and responsibilities among the Director, the Board, and the Court. While we commend the Court for its interest and support in establishing the disciplinary system, we believe that the lines of authority should be clearly defined to serve as guidelines for the daily operation as well as the long range planning of the disciplinary system. It was evident to the team that the lines of accountability, supervision, and responsibility are not sufficiently defined, especially those related to the hiring of staff and assignment of functions, the formulation of staff and budget, the development of internal policies and rule changes, and the administrative functions central to the operation of the discipline system."[3]

The Committee finds that this confusion regarding lines of authority and accountability continues to persist. Testimony taken by the Committee from present and former members of the Board, Supreme Court Justices, the Director, and the Director's Office staff uniformly cited the adverse impact of the existing lack of clarity in the assignment of authority and responsibility among the Court, the Board and the Director.

The current ambiguity arises primarily from the dual reporting relationship of the Director to the Court and to the Board. Rule

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[3] Evaluation of the Lawyer Discipline System in the State of Minnesota: Final Report, P. 41.

5(a) provides that the Director is appointed and serves at the pleasure of the Court. Under Rule 5(b), the Director is responsible to the Board and to the Court for the proper administration of the rules. Based on testimony and observation, the Committee finds that the practical effect of this rule has been insufficient oversight by either body of the operations of the Director's Office.

To remedy this ongoing deficiency, the Committee recommends that Rule 5 be revised to clearly place first line supervisory responsibility for the Director's Office with the Board. The Court should retain ultimate authority to reject the Board's recommendations concerning the operation of the Director's Office, but that authority should be exercised only in extraordinary circumstances.

19. Recommendation: Rule 5(a) should be amended to provide for the appointment and removal of the Director upon recommendation by the Board to the Court, which recommendation should be accepted unless the recommendation is determined to be arbitrary and capricious.

20. Recommendation: Rule 5(b) should be amended to provide that the Director shall be directly responsible and accountable to the Board and through the Board to the Supreme Court.

21. Recommendation: Rule 5(b) should be amended to require the Director to report annually to the Board on the operations of the Director's Office. Rule 4(c) should be amended to require the Board to report annually to the Court on the operations of the discipline system.

The Director of the Office of Lawyers Professional Responsibility is a position at the center of a delicate system of self regulation. The Director must vigorously prosecute cases of serious misconduct, yet in less serious matters be able to fashion private dispositions

calculated to most effectively correct and assist the lawyer. The Director must be both prosecutor and educator. It is a most difficult and highly sensitive position and is one with a very limited natural constituency.

Conclusions drawn about the tenure of the position of Director because of its sensitive nature were conflicting. Some testified that the natural tendency of one in such a position is to become overly prosecutorial. Those of this view argued for establishing a maximum tenure of 4-5 years for the position of Director. Others cited the ABA recommendations that the Director be considered a career position and opposed any maximum term.

The Committee was impressed by the merits of both positions. The fixing of terms tends to increase accountability necessary in this fragile system. Open-ended tenure permits the system to benefit from an experienced Director. The Committee urges the adoption of a merger of these two concepts. To insure the effective functioning of the system and to enhance accountability, the Committee recommends consideration of renewable terms of office for the position of Director.

22. Recommendation: Rule 5(a) should be amended to provide for two year renewable terms for the position of Director of the Office of Lawyers Professional Responsibility.

Although Rule 5(a) provides that the Director shall serve at the pleasure of the Supreme Court, the Managerial Plan for Court Employees adopted by the Court for fiscal year 1984-1985 confers

"for cause" status on the Director's position. It is recommended that the Court's personnel plan be amended to comport with the Rules by making the Director a confidential employee who serves at the pleasure of the Court.

23. Recommendation: The Supreme Court's personnel plan should be amended in accordance with the Rules to specify that the Director shall serve at the pleasure of the Court.

Oversight of the Director's Office involves both dispositional supervision and administrative supervision. As distinguished from administrative supervision, the Committee finds that strong oversight of the disposition of cases is built into the system. The Director can make no final disposition of any case which is not subject to some review:

1. Dismissals may be appealed by the complainant to the Board panel chairman.

2. Admonitions may be appealed by the respondent to a Board panel and by the complainant to a Board panel chairman.

3. Stipulated private probation must be approved by the Board chairman and vice chairman and may be appealed by the complainant to a Board panel chairman.

4. Public charges of unprofessional conduct require a finding of probable cause by a Board panel, followed by referee review and ultimate determination by the Court. If probable cause is not found by the Board panel, a complainant may have the matter further reviewed by the Supreme Court.

Thus, every disposition is subject to Board or Court review if one of the parties is aggrieved by the Director's processing of the case.

In contrast, the current system allows the Director near autonomy in the administration of the office and in the exercise of prosecutorial

discretion. The Board approves the annual budget of the Director's Office for submission to the Court, meets monthly with the Director[4] and annually evaluates the Director's job performance. Testimony of current and former members of the Executive Committee, however, indicated that the Board is not involved in policy decisions concerning prioritization of the office's workload and resources or in the setting of time parameters for the disposition of specific types of cases. Detailed information on the age, status, and time commitments of individual cases is not presented to the Board. Case monitoring reports which would indicate timely disposition of cases and whether or not the limited resources are being effectively utilized are not provided to the Board. Moreover, although the Director is required by rule to present an annual report to the Court, such a report has not been made since 1981. Without such information, thorough review by the Board and the Court of the Director's Office proposed budget and the performance of the Director is not possible. As a result, the Committee finds meaningful supervision of the operations of the Director's Office to be limited at the present time.

The current lack of close oversight, in part, is attributable to the system's concern for bifurcating the prosecutorial and adjudicative functions. Prosecutorial decisions made by the Director should not

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[4]On alternating months the Director meets with the full Board and with the five-member Executive Committee.

be directed by the same body which ultimately will adjudicate the case. Since the members of the Board sit in three-person panels to determine probable cause and hear appeals from private dispositions made by the Director, a certain distance between the Board and the Director's Office has been deemed necessary to preserve the independence of each. Indeed, the ABA evaluation team strongly urged the separation of the two functions.

> "(T)he Board should neither direct the internal operations nor supervise the functions performed by the Director and his staff."[5]

However, it was for this very same reason that the Board was created to serve as a buffer between the Supreme Court, the ultimate adjudicative body, and the Director's Office. The Board was intended to have, and pursuant to Rule 4(c) is given, general supervisory authority over the administration of the rules including specific responsibility for advising the Director in the performance of his duties. The Committee commends the Board for its concern for the separation of the prosecutorial and adjudicative functions. However, the Committee perceives that this concern has overshadowed the Board's responsibility to supervise the operations of the Director's Office.

To accommodate these competing responsibilities, a committee of the Board should be created to supervise the Director's Office. Members of this committee would be precluded from sitting on panels in order

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[5]Evaluation of the Lawyer Discipline System in the State of Minnesota Final Report, P. 42.

to preserve the bifurcation of adjudicative and prosecutorial functions. The Committee's oversight should include approving major budget and personnel change, setting policies for the prioritization of work and allocation of resources, establishing guidelines for the timeliness of dispositions and time expenditures on cases, long range planning, reviewing prosecutorial decisions, overseeing the system's relationships to the Court and the bar, and coordinating proposed revisions to the rules.

> 24. Recommendation: Rule 4 should be amended to create a five person Executive Committee responsible for the general supervision of the Director's Office. Members should include the Board chairman, and two lawyers and two public members designated by the chairman, all of whom must have previously served at least one year as a member of the Board. Members should not be assigned to panels during their terms on the Executive Committee.

Currently, there are 22 members of the Board. By prohibiting the five members of the Executive Committee from sitting on panels, there remain seventeen members qualified to sit. To provide the Board with six three-person panels following the creation of the expanded Executive Committee, the Rules should be revised to add one additional member to the Board.

> 25. Recommendation: Rule 4(a)(2) should be amended to add one additional member to the current Board size of twenty-two to provide six three-person panels in addition to the newly constituted five-person Executive Committee.

The Executive Committee must have adequate information on the operations of the Director's Office to perform effectively its supervisory function. The Executive Committee and the Director should work jointly to develop the type, format, and frequency of reports (whether oral, written or both) necessary to keep the

Executive Committee regularly informed on the progress of the Director's Office and alert it to actual or potential problems.

26. Recommendation: The Director and the Executive Committee should work jointly to develop a series of reports which will communicate concisely and regularly the status of the Director's Office operations and identify problem areas at an early stage. The following reports should be considered:

- Budget/Expenditure Report
- District Committee Case Aging Report
- Case Filing, Pending and Disposition Statistical Report
- Report of Cases Exceeding Filing-to-Disposition Time Standards[6]
- Report of Cases Exceeding Guidelines for Expenditure of Time by Staff[7]
- Attorney Caseload Statistics on Number and Type in Progress and Number Disposed
- Attorney and Paralegal Time Expended by Case/Activity Category[8]
- Litigation Plans for Complex Cases[9]

In addition to this regular reporting cycle, the Executive Committee annually should establish and communicate to the Director performance goals for the coming year. These goals should be mutually agreed upon by the Director and the Executive Committee and serve as an objective yardstick against which to measure the Director's performance at year end.

27. Recommendation: A regular and comprehensive management by objectives appraisal of the Director's performance should be implemented. The Executive Committee annually should establish and communicate to the Director management objectives against which the Director's performance will be measured. The Executive Committee should meet with the Director at year end to evaluate the Director's performance and to permit an adequate opportunity for response.

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[6]See Recommendation 14.
[7]See Recommendation 2.
[8]See Recommendation 1.
[9]See Recommendation 4.

Institutionalizing a regular reporting cycle and implementing a strong performance evaluation system should assure active and effective Executive Committee supervision of the Director's Office operations. In addition, the Executive Committee should consider periodically examining a sample of open and closed files. During its work, the Committee found the performance of this type of file audit to be most valuable as an additional technique for understanding the work of the office.

28. Recommendation: The Executive Committee should consider undertaking a review of Director's Office files on a sample basis at least every two years.

Although strong supervision of the Director's handling of the disposition of cases exists, testimony taken by the Committee repeatedly cited the unsupervised authority given to the Director to open files and commence investigations on the Director's own initiative. The Committee finds that the process would be strengthened by a review of the Director's judgment in these matters. Testimony indicated that only approximately 2 percent of all files are opened upon the Director's initiative. The Committee was not persuaded that the number of these complaints would overburden the Executive Committee nor that the investigations are so time-critical as to preclude prior review by the Executive Committee.

29. Recommendation: Rule 8(a) should be amended to provide that Director initiated investigations may not commence without prior approval of the Executive Committee and then only if there is a reasonable belief that

professional misconduct may have occurred.

The Supreme Court appoints one of its Justices to serve as a liaison with the discipline system to facilitate understanding and communication among the Court, the Board and the Director's Office and for purposes of oversight. The Court's liaison is the system's first point of contact with the Court when scheduling conflicts and other problems arise. In addition, the liaison is responsible for coordinating Court appointments to the Board.

The Committee commends the Court for assigning specific responsibility to one of its members for working with the discipline system. It further believes that the liaison could be of particular assistance to the Executive Committee during the transitional period in which it assumes expanded supervisory responsibilities, and urges the liaison to actively participate in Executive Committee meetings. The agenda of Executive Committee meetings should be structured to allow the liaison to attend only those portions of the meetings dealing with administrative or general policy matters and to excuse himself from discussions concerning the processing of specific cases. This should preserve the bifurcation of the adjudicatory and prosecutorial functions and enable the liaison to participate in administrative matters without requiring subsequent recusal. A more active participation by the liaison in the work of the Executive Committee and continued attendance at full Board meetings should give the Court greater opportunity for oversight of the system.

30. Recommendation: The Supreme Court's liaison to the Board is urged to attend regularly the meetings of the

Executive Committee and to participate actively in its consideration of administrative matters and general policy issues. The meetings should be structured to allow the liaison to avoid participation in the discussion of the processing of specific cases. The liaison should continue attendance at full Board meetings to provide the opportunity for communication of problems and concerns to the Court.

IV. STRUCTURAL MODIFICATIONS

A. Dispositional Authority

In recent years, the Rules have been revised to limit the dispositional authority of the district ethics committees and the Board panels. Testimony taken from the bar and many Board members indicated a significant concern over this centralization of the discipline process.

1. District Ethics Committees

The district ethics committees are a vital part of the Minnesota lawyer discipline system. There are twenty-one district committees comprised of a chairman appointed by the Court, and at least four lawyers appointed by each district bar association. Twenty percent of the district committees must be public members. Currently, the district committees conduct investigations in approximately 80 percent of all complaints.

Prior to 1977, district committees were authorized to dispose of complaints by dismissal, by the imposition of warnings or by reference to the Director for institution of public discipline proceedings. Such dispositions were without Director involvement or other central review. The report of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement issued in 1970 (known as the Clark Report) criticized this type of

decentralized disciplinary system. The report noted that decentralization requires public and attorney members of local disciplinary committees to pass judgment on the conduct of lawyers with whom they are personally acquainted; results in inconsistency in discipline imposed across the state; and creates the appearance of bias or impropriety.[10]

In recognition of these problems, the Court adopted revisions to the Rules in an attempt to assure greater uniformity in disposition. In 1977, the Rules were amended to vest ultimate authority for the investigation and prosecution of discipline cases with the Director and to divest the district ethics committees of jurisdiction to impose final dispositions.

The district committees' work is now limited to investigating complaints and making recommendations concerning disposition to the Director. All district committee recommendations for disposition are reviewed by the Director who is authorized to investigate further, dismiss, admonish, stipulate to private probation or present the case to a Board panel for probable cause determination. Currently 95 percent of the district committee recommendations for action are adopted, without change, by the Director.

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[10] Problems and Recommendations in Disciplinary Enforcement, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, 1970, American Bar Association, pp. 24-29.

District Committee chairmen, most Board members and most lawyers practicing before the Board who testified before the Committee favored the restoration of more authority to the district committees. Even though district committee recommendations are rarely reversed, it was generally felt that the Director should not be given carte blanche authority to second guess the district committee.

Although the Committee is persuaded of the need for dispositional uniformity, it feels consistency can be achieved without entirely stripping the district committee of its authority. The Committee finds that uniformity can be maintained by requiring the district committee to continue to report its dispositional recommendation to the Director. However, to give appropriate deference to the work of the district committees, which on the whole appear to be performing careful investigations and making appropriate recommendations, the Director should report to the Executive Committee the rejection of district committee recommendations and the reasons therefore. Similar notification should be provided to the involved district committee. Regular reporting should assure that rejections are kept to a minimum and that the limited resources of the Director's Office are conserved.

31. Recommendation: The Director should be required to report to the Executive Committee whenever a district committee recommendation is rejected and to provide specific reasons for the action taken. A copy of that report should be provided to the chairman of the district committee whose recommendation was rejected.

Currently, the work performed by the district committee typically is

considered by the Director's Office to be a preliminary investigation in cases warranting some disciplinary action and, on occasion, in cases recommending dismissal. Interviews with staff indicate that further investigation of cases is undertaken with some frequency by the Director's Office after the district committee's report is filed with the office. This is so, even though staff also indicated that most reports are complete and that further staff investigation is undertaken primarily to verify the information contained in the district committee report. Staff cited three reasons for this duplication of effort: 1) disparity in the kind and quality of reports among investigators and district committees, 2) perceived inadequate training of district committee members and 3) greater experience of Director's Office staff. Despite these alleged deficiencies, the Committee is not convinced that additional investigation is the answer to this problem, as reinvestigation surely contributes to the delay in final disposition which the Committee views as a principal flaw in the present operations. Instead minimum reporting standards for the district committees should be established so that reinvestigation by the Director's Office may be kept to a minimum.

In many district committees, the reports prepared by a single investigator are submitted directly to the Director's Office without any review at the local level. This procedure has evolved because of the large geographic areas covered by most rural district committees and the resultant difficulties involved in scheduling meetings of district committee members. However, testimony indicated

that, due to the inadequate training and inexperience of the investigators, this procedure results in disparate quality of reports and inconsistent dispositional recommendations. Local review of reports by experienced district committee members should remedy this problem.

The Committee notes the ABA evaluation team's conclusion that multiple levels of decision-making can contribute to unwarranted delays in disposition.[11] It also recognizes the problems of distance for the rural districts. However, the Committee believes that a limited review of the investigator's report by the district chairman or a committee designated by the chairman would contribute substantially to insuring the quality of the report without causing undue delay or hardship for Committee members. Moreover, this local review of the investigator's report should reduce the need for further investigation by the Director's Office and the delay which it currently occasions. Those district committees which have established such review procedures are commended. However, in view of the potential for delay, burden for the respondent, and time expenditure of volunteers, consideration should be given to limiting local review to the investigator's written report: specifically, district committees which still hold evidentiary hearings before issuing a report are strongly encouraged to abandon the practice.

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[11] Evaluation of the Lawyer Discipline System in the State of Minnesota: Final Report, pp. 19-22.

In addition, district ethics committees present the results of their investigations and their recommendations to the Director in varying formats. Testimony of Director's Office staff indicated that the lack of uniformity in reporting format results in the submission of incomplete information. This in turn requires the Director's Office to undertake additional inquiry to obtain the missing information.

For these reasons, the Committee recommends local review of the district committee investigator's report and the use of a standard reporting format prescribed by the Executive Committee with training in its use provided by the Director's Office. These recommendations should improve the quality and uniformity of reports so as to minimize the need for reinvestigation by the Director's Office.

32. Recommendation: Rule 3(b) should be revised to require, prior to filing with the Director, the review of each report by the district committee chairman or, preferably, by a committee designated by the chairman for that purpose.

33. Recommendation: Rule 3(b) should be amended to require the use by district committees of a standard report format approved by the Executive Committee.

34. Recommendation: The Director should report to the Executive Committee the reasons for undertaking any significant reinvestigation of cases completed by district committees.

Having given the district committees final dispositional authority, absent reversal by the Director and the Executive Committee, the Committee believes that responsibility for drafting letters of dismissal and admonition also should be shifted. The investigator

who is most familiar with the case is in the best position to draft the dispositional letter. Review of these letters should be undertaken at the same time the investigator's report goes before the district chairman or the designated committee. The Director should prescribe the format and provide pattern paragraphs for these letters in the district committee manuals produced by his office. Local review of these drafts should insure their quality and consistency. The Committee expects that this recommendation should shift some of the workload burden from the Director's Office.

35. Recommendation: If the district committee report recommends discipline not warranted or admonition, the investigator should prepare and include with the report a draft dispositional letter. The Director should prescribe the format and should include in the district ethics committee manual pattern paragraphs for use in drafting such dispositional letters.

Rule 7(c) provides that investigations are to be completed and reports submitted to the Director within 45 days after the district committee receives the complaint. This time limit is not being met. Currently, it is taking on the average over 90 days to receive reports from the district committees. Testimony of district chairmen indicates that the 45 day time standard is not unreasonable, except in the unusual case. Although current rules permit the withdrawal of individual complaints from the district committee if the 45 day deadline is exceeded, no procedure exists for dealing with chronic delinquency by a district committee. The Committee finds that if more authority is to be vested with the district committees, the existing time limits must be met.

36. Recommendation: Rule 7(c) should be amended to

provide that a district committee's consistent failure to comply with the 45 day reporting requirement be reported to the Board Chairman who should seek to remedy the matter through the district, county or regional bar association President.

Although the cases assigned to the district committee are carefully monitored by the Director's Office, the Committee finds that the timeliness and thoroughness of the investigations varies significantly across the state. In addition, procedures are not uniform among the district committees.

An annual report by each district committee of its activity to the Board and the Court would provide a vehicle for learning of needed improvements in the system and in the process. Publication of comparative statistics of district committee performance would provide further incentive for thorough investigation and timely reporting. Rule 3(b) now requires the district chairman to prepare and submit an annual report and such other reports as the Director may require. In practice, this is not being done and the Board and the Court have not regularly obtained information which might be helpful to them when monitoring the work of the district committees. Rule 3(b) should be modified to make clear that annual reports by the district committees are to be submitted to the Court and the Board.

37. Recommendation: Rule 3(b) should be modified to require each district committee to file an annual report of its activity with the Supreme Court and the Board in a format specified by the Executive Committee. Publication of comparative district committee statistics should be considered.

2. Board Panels

Panels comprised of three Board members are charged with the responsibility of determining whether there exists probable cause to believe that an ethical violation was committed which warrants public discipline. Prior to 1982, Rule 9(e) authorized Board panels, after hearing, to dismiss, impose a warning, issue a private disposition or recommend a petition for disciplinary action which could include a recommendation as to ultimate disposition. In 1982, the Rules were amended to divest the panel of all authority to order private dispositions and to transfer that authority to the Director. In addition, the panel's authority to make recommendations as to the ultimate disposition was removed.

These changes were recommended by the ABA evaluation team in 1981. The team asserted that the panel's authority to issue private dispositions and to recommend the ultimate disposition changed the character of the panel hearing from probable cause to a full evidentiary proceeding involving the submission of substantial evidence by both the respondent and the Director in an effort to achieve the desired disposition. It was the team's position that these expanded hearings were taxing the time of volunteer Board members and the resources of the discipline system, were burdensome for the complainant, and were a substantial drain on limited Director's Office resources. Moreover, the team concluded that such procedures contributed to the delay in the discipline system and

exceeded the requirements of due process.[12]

Although the Committee is reluctant to recommend a change in such a recent rules revision, the testimony taken overwhelmingly favored the restoration of dispositional authority to the Board panels. The current rules limit the authority of the panel to either: 1) finding probable cause that public discipline is warranted or 2) dismissing the complaint. Many present and former Board members expressed frustration over the lack of intermediate dispositional alternatives in those cases which warrant something less than public discipline, but something more than dismissal. Under the current rules, Board members believe that some lawyers are permitted, or will be permitted, to escape the process where full probable cause for public discipline is not established, but where some form of discipline is warranted.

Moreover, some Board members indicated their belief that the current rules underutilize the members' talents and experience. It should be noted that while the time requirements for service on panels was reduced following the rules change, the number of general Board meetings was subsequently increased, resulting in little overall change in time spent by Board members.

The Committee recognizes that the restoration of dispositional authority to the panels may place additional time burdens on Board

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[12] Evaluation of the Lawyer Discipline System in the State of Minnesota, pp. 21-22.

members. However, the Committee believes that overall increase in Board member time commitments can be minimized by reducing the number of full Board meetings to two to three per year, by assuring that there are well-prepared and properly focused panel presentations by the Director's Office and by providing adequate training for Board members and particularly for panel chairmen to insure well run panel hearings. In addition, the impact of this change is, in part, lessened by the fact that some Board panels presently hold expanded evidentiary hearings despite the current rule.

Therefore, the Committee recommends that the authority of the Board panels be expanded to include the power to admonish and to order private probation with the consent of the respondent, with or without the approval of the Director. Although the Committee considered recommending that the panels be authorized to impose private warnings and to make recommendations as to the ultimate disposition, these recommendations were not adopted. In both instances the Committee found that the limited benefits could not justify the increased length of the panel hearings which would result from the reinstitution of these provisions.

38. Recommendation: Rule 9(i) should be amended to expand the dispositional authority of the Board panels to include stipulated probation and admonition.

In expanding the panel's authority to impose private sanctions, it is necessary as a matter of due process to provide the respondent with an appeal of the panel's private discipline decision. The Committee

recommends that the respondent be given the same right to a review by the Court of a panel's decision of admonition as is currently afforded to the affirmance of a Director's admonition under Rule 9(l).

> 39. Recommendation: Rule 9(l) should be amended to provide that the respondent may seek a review by the Supreme Court of the panel's private discipline disposition.

Rule 8(d) currently provides that a complainant may appeal from the Director's determination of discipline not warranted, admonition, or private probation. The appeal is to the panel chairman who may either agree with the Director's determination or send the matter to a panel hearing. If the panel chairman agrees with the Director, the complainant has no right to appeal. Testimony from panel chairs indicated that their options are too limited and that they would prefer to have an option of requiring more investigation or making a disposition other than simply agreeing with the Director or sending the matter to a panel. In accordance with other recommendations as to broadening the dispositional authority of the Board panels, the Committee believes that the panel chairmen should have broader authority at this point. Consistent with due process, the lawyer ought to have an appeal right if an admonition is issued.

> 40. Recommendation: Rule 8(d) should be amended to give the panel chairman the right to determine that discipline is not warranted, to admonish, to order private probation, with the consent of the lawyer, or to require a further investigation. The rule should also be amended to provide the lawyer with a right to appeal an admonition.

In an effort to limit the time required for probable cause hearings, and to minimize the duplication of evidentiary presentation involved

in the disciplinary process, Rule 9(h)(1) provides that the panel hearing will be terminated whenever probable cause is determined on any charge. Having established probable cause on one charge, Rule 10(d) permits the Director to amend the petition to add charges without presentation to, and approval by, a Board panel. Lawyers practicing before the Board and some members of the Board were highly critical of these procedures. In their view, these provisions fail to provide a needed check on prosecutorial authority at an early stage. Testimony indicated that additional charges are filed after the probable cause hearing and at times late in the process. Moreover, these provisions permit the filing of a public petition containing charges on which probable cause has not been found by a Board panel.

The Committee perceives the need to establish an early and comprehensive check on the prosecutor's charging authority, while continuing to avoid the problems of serial prosecution. To accomplish this, the Committee recommends that the panels be required to determine probable cause on all charges filed. The Committee further recommends that charges should not be permitted to be added where the panel has specifically found no probable cause or where the facts on which charges could have been brought were known at the time of the panel hearing, but such charges were not brought. The Director, however, should be permitted to add new charges if new evidence is discovered following the panel's determination of probable cause.

The Committee recognizes that these proposals, coupled with the restoration of dispositional authority to the Board panels, are the most controversial of its recommendations and those which are most likely to substantially affect current operating procedures. Some argued that restoring dispositional authority to the Board panels and requiring presentation of each charge will duplicate the subsequent referee hearing, overburden the Board members and the Director's staff, and seriously hamper the efficiency of the discipline system. The Committee acknowledges that these recommendations will increase the work of the Board and likely the Director's staff. However, the number of cases affected by these proposed changes is relatively small. Currently there are approximately 10-12 cases heard by the Board panels annually in which the Director believes public discipline is warranted. It is recognized that the number of respondents agreeing to by-pass the panel hearing probably will drop under the Committee's proposals, resulting in an increase in the number of cases going to panel hearings. However, it is estimated that the time commitment for Board members should not exceed that required under the old Rules. Under the proposed change, each panel can be expected to meet once every six weeks. Most members who testified indicated that such a time commitment is not unreasonable to ask of the volunteer Board, particularly if the vitality of the panel is restored.

In addition, no change has been recommended in Rule 9 which restricts evidence presented before a panel to affidavits, depositions or other documents and testimony by the lawyer, the complainant if he

chooses, and a witness whose testimony is authorized for good cause. This limitation will continue to restrict the type of evidence put in and the amount of time required to do so. Moreover, the Board panel needs only to find probable cause. Clearly the panel hearings will not be duplicating the extent of proof involved in a trial before a referee.

Finally, it is felt that these changes not only will contribute to the fundamental fairness of the process, but also will have the salutary effect of encouraging the Director's Office to prepare and present fully its case at the time of the panel hearing. Having completed discovery, at least as to the counts known about and presented to the panel, the Director's Office should be prepared within a short time period to commence the referee hearing.

The Committee believes that the interests in efficiency and minimization of the burden to the Board, Director's Office and complainants must be balanced against the need to provide procedural safeguards for the accused lawyer to insure that the system not only is fair, but also is perceived to be fair. Under the current rules there is a three tier review process where public discipline is sought by the Director: 1) presentation to the Board panel for probable cause determination with the authority to terminate the hearing when probable cause is found on any count, 2) trial by referee of those cases in which probable cause to believe that public discipline is warranted is found by the Board panel and 3) final determination by the Supreme Court.

The proposed change would affect only the first tier of review. The Committee proposes to expand Board panel authority to include the determination of probable cause on all charges and to authorize the panel to impose private discipline, where appropriate, if probable cause is not found.

This organization, though different in some respects, resembles the three-tier ABA model. Under the ABA model, petitions for public discipline are presented by disciplinary counsel to a three-person panel of the Board which hears the evidence and makes written findings of fact, conclusions of law and recommendations for disposition to the Board.[13] The full Board, as the second tier, reviews the matter on the record and approves, modifies or disapproves the hearing committee recommendation. Finally, either disciplinary counsel or the lawyer may appeal to the Court the final disposition ordered by the Board. Under both the Committee's proposal and the ABA model, the three person Board panel fully reviews the public discipline charges presented by disciplinary counsel and reaches a dispositional decision on the merits of the case.

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[13]It should be noted that ABA Standard 8.11 requires the Disciplinary Counsel to present his recommendations for private disposition to a hearing committee chairman for approval, modification, rejection, or further investigation. No prior review of the Director's private discipline is required under Minnesota Rules.

Restricting the panel to the determination of probable cause on any count clearly has streamlined the system and reduced the work of the Board and Director's Office. However, it is the Committee's belief that a lawyer should be entitled to a review on each charge before the filing of a public petition which may be as damaging to the lawyer and his associates and family as is ultimate discipline. Moreover, if dispositional authority is to be restored to Board panels as proposed in Recommendation 39 above, Board panels must be authorized to review the evidence and determine probable cause as to each charge.

41. Recommendation: Rule 9(h)(1) and 9(i) should be amended to require the Board panels to determine whether there is probable cause to believe that public discipline is warranted on each charge brought by the Director's Office.

42. Recommendation: The Executive Committee should establish a policy directing the Director to dismiss each charge in which the Board panel fails to find probable cause or to impose private discipline.

43. Recommendation: Rule 10(d) should be amended to provide that charges may not be added following the panel hearing if presented to the panel and there was a determination of no probable cause or facts were known on which charges could have been brought to a panel but such charges were not brought.

Cases scheduled for probable cause hearings are assigned by the Director to Board panels in strict rotation order. Staff and Board members indicated that the workloads of the panels are imbalanced as a result of this assignment system. In addition, an exception to strict rotation should be possible where a particular area of practice is involved and the disposition of the matter would be

aided by the assignment to the panel of a Board member with experience in the field concerned. The Committee believes that the Rules should be amended to permit the redistribution of case assignments to balance the workload among the various panels and to utilize Board member expertise in particularly complex matters. Because discretion in panel assignments is contemplated under the proposed amendment, the Rules should be revised further to transfer the responsibility for reassignments from the Director to the Executive Committee. The Committee believes it inappropriate to give the prosecutor discretionary assignment authority.

44. Recommendation: Rule 4(e) should be amended to give to the Executive Committee the authority to redistribute case assignments to balance panel workloads and to make use of Board member expertise in appropriate cases.

B. Advisory Opinions

The availability of oral and written advisory opinions is a service which is essential to the profession. Rule 4(c) vests authority to issue opinions on questions of professional conduct with the Board, which has issued a limited number of formal opinions. The Director provides informal written and oral opinions. In 1984, 610 requests for advisory opinions were made requiring nearly 1400 hours of attorney and law clerk time. The preparation of advisory opinions has been delegated to a younger attorney whose practical experience is limited.

The ABA evaluation team recommended in 1981 that the Director's Office be divested of its responsibility for issuing informal

advisory opinions for two primary reasons. The ABA Standards for Lawyer Discipline and Disability Proceedings provide that the discipline agency should not issue advisory opinions because in a subsequent disciplinary proceeding the agency may, because of differences between the previously posed and the actual fact situations or because of strong mitigating circumstances, decide not to take action against conduct it had previously concluded would be improper. Conversely, it might take action where conduct had previously been considered proper. In addition, the team found that the issuance of the advisory opinions diverted time and resources from the primary investigative and prosecutorial functions of the office.

The Director and several Board members testified that strong reasons exist to retain this function. The Director's Office has the expertise in disciplinary matters necessary to respond quickly and accurately to inquiries. The issuance of opinions is a service to the profession which can generate a modicum of good will from the bar. In addition, the awareness by the Director's Office of ethical issues posed by lawyer questions will enable the office to prepare timely educational programs for the bar on topics of frequent inquiry.

However, representatives of the state and various local bar associations urged consideration of the transfer of the ethics opinion function to a bar association committee, independent of the Board and the Director's Office. It was suggested that such a

committee would be comprised of former district committee or Board members willing to continue to devote volunteer time to the ethics function. The disciplinary systems of many states provide for this separation of responsibilities.

The Committee recognizes the educational value of the advisory opinion service and of the constructive dialogue it currently promotes between the Director's Office and the bar. Nevertheless, the Committee finds that the current backlog and processing delays in the Director's Office and the value of increasing the participation of the profession in the discipline system support the position that most of the advisory opinion work should be transferred by the Board to a central bar association committee. However, final review and approval of written opinions should remain with the Director. Both written and oral advisory opinions should be published periodically in digest format in a bar publication. In addition, in each opinion where it is determined that no unethical conduct is involved under the facts posed, it should be stated that following the advisory opinion, if the actual facts are as stated therein, will shield the lawyer from discipline charges.

Only the most experienced of the committee members should be assigned to respond to requests for immediate oral opinions. In an attempt to achieve the objectives of Standard 1.4 of the ABA Standards for Criminal Justice: The Defense Function, these members should include experienced litigators from the high risk areas, such as family and criminal law. Records should be maintained on the

facts and the opinion issued for each inquiry. Members assigned to oral advisory opinions should meet regularly to discuss the nature of each inquiry received and each opinion issued as a means of insuring consistency of opinions.

45. Recommendation: The Minnesota State Bar Association should establish a single pro bono committee of experienced lawyers or a series of committees representing the various areas of practice to implement a system for issuing oral and written advisory opinions. The committee should issue an annual report on its activities to the Supreme Court and the Board.

Assignments to written opinions should be made on a rotating basis. Draft written opinions should be prepared promptly and submitted to the Director. The Director should approve or modify the opinion to the extent he feels is necessary. However, substantial modification should occur only after consultation with the committee member who drafted the initial opinion. Each written opinion should contain the following final paragraph:

> "Based upon the facts submitted, it is the present intention of the Director not to seek discipline if this opinion is followed and if the facts are as stated. If there is a change in enforcement intention, general publicity will be given to that effect and enforcement may be commenced but only for conduct subsequent to the date of the publicity."

Assignments to requests for immediate oral opinions should be made on a rotating basis with consideration given to the area of expertise needed. Only the most experienced members of the committee should be assigned to respond to requests for oral opinions. A record should be kept of the name, date, facts and opinion rendered. If disciplinary proceedings are later brought, the fact of following or not following the opinion should be considered in determining the degree of discipline imposed, if a violation is found to have occurred.

C. Composition of Disciplinary Agencies

1. Board

Considerable testimony indicated that there exists an impression in

some quarters of the bar that the current discipline system tends to single out criminal, family and sole or small law firm practitioners for prosecution. The Committee, however, was persuaded by the statements of current and former Board members and Director's Office staff that these areas by their very nature are high risk specialties from a professional responsibility perspective. Nevertheless, the Committee finds that these high risk areas are underrepresented on the Board. The Clark Report identified several problems caused by inadequate representation on disciplinary agencies:

> "(1) Disciplinary agencies composed of members who lack expertise in the fields of practice likely to be involved in the complaints they are required to pass on, such as negligence and criminal law, may be unable to evaluate the accused attorney's conduct intelligently.
>
> (2) Effective self-discipline requires that all segments of the profession actively support the disciplinary process. Practitioners who are the subject of complaints and who find that the disciplinary agency is composed of attorneys unfamiliar with the problems they face in their practice may feel that the propriety of their conduct is not being reviewed by a panel of their peers. This may lead to resentment of the disciplinary agency by a substantial segment of the profession."[14]

The Committee commends the Court's practice of assuring geographic diversity in Board membership and urges it to consider making a similar effort to reflect a cross section of areas of practice on the Board.

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[14] Problems and Recommendations in Disciplinary Enforcement, p. 46.

46. Recommendation: Rule 4(a)(2) should be amended to recognize the Court's traditional practice of assuring geographic diversity in Board membership and to provide that a similar diversity in areas of practice also be represented on the Board.

To facilitate the effort of identifying candidates who are representative of the various practice areas, the Committee recommends that the Court consider introducing an open appointments system in which notice of an impending vacancy on the Board and solicitation of applications would be published. Section and district bar chairmen should receive direct notice of openings. Initial screening by staff or through a state bar committee would be appropriate. The Committee believes that such a system would provide an expanded pool of applicants available for consideration by the Court, particularly those representing the various areas of practice.

47. Recommendation: The Court should consider adopting an open appointments system to expand the pool of candidates from which Board members are appointed.

2. District Ethics Committees

A similar concern was expressed regarding inadequate representation of high risk areas on the district ethics committees. The Committee finds that greater efforts should be made to insure that district committee membership reflects a cross section of the bar.

48. Recommendation: Rule 3(a)(2) should be amended to urge the appointment to district committees of lawyer members from the various areas of practice. The Board should monitor and report to the Court compliance of district committees with this objective.

The chairmen of the twenty-one district ethics committees are appointed by the Supreme Court. For the same reasons given above regarding Board member appointments, the Committee urges the Court to consider an open appointments process for the selection of district chairmen. This recommendation contemplates that experience in the disciplinary system will be one of the principal criteria for selection of committee chairmen.

> 49. Recommendation: The Court should consider adopting an open appointments system to expand the pool of available candidates from which district chairmen are appointed. A principal criterion for selection should be experience in disciplinary matters.

D. Education

It is axiomatic that education is the most effective technique for promoting high ethical standards within the profession. The Committee is convinced that "preventive medicine" or "wellness" training in the area of ethics is one of the ways to reduce the volume of ethical complaints being experienced at this time. It is clear that many of the complaints which do not rise to the level of an ethical violation could have been avoided with preventive action and that many ethical violations could likewise be avoided with even minimal exposure to the substantive law of ethics.

In 1981, the Court considered a proposal to require that 5 credits of the three-year 45 credit requirement be devoted to professional responsibility education. The Court rejected this proposal primarily because of the increased administrative burdens it would

place on the Continuing Legal Education Board and on course sponsors. In its place, the Court adopted a policy requiring all CLE providers to indicate what portion of each program is devoted to ethics and, if no time is dedicated to ethics, to provide written reasons for its absence. Failure to include an ethics component can result in non-accreditation of a program. Local sponsors often integrate professional responsibility education in their courses, but national firms and course providers in other states seldom do so.

The Committee commends the Director's Office staff for its extensive participation in continuing legal education programs. It further acknowledges the efforts of the Court in encouraging continuing education programs to integrate ethical issues into the consideration of the substantive areas of law. Nevertheless, the Committee finds that the current voluntary system is not working effectively. Members note that many of the best attended programs contain no ethics component.

The Committee understands that the State Board of Continuing Legal Education has recently made a concerted effort to notify all course providers of Rule 2 of the Rules of the Supreme Court for Continuing Legal Education which expresses the Court's strong preference that ethics be incorporated into every program and provides possible sanctions for failure to do so.[15] In addition, all applications for

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[15]"If in the opinion of the Board, presentation of problems of Professional Responsibility of legal ethics are omitted, or inadequate without satisfactory explanation, the Board may refuse to grant full credit for all hours in attendance, impose a deduction from credit hours which would otherwise be granted, and in the case of persistent refusal to cover these topics refuse to grant further credit for courses offered by that sponsor."

accreditation which fail to identify an ethics component or fail to state reasons for its absence are returned as incomplete submissions. Early indications are that this notification procedure may be proving effective. Although the Committee debated at some length recommending that the Court adopt a mandatory continuing education requirement in the area of professional responsibility, the proposal was rejected in favor of monitoring the impact of the Continuing Legal Education Board's initiatives in this area.

> 50. Recommendation: The Continuing Legal Education Board should monitor and annually report to the Court compliance by course sponsors with Rule 2 of the Rules of Continuing Legal Education which expresses the Court's strong preference that each continuing legal education course include a professional responsibility component.

The Committee believes that the state and local bar associations can play an important role in giving meaningful treatment to ethical issues within the context of substantive law consideration. In that regard, the Committee feels that the various sections of the Minnesota State Bar Association have an obligation to inform their members of the difficult ethical problems confronting their areas of practice. The Committee also believes that continuing education on ethics is far more effective when tied directly to areas of practice than when dealt with in the abstract. For that reason, the Committee urges the Minnesota State Bar Association and its various sections to consider providing free continuing education programs which focus on ethical considerations of particular interest to the areas of practice. Such programs could be presented at district bar section meetings and in particular during the annual bar convention.

Such a program would acknowledge MSBA's interest in encouraging high standards of professionalism and recognize its commitment to the lawyer discipline system.

51. Recommendation: The Minnesota State Bar Association should formulate a plan for facilitating and encouraging its various sections to sponsor free ethics related educational programs. District bar associations and sections thereof should do likewise.

V. PROCEDURAL FAIRNESS

During the course of the Committee's study, a clear picture began to emerge of a growing sense of frustration and anger within the profession over issues of fundamental procedural fairness. Testimony from a cross section of the bar identified a number of areas where refinements to the Rules or to current practice would promote fairness in the discipline system without undermining necessary enforcement efforts.

A. Mission Statement

A frequently voiced criticism of the current lawyer discipline system is that it is alleged to be overly prosecutorial. Some also asserted that there is greater scrutiny of criminal, family and sole or small firm practitioners than of others within the profession. The Committee's study of the system concludes that several steps, as outlined in previous sections of this report, should be taken to introduce additional checks on prosecutorial discretion and to ensure cross representative membership on the adjudicatory and policy-making agencies within the discipline system. Nevertheless, while excessive zeal may have been demonstrated in isolated cases, the Committee clearly found no pattern of abuse. Indeed, a review of case dispositions indicates that nearly 85 percent of all complaints are dismissed. According to a recent national survey, the Minnesota system is three times less likely to publicly discipline a lawyer than is the average nationally. In addition, the Committee was not persuaded that the high risk areas of law were

singled out for prosecution, but rather found the frequency of prosecution to be a function of the greater incidence of complaints generated in these areas of practice.

The Committee believes, however, that the Rules are deficient in failing to make clear that the mission of the lawyer discipline system is not only to protect the public, but also to afford fairness and justice to the accused lawyer. Rule 2 should be amended to reflect this broader charge to the discipline system.

> 52. Recommendation: Rule 2 should be amended to expand the purpose of the lawyer discipline system to include, in addition to the protection of the public, insuring fairness to the lawyer complained of and to the profession as a whole.

B. Notification of Charges

Currently, 15 percent of all complaints filed with the Director's Office are immediately dismissed. Most of the remaining complaints are sent to the district committees for investigation. Typically, the accused attorney will be sent a copy of the complaint by the investigator and asked to respond.

The Committee received testimony criticizing the disciplinary agencies for failing to notify the accused attorney of the specific violations of the Code which the attorney is alleged to have committed. One district chairman indicated that on occasion it is difficult even for the district committee to determine from the complaint what ethical violation is alleged to have occurred. Since

a lawyer in the Director's Office initially screens every complaint, the Committee feels it would be appropriate and not unduly time consuming for the staff attorney to identify at that time the disciplinary rule or ethical consideration which is believed to have been violated.

> 53. Recommendation: The duty attorney in the Director's Office should identify, during the initial screening of complaints, the disciplinary rule or ethical consideration which is believed to have been violated in order that the accused attorney be given specific notice of the charges.

C. Discovery

On March 15, 1985, the Court adopted amendments to the Rules of Civil Procedure which included provisions calculated to encourage reasonable limitation of discovery in civil actions. Similar concerns have been voiced about unnecessary discovery in the discipline process. Testimony of lawyers practicing before the Board cited examples of costly discovery efforts producing information of doubtful value. The Committee itself observed a certain amount of over discovery during its substantive file audit. In In Re N.P., 361 NW 2d 386 (Minn. 1985), the Supreme Court announced modifications to Rule 25 which permit respondents to test the reasonableness of Rule 25 requests by motion to the Ramsey County District Court. Although the Committee believes that this new avenue of review will provide a needed safeguard, it recommends that the Court consider a revision to Rule 25(a) to codify the right to district court review, to provide guidance to the trial court in determining reasonableness, and to clarify that a good faith

challenge to requests shall not be deemed a failure to cooperate. In part, these recommendations are found in In Re N.P., supra, yet their codification in a rule may be of assistance to lawyers practicing in this area.

54. Recommendation: Rule 25(a) should be amended to provide that discovery requests shall not be disproporationate to the gravity and complexity of the alleged ethical violation, that the Ramsey County District Court has jurisdiction over challenges to the reasonableness of Director requests, and that a good faith challenge to requests shall not constitute a failure to cooperate.

The Committee also received complaints that the investigator's report is not discoverable by the respondent. However, staff of the Director's Office indicated that such reports are made available upon request. The Committee recommends that this practice be incorporated into the Rules.

55. Recommendation: Rule 6(c) shall be amended to require the Director to furnish a copy of the investigator's report to the respondent upon request.

Testimony before the Committee indicated that an accused attorney's original books and records have sometimes been held by the Director's Office for unacceptable periods of time. The lack of access to such records by the lawyer results in obvious disruptions to the lawyer's practice. The Committee recommends that Rule 25(a) be revised to permit copies to be used in lieu of the original and that the Director's Office be urged to promptly return original books and records.

56. Recommendation: Rule 25(a) should be amended to direct the use of copies in lieu of the original and to

require the Director to promptly return originals.

D. Confidentiality and Expunction of Records

One of the most serious criticisms of the discipline system heard during the course of the Committee's review concerned the system's treatment of the "truly innocent" lawyer. Members of the bar reported that dissatisfied clients, unhappy adversaries and competitors sometimes file completely groundless complaints for ulterior purposes. Indeed, the vast majority of complaints result in dismissal.

Until recently, every dismissed complaint was maintained indefinitely. Several years ago the current Director successfully proposed a revision to Minnesota's Rules to parallel closely the newly adopted ABA standard on expunction. In 1982, Minnesota became one of the first states to provide for early expunction of dismissed complaints.

Under the current Rules, the records of dismissed complaints are maintained by the Director's Office in the attorney's file for a five year period. Thereafter, the records of the complaint are destroyed. However, a docket is permanently retained showing the names of the respondent and complainant, the final disposition and the date the records were expunged.

Testimony was taken indicating an increasing resentment by unjustly accused lawyers over the retention of any record of meritless

complaints. Others stated their belief that a record of dismissed ethical complaints (officially known as "discipline not warranted"), in practice, adversely affects a lawyer's opportunity for judicial appointment.

The Committee considered several alternatives to deal with this problem. It was suggested that two categories of dismissal be established: discipline not warranted (DNW) and dismissal without merit. While the records of the DNW would be retained for the current five year period, the records of a dismissal without merit disposition would be expunged immediately after the 14 day appeal period. Although the Committee found great appeal in this alternative, it was not adopted because of the Committee's concern that the availability of a "no record" category of disposition would result in substantial new expenditures of time by all parties in determining whether a case will be disposed of as a DNW or as a dismissal without merit.

A second alternative considered was to expunge all DNW dispositions immediately following the appeal period. This proposal also was rejected on the grounds that it would preclude the identification of lawyers whose specific acts taken in isolation are not unethical but taken together demonstrate a pattern of neglect which rises to the level of an ethical violation.

The objective of the Committee was to accommodate the concerns of the innocent lawyer who has a permanent record of what is in fact a

meritless complaint and the concerns of the discipline agencies over their ability to detect patterns of neglect. In an attempt to achieve that objective, the Committee recommends that Rule 20(d)(1) be amended to reduce the records retention period for dismissed complaints from five to three years and to eliminate the current requirement that a docket entry be maintained permanently. The Committee was persuaded that some retention period is necessary to detect patterns of neglect, but found five years to be an unnecessarily long period. In addition, it was not persuaded that a permanent docket entry was required to avoid the possibility of reprosecution. The Committee found it highly unlikely that an individual would file a second complaint covering conduct considered by the system more than three years earlier. It should be noted that the ABA Standards for Lawyer Discipline and Disability Proceedings were amended in 1982 to provide for the expunction of dismissed complaints after a three year period and to make the retention of a docket entry permissive.

57. Recommendations: Rule 20(d) should be amended to reduce the records retention period for dismissed cases from five to three years and to eliminate the permanent docket entry of the disposition of such cases.

In addition, the Committee recommends that Rule 20(b) be amended to prohibit the disclosure of records of complaints in which it was determined that discipline was not warranted. Testimony indicated that the candidacy of a number of lawyers for judicial appointment has been unfairly affected by their dismissed complaint records. This is perceived to be so despite the admonition to the Governor in letters disclosing an applicant's record that no adverse inference

should be drawn from discipline not warranted dispositions. The Committee finds that the bar perceives the cautionary language used by the Director in his disclosure letters to the Governor to be ineffectual. Once charged, lawyers seem tarnished, even though subsequently found not guilty. For that reason, the Rules should provide for non-disclosure of dismissed complaints.

58. Recommendation: Rule 20(b) should be amended to prohibit the disclosure of records of complaints to individuals and agencies external to the discipline system where it was determined that discipline was not warranted.

E. Effect of Previous Consideration

Similar considerations of fundamental fairness and due process were found by the Committee to require a change to Rule 19 which outlines the permissable use in current proceedings of conduct previously considered. The Committee urges an amendment to this rule to specify that dismissals shall not be considered except to show a pattern of neglect. The rule also should be amended to provide that the fact of previous discipline should not be used in considering whether a violation occurred unless essential to prove the present charge (e.g. lawyer has continued to practice despite suspension) or for purposes of impeachment. This recommendation is consistent with Standard 8.39 of the ABA Standards for Lawyer Discipline and Disability Proceedings.

59. Recommendation: Rule 19(b)(1) should be amended to provide that conduct which was the subject of a previously

dismissed complaint may not be considered in subsequent proceedings except to show a pattern of conduct the cumulative effect of which constitutes an ethical violation. Rule 19(b)(4) should be added to make clear that previous discipline shall be made known and used only in determining the nature of the discipline and not in determining whether a violation occurred.

F. Uniformity

Testimony of Board members and Director's Office staff suggested the need to adopt procedures that will promote greater uniformity and consistency in the disposition of cases by the district committees and Board panels. The Committee finds that one major way to encourage uniformity is through training of district committee and board members.

Existing training efforts must be expanded. The Director's Office annually sponsors a one-day orientation and training program and distributes a comprehensive procedures manual for district committee members. Program attendance, however, is voluntary. There are no formalized orientation or training programs and no procedures manual for Board members. Specialized training does not exist for district and Board panel chairmen who are the key participants in managing the disciplinary process and in assuring its efficient and effective functioning.

The Committee strongly urges that such training programs be developed by the Executive Committee and Director and that attendance in person or by tape be mandated. Training should cover such areas as the Rules on Lawyers Professional Responsibility and

the Code of Professional Responsibility, focusing on the commonly cited disciplinary rules and ethical considerations, important Minnesota cases, investigation procedures, sample findings, burdens of proof and standards of evidence. In addition, specialized training should be developed for district and Board panel chairmen. The Committee believes that formalized and mandated training of individuals charged with making decisions which may affect an individual's right to practice law is essential.

60. Recommendation: The Executive Committee and the Board should develop formalized training programs for all new district committee and Board members. Attendance in person or by tape should be mandated. Continuing members should be encouraged to attend as well. Procedures manuals for Board members and specialized training for district and Board panel chairmen also should be developed.

The Committee also considered the development of dispositional guidelines as a vehicle for promoting consistency in decision-making within the discipline system. After considerable discussion and consultation with experienced public and lawyer members of district committees and the Board, this proposal was rejected on the basis that such a large undertaking is neither justified nor necessary. However, the Committee urges the Board to consider ways to assure greater consistency in panel dispositions. For example, with the assignment of major management responsibility to the Executive Committee, it is recommended that the primary purpose of Board meetings be shifted to one of education and communication. Consideration should be given to developing a synopsis of cases heard by each panel and to discussing the facts and dispositions of unusual or controversial cases. The Committee believes that such

regularized interaction will go a long way toward promoting consistency in panel decision.

61. Recommendation: A primary purpose of Board meetings should be the interchange of information concerning Board panel actions as a means of promoting dispositional consistency among the panels.

G. Conflict of Interest

Although the disciplinary process is governed at various stages by the Rules of Civil Procedure, there is no specific provision requiring disqualification or recusal of district committee or Board panel members for conflict of interest. The Committee urges clarification of the rules to specifically require disqualification of investigators, district committee members and Board panel members from participating in any matter in which such person may have an interest in its determination or have a real or apparent bias or prejudice as to the complainant or respondent.

62. Recommendation: Rules 4(d) and 6(a) should be amended to require disqualification of an investigator, district committee member or Board member in circumstances which would require disqualification of a judge under Canon 3 of the Code of Judicial Conduct.

H. Ex Parte Communications

Testimony taken by the Committee suggested that over the years there have been isolated instances of inappropriate ex parte communications with members of the various adjudicative bodies within the discipline system. These communications typically involved urgent procedural issues. Here too, the Rules of Civil Procedure

concerning ex parte communications clearly cover points in the process, but their application to other stages is less clear. The Committee recommends that the Rules specifically deal with this subject.

> 63. Recommendation: It is recommended that the Rules be amended to provide that ex parte communications should not occur except after first attempting to contact the adversary and then only if that person is unavailable and an emergency exists.

I. Media Communications

Several years ago, one of the main sources of criticism of the discipline system was its handling of news releases concerning both individual cases and publicity on the general operation of the system. Since that time the Board has adopted a detailed policy covering the issuance of news releases upon the filing of public petitions seeking suspension or disbarment. However, no specific policy has been promulgated concerning news releases and publicity of a general nature. The Executive Committee is urged to review the need to modify its current policy with respect to specific cases, in light of other recommendations relating to panel authority made in this report, and to formulate a policy on the issuance of news releases and of publicity of a general nature.

> 64. Recommendation: The Executive Committee should review the need to modify its current media communications policy upon the filing of public petitions in light of other recommendations contained in this report. A policy covering procedures for the issuance of news releases of a general nature also should be formulated.

J. Immunity

Criticism of the various aspects of the discipline system discussed in this report has caused some individuals to propose a change to Rule 21(b) which grants immunity from suit to Board members, district committee members, the Director and Director's Office staff. The Committee believes that the same immunity granted to prosecutors and judges ought to be afforded to those serving in analogous capacities within the lawyer discipline system. While the Committee makes no recommendation for change in Rule 21, it does emphasize that the current rule applies only to civil suits. The conduct of lawyers involved in the prosecutorial and adjudicative functions of the lawyer discipline system is subject to the Code of Professional Responsibility.

K. Notification of Discipline Not Warranted

The Committee believes that the Board and the Director should review current procedures to identify areas where changes can improve relations with the bar without compromising enforcement efforts. One such area proposed to the Committee is the notifications of DNW. The current form letter should be revised to include an expression of appreciation for the lawyer's cooperation, if such has occurred, and a solicitation of the lawyer's continuing support for the system. The Committee believes that such greater sensitivity to the legitimate concerns of the "truly innocent" lawyer will enhance bar support for the system without any sacrifice to enforcement vigilence.

65. Recommendation: The Director's notice of a discipline not warranted disposition should be revised to express appreciation for the lawyer's cooperation and solicit the lawyer's continuing support of the system.

VI. CONCLUSION

This is the first local evaluation of the Minnesota lawyer discipline system since the Minnesota Rules on Lawyers Professional Responsibility were promulgated by the Supreme Court in 1971. The Court has again demonstrated its commitment to maintaining a strong and effective discipline system by its appointment of this Advisory Committee. We are honored to have been given the opportunity to evaluate objectively the current system and to offer our best judgment on ways in which it can be strengthened and improved.

The Committee commends the many volunteer members of the district committees and the Board who give so willingly of their time in service to the betterment of the profession. The dedication of the Director and his staff and their strong advocacy on behalf of disciplinary enforcement has assured that self-regulation of the legal profession is adequately protecting the public.

The Committee has attempted to use its collective judgment, informed by the testimony of a broad-based group of lawyers and citizens involved in the system, to provide the Court with constructive suggestions and recommendations for change. The Committee believes that clarification of the lines of authority, closer management

supervision of the Director's office, more representative Board and district committee membership, increased authority for the Board panels and district committees, and additional modifications to insure greater fairness in disciplinary procedures should be accomplished.

A number of the Committee's recommendations are similar to those made by the ABA evaluation team in 1981. While some recommendations were specifically rejected by the Court and the Board, others were not acted upon due to lack of time or attention. To insure appropriate follow-up, the Committee recommends that the Executive Committee report to the Court, by June 1986, on the actions taken as a result of the findings and recommendations contained in this report. The Committee also strongly recommends that the Court create in three to five years a similar oversight committee to review needed changes in the discipline system since several recommendations involve significant structural modifications which will require a period of testing before a meaningful evaluation can be made. Each year brings change to the profession, with a corresponding change to the system. This recommendation recognizes that constant analysis and study are required to keep the system flexible enough to meet the demands of a changing profession.

66. Recommendation: By June 1986, the Executive Committee should report to the Court on the implementation of the recommendations contained in this report. The Court should consider creating, after a three to five year period, a similar oversight committee to review the discipline system and make recommendations for improvement.

The Committee finds the Minnesota discipline system largely consistent with national lawyer discipline standards, but fashioned to include unique and innovative policies of its own. We believe that the recommendations offered for Court and Board consideration will serve to strengthen the disciplinary process.

Respectfully submitted,

Nancy C. Dreher, Chairperson

Members

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Dated: April 15, 1985

APPENDIX

PROPOSED REVISIONS TO
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

LAWYERS PROFESSIONAL RESPONSIBILITY

RULE 1. DEFINITIONS

As used in these Rules:

(1) "Board" means the Lawyers Professional Responsibility Board.

(2) "Chairman" means the Chairman of the Board.

(3) "Executive Committee" means the committee appointed by the Chairman under Rule 4(d).

(~~3~~4) "Director" means the Director of the Office of Lawyers Professional Responsibility.

(~~4~~5) "District Bar Association" includes the Range Bar Association.

(~~5~~6) "District Chairman" means the Chairman of a District Bar Association's Ethics Committee.

(~~6~~7) "District Committee" means a District Bar Association's Ethics Committee.

(~~7~~8) "Notify" means to give personal notice or to mail to the person at his last known address or the address maintained on this Court's attorney registration records.

(~~8~~9) "Panel" means a panel of the Board.

RULE 2. PURPOSE

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of with fairness and justice, having in mind the public, the lawyer complained of and the profession as a whole, and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

RULE 3. DISTRICT ETHICS COMMITTEE

(a) Composition. Each District Committee 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) Four or more persons whom the District Bar Association (or, upon failure thereof, this Court) may appoint to three-year terms except that shorter terms shall be used where necessary to assure that approximately one-third of all terms expire annually. 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 District Chairman. At least 20 percent of each

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Note: In all instances throughout these Rules, the use of the masculine form of a word is intended to be gender-neutral.

District Committee's members shall be nonlawyers. Every effort shall be made to appoint lawyer members from the various areas of practice. The Board shall monitor District Committee compliance with this objective and the District Committee shall include information on compliance in its annual report to the Court.

(b) Duties. The District Committee shall investigate complaints of lawyers' alleged unprofessional conduct and make reports and recommendations thereon as provided in these Rules in a format prescribed by the Executive Committee. It shall meet at least annually and from time to time as required. The District Chairman shall prepare and submit an annual report to the Board and this Court in a format specified by the Executive Committee and make such other reports as the ~~Director~~ Executive Committee may require.

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) ~~Twelve~~ Thirteen 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. 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. To the extent possible, members shall be geographically representative of the state and lawyer members shall reflect a broad cross section of areas of practice.

(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.

(c) Duties. The Board shall have general supervisory authority over the administration of the Office of Lawyers Professional Responsibility and these Rules, ~~shall advise and assist the Director in the performance of his duties,~~ and may, from time to time, issue opinions on questions of professional conduct. The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system. The Board may elect a Vice-Chairman and specify his duties. ~~, and may elect an Executive Committee and authorize it to perform specified duties of the Board between Board meetings,~~

(d) Executive Committee. The Executive Committee, consisting

of the Chairman, and two lawyers and two nonlawyers designated annually by the Chairman, shall be responsible for carrying out the duties set forth in these Rules and for the day-to-day supervision of the Office of Lawyers Professional Responsibility. The Executive Committee shall act on behalf of the Board between Board meetings. It shall have the assistance of the State Court Administrator's office in carrying out its responsibilities. Members shall have served at least one year as a member of the Board prior to appointment to the Executive Committee. Members shall not be assigned to Panels during their terms on the Executive Committee.

(~~d~~e) Panels. The Chairman shall divide the Board into Panels, each consisting of not less than three Board members and 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 is a Panel member at any Panel proceeding he attends.~~ Three Panel members, at least one of whom is a nonlawyer and at least one of whom is a lawyer, shall constitute a quorum. No Board member shall be assigned to a matter in which disqualification would be required of a judge under Canon 3 of the Code of Judicial Conduct. The Board's Chairman or the Vice-Chairman may 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~~.~~ , excluding members of the Executive Committee.

(e~~f~~) Assignment to Panels. The Director shall assign matters to Panels in rotation~~.~~ ; provided, however, that the Executive Committee may redistribute case assignments to balance workloads among the Panels or to utilize Board member expertise.

(~~f~~g) 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.

RULE 5. DIRECTOR

(a) Appointment. The Director shall be appointed by and serve at the pleasure of this Court~~.~~ for a term of two years, and shall be paid such salary as this Court shall fix. The Director may be reappointed for successive terms. The Executive Committee shall make recommendations to the Court concerning the hiring and termination of the Director, which recommendations shall be accepted unless they are arbitrary and capricious. The Court may, however, remove the Director prior to the expiration of any term with or without cause.

(b) Duties. The Director shall be responsible and accountable directly to the Board and through the Board to this Court for the proper administration of the Office of Lawyers Professional Responsibility and these Rules. The Director shall prepare and submit to ~~this Court~~ the Board an annual report covering the

operation of the Office of Lawyers Professional Responsibility ~~lawyer=discipline=and=disability=system~~ and shall make such other reports to the Board as the Board or as this Court through the Board ~~as=it~~ may order.

(c) Employees. The Director when authorized by the Board ~~this Court==and==on==this==Court's==behalf~~ may employ, on behalf of this Court, persons at such compensation as the Board shall recommend and as this Court may approve.

RULE 6. COMPLAINTS

(a) Investigation. All complaints of lawyers' alleged unprofessional conduct or allegations of disability shall be investigated pursuant to these Rules. No District Committee or Director's Office investigator shall be assigned to a matter in which disqualification would be required of a judge under Canon 3 of the Code of Judicial Conduct.

(b) Notification: referral. If a complaint of a lawyers' alleged unprofessional conduct is submitted to a District Committee, the District Chairman promptly shall notify the Director of its pendency. If a complaint is submitted to the Director, he shall refer it for investigation to the District Committee of the district where the lawyer has his principal office unless he determines to investigate it without referral~~.~~ or that discipline is not warranted.

(c) Copies of Investigator's Report. Upon the request of the lawyer being investigated, the Director shall provide a copy of the investigator's report, whether that investigation was undertaken by the District Committee or the Director's Office.

RULE 7. DISTRICT COMMITTEE INVESTIGATION

(a) Assignment; assistance. The District Chairman may investigate or assign investigation of the complaint to one or more of the Committee's members, and may request the director's assistance in making the investigation. The investigation may be conducted by means of written and telephonic communication and personal interviews.

(b) Report. ~~The=District=Chairman=or=his=designee=shall=report=the results==of==the=investigation=to=the=Director.~~ The investigator's report and recommendations shall be submitted for review and approval to the District Chairman, or to a committee designated for this purpose by the District Chairman, prior to its submission to the Director. The report shall include a recommendation that the Director:

(1) Determine that discipline is not warranted;
(2) Issue an admonition;
(3) Refer the matter to a Panel; or
(4) Investigate the matter further.

If the report recommends discipline not warranted or admonition, the investigator shall include in the report a draft letter of disposition in a format prescribed by the Director.

(c) Time. The investigation shall be completed and the report made promptly and, in any event, within 45 days after the District Committee received the complaint, unless good cause exists. If the report is not made within 45 days, the District Chairman or his designee within that time shall notify the Director of the reasons for the delay. If a District Committee has a pattern of responding substantially beyond the 45 day limitation, the Director shall advise the Board and the Chairman shall seek to remedy the matter through the President of the appropriate District Bar Association.

(d) Removal. The Director may at any time and for any reason remove a complaint from a District Committee's consideration by notifying the District Chairman of the removal.

(e) Notice to complainant. The Director shall keep the complainant advised of the progress of the proceedings.

RULE 8. DIRECTOR'S INVESTIGATION

(a) Initiating investigation. At any time, with or without a complaint or a District Committee's report, and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers~~.~~ ; provided, however, that investigations to be commenced upon the sole initiative of the Director shall not be commenced without the prior approval of the Executive Committee.

(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) 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) Admonition. 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. The Director shall notify the lawyer in writing:

(i) Of the admonition;

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

(iii) That the lawyer may, by notifying the Director in writing within fourteen days, demand that the Director so present the charges to a Panel which shall consider the matter de novo or instruct the Director to file a Petition for Disciplinary Action in this Court; and

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

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

(3) Stipulated probation.

(i) In any matter, with or without a 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.

(ii) At any time during the period, with the Board Chairman or Vice-Chairman's approval, the ~~parties~~ Director and the lawyer 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.

(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;

(ii) The lawyer makes a demand under 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 an appeal under subdivision (d).

(d) ~~Complainant's appeal~~ Review by Panel Chairman. 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~~.~~ , direct that further investigation be undertaken, or exercise the same powers of private discipline given to the Director under Rule 8(c)(1), (2) or (3). If the respondent is not satisfied with the Panel chairman's disposition, he may appeal the matter to a Panel on which the reviewing Panel chairman does not sit by notifying the Director in writing within fourteen days.

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, assign them to a Panel by rotation, schedule a prehearing meeting, and notify the lawyer of:

(1) The charges;

(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 rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman.

(b) Admission of 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 a 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 Courts 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 permitted by the Rules of Civil Procedure for the District Courts.

(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 the 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 other 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~~ 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 ~~the Director has issued~~ an admonition has been issued under Rule 8(c)(2) or 8 (d), 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 proposed 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.

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

(1) As to each charge, ~~D~~ determine that there is or 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) As to each charge where probable cause has not been found to believe that public discipline is warranted,

(i) determine that discipline is not warranted, or

(ii) issue an admonition, or

(iii) with the consent of the lawyer, order probation subject to the same terms and conditions as provided under Rule 8(c)(3), except that the consent of the Panel shall be permitted in lieu of the approval by the Director, required under Rule 8(c)(3)(i).

(~~2~~3) 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. The Panel shall not make a recommendation as to the matter's ultimate disposition.

(j) Notification. The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has the complaint, of the Panel's disposition. ~~If the Panel did not determine that there was probable cause to believe that public discipline is warranted, t~~ The notification to the complainant, if any, shall inform him of his right to petition for review under subdivision (k). ~~If the Panel affirmed the Director's admonition, t~~ The notification to the lawyer shall inform him of his right to appeal to the Supreme Court under subdivision (l).

(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.

(l) Respondent's appeal to Supreme Court. The lawyer may appeal the Panel's ~~affirmance of the Director's admonition~~ decision by filing a notice of appeal and nine copies thereof with the Clerk of Appellate Courts and by serving a copy on the Director within 30 days after being notified of the Panel's action. The respondent shall be denominated by initials in the proceeding. This Court may review the matter on the record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may either affirm the ~~admonition~~ decision or make such other disposition as it deems appropriate.

(m) 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.

(n) 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.

RULE 10. 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 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 file a petition for disciplinary action together with the lawyer's admission or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter may be remanded 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, willful 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, with the approval of the chairman of the Board, 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~~.~~ ; provided, however, that no charges may be added if presented to a panel and there was a determination of no probable cause or sufficient facts were known on which charges could have been brought to a panel but such charges were not made.

(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).

RULE 11. RESIGNATION

This Court may at any time, with or without a hearing and with any conditions it may deem appropriate, grant or deny a lawyer's petition to resign from the bar. A lawyer's petition to resign from the bar shall be served upon the Director. The original petition with proof of service and one copy shall be filed with this Court. If the Director does not object to the petition, he shall promptly advise the Court. If he objects, he shall also advise the Court, but then submit the matter to a Panel, which shall conduct a hearing and make a recommendation to the Court. The recommendation shall be served upon the petitioner and filed with the Court.

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. An original and nine copies shall be filed. The petition shall set forth the unprofessional conduct charged.

(b) Service. The Director shall cause the petition to be served upon the respondent in the same manner as a summons in a civil action. If the respondent has a duly appointed resident guardian or conservator service shall be made thereupon in like manner.

(c) Respondent not found.

(1) Suspension. If the respondent cannot be found in the state, the Director shall mail a copy of the petition to the respondent's last known address and file an affidavit of mailing with this Court. Thereafter the Director may apply to this Court for an order suspending the respondent from the practice of law. A copy of the order, when made and filed, shall be mailed to each district court judge of this state. Within one year after the order is filed, the respondent may move this Court for a vacation of the order

of suspension and for leave to answer the petition for disciplinary action.

(2) Order to show cause. If the respondent does not so move, the Director shall petition this Court for an order directing the respondent to show cause to this Court why appropriate disciplinary action should not be taken. The order to show cause shall be returnable not sooner than 20 days after service. The order may be served on the respondent by publishing it once each week for three weeks in the regular issue of a qualified newspaper published in the county in this state in which the respondent was last known to practice or reside. The service shall be deemed complete 21 days after the first publication. Personal service of the order without the state, proved by the affidavit of the person making the service, sworn to before a person authorized to administer an oath, shall have the same effect as service by publication. Proof of service shall be filed with this Court. If the respondent fails to respond to the order to show cause, this Court may proceed under Rule 15.

RULE 13. ANSWER TO PETITION FOR DISCIPLINARY ACTION

(a) Filing. Within 20 days after service of the petition, the respondent shall file an original and nine copies of an answer in this Court. The answer may deny or admit any accusations or state any defense, privilege, or matter in mitigation.

(b) Conditional admission. The answer may tender an admission of some or all accusations conditioned upon a stated disposition.

(c) Failure to file. If the respondent fails to file an answer within the time provided or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may proceed under Rule 15.

RULE 14. HEARING ON PETITION FOR DISCIPLINARY ACTION

(a) Referee. This Court may appoint a referee with directions to hear and report the evidence submitted for or against the petition for disciplinary action.

(b) Conduct of hearing before referee. Unless this Court otherwise directs, the hearing shall be conducted in accordance with the rules of civil procedure applicable to district courts and the referee shall have all the powers of a district court judge.

(c) Record. The referee shall appoint a court reporter to make a record of the proceedings as in civil cases.

(d) Referee's findings, conclusions, and recommendations. The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and Director of them. Unless the respondent or Director

within five days orders a transcript and so notifies the Court, the findings of fact and conclusions shall be conclusive. One ordering a transcript shall make satisfactory arrangements with the reporter for his payment and shall specify in his initial brief to the Court the referee's findings of fact, conclusions and recommendations he disputes, if any. The reporter shall complete the transcript within 30 days.

(d) Hearing before Court. This Court within ten days of the referee's findings, conclusions, and recommendations, shall set a time for hearing before this Court. The order shall specify times for briefs and oral arguments. The matter shall be heard upon the record, briefs, and arguments.

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;

(3) Order the lawyer to pay a fine, costs, or both.

(4) Place him on a probationary status for a stated period, or until further order of this Court, with such conditions as this Court may specify and to be supervised by the Director;

(5) Reprimand him;

(6) Order the lawyer to successfully complete within a specified period such written examination as may be required of applicants for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility;

(7) Make such other disposition as this Court deems appropriate; or

(8) Dismiss the petition for disciplinary action.

(b) Protection of clients. When a lawyer is disciplined or permitted to resign, this Court may issue orders as may be appropriate for the protection of clients or other persons.

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 may result in risk of injury to the public, the Director may file with

this Court an original and nine 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.

(b) Service. The Director shall cause the petition to be served upon the lawyer in the same manner as a petition for disciplinary action.

(c) Answer. Within 20 days after service of the petition or such shorter time as this Court may order, the lawyer shall file in this Court an original and nine copies of an answer to the petition for temporary suspension. If he fails to do so within that time or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may enter an order suspending the lawyer pending final determination of disciplinary proceedings. The answer may be supported by a transcript of any evidence taken by the 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 may result in risk of injury to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.

RULE 17. FELONY CONVICTION

(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.

(b) Other cases. Nothing in these Rules precludes disciplinary proceedings, where appropriate, in case 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.

RULE 18. REINSTATEMENT

(a) Petition for reinstatement. A suspended, disbarred, or resigned lawyer's petition for reinstatement to practice law shall be served upon the Director and the President of the State Bar Association. The original petition, with proof of service, and nine copies, shall then be filed with this Court.

(b) Investigation; report. The Director shall investigate and report his conclusions to a Panel.

(c) Recommendation. The Panel may conduct a hearing and shall make its recommendation. The recommendation shall be served upon the petitioner and filed with this Court.

(d) Hearing before Court. There shall be a hearing before this Court on the petition unless otherwise ordered by this Court. This Court may appoint a referee. If a referee is appointed, the same procedure shall be followed as under Rule 14.

(e) General requirements for reinstatement. Unless such examination is specifically waived by this Court, no lawyer ordered reinstated to the practice of law after having been disbarred by this Court shall be effectively reinstated until he shall have successfully completed such written examinations as may be required of applicants for admission to the practice of law by the State Board of Law Examiners, and no lawyer ordered reinstated to the practice of law after having been suspended by this Court shall be effectively reinstated until he shall have successfully completed such written examination as may be required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Unless specifically waived by this Court, no lawyer shall be reinstated to the practice of law following his suspension or disbarment by this Court until he shall have satisfied the requirements imposed under the rules for Continuing Legal Education on members of the bar as a condition to a change from a restricted to an active status.

RULE 19. EFFECT OF PREVIOUS PROCEEDINGS

(a) Criminal conviction. A lawyer's criminal conviction in any American jurisiction, even if upon a plea of nolo contendere or subject to appellate review, is, in proceedings under 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.

(1) Conduct previously considered. Unless it was determined in previous proceedings that discipline was not warranted, ~~P~~proceedings under these Rules may be based upon conduct considered in previous lawyer disciplinary proceedings of any jurisdiction, even if it was determined in the previous proceedings that ~~discipline was not warranted or that~~ the proceedings should be discontinued after the lawyer's compliance with conditions~~.~~ ; provided, however, that previous conduct which resulted in a disposition of dismissal may be used to show a pattern of conduct the cumulative effect of which constitutes an ethical violation.

(2) Previous finding. A finding in 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 reprimand, probation, suspension, disbarment, or equivalent in the previous disciplinary proceedings is admissible in evidence in proceedings under these Rules.

(4) Limitation on consideration. Notwithstanding (2) and (3) hereof, findings of previous misconduct warranting discipline and facts relating to previous discipline imposed shall only be made known and used in connection with the nature of the discipline being considered and not in determining whether a violation has occurred.

(c) Stipulation. Unless the referee or this Court otherwise directs or the stipulation otherwise provides, a stipulation before a Panel remains in effect at subsequent proceedings regarding the same matter before the referee or this Court.

(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.

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 proceedings before a referee or this Court 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~~ To the lawyer affected;

(5) Where permitted by this Court; or

(6) Where required or permitted by these Rules.

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

(1) The fact that a matter is or is not being investi-

gated or considered by the Committee, Director, or Panel;

(2) The fact that the Director has ~~either determined that discipline is not warranted, or~~ issued an admonition;

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

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

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 the Committees, Board, Director, Referee or this Court in furtherance of their duties under these Rules.

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

(1) Destruction schedule. All records or other evidence of the existence of a dismissed complaint shall be destroyed ~~five~~ three years after the dismissal~~; except that the Director shall keep a docket showing the names of each respondent and complainant, the final disposition, and the date all records relating to the matter were expunged~~.

~~(2) Effect of expunction. After a file has been expunged, any Director response to an inquiry requiring a reference to the matter shall state that it was dismissed and that any other record the Director may have had of such matter has been expunged. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that the complaint was dismissed and thereafter expunged~~.

(~~3~~2) Retention of records. Upon application to a Panel by the Director, 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 ~~five~~ three years as the Panel deems appropriate.

The Director may, for good cause shown and with notice to the respondent and opportunity to be heard, seek a further extension of the period for which retention of the records is authorized whenever a previous application has been granted for the maximum period (~~five~~ three years) permitted hereunder.

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, 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.

(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.

RULE 22. PAYMENT OF EXPENSES

Payment of necessary expenses of the Director and the Board and its members incurred from time to time and certified to this Court as having been incurred in the performance of their duties under these Rules and the compensation of the Director and persons employed by him under these Rules shall be made upon vouchers approved by this Court from its funds now or hereafter to be deposited to its credit with the State of Minnesota or elsewhere.

RULE 23. SUPPLEMENTAL RULES

The Board and each District Committee may adopt rules and regulations, not inconsistent with these Rules, governing the conduct of business and performance of their duties.

RULE 24. COSTS AND DISBURSEMENTS

(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.

(b) Disbursements. Unless otherwise ordered by this Court, the prevailing party in any disciplinary proceedings 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 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 court.

(c) 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) Judgment for costs and disbursements. Costs and disbursements 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 taxed under this Rule has not been fully paid.

RULE 25. REQUIRED COOPERATION

(a) Lawyer's duty. It shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director or his staff, the Board, or a Panel, by complying with reasonable requests, including requests to:

(1) ~~Furnish~~ Make available designated papers, documents or tangible objects;

(2) Furnish in writing a full and complete explanation covering the matter under consideration;

(3) Appear for conferences and hearings at the times and places designated.

Such requests shall not be disproportionate to the gravity and complexity of the alleged ethical violations. The District Court of Ramsey County shall have jurisdiction over motions arising from Rule 25 requests. The lawyer shall be denominated by initials in any District Court proceeding. Copies of documents shall be permitted in lieu of the original in all proceedings under these Rules. The respondent shall furnish for reproduction the original at the Director's request. The Director shall promptly return the originals to the respondent after they have been copied.

(b) Grounds of discipline. Violation of this rule is unprofessional conduct and shall constitute a ground for discipline~~;~~ provided, however, that a lawyer's challenge to the Director's requests shall not constitute lack of cooperation if the challenge is promptly made, has an arguable basis in law and is asserted for a substantial purpose other than delay.

RULE 26. DUTIES OF DISCIPLINED OR RESIGNED LAWYER

(a) Notice to clients in non-litigation matters. Unless this court orders otherwise, a disbarred, suspended or resigned lawyer shall notify each client being represented in a pending matter other than litigation or administrative proceedings of the disbarred, suspended or resigned lawyer's inability to represent the client. The notification shall urge the client to seek legal advice of the client's own choice elsewhere.

(b) Notice to parties and tribunal in litigation. Unless this Court orders otherwise, a disbarred, suspended or resigned lawyer shall notify each client, opposing counsel and the tribunal involved in pending litigation or adminsitrative proceedings of the disbarred, suspended or resigned lawyer's inability to represent the client. The notification to the client shall urge the prompt substitution of other counsel in place of the disbarred, suspended or resigned lawyer.

(c) Manner of notice. Notices required by this rule shall be sent by certified mail, return receipt requested, within ten (10) days of the disbarment, suspension or resignation order.

(d) Client papers and property. A disbarred, suspended or resigned lawyer shall make arrangements to deliver to each client being represented in a pending matter, litigation or administrative proceeding any papers or other property to which the client is entitled.

(e) Proof of compliance. Within fifteen (15) days after the effective date of the disbarment, suspension or resignation order, the disbarred, suspended or resigned lawyer shall file with the Director an affidavit showing:

1. That the affiant has fully complied with the provisions of the order and with this rule;

2. All other State, Federal and administrative jurisdictions to which the affiant is admitted to practice; and

3. The residence or other address where communications may thereafter be directed to the affiant.

Copies of all notices sent by the disbarred, suspended or resigned lawyer shall be attached to the affidavit.

(f) Maintenace of records. A disbarred, suspended or resigned lawyer shall keep and maintain records of the actions taken to comply with this rule so that upon any subsequent proceeding being instituted by or against the disbarred, suspended or resigned lawyer, proof of compliance with this rule and with the disbarment, suspension or resignation order will be available.

(g) Condition of reinstatement. Proof of compliance with this rule shall be a condition precedent to any petition for reinstatement made by a disbarred, suspended or resigned lawyer.

RULE 27. TRUSTEE PROCEEDING

(a) Appointment of trustee. Upon a showing that a lawyer is unable to properly discharge responsibilities to clients due to disability, disappearance or death, or that a suspended, disbarred or resigned lawyer has not complied with Rule 26, and that no arrangement has been made for another lawyer to discharge such responsibilities, this Court may appoint a lawyer to serve as the

trustee to inventory the files of the disabled, disappeared, deceased, suspended, disbarred or resigned lawyer and to take whatever other action seems indicated to protect the interests of the clients and other affected parties.

(b) Protection of records. The trustee shall not disclose any information contained in any inventoried file without the client's consent, except as necessary to execute this Court's order appointing the trustee.

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 proceeding:

(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 resumne 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.

RULE 29. EX PARTE COMMUNICATIONS

Ex parte communications to any adjudicatory body including panels, referees and this Court are strongly disfavored. Such communications should not occur except after first attempting to contact the adversary and then only if the adversary is unavailable and an emergency exists. Such communications should be strictly limited to the matter relating to the emergency and the adversary notified at the earliest practicable time of the prior attempted contact and of the ex parte communication.