

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PANEL MANUAL

TABLE OF CONTENTS

	<u>PAGE</u>
1. INTRODUCTION	1
2. PANEL PROCEDURES	
A. Panel Assignment Procedure	3
B. Conflicts and Substitutions for Panel Members	5
C. Timeframes and Continuances	8
D. Charges; Determination of Hearing and Pre-hearing Meeting	12
E. Panel Chair Responsibilities	16
F. Motions	21
G. Constitutional and Other Legal Claims	22
3. PROBABLE CAUSE PANEL HEARING PROCEDURES	
A. Opening Remarks in Probable Cause Hearings	24
B. Exhibits	26
C. Witnesses	28
D. Issues at Hearing	
(1) Length	31
(2) Character Evidence	31
(3) Mitigating Circumstances and Disability	31
(4) Disciplinary Record	32
(5) Effect of Other Proceedings	35
4. SPECIAL PANEL PROCEDURES FOR ADMONITION APPEALS AND REINSTATEMENT PETITIONS	
A. Admonition Appeals	36
B. Reinstatement Petitions	41

PAGE

5.	PROCEDURES AFTER PANEL HEARING	
A.	Probable Cause Determination	47
B.	Oral Arguments/Briefs	51
C.	Timing of Probable Cause Determination	52
D.	Admonition Issued by Panel	53
6.	RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY	

1. INTRODUCTION

In April 1985, the Supreme Court Advisory Committee saw a “need to adopt procedures that will promote greater uniformity and consistency in the disposition of cases by the district committees and Board panels.” Minn. Sup. Ct. Advisory Comm., *Dreher Report on Lawyer Discipline* (1985) (hereinafter “*Dreher Report*”). As a way of promoting procedural consistency among the six Lawyers Board hearing panels, the Board has approved a Panel Manual.

The Panel Manual (hereinafter “Manual”) is one of several important steps the Board has taken to promote consistency in professional responsibility matters. In 1986, the Board adopted “summary dismissal guidelines,” for use by the Director’s Office. These guidelines have been applied by the Director’s Office, resulting in the dismissal of several common types of complaints that are generally not investigated by the Director’s Office. The Board has sought to increase consistency in disciplinary sanctions and reasoning by referring to the *ABA Standards for Imposing Lawyer Sanctions*. The Board has also sought to improve consistency, and efficiency, by proposing for the Court’s adoption, Rule 10(d), Rules on Lawyers Professional Responsibility (“RLPR”). This rule was ultimately adopted, and identifies certain classes of serious cases that may, upon motion, be referred to the Court by a Panel Chair without full Panel consideration.

The Manual is meant to promote consistency among the hearing panels, and to promote other important goals as well. The Manual should make the procedures of Board Panels more open to the bar and to the public. Copies of the Manual will be available for purchase at cost, or for review in the Director’s Office, to any lawyer or citizen who wishes to review the Manual. The Manual will also enable *pro se* respondent lawyers, and lawyers who represent respondents only infrequently, to achieve more effective representation before a Panel. Notice of the existence and

availability of the Manual has been incorporated into the letter serving charges on respondent sent by the Director's Office.

The Manual was first approved by the Board in January of 1989, which was a particularly suitable time in the Board's history. At the time, the Board was a veteran group, attempting to summarize the way certain Panel matters had been handled in the past and state the guidelines for how certain matters should be handled in the future. In approving the Manual, the Board anticipated it would be changed and supplemented as needed over the years.

The contents of the Manual are meant to be summaries and guidelines, not hard and fast rules. The Board does have authority under Rule 23, RLPR, to "adopt rules and regulations, not inconsistent with [the RLPR], governing the conduct of business and performance of [its] duties." However, the Manual is not meant to be a set of determinative rules. Statements in the Manual are, for the most part, generally statements of how things *have* been done and how things *ought* be done.

The Manual is meant to be a working resource for Board members. Board members should bring their Manuals to Panel hearings. Panel Chairpersons should consult the Manual in connection with motions and other Panel matters.

Although the Director's Office has assisted in the preparation of the Manual, the Manual is subject to the Board's approval. No part of the Manual may be changed without Board approval, subject to the authority of the Executive Committee to act on the Board's behalf between meetings, pursuant to Rule 4(d), RLPR. Anyone may propose additions or changes to the Manual, normally by submitting a proposal in writing to the Board Chair.

2. PANEL PROCEDURES

A. Panel Assignment Procedure

(1) General Procedure

Rule 4(f), RLPR, provides, in part, “The Director shall assign matters to Panels in rotation.” To enhance the appearance of fairness and avoid any perception that the Director’s Office could manipulate Panel assignments, matters are assigned to Lawyers Board panels by a blind rotation system. The rotation chart is kept by a Board member designated by the Board Chair.

The procedure approved by the Executive Committee is outlined as follows:

- i. A rotation chart is prepared by a Board member designee. The chart designates Panel rotations from one through six, picked arbitrarily. The designee provides the Board Chair with a copy of the rotation schedule.
- ii. In the Director’s Office, the following are immediately forwarded to the disciplinary clerk for Panel assignment: signed charges; admonition appeals when a determination is made to proceed to hearing; expunction petitions; and reinstatement petitions when received.
- iii. The disciplinary clerk promptly contacts the designee’s secretary. The clerk informs the secretary of the name of the respondent and type of proceeding. The secretary gives the clerk the name of the Panel Chair and number of the next Panel on the rotation chart.

If the disciplinary clerk is unable to reach the secretary within 24 hours, she attempts to contact the Board member designee. If the clerk is unable to contact either the secretary or the designee, she contacts the Board Chair or Vice-Chair who shall choose a Panel at random.

(2) Assigning Admonition Appeals

Rule 4(f), RLPR, also allows the Executive Committee to “assign appeals of multiple admonitions issued to the same lawyer to the same Panel for hearing.” The Executive Committee delegates this authority to one of its members. The delegate may make such assignments whenever it appears to be appropriate.

Lawyers Board Policy and Procedure No. 2 provides for routine reassignment of admonition appeals by the Executive Committee delegate so that multiple admonition appeals may be heard by one Panel in one day. Whenever such a reassignment appears appropriate, the Director's Office writes to the delegate and requests it.

B. Conflicts and Substitutions for Panel Members

(1) General Procedure

Rule 4(e), RLPR, provides in part, “The Board’s Chair or the Vice-Chair may designate substitute Panel members” It is impractical for such substitutions to be made personally by the Chair or Vice-Chair, or by the Executive Committee designee. Therefore, this function has been delegated by the Board Chair to the disciplinary clerk in the Director’s Office. The procedures followed by the clerk are as follows:

If a Board member has a conflict in a matter or cannot serve on a Panel for some other reason, a substitute Panel member must be obtained. The disciplinary clerk finds a substitute Panel member using a rotation schedule. This rotation schedule is separate from the Panel rotation schedule. The clerk must, however, take into consideration the following:

- i. Panel Chairs are not called to substitute unless there is an emergency or no non-chairs are available.
- ii. Panels must include at least one lawyer and one public member.

The disciplinary clerk should note on her rotation chart the reason why each Board member could not serve as a substitute.

(2) Board Member Expertise and Workloads; District Committee and Former Board Member Panel Substitutions

Rule 4(e) and (f), RLPR, provide, in pertinent part:

“The Board’s Chair or the Vice-Chair 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.” Rule 4(e), RLPR.

“The Executive Committee may, however, redistribute case assignments to balance workloads among the Panels, appoint substitute panel members to utilize Board member or District Committee member expertise” Rule 4(f), RLPR.

(3) Expertise

A Panel Chair—or, upon notice, a respondent or the Director—may request that there be a substitution on a particular Panel to utilize the expertise of a Board member or a District Committee member. The request should be made at or before the time of the pre-hearing meeting and shall state the particular expertise needed. The Board Chair—or, by delegation from the Chair, the Vice-Chair—shall decide whether expertise is needed and, if so, substitute an expert Board member or District Committee member. The Director’s Office shall maintain a directory of Board members, indicating individual expertise, and a list of District Committee chairpersons.

The substitution must harmonize with the requirements that each Panel include a current Board member and a public member. The substitution should not be for the Panel Chair. The Board Chair or Vice-Chair shall choose the person to be substituted by using the above criteria and, secondarily, by seniority. A list of Board member areas of expertise may be found on our Web site at www.mncourts.gov/lprb.

(4) Workload Balancing

Either on the Executive Committee’s own initiative or at the request of a Panel Chair, the Executive Committee designee may redistribute case assignments among panels or among Board members in such a way that, in the designee’s discretion, balances workloads in a reasonable fashion.

(5) Substitution of District Committee Members

Normally, reasonable efforts should be made to utilize current Board members on panels. However, when an expert is desirable, or when Board members have excessive workloads in view of their volunteer status or when some other particular exigency exists, the Executive Committee designee may, on the designee’s initiative or after receiving a written request from any interested party, substitute current or former District Committee or Board members.

(6) Choosing “The Panel Chair” Under Rule 10(e), RLPR

Rule 10(e), RLPR, provides:

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.

If charges were made against the respondent and assigned to a Panel, the Chair of that Panel shall have the authority to determine whether to approve supplemental petitions. If the Director seeks to further supplement the petition, but the Panel Chair has changed (e.g., the Panel Chair’s term on the Board expires), the new Panel Chair shall have the authority to determine whether to approve supplemental petitions. If the matter involving the respondent was never assigned to a Panel (e.g., the respondent waived the Panel before the charges were filed), the matter shall be submitted to the Board Chair.

C. Timeframes and Continuances

(1) Timeframes

Rule 2, RLPR, which sets forth the purpose of the RLPR, states:

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.

(Emphasis added).

Some time intervals are stated or implied by rule, some are set by Supreme Court order in individual cases, and others occur for reasons that are specific to the particular case. For example, a 90-day DEC investigation period is set in Rule 7(c), RLPR. A 40-day period for the Panel to determine whether to conduct a probable cause hearing is set in Rule 9(a)(2), RLPR. After service of a Petition, Rule 13(a), RLPR, requires that the answer be served within 20 days. The Supreme Court time periods for briefs and oral argument are part of the Court's regular administrative practice.

There are a number of factors that affect the length of proceedings. For example, there may be more than one complaint to be investigated. There may be unusually complex facts, numerous witnesses, or voluminous books and records to analyze. While Rule 9(f), RLPR, states that the Panel hearing is to be scheduled "promptly after the pre-hearing meeting," conflicting schedules of Panel members and parties may result in a 30 or 45-day interval.

The overall timeframes to be expected should be considered in connection with each procedural interval by the Director, the Panel, the referee and the Court. In 1985, the Minnesota Supreme Court Advisory Committee echoed an earlier observation by the ABA Evaluation Team:

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

Dreher Report.

The Advisory Committee also recommended that:

The Executive Committee and the Director should establish time standards to serve as benchmarks or guidelines for the movement of cases through the discipline process.

Id.

Overall guidelines or targets have been established for the number of “old” cases—defined as cases older than one year—pending at any time. Achieving these goals depends upon awareness and concern for the normal and expected time intervals of each stage of the process.

The Panels have authority and discretion to monitor and, to some extent, control the intervals from the Director’s issuance of charges to the Panel’s decision. The Panel Chair’s role is particularly important in setting the hearing date, responding to motions, reaching a Panel determination and in handling requests for continuances. Panel Chair(s) should strive to make decisions regarding the foregoing promptly and within no more than one week, unless exceptional circumstances exist. The Director’s Office will advise the Board Chair if a Panel Chair fails to meet this timeline. The Board Chair will send a reminder letter to the Panel Chair requesting him or her to address the matter promptly.

(2) Continuances

The Supreme Court has stated its views on Panel scheduling and continuances as follows:

This court takes judicial notice that members of the Lawyers Professional Responsibility Board sit on panels to evaluate complaints and determine whether there is probable cause to proceed with disciplinary action.

These panel members are all volunteers, are uncompensated for their time, consist of both lawyers and lay people, and reside in all parts of the State of Minnesota. Because of those facts, continuances of panel hearings are rarely given. In this case, approximately a month before the date of the scheduled panel hearing respondent Peters was given written notice of the charges and the date set for the panel hearing. The record before us shows no facts that would lead us to conclude that a failure to grant a continuance was a breach of discretion on the part of the director.

Peters, 322 N.W.2d at 15-16.

In matters in which the Panel determines that a probable cause hearing is necessary, the Director's Office will set the Panel hearing at least 30 days after the pre-hearing meeting. These time periods may be shortened (e.g., when there is ongoing harm from the attorney) or lengthened (e.g., when the facts are very complicated or there are scheduling problems). For "good cause," the Panel Chair has the authority to extend the time periods provided for under Rule 9(a), governing the Panel's determination whether to conduct a hearing." Rule (9)(a)(3), RLPR. Furthermore, "[f]or good cause shown, the Panel Chair or Vice-Chair may shorten or enlarge time periods for discovery under this Rule." Rule 9(o), RLPR. Granting a continuance of a Panel hearing is also within the Panel Chair's authority under Rule 9(o), RLPR. The Director's Office may also unilaterally continue a matter before the Panel hearing date is set.

The Panel Chair should rule promptly on contested motions for continuances with the following considerations in mind:

1. Is the motion timely? How long after the moving party learned of the Panel hearing date has the motion been brought? How close to the Panel hearing date has the motion been brought?
2. What is the basis for the motion? If it is a conflicting court appearance, which matter was scheduled first? Why can the conflicting court appearance not be rescheduled?
3. Has respondent cooperated with other procedural rules?

4. Do the documents already on file appear to indicate little likelihood that respondent will prevail at the Panel hearing, whether or not there is a continuance?
5. Did respondent initially indicate availability on the scheduled date? Have there been any previous continuances?
6. How long a continuance is sought? (The moving party must ordinarily specify the length of the continuance sought.)
7. Is there any specific harm, prejudice or danger that would be caused by the continuance?
8. Would the continuance be consistent with overall concerns for prompt and fair disposition of discipline matters?
9. Does the continuance motion appear to be part of an overall effort to burden or delay the Panel proceedings?

Ordinarily, the Panel Chair rules upon continuance motions in whatever format is most convenient. Often a three-way telephone conference, with the Director and respondent is the best method. Ordinarily, consultation with other Panel members is not necessary, nor is a written ruling generally needed. If a continuance is granted, the Director should serve and file an "Amended Notice of Panel Hearing."

Panel Chairs should have in mind, in addition to the above specific factors, the Court's general indication that continuances "are rarely given." *Peters*, 332 N.W.2d at 16. The Board will expect the Director's Office to schedule matters fairly and not to oppose timely and well-supported motions for short continuances that are consistent with fair and prompt administration of justice.

D. Charges; Determination of Hearing and Pre-hearing Meeting

Rule 9(a)(1), RLPR, states:

Charges. Within 14 days after the lawyer is notified of the Charges, the lawyer shall submit an answer to the Charges to the Panel Chair and the Director and may submit a request that the Panel conduct a hearing. Within ten days after the lawyer submits an answer, the Director and the lawyer may submit affidavits and other documents in support of their positions.

Purpose: It is anticipated that when the Director has issued charges of unprofessional conduct, a full Panel Hearing to determine probable cause will not be necessary in every instance. If the lawyer desires a hearing, the lawyer must make that request to the Panel Chair. The lawyer and the Director then have ten days to submit additional documents addressing the need for a hearing.

Although the Rule does not distinguish between “charges” issued pursuant to admonition appeals and charges issued pursuant to probable cause determinations, it was the intent of Supreme Court Advisory Committee to Review the Lawyer Discipline System that lawyers appealing admonitions would have the right to a hearing. Accordingly, the procedure set out in Rule 9(a)(1) applies only to probable cause hearings.

Rule 9(a)(2), RLPR, states:

The Panel shall make a determination in accordance with paragraph (j) within 40 days after the lawyer is notified of the Charges based on the documents submitted by the Director and the lawyer, except in its discretion, the Panel may hear oral argument or conduct a hearing. If the Panel orders a hearing, the matter shall proceed in accordance with subdivisions (b) through (i). If the Panel does not order a hearing, subdivisions (b) through (i) do not apply.

Purpose: Again, it is anticipated that not every matter will require a full Panel Hearing to determine probable cause. Based upon the charges, the answer to the charges, and the documents submitted by the lawyer and the Director, the Panel shall

make a determination regarding the appropriate disposition. If the Panel concludes that additional information is needed the Panel has the option of hearing oral argument, or if it determines that oral argument is not sufficient, conducting a probable cause hearing.

(1) Determination of No Hearing, Issuance of Admonition

Rule 9(a)(2), RLPR, requires that if the Panel determines not to conduct a hearing, the Panel shall make a determination in accordance with Rule 9(j), RLPR. Among the options available to the Panel pursuant to Rule 9(j), is to find that the lawyer engaged in unprofessional conduct, but that it was of an isolated and nonserious nature, and issue an admonition.

Rule 9(j)(1)(iii), RLPR , states in pertinent part:

If the Panel issues an admonition based on the parties' submissions without a hearing, the lawyer shall have the right to a hearing de novo before a different Panel.

(2) Determination to Conduct Hearing, Setting Prehearing Meeting

Rule 9(b), RLPR, states:

If the Panel orders a hearing, the Director shall notify the lawyer of:

- (1) The time and place of the pre-hearing meeting; and
- (2) 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 Chair or Vice-Chair.

Purpose: It is anticipated that this requirement will facilitate the narrowing of the issues at the pre-hearing meeting and provide the panels with a clear statement of which matters are at issue.

Rule 9(e), RLPR, states:

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; and
- (2) Each party shall mark and provide the other party with 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 Civil 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.

Purpose: The purpose of the pre-hearing meeting is to streamline Panel proceedings. The parties should, with the assistance of the answer to the charges, narrow and simplify issues and identify and exchange exhibits. It has also been the practice at pre-hearing meetings to identify any proposed witnesses and any disputes.

(3) Panel Chairs

Pre-hearing conferences generally have not been conducted by Panel Chairs, except in complicated cases. Panel hearings may be facilitated, however, if Panel Chairs issue directives on pre-hearing meeting matters (e.g., that no requests will be granted at hearing for witnesses or exhibits not identified at the pre-hearing meeting or within a stated time thereafter). The Panel Chair also plays an important role regarding the pre-hearing meeting in deciding which exhibits are transmitted to the Panel members before hearing under Rule 9(f)(3), RLPR. When the procedures are not followed or the parties have numerous disputes, the Panel Chair should introduce order into the proceedings before the Panel hearing by addressing pre-hearing meeting issues under Rule 9(e), (f) and (o), RLPR. The Director and respondent should make appropriate requests and motions to the Panel Chair so that the Chair can resolve such issues.

(4) Panel Date

The Panel hearing date is set “promptly after the pre-hearing meeting” by the Director, after obtaining available dates from the respondent and the Panel Chair.

Rule 9(f), RLPR.

E. Panel Chair Responsibilities

In general, the Panel Chair acts in a quasi-judicial manner so as to give procedural order to Panel proceedings, particularly before the Panel hearing.

(1) Panel Chair/Vice-Chair

Most of the responsibilities assigned to the Panel Chair by the RLPR are assigned to “the Panel Chair or Vice-Chair.” It has been the practice for the Chair to assume all of these responsibilities. The Vice-Chair exercises the authority provided by the Rules only by specific delegation from the Panel Chair. If there were some emergency circumstance calling for an exception to this practice, the Board Chair could be called upon to approve the Vice-Chair’s assumption of responsibility.

(2) Panel Chair responsibilities before Panel hearing

Rule 9, RLPR, assigns several specific responsibilities before the Panel hearing to the Panel Chair. They are as follows:

i. Rule on extensions of the time periods provided for in Rule 9(a).

If the lawyer submits a request that the Panel conduct a hearing, within ten days after the lawyer submits an answer, the Director and the lawyer may submit affidavits and other documents in support of their positions. The Panel shall make a determination regarding the request for the hearing within 40 days after the lawyer is notified of the charges.

RLPR 9(a)(3), permits the Panel Chair to extend the time periods provided for in this subdivision for good cause.

ii. Determining requests or disputes (Rule 9(o))

The most general authority of the Panel Chair is to resolve all requests or disputes which arise before Panel hearing and which are not specifically assigned to another, e.g., the Ramsey County District Court. This generally gives the Panel Chair a great deal of authority to shape the Panel proceedings beforehand into an orderly and relatively predictable

form. Rule 9(o), RLPR, also places responsibility on the parties to foresee disputes and make requests or motions to the Panel Chair well in advance of Panel hearing.

iii. **Discovery and requests for admission (Rules 9(c) and (o))**

Discovery is to be completed within 10 days after the pre-hearing meeting, unless the Chair enlarges the period. The Panel Chair has authority to “rule upon any objections” to requests for admissions. Rule 36, Rules of Civil Procedure, is incorporated by reference so that the Panel Chair, under either Rule 9(c) or 9(o), RLPR, has authority both over objections to requests and over motions “to determine the sufficiency of the answers or objections.” Rule 36.01, R. Civ. Proc. Under Rule 9(o), RLPR, the Panel Chair “may shorten or enlarge time periods for discovery” The Panel Chair does not have jurisdiction “over motions arising from the [pre-hearing] deposition,” as Rule 9(d), RLPR, assigns that jurisdiction to the Ramsey County District Court.

iv. **Exhibits**

Regarding Panel exhibits generally, *see* Manual, § 3.B. The Panel Chair may order that a party not provide to the whole Panel “copies of all documentary exhibits marked by that party at the pre-hearing meeting. . . .” Rule 9(f)(3), RLPR. A party may request the Panel Chair to determine that the other party’s pre-hearing meeting exhibits are irrelevant, too voluminous, or otherwise objectionable, such that they should not be sent to each Panel member before the hearing.

v. **Witnesses**

Regarding Panel witnesses generally, *see* Manual, § 3.C. Rule 9(h), RLPR, restricts the witnesses at the Panel hearing to the respondent-lawyer, the complainant, and, “[a] witness whose testimony the Panel

Chair or Vice-Chair authorized for good cause.” Note that “authorized” is used in the past tense; normally, it is to be expected that any additional proposed witnesses will be made to the Panel Chair promptly after the pre-hearing meeting and well before the day of the Panel hearing.

vi. **Setting the Panel hearing (Rule 9(f))**

The RLPR state that the Director “shall schedule a hearing by the Panel on the charges,” but in practice the Director’s Office calls the Panel Chair (usually shortly after the pre-hearing meeting) to determine the Chair’s availability before scheduling.

vii. **Panel Chair responsibilities at Panel hearing (Rule 9(i))**

At the outset of the Panel hearing, the Panel Chair opens the record by identifying the matter before the Panel, asking those present to identify themselves for the record, and explaining the probable cause nature of the hearing. Rule 9(i)(1), RLPR. One format for these opening remarks is found below at Manual, § 3.A. Rule 9(h), RLPR, provides, “[t]he Panel shall receive evidence [in certain forms].” In practice, the Panel Chair normally rules on ordinary evidentiary objections, perhaps consulting other Panel member(s) on unusual or exceptionally important evidentiary disputes. Usually the Panel Chair speaks for the Panel. The Panel Chair generally takes responsibility for maintaining order in the proceedings and keeping Panel proceedings to approximately their appropriate length. Any Panel member may question a witness.

viii. **Post-Panel responsibilities**

After the Panel hearing, the Panel determines whether to take the matter under advisement or to decide on the spot. The Panel reaches the disposition by consensus or majority vote. The Panel Chair coordinates

these efforts. The Panel Chair also takes responsibility for announcing or communicating the Panel decision.

ix. **Dispensing with Panel proceedings (Rule 10)**

Under Rule 10(d), RLPR, the Director may move the Panel Chair for approval for filing a public petition, in certain circumstances, without Panel consideration. Such a motion is made with notice to the respondent. Although such a motion is required, there are extreme circumstances in which no time, or very little time, should be given to respondent to reply—for example, when respondent has abandoned practice and appears to be unavailable. The Panel Chair can determine, as a matter of discretion, the timing, form, and length of presentation that may be made by the Director and respondent with respect to such a motion.

x. **Supplementary petition for disciplinary action (Rule 10(e))**

If a Panel has been assigned charges of unprofessional conduct against an attorney and a petition has been filed, then any supplementary petition must be presented to the Panel Chair for approval. *See* Manual, § 2.B(6). Normally, such requests for approval of supplementary petitions have been made *ex parte*, without notice to respondent. However, there may be situations in which notice will be given to respondent—for example, the Director and respondent may stipulate to dispense with Panel proceedings with respect to some charges, under Rule 10(a), RLPR, and agree that before additional charges are filed publicly under Rule 10(e), RLPR, respondent will have some right to be heard before a Panel Chair. The Panel Chair might also wish to hear from a respondent before approving a supplementary petition when some particularly grave or

inflammatory matter is alleged which is unrelated to the charges heard by the Panel.

xi. **General responsibility**

Panel Chairs have traditionally taken a leadership role in improving Panel procedures for the Board generally. This has been done by occasional pre-Board meetings of Panel Chairs—at which problems are identified and discussed—by proposing rule changes, and by bringing problems to the attention of the Board Chair and the Director.

The Lawyers Board Chair and Vice-Chair both have substantial experience as Panel Chairs. Current Panel Chairs should feel free to consult with them, with their own Panel members, or with other Panel Chairs in deciding difficult issues.

F. Motions

(1) Motion to Panel Chairs

In general, *see* Manual, § 2.E, “Panel Chair Responsibilities.” Rule 9(o), RLPR, “Panel Chair Authority,” establishes the general authority of the Panel Chair to decide “[r]equests or disputes” arising under Rule 9 before the Panel hearing. Motion procedures are within the discretion of the Panel Chair to determine. For routine motions, it has been customary to conduct telephone conference hearings, arranged by the Director’s Office.

(2) Motions to Ramsey County District Court

The Ramsey County District Court has jurisdiction to hear motions arising under Rule 25 (required cooperation), Rule 9(d) (depositions), and Rule 9(h), RLPR (subpoenas, claims of privilege, etc., pertaining to Panel Hearings).

(3) Motions to Panel

There is no rule specifically limiting the types of motions that may be brought to a Panel, but Rule 9(o), RLPR, appears to be a catch-all rule assigning disputes under Rule 9 generally to the Panel Chair, rather than the Panel as a whole. The Panel determines motions with respect to whether or not there is probable cause. Under Rule 4(e), RLPR, the Panel may refer “any matters before it to the full Board, excluding members of the Executive Committee.” A referral to the full Board should only be made under extraordinary circumstances (i.e., a complex matter where no other resolution is possible).

G. Constitutional and Other Legal Claims

In general, Lawyers Board Panel Chairs do not have jurisdiction to decide constitutional challenges to the Rules on Lawyers Professional Responsibility or the Rules of Professional Conduct:

[T]he supreme court in *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366 (Minn. 1977) stated that constitutional issues may not be presented to or passed upon by administrative bodies below; the appellate court is the first forum possessing subject matter jurisdiction. *Id.* at 368.

Seemann v. Little Crow Trucking, 412 N.W.2d 422, 425 (Minn. Ct. App. 1987).

A Lawyers Board Panel in the matter of *Johnson v. Dir. of Prof'l Responsibility*, 341 N.W.2d 282 (Minn. 1983), declined to rule on the constitutionality of a challenged disciplinary rule. The Court, articulating the Panel's reasoning, stated:

The panel, after expressing doubt in [sic] the constitutionality of DR 2-105(B), declared that it was not the proper authority to decide the constitutionality issue because 'a decision by the Panel declaring the [rule] unconstitutional could not be publicized to the members of the Minnesota Bar.'

Id. at 283.

The Panel is also not the appropriate forum for deciding constitutional claims because of the burden placed on volunteers to review extensive briefs and constitutional argument in making such decisions. Constitutional claims are more suited to a judicial forum.

A respondent attorney can bring constitutional issues to the Supreme Court, its referee or, before a petition is filed—on matters such as Rule 25, RLPR, requests, depositions and subpoenas—to the Ramsey County District Court.

Although a challenge to a particular procedure may be couched in constitutional terms, it may essentially be a claim that certain procedures are unfair. The Minnesota Supreme Court has noted the inherent need for fairness in administrative proceedings:

We have often stated that administrative agencies 'must observe the basic rules of fairness as to parties appearing before them.' * * * Even if there

were no specific statutory requirement of notice, this principle would seem to require that adequate notice and opportunity to be heard be afforded in a case such as this.

Schulte v. Transportation Unlimited, Inc., 354 N.W.2d 830, 834 (Minn. 1984) (quoting *Ottenheimer Publishers, Inc. v. Employment Sec. Admin.*, 340 A.2d 701, 704-05 (Md. 1975).

The purpose of the RLPR includes the concept that discipline and disability matters “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” Rule 2, RLPR (emphasis added). Panel Chairs and panels can deal with complaints of unfairness as such, by interpreting and applying the RLPR to promote fairness.

In summary, Lawyers Board proceedings are to be fair, but they are not suited for determining the validity of constitutional claims. Alternative judicial forums of one form or another are usually available for such claims.

3. PROBABLE CAUSE PANEL HEARING PROCEDURES

Matters come before a Panel for a hearing in four possible procedural postures:

- i) The Director has prepared charges of unprofessional conduct alleging that public discipline is warranted.
- ii) The lawyer is appealing the Director's issuance of an admonition,
- iii) The Director is seeking a determination as to whether there is probable cause to believe that a lawyer's conditional admission agreement has been violated, and
- iv) Pursuant to Rule 18, RLPR, a suspended or disbarred lawyer is seeking reinstatement to the practice of law.

This section deals with probable cause hearings. Hearings on admonition appeals and petitions for reinstatement are dealt with in Section 4.

A. Opening Remarks in Probable Cause Hearings

Rule 9(i), RLPR, is entitled, "Procedure at Panel Hearing." Based upon the directions of this rule, the Panel hearing may be commenced with the following statements by the Panel Chair, followed by the Director's summaries and the respondent's response.

1. Identification of the Matter for the Record:

"This is a hearing on charges of unprofessional conduct against_____."

2. "I am Panel Chair _____, an attorney from _____, Minnesota; the other Panel members are _____. The representative of the Director's Office, the respondent and respondent's counsel may now also identify themselves for the record. The complainant and any other persons present may also identify themselves for the record."

3. "The purpose of the Panel hearing is to determine whether there is probable cause to believe that public discipline is warranted. The Panel will terminate the hearing whenever it is satisfied that there is or is not such probable cause. Evidence will be received in conformity with the rules of evidence except that affidavits and depositions are admissible in lieu of testimony. After

presentation of evidence, the parties may present oral arguments. The Panel will then either recess to deliberate or take the matter under advisement.”

4. “If the Panel concludes that there is not probable cause to believe public discipline is warranted, but also concludes that respondent committed unprofessional conduct of an isolated and non-serious nature, the Panel will issue an admonition.”

5. “If the Panel concludes that there was no unprofessional conduct, the charges will be dismissed.”

6. “The Director’s Office shall now briefly summarize the matters admitted and disputed, and the proof the Director proposes to offer. The respondent attorney may then respond to the Director’s remarks.”

B. Exhibits

(1) Timing

Pursuant to Rule 9(e)(2), RLPR, all exhibits are to be marked at the pre-hearing meeting and “[n]o additional exhibit shall be received at the Panel hearing without the opposing party’s consent or the Panel’s permission.” The Director’s Office has frequently consented to additional exhibits from respondents, not marked at the pre-hearing meeting, if they are provided to the Director soon after the pre-hearing meeting. The Director’s Office typically will object to exhibits offered at the Panel hearing which have not been marked and exchanged beforehand.

For a Panel to decide whether to receive exhibits not marked at the pre-hearing meeting or otherwise agreed to, questions including the following would normally be raised.

- i. How voluminous or numerous are the “late” exhibits?
- ii. Why were they not marked more timely?
- iii. Is there unfair surprise caused by the exhibits?
- iv. How important are the exhibits?
- v. How much time has elapsed between the pre-hearing meeting and the Panel hearing?

(2) Submission to Panel

Rule 9(f)(3), RLPR, provides:

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 Chair or Vice-Chair orders to the contrary.

The Panel rules generally contemplate that the Panel members will have received and read all charges, responses and exhibits before hearing, so that at the Panel hearing there will be testimony only from the complainant, the respondent and, perhaps, one or two additional witnesses. Sometimes the parties do not agree on the relevance of certain exhibits, and they may also disagree on the number of exhibits. If there are such disagreements, the Panel Chair should be informed, and the Chair may rule on which

exhibits may be submitted to the Panel before hearing. If this process for resolving disagreements concerning exhibits is used, the Panel hearing can be reserved for hearing witnesses and making a probable cause determination.

(3) Volume of Exhibits

Sometimes a party will mark an entire file, series of files, or lengthy transcripts as exhibits. Prior to the hearing the Panel Chair should make a determination of whether voluminous exhibits should be distributed to all Panel members. If so, Rule 9(f)(3), RLPR, places the burden of copying and distribution on the party which seeks to introduce the exhibits. The probable cause nature of the proceeding should be kept in mind in determining the appropriate volume of exhibits. If exhibits are too burdensome for a volunteer Panel, consideration should be given to using the “referee probable cause hearing” procedure of Rule 9(g), RLPR. The Panel Chair may also wish to instruct the party offering numerous exhibits to organize them in a tabbed, indexed fashion.

(4) Genuineness of Exhibits

Foundation and authenticity for exhibits have seldom been problems in Panel matters. Genuineness is admitted as to any exhibit exchanged at the pre-hearing meeting unless objection is made within ten days. Rule 9(e)(2), RLPR. If there are issues of authenticity or foundation, they should be resolved (with the Panel Chair’s help if necessary) prior to the Panel hearing.

C. Witnesses

Rule 9(h), RLPR, provides:

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 Chair or Vice-Chair authorized for good cause.

(1) Witnesses Other Than Respondent and Complainant

No witnesses, other than the respondent and complainant, may testify before the Panel unless the Chair or Vice-Chair has so “authorized for good cause.” Rule 9(h), RLPR. Note that “authorized” is in the past tense. Ordinarily the Panel Chair will rule on a request for additional witnesses by the Director or respondent, well in advance of Panel hearing. At the pre-hearing meeting, the Director will inform respondent that any proposed witnesses should be identified and a request made to the Panel Chair to authorize their testimony.

If the Panel Chair gives last-minute authorizations for witnesses, the administration of the Panel system is harmed: scheduling of Panel matters, particularly more than one Panel matter in a day, becomes difficult or impossible; a party’s ability to undertake proper discovery is compromised; the parties are given to understand, in the future, that the tactic of surprise may be useful; and valuable Panel hearing time may be taken up by consideration of motions regarding witnesses.

It is the responsibility of the party seeking authorization for additional witness(es) to timely seek authorization. If authorization is not timely sought, ordinarily the authorization should be denied.

(2) “For Good Cause”

What is “good cause” for authorizing a Panel witness other than the respondent and complainant? Rule 9(h), RLPR, contemplates that evidence from such witnesses will ordinarily be in the form of “affidavits, depositions, or other documents.” The desire by a party to cross-examine an affiant is not ordinarily “good cause” for live testimony because the cross-examination can be accomplished by deposition. Witnesses as to character and alleged mitigating circumstances have not been authorized by Panels.

An authorized witness should be someone who has special, crucial knowledge, and whose credibility may be so important that a deposition transcript cannot substitute for live testimony. In many Panel hearings there will be no such witnesses, only the complainant and respondent. In some Panel hearings there will be one or two such witnesses, authorized for good cause. More than one or two such witnesses have been authorized only very rarely. Authorization for several such witnesses tends to make it difficult or impossible to complete a Panel hearing in one day. This often burdens the witnesses themselves, who must then also testify at a referee hearing if probable cause is found. It can entail considerable expense if a transcript is ordered, if a multi-day hearing (including travel by parties or Panel members) results, or if professional witness fees must be paid.

(3) The Respondent Witness

Rule 9(h), RLPR, restricts the form of evidence receivable at Panel hearings and does not accord the complainant or respondent an absolute right to testify, or to testify at any length. Rule 9(f)(2), RLPR, recognizes “[t]he lawyer’s right to be heard at the hearing” and, in almost all Panel hearings, the respondent has, in fact, been permitted to testify. There may be situations, however, in which considerations akin to collateral estoppel apply so strongly that no testimony by any party is needed for a probable

cause determination. If, for example, a respondent has made crucial admissions or has been found in a civil or criminal proceeding to have done things which entail serious misconduct, probable cause may be obvious.

(4) The Complainant Witness

The testimony of “a complainant who affirmatively desires to attend,” Rule 9(h), RLPR, need not be authorized by a Panel Chair. Sometimes a complainant will not desire to testify or, indeed, not desire to attend. In those situations, the complainant’s evidence may be presented by: (a) affidavit; (b) deposition; (c) not at all; or (d) pursuant to subpoena, if the Panel Chair authorizes complainant’s testimony for good cause. Ordinarily, complainants *do* affirmatively desire to attend. Sometimes the complainant, for various reasons (e.g., fear, indifference, already having received a monetary settlement) will cease being cooperative. In such situations, the Director may seek the Panel Chair’s authorization on good cause shown to compel complainant’s testimony. A respondent may also seek to compel complainant’s testimony when the complainant does not wish to attend.

D. Issues at Hearing

(1) Length

It is common for Panel hearings to last between a half day and a day. Because of the burden lengthy hearings place upon volunteer Panel members, witnesses, the respondent, and the Director's Office, hearings on charges and or reinstatement petitions normally should be concluded in one day or less. Normal admonition appeal hearings should be concluded in a half day or less.

If it appears impossible to have a fair and complete Panel hearing in a reasonable length of time, consideration should be given to a request by the Panel Chair and Board Chair under Rule 9(g), RLPR, for the appointment of a referee to conduct the Panel hearing.

(2) Character Evidence

Character evidence has only been admitted at Panel hearings in connection with reinstatement petitions. Panels have regarded probable cause as being determinable without character evidence. However, character evidence remains admissible before referees in hearings on petitions for disciplinary action. The presumption of Rule 9(h), RLPR, is that live testimony is not necessary at Panel hearing except by complainants, respondents and a witness authorized by the Panel Chair "for good cause."

(3) Mitigating Circumstances and Disability

Mitigating Circumstances

Evidence regarding such alleged mitigating circumstances as alcoholism, psychological difficulties, etc., has not been received at probable cause and admonition appeal hearings. Such evidence may often be relevant to the degree of public discipline imposed, but not to the question of whether there is probable cause to believe public discipline is warranted. Also, the burden of receiving expert testimony, medical records, and similar evidence has been regarded as beyond the scope of Panel hearings.

Evidence by respondent regarding other alleged mitigating circumstances has occasionally been received by Panels, depending on its length and its apparent probative value.

Disability

If a respondent asserts inability to assist in his or her defense due to mental incapacity, the Court may transfer the lawyer to disability inactive status. Rule 28(c), RLPR. In the alternative, the Director may submit charges of unprofessional conduct that include allegations of disability. Such charging may be done when observations of respondent, assertions of respondent or incomplete medical evidence indicate there is some reason to believe that the apparent misconduct (such as neglect, non-communication, etc.) is a manifestation of disability rather than misconduct. In such cases, the Panel may authorize a petition likewise alleged in the alternative.

It is the Director's burden to demonstrate probable cause to believe there is disability, if it is alleged. It will not normally be alleged (except, perhaps, in the alternative) if the respondent is not cooperative and will not furnish medical records. Disability proceedings pursuant to Rule 28 and Rule 9, RLPR, are rare. When they have occurred, the normal rules are followed, but the Panel and Panel Chair exercise considerable discretion regarding the form of the evidence, the timing of procedures, etc.

(4) Disciplinary Record

Rule 19(b), RLPR, provides:

(1) *Conduct Previously Considered And Investigated 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, except as provided in subsection (b)(2).

(2) *Conduct Previously Considered Where No Investigation Was Taken And Discipline Was Not Warranted.* Conduct in previous lawyer disciplinary proceedings of any jurisdiction . . . which was not investigated, is admissible, even if it was determined in the proceedings without investigation that discipline was not warranted.

(3) *Previous Finding.* A finding in previous disciplinary proceedings that a lawyer committed conduct warranting discipline . . . is, in proceedings under these Rules, conclusive evidence that the lawyer committed the conduct.

(4) *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 the lawyer acted in conformity therewith; provided, however, that evidence of such prior discipline may be used to prove:

- (i) A pattern of related conduct, the cumulative effect of which constitutes a violation;
- (ii) The current charge (e.g., the lawyer has continued to practice despite suspension);
- (iii) For purposes of impeachment (e.g., the lawyer denies having been disciplined before); or
- (iv) Motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 19(b)(4), RLPR, provides that prior discipline, “is admissible to determine the nature of the discipline to be imposed” Prior discipline may, then, be relevant to determinations of probable cause (and, in admonition appeals, relevant as to whether the offense is indeed “isolated”).

Although prior discipline is generally said to be admissible, there may be prior discipline which is not relevant and, is therefore inadmissible. In general, prior discipline is relevant if:

- i. It is serious, (i.e., Supreme Court discipline or stipulated probation); or

- ii. It is topically-related (e.g., neglect or dishonesty in both prior and current matters; or neglect in prior matter and non-filing of tax returns in current matter); or
- iii. The actual subject or persons in the prior matter and current matter are related (e.g., the respondent is still neglecting the probate proceedings, for which the respondent was previously admonished); or
- iv. The prior discipline is very recent; or
- vi. It falls under the circumstances listed in Rule 19(b)(4), RLPR. For example, prior discipline for a dishonest act and subsequent promises to amend dishonest behavior may be relevant to a credibility determination in the current matter. *See, e.g., Matter of Simonson*, 420 N.W.2d 903, 907 (Minn. 1988) (“Simonson’s credibility with this court is low because of his misrepresentation to us during the prior disciplinary proceeding.”).

Warnings and Prior Discipline

Effective July 1, 1982, the terminology of the Rules on Lawyers Professional Responsibility was changed to call the least-serious determination of unprofessional conduct an “admonition” rather than a “warning.” “Warnings” were not technically “discipline” under the previous rules. However, almost all warnings alleged violations of the Code of Professional Responsibility, and such violations were usually either admitted or found if a warning became a permanent part of an attorney’s record. Although warnings are not automatically admissible under Rule 19(b)(4), RLPR (as the Rule technically applies only to “discipline”), warnings are not, by rule, declared inadmissible. Indeed, under Rule 19(b)(1), RLPR, even certain dismissals may be admissible. Therefore, evidence regarding a prior warning which appears relevant to the nature of the current discipline under consideration should be admissible by ruling of the Panel Chair, under the criteria stated above.

(5) Effect of Other Proceedings

Criminal Conviction

Rule 19(a), RLPR, provides that the criminal conviction of a lawyer is “conclusive evidence that the lawyer committed the conduct for which the lawyer was convicted.” *See, e.g., In re Pugh*, 710 N.W.2d 285, 288 (Minn. 2006). With respect to convictions or guilty pleas for certain serious matters, the Director may submit the matter to a Panel or to the Board Chair for a probable cause determination. Rule 10(c), RLPR. As to any criminal conviction, the facts may not be re-litigated before the Panel.

Civil Proceedings

Pursuant to Rule 10(d), RLPR, civil findings of serious misconduct may result in a matter bypassing a Panel, upon approval of a Panel Chair. The Supreme Court has indicated that findings in some circumstances may be final even before Supreme Court referees. *See In re Tieso*, 396 N.W.2d 32 (Minn. 1986) (federal court determination of bad faith litigation binding). On the other hand, the findings of the Governor’s Commission were not binding before the referee in the Kathleen Morris matter. *In re Morris*, 408 N.W.2d 859 (Minn. 1987). In *Morris*, the absence of a clear appeal right may have been important to the Court’s decision.

Even in *Morris*, the civil findings and evidence were admissible. Since the probable cause standard is a lower threshold than the civil standard of a preponderance of the evidence, civil findings will normally be sufficient to determine probable cause in Panel matters. The Panel (or Panel Chair, if there is a Rule 10(d) bypass motion) will still have to determine in most cases whether the facts as found entail unprofessional conduct, and whether the unprofessional conduct is serious enough to warrant public discipline.

The Court’s adoption of Rule 10(d), RLPR, with respect to civil findings makes it clear that it is appropriate for panels to take such findings into account.

4. SPECIAL PANEL PROCEDURES FOR ADMONITION
APPEALS AND REINSTATEMENT PETITIONS

A. Admonition Appeals

Rule 8(d)(2), RLPR, provides:

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, the Director may issue an admonition. The Director shall issue an admonition if so directed by a Board member reviewing a complainant appeal, under the circumstances identified in Rule 8(e). 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 Chair of the District Committee, if any, that has considered the complaint, that the Director has issued the admonition.

Special procedures for admonition appeals are set out in Rule 9(i)(1)(ii), RLPR, as follows:

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

- (1) The Chair shall explain the purpose of the hearing, which is to determine:

* * *

- (ii) if an admonition has been issued under Rule 8(d)(2) or 8(e), 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.

Additionally, Rule 9(k), RLPR, provides that “[i]f the Panel affirmed the Director’s admonition, the notification to the lawyer shall inform the lawyer of the right to appeal to the Supreme Court under subdivision (m).”

Although most of the Panel pre-hearing and hearing procedures for probable cause matters are also applicable to admonition appeals, there are several important differences:

- i. The admonition appeal hearing is the only evidentiary hearing. In contrast, the probable cause hearing (if probable cause is determined) is followed by a more complete evidentiary hearing before a Court referee.
- ii. Because the admonition appeal is the only evidentiary hearing, the standard of proof is clear and convincing evidence rather than probable cause. Rule 9(i)(1)(ii), RLPR.
- iii. After an admonition appeal, the panel may (a) affirm the admonition; (b) reverse the admonition; or (c) if there is probable cause to believe public discipline is warranted, authorize a public petition. *Id.*
- iv. The level of gravity of unprofessional conduct is far lower than that considered at a probable cause hearing; the issue at an admonition appeal hearing is whether there was unprofessional conduct “of an isolated and non-serious nature.” Rule 8(d)(2), RLPR.

From these basic differences, several procedures and emphases should follow.

Witnesses

Because the Panel hearing is the only evidentiary hearing, the Panel Chair may wish to be somewhat more liberal in allowing testimony from witnesses other than the complainant and the respondent. On the other hand, because the issues at stake and the consequences of an admonition are typically far less serious than at a probable cause hearing, the Panel will normally not need lengthy or voluminous testimony to make its determination.

Clear and Convincing Evidence

Clear and convincing evidence exists “where the truth of the facts asserted is highly probable.” *In re Erickson*, 653 N.W.2d 184, 189 (Minn. 2002) (quoting *In re Moeller*, 582 N.W.2d 554, 557 (Minn. 1998)). “[U]ncorroborated evidence may be clear and convincing if the trier of fact can impose discipline with clarity and conviction of its factual justification. In fact, depending on its source, uncorroborated evidence may be more reliable than that remotely corroborated by a dubious source.” *In re Miera*, 426 N.W.2d 850, 854 (Minn. 1988) (quoting *In re McDonough*, 296 N.W.2d 648, 691 (Minn. 1979)). “Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” *Kiecker v. Estate of Kiecker*, 404 N.W.2d 881, 883 (Minn. Ct. App. 1987) (citing *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978)).

Post-Hearing Findings, Conclusions and Explanation

The Supreme Court, in affirming a Panel’s affirmance of an admonition, stated:

While the panel’s brief report did contain its reasons for affirming the director’s admonition, it failed to address disputed testimony or indicate what facts the panel relied on. We urge future panels reviewing a director’s admonition to document their decision with greater factual specificity together with reasons.

In re Appeal of Panel’s Affirmance of Dir. of Prof’l Responsibility’s Admonition in Panel Matter No. 87-22, 425 N.W.2d 824, 827 (Minn. 1988).

In an unpublished order in *Panel File No. 98-38* (April 29, 1999), the Supreme Court noted that “although written explanation of a Panel’s decision is not required in every case, in the circumstances presented here findings and conclusions by the Panel would facilitate, and may obviate the need for, this court’s review.”

The Court is not necessarily requiring that panels issue lengthy written sets of findings, with memoranda, in the style of a district court or referee. The Court’s

concern can be balanced with the fact that Panel members are volunteers and with the need for panels to make prompt determinations. In all matters decided by a Panel, other than a finding of probable cause for public discipline, written findings should be issued in accordance with one of the following options:

- i. The Panel Chair dictates the decision and the basis for the decision on the record at the hearing and asks the Director's Office to prepare the findings and conclusions based upon these oral instructions with a copy to respondent for approval only as to form.
- ii. The Panel, in affirming an admonition, explicitly incorporates by reference in its statement some or all of the allegations of fact in the admonition and reasoning of the memorandum (if any) accompanying the admonition.
- iii. The Panel Chair asks the Director's Office and respondent to prepare proposed findings and conclusions for prompt submission to the Panel. Written findings and conclusions are then prepared and adopted by the Panel.
- iv. The Panel takes the matter under advisement and prepares its own findings and conclusions.

The Panel should consider preparing a memo for attachment to the written findings setting forth a brief explanation or rationale for its decision. An agency may issue findings after making its decision. See *Queen v. Minneapolis Public Schools*, No. C3-90-835, 1990 WL 146608 (Minn. Ct. App. Oct. 9, 1990); see also *In re LMN*, 463 N.W.2d 902 (Minn. 1990) (affirming a Panel affirmance of Director's admonition). In *LMN*, the Panel's findings and conclusions were prepared by the Director's Office after respondent's appeal to the Supreme Court was filed. Normally, however, the Panel findings and conclusions should be prepared when the admonition is affirmed or within one week thereafter. The Director's Office will advise the Board Chair if a Panel fails to meet this timeline. The Board Chair will send a reminder letter to the Panel Chair advising the Panel of the need to make its determination promptly.

If the admonition is not affirmed, then no findings and explanation are necessary. Whatever the format, findings that are particularly within the province of a trier of fact (e.g., the credibility of witnesses), should be made when appropriate. If clerical assistance is needed in preparing findings and conclusions, the Panel Chair may contact the office administrator at the Office of Lawyers Professional Responsibility.

B. Reinstatement Petitions

Rule 18, RLPR, governs reinstatement petitions. It provides:

(a) Petition for Reinstatement. A petition for reinstatement to practice law shall be served upon the Director. 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 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 the 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.

(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.

(1) Unless such examination is specifically waived by this Court, no lawyer after having been disbarred by this Court, may petition for reinstatement 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.

(f) Reinstatement by Affidavit. Unless otherwise ordered by this Court, subdivisions (a) through (d) shall not apply to lawyers who have been suspended for a fixed period of ninety (90) days or less. Such a suspended lawyer, and any suspended lawyer for whom the Court waives the requirements of subdivisions (a) through (d), may apply for reinstatement by filing an affidavit with the Clerk of Appellate Courts and the Director, stating that the suspended lawyer has complied with Rules 24 and 26 of these rules, is current in Continuing Legal Education requirements, and has complied with all other conditions for reinstatement imposed by the Court. After receiving the lawyer's affidavit, the Director shall promptly file a proposed order and an affidavit regarding the lawyer's compliance or lack thereof with the

requirements for reinstatement. The lawyer may not resume the practice of law unless and until this Court issues a reinstatement order.

(1) Director's Investigation and Report

When the Director receives a petition for reinstatement and a hearing is required, the matter is immediately assigned to a Panel. As soon as practicable, an Assistant Director begins an investigation, which includes:

- i. A determination of whether all preconditions for reinstatement ordered by the Court have been met, including compliance with Rules 24 and 26, RLPR. If petitioner has clearly not met certain preconditions, the Director may move the Court for a summary denial of the petition. *See, e.g., In re Mansur*, No. C2-83-659 (Minn. Feb. 22, 1990).
- ii. Whether the conduct of the petitioner during the time since suspension or disbarment indicates rehabilitation such that petitioner is presently fit to practice law.
- iii. In cases where chemical dependency or mental or emotional problems have been a cause or factor in petitioner's suspension or disbarment, the Director's Office obtains medical authorizations and carefully reviews petitioner's medical records and consults with all treating physicians and counselors. The Director interviews character witnesses, employers and others who may have knowledge of petitioner's conduct during the time since suspension or disbarment.

When the investigation is complete, the Director prepares a report, indicating whether the Director believes the preconditions for reinstatement have been met. The report may also include the Director's conclusion as to whether petitioner is presently morally and psychologically fit to practice law. Sometimes this conclusion cannot be reached until after Panel hearing.

The investigation report is submitted to the Panel and to the petitioner or petitioner's attorney. A pre-hearing meeting is also held to exchange exhibits, witness lists, and to set a Panel hearing date.

(2) Panel Hearing

Open to the Public

Unlike other Panel hearings, the reinstatement hearing is open to the public. Both the prior discipline and the reinstatement petition are publicly filed, as is the Panel's report after the hearing.

Form of Evidence

The petitioner and Director present and cross-examine witnesses pursuant to the Minnesota Rules of Evidence. Affidavits or letters from individuals regarding petitioner's character are often admitted by stipulation.

(3) Post-Hearing Procedures

Recommendation

At the conclusion of the Panel hearing, the Panel makes a written recommendation which the Panel Chair files with the Clerk of Appellate Courts and serves by mail on the petitioner and the Director's Office. Rule 18(c), RLPR. The Panel may recommend that the petitioner be reinstated, that the petitioner be reinstated subject to specific conditions, or that the petitioner be denied reinstatement. The Panel should ordinarily include a memorandum stating the basis for its recommendation, particularly if its recommendation is to deny reinstatement. As an example, see the Panel memorandum appended by the Minnesota Supreme Court to its own opinion, *In re Swanson*, 405 N.W.2d 892 (Minn. 1987).

If the Panel recommendation is based on determinations of credibility or demeanor, the Panel should so indicate to enable the Court to have the best basis for its review. In matters involving numerous or important factual determinations or conclusions, the Panel should consider drafting findings and conclusions or requesting proposals from the Director and the petitioner. As indicated in the discussion of post-hearing procedures on admonition appeals at Manual, § 4.A above, the Supreme Court

has indicated the importance of findings and explanations for facilitating its review of Panel decisions. *See Panel Matter No. 87-22*, 425 N.W.2d at 827.

If clerical assistance is needed in preparing the Panel recommendation, arrangements can be made through the Director's Office.

(4) Transcript

Ordinarily, if the Director and petitioner agree with the Panel's recommendation, a transcript is not provided to the Court unless the Court requests it. If either the Director or the petitioner contests the Panel's recommendation, a transcript may be ordered and a request for briefing and oral argument made to the Court.

(5) Referee Procedures

Rule 18(d), RLPR, provides that the Court may appoint a referee to conduct a hearing pursuant to the same procedures as under Rule 14, RLPR. Neither the Director nor any petitioner in recent years has requested the appointment of a referee. Instead, briefing and oral argument is made to the Court based upon the transcript of the Panel hearing.

(6) Burden and Standard of Proof

It is the petitioner's burden to "establish by clear and convincing evidence that [petitioner] has undergone such a moral change as now to render [petitioner] a fit person to enjoy the public confidence and trust once forfeited." *In re Reinstatement of Singer*, 735 N.W.2d 698 (Minn. 2007) (quoting *In re Reinstatement of Jellinger*, 728 N.W.2d 917, 922 (Minn. 2007)); *see also In re Reinstatement of Kadrie*, 602 N.W.2d 868, 870 (Minn. 1990) ("This moral change must be such that if the petitioner were reinstated, 'clients could submit their most intimate and important affairs to him with complete confidence in both his competence and fidelity.'") (quoting *In re Herman*, 293 Minn. 472, 476, 197 N.W.2d 241, 244 (1972)).

(7) Reinstatement Standards

The most decisive factor in determining the appropriateness of reinstatement is petitioner's present character and present fitness to practice law. See *In re Reinstatement of Ramirez*, 719 N.W.2d 920, 924-25 (Minn. 2006); *In re Wegner*, 417 N.W.2d 97, 98 (Minn. 1987) (quoting *In re Smith*, 220 Minn. 197, 200, 19 N.W.2d 324, 326 (1945)). Other factors to be considered include petitioner's consciousness of the wrongfulness of the conduct, *Jellinger*, 728 N.W.2d at 922; length of time since the misconduct and suspension or disbarment, *Petition of Hanson*, 454 N.W.2d 924, 925 (Minn. 1990); the presence of physical or psychological illnesses or pressures which are susceptible to correction, *In re Reutter*, 474 N.W.2d 343 (Minn. 1991); and the seriousness of the original misconduct, *In re Anderley*, 696 N.W.2d 380, 385 (Minn. 2005).

The Supreme Court has indicated that a more rigorous showing of professional moral character is required for the purpose of reinstatement than original admission to the bar. *Id.* (citing *In re Reinstatement of Porter*, 472 N.W.2d 654, 655-56 (Minn. 1991)); *Matter of Thompson*, 365 N.W.2d 262, 264 (Minn. 1985) (citing *Smith*, 220 Minn. at 200, 19 N.W.2d at 326).

(8) Sequence of Hearing and Rule 18(e) Requirements

Rule 18(e), RLPR, requires that a suspended lawyer complete the professional responsibility portion of the bar examination—and be current in continuing legal education prior to the reinstatement becoming effective, unless the Court orders otherwise. The Director's Office rarely recommends waiver of these requirements. However, if the petitioner has not completed these requirements prior to the reinstatement hearing, the Panel may nonetheless make a favorable recommendation for reinstatement subject to completion of the remaining Rule 18(e), RLPR, requirements. See, e.g., *Reutter*, 474 N.W.2d at 345.

5. **PROCEDURES AFTER PANEL HEARING**

A. **Probable Cause Determination**

Rule 9(j)(1), RLPR, in pertinent part, provides:

Disposition.

- (1) In the case of charges of unprofessional conduct, the Panel shall:
 - (i) determine that there is not probable cause to believe that public discipline is warranted . . . ;
 - (ii) 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; [or]
 - (iii) if it concludes that the attorney engaged in conduct that was unprofessional but of an isolated and nonserious nature, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition. . . . If the Panel issues an admonition following a hearing, the lawyer shall have the right to appeal in accordance with Rule 9(m); or
 - (iv) if it finds probable cause to revoke a conditional admission agreement, instruct the Director to file in this Court a petition for revocation of conditional admission.
- (2) If the Panel held a hearing on a lawyer's appeal of an admonition that was issued under Rule 8(d)(2), or issued by another panel without a hearing, the Panel shall affirm or reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, instruct the Director to file a petition for disciplinary action in this Court. [For a further discussion of Panel issued admonitions after probable cause Hearings, see § 5. D.]

In deciding whether there is or is not probable cause to believe that public discipline is warranted, or to revoke a conditional admission, the Panel must

understand both the meaning of “probable cause” and to what the probable cause standard applies.

For probable cause determinations, the Panel is not required to make findings of fact or conclusions of law unless it is issuing an admonition. Nor is the Panel required to explain its reasoning or to state whether its decision was unanimous. *C.f. In re R.P.*, 392 N.W.2d 544 (Minn. 1986) (Court declines to impose requirement of unanimity on Panel probable cause determinations).

Normally Panels have simply announced their decision without comment or explanation, although many Panels have given some brief comment.

Once or twice, a Panel has produced a written memorandum of several pages, explaining its decision to find probable cause for public discipline. This does not seem to be a good practice, as it burdens Panel members, delays the decision, and may lead to a challenge of the basis for the Panel’s decision—further complicating and delaying the proceedings.

It is suggested that, if the Panel reaches its decision shortly after hearing, the Panel Chair should simply announce on the record what the decision is. If the Panel finds probable cause for public discipline on each charge, the announcement of this outcome on the record is sufficient.

If the Panel dismisses a charge, issues an admonition, or dismisses an admonition in an admonition appeal, then written findings should be made utilizing one of the options set forth in § 4.A of this Manual for the issuance of written findings after a hearing on an admonition appeal.

(1) Definitions of Probable Cause

Various definitions of probable cause exist. A proper probable cause instruction given to a grand jury is that an indictment may issue:

[W]hen, upon all the evidence, there is probable cause to believe that an offense has been committed and that the defendant committed it, and that probable cause has been defined as reasonable cause and as an apparent

state of facts found to exist upon reasonable inquiry which would induce a reasonably intelligent and prudent person to believe that the accused person has committed the crime charged.

State v. Inthavong, 402 N.W.2d 799, 801 n.2 (Minn. 1987).

The Minnesota Court of Appeals, in a 1985 dentist discipline case, stated:

Although we are dealing with a civil matter, we find the following test of probable cause in a criminal context to be useful:

[W]hether the objective facts are such that under the circumstances ‘a person of ordinary care and prudence [would] entertain an honest and strong suspicion’ that a crime had been committed.

‘This standard is a flexible common sense one.’

Matter of Schultz, 375 N.W.2d 509, 513 (Minn. Ct. App. 1985) (citations omitted).

The Supreme Court of Ohio has defined probable cause in the attorney-disciplinary context as “that there is available substantial credible evidence that . . . misconduct has been committed.” Rule V, § 6(A)(2), R. for the Gov’t of the Ohio Bar (2007).

And lastly, Black’s Law Dictionary, 1239 (8th ed. 2004), states that “[t]he probable cause test . . . is an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man.”

(2) Application of the Probable Cause Standard

In determining whether there is probable cause to believe that public discipline is warranted, the Panel should apply the probable cause standard in answering these questions:

- i. Is there probable cause to believe that certain alleged facts are indeed the facts of the matter?

- ii. If the previous question is answered in the affirmative, is there also probable cause to believe that the facts constitute violation(s) of the Minnesota Rules of Professional Conduct?
- iii. If the first two questions are answered in the affirmative, is there probable cause to believe that the rule violation(s) are serious enough to warrant public discipline?

In determining whether a Rule violation probably occurred, it should be kept in mind that:

The emphasis of an ethical code is on its spirit rather than its letter. And the fact that the disciplinary rules attempt to establish a reasonably precise boundary between ethical and unethical conduct does not support the proposition that they must be strictly construed so as to save putatively borderline conduct from meaningful sanction. Rather, members of the bar should steer the widest feasible course around conduct proscribed by the disciplinary rules.

Matter of Scallen, 269 N.W.2d 834, 840 (Minn. 1978).

In determining whether public discipline is probably warranted for a Rule violation(s), the Panel should be mindful of Supreme Court discipline for similar previous actions. If there is no clear precedent, fundamental standards should be applied. For example, was the lawyer dishonest? What was the actual or potential harm caused by the misconduct? Who was harmed or may be harmed? Did the lawyer act intentionally, knowingly or negligently? If the lawyer acted negligently, was the misconduct repeated? Similar questions are posed for determining gravity of misconduct by the *ABA Standards for Imposing Lawyer Sanctions* (1992).

B. Oral Arguments/Briefs

Rule 9(i)(5), RLPR, provides, “The parties may present oral arguments[.]”

Ordinarily, it is to be expected there will be final argument, in oral form. There may be rare cases in which no final argument is required or in which written briefs will be required in lieu of (or in addition to) oral argument. There may also be cases in which the Panel can instruct the parties as to the length of the final argument or the topics of particular concern to the Panel.

Briefs are ordinarily not required—both because the proceedings are preliminary in nature and because briefs tend to burden and delay the proceedings. Briefs may be appropriate where there is a difficult legal issue that is pivotal. Even in such cases, however, the issue may be identifiable well before the Panel hearing so that the Panel Chair can instruct the parties to submit briefs prior to the Panel hearing.

Customarily, the sequence of argument has been for the Director to present oral argument first. If there are written briefs, they should ordinarily be submitted simultaneously, within a short period after the hearing.

C. Timing of Probable Cause Determination

Rule 9(i)(7), RLPR, provides that, after the Panel hearing, “[t]he Panel shall either recess to deliberate or take the matter under advisement.”

The more common and preferred practice has been for Panels to recess, deliberate, and announce their decision shortly after the hearing. It seems advisable to recess at least to determine whether or not brief deliberations will result in a decision.

Panels have occasionally taken matters under advisement and announced their decisions after the hearing. Matters taken under advisement should be the exception. If the matter is taken under advisement, the Panel should be mindful of any factors which may unduly delay the decision, such as the geographical distance of Panel members from each other or the expected unavailability of a Panel member. Panels that have taken a matter under advisement should decide the matter within one week of the hearing unless exceptional circumstances exist. The Director’s Office will advise the Board Chair if a Panel fails to meet this timeline. The Board Chair will send a reminder letter to the Panel Chair, advising the Panel of the need to make its determination promptly.

D. Admonition Issued by Panel

If, after hearing evidence on charges of unprofessional conduct, a Panel “concludes that the attorney engaged in conduct that was unprofessional but of an isolated and nonserious nature, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition[.]” Rule 9(j)(1)(iii), RLPR. In order to issue such an admonition, the Panel must conclude that there:

- i. was a violation of the Rules of Professional Conduct; and
- ii. that the violation was non-serious; and
- iii. that the violation was isolated.

Upon so concluding, the Panel must then state the facts and conclusions constituting the unprofessional conduct and issue an admonition. Such conclusions may be reached as to any charge.

Rule 9(j)(1)(iii), RLPR, does not specifically require that the facts and conclusions for the admonition be stated in detail at the conclusion of the Panel hearing. However, as noted in § 4.A of this Manual, written findings and conclusions are preferred by the Court and should be prepared. Procedures for their preparation would be similar to those followed after a hearing on an admonition appeal. *See* Manual, § 4.A. In any event, an admonition must be in a sufficiently clear and definite form to comprise a part of a permanent record and to provide a basis for appeal to the Supreme Court if the respondent disagrees.

Clear and convincing evidence is the standard for any final discipline determination, including the issuance of any admonition—be it issued by the Director or by a Panel. *See In re Nelson*, 733 N.W.2d 458, 461 (Minn. 2007) (“The standard of proof in an attorney discipline proceeding is full, clear, and convincing evidence.”); Rule 9(i)(1)(ii), RLPR (an admonition is to be affirmed by the Panel if supported by clear and convincing evidence). The Panel should bear in mind that—while the standard is clear and convincing evidence with respect to whether misconduct is isolated and non-serious, warranting an admonition—as to the question of whether public discipline is warranted, the standard is merely that of probable cause. *See* Rule 9(i)(1)(iii), RLPR.