

FILE NO. 01-84-2140

STATE OF MINNESOTA

IN SUPREME COURT
OFFICE OF APPELLATE COURTS
FILED RECEIVED

Petition of the Lawyers Professional
Responsibility Board to Amend Rules
on Lawyers Professional Responsibility

AUG 18 1986 JUL 28 1986

Wayne Tschimperle
Lawyers Prof. Resp. Board
CLERK

WHEREAS, by order dated August 31, 1984, the Supreme Court appointed an Advisory Committee on Lawyer Discipline to study the lawyer discipline process and to recommend such changes as it deemed appropriate for the consideration of the Court; and

WHEREAS, on December 2, 1985, the Supreme Court Advisory Committee filed a petition in the Supreme Court recommending certain changes to the Rules on Lawyers Professional Responsibility and a public hearing was held on those recommendations on March 18, 1986; and

WHEREAS, the Lawyers Professional Responsibility Board submitted proposals for futher rule changes on February 6, 1986, which proposals were not considered on March 18, 1986, by this Court because there had been an insufficient period of time for notice and comment regarding the Board's further proposals; and

WHEREAS, for the reasons presented in the attached statement, the Lawyers Professional Responsibility Board believes that its further proposals would strengthen and improve the lawyer discipline system in the State of Minnesota,

NOW, THEREFORE, the Lawyers Professional Responsibility Board respectfully petitions the Court to hold public hearings concerning amendments to the Rules on Lawyers Professional Responsibility as attached to this petition.

Dated: July 25, 1986.

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

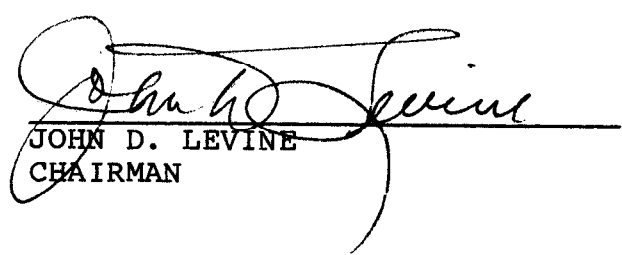

JOHN D. LEVINE
CHAIRMAN

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I. INTRODUCTION

Upon receipt of the April 15, 1985, Report of the Supreme Court Advisory Committee on Lawyer Discipline, Lawyers Board Chair, Robert Henson, appointed a Board committee to formulate a proposed Board response to the Report. The Board committee (hereinafter Committee) was also asked to make recommendations on any other matters affecting the lawyer disciplinary system insofar as they were not covered by the Report.

The proposed rule changes presented in this petition were recommended by this Committee to the Lawyers Professional Responsibility Board which adopted them and requested that this petition be filed with the court.

II. STATEMENT OF CONCERN REGARDING DELAY AND RECOMMENDED CHANGES

A. General Problem and Causes of Delay in Public Disciplinary Matters.

The harm done to the public, the bench, the bar and the bar's image by the small number of corrupt, incompetent or disabled attorneys is enormous. The prompt investigation, presentation and disposition of cases involving such attorneys is of paramount importance. To be licensed by the court as an attorney is to be "recommended to the public as a trustworthy person fit to be consulted in matters of confidence." In re Smith, 220 Minn. 197, 19 N.W.2d 324, 326 (1945). When a lawyer is routinely certified for a long period someone as completely trustworthy when he is really unfit, and there is during this period reason to know of this inconsistency, recommendations for procedural change are needed.

The problem of delay in (and due to) disciplinary proceedings has been chronic and long-standing. See 1970

ABA Clark Report, at 30-33 (A. 23-24). The 1981 ABA Committee and the Supreme Court Advisory Committee addressed different aspects of the problem of delay. Although a great deal of progress has recently been made in curbing delay, a significant problem remains.

The length of time entailed in supreme court disciplinary dispositions has resulted from: (1) previous staff shortages in the Director's office; (2) duplication of proceedings before the Panel and referee; (3) occasional delays by referees while matters are under advisement; (4) the several months that are involved in supreme court briefing, arguing and opinion writing; (5) toleration of litigious respondents who seek delay; and (6) the unusually large and complicated cases that cannot readily be investigated and presented. Current staffing authorization levels and the court's policy of requiring a referee return date may well be sufficient to deal with causes (1) and (3).

In addition to concern with the overall length of time from file-opening to supreme court disposition, there should be a concern with the time elapsed between file-opening and filing of a petition for disciplinary action, and with the time lapse between a referee suspension or disbarment recommendation and the court's order.

B. Pre-Petition Delay

The time lapse before public filing of a petition is crucial because the petition is the first public notice that there is probable cause to believe a lawyer should be disciplined, and perhaps suspended or disbarred. Until this time, the certification of the court is unqualified and the Director, with few exceptions, cannot inform the public or

inquirers of any questions of the lawyer's trustworthiness. It is unquestionably in the public's interest to have this information as soon as it is fair to the respondent attorney to disclose it. The principal cause of delay at this stage has been inadequate staffing in the Director's office. This problem has been rectified. Pre-petition delay could also be curtailed by amendment of Rule 10.

1. Expanding Panel Bypass Situations Under Rule 10.

Rule 10(c), RLPR, now allows the Director, after certain criminal convictions, to file a petition, "with the approval of the Chairman of the Board." Rule 10 should be amended to provide for dispensing with Panel proceedings and filing a petition upon the approval of a panel chair in cases in which there are admissions or clear documentary evidence of (a) misappropriation of client funds; or (b) non-filing of tax returns; or (c) civil judgments with findings equivalent to serious breaches of disciplinary rules; and (d) other cases in which the misconduct has regularly resulted in suspension or disbarment by the court. The need for a Panel hearing should also be eliminated when an attorney will not respond to investigative inquiries and does not appear at a pre-hearing meeting. ABA Standard 8.11 contemplates a summary review by a Panel Chair before all formal, public charges. Even with a summary expedited proceeding for the most serious matters, Minnesota respondent attorneys generally would still be accorded more due process before formal charges than is recommended by the ABA. See ABA Std. 8.11. (A. 25.)

Board Recommendation 1.

RULE 10, RLPR, "DISPENSING WITH PANEL PROCEEDINGS," SHOULD

BE AMENDED TO ADD A SUBSECTION PROVIDING THAT IN MATTERS IN WHICH THERE ARE AN ATTORNEY'S ADMISSIONS, CIVIL FINDINGS, OR APPARENTLY CLEAR AND CONVINCING DOCUMENTARY EVIDENCE OF AN OFFENSE OF A TYPE FOR WHICH THE COURT HAS SUSPENDED OR DISBARRED LAWYERS IN THE PAST, SUCH AS MISAPPROPRIATION OF FUNDS, REPEATED NON-FILING OF PERSONAL INCOME TAX RETURNS, FLAGRANT NON-COOPERATION INCLUDING FAILURE TO ATTEND A PRE-HEARING MEETING, FRAUD AND THE LIKE, THE DIRECTOR MAY EITHER SUBMIT THE MATTER TO A PANEL OR UPON A MOTION MADE WITH NOTICE TO THE ATTORNEY AND APPROVED BY THE PANEL CHAIR, FILE THE PETITION UNDER RULE 12. See A. 11.

The Supplemental Report of the Supreme Court Advisory Committee indicates that the Committee was aware of this recommendation, that it was not able to review it as a Committee, but that it believed the recommendation "merits serious consideration by the Court." Supp. Rep. at 18.

2. Referee Appointment for Probable Cause Hearing in Extraordinary Circumstances.

Occasionally, there are charges against an attorney which cannot readily be heard in a Panel probable cause proceeding. The extraordinary reasons for such unusual cases include litigation entailing numerous and voluminous documents, numerous and complicated motions and other situations causing undue burden on a volunteer group. In such situations it may be unreasonably burdensome to convene Panel members from around the state for hearings lasting more than a couple of days, and make multiple copies of documents for deliberation regarding the hearings and documents. In such situations, it may also be more efficient for understanding extraordinarily complex situations and facts for one person, namely a referee, to

conduct both the probable cause hearing and the referee hearing that would ordinarily follow on a probable cause determination. In such situations, if one referee heard both matters, witnesses would not have to be burdened with repeating their testimony, and delay would be alleviated by avoiding needless repetition. To satisfy the policy concern that final disciplinary hearings be fully public, a transcript of the probable cause hearing could be publicly filed. Scheduling would also be easier, as the number of persons whose time had to be coordinated would be reduced. Although the court appointment of a referee would be public, the rule would provide for identification of the attorney by number or randomly-chosen initials. To insure that only truly extraordinary situations triggered this rule, certification of both the Panel and Board Chair would be required. Accordingly, the Board makes the following recommendation.

Recommendation 2.

UPON THE CERTIFICATION OF THE PANEL CHAIRMAN AND THE BOARD CHAIRMAN TO THE COURT THAT EXTRAORDINARY CIRCUMSTANCES INDICATE THAT A MATTER IS NOT SUITABLE FOR SUBMISSION TO A PANEL UNDER RULE 9, BECAUSE OF EXCEPTIONAL COMPLEXITY OR OTHER REASONS, THE COURT MAY APPOINT A REFEREE WITH DIRECTIONS TO CONDUCT A PROBABLE CAUSE HEARING ACTING AS A PANEL WOULD UNDER RULE 9, OR THE COURT MAY REMAND THE MATTER TO A PANEL UNDER RULE 9 WITH INSTRUCTIONS, OR THE COURT MAY DIRECT THE DIRECTOR TO FILE WITH THIS COURT A PETITION FOR DISCIPLINARY ACTION UNDER RULE 12(a). IF A REFEREE IS APPOINTED TO SUBSTITUTE FOR A PANEL, THE REFEREE SHALL HAVE THE POWERS OF A DISTRICT COURT JUDGE AND RAMSEY COUNTY

DISTRICT COURT SHALL NOT EXERCISE SUCH POWERS IN SUCH CASES. IF THE REFEREE SO APPOINTED DETERMINES THERE IS PROBABLE CAUSE AS TO ANY CHARGE AND A PETITION FOR DISCIPLINARY ACTION IS FILED IN THIS COURT, THE COURT MAY APPOINT THE SAME REFEREE TO CONDUCT A HEARING ON THE PETITION FOR DISCIPLINARY ACTION UNDER RULE 14. IF A REFEREE APPOINTED UNDER RULE 14 CONSIDERS ALL OF THE EVIDENCE PRESENTED AT THE PROBABLE CAUSE HEARING, A TRANSCRIPT OF THAT HEARING SHALL BE MADE PART OF THE PUBLIC RECORD. See A. 8.

3. Final Panel Hearing.

Just as there are some cases which are perhaps too complex for a suitable panel hearing, there are some cases, probably more numerous, which may appropriately be heard finally by a panel, without a referee hearing. It appears that the concern with public filing of charges against a lawyer is such that the panel hearing would, until probable cause was determined, have to remain private. However, upon such a determination, and agreement of the parties, a petition could be filed publicly, and the same panel appointed by the Court to make findings and a recommendation to the Court. The Panel would then reconvene for any further hearings that were necessary. A transcript of the Panel hearing would be publicly filed. The Panels have conducted a number of final evidentiary hearings in reinstatement petition matters, with satisfactory results, and often by agreement of the parties. Expanding the situations in which Panels conduct final hearings would best utilize the Board's talent. Accordingly, the Board makes the following recommendation.

Recommendation 3.

RULE 14 SHOULD BE AMENDED TO ADD A PARAGRAPH (F), PROVIDING THAT UPON WRITTEN AGREEMENT OF AN ATTORNEY, THE PANEL CHAIRMAN AND THE DIRECTOR, AT ANY TIME, THIS COURT MAY APPOINT THE PANEL WHICH IS TO CONDUCT OR HAS ALREADY CONDUCTED THE PROBABLE CAUSE HEARING AS ITS REFEREE TO HEAR AND REPORT THE EVIDENCE SUBMITTED FOR OR AGAINST THE PETITION FOR DISCIPLINARY ACTION. UPON SUCH APPOINTMENT, THE PANEL SHALL PROCEED UNDER RULE 14 AS THE COURT'S REFEREE, EXCEPT THAT IF THE PANEL CONSIDERS EVIDENCE ALREADY PRESENTED AT THE PANEL HEARING, A TRANSCRIPT OF THE HEARING SHALL BE MADE PART OF THE PUBLIC RECORD. THE DISTRICT COURT OF RAMSEY COUNTY SHALL CONTINUE TO HAVE THE JURISDICTION OVER DISCOVERY AND SUBPOENAS PROVIDED IN RULE 9(d) AND (gh). See A. 13.

C. Post-referee Hearing and Court Scheduling

It is common for at least six months to elapse between the referee hearing and the court suspension or disbarment opinion. During this time, a transcript is prepared, a briefing schedule (typically of 75 days) is set, a hearing is held and an opinion formulated and published. During this time, also, the attorney continues to be licensed and certified by the court.

Rule 16, RLPR, provides for temporary suspension during disciplinary proceedings. However, in recent years, with the exceptions of temporary suspensions by consent or after criminal convictions, the court has not ordered temporary suspensions, although in every case in which such suspension has been sought, the ultimate court determination has been for suspension or disbarment.

There have not been any cases in recent years in which a referee has recommended disbarment in which the court has not either suspended or disbarred the respondent. That being so, a referee disbarment recommendation should result in a temporary suspension pending completion of disciplinary proceedings, unless the referee or the court otherwise orders.

Board Recommendation 4.

RULE 16, RLPR, SHOULD BE AMENDED TO ADD A SUBSECTION (E), PROVIDING THAT UPON A REFEREE DISBARMENT RECOMMENDATION, THE LAWYER'S AUTHORITY TO PRACTICE LAW SHOULD BE SUSPENDED PENDING FINAL DETERMINATION OF THE DISCIPLINARY PROCEEDING, UNLESS THE REFEREE DIRECTS OTHERWISE OR THE COURT OTHERWISE ORDERS. See A. 15.

The Supplemental Report of the Supreme Court Advisory Committee indicates that the Committee was aware of this recommendation, that it was not able to review it as a Committee, but that it believed the recommendation "merits serious consideration by the Court."

III. OTHER LAWYERS PROFESSIONAL RESPONSIBILITY
BOARD RECOMMENDED RULE CHANGES

A. Protection of Work Product and Internal Communications.

Three concerns make it appear necessary and desirable to propose a rule change to the Court protecting the Board, the Executive Committee, and the Director from intrusive discovery requests. First, if the Advisory Committee's proposal for greater involvement of the Executive Committee in the Director's office, and shifting of supervisory responsibility from the Court to the Board are to be workable, communications in furtherance of these duties must be protected from general scrutiny. Second, Board members

are volunteers and it would be particularly burdensome for them to be deponents or otherwise subject to discovery requests. Third, in two recent matters there have been numerous motions and petitions to the Ramsey County District Court and Minnesota Supreme Court seeking discovery of Director work product, depositions of current and former attorneys and Directors, and of actions purportedly involving Board members. The elaborate and time-consuming motion practice related to these attempts could be curtailed with a strong rule. Accordingly, the Board makes the following recommendation.

Recommendation 5.

RULE 20(a)(4) SHOULD BE AMENDED TO INCLUDE THE FOLLOWING LANGUAGE:

UPON THE REQUEST OF THE LAWYER AFFECTED THE FILE MAINTAINED BY THE DIRECTOR SHALL BE PRODUCED, INCLUDING ANY DISTRICT COMMITTEE REPORT; HOWEVER, THE DIRECTOR'S WORK PRODUCT SHALL NOT BE REQUIRED TO BE PRODUCED EXCEPT UPON A SHOWING OF COMPELLING NEED. IN ANY EVENT, THE MENTAL IMPRESSIONS, CONCLUSIONS, OPINIONS, AND LEGAL THEORIES OF THE DIRECTOR AND THE DIRECTOR'S STAFF SHALL REMAIN PROTECTED;

RULE 20(a)(7) SHOULD BE ADDED:

NOTHING IN THESE RULES SHALL BE CONSTRUED TO REQUIRE A DISCLOSURE OF THE MENTAL PROCESSES OR COMMUNICATIONS OF COMMITTEE OR BOARD MEMBERS MADE IN FURTHERANCE OF THEIR DUTIES. See A. 17.

B. Assessment of Attorney Fees and Increased Costs.

The largest portion of the attorney registration fees paid in Minnesota is used to support the disciplinary system. It is the opinion of the Board that a greater portion of the

cost of the operation of the disciplinary system should be borne by those attorneys whose conduct requires public discipline. In furtherance of this user-fee concept, the Board makes the following recommendations.

Recommendation 6.

RULE 24(a) SHOULD BE AMENDED TO INCREASE THE AMOUNT OF COSTS RECOVERED BY THE BOARD FROM \$500.00 TO \$750.00. See A. 19.

This \$250.00 increase reflects only inflationary increases since the setting of the \$500.00 fee in 1982. About \$18,500 was recovered in costs and fines in 1985. This amount could be significantly increased. The Committee's concern with burdens on the "innocent attorney" and the user fee concept suggest that disciplined attorneys bear more disciplinary expenses.

In recent years a limited number of highly litigious respondents with financial resources have placed a disproportionate burden on the resources of the disciplinary system. It is the Board's opinion that in appropriate cases the rules should provide for the assessment of reasonable attorney fees at the Court's discretion. Accordingly, the Board makes the following recommendation.

Recommendation 7.

RULE 15(a)(3) SHOULD BE AMENDED TO READ:

ORDER THE LAWYER TO PAY A FINE, COSTS, ATTORNEY FEES,
OR BOTH ALL OF THE FOREGOING. See A. 14.

The Board requests that this amendment apply to all cases wherein a referee hearing is held after the date of the Court's order amending Rule 24(a) and Rule 15(a)(3), LRPR, and that it apply to all costs, disbursements,

expenses and legal fees incurred in said cases whether incurred before or after the amendment.

C. Miscellaneous.

1. Confidentiality, Other Lawyers' Responsibilities and Client Protection.

Rules 5.1 and 5.2 of the Rules of Professional Conduct make lawyers responsible for other lawyers' violations of rules or directions in certain circumstances. In imposing these responsibilities, it may also be appropriate to allow discretionary disclosure of disciplinary file information by the Director to other attorneys in a lawyer's firm. Such disclosure may also be appropriate in certain situations for the protection of the firm's clients. To enable the Director to exercise such discretion, the Board recommends adding to Rule 20(b), a new section (5):

Recommendation 8.

RULE 20(b) SHOULD BE SUPPLEMENTED BY ADDING A SECTION (5) PROVIDING THAT THE DIRECTOR MAY DISCLOSE TO OTHER MEMBERS OF THE LAWYER'S FIRM INFORMATION NECESSARY FOR PROTECTION OF THE FIRM'S CLIENTS OR APPROPRIATE FOR EXERCISE OF RESPONSIBILITIES UNDER RULES 5.1 AND 5.2, RULES OF PROFESSIONAL CONDUCT. See A. 17.

2. Provision of Sending Exhibits to Panel Members.

Rule 9(f) provides that the Director shall send each panel member copies of all documentary exhibits marked at the pre-hearing meeting. In some cases the respondents have extraordinarily large numbers of documentary exhibits. In conformity with the user fee concept the Board recommends that this rule be amended to require that each party provides copies of his or her own exhibits to the panel members, thereby relieving the Director of the burden of copying and mailing large numbers of respondent's exhibits.

Recommendation 9.

RULE 9(f) SHOULD BE AMENDED TO PROVIDE THAT EACH PARTY SHALL SEND COPIES OF THE DOCUMENTARY EXHIBITS MARKED BY THAT PARTY AT THE PRE-HEARING MEETING TO EACH PANEL MEMBER IN ADVANCE OF THE PANEL HEARING. See A. 8.

3. Subpoenas for Referee Hearings.

On several occasions questions have arisen as to jurisdiction to issue subpoenas for witnesses and documents for proceedings before a referee pursuant to Rule 14, RLPR. Hearings occur at various locations throughout the State of Minnesota, oftentimes before referees from other judicial districts or who may be retired. Clerks of court are unfamiliar with the rules and procedures pertaining to lawyers professional responsibility. The present rule fails to designate which jurisdiction shall issue subpoenas. The Board therefore makes the following recommendation:

Recommendation 10.

RULE 14 SHALL BE AMENDED TO ADD A SUBSECTION (c) WHICH PROVIDES THAT THE DISTRICT COURT OF RAMSEY COUNTY SHALL ISSUE SUBPOENAS. THE REFEREE SHALL HAVE JURISDICTION TO DETERMINE ALL MOTIONS ARISING FROM THE ISSUANCE AND ENFORCEMENT OF SUBPOENAS. See A. 13.

Dated: Aug July 25, 1986. (8-14-86)

Respectfully submitted,

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD


JOHN D. LEVINE
CHAIRMAN

**LPRB PROPOSED REVISIONS TO RULES
ON 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).
- (4) "Director" means the Director of the Office of Lawyers Professional Responsibility.
- (5) "District Bar Association" includes the Range Bar Association.
- (6) "District Chairman" means the Chairman of a District Bar Association's Ethics Committee.
- (7) "District Committee" means a District Bar Association's Ethics Committee.
- (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.
- (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.

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

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 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 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) 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, 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.

(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 general supervision of the Office of Lawyers Professional Responsibility. The Executive Committee shall act on behalf of the Board between Board meetings. If requested by the Executive Committee, 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.

(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. 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.

(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.

(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, and shall be paid such salary as this Court shall fix. The Board shall review the performance of the Director every 2 years or at such times as this Court directs and the Board shall make recommendations to this Court concerning the continuing service of the Director.

(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 the Board an annual report covering the operation of the Office of Lawyers Professional Responsibility and shall make such other reports to the Board as the Board or as this Court through the Board may order.

(c) **Employees.** The Director when authorized by the Board 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'~~ lawyer's 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 investigator's report and recommendations shall be submitted for review and approval to the District Chairman, his designee 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 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 reviewing Board member so directs upon an appeal under subdivision (d).

(d) **Review by Lawyers Board.** 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 by rotation to a Board member, other than an Executive committee member, appointed by the chairman. The reviewing Board member may approve the Director's disposition or, direct that the matter be submitted to a Panel other than his own, or direct that further investigation be undertaken.

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 number or randomly selected 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, Each party shall provide to each Panel member in advance of the Panel hearing, copies of all documentary exhibits marked by that party at the pre-hearing meeting, unless the parties agree otherwise or the Panel chairman or vice-chairman orders to the contrary. 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) **Referee probable cause hearing.** Upon the certification of the Panel chairman and the Board chairman to the court that extraordinary circumstances indicate that a matter is not suitable for submission to a Panel under this rule, because of exceptional complexity or other reasons, the court may appoint a referee with directions to conduct a probable cause hearing acting as a Panel would under this rule, or the court may remand the matter to a Panel under this rule with instructions, or the court may direct the Director to file with this court a petition for disciplinary action under Rule 12(a). If a referee is appointed to substitute for a Panel, the referee shall have the powers of a district court judge and Ramsey County District Court shall not exercise such powers in such case. If the referee so appointed determines there is probable cause as to any charge and a petition for disciplinary action is filed in this court, the court may appoint the same referee to conduct a hearing on the petition for disciplinary action under Rule 14. If a referee appointed under Rule 14 considers all of the evidence presented at the probable cause hearing, a transcript of that hearing shall be made part of the public record.

(gh) **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 number or randomly selected initials in any district court proceeding.

(hi) **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 each charge, and that the Panel will terminate the hearing on any charge whenever it is satisfied that there is or is not such probable cause (or, if an admonition has been issued under Rule 8(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 proposes to offer thereon;

- (3) The lawyer may respond to the Director's remarks;

- (4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;

- (5) The parties may present oral arguments; and

- (6) The Panel shall either recess to deliberate or take the matter under advisement.

(ij) **Disposition.** After the hearing, the Panel shall either:

- (1) Determine that there is not probable cause to believe that public discipline is warranted (or, if the Director has issued an admonition under Rule 8(c)(2), affirm or reverse the admonition);

- (2) If it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action. The Panel

shall not make a recommendation as to the matter's ultimate disposition.

(jk) **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. The notification to the complainant, if any, shall inform him of his right to petition for review under subdivision (kl). If the Panel affirmed the Director's admonition, the notification to the lawyer shall inform him of his right to appeal to the Supreme Court under subdivision (lm).

(kl) **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 appellate courts a petition for review. The clerk shall notify the respondent and the Board Chairman of the petition. The respondent shall be denominated by number or randomly selected 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.

(lm) **Respondent's appeal to Supreme Court.** The lawyer may appeal the Panel's affirmance of the Director's admonition by filing a notice of appeal and ~~nine~~ seven 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 number or randomly selected 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 decision or make such other disposition as it deems appropriate.

(mn) **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.

(no) **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) **Other serious matters.** In matters in which there are an attorney's admissions, civil findings, or apparently clear and convincing documentary evidence of an offense of a type for which the court has suspended or disbarred lawyers in the past, such as misappropriation of funds, repeated non-filing of personal income tax returns, flagrant non-cooperation including failure to attend a pre-hearing meeting, fraud and the like, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by the Panel chair, file the petition under Rule 12.

(de) **Additional charges.** If a petition under Rule 12 is pending before this Court, the Director must present the matter to the Panel chair, or, if the matter was not heard by a Panel, to the Board chair, or vice-chair, for approval before amending the petition to include additional charges based upon conduct committed before or after the petition was filed.

(ef) **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 seven 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 seven 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) Subpoenas. The District Court of Ramsey County shall issue subpoenas. The referee shall have jurisdiction to determine all motions arising from the issuance and enforcement of subpoenas.

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

(de) 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.

(f) Panel as referee. Upon written agreement of an attorney, the Panel chairman and the Director, at any time, this court may appoint the Panel which is to conduct or has already conducted the probable cause hearing as its referee to hear and report the evidence submitted for or against the petition for disciplinary action. Upon such appointment, the Panel shall proceed under Rule 14 as the court's referee, except that if the Panel considers evidence already presented at the Panel hearing, a transcript of the hearing shall be made part of the public record. The District Court of Ramsey County shall continue to have the jurisdiction over discovery and subpoenas in Rule 9(d) and (h).

(eg) 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, attorney's fees or ~~both~~ all of the foregoing.
- (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~~ seven copies of a petition for suspension of the lawyer pending final determination of the disciplinary proceeding. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

(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~~ seven 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.

(e) Interim suspension. Upon a referee disbarment recommendation, the lawyer's authority to practice law shall be suspended pending final determination of the disciplinary proceeding, unless the referee directs otherwise or the court otherwise orders.

RULE 17. FELONY CONVICTION

(a) **Duty of the court administrator.** Whenever a lawyer is convicted of a felony, the court administrator 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~~ seven 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 jurisdiction, 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 where discipline was not warranted.** Conduct considered in previous lawyer disciplinary proceedings of any jurisdiction is inadmissible if it was determined in the proceedings that discipline was not warranted except to show a pattern of related 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 discipline is, in proceedings under these Rules, conclusive evidence that he committed the conduct.

(3) **Previous discipline.** The fact that the lawyer received discipline in previous disciplinary proceedings is admissible to determine the nature of the discipline to be imposed, but is not admissible to prove that a violation occurred and is not admissible to prove the character of the lawyer in order to show that he acted in conformity therewith; provided, however, that evidence of such prior discipline may be used to prove:

- a. A pattern of related conduct, the cumulative effect of which constitutes a violation;
- b. The current charge (e.g., the lawyer has continued to practice despite suspension);
- c. For purposes of impeachment (e.g., the lawyer testifies he has never been disciplined before); or
- d. Motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(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 the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected;

(5) Where permitted by this Court; or

(6) Where required or permitted by these Rules.

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

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

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

(2) The fact that the Director has 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);

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

Notwithstanding any other provision of this rule, the records of matters in which it has been determined that discipline is not

warranted shall not be disclosed to any person, office or agency except to the lawyer and as between 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 three years after the dismissal;

(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 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 (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~~ \$750.

(b) **Disbursements.** Unless otherwise ordered by this Court, the prevailing party in any disciplinary proceeding decided by this Court shall recover, in addition to the costs specified in subdivision (a), all disbursements necessarily incurred after the filing of a petition for disciplinary action under Rule 12. Recoverable disbursements in proceedings before a referee or this Court shall include those normally assessed in appellate proceedings in this Court together with those which are normally recoverable by the prevailing party in civil actions in the district courts.

(c) **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 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 number or randomly selected 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, is in good faith 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 administrative 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) **Maintenance 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 resume the practice of law. The parties shall proceed as provided in Rule 18. The lawyer's petition for reinstatement:

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

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

(e) **Asserting disability in disciplinary proceeding.** A lawyer's asserting disability in defense or mitigation in a disciplinary proceeding shall be deemed a waiver of the doctor-patient privilege. The referee may order an examination or evaluation by such person or institution as the referee designates.

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.

Problem 3

Cumbersome structures that result in an inordinate time gap between the inception and conclusion of disciplinary proceedings.

DIMENSION

The survey of disciplinary agencies throughout the United States conducted by this Committee discloses that the time gap between receipt of the complaint and the entry of a court order imposing discipline varies from several months to more than five years. In some instances delay is caused by the complexity of the underlying matter and the difficulty of obtaining relevant evidence. Too often, however, the disciplinary structure itself is a major cause of delay. The chairman of a state bar association disciplinary agency from one of the midwestern states testified:

I mentioned five areas of concern. One . . . is a rule which has a kind of built-in delay mechanism. We have to go through a series of steps, committees, probable cause hearings, to get to the point of a formal action in the supreme court, aimed at an effective discipline. I can tell you that the people here and the profession . . . are concerned about the fact, and are studying it and trying to resolve it.

Inordinate delay not only unnecessarily exposes the public to the malefactor but may result in harm to the innocent attorney as well. A state bar counsel explained:

I continue to remind our committee that they do a grave injustice to the accused lawyer who is innocent by not processing that complaint, having a hearing on it, if one be necessary, and clearing his name. I warn them that one of these days they're going to find an outstanding complaint of long duration still pending when a very fine, ethical lawyer receives an appointment to the federal bench or some

scheduling of firm dates for hearings with adequate notice to the respondent-attorney in order to minimize adjournments; and court rules affording disciplinary proceedings priority.

DISCUSSION

Much of the delay inherent in the disciplinary process results from reliance on volunteer practitioners to process, investigate and prosecute complaints of attorney misconduct. The consequences of a disciplinary system that must rely on the "spare time" of volunteers because of lack of financing necessary to hire a full-time staff are discussed separately in other portions of this report.

In many jurisdictions the disciplinary structure is itself a principal cause of inordinate delay. It is not unusual to find jurisdictions with procedures involving six or seven stages, including three adversary hearings, before final action on a complaint can be taken. A member of a local disciplinary agency in a small integrated jurisdiction illustrated an instance of needless duplication:

The present rules require that if a charge is being investigated against a member, the member shall be allowed the opportunity to be heard before the filing of a formal complaint. That is, in the course of the investigation it is mandatory that either there be an informal hearing of the member before the local administrative committee, or the examiner must go over the matter with the accused attorney. We feel that this has caused some delays and has caused problems in another way, and that is if we have a serious matter in which an attorney is going to be formally charged and we have an informal hearing before the local administrative committee, then the committee makes a determination that this charge does have merit and should go forward. Then it comes back for hearing again before the

There have been instances of dual investigation in the past. There have been instances of the bar association committee taking many months to complete its investigation, only to find that a very serious charge was involved. Feeling it had no jurisdiction, it referred the matter to the supreme court committee, which then undertook the same investigation with different investigators. This kind of a thing breeds inefficiency. We hope it is being solved.

The state bar association agency or the disciplinary commission may then institute a formal proceeding in the court having disciplinary jurisdiction. In some jurisdictions this court must first decide whether the complaint should be formally filed before appointing its own referee or judge to hold a further hearing. Thereafter, the referee or judge files his report and recommendations, on the basis of which the court finally disposes of the case after affording the parties an opportunity to file briefs and to present oral argument.

A substantially similar multi-stage procedure is followed in many integrated bar states. The complaint is first investigated by an inquiry committee, which is authorized to conduct a hearing. The inquiry committee then files a report and recommendations with the governing board of the state bar for approval. The board authorizes a formal proceeding and appoints a trial committee and the prosecutors. A formal hearing is then held by the trial committee, which thereafter files its report and recommendations with the governing board of the state bar for approval. Frequently, the parties to the disciplinary proceeding are permitted to file briefs with the governing board and to appear personally for oral argument at this stage. If the board decides to proceed further, its own report and recommendations are prepared and filed in the court having disciplinary jurisdiction, together with the record of the formal hearing. The court then resolves the proceeding after affording the parties an opportunity to file briefs and present oral argument.

The multiple stages encompassed in these procedures far exceed the requirements of due process. Even an individual charged with murder in the first degree and subject to a possible death sentence is entitled to no more than indictment by a grand jury, limited discovery procedures and one trial. This point was forcefully made by a state bar counsel:

I mentioned that some committees insist on a full-scale adversary proceeding. Others do not. They hold that it is an ex parte grand jury type of thing. Now, those who insist on the full scale adversary

proceeding say, "Well, we've got to be aware of due process." They claim that you are not affording the accused lawyer due process unless he is permitted to cross-examine the accuser and the accuser's witnesses, and you must have a full-dress adversary proceeding or he is not afforded due process.

Well, to me, the obvious answer is that then we do not have due process in any criminal case . . . where the accused is indicted by a grand jury. There isn't any adversary proceeding before a grand jury.

I don't think the courts would say that he is not afforded due process simply because he is not afforded an adversary proceeding before the grievance committee.

Thus, there does not appear to be any constitutional bar to the streamlining of disciplinary procedures necessary to minimize delay.

We have already discussed the desirability of a single statewide disciplinary agency. Centralization avoids the repetitive investigative stages that now cause the transfer of complaints from one disciplinary agency to another. One investigation, if properly conducted, is sufficient.

While most jurisdictions authorize an adversary hearing at the investigative stage, this is not always possible. Some investigations relate to misconduct of a complex or continuing nature. This possible misconduct is more efficiently investigated by ex parte proceedings similar to a grand jury investigation. Disciplinary agencies should be given discretion to determine whether an adversary hearing or an ex parte investigation is more appropriate. That determination, however, will affect the procedure to be followed if a formal proceeding is instituted later.

If there has been an adversary hearing at the investigative stage, there is no necessity for pretrial discovery, since the parties will have had each other's case disclosed to them in the course of the hearing. If, on the other hand, the investigative stage is conducted ex parte, there will have been no disclosure, and pretrial discovery should be available following the filing of charges and prior to the formal hearing. Implementation of this recommendation, therefore, affords the parties reasonable opportunity to obtain necessary information concerning the nature and substance of their adversary's case while limiting the number of hearings necessary to reach a final determination, thereby significantly reducing delay.

Repetitive review by governing bodies also should be avoided. This can be accomplished by limiting review to the stage of the proceeding (depending on the procedure that exists in the

Standards for Lawyer Discipline and Disability Proceedings

Joint Committee on Professional Discipline

American Bar Association

- 8.11 Disposition Following Screening or Investigation
- Review by Hearing Committee Chairman. The recommendation of counsel for disposition of a matter should be reviewed by the chairman of a hearing committee designated by the board, who may approve, modify, or disapprove the recommendation, or direct that the matter be investigated further.

COMMENTARY

The review process preserves elements of bifurcation within the unitary system, because the recommendation of counsel is subject to review and approval by a representative of the adjudicative body. The approval of counsel's recommendation to file formal charges by the reviewing member amounts to a finding of probable cause to proceed.

In order to prevent any possibility of forum shopping by counsel, the hearing committee chairman should be designated by the board.

The hearing committee of which the reviewing chairman is a member should be disqualified from any future consideration of the matter, in order to avoid his being placed in the position of passing upon the correctness of his approval of the recommendation to prosecute formal charges.

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8-18-86
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August 18, 1986

PERSONAL AND CONFIDENTIAL

Mr. Wayne O. Tschimperle
Clerk of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: Petition of the Lawyers Professional Responsibility
Board to Amend Rules on Lawyers Professional
Responsibility.

Dear Mr. Tschimperle:

Enclosed are an original and seven copies of the above petition.
I am sending Justice Kelley a separate copy.

Very truly yours,

William J. Wernz
Director

By Candice M. Hojan
Candice M. Hojan
Senior Assistant Director

CMH/rlb
Enclosures