

STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650 & C1-84-2140

PROMULGATION OF AMENDMENTS TO THE
RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY
AND THE RULES OF PROFESSIONAL CONDUCT

ORDER

WHEREAS, the Minnesota State Bar Association and the Advisory Committee to Review Lawyer Discipline in Minnesota and Evaluate the Recommendations of the American Bar Association filed petitions with this Court proposing certain amendments to the Minnesota Rules on Lawyers Professional Responsibility and the Rules of Professional Conduct, and

WHEREAS, this Court held a hearing on the proposed amendments on December 2, 1994, and

WHEREAS, the Lawyers Professional Responsibility Board filed a petition with this Court proposing a housekeeping amendment to Rule 9(j)(2) of the Rules on Lawyers Professional Responsibility, and

WHEREAS, this Court has reviewed the proposals, and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The attached amendments to the Minnesota Rules on Lawyers Professional Responsibility and the Rules of Professional Conduct be, and the same hereby are, prescribed and promulgated for the regulation of attorney discipline in the State of Minnesota.
2. Except as otherwise provided in Rules 6X and 6Y of the Rules on Lawyers Professional Responsibility, these amended rules shall govern all lawyer disciplinary actions commenced on or after January 1, 1995.

Dated: December 12, 1994

BY THE COURT:

OFFICE OF
APPELLATE COURTS

DEC 13 1994

FILED



A.M. Keith
Chief Justice

AMENDMENTS TO RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD.

.....
(c) **Duties.** The Board shall have general supervisory authority over the administration of the Office of Lawyers Professional Responsibility and these Rules, and may, from time to time, issue opinions on questions of professional conduct. The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system. The Board may elect a Vice-Chair and specify the Vice-Chair's duties. Board meetings are open to the public, except the Board may go into closed session not open to the public to discuss matters protected by Rule 20 or for other good cause.

.....

RULE 6. COMPLAINTS

.....
(d) **Opportunity to respond to statements.** The District Committee or the Director's Office shall afford the complainant an opportunity to reply to the lawyer's response to the complaint.

Rule 6X. PILOT MEDIATION PROGRAM FOR COMPLAINTS AGAINST LAWYERS IN THE THIRD, FOURTH, AND TWELFTH BAR ASSOCIATION DISTRICTS

(a) Scope of the Program. This rule, rather than Rule 6(b), shall apply from July 1, 1995, through July 1, 1998, to any complaint against a lawyer whose principal office is located in Chippewa, Hennepin, Houston, Kandiyohi, Lac Qui Parle, Meeker, Olmsted, Renville, Swift Wabasha, Winona or Yellow Medicine county.

(b) Submission; Referral. If a complaint of a lawyer's alleged unprofessional conduct is submitted to a District Committee, the District Chair shall promptly forward it to the Director. If a complaint is submitted or forwarded to the Director, the Director shall:

(1) Refer it to the District Committee of the district where the lawyer's principal office is located or, in exceptional circumstances, to another District Committee that the Director reasonably selects, with a direction that the complaint be investigated;

(2) Investigate it without referral;

(3) Refer the complaint for mediation to the District Mediation Project Coordinator or directly to a mediator chosen by the Director. When a complaint is mediated pursuant to this rule, the mediator shall, in all cases, be a trained volunteer mediator who shall be on the Neutral Roster maintained by the State Court Administrator's Office;

(4) Refer the complaint to the District Committee with a direction that the complaint be mediated, if found to be appropriate after investigation; or

(5) Determine that neither discipline nor mediation is warranted.

(c) District Committee Investigation. If the Director refers the complaint for investigation, the complaint shall be investigated as provided in Rule 7. If, in the course of the investigation, the investigator concludes that the complaint can be more appropriately dealt with

through mediation, the investigator shall promptly consult the Director. If the Director concurs, the Director may withdraw the complaint from investigation and refer it for mediation.

(d) Mediation. The mediator shall arrange the mediation sessions and shall report at the conclusion of the mediation. The mediator shall conduct the mediation in accordance with generally accepted principles of mediation and in accordance with policies established from time to time by the Director.

(1) If the mediator decides that the best interests of the parties or of the public would not be well-served by the mediation, the mediator may terminate the mediation at any time.

(2) If a resolution is reached, the mediator shall prepare a written agreement of resolution. The mediator shall report to the District Mediation Project Coordinator or the Director that an agreement has been reached. If either party fails to appear for the mediation session or if no agreement is reached, the mediator shall so report; in that case, the Director shall determine whether to investigate further.

(3) The mediation shall be completed within 45 days of the assignment of the mediator. The Director may, upon request of the mediator, extend the time for good cause.

(4) A lawyer shall participate in good faith in a mediation held pursuant to these rules; failure to do so is separate grounds for discipline.

(5) The mediator may not be called to testify in any proceeding about anything that happened or was said in the mediation. Lawyers who serve as mediators under these rules are not bound by the mandatory reporting rules of Minnesota Rules of Professional Conduct 8.3 to report information learned during the course of the mediation. The mediator may not reveal nor can the mediator be compelled to disclose the mediator's notes or other material that the mediator has prepared, or any document or other material presented or shown to the mediator by one party in the absence of the other party during the course of the mediation. A communication or document otherwise not privileged does not, however, become privileged because of this rule.

Nothing in this rule prevents the parties from revealing or testifying about communications made during the mediation.

(6) The parties may not agree, as part of a resolution through mediation, that the complaining party will waive or settle any claim for legal malpractice.

(7) If the complaint is resolved through mediation, the Director shall determine that discipline is not warranted and, after the applicable time period, expunge the records of the matter under Rule 20(e). If additional allegations of the lawyer's misconduct come to the Director's attention before the expunction, the Director may reopen the file and investigate the complaint.

(e) Report on the Pilot Program. No later than July 1, 1997, the Director shall report to the Court on the operation of the pilot program and shall make recommendations.

Rule 6Y. PILOT MANDATORY ARBITRATION PROGRAM FOR ATTORNEY-CLIENT FEE DISPUTES INVOLVING LAWYERS IN THE SECOND, SIXTH AND FOURTEENTH BAR ASSOCIATION DISTRICTS

(a) Scope of the Program. This rule shall apply from July 1, 1995, through July 1, 1997, to any fee dispute between a client and a lawyer whose principal office is located in Blue Earth, Kittson, Mahnomen, Marshall, Norman, Pennington, Polk, Ramsey, Red Lake, Roseau or Watanwan county.

(b) District Fee Arbitration. If a complaint involves a fee dispute subject to this rule, the Director shall advise the complainant and the respondent of the availability of fee arbitration and may refer the fee dispute to a participating district fee arbitration committee in the district where the lawyer maintains an office. Upon receipt of a referral from the Director or upon the request of a client or a lawyer located in that district the district fee arbitration committee shall contact the client and determine if the client consents to arbitration of the dispute. If the client consents to arbitration of a fee dispute involving a lawyer who maintains an office in the district, the dispute shall be heard by the participating district fee arbitration committee and its results shall be binding. If the amount of the fee claims by the lawyer is greater than the jurisdictional limit of the conciliation courts under Minnesota Statutes Chapter 491A, then the lawyer may decline to arbitrate by notifying the committee in writing. Each district fee arbitration committee shall adopt rules of procedure to implement this rule.

(c) Report on the Pilot Program. No later than October 1, 1996, the Director shall report to the Court on the operation of the pilot program and shall make recommendations.

RULE 8. DIRECTOR'S INVESTIGATION

.....
(d) Disposition.

(1) *Determination Discipline Not Warranted.* If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted, the Director shall so notify the lawyer involved, the complainant, and the Chair of the District Committee, if any, that has considered the complaint. The notification shall:

- (i) ~~May~~ Set forth ~~an~~ a brief explanation of the Director's conclusion;
- (ii) ~~Shall~~ Set forth the complainant's identity and the complaint's substance; and
- (iii) ~~Shall~~ Inform the complainant of the right to appeal under subdivision

(e).

.....
(e) Review by Lawyers Board. If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal and assign the matter by rotation to a board member, other than an Executive Committee member, appointed by the Chair. The reviewing Board member may:

- (1) approve the Director's disposition; or
- (2) direct that further investigation be undertaken; or
- (3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or

(4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.

The reviewing Board member shall set forth an explanation of the Board member's action. A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed to a Board member for review under this section.

RULE 9. PANEL PROCEEDINGS

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

(1) The Chair shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on each charge, and that the Panel will terminate the hearing on any charge whenever it is satisfied that there is or is not such probable cause (or, if an admonition has been issued under Rule 8(d)(2) or 8(e), that the hearing's purpose is to determine whether the panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court);

(2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which the Director proposes to offer thereon;

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

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

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

(6) The complainant may be present for all parts of the hearing related to the complainant's complaint except when excluded for good cause; and

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

(j) **Disposition.** After the hearing the panel shall:

.....
(2) If the hearing was on a lawyer's appeal of an admonition issued under Rule 8(d)(2), 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.

RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS

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

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

. . . .
(d) **Hearing; Disposition.** If this Court after hearing finds a continuation of the lawyer's authority to practice law poses a substantial threat of serious harm ~~may result in risk of injury~~ to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.

. . . .
RULE 20. CONFIDENTIALITY; EXPUNCTION

(a) **General Rule.** The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except:

- (1) As between the Committees, Board and Director in furtherance of their duties;
- (2) ~~In~~ After probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules;
- (3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;
- (4) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected.
- (5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege that portions may be deleted.
- (6) Where permitted by this Court; or
- (7) Where required or permitted by these Rules.
- (8) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties.
- (9) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer.

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

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

(2) With the affected lawyers consent, the fact that the Director has determined that discipline is not warranted;

~~(2)~~ (3) The fact that the Director has issued an admonition;

~~(3)~~ (4) The Panel's disposition under these Rules;

~~(4)~~ (5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e).

~~(5)~~ (6) Information to other members of the lawyer's firm necessary for protection of the firm's clients or appropriate for exercise of responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

Notwithstanding any other provision of this Rule the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any person, office or agency except to the lawyer and as between Committees, Board, Director, Referee or this Court in furtherance of their duties under these Rules.

(c) Records after Determination of Probable Cause or Commencement of Referee or Court Proceedings. Except as ordered by the referee or this Court and except for work product, after probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director relating to the matter are not confidential.

~~(e)~~ (d) Referee or Court Proceedings. Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under these Rules are not confidential.

~~(d)~~ (e) Expunction of Records. The Director shall expunge records relating to dismissed complaints as follows:

(1) *Destruction Schedule.* All records or other evidence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) *Retention of Records.* Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.

AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. A party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the lawyer for the other party, or unless the other party manifests a desire to communicate only through counsel.