

STATE OF MINNESOTA

IN SUPREME COURT

CI-84-2140

**ORDER ESTABLISHING DEADLINE FOR SUBMITTING
COMMENTS ON PROPOSED AMENDMENTS
TO THE MINNESOTA RULES ON LAWYERS
PROFESSIONAL RESPONSIBILITY**

The Lawyers Professional Responsibility Board filed a petition with this Court on September 3, 2008, proposing changes to the Minnesota Rules on Lawyers Professional Responsibility; and,

This Court will consider the proposed changes without a hearing after soliciting and reviewing comments on the proposed changes;

IT IS HEREBY ORDERED that any individual wishing to provide statements in support or opposition to the proposed changes shall submit twelve copies in writing addressed to Frederick K. Grittner, Clerk of the Appellate Courts, 25 Rev. Dr. Martin Luther King Jr. Blvd, St. Paul, Minnesota 55155, no later than November 26, 2008. A copy of the petition containing the proposed changes is annexed to this order.

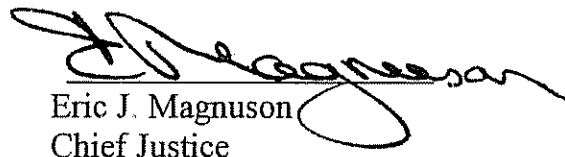
Dated: September 25, 2008

BY THE COURT:

OFFICE OF
APPELLATE COURTS

SEP 25 2008

FILED


Eric J. Magnuson
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the Rules on
Lawyers Professional Responsibility.

**PETITION OF THE LAWYERS
PROFESSIONAL RESPONSIBILITY
BOARD TO AMEND THE
RULES ON LAWYERS
PROFESSIONAL RESPONSIBILITY**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE
STATE OF MINNESOTA:

Petitioner Lawyers Professional Responsibility Board (LPRB) respectfully
petitions this Court to amend the Rules on Lawyers Professional Responsibility (RLPR)
as set forth below.

In support of this petition, the LPRB would show the following:

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer discipline system.
2. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.
3. This Court has adopted the RLPR to establish procedures for the investigation of complaints against attorneys and prosecution of violations of the Minnesota Rules of Professional Conduct. These Rules have been amended from time-to-time.
4. The Court currently has before it the Report of The Supreme Court Advisory Committee to Review the Lawyer Discipline System. A hearing on that report is scheduled for September 23, 2008.

5. The LPRB, through its Rules Committee, reviewed a number of proposed changes to the RLPR. Input was sought and received from the MSBA Rules of Professional Conduct Committee.

Proposed Rule 8(c)

6. The LPRB recommends that Rule 8(c), RLPR, be amended to provide for the issuance of subpoenas to compel the attendance of witnesses and production of documents located in Minnesota for use in attorney disciplinary proceedings of other jurisdictions. Similar subpoena provisions for attorney discipline proceedings have been adopted by at least twenty one other jurisdictions.

7. The LPRB requests that Rule 8(c), RLPR, be amended as follows:

(c) Investigatory Subpoena. With the Board Chair or Vice-Chair'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. When a subpoena is sought in this state to obtain testimony or documents for use in lawyer discipline or disability proceedings in another jurisdiction and the request for the subpoena has been duly approved under the laws of the other jurisdiction, upon approval of the Board Chair or Vice Chair the Director may obtain a subpoena as provided in this section to compel the attendance of witnesses and production of documents.

Proposed Rules 9(i)(1), (l), and (m)

8. The LPRB recommends that Rules 9(i)(1), (l), and (m), be amended to correct grammatical errors, require that a complainant's petition for review of a panel determination be served upon the respondent and the Director, and require that the Director notify the complainant of a respondent's appeal to the Supreme Court of a panel's affirmance of an admonition. Such notifications are not required by the current rules.

9. The LPRB requests that Rules 9(i)(1), (l), and (m), RLPR, be amended as follows:

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

(1) The purpose of the hearing, which shall be explained by the Chair,
~~shall explain that the hearing's purpose is to determine:~~

(i) 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;

(ii) if an admonition has been issued under Rule 8(d)(2) or 8(e), ~~that the hearing's purpose is to determine~~ whether the panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court; or

(iii) to determine whether there is probable cause to believe that a conditional admission agreement has been violated, thereby warranting revocation of the conditional admission to practice law, and ~~that~~ the Panel will terminate the hearing whenever it is satisfied there is or is not such probable cause.

(l) **Complainant's Petition for Review.** If not satisfied with the Panel's disposition, the complainant may within 14 days file with the Clerk of the Appellate Courts a petition for review. The complainant shall, prior to or at the time of filing, serve a copy of the petition for review upon the respondent and on the Director. ~~The clerk shall notify the respondent and the Board Chair of the petition.~~ The respondent shall be denominated by number or randomly selected initials in the proceeding. This Court will grant 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 a petition for revocation of conditional admission, or take any other action as the interest of justice may require.

(m) Respondent's Appeal to Supreme Court. The lawyer may appeal a Panel's affirmance of the Director's admonition or an admonition issued by a Panel by filing a notice of appeal and 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. The Director shall notify the complainant, if any, of respondent's appeal. 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.

Rule 10(e)

10. The LPRB recommends that Rule 10(e) be amended to permit the Director, in the event of the unavailability of the Panel Chair, to seek approval from the Board Chair or Vice Chair of amendments to petitions for disciplinary action seeking to add additional charges. The current rule requires approval of the Panel Chair if the matter was heard by a Panel. This has resulted in some delay in the past where the Panel Chair has been unavailable to consider the proposed amendments.

11. The LPRB requests that Rule 10(e) be amended as follows:

(e) 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 or the Panel Chair is unavailable, 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.

Rule 14(g)

12. The LPRB recommends that Rule 14(g) be amended to expand the time in which the Court should issue a briefing order from ten to thirty days. The current rule states that the Court shall issue a briefing order within ten days of the submission of a referee's findings, conclusions and recommendations. Because, pursuant to Rule 14(c),

RLPR, the Director and the respondent have ten days from the submission of a referee's findings to order a transcript and thereby contest the findings and conclusions of the referee, it is not possible to determine the timing and order of briefing until after that ten day period has expired.

13. The LPRB requests that Rule 14(g) be amended as follows:

(g) Hearing Before Court. This Court within ~~ten~~ thirty 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. In all matters in which the Director seeks discipline, the cover of the main brief of the Director shall be blue; the main brief of the respondent, red; and any reply brief shall be gray. In a matter in which reinstatement is sought pursuant to Rule 18 of these Rules, the cover of the respondent's main brief shall be blue; that of the main brief of the Director, red; and that of any reply brief, gray. The matter shall be heard upon the record, briefs, and arguments.

Rule 16(a)

14. The LPRB recommends that Rule 16(a) be amended to provide for the temporary suspension of lawyers who have failed to file an answer to a petition for disciplinary action. Currently, Rule 13(b), RLPR, provides that when a lawyer fails to answer a petition for disciplinary action, the allegations of the petition shall be deemed admitted. Thereafter the matter is briefed to the Court by the Director and a sanction imposed pursuant to Rule 15, RLPR. In the interim, the lawyer retains the right to practice. The proposed amendment permits the Director to seek the temporary suspension of a lawyer who has failed to submit an answer.

15. The LPRB requests that Rule 16(a) be amended as follows:

(a) Petition for Temporary Suspension. In any case where the Director files or has filed a petition under Rule 12, if it appears that a continuation of the lawyer's authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm to the public or if the lawyer has failed to file an answer to a petition for disciplinary action, the Director may file with this Court an original and seven copies of a petition for suspension of the lawyer

pending final determination of the disciplinary proceeding. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

Rules 18(a), (b), and (e)

16. The LPRB recommends that Rule 18(a) be amended (a) to eliminate the requirement that petitions for reinstatement be served on the president of the Minnesota State Bar Association (MSBA) and (b) to set the fee paid to the Director in reinstatement proceedings (currently \$300) at the same amount as is required by Rule 12(B), Rules for Admission to the Bar (currently \$500). The MSBA authorized a petition seeking these changes in 2002. The first change is warranted in that neither the MSBA nor its president plays any significant formal role in attorney reinstatement proceedings such that service of the petition on them is warranted. The amendment to the fee charged for reinstatement petitions is intended to make the fee paid the Director on petitions for reinstatement commensurate with the fee paid to the Board of Law Examiners for an applicant's initial character and fitness inquiry.

17. The LPRB recommends that Rule 18(b) be amended to codify the current practice of announcing a petition for reinstatement and seeking comment. The proposed amendment also provides that any comments made in response to the solicitation are absolutely privileged and may not serve as the basis for civil liability. The MSBA authorized a petition seeking the changes pertaining to publication and comment in 2002.

18. The LPRB recommends that Rule 18(e)(1) be amended to require that lawyers who have been disbarred take and pass the bar exam prior to petitioning for reinstatement. This is intended to avoid the expenditure of the Director's and the Court's resources in considering a reinstatement petition after disbarment where the lawyer subsequently is unable or unwilling to take and pass the bar exam after reinstatement. This further protects the public by ensuring a minimum level of

competence on the part of the lawyer seeking reinstatement. The LPRB recommends that Rule 18(e)(4) be amended to add resigned lawyers to the list of persons who must demonstrate compliance with CLE requirements and satisfaction of Client Security Board (CSB) subrogation claims before reinstatement. The change pertaining to CLE is intended to protect the public by ensuring that lawyers returning to practice from retirement have maintained their competency. The change pertaining to CSB claims is intended to protect the public by ensuring that appropriate restitution is made for any defalcations involving client funds prior to reinstatement.

19. The LPRB requests that Rules 18(a), (b), and (e) be amended as follows:

(a) Petition for Reinstatement. A 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 seven copies, shall then be filed with this Court. Together with the petition served upon the Director's Office, a petitioner seeking reinstatement shall pay to the Director a fee ~~of \$300. in the same amount as that required by Rule 12(B), Rules for Admission to the Bar for timely filings.~~ Applications for admission to the bar following a revocation of conditional admission shall be filed with the Board of Law Examiners pursuant to Rule 16, Rules for Admission to the Bar.

(b) Investigation; Report.

(1) The Director shall publish an announcement of the petition for reinstatement in a publication of general statewide circulation to attorneys soliciting comments regarding the appropriateness of the petitioner's reinstatement. Any comments made in response to such a solicitation shall be absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person making the statement.

(2) The Director shall investigate and report the Director's conclusions to a Panel.

(e) General Requirements for Reinstatement.

(1) 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, may petition for reinstatement ~~shall be effectively reinstated~~ until the lawyer 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.

(2) No lawyer ordered reinstated to the practice of law after having been suspended or transferred to disability inactive status by this Court, and after petitioning for reinstatement under subdivision (a), shall be effectively reinstated until the lawyer 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.

(3) Unless specifically waived by this Court, any lawyer suspended for a fixed period of ninety (90) days or less, and any suspended lawyer for whom the Court waives the requirements of subdivisions (a) through (d), must, within one year from the date of the suspension order, successfully complete 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. Except upon motion and for good cause shown, failure to successfully complete this examination shall result in automatic suspension of the lawyer effective one year after the date of the original suspension order.

(4) Unless specifically waived by this Court, no lawyer shall be reinstated to the practice of law following the lawyer's resignation, suspension, disbarment, or transfer to disability inactive status by this Court until the lawyer shall have satisfied (1) 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 and (2) any subrogation claim against the lawyer by the Client Security Board.

Rule 20(a)(4) and (f)

20. The LPRB recommends that Rule 20(a)(4) be amended to add LPRB Board members and District Ethics Committee (DEC) members to the category of persons whose compelled testimony may be obtained only upon a showing of extraordinary circumstance and compelling need. The functions of Board members and DEC

members within the disciplinary system are no less deserving of the protection of the rule than are the functions of the Director and the Director's staff. As such, they should be included in the group of persons whose work product and testimony is protected.

21. The LPRB recommends that Rule 20(f) be amended to provide that the Director's files, notes, and records pertaining to advisory opinions, overdraft notification matters and probation files be deemed confidential. The confidentiality of advisory opinion notes is intended to encourage open communication from lawyers seeking to obtain advice as to how to proceed in the face of an ethical dilemma. The information provided in response to an overdraft inquiry typically consists of trust account books and records containing otherwise confidential client information. There is no substantial public purpose to be served by making that information available to the public and the failure to have it considered confidential would be an impediment to the operation of the program. Information contained in probation files often consists of sensitive medical, psychological, and/or chemical dependency treatment records. No public purpose would be served by making such information accessible to the public.

22. The LPRB requests that Rules 20(a)(4) and (f) be amended as follows:

(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:

(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 a member of the District Ethics Committee or the Board, 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.

(f) Advisory Opinions, Overdraft Notification Program Files, and Probation Files. The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:

(1) in the course of disciplinary proceedings arising out of the facts or circumstances of the advisory opinion, overdraft notification, or probation or

(2) upon consent of the lawyer who requested the advisory opinion or was the subject of the overdraft notification or probation.

Rule 24(a)

23. The LPRB recommends that Rule 24(a) be amended to increase the costs recoverable in disciplinary proceedings from \$900 to \$2000. The \$900 cost amount was established in 1996 and the proposed amendment is intended to reflect increased costs since that date. In 2002, the MSBA authorized a petition seeking an increase in the costs assessed from \$900 to \$1200.

24. The LPRB requests that Rule 24(a) be amended as follows:

(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 ~~\$900~~ \$2,000.

Rules 26(a), (b), and (e)

25. The LPRB recommends that Rules 26(a) and (b) be amended to set the date of the order imposing discipline or transfer to disability status as the effective date in determining to whom notice of loss of license must be given. This is intended to preclude respondents whose suspension is not immediately effective from transferring client files to another attorney(s) in the interim between the suspension order and the effective date and then subsequently arguing that no notice need be given because s/he represented no clients as of the effective date of the suspension.

26. The LPRB recommends that Rule 26(e) be amended to require that copies of the certified mail return receipts be provided as further proof of compliance with Rule 26 so that it may be ascertained whether clients, courts and opposing counsel actually received the notice of suspension.

27. The LPRB requests that Rules 26(a), (b), and (e) be amended as follows:

(a) **Notice to Clients in Nonlitigation Matters.** Unless this Court orders otherwise, a disbarred, suspended or resigned lawyer, a lawyer whose conditional admission has been revoked, or a lawyer transferred to disability inactive status, shall notify each client being represented as of the date of the resignation or the order imposing discipline or transferring the lawyer to disability inactive status in a pending matter other than litigation or administrative proceedings of the lawyer's disbarment, suspension, resignation, revocation of conditional admission, or disability. The notification shall urge the client to seek legal advice of the client's own choice elsewhere, and shall include a copy of the Court's order.

(b) **Notice to Parties and Tribunal in Litigation.** Unless this Court orders otherwise, a disbarred, suspended or resigned lawyer, a lawyer whose conditional admission has been revoked, or a lawyer transferred to disability inactive status, shall notify each client, opposing counsel (or opposing party acting pro se) and the tribunal involved in pending litigation or administrative proceedings as of the date of the resignation or the order imposing discipline or transferring the lawyer to disability inactive status of the lawyer's disbarment, suspension, resignation, revocation of conditional admission, or disability. The notification to the client shall urge the prompt substitution of other counsel in place of the disbarred, suspended, or resigned, disabled lawyer, or a lawyer whose conditional admission has been revoked, and shall include a copy of the Court's order.

(e) **Proof of Compliance.** Within fifteen (15) days after the effective date of the Court's order, the disbarred, suspended, resigned or disabled lawyer, or a lawyer whose conditional admission has been revoked, 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, resigned or disabled lawyer, or lawyer whose conditional admission has been revoked, shall be attached to the affidavit, along with proof of mailing by certified mail. The returned receipts from the certified mailing shall be provided to the Director within two months of the mailing of notices.

Rule 27

28. The Director recommends that Rule 27 be amended to permit petition for appointment of a trustee to the district court in addition to the Supreme Court; provide that a trustee shall not, without permission of the appointing court, assume representation of any client of the lawyer over whom the trusteeship is granted; provide for the charging of a fee for trusteeship services to be charged to the lawyer or the lawyer's estate; and provide for privilege and immunity of the trustee. The MSBA authorized a petition to the Supreme Court seeking these changes in 2002. It is anticipated that these changes will make it easier for lawyers other than the Director's Office to serve as trustees to aid in the disposition of client files where the responsible attorney has died, become disabled, or lost his or her license and has not made appropriate arrangements for transfer of client files.

29. The LPRB requests that Rule 27 be amended as follows:

(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 or disabled lawyer has not complied with Rule 26, and that no arrangement has been made for another lawyer to discharge such responsibilities, this Court or the District Court in the judicial district where the lawyer maintains or maintained his principal office 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. The trustee shall not assume the representation of any client of the lawyer except with the express approval of the appointing court.

(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 the Court's order appointing the trustee.

(c) **Remuneration of Trustee.** Upon the conclusion of the trustee's work, the trustee shall file a report and request for discharge with the appointing court which may determine expenses and fix the fee, if any, for the trustee's services, and such fee and expenses may be charged against the lawyer who is suspended, disbarred, resigned or incapacitated or against the estate of a lawyer who has died.

(d) **Privilege and Immunity.** A trustee appointed under this Rule shall have the same privilege and immunity in his or her capacity as trustee as granted to persons under Rule 21, Rules on Lawyers Professional Responsibility.

Rule 28(c)(3)

30. The LPRB recommends that Rule 28(c)(3) be amended to establish financial eligibility standards for appointed counsel in attorney disability proceedings. Currently the rule provides for appointment of counsel, but has no provision for who is financially eligible for appointed counsel.

31. The LPRB requests that Rule 28(c)(3) be amended as follows:

(c) **Asserting Disability in Disciplinary Proceeding.** A lawyer's assertion of disability in defense or mitigation in a disciplinary proceeding or a revocation of conditional admission 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. If a lawyer alleges disability during a disciplinary investigation or proceeding or a revocation of conditional admission proceeding, and therefore is unable to assist in the defense, the Director shall inform the Court of the allegation and of the Director's position regarding the allegation. The Court may:

(3) Appoint counsel if the lawyer has not retained counsel; and the lawyer is financially eligible for appointed counsel. Financial

eligibility shall be determined by the referee appointed by the Court to hear the disciplinary/disability petition in the same manner as eligibility for appointment of a public defender in a criminal case pursuant to Minn. Stat. section 611.17;

32. Based upon the foregoing, petitioner Lawyers Professional Responsibility Board respectfully requests and recommends this Honorable Court to amend the Rules on Lawyers Professional Responsibility as set forth above.

Dated: August 27, 2008.

Respectfully submitted,



KENT A. GERNANDER, CHAIR
LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

Attorney No. 34290
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218
(651) 296-3952

and



MARTIN A. COLE
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY

Attorney No. 148416