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WAYNE TSCHIMPERLE  
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February 10, 1986

PERSONAL AND CONFIDENTIAL

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

Re: Petition for Changes In Rules on Lawyers Professional  
Responsibility

C1-84-2140

Dear Mr. Tschimperle:

Enclosed for filing in the above matter, please find the original  
and ten copies of the Lawyers Professional Responsibility Board  
proposals for further rule changes and reply to the report in  
supplemental report of the Supreme Court Advisory Committee.

Very truly yours,

William J. Wernz  
Director

By Betty M. Shaw  
Betty M. Shaw  
Assistant Director

BMS/jc  
Enclosure  
cc: John Levine  
Charles Kennedy

OFFICE OF  
APPELLATE COURTS  
FILED

FEB 11 1986

WAYNE TSCHIRNITZ  
CLERK

C1-84-2140

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
FURTHER PROPOSALS FOR RULE CHANGES  
AND SUPPLEMENTAL REPORT OF THE  
SUPREME COURT ADVISORY COMMITTEE  
AND REPLY TO THE REPORT

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## I. INTRODUCTION

### A. Procedures in Formulating the Board's Response -

This response supersedes the September 6, 1985, response of the Lawyers Professional Responsibility Board to the Supreme Court Advisory Committee on Lawyer Discipline. Since September 6, further discussions within the Board, between the Board and the Advisory Committee, and filing of the Supplemental Report of the Advisory Committee have all tended to increase the number of proposals on which the Board and Committee agree. This Response takes account of those agreements, and also states certain additional proposals by the Board for rule change.

Attached is the Board's petition for changes to the Rules on Lawyers Professional Responsibility. (A. 11-33.) The petition does not incorporate all the rule changes recommended by the Advisory Committee. The petition relates only to (1) matters recommended by the Board but not addressed by the Advisory Committee; and (2) rule changes recommended by the Advisory Committee which the Board opposes.

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

The Committee members appointed by Robert Henson were attorneys John Levine (Chair), Charles Kennedy, Elizabeth Norton and Ronald P. Smith, as well as public members Paul Kinney and George Ludcke. The Committee met on May 30, June 19, July 11 and August 7, 1985. The Committee considered the Report recommendations individually and systemically. The Committee reported to the Board at its September 6 meeting.

The Advisory Committee had requested the Board's comments by July 15, solely relating to questions of draftsmanship in the report recommendations. The Board replied, as requested, without comment at that time on substantive questions relating to the Report.

The Advisory Committee also requested the Board's response on the substantive report recommendations. The Board first responded on September 6, 1985. Between September 6 and December 2, 1985, several Board members and the Director met on several occasions with Advisory Committee members to attempt to lessen or eliminate differences. There now remain only four differences of substance between the Board and the Advisory Committee, and some differences on four other matters.

B. Board's Approach -

The Board welcomes the Advisory Committee Report. The formation of the Advisory Committee was suggested at the 1984 MSBA Convention by Robert Henson. Several current and former Board members appeared before the Advisory Committee upon request. The Director's office was asked to, and did,

fully cooperate with the Advisory Committee. The Board regards the Report and Supplemental Report as thoughtful, professional and insightful assessments of the operations of the Minnesota attorney discipline system.

The Board agrees with almost all of the recommendations of the Report, as modified in the Supplemental Report. A number of recommendations for action by the Board, the Executive Committee or the Director have already been implemented where no Rule change is required.

A list of the recommendations with which the Board agrees or which it does not oppose is set out in table form in Section III below. Included are 58 of the 66 report recommendations.

There are four recommendations on which there is agreement in general principle, but not as to every detail. See Section IV. The Board makes specific comments regarding each recommendation in this category.

Finally, there are four recommendations which the Board either opposes in substance or in one important feature, or on which the Board has made superseding recommendations. The superseding recommendations largely concern the problem of delay in public cases and the Report Panel recommendations.

Some of the differences between the Board response and the Report recommendations are due to changes in factual premises. In recent months the Board, the Executive Committee and the Director have made certain changes which appear to satisfy several of the general concerns of the

Report. In some cases, the Board has obtained more information affecting the Report's factual premise; e.g. Rec. 40 (expanding options on review of complainant appeals) was based upon the Report's "testimony from panel chairs," Report, p. 56. However, only two panel chairs appeared before the Advisory Committee. When seven panel chairs were polled, five were opposed to expanding these options. Another such example is Recommendation 45 (that the MSBA take over the advisory opinion service), which has become largely mooted by the MSBA's position that it does not wish to offer an advisory opinion service.

## II. STATEMENTS OF PRINCIPLE

### A. The Bar and the Public -

The Report begins by noting "increasing criticism from the Bar" of the discipline system, and listing the deficiencies perceived by the Bar. The principal focus of the Report is on responding to these criticisms and rectifying these deficiencies.

The Board shares the concern with responding to the Bar's criticisms. The Board agrees that the cost of the disciplinary system is of concern, that delay has been a significant problem, that there have been some problems with centralization in the Director's office, that there should not be excessive adversariness and that the disciplinary system could deal more thoughtfully with the "innocent" lawyer, with complainants and with witnesses. See Report p. 1.

There has been some discussion (outside the Committee and Board) which seems to assume that the interests of the public in a strong disciplinary system and the interests of the bar are in opposition. The Board believes that for the most part, this is a false dichotomy. The bar supported a registration fee increase for funding a strong disciplinary system, notwithstanding the many pending criticisms and perceived deficiencies. The bench and bar, as much as the public, have an interest in the prompt discipline of attorneys who have committed serious misconduct. The purposes of the discipline system are to protect the public and to protect the integrity of the bench and bar.

The Board finds in the Report a concern with delay, and a number of suggestions for addressing the problem of delay by changes in the Director's office and by involvement of the Executive Committee. The Report also makes a few other recommendations regarding delay. The Board now makes several recommendations, principally regarding the Panel and referee system, for dealing with the problem of delay. In these recommendations, the Board intends to go beyond the Panel recommendations of the Report, and to oppose Report Recommendation 41 (requiring probable cause determinations regarding each charge). The Board's own experience with the pre-1982 procedural rules has convinced it that the 1982 amendments were a very positive change, and that further changes in the same direction are preferable to making the Panel proceedings more elaborate, as Recommendation 41 would.

B. The Board, the Executive Committee and the Director -

The Board agrees that there is a need to further define the lines of authority and accountability in the disciplinary system. The Board also agrees with the Report that there is a need to increase both the monitoring and the controls on certain exercises of the Director's authority and discretion. These agreements in principle are reflected in specific agreed-upon recommendations enumerated below.

The Supplemental Report's statement (p. 11) regarding Recommendation 61, and the general role of the Board, appears to reduce the Board's concern that the responsibilities of its non-Executive Committee members were being attenuated. Further, the Supplemental Report revisions to proposed rule changes 4(d) and 5(a) [see Exhibits B-2, B-3 to Supplemental Report] appear to reduce the concern that too many time-consuming duties would be placed on the Executive Committee. A list of the tasks recommended for the Executive Committee by the Report is attached hereto as A. 1-2. Many of these recommended duties do not involve rule changes. The Supplemental Report (p. 2) recognizes that "considerable leeway" should be allowed regarding certain of these recommendations.

The Board and Executive Committee still wish to register their concern that the Advisory Committee recommendations for Executive Committee duties, in their totality, could involve unrealistic expectations for a volunteer group. The Board recommends that the Executive Committee be involved in prior authorization controls at such key points as the opening of

Director-initiated files and large-case planning, and that the Executive Committee's involvement otherwise be principally in conferring with, and monitoring reports from, the Director.

C. The Director's Office -

The Board shares the Report's concern with certain problems that have affected the Director's office in recent times. It appears that these problems are being brought under control, through the Report recommendations, the activities of the Executive Committee and the Director. For example, the overall number of open files (now about 415) and the overall number of files at least one year old (about 65) are no longer intolerable. At the beginning of December, 1984, when the Advisory Committee began closely examining the Director's office, there were 723 open files, of which 244 were at least one year old. Among the non-lawyer staff, there have been no employment terminations, voluntary or involuntary, since December, 1984. Experienced attorneys, including a former judge with 20 years experience, have been added to the Director's staff. The Executive Committee is more regularly involved in both monitoring the overall operation of the Director's office and dealing in advance with important and controversial questions that arise.

The Report recommendations for changes in administration of the Director's office, taken as a whole, involve a vast increase in accumulation and monitoring of information. While the Board agrees that for effective monitoring and

evaluation, more regular and detailed information is required, the Board does not believe it is prudent to prescribe all the measures recommended by the Report. For example, Rec. 14 apparently contemplates that "exception reports" will be generated every time a case is disposed of beyond the general time expectation for the disposition category. The dictating, typing, filing and review of such reports may well be a time-consuming activity. The Board would favor a system in which such reports and detailed analysis would be required only when there was a more than standard deviation in percentage of cases from the disposition norm. There are several such recommendations, where the Board favors an evolving style of generating and exchanging information by the Director, Executive Committee and Board. The Board is also concerned that the recommendations taken as a whole will cause the Director's office to spend too much of its limited time on record-keeping, report-generating and the like. The Board appreciates the Advisory Committee's recognition in its Supplemental Report there should be room for flexibility and evolution in finding the appropriate administrative pattern for the disciplinary system.

III. AGREED UPON RECOMMENDATIONS OF ADVISORY  
COMMITTEE REPORT AND SUPPLEMENTAL REPORT

The tables below, including the time demand estimations, were prepared by the Director. A more summary listing of all Report recommendations, in complete sequential order, is appended (A. 3-7).

A table immediately below, under III.A., lists the report recommendations initially agreed to by the Lawyers Board. The following table, III.B., at p. 18, lists Report recommendations either withdrawn by the Supplemental Report or modified by statement or comment such that there no longer appears to be any significant disagreement. Abbreviations used include:

- EC = Executive Committee
- Rec. = Recommendations from Advisory Committee Report
- DEC = District Ethics Committee
- LPRB = Lawyers Professional Responsibility Board
- Dir = Director

A. No Disagreement Based on Initial Report.

Rec.	Page	Descriptive Title	Time Demand	Action By	Rule Change
1	18	Approve Allocation of Staff Resources Monitor Resource Expenditure with Goals	Moderate Increase	Dir/EC	None
4	19	EC Approve Litigation Plans for Complex Cases; Monitor Experience Against Plan	Moderate Increase	Dir/EC	None
5	20	Complainants Should Exhaust Remedies in Other Forums	Small Decrease	Dir	None
6	20, 21	Fee/Malpractice Disputes Should be Resolved in Other Forums	No Change	Dir	None

Rec.	Page	Descriptive Title	Time Demand	Action By	Rule Change
7	21	Professional Corporation Fee Transfer	Decrease	S. Ct.	None
8	22	Exit Interviews Should be Held for all Terminating Employees	No Change	Dir	None
10	24	At Least One Attorney Besides the Director Should Have at Least Five Years Litigation Experience	None	Dir	None
11	25, 26	Paralegals Should Perform Fewer Clerical Functions	None	Dir	None
12	26	Final Authority for Dismissals Should be Delegated to Adequately Trained Ass't Directors	No Change	Dir	None
13	28	Misc. Admin. <u>Comment:</u> The word processing and paralegal supervisor positions should not be reduced to lead worker with current personnel	No Change	Dir	None
16	32	S. Ct. Referee Reports to be Expedited by Due Dates	No Change	S. Ct.	None

Rec.	Page	Descriptive Title	Time Demand	Action By	Rule Change
17	32	Monitor Case Backlog and Request Blue Ribbon Committee if Delays too Great	Moderate Increase	EC (contingent)	None
18	33	Permanent Hearing Room for LPRB	Moderate Decrease	S. Ct.	None
19	35	S. Ct. Removes Director on LPRB Recommendation	No Change	S. Ct.	5(a)**
20	35	Director Accountable to LPRB	No Change	S. Ct.	5(b)
21	35	Director Reports to LPRB and LPRB Reports to S. Ct.	No Change	S. Ct.	5(b)
23	37	Director Serves at S. Ct.'s Pleasure	No Change	S. Ct.	None
25	40	Additional LPRB Member	No Change	S. Ct.	4(a)(2)
26	41	Develop Series of Director Reports	Potential Substantial Increase	Dir/EC	None
28	42	Review Director Files Bi-Annually	Small Increase	EC	None

\*\* Oppose that portion of rule change establishing a two year term for the Director. See Recommendation 22.

Rec.	Page	Descriptive Title	Time Demand	Action By	Rule Change
29	42	EC Must Approve Director-Initiated Investigations	Moderate Increase	S. Ct.	8(a)
30	43	Supreme Court Liaison Attend Executive Committee Meetings	No Change	S. Ct.	None
31	47	EC Receives Report of Director Whenever DEC Recommendation is Not Followed	Potential Substantial Increase	Dir/EC	None
32	50	DEC Report Review by DEC Chair or Committee	No Change	S. Ct.	3(b)
33	59	Approve DEC Report Format	No Change	S. Ct.	3(b)
34	50	EC Receives Director Report on Significant Reinvestigation of Cases Completed by DEC	Potential Substantial Increase	Dir/EC	None
36	51-2	Tardy DEC Reports/ LPRB Chair Seeks Remedy	Small Decrease	S. Ct.	7(c)
37	52	DEC Annual Reports Required	No Change	S. Ct.	3(b)
39	56	Resp. Review Right of Panel Private Discipline	No Change	S. Ct.	9(1)

Rec.	Page	Descriptive Title	Time Demand	Action By	Rule Change
44	62	Balance Panels by Workload and Expertise	No Change	S. Ct.	4(e)
46	67	LPRB Members Should be Diverse Geographically by Areas of Practice	No Change	S. Ct.	3(a)(2) and 4(a)(2)
47	67	Open Appointments for LPRB Members	No Change	S. Ct.	3(a)(2) and 4(a)(2)
48	67	DEC Members Should be from Various Areas of Practice	No Change	S. Ct.	3(a)(2) and 4(a)(2)
49	68	Open Appointments System for DEC Chairs	No Change	S. Ct.	3(a)(2) and 4(a)(2)
50	70	CLE Reports on Prof'l Responsibility Components of Courses	No Change	CLE Board	None
51	71	MSBA Plan for Ethics Education	No Change	MSBA	None
52	73	Discipline Purpose Includes Fairness to Lawyers	No Change	S.Ct.	2
55	75	Invest. Report Available to Respondent	No Change	S.Ct.	6(c)

Rec.	Page	Descriptive Title	Time Demand	Action By	Rule Change
56	75-6	Copies Normally May be Used to Satisfy Rule 25 Requests	(As RLPR is drafted) No Change	S.Ct.	25(a)
57	78	Expunction: Retention for 3 Years (Not 5) and Eliminate Permanent Docket	No Change	S.Ct.	20(d)
58	79	Expunction: Disclosure of Dismissals	Small Decrease	S.Ct.	20(d)
62	82	Disqualification for Conflicts of Interest	No Change	S.Ct.	4(d) and 6(a)
64	83	Reconsider Media Policy	No Change	EC	None
65	85	Dismissals to Express Appreciation for Lawyer Cooperation	No Change	Dir.	None

B. No Disagreement, Based on Supplemental Report.

The following Report recommendations were opposed to some degree by the Board as first proposed. The Board and Committee have since reduced or resolved differences on the following points:

The Board and Committee appear to agree that in principle administrative measures addressing subjects of several of these recommendations (2, 3, 9, 14, 27) are appropriate. There should be "considerable leeway" in working out the details of such matters over a period of time. See Supplement Report, pp. 2-3.

Rec.	Page	Descriptive Title	Staff Time Demand	Action By	Rule Change
2	18	Approve Individual Case Time Parameters for Junior Staff/Paralegals	Significant Increase	Dir	None
3	19	Review Attorney and Paralegal Time Reports on Individual Cases	Substantial Increase	EC & Dir & Computer	None
9	23	Review Attorney Staffing Configuration Regarding Time Devoted to Major and Minor Cases	Substantial Increase	Dir/EC	None
14	31	Various Reports Recommended	Substantial Increase	Dir	None
15	31	Set Dispositional Time Guidelines. Review Petitions for Prompt Hearing or Disposition	Potential Substantial Increase	EC	None
COMMENT: Withdrawn by Supplemental Report, p. 6.					

Rec.	Page	Descriptive Title	Staff Time Demand	Action By	Rule Change
24	40	Executive Committee Provides General (or "day-to-day") supervision of Director's Office; Executive Committee members not on Panels	Substantial increase	S.Ct.	4
<p>COMMENT: The Advisory Committee modified its recommendation so that the Executive Committee is to provide "general," as opposed to "day-to-day" supervision of the Director's office. See Supplemental Report, p. 7. As modified, the Board agrees to this recommendation. The Board withdraws its earlier opposition to the provision of Recommendation 24 that Executive Committee members not participate in panels. <u>Id.</u></p>					
27	41	Implement MBO Appraisal of Director	Potential Increase	EC	None
35	51	DECs [with Adequate Resources, Records of Timeliness and Interest] Should be Allowed to Draft Proposed Dismissals and Admonitions	Possible Decrease	Dir	None
<p>COMMENT: The Advisory Committee and Board agree that district ethics committees should be allowed to draft proposed dismissals and admonitions. The two largest District Committees are already drafting proposed dismissals. The other committees have been requested to do so. The only unresolved point is whether those volunteer District Committees which either do not want to draft dispositions, or have a record of tardiness in their reports, should be required to draft such dispositions. The numbers of such districts and dispositions are so small that this does not appear to the Board to be a material issue.</p>					

Rec.	Page	Descriptive Title	Staff Time Demand	Action By	Rule Change
42	61	Dismiss Charge Without Probable Cause or Private Discipline	Increase	EC	None
<p>COMMENT: The Supplemental Report (p. 3) agrees with the Board's recommended redrafting. No rule change is involved in this policy recommendation.</p>					
43	61	Supp'l. Charges must be approved by panel	Substantial Increase	S.Ct.	10(d)
<p>COMMENT: The Board opposed this recommendation, but suggested a compromise by which the Director could not add supplemental charges, not considered by a panel, without the approval of a Panel Chair. The Supplemental Report (pp. 18-19) agreed and withdrew the original Recommendation 43. The compromise language is found at Supplemental Report Exh. B-8. The Board's only remaining concern is with cases in which the petition was not authorized by any particular panel, but rather by stipulation or other rule. Appended hereto as A. 22 is a "friendly amendment" revision to the Committee's proposed Rule 10(dE), providing for such approval by the Board Chair or Vice-Chair.</p>					
59	79-80	Use of Prior Misconduct in Evidence	None	S.Ct.	19(b)(4)
<p>COMMENT: The Board agrees with the Advisory Committee's proposed revision to Rule 19(b), RLPR, in the Supplemental Report (pp. 3-5; Exh. B-1).</p>					

Rec.	Page	Descriptive Title	Staff Time Demand	Action By	Rule Change
60	81	Training of DEC and LPRB Members.	Increase	EC/ LPRB	None
<p>COMMENT: The Board does not disagree with the Supplemental Report's (pp. 4-5) view that further training of DEC and new Board members is desirable. The Board's concern is with the overall time demands suggested by the Report on the Board and Executive Committee.</p>					
61	82	Restricted LPRB Purpose	None	LPRB	Indirect
<p>COMMENT: As the Advisory Committee's views are modified and stated in its Supplemental Report (p. 11), it is agreed that among the purposes of Board meetings are education, and policy-making.</p>					
66	87	LPRB Report to Supreme Court on Recommendation Implementation	Small Increase	EC	None
<p>COMMENT: The Supplemental Report, p. 5, indicates basic agreement between the Board and Advisory Committee.</p>					

IV. ISSUES IN PART UNRESOLVED BETWEEN THE  
ADVISORY COMMITTEE AND THE BOARD

Rec.	Page	Descriptive Title	Staff Time Demand	Action By	Rule Change
22	36	Director 2 year term	None	S.Ct.	5(a)
<p>COMMENT: The Advisory Committee and Board agree that the Director should be appointed by the court upon Board recommendation (Rec. 19); that the Director should be accountable to the Board and through the Board to the court (Rec. 20); and that the Director shall serve at the court's pleasure (Rec. 23). The Board believes that also specifying two year terms is unnecessary and perhaps inconsistent, but in view of other agreements regarding the Director's position, does not regard this point as a major unresolved issue.</p>					
40	31	Expanding Options on Review of Complainant Appeals	Sub-stantial Increase	S.Ct.	8(d)
<p>COMMENT: The Board and Committee agree that complainant appeals of Director disposition should be heard by members of a Board group larger than just Panel Chairs. See Supplemental Report, p. 8. There is disagreement over whether the options in reviewing complainant appeals should be expanded. <u>Five of the seven panel chairs polled opposed the Advisory Committee recommendation, despite some dissatisfaction with the limited option in the present appeals process.</u> Expansion of panel disposition options upon a complainant appeal would impair consistency in the disciplinary system. Moreover, allocation of investigatory resources would be decided by a large group of people (through the option to require further investigation) making the coordinated use of such resources difficult. If each of the seven panel chairs (and as modified, perhaps another five to ten persons) make decisions about the exact appropriate discipline, there will be a wide variety of standards for every level of discipline. The complainant is not really a party in disciplinary proceedings, and should at most be accorded only the right to reversal on appeal of a seriously mistaken disposition--one where public discipline should have been imposed.</p>					

Rec.	Page	Descriptive Title	Staff Time Demand	Action By	Rule Change
45	65	Advisory Opinions to MSBA	Substantial Decrease	MSBA.	None
<p>COMMENT: The Board believed the Advisory Committee proposal for the MSBA and Director to both be involved in different aspects of the advisory opinion service was unworkable. Although the Board preferred to retain offering the service, it was also willing to transfer it to the MSBA, but did not wish to be partially involved. This issue now appears moot, as the MSBA has announced an intention not to initiate offering such a service.</p>					
54	75	Director's Discovery Request	Increase	S. Ct.	Rule 25
<p>COMMENT: The supreme court has recently dealt with Rule 25 in <u>In re Charges of Unprofessional Conduct against N.P.</u>, 361 N.W.2d 386, 394 (Minn. 1985), and restated the cooperation requirement in Rule of Professional Conduct 8.1(a)(3). Incorporation of the N.P. standard in Rule 25(b) [Supp. Rep., pp. 10-11; Exh. B-5] is desirable. The Report's proposed additional language ["Such requests shall not be disproportionate to the gravity and complexity of the alleged ethical violations." See Report, A-10] is unnecessary. Even the limited gloss on Rule 25 of <u>N.P.</u> has resulted in a great deal of motion practice in Ramsey District Court.</p>					

V. ADVISORY COMMITTEE REPORT RECOMMENDATIONS NOT AGREED  
TO BY LAWYERS BOARD

A. Recommendation 53 (Report, p. 74; Supp. Report, pp. 10-11).  
(Notice of disciplinary rule violations alleged by  
complainant.)

One thousand two hundred forty-four files were opened in the Director's office in 1985. If past patterns continue, over 80% will be closed without discipline. Almost all attorneys respond to complainants without objection. The identification by the Director's office of all the possible disciplinary rules and ethical considerations implicated in each complaint, if it and the related dictation averaged only fifteen minutes per complaint, would total over seven and one-half weeks of attorney time per year. The presumed benefit from such an expenditure of time is not evident. Moreover, complainants are frequently inarticulate and are seldom aware of the Rules of Professional Conduct. Respondents should be made aware of which disciplinary rule violations have apparently been alleged at the district ethics committee level after the respondent has replied to the initial complaint. At that point respondents would be able to receive a copy of the DEC report, including allegations of apparent disciplinary rule violations.

B. Recommendation 63 (Report, p. 83; Supp. Report, p. 11).  
(Additional Rule Against Ex parte contacts.)

The Advisory Committee and Board agree that ex parte contacts should not occur, and further agree that such communications are forbidden by Rule 3.5(g), Rules of

Professional Conduct, as well as by Canon 3A(4), Code of Judicial Conduct. The Board believes that no further restatement of the rule is necessary. It is also unclear how a rule more liberal than either of its counterparts would correct any problem that may exist.

C. Recommendation 41 (Requiring probable cause hearing as to every charge).

Recommendation 41 would cause unacceptable burden and delay in the most serious cases of misconduct. There have been in the last two years several panel hearings that extended two or more days, utilizing the current probable cause rules. There have also been panel proceedings that, between charges and hearing, because of motions for continuance, emerging additional misconduct, supreme court petitions and the like have extended for months, and in one case for over a year and one-half. These are proceedings in which the stated purpose is only to determine whether there is probable cause to believe public discipline is warranted as to any charge. If the proceedings are instead to determine whether there is probable cause to believe public discipline is warranted as to each and every charge, many such proceedings will be intolerably lengthened. Of course the proceedings principally affected, because there are multiple charges, are those involving the most serious misconduct.

The Board does not believe respondents are harmed by the current rules. For example, the Board's news release policy omits mention of charges not heard by a Panel.

The Supplemental Report (pp. 12-17) advances several reasons for adopting Recommendations 38 and 41 as "part of a single, interrelated package." These recommendations are not necessarily joined, and several of the reasons advanced for them are not supportable.

The Supplemental Report (pp. 12-13) contends, correctly, that perception of fairness is important in any legal system. However, there has been no demonstrated basis for perceiving the current probable cause system as being unfair. Elsewhere, the Report and Supplemental Report have made a commendable effort to anchor their findings in specific data. The supposed perception of unfairness in probable cause proceedings is, however, unsupported by any case in which the Director has unfairly charged respondents with allegations that a Panel might have filtered out.

The Supplemental Report (p. 13) erroneously states,

. . . The Committee's recommendations would go no further in according due process guarantees to respondents than is provided under the ABA Standards . . . .

In fact, under ABA Standard 8.11 and related standards, there is no private, probable cause hearing as to any charge, let alone as to every charge. See (A. 8). Instead, before the Director charges publicly, an ex parte approval of a Panel Chair is required under the ABA model. The fact of the matter is that Minnesota lawyers already receive far more procedural due process than is recommended by the American Bar Association.

The Supplemental Report also argues (p. 14) that the time demands on Panels and the Director's office will not be excessive upon adoption of its recommendations. However, these were exactly the reasons, coupled with the perennial problem of delay, which led the ABA, the Lawyers Board and the Court to enact the 1982 rule changes.<sup>1</sup>

In judging the desirability of Recommendation 41, the Board particularly asks the Court to be mindful of three facts: (1) The only attorneys affected by Recommendation 41 are those about whom a Panel has already found probable cause to believe public discipline is warranted as to some charge. (2) No case has been cited of abuse of attorney rights or as a basis for perceived unfairness. (3) The Board that worked under the old rules and found them burdensome, very strongly does not wish to bring them back in this respect, for the sake of this group of attorneys and a purported perception of unfairness regarding them.

If some compromise position is needed, one possibility would be to amend Rule 9, RLPR, to allow a respondent attorney to move the Panel Chair before hearing, to require a Panel probable cause ruling as to any particular charge

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<sup>1</sup>/The Supplemental Report (p. 15) states that there is now twice the staff to handle the work. After staff turnover in mid-1981, there were five staff attorneys (Janet Dolan, William Wernz, Sonja Steven, Thomas Aaby and Richard Harden), and a Director, as well as seven support staff. There are now six attorneys and a Director, and 13 support staff. In 1981 the advisory opinion service was discontinued, there were intolerable delays in presenting disciplinary matters and there were 300 fewer new complaint files than in 1985.

that is extraordinarily sensitive to public disclosure. The Board's petition incorporates this compromise (A. 19).

D. Recommendation 38 (Expansion of Panel Disposition Options; Effect on Stipulation Process).

One significant effect of the 1982 amendments regarding Panel procedures, beyond the form of the panel proceedings themselves, has been in the number of matters that have proceeded to the Supreme Court or to final discipline without panel proceedings, and indeed in some cases without any evidentiary hearing at all. Such stipulated dispositions were far less frequent before the rule changes.

This system has saved enormous resources of the Director, Board and Court. The overall efficiency of the disciplinary process has been thereby greatly improved.

Report Recommendation 38 is that the Board Panel dispositional alternatives be expanded to include stipulated probation and admonition. The Report recognizes, "that the number of respondents agreeing to by-pass panel hearing probably will drop under the Committee's proposals, resulting in an increase in the number of cases going to panel hearings." (p. 58). The principal reasons advanced by the Report for this recommendation are that "the current rules underutilize the [LPRB] members' talents and experience" (p. 54) and that some respondents escape discipline altogether after Panel hearings. There have been only seven respondents in the latter group in the three and one-half years since the rules were amended.

The Supplemental Report's revised rule-change language provides that after hearing a Panel may "DETERMINE THAT PRIVATE DISCIPLINE IS WARRANTED AND ISSUE AN ADMONITION BASED ON CLEAR AND CONVINCING EVIDENCE OR . . . ." [Supp. Rep. Exh. B-7.] The "clear and convincing evidence" standard cannot be used in a Panel proceeding, which under Rules 9(§H) and (hI), has restricted evidence and has a stated purpose of determining whether there is probable cause. To change the standard after the hearing to "clear and convincing evidence" would be unfair to the Director and the respondent, and would be unworkable.

If the Court is inclined to restore a fuller range of dispositional alternatives to the Panel, an admonition could perhaps be issued if the respondent would agree to it. Otherwise, the respondent could argue he had suffered due process deprivations because of the evidentiary limitations of Rule 9(§H). The Board's petition incorporates this compromise (A. 19).

VI. STATEMENT OF CONCERN REGARDING DELAY AND RECOMMENDED CHANGES.

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

The harm done to the public, the bench, the bar and the bar's image by the small number of corrupt, incompetent or disabled attorneys is enormous. The prompt investigation, presentation and disposition of cases involving such attorneys is of paramount importance. The Advisory Committee Report addresses the concern with such lawyers principally through recommendations regarding operation of

the Director's office. The Board believes there are other causes of delay that should be addressed.

The Report (p. 11) indicates that in 1984 the average age of supreme court dispositions, in months, was:

Reprimand	18
Probation	30
Suspension	27
Disbarment	35
Transfer to Disability	12

The 1985 timeframes appear to be similar, except that disbarments were ordered far more promptly. (This change occurred because disbarments were by stipulations or on default after criminal convictions.)

To be licensed by the court as an attorney is to be "recommended to the public as a trustworthy person fit to be consulted in matters of confidence." In re Smith, 220 Minn. 197, 19 N.W.2d 324, 326 (1945). When a lawyer is routinely certified for a long period someone as completely trustworthy when he is really unfit, and there is during this period reason to know of this inconsistency, recommendations for procedural change are needed.

The problem of delay in (and due to) disciplinary proceedings is chronic and long-standing. See 1970 ABA Clark Report, at 30-33 (A.9-10). The 1981 ABA Committee and the Supreme Court Advisory Committee addressed different aspects of the problem of delay.

The Report does not systematically address the problem of delay in serious public disciplinary proceedings. Recommendation 16 (p. 32), that supreme court referees be given time limits for insuring prompt processing, may be helpful in a few cases. Recommendations 1-3, for case monitoring and planning, may well be helpful for other cases.

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

Current staffing authorization levels and the Advisory Committee Report may well be sufficient to deal with causes (1) and (3). Report Recommendation 41, discussed above, will actually worsen causes (2) and (5). Items (2) and (4) are addressed below.

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

B. Pre-Petition Delay

The time lapse before public filing of a petition is crucial because the petition is the first public notice that there is probable cause to believe a lawyer should be disciplined, and perhaps suspended or disbarred. Until this time, the certification of the court is unqualified and the Director, with few exceptions, cannot inform the public or inquirers of any questions of the lawyer's trustworthiness. It is unquestionably in the public's interest to have this information as soon as it is fair to the respondent attorney to disclose it. The principal cause of delay at this stage has been inadequate staffing in the Director's office. This problem has been rectified. Pre-petition delay could also be curtailed by amendment of Rule 10.

1. Expanding Panel Bypass Situations Under Rule 10.

Rule 10(c), RLPR, now allows the Director, after certain criminal convictions, to file a petition, "with the approval of the Chairman of the Board." Rule 10 should be amended to provide for dispensing with Panel proceedings and filing a petition upon the approval of a panel chair in cases in which there are admissions or clear documentary evidence of misappropriation of client funds, non-filing of tax returns, civil judgments with findings equivalent to serious breaches of disciplinary rules, and other cases in which the misconduct has regularly resulted in suspension or disbarment by the court. The need for a Panel hearing should also be eliminated when an attorney will not respond to investigative inquiries and does not appear at a

pre-hearing meeting. ABA Standard 8.11 contemplates a summary review by a Panel Chair before all formal, public charges. Even with a summary expedited proceeding for the most serious matters, Minnesota respondent attorneys generally would still be accorded more due process before formal charges than is recommended by the ABA. See ABA Std. 8.11. (A. 8.)

Board Recommendation A.

RULE 10, RLPR, "DISPENSING WITH PANEL PROCEEDINGS," SHOULD BE AMENDED TO ADD A SUBSECTION PROVIDING THAT IN MATTERS IN WHICH THERE ARE AN ATTORNEY'S ADMISSIONS, CIVIL FINDINGS, OR APPARENTLY CLEAR AND CONVINCING DOCUMENTARY EVIDENCE OF AN OFFENSE OF A TYPE FOR WHICH THE COURT HAS SUSPENDED OR DISBARRED LAWYERS IN THE PAST, SUCH AS MISAPPROPRIATION OF FUNDS, REPEATED NON-FILING OF PERSONAL INCOME TAX RETURNS, FLAGRANT NON-COOPERATION INCLUDING FAILURE TO ATTEND A PRE-HEARING MEETING, FRAUD AND THE LIKE, THE DIRECTOR MAY EITHER SUBMIT THE MATTER TO A PANEL OR UPON A MOTION MADE WITH NOTICE TO THE ATTORNEY AND APPROVED BY THE PANEL CHAIR, FILE THE PETITION UNDER RULE 12. See A. 21-22.

The Supplemental Report (pp. 17-18) indicates that the Committee is aware of this recommendation, that it was not able to review it as a Committee, but that it believes the recommendation "merits serious consideration by the Court."

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

Occasionally, there are charges against an attorney which cannot readily be heard in a Panel probable cause

proceeding. The extraordinary reasons for such unusual cases include litigation entailing numerous and voluminous documents, numerous and complicated motions and other situations causing undue burden on a volunteer group. In such situations it may be unreasonably burdensome to convene Panel members from around the state for hearings lasting more than a couple of days, make multiple copies of documents and for deliberation regarding the hearings and documents. In such situations, it may also be more efficient for understanding extraordinarily complex situations and facts for one person, namely a referee, to conduct both the probable cause hearing and the referee hearing that would ordinarily follow on a probable cause determination. In such situations, if one referee heard both matters, witnesses would not have to be burdened with repeating their testimony, and delay would be alleviated by avoiding needless repetition. To satisfy the policy concern that final disciplinary hearings be fully public, a transcript of the probable cause hearing could be publicly filed. Scheduling would also be easier, as the number of persons whose time had to be coordinated would be reduced. Although the court appointment of a referee would be public, the rule would provide for identification of the attorney by number or randomly-chosen initial. To insure that only truly extraordinary situations triggered this rule, certification of both the Panel and Board Chair would be required. Accordingly, the Board makes the following recommendation.

Recommendation B.

UPON THE CERTIFICATION OF THE PANEL CHAIRMAN AND THE BOARD CHAIRMAN TO THE COURT THAT EXTRAORDINARY CIRCUMSTANCES INDICATE THAT A MATTER IS NOT SUITABLE FOR SUBMISSION TO A PANEL UNDER RULE 9, BECAUSE OF EXCEPTIONAL COMPLEXITY OR OTHER REASONS, THE COURT MAY APPOINT A REFEREE WITH DIRECTIONS TO CONDUCT A PROBABLE CAUSE HEARING ACTING AS A PANEL WOULD UNDER RULE 9, OR THE COURT MAY REMAND THE MATTER TO A PANEL UNDER RULE 9 WITH INSTRUCTIONS, OR THE COURT MAY DIRECT THE DIRECTOR TO FILE WITH THIS COURT A PETITION FOR DISCIPLINARY ACTION UNDER RULE 12(a). IF A REFEREE IS APPOINTED TO SUBSTITUTE FOR A PANEL, THE REFEREE SHALL HAVE THE POWERS OF A DISTRICT COURT JUDGE AND RAMSEY COUNTY DISTRICT COURT SHALL NOT EXERCISE SUCH POWERS IN SUCH CASES. IF THE REFEREE SO APPOINTED DETERMINES THERE IS PROBABLE CAUSE AS TO ANY CHARGE AND A PETITION FOR DISCIPLINARY ACTION IS FILED IN THIS COURT, THE COURT MAY APPOINT THE SAME REFEREE TO CONDUCT A HEARING ON THE PETITION FOR DISCIPLINARY ACTION UNDER RULE 14. IF A REFEREE APPOINTED UNDER RULE 14 CONSIDERS ALL OF THE EVIDENCE PRESENTED AT THE PROBABLE CAUSE HEARING, A TRANSCRIPT OF THAT HEARING SHALL BE MADE PART OF THE PUBLIC RECORD.

3. Final Panel Hearing.

Just as there are some cases which are perhaps too complex for a suitable panel hearing, there are some cases, probably more numerous, which may appropriately be heard finally by a panel, without a referee hearing. It appears that the concern with public filing of charges against a

lawyer is such that the panel hearing would, until probable cause was determined, have to remain private. However, upon such a determination, and agreement of the parties, a petition could be filed publicly, and the same panel appointed by the Court to make findings and a recommendation to the Court. The Panel would then reconvene for any further hearings that were necessary. A transcript of the Panel hearing would be publicly filed. The Panels have conducted a number of final evidentiary hearings in reinstatement petition matters, with satisfactory results, and often by agreement of the parties. Expanding the situations in which Panels conduct final hearings would best satisfy the Committee's concern with underutilization of Board talents (Report, p. 54). Accordingly, the Board makes the following recommendation.

Recommendation C.

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

OVER DISCOVERY AND SUBPOENAS PROVIDED IN RULE 9(d) AND (gH).

C. Post-referee Hearing and Court Scheduling

As noted, Report recommendation 16 attempts to deal with the occasional problem of delays by referees in reporting to the court. The court has also addressed this problem in particular cases by ordering expedited hearings.

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

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

There have not been any cases in recent years in which a referee has recommended disbarment in which the court has not either suspended or disbarred the respondent. That being so, fairly "having in mind the public, the lawyer complained of and the profession as a whole," Report, p. A.1, a referee disbarment recommendation should result in a temporary suspension pending completion of disciplinary

proceedings, unless the referee or the court otherwise orders.

Board Recommendation D.

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

The Supplemental Report (pp. 17-18) indicates that the Committee is aware of this recommendation, that it was not able to review it as a Committee, but that it believes the recommendation "merits serious consideration by the Court."

VII. OTHER LPRB RECOMMENDED RULE CHANGES

A. Protection of Work Product and Internal Communications -

Three concerns make it appear necessary and desirable to propose a rule change to the Court protecting the Board, the Executive Committee, and the Director from intrusive discovery requests. First, if the Advisory Committee's proposal for greater involvement of the Executive Committee in the Director's office, and shifting of supervisory responsibility from the Court to the Board are to be workable, communications in furtherance of these duties must be protected from general scrutiny. Second, Board members are volunteers and it would be particularly burdensome for them to be deponents or otherwise subject to discovery requests. Third, in two pending matters there have been numerous motions and petitions to the Ramsey County District

Court and Minnesota Supreme Court seeking discovery of Director work product, depositions of current and former attorneys and Directors, and of actions purportedly involving Board members. The elaborate and time-consuming motion practice related to these attempts could be curtailed with a strong rule. Accordingly, the Board makes the following recommendation.

Recommendation E.

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

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

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

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

B. Assessment of Attorney Fees and Increased Costs -

The largest portion of the attorney registration fees paid in Minnesota is used to support the disciplinary system. It is the opinion of the Board that a greater portion of the cost of the operation of the disciplinary system should be borne by those attorneys whose conduct requires public

discipline. In furtherance of this user-fee concept, the Board makes the following recommendations.

Recommendation F.

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

This \$250.00 increase reflects only inflationary increases since the setting of the \$500.00 fee in 1982. About \$18,500 was recovered in costs and fines in 1985. This amount could be significantly increased. In FY'86 approximately \$25,000 was added to Board expenses for Supreme Court accounting and attorney registration salaries. The Committee's concern with burdens on the "innocent attorney" and the user fee concept suggest that disciplined attorneys bear more disciplinary expenses.

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

Recommendation G.

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

ORDER THE LAWYER TO PAY A FINE, COSTS, ATTORNEY FEES, OR BOTH ALL OF THE FOREGOING. See A. 15.

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

and that it apply to all costs, disbursements, expenses and legal fees incurred in said cases whether incurred before or after the amendment.

C. Miscellaneous -

1. Reduction of Filing Copies.

Several sections of the Rules of Lawyers Professional Responsibility require filing of an original and nine copies. Since the membership of the Supreme Court has now been reduced to seven, it may be appropriate to amend these rules accordingly. The Board recommends as follows:

Recommendation H.

RULES 12(a), 13(a) and 18(a) SHOULD BE AMENDED TO SUBSTITUTE "SEVEN" FOR "NINE."

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

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

Recommendation I.

RULE 20(b) SHOULD BE SUPPLEMENTED BY ADDING A SECTION (5) PROVIDING THAT THE DIRECTOR MAY DISCLOSE TO OTHER MEMBERS OF

THE LAWYER'S FIRM INFORMATION NECESSARY FOR PROTECTION OF THE FIRM'S CLIENTS OR APPROPRIATE FOR EXERCISE OF RESPONSIBILITIES UNDER RULES 5.1 AND 5.2, RULES OF PROFESSIONAL CONDUCT.

3. Provision of Sending Exhibits to Panel Members.

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

Recommendation J.

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

4. Subpoenas for Referee Hearings.

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

issue subpoenas. The Board therefore makes the following recommendation:

Recommendation K.

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

Dated: February 6, 1986.

Respectfully submitted,

LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD

  
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JOHN D. LEVINE  
Chairman  
Lawyers Professional Responsibility  
Board

PROPOSED STRUCTURE AND LINES OF RESPONSIBILITY

**EXECUTIVE COMMITTEE**

Rec.	Page	Descriptive Title	Time Demand	RLPR Change	Page	Freq
1	18	Approve Allocation of Staff Resources Monitor Resource Expenditure with Goals	Medium	None		Quar
3	19	Review Attorney and Paralegal Time Reports on Individual Cases	Major	None		Unsp fied
4	19	Approve Litigation Plan; Monitor Experience Against Plan	Major	None		Quar
9	23	Review Attorney Staffing Configuration	Medium	None		Unsp fied
14	31	Review Attorney Case Listing Reports	Medium	None		Unsp fied
15	31	Set Dispositional Time Guidelines. Review Petitions for Prompt Hearing or Disposition.	Unknown; Potentially Major	None		Unsp fied
17	32	Monitor Case Backlog and Request Blue Ribbon Committee	Medium	None		Unspe fied
24	40	Provide General Supervision of Director's Office	Major	24(d)	A-2, 3	Unspe fied
26	41	Develop Series of Director Reports	Medium	None		Unspe fied
27	41	Implement MBO Appraisal of Director	Medium	None		Annua

Rec.	Page	Descriptive Title	Time Demand	RLPR Change	Page	Frequ
28	42	Review Director Files Bi-Annually	Medium	None		Bi-
29	42	Approve Director-Initiated Investigations	Medium	8(a)	A-5	Regul
30	43	Supreme Court Liaison Attend Executive Committee Meetings	Minor	None		
31	47	Receive Report of Director Whenever DEC Recommendation is Not Followed	Medium	None		Unspe fied
33	59	Approve DEC Report Format	Minor	3(b)	A-2	Singl
34	50	Receive Director Report on Significant Reinvestigation of Cases Completed by DEC	Minor	None		Unspe fied
37	52	Specify DEC Format for Annual Report to Supreme Court	Minor	3(b)	A-2	Singl
42	61	Establish Policy Dismissing Each Charge on Which Panel Fails to Find Probable Cause or Impose Discipline	Minor	None		Single
44	62	Redistribute Panel Assignment Workloads	Minor	4(c)	A-3	Regula
60	81	Develop (with LPRB) Formalized Training Programs for DEC and Board Members	Major	None		On-goi
64	83	Establish Media Procedures	Medium	None		Single
66	87	Report to Court on Implementation of Advisory Committee Recommendations	Major	None		Si

TABLE OF RECOMMENDATIONS

Rec.	Descriptive Title	LPRB Response
1	Resource Allocation	1
2	Time Allocation	2
3	Time Sheets	2
4	Litigation Plan	1
5	Exhaustion of Remedies	1
6	Fee/MALPR. Disputes	1
7	Prof'l Corp. Fee Transfer	1
8	Exit Interview	1
9	Atty. I/II	2
10	Atty. Exp.	1
11	Paralegal/Admin.	1
12	DNW & Admon. Delegation	1
13	Admin. Misc.	1
14	Reports	2

1. Originally agreed to by LPRB.
2. Agreed to after Supplementary Report.
3. Partially unresolved.
4. Unresolved.

Rec.	Descriptive Title	LPRB Response
15	Prompt Hearing Petition	2
16	Referee Dates	1
17	Blue Ribbon Delay Committee	1
18	Hearing Room	1
19	LPRB/Dir./S.Ct.	1
20	LPRB/Dir.	1
21	Reports (Dir. to LPRB to Ct.)	1
22	Dir. 2 Yr. Term	3
23	Dir. at Ct. Pleasure	1
24	EC Duty	2
25	Add'l LPRB Member	1
26	Dir./EC Reports	1
27	Mgt. by Objec. Review	2
28	EC Review of Dir.	1

1. Originally agreed to by LPRB.
2. Agreed to after Supplementary Report.
3. Partially unresolved.
4. Unresolved.

Rec.	Descriptive Title	LPRB Response
29	Invest. W/out Compel.	1
30	S.Ct. Liaison	1
31	Dir. DEC Rejection Report	1
32	DEC Report Review	1
33	DEC Report Format	1
34	Reinvest. Reports	1
35	DNW/Ad Drafting	2
36	Tardy DEC Reports	1
37	DEC Reports	1
38	Panel Options	4
39	Resp. Review Right	1
40	Compl Appeal Review Options	3
41	Prob'l Cause @ Charge	4

1. Originally agreed to by LPRB.
2. Agreed to after Supplementary Report.
3. Partially unresolved.
4. Unresolved.

Rec.	Descriptive Title	LPRB Response
42	Dismiss Charges W/out Cause	2
43	Supp'l Charges	2
44	Balance Panels	1
45	Adv. Op.	3
46	LPRB Diversity	1
47	Open Appointments LPRB	1
48	DEC Diversity	1
49	Open Appointments DEC	1
50	CLE Reports	1
51	Education	1
52	Discipline Purpose	1
53	Notice Re Charges	4
54	RLPR 25	3
55	Invest. Report	1

1. Originally agreed to by LPRB.
2. Agreed to after Supplementary Report.
3. Partially unresolved.
4. Unresolved.

Rec.	Descriptive Title	LPRB Response
56	RLPR 25 (Copies)	1
57	Expunction	1
58	Expunction	1
59	Prior Misconduct	2
60	Training	2
61	LPRB Purpose	2
62	Disqual.	1
63	Ex Parte Contacts	4
64	Media Policy	1
65	DNW Notice	1
66	Report on Implementation	2

1. Originally agreed to by LPRB.
2. Agreed to after Supplementary Report.
3. Partially unresolved.
4. Unresolved.

Standards for Lawyer Discipline and Disability Proceedings

Joint Committee on Professional Discipline

American Bar Association

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

COMMENTARY

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

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

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

**Problem 3**

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

**DIMENSION**

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

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

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

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

It is significant to note that most of the disciplinary agencies surveyed are themselves dissatisfied with their cumbersome structures and recognize that inordinate delay is a major problem in effective disciplinary enforcement. This attitude is illustrated in the following statement by counsel to a large urban disciplinary agency:

The delay between receipt of a complaint and final imposition of discipline is a disservice to effective enforcement. It permits the violator to continue to practice, and in some instances to continue his misconduct, and undermines the confidence of the public in the bar's determination to enforce the canons of ethics.

**RECOMMENDATION**

Reduction of procedural stages within the disciplinary process;

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

**DISCUSSION**

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

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

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

In many nonintegrated jurisdictions, complaints are processed initially by local disciplinary agencies, which are authorized to conduct hearings in furtherance of their investigation. These local agencies submit their findings and recommendations to the governing body of the local bar association for approval. The complaint may then be forwarded by the local committee to the state bar association disciplinary agency or a state disciplinary commission appointed by the court having disciplinary jurisdiction. This agency may investigate the matter further and also is authorized to conduct a hearing. The president of a state bar association noted the inevitable delay that results:

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

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

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

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

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

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

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

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

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

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

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

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

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

LPRB PROPOSED REVISIONS TO RULES  
ON LAWYERS PROFESSIONAL RESPONSIBILITY\*\*

RULE 1. DEFINITIONS

As used in these Rules:

- (1) "Board" means the Lawyers Professional Responsibility Board.
- (2) "Chairman"\* means the Chairman of the Board.
- (3) "Executive Committee" means the committee appointed by the Chairman under Rule 4(d).
- (~~3~~4) "Director" means the Director of the Office of Lawyers Professional Responsibility.
- (45) "District Bar Association" includes the Range Bar Association.
- (~~5~~6) "District Chairman" means the Chairman of a District Bar Association's Ethics Committee.
- (67) "District Committee" means a District Bar Association's Ethics Committee.
- (78) "Notify" means to give personal notice or to mail to the person at his last known address or the address maintained on this Court's attorney registration records.
- (~~8~~9) "Panel" means a panel of the Board.

RULE 2. PURPOSE

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of with fairness and justice, having in mind the public, the lawyer complained of and the profession as a whole, and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

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

\*\* Revisions to the Rules proposed by the Advisory Committee and agreed to by the LPRB are underlined. Unerlined provisions which are also struck through are proposed revisions of the Advisory Committee which the LPRB opposes. Revisions proposed by the LPRB are underlined and in all capital letters.

### RULE 3. DISTRICT ETHICS COMMITTEE

(a) **Composition.** Each District Committee shall consist of:

(1) A Chairman appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chairman; and

(2) Four or more persons whom the District Bar Association (or, upon failure thereof, this Court) may appoint to three-year terms except that shorter terms shall be used where necessary to assure that approximately one-third of all terms expire annually. No person may serve more than two three-year terms, in addition to any additional shorter term for which he was originally appointed and any period served as District Chairman. At least 20 percent of each District Committee's members shall be nonlawyers. Every effort shall be made to appoint lawyer members from the various areas of practice. The Board shall monitor District Committee compliance with this objective and the District Committee shall include information on compliance in its annual report to the Court.

(b) **Duties.** The District Committee shall investigate complaints of lawyers' alleged unprofessional conduct and make reports and recommendations thereon as provided in these Rules in a format prescribed by the Executive Committee. It shall meet at least annually and from time to time as required. The District Chairman shall prepare and submit an annual report to the Board and this Court in a format specified by the Executive Committee and make such other reports as the ~~Director~~ Executive Committee may require.

### RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

(a) **Composition.** The Board shall consist of:

(1) A Chairman appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chairman; and

(2) ~~Twelve~~ Thirteen lawyers having their principal office in this state, six of whom the Minnesota State Bar Association may nominate, and nine nonlawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms shall be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any additional shorter term for which he was originally appointed and any period served as Chairman. To the extent possible members shall be geographically representative of the state and lawyer members shall reflect a broad cross section of areas of practice.

(b) **Compensation.** The Chairman, other Board members, and other panel members shall serve without compensation, but shall be paid their reasonable and necessary expenses incurred in the performance of their duties.

(c) Duties. The Board shall have general supervisory authority over the administration of the Office of Lawyers Professional Responsibility and these Rules, shall advise and assist the Director in the performance of his duties, and may, from time to time, issue opinions on questions of professional conduct. The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system. The Board may elect a Vice-Chairman and specify his duties, and may elect an Executive Committee and authorize it to perform specified duties of the Board between Board meetings.

(d) Executive Committee. The Executive Committee, consisting of the Chairman, and two lawyers and two nonlawyers designated annually by the Chairman, shall be responsible for carrying out the duties set forth in these Rules and for the general supervision of the Office of Lawyers Professional Responsibility. The Executive Committee shall act on behalf of the Board between Board meetings. If requested by the Executive Committee, it shall have the assistance of the State Court Administrator's office in carrying out its responsibilities. Members shall have served at least one year as a member of the Board prior to appointment to the Executive Committee. Members shall not be assigned to Panels during their terms on the Executive Committee.

(de) Panels. The Chairman shall divide the Board into Panels, each consisting of not less than three Board members and at least one of whom is a nonlawyer, and shall designate a Chairman and a Vice-Chairman for each Panel. The Board's Chairman or the Vice-Chairman is a Panel member at any Panel proceeding he attends. Three Panel members, at least one of whom is a nonlawyer and at least one of whom is a lawyer, shall constitute a quorum. No Board member shall be assigned to a matter in which disqualification would be required of a judge under Canon 3 of the Code of Judicial Conduct. The Board's Chairman or the Vice-Chairman may designate substitute Panel members from current or former Board members or current or former District Committee members for the particular matter, provided, that any panel with other than current Board members must include at least one current lawyer Board member. A Panel may refer any matters before it to the full Board, excluding members of the Executive Committee.

(ef) Assignment to Panels. The Director shall assign matters to Panels in rotation; provided, however, that the Executive Committee may redistribute case assignments to balance workloads among the Panels or to utilize Board member expertise.

(fg) Approval of petitions. Except as provided in these Rules or ordered by this Court, no petition for disciplinary action shall be filed with this Court without the approval of a Panel or the Board.

## RULE 5. DIRECTOR

(a) Appointment. The Director shall be appointed by and serve at the pleasure of this Court, ~~for a term of two years,~~ and shall be paid such salary as this Court shall fix. The Director may be reappointed for successive terms. The Board shall make recommendations to the Court concerning the hiring and termination of the Director, which recommendations shall be accepted unless they are arbitrary and capricious. The Court may, however, remove the Director prior to the expiration of any term with or without cause.

(b) Duties. The Director shall be responsible and accountable directly to the Board and through the Board to this Court for the proper administration of the Office of Lawyers Professional Responsibility and these Rules. The Director shall prepare and submit to ~~this Court~~ the Board an annual report covering the operation of the Office of Lawyers Professional Responsibility ~~lawyer discipline and disability system~~ and shall make such other reports to the Board as the Board or as this Court through the Board as ~~it~~ may order.

(c) Employees. The Director when authorized by the Board ~~this Court and on this Court's behalf~~ may employ, on behalf of this Court, persons at such compensation as the Board shall recommend and as this Court may approve.

## RULE 6. COMPLAINTS

(a) Investigation. All complaints of lawyers' alleged unprofessional conduct or allegations of disability shall be investigated pursuant to these Rules. No District Committee or Director's Office investigator shall be assigned to a matter in which disqualification would be required of a judge under Canon 3 of the Code of Judicial Conduct.

(b) Notification; referral. If a complaint of a lawyer's alleged unprofessional conduct is submitted to a District Committee, the District Chairman promptly shall notify the Director of its pendency. If a complaint is submitted to the Director, he shall refer it for investigation to the District Committee of the district where the lawyer has his principal office unless he determines to investigate it without referral, or that discipline is not warranted.

(c) Copies of Investigator's Report. Upon the request of the lawyer being investigated, the Director shall provide a copy of the investigator's report, whether that investigation was undertaken by the District Committee or the Director's Office.

## RULE 7. DISTRICT COMMITTEE INVESTIGATION

(a) Assignment; assistance. The District Chairman may investigate or assign investigation of the complaint to one or more of the Committee's members, and may request the Director's assistance in making the investigation. The investigation may be

conducted by means of written and telephonic communication and personal interviews.

(b) Report. The District Chairman or his designee shall report the results of the investigation to the Director. The investigator's report and recommendations shall be submitted for review and approval to the District Chairman, his designee or to a committee designated for this purpose by the District Chairman, prior to its submission to the Director. The report shall include a recommendation that the Director:

- (1) Determine that discipline is not warranted;
- (2) Issue an admonition;
- (3) Refer the matter to a Panel; or
- (4) Investigate the matter further.

If the report recommends discipline not warranted or admonition, the investigator shall include in the report a draft letter of disposition in a format prescribed by the Director.

(c) Time. The investigation shall be completed and the report made promptly and, in any event, within 45 days after the District Committee received the complaint, unless good cause exists. If the report is not made within 45 days, the District Chairman or his designee within that time shall notify the Director of the reasons for the delay. If a District Committee has a pattern of responding substantially beyond the 45 day limitation, the Director shall advise the Board and the Chairman shall seek to remedy the matter through the President of the appropriate District Bar Association.

(d) Removal. The Director may at any time and for any reason remove a complaint from a District Committee's consideration by notifying the District Chairman of the removal.

(e) Notice to complainant. The Director shall keep the complainant advised of the progress of the proceedings.

## RULE 8. DIRECTOR'S INVESTIGATION

(a) Initiating investigation. At any time, with or without a complaint or a District Committee's report, and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers; provided, however, that investigations to be commenced upon the sole initiative of the Director shall not be commenced without the prior approval of the Executive Committee.

(b) Investigatory subpoena. With the Board Chairman or Vice-Chairman's approval upon the Director's application showing that it is necessary to do this before issuance of charges under Rule 9(a), the Director may subpoena and take the testimony of any person believed to possess information concerning possible unprofessional conduct of a lawyer. The examination shall be recorded by such means as the Director designates. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the examination.

(c) Disposition.

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

(i) May set forth an explanation of the Director's conclusion;

(ii) Shall set forth the complainant's identity and the complaint's substance; and

(iii) Shall inform the complainant of his right to appeal under subdivision (d).

(2) Admonition. In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature, he may issue an admonition. The Director shall notify the lawyer in writing:

(i) Of the admonition;

(ii) That the admonition is in lieu of the Director's presenting charges of unprofessional conduct to a Panel;

(iii) That the lawyer may, by notifying the Director in writing within fourteen days, demand that the Director so present the charges to a Panel which shall consider the matter de novo or instruct the Director to file a Petition for Disciplinary Action in this Court; and

(iv) That unless the lawyer so demands the Director after that time will notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, that the Director has issued the admonition.

If the lawyer makes no demand under clause (iii), the Director shall notify as provided in clause (iv). The notification to the complainant, if any, shall inform him of his right to appeal under subdivision (d).

(3) Stipulated probation.

(i) In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional and the Board Chairman or Vice-Chairman approves, the Director and the lawyer may agree that the proceedings will be held in abeyance for a specified period up to two years and thereafter terminated, provided the lawyer throughout the period complies with specified reasonable conditions.

(ii) At any time during the period, with the Board Chairman or Vice-Chairman's approval, the parties Director and the lawyer may agree to modify the agreement or to one extension of it for a specified period up to two additional years. The Director shall notify the complainant, if any, and the Chairman of the District Committee, if any, that has considered the complaint, of the agreement and any modification. The notification to the complainant, if any, shall inform

him of his right to appeal under subdivision (d). The Director may reinstitute the underlying proceedings if the lawyer consents or a Panel determines that the lawyer has violated the conditions.

(4) **Submission to Panel.** The Director shall submit the matter to a Panel under Rule 9 if:

(i) In any matter, with or without a complaint, the Director concludes that public discipline is warranted;

(ii) The lawyer makes a demand under subdivision (c)(2)(iii);

(iii) The lawyer consents or a Panel determines that the lawyer has violated conditions under subdivision (c)(3); or

(iv) A Panel Chairman reviewing Board member so directs upon an appeal under subdivision (d).

(d) **Complainant's appeal Review by Lawyers Board.** If the complainant is not satisfied with the Director's disposition under Rule 8(c)(1), (2) or (3), he may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the lawyer of the appeal and assign the matter to a Panel chairman by rotation to a Board member, other than an Executive committee member, appointed by the chairman. The Panel chairman reviewing Board member may approve the Director's disposition or, direct that the matter be submitted to a Panel other than his own. Direct that further investigation be undertaken, or direct the issuance of a disposition pursuant to Rule 8(c)(1), (2) or (3). If the respondent is not satisfied with the reviewing Board member's disposition, he may appeal the matter to a Panel on which the reviewing Board member does not sit by notifying the Director in writing within fourteen days.

## RULE 9. PANEL PROCEEDINGS

(a) **Charges; setting pre-hearing meeting.** If the matter is to be submitted to a Panel, the Director shall prepare charges of unprofessional conduct, assign them to a Panel by rotation, schedule a prehearing meeting, and notify the lawyer of:

(1) The charges;

(2) The name, address, and telephone number of the Panel chairman and vice-chairman;

(3) The time and place of the pre-hearing meeting; and

(4) The lawyer's obligation to appear at the time set unless the meeting is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman.

(b) **Admission of charges.** The lawyer may, if he so desires:

(1) Admit some or all charges; or

(2) Tender an admission of some or all charges conditioned upon a stated disposition.

If a lawyer makes such an admission or tender, the Director may proceed under Rule 10(b).

(c) Request for admission. Either party may serve upon the other a request for admission. The request shall be made before the pre-hearing meeting or within ten days thereafter. The Rules of Civil Procedure for the District Courts applicable to requests for admissions, govern except that the time for answers or objections is ten days and the Panel chairman or vice-chairman shall rule upon any objections. If a party fails to admit, the Panel may award expenses as permitted by the Rules of Civil Procedure for the District Courts.

(d) Deposition. Either party may take a deposition as provided by the Rules of Civil Procedure for the District Courts. A deposition under this Rule may be taken before the pre-hearing meeting or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by number or randomly selected initials in any District Court proceeding.

(e) Pre-hearing meeting. The Director and the lawyer shall attend a pre-hearing meeting. At the meeting:

(1) The parties shall endeavor to formulate stipulations of fact and to narrow and simplify the issues in order to expedite the Panel hearing;

(2) Each party shall mark and provide the other party a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Rules of Procedure for the District Courts. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the Panel's permission; and

(3) The parties shall prepare a pre-hearing statement.

(f) Setting Panel hearing. Promptly after the pre-hearing meeting, the Director shall schedule a hearing by the Panel on the charges and notify the lawyer of:

(1) The time and place of the hearing;

(2) The lawyer's right to be heard at the hearing; and

(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled by agreement of the parties or by order of the Panel chairman or vice-chairman. The Director shall also notify the complainant, if any, of the hearing's time and place. The Director shall send each Panel member a copy of the charges, of any stipulations, of the pre-hearing statement, EACH PARTY SHALL PROVIDE TO EACH PANEL MEMBER IN ADVANCE OF THE PANEL HEARING, COPIES OF ALL DOCUMENTARY EXHIBITS MARKED BY THAT PARTY AT THE PRE-HEARING MEETING, UNLESS THE PARTIES AGREE OTHERWISE OR THE PANEL CHAIRMAN OR VICE-CHAIRMAN ORDERS TO THE CONTRARY. and, unless the parties agree or the Panel chairman or vice-chairman orders to the contrary, of all documentary exhibits marked at the pre-hearing meeting.

(G) REFEREE PROBABLE CAUSE HEARING. UPON THE CERTIFICATION OF THE PANEL CHAIRMAN AND THE BOARD CHAIRMAN TO THE COURT THAT EXTRAORDINARY CIRCUMSTANCES INDICATE THAT A MATTER IS

NOT SUITABLE FOR SUBMISSION TO A PANEL UNDER THIS RULE, BECAUSE OF EXCEPTIONAL COMPLEXITY OR OTHER REASONS, THE COURT MAY APPOINT A REFEREE WITH DIRECTIONS TO CONDUCT A PROBABLE CAUSE HEARING ACTING AS A PANEL WOULD UNDER THIS RULE, OR THE COURT MAY REMAND THE MATTER TO A PANEL UNDER THIS RULE WITH INSTRUCTIONS, OR THE COURT MAY DIRECT THE DIRECTOR TO FILE WITH THIS COURT A PETITION FOR DISCIPLINARY ACTION UNDER RULE 12(A). IF A REFEREE IS APPOINTED TO SUBSTITUTE FOR A PANEL, THE REFEREE SHALL HAVE THE POWERS OF A DISTRICT COURT JUDGE AND RAMSEY COUNTY DISTRICT COURT SHALL NOT EXERCISE SUCH POWERS IN SUCH CASE. IF THE REFEREE SO APPOINTED DETERMINES THERE IS PROBABLE CAUSE AS TO ANY CHARGE AND A PETITION FOR DISCIPLINARY ACTION IS FILED IN THIS COURT, THE COURT MAY APPOINT THE SAME REFEREE TO CONDUCT A HEARING ON THE PETITION FOR DISCIPLINARY ACTION UNDER RULE 14. IF A REFEREE APPOINTED UNDER RULE 14 CONSIDERS ALL OF THE EVIDENCE PRESENTED AT THE PROBABLE CAUSE HEARING, A TRANSCRIPT OF THAT HEARING SHALL BE MADE PART OF THE PUBLIC RECORD.

(gH) Form of evidence at Panel hearing. The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for testimony by:

- (1) The lawyer;
  - (2) A complainant who affirmatively desires to attend;
- and
- (3) A witness whose testimony the Panel chairman or vice-chairman authorized for good cause.

If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by number or randomly selected initials in any district court proceeding.

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

- (1) The Chairman shall explain that the hearing's purpose is to determine whether there is probable cause to believe that public discipline is warranted on any 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 UNLESS, UPON THE MOTION OF AN ATTORNEY MADE WITHIN TEN DAYS OF THE PRE-HEARING MEETING, THE PANEL CHAIR HAS DETERMINED THAT A PROBABLE CAUSE DETERMINATION MUST BE MADE AS TO ANY OTHER PARTICULAR CHARGE THAT IS EXTRAORDINARILY SENSITIVE TO PUBLIC DISCLOSURE (or, if the Director has issued an admonition has been issued under Rule 8(c)(2) or 8(d), that the hearing's purpose is to determine whether the Panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is

warranted, should instruct the Director to file a petition for disciplinary action in this Court);

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

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

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

(5) The parties may present oral arguments; and

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

(j) ~~J~~ Disposition. After the hearing, the Panel shall either:

(1) ~~D~~ determine that ~~there is not probable cause to believe that public discipline is not warranted (or, if the Director has issued an admonition under Rule 8(e)(2), affirm or reverse the admonition),~~ and dismiss the complaint; or

(2) determine that private discipline is warranted AND, WITH THE CONSENT OF THE ATTORNEY, issue an admonition based on clear and convincing evidence or, with the consent of the lawyer, order probation subject to the same terms and conditions as provided under Rule 8(c)(3), except that the consent of the Panel shall be permitted in lieu of the approval by the Director, required under Rule 8(c)(3)(i); or

(3) affirm or reverse an admonition issued by the Director under Rule 8(c)(2) or affirm or reverse a decision of a reviewing Board member under Rule 8(d); or

(4) if it finds determine that probable cause exists to believe that public discipline is warranted, and instruct the Director to file in this Court a petition for disciplinary action. Except as provided in Rule 10(f), the petition shall contain only those charges, individually or taken together, for which the Panel found probable cause to believe that public discipline is warranted. The Panel shall not make a recommendation as to the matter's ultimate disposition.

(j) ~~K~~ Notification. The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has the complaint, of the Panel's disposition. ~~If the Panel did not determine that there was probable cause to believe that public discipline is warranted,~~ ~~the~~ The notification to the complainant, if any, shall inform him of his right to petition for review under subdivision (L). ~~If the Panel affirmed the Director's admonition,~~ ~~the~~ The notification to the lawyer shall inform him of his right to appeal to the Supreme Court under subdivision (M).

(k) ~~L~~ Complainant's petition for review. If the complainant is not satisfied with the Panel's disposition, he may within 14 days file with the clerk of the Supreme Court a petition for review. The clerk shall notify the respondent and the Board Chairman of the petition. The respondent shall be denominated by

number or randomly selected initials in the proceeding. This Court will grant the review only if the petition shows that the Panel acted arbitrarily, capriciously, or unreasonably. If the Court grants review, it may order such proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may dismiss the petition or, if it finds that the Panel acted arbitrarily, capriciously, or unreasonably, remand the matter to the same or a different Panel, direct the filing of a petition for disciplinary action, or take any other action as the interest of justice may require.

(~~M~~) **Respondent's appeal to Supreme Court.** The lawyer may appeal the Panel's affirmance of the Director's admonition by filing a notice of appeal and ~~nine~~ SEVEN copies thereof with the Clerk of Appellate Courts and by serving a copy on the Director within 30 days after being notified of the Panel's action. The respondent shall be denominated by number or randomly selected initials in the proceeding. This Court may review the matter on the record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may either affirm the ~~admonition~~ decision or make such other disposition as it deems appropriate.

(~~M~~) **Manner of recording.** Proceedings at a Panel hearing or deposition may be recorded by sound recording or audio-video recording if the notification thereof so specifies. A party may nevertheless arrange for stenographic recording at his own expense.

(~~O~~) **Panel chairman authority.** Requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel chairman or vice-chairman. For good cause shown, the Panel chairman or vice-chairman may shorten or enlarge time periods for discovery under this Rule.

#### RULE 10. DISPENSING WITH PANEL PROCEEDINGS

(a) **Agreement of parties.** The parties by written agreement may dispense with some or all procedures under Rule 9 before the Director files a petition under Rule 12.

(b) **Admission or tender of conditional admission.** If the lawyer admits some or all charges, or tenders an admission of some or all charges conditioned upon a stated disposition, the Director may dispense with some or all procedures under Rule 9 and file a petition for disciplinary action together with the lawyer's admission or tender of conditional admission. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14. If this Court rejects a tender of conditional admission, the matter may be remanded for proceedings under Rule 9.

(c) **Criminal conviction.** If a lawyer is convicted of a felony under Minnesota statute, a crime punishable by incarceration for more than one year under the laws of any other jurisdiction, or any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion,

misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit such a crime, the Director may either submit the matter to a Panel or, with the approval of the chairman of the Board, file a petition under Rule 12.

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

(dE) Additional charges. If a petition under Rule 12 is pending before this Court, the Director need ~~not~~ must present the matter to a the Panel chair, OR, IF THE MATTER WAS NOT HEARD BY A PANEL, TO THE BOARD CHAIR, OR VICE-CHAIR, for approval before amending the petition to include additional charges based upon conduct committed before or after the petition was filed.

(eF) Discontinuing Panel proceedings. The Director may discontinue Panel proceedings for the matter to be disposed of under Rule 8(c)(1), (2) or (3).

#### RULE 11. RESIGNATION

This Court may at any time, with or without a hearing and with any conditions it may deem appropriate, grant or deny a lawyer's petition to resign from the bar. A lawyer's petition to resign from the bar shall be served upon the Director. The original petition with proof of service and one copy shall be filed with this Court. If the Director does not object to the petition, he shall promptly advise the Court. If he objects, he shall also advise the Court, but then submit the matter to a Panel, which shall conduct a hearing and make a recommendation to the Court. The recommendation shall be served upon the petitioner and filed with the Court.

#### RULE 12. PETITION FOR DISCIPLINARY ACTION

(a) Petition. When so directed by a Panel or by this Court or when authorized under Rule 10, the Director shall file with this Court a petition for disciplinary action. An original and ~~nine~~ SEVEN copies shall be filed. The petition shall set forth the unprofessional conduct charged.

(b) Service. The Director shall cause the petition to be served upon the respondent in the same manner as a summons in a civil action. If the respondent has a duly appointed resident guardian or conservator service shall be made thereupon in like manner.

(c) Respondent not found.

(1) Suspension. If the respondent cannot be found in the state, the Director shall mail a copy of the petition to the respondent's last known address and file an affidavit of mailing with this Court. Thereafter the Director may apply to this Court for an order suspending the respondent from the practice of law. A copy of the order, when made and filed, shall be mailed to each district court judge of this state. Within one year after the order is filed, the respondent may move this Court for a vacation of the order of suspension and for leave to answer the petition for disciplinary action.

(2) Order to show cause. If the respondent does not so move, the Director shall petition this Court for an order directing the respondent to show cause to this Court why appropriate disciplinary action should not be taken. The order to show cause shall be returnable not sooner than 20 days after service. The order may be served on the respondent by publishing it once each week for three weeks in the regular issue of a qualified newspaper published in the county in this state in which the respondent was last known to practice or reside. The service shall be deemed complete 21 days after the first publication. Personal service of the order without the state, proved by the affidavit of the person making the service, sworn to before a person authorized to administer an oath, shall have the same effect as service by publication. Proof of service shall be filed with this Court. If the respondent fails to respond to the order to show cause, this Court may proceed under Rule 15.

#### **RULE 13. ANSWER TO PETITION FOR DISCIPLINARY ACTION**

(a) Filing. Within 20 days after service of the petition, the respondent shall file an original and ~~nine~~ SEVEN copies of an answer in this Court. The answer may deny or admit any accusations or state any defense, privilege, or matter in mitigation.

(b) Conditional admission. The answer may tender an admission of some or all accusations conditioned upon a stated disposition.

(c) Failure to file. If the respondent fails to file an answer within the time provided or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may proceed under Rule 15.

#### **RULE 14. HEARING ON PETITION FOR DISCIPLINARY ACTION**

(a) Referee. This Court may appoint a referee with directions to hear and report the evidence submitted for or against the petition for disciplinary action.

(b) Conduct of hearing before referee. Unless this Court otherwise directs, the hearing shall be conducted in accordance with the rules of civil procedure applicable to district courts

and the referee shall have all the powers of a district court judge.

(C) SUBPOENAS. THE DISTRICT COURT OF RAMSEY COUNTY SHALL ISSUE SUBPOENAS. THE REFEREE SHALL HAVE JURISDICTION TO DETERMINE ALL MOTIONS ARISING FROM THE ISSUANCE AND ENFORCEMENT OF SUBPOENAS.

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

(dE) Referee's findings, conclusions, and recommendations. The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and Director of them. Unless the respondent or Director within five days orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. One ordering a transcript shall make satisfactory arrangements with the reporter for his payment and shall specify in his initial brief to the Court the referee's findings of fact, conclusions and recommendations he disputes, if any.. The reporter shall complete the transcript within 30 days.

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

(eG) Hearing before Court. This Court within ten days of the referee's findings, conclusions, and recommendations, shall set a time for hearing before this Court. The order shall specify times for briefs and oral arguments. The matter shall be heard upon the record, briefs, and arguments.

#### RULE 15. DISPOSITION; PROTECTION OF CLIENTS

(a) Disposition. Upon conclusion of the proceedings, this Court may:

- (1) Disbar the lawyer;
- (2) Suspend him indefinitely or for a stated period of time;
- (3) Order the lawyer to pay a fine, costs, ATTORNEY FEES, or ~~both~~ ALL OF THE FOREGOING.
- (4) Place him on a probationary status for a stated period, or until further order of this Court, with such conditions as this Court may specify and to be supervised by the Director;
- (5) Reprimand him;
- (6) Order the lawyer to successfully complete within a specified period such written examination as may be required

of applicants for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility;

(7) Make such other disposition as this Court deems appropriate; or

(8) Dismiss the petition for disciplinary action.

(b) **Protection of clients.** When a lawyer is disciplined or permitted to resign, this Court may issue orders as may be appropriate for the protection of clients or other persons.

#### **RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS**

(a) **Petition for temporary suspension.** In any case where the Director files or has filed a petition under Rule 12, if it appears that a continuation of the lawyer's authority to practice law pending final determination of the disciplinary proceeding may result in risk of injury to the public, the Director may file with this Court an original and nine copies of a petition for suspension of the lawyer pending final determination of the disciplinary proceeding. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

(b) **Service.** The Director shall cause the petition to be served upon the lawyer in the same manner as a petition for disciplinary action.

(c) **Answer.** Within 20 days after service of the petition or such shorter time as this Court may order, the lawyer shall file this Court an original and nine copies of an answer to the petition for temporary suspension. If he fails to do so within that time or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may enter an order suspending the lawyer pending final determination of disciplinary proceedings. The answer may be supported by a transcript of any evidence taken by the Panel, court records, documents, or affidavits.

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

**(E) INTERIM SUSPENSION. UPON A REFEREE DISBARMENT RECOMMENDATION, THE LAWYER'S AUTHORITY TO PRACTICE LAW SHALL BE SUSPENDED PENDING FINAL DETERMINATION OF THE DISCIPLINARY PROCEEDING, UNLESS THE REFEREE DIRECTS OTHERWISE OR THE COURT OTHERWISE ORDER.**

## RULE 17. FELONY CONVICTION

(a) Clerk of court duty. Whenever a lawyer is convicted of a felony, the clerk of district court shall send the Director a certified copy of the judgment of conviction.

(b) Other cases. Nothing in these Rules precludes disciplinary proceedings, where appropriate, in case of conviction of an offense not punishable by incarceration for more than one year or in case of unprofessional conduct for which there has been no criminal conviction or for which a criminal conviction is subject to appellate review.

## RULE 18. REINSTATEMENT

(a) Petition for reinstatement. A suspended, disbarred, or resigned lawyer's petition for reinstatement to practice law shall be served upon the Director and the president of the State Bar Association. The original petition, with proof of service, and ~~nine~~ SEVEN copies, shall then be filed with this Court.

(b) Investigation; report. The Director shall investigate and report his conclusions to a Panel.

(c) Recommendation. The Panel may conduct a hearing and shall make its recommendation. The recommendation shall be served upon the petitioner and filed with this Court.

(d) Hearing before Court. There shall be a hearing before this Court on the petition unless otherwise ordered by this Court. This Court may appoint a referee. If a referee is appointed, the same procedure shall be followed as under Rule 14.

(e) General requirements for reinstatement. Unless such examination is specifically waived by this Court, no lawyer ordered reinstated to the practice of law after having been disbarred by this Court shall be effectively reinstated until he shall have successfully completed such written examinations as may be required of applicants for admission to the practice of law by the State Board of Law Examiners, and no lawyer ordered reinstated to the practice of law after having been suspended by this Court shall be effectively reinstated until he shall have successfully completed such written examination as may be required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Unless specifically waived by this Court, no lawyer shall be reinstated to the practice of law following his suspension or disbarment by this Court until he shall have satisfied the requirements imposed under the rules for Continuing Legal Education on members of the bar as a condition to a change from a restricted to an active status.

## RULE 19. EFFECT OF PREVIOUS PROCEEDINGS

(a) Criminal conviction. A lawyer's criminal conviction in any American jurisdiction, even if upon a plea of nolo contendere or subject to appellate review, is, in proceedings

under these Rules, conclusive evidence that he committed the conduct for which he was convicted. The same is true of a conviction in a foreign country if the facts and circumstances surrounding the conviction indicate that the lawyer was accorded fundamental fairness and due process.

(b) **Disciplinary proceedings.**

(1) Conduct previously considered where discipline was not warranted. Proceedings under these Rules may be based upon the Conduct considered in previous lawyer disciplinary proceedings of any jurisdiction, even if it was determined in the previous proceedings is inadmissible if it was determined in the proceedings that discipline was not warranted or that the proceedings should be discontinued after the lawyer's compliance with conditions except to show a pattern of related conduct the cumulative effect of which constitutes an ethical violation.

(2) **Previous finding.** A finding in previous disciplinary proceedings that a lawyer committed conduct warranting ~~reprimand, probation, suspension, disbarment, or equivalent~~ discipline is, in proceedings under these Rules, ~~prima facie~~ conclusive evidence that he committed the conduct.

(3) **Previous discipline.** ~~Subject to Rule 404(b), Rules of Evidence, & The fact that the lawyer received a reprimand, probation, suspension, disbarment, or equivalent discipline in the previous disciplinary proceedings is admissible in evidence in proceedings under these Rules to determine the nature of the discipline to be imposed, but is not admissible to prove that a violation occurred and is not admissible to prove the character of the lawyer in order to show that he acted in conformity therewith; provided, however, that evidence of such prior discipline may be used to prove:~~

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

(c) **Stipulation.** Unless the referee or this Court otherwise directs or the stipulation otherwise provides, a stipulation before a Panel remains in effect at subsequent proceedings regarding the same matter before the referee or this Court.

(d) **Panel proceedings.** Subject to the Rules of Civil Procedure for District Courts and the Rules of Evidence, evidence obtained through a request for admission, deposition, or hearing under Rule 9 is admissible in proceedings before the referee or this Court.

(e) Admission. Subject to the Rules of Evidence, a lawyer's admission of unprofessional conduct is admissible in evidence in proceedings under these Rules.

#### RULE 20. CONFIDENTIALITY; EXPUNCTION

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

(1) As between the Committees, Board, and Director in furtherance of their duties;

(2) In proceedings before a referee or this Court under these Rules;

(3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;

(4) Upon request of the lawyer affected, THE FILE MAINTAINED BY THE DIRECTOR SHALL BE PRODUCED INCLUDING ANY DISTRICT COMMITTEE REPORT; HOWEVER, THE DIRECTOR'S WORK PRODUCT SHALL NOT BE REQUIRED TO BE PRODUCED, NOR SHALL THE DIRECTOR OR DIRECTOR'S STAFF BE SUBJECT TO DEPOSITION OR COMPELLED TESTIMONY, EXCEPT UPON A SHOWING TO THE COURT ISSUING THE SUBPOENA OF EXTRAORDINARY CIRCUMSTANCE AND COMPELLING NEED. IN ANY EVENT, THE MENTAL IMPRESSIONS, CONCLUSIONS, OPINIONS AND LEGAL THEORIES OF THE DIRECTOR AND DIRECTOR'S STAFF SHALL REMAIN PROTECTED;

(5) Where permitted by this Court; or

(6) Where required or permitted by these Rules.

(7) NOTHING IN THIS RULE SHALL BE CONSTRUED TO REQUIRE THE DISCLOSURE OF THE MENTAL PROCESSES OR COMMUNICATIONS OF COMMITTEE OR BOARD MEMBERS MADE IN FURTHERANCE OF THEIR DUTIES.

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

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

(2) The fact that the Director has ~~either determined that discipline is not warranted, or~~ issued an admonition;

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

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

(5) INFORMATION TO OTHER MEMBERS OF THE LAWYER'S FIRM NECESSARY FOR PROTECTION OF THE FIRM'S CLIENTS OR APPROPRIATE FOR EXERCISE OF RESPONSIBILITIES UNDER RULES 5.1 AND 5.2, RULES OF PROFESSIONAL CONDUCT.

Notwithstanding any other provision of this rule, the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any person, office or agency except to the lawyer and as between the Committees, Board,

Director, Referee or this Court in furtherance of their duties under these Rules.

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

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

(1) Destruction schedule. All records or other evidence of the existence of a dismissed complaint shall be destroyed ~~five~~ three years after the dismissal; ~~7~~ except that the Director shall keep a docket showing the names of each respondent and complainant, the final disposition, and the date all records relating to the matter were expunged.

(2) Effect of expunction. After a file has been expunged, any Director response to an inquiry requiring a reference to the matter shall state that it was dismissed and that any other record the Director may have had of such matter has been expunged. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that the complaint was dismissed and thereafter expunged.

(3) Retention of records. Upon application to a Panel by the Director, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this rule may be retained for such additional time not exceeding ~~five~~ three years as the Panel deems appropriate.

The Director may, for good cause shown and with notice to the respondent and opportunity to be heard, seek a further extension of the period for which retention of the records is authorized whenever a previous application has been granted for the maximum period (~~five~~ three years) permitted hereunder.

#### RULE 21. PRIVILEGE: IMMUNITY

(a) Privilege. A complaint or charge, or statement relating to a complaint or charge, of a lawyer's alleged unprofessional conduct, to the extent that it is made in proceedings under these Rules, or to the Director or a person employed thereby or to a District Committee, the Board or this Court, or any member thereof, is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the complaint, charge, or statement.

(b) Immunity. Board members, other panel members, District Committee members, the Director, and his staff, shall be immune from suit for any conduct in the course of their official duties.

## **RULE 22. PAYMENT OF EXPENSES**

Payment of necessary expenses of the Director and the Board and its members incurred from time to time and certified to this Court as having been incurred in the performance of their duties under these Rules and the compensation of the Director and persons employed by him under these Rules shall be made upon vouchers approved by this Court from its funds now or hereafter to be deposited to its credit with the State of Minnesota or elsewhere.

## **RULE 23. SUPPLEMENTAL RULES**

The Board and each District Committee may adopt rules and regulations, not inconsistent with these Rules, governing the conduct of business and performance of their duties.

## **RULE 24. COSTS AND DISBURSEMENTS**

(a) **Costs.** Unless this Court orders otherwise or specifies a higher amount, the prevailing party in any disciplinary proceeding decided by this Court shall recover costs in the amount of ~~\$500~~ \$750.

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

(c) **Time and manner for taxation of costs and disbursements.** The procedures and times governing the taxation of costs and disbursements and for making objection to same and for appealing from the clerk's taxation shall be as set forth in the Rules of Civil Appellate Procedure.

(d) **Judgment for costs and disbursements.** Costs and disbursements taxed under this Rule shall be inserted in the judgment of this Court in any disciplinary proceeding wherein suspension or disbarment is ordered. No suspended attorney shall be permitted to resume practice and no disbarred attorney may file a petition for reinstatement if the amount of the costs and disbursements taxed under this Rule has not been fully paid.

## **RULE 25. REQUIRED COOPERATION**

(a) **Lawyer's duty.** It shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director or

his staff, the Board, or a Panel, by complying with reasonable requests, including requests to:

- (1) Furnish make available designated papers, documents or tangible objects;
- (2) Furnish in writing a full and complete explanation covering the matter under consideration;
- (3) Appear for conferences and hearings at the times and places designated.

Such requests shall not be disproportionate to the gravity and complexity of the alleged ethical violations. The District Court of Ramsey County shall have jurisdiction over motions arising from Rule 25 requests. The lawyer shall be denominated by number or randomly selected initials in any District Court proceeding. Copies of documents shall be permitted in lieu of the original in all proceedings under these Rules. The respondent shall furnish for reproduction the original at the Director's request. The Director shall promptly return the originals to the respondent after they have been copied.

(b) Grounds of discipline. Violation of this rule is unprofessional conduct and shall constitute a ground for discipline. ~~It provided, however, that a lawyer's challenge to the Director's requests shall not constitute lack of cooperation if the challenge is promptly made, is in good faith and is asserted for a substantial purpose other than delay.~~

#### RULE 26. DUTIES OF DISCIPLINED OR RESIGNED LAWYER

(a) Notice to clients in non-litigation matters. Unless this court orders otherwise, a disbarred, suspended or resigned lawyer shall notify each client being represented in a pending matter other than litigation or administrative proceedings of the disbarred, suspended or resigned lawyer's inability to represent the client. The notification shall urge the client to seek legal advice of the client's own choice elsewhere.

(b) Notice to parties and tribunal in litigation. Unless this Court orders otherwise, a disbarred, suspended or resigned lawyer shall notify each client, opposing counsel and the tribunal involved in pending litigation or administrative proceedings of the disbarred, suspended or resigned lawyer's inability to represent the client. The notification to the client shall urge the prompt substitution of other counsel in place of the disbarred, suspended or resigned lawyer.

(c) Manner of notice. Notices required by this rule shall be sent by certified mail, return receipt requested, within ten (10) days of the disbarment, suspension or resignation order.

(d) Client papers and property. A disbarred, suspended or resigned lawyer shall make arrangements to deliver to each client being represented in a pending matter, litigation or administrative proceeding any papers or other property to which the client is entitled.

(e) Proof of compliance. Within fifteen (15) days after the effective date of the disbarment, suspension or resignation

order, the disbarred, suspended or resigned lawyer shall file with the Director an affidavit showing:

1. That the affiant has fully complied with the provisions of the order and with this rule;
2. All other State, Federal and administrative jurisdictions to which the affiant is admitted to practice; and
3. The residence or other address where communications may thereafter be directed to the affiant.

Copies of all notices sent by the disbarred, suspended or resigned lawyer shall be attached to the affidavit.

(f) **Maintenance of records.** A disbarred, suspended or resigned lawyer shall keep and maintain records of the actions taken to comply with this rule so that upon any subsequent proceeding being instituted by or against the disbarred, suspended or resigned lawyer, proof of compliance with this rule and with the disbarment, suspension or resignation order will be available.

(g) **Condition of reinstatement.** Proof of compliance with this Rule shall be a condition precedent to any petition for reinstatement made by a disbarred, suspended or resigned lawyer.

#### **RULE 27. TRUSTEE PROCEEDING**

(a) **Appointment of trustee.** Upon a showing that a lawyer is unable to properly discharge responsibilities to clients due to disability, disappearance or death, or that a suspended, disbarred or resigned lawyer has not complied with Rule 26, and that no arrangement has been made for another lawyer to discharge such responsibilities, this Court may appoint a lawyer to serve as the trustee to inventory the files of the disabled, disappeared, deceased, suspended, disbarred or resigned lawyer and to take whatever other action seems indicated to protect the interests of the clients and other affected parties.

(b) **Protection of records.** The trustee shall not disclose any information contained in any inventoried file without the client's consent, except as necessary to execute this Court's order appointing the trustee.

#### **RULE 28. DISABILITY STATUS**

(a) **Transfer to disability inactive status.** A lawyer whose physical condition, mental illness, mental deficiency, senility, or habitual and excessive use of intoxicating liquors, narcotics, or other drugs prevents him from competently representing clients shall be transferred to disability inactive status.

(b) **Immediate transfer.** This Court shall immediately transfer a lawyer to disability inactive status upon proof that:

- (1) The lawyer has been found in a judicial proceeding to be a mentally ill, mentally deficient, or inebriate person; or

(2) The lawyer has alleged during a disciplinary proceeding that he is incapable of assisting in his defense due to mental incapacity.

(c) **Transfer following hearing.** In cases other than immediate transfer to disability inactive status, this Court may transfer a lawyer to or from disability inactive status following a proceeding initiated by the Director and conducted in the same manner as a disciplinary proceeding under these Rules. In such proceeding:

(1) If the lawyer does not retain counsel, counsel shall be appointed to represent him; and

(2) Upon petition of the Director and for good cause shown; the referee may order the lawyer to submit to a medical examination by an expert appointed by the referee.

(d) **Reinstatement.** This Court may reinstate a lawyer to active status upon a showing that the lawyer is fit to resume the practice of law. The parties shall proceed as provided in Rule 18. The lawyer's petition for reinstatement:

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

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

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

#### **RULE 29. EX PARTE COMMUNICATIONS**

Ex parte communications to any adjudicatory body including panels, referees and this Court are strongly disfavored. Such communications should not occur except after first attempting to contact the adversary and then only if the adversary is unavailable and an emergency exists. Such communications should be strictly limited to the matter relating to the emergency and the adversary notified at the earliest practicable time of the prior attempted contact and of the ex parte communication.