

## MEETING SUMMARY

### **Committee on Rules of the Board on Judicial Standards December 21, 2007**

#### **Members Present:**

Hon. Paul Anderson  
Sen. Don Betzold  
Hon. Edward Cleary  
Annamarie Daley  
Hon. Sam Hanson  
Karen Janisch  
Robert Johnson  
Jeremy Lane Hon.  
Cmdr. Bill Martinez  
Leslie Metzen  
Sharon Mohr

Sen. Tom Neuville  
Hon. Gary Pagliaccetti  
Pat Sexton  
Rep. Steve Simon  
Dane Smith  
Rep. Steve Smith  
Virginia Stringer  
William Wernz  
DePaul Willette  
Hon. Bruce Willis

#### **Members Absent:**

Felicia Boyd  
Hon. Tanya Bransford

Jeffrey Johnson  
Amy Rotenberg

#### **Court Services Staff Present:**

Kelly Mitchell

#### **I. Next Meetings**

The next meeting of the Committee on Rules of the Board on Judicial Standards will be:

**Friday, January 18, 2008  
10 a.m. to 3 p.m.  
Capitol, Room 15**

A public forum will be held:

**Thursday, January 31, 2007  
4 p.m. to 6 p.m.  
Minnesota Judicial Center, Room 230**

#### **II. Meeting Summary**

1. Procedural Matters. Judge Pagliaccetti added an additional item to the agenda: discussion of the committee's records access request, to be discussed between items I and II. The committee approved the minutes from the November meeting.

2. Mental Illness/Disability Draft Amendments. The committee continued to review the proposed amendments reported by the Mental Illness/Disability Subcommittee at the November meeting.

In Rule 14, the definition of “Formal Statement of Disability Proceeding” was amended to better reflect that the statement is made at a point in the proceedings where the disability is alleged rather than found. The new language, which reads as follows, was preliminarily approved:

**“Formal Statement of Disability Proceeding”** is a statement that the board has determined to conduct a public hearing to determine the appropriate action with regard to a judge alleged to suffer from a physical or mental condition that adversely affects the judge’s ability to perform judicial functions.

With regard to Rule 14(d) and 15(a), a member asked what formal event triggers suspension of a judge. Is it commencement of the proceeding? Is it a finding of reasonable cause? Should suspension be automatic upon reaching the formal event or should the rule be more flexible, and allow the board to request suspension when the board deems it appropriate? For example, if the disability is a heart condition, the solution may be for the judge to work a relaxed schedule rather than suspension. Another member noted that the rules should be amended so it is clear the entity suspending the judge is the Supreme Court rather than the board. The matter was referred back to the subcommittee for clarification.

The committee then worked through the proposed amendments to Rule 15. In paragraph (a), a member noted that one of the three triggers for a disability proceeding – investigation – should be amended so that it relates not just to investigation of a complaint but also to an investigation commenced on the board’s own initiative. The same change must be made to paragraph (d). The paragraphs were amended as follows and preliminarily approved:

**(a) Initiation of Proceedings; Purpose.** The board may initiate an inquiry into a case involving physical or mental disability upon receiving a complaint alleging a disability, when investigation indicates the alleged misconduct may be due to disability, or when the judge asserts inability to defend in a disciplinary proceeding due to disability. Initiation of proceedings triggers interim suspension as provided under Rule 14(d).

**(d) Notice.** The board shall provide notice to the judge, as required under Rule 6(d)(2), of a complaint alleging disability or that an investigation has indicated the misconduct may be due to disability. The notice shall instruct that judge that when providing a written response under Rule 6(d)(5), the judge shall admit or deny disability.

In paragraph (b), the committee requested that the phrase “that it employs” be changed to “used” and the paragraph was preliminarily approved.

**(ab) Procedure Proceedings In General.** ~~In carrying out its responsibilities regarding physical or mental disabilities, the~~ The board shall follow the same procedures that it employs used with respect to discipline for misconduct, except as modified by this rule.

In paragraph (c), the committee requested that the word “initiated” be removed and the paragraph was preliminarily approved.

**(bc) Representation by Counsel.** ~~If the judge in a matter relating to physical or mental disability~~ any proceeding under this rule is not represented by counsel, the board or, if a ~~factfinding~~ hearing panel has been appointed, the presider of the ~~factfinding~~ panel, shall appoint an attorney to represent the judge at public expense.

In paragraph (e), the committee noted there is an inconsistency in that disability is referred to as a “claimed disability” in some locations but as an “alleged disability” in others. The subcommittee was requested to make the terms uniform.

In paragraph (e)(2), the committee questioned to what extent medical privilege is waived. One member noted a scenario in which a judge may have been seeing a psychiatrist for a number of years and is unwilling to disclose those records, but is willing to submit to an examination. The member questioned whether it is fair to require such broad disclosure and suggested that the disclosure at least be limited to those records that are relevant to the alleged disability. Another member asked who determines which records are relevant. The committee discussed several alternatives, including the possibility of releasing the records to another medical professional and of identifying an arbiter of disputes as to relevancy. Some members voiced concern about being overly prescriptive in the rules. The matter was referred to the Mental Illness/Disability Subcommittee for further consideration.

In paragraph (f), the committee noted that the findings in sub-paragraphs (1) and (2) are incorrectly framed. The wording should be changed to conceptually put the decision in the board’s hands. Moreover, as the findings are worded, they repeat the definition of “disability” rather than using the term. The committee recommended changing the introductory language to (f)(1) and (f)(2) as follows:

(1) If the board determines that the judge does not suffer from a disability, the matter shall resume as a disciplinary proceeding.

(2) If the board determines that the judge suffers from a disability:

When reviewing paragraph (f)(2)(ii), which was intended to address situations in which there appears to be a disability but no misconduct, the committee noted that the options are too limited. Though the paragraph allows for the option of treatment, it fails to provide a method for removing the judge if the disability is severe or for addressing the situation if the judge refuses to cooperate with the treatment plan. A member suggested this section must address: (1) a disability that adversely affects judicial function; (2) a disability combined with judicial misconduct; and (3) a disability that does not interfere with judicial function. It was also noted that even if there is no misconduct, because the judge may challenge the board's finding of disability, this section must tie into the hearing provisions in paragraph (g) to afford the judge due process. The matter was referred back to the subcommittee for further consideration.

In reviewing paragraph (g), the committee noted the procedure assumes misconduct. It will have to be adjusted to address situations in which the disability finding is challenged but there is no misconduct. The matter was referred back to the subcommittee for further consideration.

In paragraph (h), the committee asked that the subcommittee clarify whether there is a limit to the medical records that must be provided. For example, if a judge is placed on restricted duty due to a heart condition and subsequently breaks his or her arm, does he or she have to disclose the records relating to the break? The committee also questioned whether the petition is to go to the board or Supreme Court. Finally, a member raised concern that the rule does not adequately address the situation in which the board decides the judge is not ready to be reinstated. Could this rule have a chilling effect on requests for reinstatement? It seems to imply that the choices are limited to reinstatement or permanent removal or retirement from the bench. Another member noted that there are other factors at play in terms of the length of the suspension such as the impact of the judge's absence on the work of the district court and elections. It may be better to leave the rule more flexible. The issues identified in this paragraph were referred back to the subcommittee for further consideration.

The committee then engaged in considerable discussion regarding proposed new rule 20, which provides for disclosure to the governor of information about pending complaints when a judge applies to the governor for retirement, and retention of jurisdiction over the complaint for a short period of time following retirement. The subcommittee explained that the rule is intended to apply to all retirements, and is intended to: (1) address retirement when used as a method to avoid resolving a complaint that is before the board; and (2) prevent judges from working as retired judges if there was misconduct at the end of the judge's term. A member questioned why the board retains jurisdiction after retirement, and the subcommittee responded that retention of jurisdiction allows the board time to wrap up disciplinary proceedings or to refer the matter to the Lawyers Board. Some members stated it is not good public policy to allow the judge to retire as a way out. Even if there is little the board can do to sanction a judge after they have left the bench, there is value for the victims in having the board acknowledge they were wronged. Other members stated it is important to remove a judge who is committing serious misconduct from the bench and retirement is a good way to accomplish that. The

committee was unable to agree that the board should retain jurisdiction or refer the matter to the Lawyers Board in misconduct situations, but there was some agreement to those concepts in the context of a disability retirement. Members differentiated the two in that disability retirement is a more significant outcome because it may be granted well before a judge would ordinarily be eligible for retirement. A member moved to limit Rule 20 to disability retirement. The motion carried and the rule was preliminarily approved by a vote of 11 to 7. The committee also preliminarily approved the conforming amendment to Rule 5. (Note: Discussion on this topic was briefly interrupted for the report on the records access request, but was summarized here in one place for ease of readability.)

3. Records Access Request. Justice Paul Anderson provided the committee with a letter from Chief Justice Russell Anderson responding to the request of the committee to have access to a representative sample of the board's files. The request was denied. A copy of the letter is appended to this meeting summary. Justice Anderson explained that the court discussed the matter several times, and kept coming back to confidentiality. Though the Court has approved an audit of the Lawyers Professional Responsibility Board, which is similar to the records access request by the committee, the difference is the Lawyers Board rules provide room for the Court to do so whereas the Rules of the Board on Judicial Standards do not. Thus, the expectation of confidentiality for the judge and complainant is absolute.
4. Complaint Subcommittee Report. The committee reviewed the report of the Complaint Process Subcommittee addressing two items referred back to the subcommittee at the November meeting.

The first item was a redraft of Rule 13A, which addresses discipline by consent. The rules was redrafted to clarify the grounds for and content of the agreement as well as the manner in which the agreed upon sanction is imposed. The committee preliminarily approved Rule 13A.

The second item was the election rule. The subcommittee proposed a significantly scaled back version of the rule that, instead of creating an elaborate procedure for a small number of cases, provides the board the flexibility to expedite its timeline and issue a public statement exonerating a candidate of an accusation if deemed appropriate. Members questioned whether the authority of the board should extend to all candidates rather than just to judges who are candidates. Some concern was voiced that candidates could receive inconsistent treatment if the Board on Judicial Standards and Lawyers Board respond differently to election complaints. The proposed amendment was preliminarily approved.

5. Expungement. Judge Cleary requested that the committee reconsider the timeline for expungement. At the November meeting, the committee rejected the proposal of the Complaint Process Subcommittee, which would have provided for immediate destruction of meritless complaints. Instead, complaints found without reasonable cause will be destroyed three years after receipt of the complaint or authorization of an investigation. Judge Cleary communicated to the committee that MDJA has requested the standard be

immediate destruction of meritless complaints. The committee discussed several pros and cons to the request including the need of the board to be able to track individuals who file the same complaint repeatedly, the administrative burden of tracking two time standards (one for meritless complaints and one for complaints found without reasonable cause), and the need to be able to identify a pattern of behavior. A member moved to leave the language as voted on at the November meeting, and the motion was approved 13 to 4.

6. Confidentiality Subcommittee Report. The committee reviewed the report of the Confidentiality Subcommittee, which addressed several issues referred back to the subcommittee at the October and November meetings.

The committee first addressed board member recusals. The Confidentiality Subcommittee proposed language to require the board to disclose to the complainant and judge the names of the board members who recused from participation in the action. No recommendation was made as to disclosure of absences. Committee members felt it would be more constructive to provide the names of the persons who *did* participate in the action. Persons speaking in favor of the proposal indicated it would help to dispel the notion of bias and would provide the judge and complainant with a clearer picture of the composition of the group rendering judgment. Persons speaking against the proposal questioned why the information was needed, and asked whether it makes the decision any less meaningful if only certain members participated in making it. The committee preliminarily approved the following language as amended:

Rule 5(c):

(c) Notice to Complainant. The board shall promptly notify the complainant, if any, of the board's action and give a brief explanation of the action. The notice shall disclose the names of the board members who participated in the action. If the board's action is issuance of a Formal Complaint, the board shall notify the complainant of the issuance of the Formal Complaint, the hearing panel's action, and the action, if any, of the Supreme Court.

Rule 6(e)(6):

(6) The board shall notify the judge of its action and shall disclose the names of the board members who participated in the action.

The committee then reviewed and preliminarily approved the proposed amendments to Rule 1 providing for an annual performance review of the executive secretary. In so doing, a member noticed Rule 1(c) is not as complete as the statute and moved to amend the rule to mirror the statute. The motion was approved.

The committee reviewed the proposal to incorporate language in the rules defining the board's advisory function. A member questioned why the proposal is written so that the advisory opinion is not binding on the board in a later disciplinary proceeding. It was

noted that the models utilized from other states were all set up so that a separate body issues advisory opinions. The committee agreed that since the board will both advise and discipline, the opinion should be binding on the board. It should not, however, be binding on the hearing panel or Supreme Court. The language was amended and preliminarily approved as follows:

**(a) Powers ~~in General~~ of the Board.**

(1) Disposition of Complaints. The board shall have the power to receive complaints, investigate, conduct hearings, make certain summary dispositions, and make recommendations to the Supreme Court concerning:

- (1i) Allegations of judicial misconduct;
- (2ii) Allegations of physical or mental disability of judges;
- (3iii) Matters of voluntary retirement for disability; and
- (4iv) Review of a judge's compliance with Minn. St. § 546.

(2) Advisory Opinions. The board may issue advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct. An advisory opinion may be requested by a judge or candidate for judicial office. A request for an advisory opinion shall relate to prospective conduct only, and shall be submitted in writing and contain a complete statement of all facts pertaining to the intended conduct and a clear, concise question of judicial ethics. The board shall issue a written opinion within 30 days after receipt of the written request, unless the time period is extended by the board. The fact that the judge or judicial candidate requested and relied on an advisory opinion shall be taken into account in any subsequent disciplinary proceedings. But the advisory opinion shall not be binding on the hearing panel or the Supreme Court in the exercise of their judicial-discipline responsibilities.

The committee then considered proposed Rule 7A regarding review of a private admonition. The proposal contained two options regarding the confidentiality of an appeal of a private admonition review: (1) the recommendation of the Confidentiality Subcommittee that the appeal should be kept confidential by denominating it by number or random letters; or (2) the recommendation of the Complaint Process Subcommittee that the appeal should be public. The Confidentiality Subcommittee explained that it adopted its position regarding confidentiality largely because it is the same method currently in place for appeal of the private admonition of a lawyer and it seems to work. A member countered that position by explaining that because judges are higher in profile and fewer in number, there is likely to be more media attention, and it is more likely a person could determine who the judge is from other information in the file. It was noted that the rule has already provided for a private review at this point. A member moved to

adopt the second option, recommended by the Complaint Subcommittee. The motion carried, and the language was preliminarily approved.

**RULE 7A. PRIVATE ADMONITION REVIEW**

**(a) Private Admonition Review Committee.** The executive secretary shall create a list of former board members who agree to serve on a private admonition review committee. The chair shall randomly appoint a three-member committee from the list upon request as provided in paragraph (b). At least one member of the committee shall be a judge, retired judge, or lawyer. If possible, at least one member of the committee shall be a public member.

**(b) Review.** A judge may seek confidential review of a private admonition by filing a request for review with the board within 14 days after actual receipt of notice of issuance of the admonition. The committee may, by a preponderance of the evidence, affirm issuance of the admonition or direct the board to dismiss the complaint. If directed to dismiss, the board may issue a letter of caution that addresses the judge's conduct.

**(c) Appeal.** If the judge is not satisfied with the panel's disposition, the judge may appeal to the Supreme Court within 30 days. Review shall proceed under Rule 13.

The committee addressed the issue of noticed to the complainant and approved the recommended changes along with the notice regarding board member participation approved earlier in the meeting.

The committee reviewed the proposal regarding an operational audit. The goal of this rule was to provide some sort of authorization for a panel to review the records of the board. Members did not like use of the term "audit." It was suggested the proposal be reworked, and that the language of the Supreme Court order authorizing an audit of the Lawyers Board might be helpful.



THE SUPREME COURT OF MINNESOTA  
MINNESOTA JUDICIAL CENTER  
25 REV. DR. MARTIN LUTHER KING JR. BLVD.  
ST. PAUL, MINNESOTA 55155

CHAMBERS OF  
RUSSELL A. ANDERSON  
CHIEF JUSTICE

(651) 296-3380

December 21, 2007

Hon. Gary J. Pagliaccetti  
Sixth Judicial District  
St. Louis County Courthouse  
Virginia, Minnesota 55792

Re: Request for Access to Files of the Board on Judicial Standards

Dear Judge Pagliaccetti:

I am writing in response to your letters on behalf of the Committee on Rules of the Board on Judicial Standards requesting that the Supreme Court issue an order permitting selected members of the committee to review a sample of the board's confidential complaint files. After fully and carefully considering the matter, including related legal issues and potential ramifications of a positive or negative response, the court has decided to deny the committee's request.

Our primary concern, among others, in evaluating the committee's request has been the effect our response will have on the principle of confidentiality that is a core tenet of the board's processes, as reflected in Rule 5 of the Rules of the Board on Judicial Standards. Rule 5 provides that, subject to specific narrow exceptions, "all proceedings shall be confidential" until a public Formal Complaint is filed with this court, which occurs only after a full investigation and a board finding of sufficient cause to proceed. Because most files do not reach the Formal Complaint stage, they remain confidential under the rules. The board is charged with establishing "procedures for enforcing the confidentiality provided by this rule."

The Rules on Lawyers Professional Responsibility (RLPR) similarly provide for confidentiality. Lawyer discipline files are confidential unless and until they reach a public complaint stage, subject to exceptions to confidentiality in certain specified circumstances. Rule 20(a), RLPR. Those express exceptions include "[w]here permitted by the Court." Rule 20(a)(6), RLPR. Notably, the confidentiality rule of the Rules of the Board on Judicial Standards, Rule 5, does not contain a comparable provision that allows the court to override the confidentiality requirement.

The standard of confidentiality in Rule 5 protects not only judges who are the subjects of complaints, but also those who file complaints and others, such as witnesses, who may become involved in the investigation or complaint process. The principle of confidentiality has created clear expectations of privacy for judges, complainants, and other participants.

Your request seeks to protect the confidentiality interest of judges by proposing that the committee review only files concerning judges who volunteer to waive confidentiality for the purposes of this review. One problem with this approach is that it negates the concept of a random selection of files to be reviewed. More importantly, this approach does not adequately address confidentiality concerns regarding complainants and other participants, and the potential chilling effect opening the files could have on future participation in the board process.

Your committee includes several current and former members of the board. Part of the reason these members were appointed was to serve as a resource to the committee with regard to board functions and practical application of the rules. We believe the committee has benefited by the service of these members. We encourage the committee to continue to move forward with its charge to review and recommend proposed changes to the rules, based on the information and knowledge of the current committee members. We also note your indication that the committee is nearing the end of its work. In these circumstances, the additional information the committee may receive by reviewing a sample of the board's confidential files does not outweigh the potential harm that could result from the breach of confidentiality inherent in that review.

Sincerely,

A handwritten signature in cursive script, appearing to read "Russell A. Anderson".

Russell A. Anderson  
Chief Justice